The Journey to India's First Smell Mark: How Global Practices on Unconventional Trademarks Shaped the CGPDTM's Ruling

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ABSTRACT

Today, we live in a global era where trademarks are no longer bound to their conventional notions. Aside from words, symbols and numbers, newer unconventional forms of marks pertaining to sound, smell and hologram have emerged in the face of advancing commerce and technology. Keeping pace with these developments, India has recently recognised its first smell mark, which has brought the conversation around unconventional trademarks to the forefront once again. To this end, this article examines the recent smell mark ruling and critically analyses it while highlighting the role of global jurisprudence on unconventional trademarks in the passing of the order. After examining key legal principles and developments from the US, UK and India, it discusses the recent smell mark ruling at length by assessing the comparative jurisprudence employed and the ratio behind adopting the seven-dimensional graphical representation. The article then highlights the significant issues with the ruling, along with recognising crucial legislative gaps. The article concludes by advocating for a trademark framework that better deals with the dynamic challenges posed by unconventional trademarks.

Keywords: Unconventional Trademarks, Smell Marks, Colour Marks, Sound Marks, Trade Dress.

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"Law must be stable, and yet it cannot stand still." **- Roscoe Pound**

1. INTRODUCTION

Trade marks (or trademarks) fundamentally are symbols and signs that facilitate consumers to recognise and differentiate between the services and goods of different mark owners.[1]

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[1] UNCTAD-ICTSD, *Resource Book on TRIPS and Development* (Cambridge University Press 2005) 216

According to the TRIPS agreement, a trademark could consist of a single or a mixture of multiple signs, provided it can identify and differentiate the services and goods of one mark owner from another's. Eligible signs for registration incorporate words, images, letters, numbers, colour combinations, or any arrangement of these elements.[2] However, the subject matter of trade marks has evolved beyond conventional bounds and also involves unconventional marks such as sounds, smells, tastes, etc.[3] Since there is no unified consensus on unconventional mark's registration across the world, it is worth examining how the different jurisdictions deal with the issue.

1.1. History of Unconventional Trademarks

Traditionally, text, logos and designs have been used for hundreds of years to serve as identifiers of particular goods and services. Aside from these traditional trademarks, due to the advancement in technology and in a bid to innovate, trademarks have transcended beyond these limitations. With businesses and corporations getting bigger than ever and advertisement and marketing budgets swelling more and more, there have been experiments by companies towards more expressive and extreme branding with the help of sounds, colours, touch, smell, etc.[4] Companies have tried to register shapes, colours, sounds and stitching patterns to differentiate themselves from the competition. Being the most popular beverage in the world, Coca-Cola's packaging has achieved worldwide fame and is widely recognised all across the world. The jewellery boxes with the distinct blue colour by Tiffany have been in use since 1845.[5] The colour pink has also been subject to trademark. The Owens Corning Corporation was associated with the pink colour because of them using the colour pink in their insulation products. Through a long legal battle, the company was able to secure a ruling that protected its use of pink colour for fibreglass insulation.[6] Levi Strauss & Co. has also attempted to trademark their stitching pattern design since the late 1800s. MGM has used its classic lion's roar since 1924 at the beginning of each of its creations. The application was finally filed to register the roar as a trademark for sound in 1985.[7] The classic and NBC chime was granted

[2] Agreement on Trade-Related Aspects of Intellectual Property Rights (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 299 (TRIPS Agreement), art 15(1)
[3] David Vaver, 'Unconventional and Well-Known Trade Marks' (2005) Sing JLS 1, 2
[4] Lisa P Lukose, 'Non-Traditional Trademarks: A Critique' (2015) 57 JILI 197, 198
[5] *Id*
[6] *In re Owens-Corning Fiberglas Corp* 774 F 2d 1116 (Fed Cir 1985)
[7] US Patent and Trademark Office Trade Mark Reg No 1395550

registration in 1950. The famous Intel jingle has been used since 1994 and has been granted protection in countries around the world.

There have been several treaties on trademarks in an effort to harmonise and standardise the trademark framework across the globe. A number of international agreements and instruments have all attempted to provide uniformity to international trademark law. The TRIPS Agreement provides that trademarks need not satisfy the condition of being represented graphically, though countries may mandate signs to be visually perceivable.[8] The mark should not deceive people and must not confuse the eyes of the masses. The mark must be distinct and should serve as the identifier of the source. Differences arise when local jurisdictions try to apply these principles within their limits on unconventional trademarks.

2. UNITED STATES AND UNCONVENTIONAL TRADEMARKS

The US Lanham Act provides that any symbol, word, name or combination thereof can be granted protection if they serve as identifiers of the services and goods of a person and distinguish them from those of another.[9] The definition given under the Lanham Act is a negative one, and it also lays down the requirements for registration.[10] Trademarks, therefore, should be non-functional, distinct and need to be able to be differentiated and identified easily by customers. The functionality of a mark pertains to the product's primary function. Since functionality lies in the domain of patents, it is not covered under trademarks. This is also known as the doctrine of protection.[11]

In Qualitex v Jacobson Products,[12] the floodgates to recognition of unconventional trademarks and trade dress were opened by the US Supreme Court. It was established that a colour itself is not inherently distinct. Therefore, when granting a trade mark, there is the necessity of acquired secondary meaning to that colour. Any kind of sales for advertisements that indicate the product's colour or the results of a survey among customers, which points towards the popularity of the colour and its association with the product, would suffice the condition of secondary meaning.[13] In the Re Celia case,[14] it was held by the court that there should be no

[8] Note 2
[9] 15 USC s 1052 (Lanham Act)
[10] Rachna R Kurup and Nimita Aksa Pradeep, 'Non-Conventional Trademarks in India: The What, the Why and the How' (2020) 1(1) E-JAIRIPA 131, 142
[11] ibid
[12] *Qualitex Co v Jacobson Products Co* 115 S Ct 1300 (1995)
[13] Neha Mishra, 'Registration of Non-Traditional Trademarks' (2008) 13(1) JIPR 43, 46
[14] *In re Celia* 217 USPQ 1238 (TTAB 1990)

connection between the functionality of the product and its smell, where the smell is granted registration. In Louboutin v. YSL,[15] the fact that functional features of a product lie under patent law and not under trademark law was affirmed by the court.

As far as shape marks are concerned, the US Patent Office granted the trade mark to the classic Coca-Cola bottle. It was held that the trade dress and product packaging achieved secondary meaning, thereby becoming eligible for registration. It seems that the US courts focus on whether the shape is functional in nature and whether it has acquired distinctiveness to consider granting a trademark to trade dresses.[16] Therefore, consumer recognition seems to be the biggest factor in granting protection to non-conventional trademarks.

3. UNCONVENTIONAL TRADEMARKS AND THEIR GRAPHICAL REPRESENTATION IN THE EU

The European Communities have developed a test for determining whether unconventional marks can be registered via a series of directives and precedents. When a sign acts as a trade mark in the market, it must be treated as such. Nonetheless, for unconventional trademarks as well, the "sign" is required to be graphically representable.[17] EU's Directive relating to trademarks clearly laid down that a trademark may be constituted by any sign that lends itself to graphical representation, such as words, numerals, letters, designs, or good's shapes and their packaging, given that the sign in question can differentiate the services or goods of separate undertakings.[18]

General shapes, as a rule, which also denote a function, cannot be granted registration. This is illustrated in the Dyson case by the ECJ, where the court had to decide upon the issue of whether a shape mark could be granted to Dyson for a vacuum cleaner's shape.[19] The protection sought by the company was for the transparent compartment of the device. The ECJ ruled that the transparent compartment shape could not be granted a trademark, as that would include every possible configuration of the transparent container or holding chambers.[20] Philips v. Remington is also one of the premier cases about shape marks.[21] It was held in this case by the ECJ that

[15] *Louboutin v Yves Saint Laurent America Holding, Inc* 696 F3d 206 (2d Cir 2012)
[16] Note 13
[17] Christopher Morcom, Ashley Roughton and Simon Malynicz, *The Modern Law of Trade Marks* (3rd edn, LexisNexis 2008) 54
[18] Council Directive (EEC) 89/104 of 21 December 1988 to approximate the laws of the Member States relating to trade marks [1989] OJ L40/1, art 2
[19] Case C-321/03 *Dyson Ltd v Registrar of Trade Marks* [2007] ETMR 34, 523
[20] Morcom, Roughton and Malynicz (n 17) 56
[21] *Philips Electronics NV v Remington Consumer Products Ltd* (C-299/99) [2002] ECR I-5475, [2003] ETMR 81

since the shape of the shaver for which trademark registration was sought was functional and technical in nature and not merely cosmetic, protection was denied.

In the Eli Lilly case,[22] the artificial strawberry flavour was attempted to be registered as a taste mark for pharmaceutical products. Although the court did not allow the particular application in this case, it hinted that taste marks can be recognised and registered. It was stated that if a trademark were to be granted in this case, the customers would get confused and associate artificial strawberry taste with an attempt to hide the unpleasant taste of pharmaceuticals, as other manufacturers also use artificial flavours to hide the taste of their pharmaceuticals.[23]

The first major case regarding smell marks that was brought after the EU directive was the Chanel case. The company Chanel wanted registration of their Chanel No. 5 perfume's fragrance in the year 1994. A trademark could not be granted to Chanel because it was stated that both the perfume and the fragrance, i.e. the product and the smell, were the same thing.[24] Confusion remained around the grant of smell marks. In the John Lewis of Hungerford case,[25] A worded depiction of an odour was accepted by the Appointed Person to be sufficient as "graphical representation" although he held that the form used in the particular application, i.e. the faint odour of cinnamon, was insufficiently precise. Similarly, the appellate body at OHIM found the odour of "freshly cut grass" acceptable as a description for a trade mark about tennis balls.[26]

3.1.Sieckmann Rule

This debate was ended by the Sieckmann case,[27] where the ECJ decided upon the matter of whether or not an olfactory mark could be registered. Registration was sought for a "balsamically fruity" odour containing traces of "cinnamon." He also provided a chemical formula for it. The court, while following Article 2 of the EU Directive, laid down a 7-step test, now called the "Sieckmann Rule." The court stated that, along with the mark being graphically representable, the representation must be:

[22] *Eli Lilly's Trade Mark Application* [2004] ETMR 4
[23] *Id*
[24] Kurup and Pradeep (n 10) 142
[25] *John Lewis of Hungerford Ltd's Trade Mark Application* [2001] RPC 28
[26] *Vennootschap onder Firma Senta Aromatic Marketing's Application* [1999] ETMR 429 (OHIM Second Board of Appeal)
[27] *Ralf Sieckmann v Deutsches Patent- und Markenamt* (C-273/00) [2002] ECR I-11737

1. Clear

2. Intelligible

3. Easily accessible

4. Precise

5. Objective

6. Self-contained

7. Durable

The court ruled that the smell mark depiction lacked clarity, preciseness and objectivity despite being graphic.[28] The chemical formula and the description provided by the applicant were unable to satisfy the above tests, and hence the trade mark was not granted. Again, Eden v OHIM[29] saw an attempt to register the smell of "ripe strawberries." Following the precedent set by the Sieckmann case, the registration was rejected, stating that the sign wasn't graphically representable.

Another landmark case that dealt with unconventional trademarks is the Joost Kist case.[30] The issue at hand in this case was whether or not sound marks are registerable. The court while invoking the Sieckmann principle held that "when considering sound marks, the graphical representability requirement is not accomplished if the sign is depicted solely through a written description, whether by stating that it consists of musical notes forming a composition, by identifying it as an animal's cry, by resorting merely to onomatopoeic expressions, or even by presenting a bare sequence of musical notes without additional specification. By contrast, the requisite standard is met when a tone is depicted on a musical stave, structured in measures and displaying, specifically, musical notes, a clef, and rests that reflect their respective values, along with accidentals wherever necessary."[31]

We can see that the Sieckmann case has been a landmark judgment concerning unconventional trademarks in the EU. The criteria laid down by the court in this case became the "Sieckmann

[28] *Id*
[29] *Eden v OHIM* (T-305/04) [2006] ETMR 14
[30] *Shield Mark BV v Joost Kist h.o.d.n. Memex* (C-283/01) [2003] ECR I-14313
[31] *Id*

Rule," ending the confusion surrounding registration of olfactory marks while also proving useful for unconventional trademarks. The judgment in the Sieckmann case ensures that unless some form of 'representation' can be made clear to other traders what the 'sign' applied for is, smell marks will continue to be barred from registration under the European Trade Mark Law.[32] The rule proves to be very prohibitive in nature in the European Union.

The rule also sees application when determining the registrability of unconventional trademarks other than olfactory/smell marks, as displayed in the Joost Kist case,[33] where the court applied the Sieckmann Rule for determining the registrability of a sound mark. Hence, the Sieckmann Rule greatly influenced subsequent cases under the European Trademark landscape.

4. POSITION IN INDIA

India's Trade Marks Act of 1999 stipulates that a trademark refers to a sign which is graphically representable and designed to set apart the services or goods of different mark owners. It includes packaging, goods' shape or chromatic composition.[34] The Act defines a mark as "a label, brand, ticket, signature, name, device, numeral, letter, packaging, shape of goods or amalgamation thereof."[35] It also places forward the condition of the mark being graphically representable and distinguishable from others' goods and services.[36]

Section 18 of the act provides that rules must be complied with by any application moved forward for registration. As per the trademark rules, "graphical representation" implies the capability of being recorded on paper.[37] The rules also state that for a registration application approval, the mark requires graphical representability.[38]

Rule 26 provides clarification regarding the representation of trademarks. A combination of colours is also registrable, provided that a reproduction of the trademark featuring the combination of colours is provided along with the application. For a three-dimensional trademark, three different views must be provided. If registration is applied for the good's shape or packaging, then at least five different views along with a description must be depicted. For

[32] Note17
[33] Note 30
[34] Trade Marks Act 1999, s 2(1)(zb).
[35] *Id*
[36] *Id*
[37] Trade Marks Rules 2017, r 2(ii)
[38] *Id*

sound marks, submission in MP3 format must be made where the length of the recorded sound is not over 30 seconds. It should also be in a medium that allows easy replayability and clear audibility. Lastly, a graphical representation of the notations must also be provided.[39]

Therefore, it is clear that unconventional trademarks can indeed be registered in India. However, their scope is narrower compared to the approach taken by American courts and is therefore restrictive.[40] The registration of unconventional trademarks is contingent on the fulfilment of several conditions, and each of those has to be complied with. The condition of graphical representation is the biggest hurdle when it comes to other forms of unconventional marks compared to the ones discussed under Rule 26.

4.1. Judicial Attitude towards Unconventional Trademarks in India

William Grant & Sons v Mc Dowell Case served as the first instance where Indian courts had to deal with trade dress.[41] The importance of international recognition, as well as a trade dress, was first recognised in this case. Shapes require distinction along with acquired secondary meaning.

Courts display reluctance in granting registration to single colours. Cadbury had tried to register its purple colour, which it uses for its advertising and packaging. An attempt to register Cadbury purple was unsuccessful before the court on account of single colours not being granted trademark protection.[42] This was reaffirmed in the Christian Louboutin case, where the red colour that was present on the footwear products could not be protected under the trademark law.[43]

With regards to shape marks, judgements demonstrate consistency. In the Lilly ICOS case,[44] the almond figure of the plaintiff's product was held to be protected under the law, and the Delhi HC ruled in the plaintiff's favour. Likewise, in the Gorbatschow Wodka case,[45] the shape of vodka bottles was held to be a trademark by the Bombay HC in an injunction favouring the plaintiff.

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[39] *Id*
[40] Note 13
[41] *William Grant & Sons Ltd v McDowell & Co Ltd* (1997) 17 PTC 134 (Del HC)
[42] Note 13
[43] *Christian Louboutin SAS v Abu Baker and Ors* (2018) 250 DLT 475 (Del HC)
[44] *Lilly ICOS LLC and Anr v Maiden Pharmaceuticals Ltd* (2009) 39 PTC 666 (Del HC)
[45] *Gorbatschow Wodka KG v John Distilleries Ltd* (2011) 47 PTC 100 (Bom HC)

When it comes to sound marks, Yahoo was one of the first entities in the country to register its sound mark.[46] The company had registered its three-note yodel. The ICICI bank jingle was also granted a sound mark.[47] Other notable companies having sound marks are the Nokia ringtone, the Britannia jingle and Intel's distinct jingle.

5. Opening the Doors to Smell Marks: the Case of Sumitomo

The question of whether smell marks can be granted in India remained unclear until it was finally put to rest by the Sumitomo case. In November 2025, the olfactory mark was granted registration by the nation's trademark registry.[48] The mark in question pertained to the smell of roses emanating when the tyres of the same brand were fitted to a vehicle. The applicants made a case for their registration based on the distinct "rose" smell that came from their tyres when used by vehicles, and that they had successfully represented the mark graphically.

The applicants contended that they had, through extensive research and development, created the rose-like smell, and it was easily distinguishable by a common person of imperfect memory and average intelligence.[49] The applicants used Shakespeare's analogy of a rose's smell's wide recognition to cement the fact that there is no question of mistaking the smell of a rose as something else, therefore the smell mark under assessment couldn't be confused with another's. The applicant's smell mark had been granted registration in the UK as the first smell mark in the nation, as early as 1996,[50] through which it had already gained recognition and worldwide fame.

As for graphical representation, the smell was represented graphically as a vector with the help of technology that was developed by IIIT Allahabad, utilising a 7-dimensional space with each

[46] P Manoj, 'Yahoo awarded India's first sound mark; Nokia in queue' *Mint* (Mumbai, 22 August 2008) <https://www.livemint.com/Home-Page/5z2B1NQUy3YyPkpRDp789M/Yahoo-awarded-India8217s-first-sound-mark-Nokia-in-queue.html> accessed 15 March 2026

[47] Shayonee Dasgupta, 'ICICI Jingle Now Trademarked!' *SpicyIP* (14 March 2011) <https://spicyip.com/2011/03/icici-jingle-now-trademarked.html> accessed 15 March 2026

[48] Ayushi Shukla, 'India's First Smell Trademark: Sumitomo Rubber's Rose Fragrance For Tyres' *LiveLaw* (21 November 2025) <https://www.livelaw.in/ipr/india-first-smell-trademark-sumitomo-rubber-rose-fragrance-tyres-310803> accessed 15 March 2026

[49] *In re Application of Sumitomo Rubber Industries Ltd* (Trade Marks Registry, 21 November 2025) Application No 5860303 <https://images.assettype.com/barandbench/2025-11-21/qnfoiqwo/Smell_mark_Order.pdf> accessed 15 March 2026

[50] The trademark of a floral fragrance reminiscent of roses as applied to tyres was registered in the UK on 9 April 1996; See *Case details for Trade Mark 2001416* (UK Intellectual Property Office) <https://www.ipo.gov.uk/trademark/history/GB50000000002001416.pdf> accessed 15 March 2026

dimension representing a fundamental smell, namely: pungent, nutty, floral, fruity, minty, woody and sweet.[51]

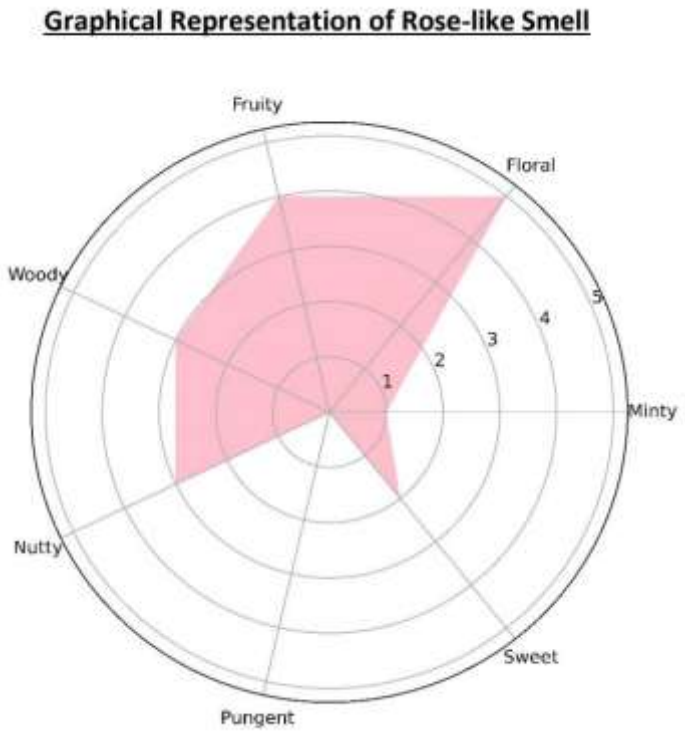

Fig. 1. 7-D Graphical Representation of Rose-like Smell (Source: Order Annexure A)

While considering the registration of the olfactory mark in question, the CGPDTM also considered the fact that smell marks had been granted in various jurisdictions, including the EU, the UK, Australia, Costa Rica and the US. It was also noted that UK and Australian trademark regimes required graphical representation but granted smell marks based on statements describing the smells without the need for chemical formulae or scientific notes.[52]

In the decision, the Sieckmann case was also referred to,[53] along with the Vennootschap case,[54] where the CGPDTM noted that the EUIPO initially refused to grant registration to the "fresh cut grass" smell due to the mark not being represented graphically, but subsequently registration was granted upon appeal. The opinion of amicus curiae was also considered, who remarked that smell marks in the US have to be non-functional and hence if related to the function of the product, e.g. air fresheners, perfumes, etc., it cannot be registered.[55] An

[51] Note 49
[52] *Id*
[53] Note 27
[54] Note 26
[55] Note 49

elaborate description of the mark, the role of the odour in identification of the source of the mark's services or goods, and a sample of the odour must be provided for registration.

Hence, noting that the domestic trademark regime didn't prohibit registering smell marks, and along with keeping global trends in mind, the olfactory mark was granted registration based on it fulfilling the criteria of distinctiveness and graphical representability.

5.1.Criticism of the Ruling

There is no doubt that India joining other countries in recognising smell marks was not only needed, but perhaps long overdue. This ruling has paved the way for more smell marks to be granted and has contributed to the ever continuing discourse on unconventional trademarks. However, the order seems to have several shortcomings, largely pertaining to the aspect of graphical representation. If the same "rose" smell is used for different goods such as stationery, purses, apparel or other items, the order's ratio would extend protection to these as well. In such a case, the same graphical representation would be employed for these different kinds of goods, leading to dilution of the principle of distinctiveness.[56] Another criticism is that the ruling is that while making use of the 7D figure, the use of words like sweet, nutty or woody, and by extension, the entire representation by itself, does not convey the smell clearly and objectively to the common person.[57] In the Sieckmann case,[58] the ECJ clarified that a mark's description requires a clear understanding by the common man. Since this is the first smell mark granted in the country, the CGPDTM ought to have given more thought to the method of graphically representing smell marks.

The ruling contemplates the US position, but critics argue that it failed to appreciate the wider frame of the US position on the grant of smell marks.[59] It is argued that in the US, a smell mark similar to a single colour mark requires "acquired distinctiveness" in the common folk's mind through usage rather than merely having a graphical representation and being inherently

[56] Goswami, Tanishka, 'The Scent of the Sumitomo Trademark: What is the Celebration About?' *SpicyIP* (26 November 2025) <https://spicyip.com/2025/11/the-scent-of-the-sumitomo-trademark-what-is-the-celebration-about.html> accessed 15 March 2026

[57] Arul George Scaria, 'Sorry, Not All Roses Smell The Same: A Critical Look At The Decision In Sumitomo's Smell Mark Application' *LiveLaw* (24 November 2025) <https://www.livelaw.in/articles/sorry-not-all-roses-smell-the-same-a-critical-look-at-the-decision-in-sumitomos-smell-mark-application-310913> accessed 15 March 2026

[58] Note 27

[59] Shama Mahajan, 'Don't Look to the United States: They See "Smell" Differently!' *SpicyIP* (29 November 2025) <https://spicyip.com/2025/11/dont-look-to-the-united-states-they-see-smell-differently.html> accessed 15 March 2026

distinctive.[60] Therefore, while the ruling has proved to be a giant leap towards the development of unconventional trademark registration in India, the decision seems to be hasty in recognising smell marks and could have contemplated the issue more comprehensively.

6. CONCLUSION

Trademark law has long since transcended its conventional shackles of what constitutes a mark. The purview of trademarks is no longer limited to mere words, logos, numbers or designs, etc., but now encompasses unconventional forms such as sound, smell and holograms, to name a few. With globalisation and the development of technology, trademark frameworks too need to evolve to provide better protection to the goods and services of trademark owners.

On that note, legal systems of various nations have evolved to better respond to the question posed by unconventional trademarks. The US, for instance, seems to emphasise more on the aspect of "acquired distinctiveness" in addition to graphical representation and inherent distinctiveness. The EU, as we discussed above, developed the Sieckmann rule, which laid down the criteria that must be adhered to when graphically representing unconventional marks. The rule continues to be a guiding light in subsequent decisions and continues to shape the dialogue around unconventional trademarks.

Unconventional trademarks are very much registrable in India, as nothing in the legislation prohibits their registration, with the trademark rules even providing the specific manner in which certain kinds of unconventional trademarks need to be representable graphically. As such, the prescribed form of graphical representation only covers some forms, with marks such as smell marks not contemplated under the rules. The Sumitomo ruling by the CGPDTM has allowed India to join the ranks of other countries in recognising olfactory marks and is a natural step towards the progression of the Indian trademark system. The order was passed after taking into account the position of various jurisdictions across the globe, along with the US and EU's position on unconventional trademarks.

The ruling, however, is marred with certain issues as it seems that in a bid to set a milestone precedent, it misconstrued the US position on unconventional trademarks, and did not fully appreciate the ratio of the Sieckmann rule. Additionally, the correctness of the graphical representation accepted by the CGPDTM is also a matter for debate, as it has been criticised

[60] *Id*

by eminent scholars. In light of these developments, it is amply clear to us that there exists a legislative gap within the trademark framework of the country that needs to be urgently addressed. To that end, it is imperative that the trademark framework and the trademark rules of the nation are revisited to contemplate the issue of graphically representing olfactory marks along with other such marks yet to be registered domestically, but will inevitably need to be accommodated in the future. Thus, in an era where trademarks are evolving every day, so too should our trademark framework.

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