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## Beyond Words And Symbols: The Future Of Non-Conventional Trademarks In India

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### ABSTRACT

Non-conventional trademarks, such as sound marks, scent marks, colour marks, and motion marks, are redefining the intellectual property landscape globally. In India, the Trade Marks Act, 1999 has laid the groundwork for recognizing these marks, but their adoption remains limited due to legal, technical, and cultural challenges. This paper explores the current state of non-conventional trademarks in India, analyzing their registration trends, legal framework, and practical challenges. It highlights key examples, such as the Yahoo yodel and Cadbury's colour mark, to illustrate the evolving landscape. The study also examines emerging trends driven by technological advancements, including digital transformation, virtual reality, and sensory branding, which are shaping the future of trademarks. By comparing India's approach with global practices, the paper identifies opportunities for reform and growth. It predicts that non-conventional trademarks will play an increasingly significant role in branding and marketing strategies, provided that legal frameworks adapt to accommodate new types of marks. This research offers valuable insights for policymakers, businesses, and legal practitioners, emphasizing the need for innovation and adaptability in India's trademark ecosystem.

*Keywords:* Branding, India, Non-Conventional Trademarks, Sensory Branding, Technological Advancements, Trade Marks Act, 1999

### INTRODUCTION

#### Definition of Non-Conventional Trademarks

Non-conventional trademarks, also known as non-traditional trademarks, represent a paradigm shift in the field of intellectual property. Unlike traditional trademarks, which are typically limited to logos, words, and symbols, non-conventional trademarks encompass a broader range of identifiers that appeal to the senses. These include sound marks, such as musical jingles or distinctive sounds; scent marks, which involve unique fragrances associated with a product; colour marks, where specific colours or colour combinations are used to distinguish goods or services; and motion marks, which involve moving images or animations.<sup>1</sup> The defining characteristic

<sup>1</sup> Graeme B. Dinwoodie & Mark D. Janis, *Trademarks and Unfair Competition: Law and Policy* 45-47 (4th ed. 2014).

of these marks is their ability to create a multi-sensory connection with consumers, thereby enhancing brand recognition and loyalty.

The concept of non-conventional trademarks is not entirely new. Globally, jurisdictions such as the European Union (EU) and the United States (US) have recognized and protected these marks for decades. However, in India, the adoption of non-conventional trademarks is still in its nascent stages. The Trade Marks Act, 1999 provides the legal framework for the registration of trademarks in India, but its provisions are primarily designed for traditional marks. As a result, the registration and enforcement of non-conventional trademarks in India present unique challenges, particularly in terms of proving distinctiveness and graphical representation.<sup>2</sup>

### **Importance in Modern Branding**

In today's hyper-competitive marketplace, brands are constantly seeking innovative ways to differentiate themselves and create lasting impressions on consumers. Traditional trademarks, while effective, are often insufficient to capture the attention of increasingly discerning consumers. Non-conventional trademarks offer a powerful tool for brands to stand out by engaging multiple senses. For instance, a distinctive sound, such as the Intel jingle or the Nokia ringtone, can instantly evoke brand recognition. Similarly, a unique scent, like the signature fragrance of a luxury hotel, can create a memorable experience for guests.

The importance of non-conventional trademarks extends beyond mere brand recognition. These marks play a crucial role in sensory branding, a marketing strategy that leverages sensory stimuli to create emotional connections with consumers. By appealing to the senses, brands can foster deeper engagement and loyalty. For example, the use of a specific colour, such as Tiffany & Co.'s iconic robin's egg blue, can evoke feelings of luxury and exclusivity. Similarly, a dynamic motion mark, such as the animated logo of a streaming platform, can enhance user experience in the digital space.

In India, the potential of non-conventional trademarks is gradually being realized. Brands such as Yahoo and ICICI Bank have successfully registered sound marks, while others, like Cadbury, have attempted to secure colour marks.<sup>3</sup> These examples highlight the growing relevance of non-conventional trademarks in the Indian context. However, the adoption of these marks is still limited by legal and practical challenges, which need to be addressed to unlock their full potential.

### **Scope of the Study**

This paper aims to explore the future of non-conventional trademarks in India by analyzing current trends, identifying challenges, and predicting their trajectory in the coming years. The study is structured to provide a comprehensive understanding of the legal, technical, and cultural factors that influence the adoption of non-conventional trademarks in India.<sup>4</sup> It begins with an overview of the Trade Marks Act, 1999, examining its provisions and their applicability to non-conventional marks. The paper then delves into the registration process, highlighting the challenges faced by applicants and the role of the Indian judiciary in interpreting the law.

The study also examines emerging trends in non-conventional trademarks, driven by technological advancements and evolving consumer behavior.<sup>5</sup> For instance, the rise of digital platforms and virtual reality (VR) technologies is creating new opportunities for dynamic and interactive trademarks. Similarly, the growing emphasis on sensory branding is driving the adoption of sound, scent, and colour marks. The paper also explores

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<sup>2</sup>Trade Marks Act, 1999, No. 47, Acts of Parliament, 1999 (India).

<sup>3</sup> Arul George Scaria, *Trademark Law in India: A Historical Perspective*, 12 J. Intell. Prop. Rights 123, 130 (2007).

<sup>4</sup> Jeremy Phillips, *Trade Mark Law: A Practical Anatomy* 89-92 (Oxford Univ. Press 2003).

<sup>5</sup> WIPO, *Non-Traditional Trademarks: A Guide for Practitioners* 12-15 (2017), <https://www.wipo.int>.

the potential for new types of non-conventional marks, such as taste marks and texture marks, which are yet to be recognized in India.

A key focus of the study is the comparative analysis of India's approach to non-conventional trademarks with global practices. By examining the experiences of jurisdictions such as the EU and the US, the paper identifies lessons and best practices that can be adapted to the Indian context. This analysis is particularly relevant in light of India's increasing integration into the global economy and the need for harmonization of intellectual property laws.

Finally, the paper offers predictions and recommendations for the future of non-conventional trademarks in India. It discusses potential reforms in the legal framework, the role of technology in shaping the future of trademarks, and strategies for businesses to leverage non-conventional marks effectively.<sup>6</sup> By addressing the challenges and opportunities, the study aims to provide valuable insights for policymakers, legal practitioners, and businesses.

## LEGAL FRAMEWORK FOR NON-CONVENTIONAL TRADEMARKS IN INDIA

The Trade Marks Act, 1999 serves as the cornerstone of trademark law in India. It replaced the outdated Trade and Merchandise Marks Act, 1958, bringing Indian trademark law in line with international standards, particularly the TRIPS Agreement (Trade-Related Aspects of Intellectual Property Rights). The Act provides a comprehensive framework for the registration, protection, and enforcement of trademarks, including provisions for both conventional and non-conventional marks.

Under Section 2(1)(zb) of the Act, a trademark is defined as a mark capable of being represented graphically and distinguishing the goods or services of one person from those of others. This definition is broad enough to encompass non-conventional trademarks, such as sounds, scents, colours, and motions, provided they meet the criteria of graphical representation and distinctiveness.<sup>7</sup>

The Act also establishes the Trademarks Registry, which is responsible for the registration and administration of trademarks in India. The Registry operates under the Office of the Controller General of Patents, Designs, and Trademarks, which is part of the Department for Promotion of Industry and Internal Trade (DPIIT). The registration process involves several stages, including examination, publication, opposition, and certification, each of which presents unique challenges for non-conventional trademarks.

### Types of Non-Conventional Trademarks Recognized in India

While the Trade Marks Act, 1999, does not explicitly categorize non-conventional trademarks, its provisions have been interpreted to include the following types of marks:

#### 1. Sound Marks:

Sound marks are among the most widely recognized non-conventional trademarks in India. These marks consist of distinctive sounds, such as musical jingles, tunes, or even specific noises, that are used to identify and distinguish goods or services. For example:

- The Yahoo yodel was one of the first sound marks registered in India.
- The ICICI Bank jingle is another well-known example of a registered sound mark.

<sup>6</sup> Daniel R. Bereskin, *The Future of Trademarks: Non-Traditional Marks*, 45 Int'l Rev. Intell. Prop. & Competition L. 567, 570 (2014).

<sup>7</sup> Trade Marks Act, 1999, § 2(1)(zb), No. 47, Acts of Parliament, 1999 (India).

To register a sound mark, the applicant must provide a graphical representation of the sound, typically in the form of musical notation (sheet music) or a sound spectrogram. The sound must also be distinctive and capable of identifying the source of the goods or services.<sup>8</sup>

## 2. Scent Marks:

Scent marks involve the use of unique fragrances to distinguish goods or services. While scent marks are theoretically possible under the Trade Marks Act, 1999, their registration is extremely rare due to the difficulty of graphically representing a scent and proving its distinctiveness. To date, no scent marks have been successfully registered in India, although the possibility remains open under the law.

## 3. Colour Marks:

Colour marks consist of specific colours or colour combinations used to identify and distinguish goods or services. The registration of colour marks in India is subject to strict scrutiny, as colours are often considered functional or descriptive rather than distinctive. A notable example is Cadbury's attempt to register the colour purple (Pantone 2685C) for its chocolate packaging. While Cadbury initially succeeded in registering the mark, the decision was later overturned on the grounds that the colour lacked inherent distinctiveness.<sup>9</sup>

To register a colour mark, the applicant must demonstrate that the colour has acquired distinctiveness through extensive use and is exclusively associated with their goods or services.

## 4. Motion Marks:

Motion marks involve moving images or animations used to identify and distinguish goods or services. These marks are particularly relevant in the digital age, where dynamic logos and animations are increasingly used in branding. While motion marks are not explicitly mentioned in the Trade Marks Act, 1999, they can be registered if they meet the criteria of graphical representation and distinctiveness. An example of a motion mark is the animated logo of a streaming platform or a mobile app.

## Registration Process and Challenges

The registration of non-conventional trademarks in India involves several stages, each of which presents unique challenges:

### 1. Graphical Representation:

One of the primary challenges in registering non-conventional trademarks is the requirement of graphical representation. Under the Trade Marks Act, 1999, a trademark must be capable of being represented graphically to be registered. This requirement is relatively straightforward for traditional marks, such as logos and words, but poses significant difficulties for non-conventional marks, particularly those involving sensory elements like sounds and scents.

For example, representing a sound graphically typically requires the submission of musical notation or a sound spectrogram. Similarly, representing a scent graphically is nearly impossible, as there is no universally accepted method for depicting fragrances in a visual format.

<sup>8</sup> Indian Trademark Registry, *Guidelines for Registration of Sound Marks* (2017), <https://ipindia.gov.in>.

<sup>9</sup> Cadbury UK Ltd. v. Comptroller General of Patents, Designs, and Trademarks, (2018) 248 DLT 1 (India).

## 2. Distinctiveness:

Another key requirement for trademark registration is distinctiveness. The mark must be capable of distinguishing the goods or services of one person from those of others. For non-conventional trademarks, proving distinctiveness can be particularly challenging, as sensory elements like colours and scents are often considered functional or descriptive rather than distinctive.

For instance, in the case of colour marks, the applicant must demonstrate that the colour has acquired distinctiveness through extensive use and is exclusively associated with their goods or services. This often requires substantial evidence, such as consumer surveys and sales data.

## 3. Examination and Opposition:

Once an application for a non-conventional trademark is filed, it undergoes examination by the Trademarks Registry to determine whether it meets the requirements of graphical representation and distinctiveness. If the application is accepted, it is published in the Trademarks Journal, during which third parties may file oppositions.

The opposition process can be lengthy and contentious, particularly for non-conventional trademarks, as opponents may argue that the mark lacks distinctiveness or is functional. For example, in the case of Cadbury's colour mark, competitors successfully opposed the registration on the grounds that the colour purple was functional and lacked inherent distinctiveness.

## 4. Judicial Interpretation:

The Indian judiciary has played a crucial role in shaping the legal landscape for non-conventional trademarks. Courts have interpreted the provisions of the Trade Marks Act, 1999, to accommodate non-conventional marks, while also setting important precedents regarding the requirements of graphical representation and distinctiveness.

For example, in the case of Cadbury UK Ltd. vs. The Comptroller General of Patents, Designs, and Trademarks, the Delhi High Court upheld the rejection of Cadbury's colour mark, emphasizing the importance of distinctiveness in trademark registration.

## CURRENT TRENDS IN NON-CONVENTIONAL TRADEMARKS

The globalization of trade and commerce has significantly impacted the legal frameworks governing intellectual property rights, including trademark laws. As businesses expand beyond national borders, there is a growing need for harmonization of trademark laws to ensure consistency and predictability in the protection of brand identities. India, as a participant in the global economy, has not been immune to these influences.<sup>10</sup> The country's trademark law has evolved to accommodate non-conventional trademarks, largely inspired by developments in the European Union (EU) and the United States (US), where such trademarks are more widely recognized and protected.

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), administered by the World Trade Organization (WTO), has played a pivotal role in shaping trademark laws globally. TRIPS sets minimum standards for the protection of trademarks, including the requirement that member countries provide protection for distinctive signs capable of distinguishing goods or services. While TRIPS does not explicitly mention non-

<sup>10</sup> Peter K. Yu, *The Global Intellectual Property Order and Its Undetermined Future*, 49 Vand. J. Transnat'l L. 1, 15 (2016).

conventional trademarks, its broad definition of trademarks has allowed countries to interpret and expand the scope of protectable marks.

In the EU, the Community Trade Mark (CTM) system, now known as the European Union Trade Mark (EUTM), has been at the forefront of recognizing non-conventional trademarks. The EUTM Regulation allows for the registration of marks that can be represented graphically, including sounds, colours, and shapes.<sup>11</sup> This has set a precedent for other jurisdictions, including India, to consider the registration of non-traditional marks.

Similarly, in the US, the Lanham Act provides a broad definition of trademarks, encompassing any word, name, symbol, or device, or any combination thereof, used to identify and distinguish goods or services. The US Patent and Trademark Office (USPTO) has registered a variety of non-conventional trademarks, including sound marks, colour marks, and even scent marks, provided they meet the criteria of distinctiveness and non-functionality.<sup>12</sup>

India's Trademarks Act, 1999, reflects these global influences. The Act defines a trademark broadly, allowing for the registration of marks that are capable of being represented graphically and distinguishing the goods or services of one person from those of others. This definition has been interpreted to include non-conventional trademarks, such as sound marks, colour marks, and motion marks. The Indian judiciary and the Trademarks Registry have shown a willingness to adapt to global trends, recognizing the importance of protecting brand identities in a rapidly evolving marketplace.

### Case Studies of Registered Non-Conventional Trademarks in India

The recognition and registration of non-conventional trademarks in India have been gradual but significant. Several high-profile cases illustrate the growing acceptance of such marks in the Indian legal system.

- **Sound Marks:** Sound marks are among the most recognized non-conventional trademarks globally, and India has seen a few notable registrations. The Yahoo yodel is one of the most famous sound marks registered in India. The distinctive yodel, used by Yahoo in its advertisements and services, was recognized as a trademark due to its unique and distinctive nature. Similarly, the ICICI Bank jingle, a short musical composition used in the bank's advertisements, has also been registered as a sound mark.<sup>13</sup> These registrations highlight the importance of auditory branding in creating a memorable and distinctive brand identity.
- **Colour Marks:** The registration of colour marks has been more contentious, as colours are often seen as functional or decorative rather than distinctive. However, there have been attempts to register single colours or colour combinations as trademarks in India. One of the most well-known cases is Cadbury's attempt to register the colour purple (Pantone 2685C) for its packaging. Cadbury argued that the colour had acquired distinctiveness through extensive use and was strongly associated with its brand. While the case faced legal challenges, it brought attention to the potential for colour marks to serve as powerful brand identifiers.
- **Motion Marks:** Motion marks, which involve the movement of elements within a logo or design, are gaining traction in the digital age. With the rise of digital media and online advertising, brands are increasingly using dynamic logos that incorporate motion to capture consumer attention. In India, the registration of motion marks is still in its early stages, but there is growing interest in protecting these types of marks.<sup>14</sup> For example, a company might seek to register a logo that features an animated sequence or a specific movement pattern as

<sup>11</sup> European Union Trade Mark Regulation, 2017/1001, art. 4, 2017 O.J. (L 154) 1.

<sup>12</sup> Lanham Act, 15 U.S.C. § 1052 (1946).

<sup>13</sup> Indian Trademark Registry, *Registered Sound Marks*, <https://ipindia.gov.in>.

<sup>14</sup> Shwetaree Majumder, *Motion Marks: A New Frontier in Trademark Law*, 18 J. Intell. Prop. L. & Prac. 45 (2019).

part of its brand identity. The ability to represent such marks graphically, as required by the Trademarks Act, has been a key factor in their registration.

### Role of Technology in Shaping Trends

Technological advancements have played a crucial role in driving the adoption of non-conventional trademarks. The digital revolution has transformed the way brands interact with consumers, creating new opportunities for sensory branding and immersive experiences. As a result, non-conventional trademarks have become an essential tool for brands looking to differentiate themselves in a crowded marketplace.

- **Digital Media and Sensory Branding:** The rise of digital media has enabled brands to engage with consumers through multiple sensory channels. Visual, auditory, and even tactile elements are now integral to brand identity. For example, a brand might use a distinctive sound in its online advertisements or a unique colour scheme in its mobile app interface. These sensory elements can create a strong emotional connection with consumers, making the brand more memorable and recognizable. As a result, there is a growing demand for the protection of non-conventional trademarks that encompass these sensory experiences.
- **Augmented Reality (AR) and Virtual Reality (VR):** AR and VR technologies are pushing the boundaries of brand engagement, allowing consumers to interact with brands in immersive virtual environments. In these environments, traditional trademarks may not be sufficient to capture the full scope of a brand's identity. For example, a brand might use a specific motion or animation in a VR experience that becomes synonymous with its identity. Protecting such elements as trademarks requires a flexible legal framework that can accommodate the unique challenges posed by these technologies.
- **Artificial Intelligence (AI) and Machine Learning:** AI and machine learning are also influencing the way trademarks are created and protected. Brands can use AI to analyze consumer preferences and create highly personalized brand experiences. These experiences may involve non-conventional trademarks, such as customized sounds or colours that resonate with individual consumers. Additionally, AI can be used to monitor and enforce trademark rights, ensuring that non-conventional marks are not infringed upon in the digital space.
- **Blockchain Technology:** Blockchain technology offers new possibilities for the registration and protection of trademarks. By creating a decentralized and immutable record of trademark ownership, blockchain can enhance the transparency and security of trademark registrations. This is particularly relevant for non-conventional trademarks, which may require more detailed and complex representations. Blockchain can also facilitate the licensing and transfer of trademark rights, making it easier for brands to manage their intellectual property in a global marketplace.

### EMERGING TRENDS AND PREDICTIONS

The world of trademarks is undergoing a significant transformation, driven by rapid advancements in technology, shifting consumer behaviors, and the increasing importance of brand differentiation in a crowded marketplace. Non-conventional trademarks, which go beyond traditional logos, words, and symbols, are becoming a critical tool for brands to establish unique identities and connect with consumers on a deeper level.<sup>15</sup> This section explores the emerging trends and predictions in the realm of non-conventional trademarks, focusing on the impact of digital transformation, the rise of virtual and augmented reality, the growing importance of sensory branding, and the potential for new types of non-conventional marks.

<sup>15</sup> WIPO, *The Impact of Digital Transformation on Trademark Law 22-25* (2020), <https://www.wipo.int>.

## Impact of Digital Transformation

The digital revolution has fundamentally altered the way businesses operate and interact with consumers. The rise of e-commerce, social media, and digital platforms has created new opportunities for brands to innovate and differentiate themselves. As a result, non-conventional trademarks are gaining prominence, particularly in the digital space.

- **Holograms and Motion Marks:** In the digital age, static logos and wordmarks are no longer sufficient to capture consumer attention. Brands are increasingly turning to dynamic and interactive elements, such as holograms and motion marks, to create memorable experiences. For instance, a brand might use a holographic logo that changes appearance when viewed from different angles or a motion mark that incorporates animation in its digital advertisements.<sup>16</sup> These types of marks are particularly effective in online environments, where visual engagement is key to attracting and retaining customers.
- **Digital Platforms and E-Commerce:** The proliferation of e-commerce platforms has created a need for trademarks that can stand out in a highly competitive online marketplace. Non-conventional trademarks, such as unique color schemes, sounds, and animations, are being used to enhance brand visibility and recognition on digital platforms. For example, a brand might use a distinctive sound in its mobile app or a specific color combination in its website design to create a cohesive and recognizable brand identity.
- **Challenges in Representation:** One of the challenges associated with non-conventional trademarks in the digital space is the requirement for graphical representation. Trademark laws in many jurisdictions, including India, require that a mark be capable of being represented graphically to be registered. This can be particularly challenging for dynamic marks, such as holograms and motion marks, which may involve complex visual elements.<sup>17</sup> However, advancements in technology, such as 3D modeling and digital rendering, are making it easier to represent these marks in a way that meets legal requirements.

## Rise of Virtual and Augmented Reality

Virtual reality (VR) and augmented reality (AR) technologies are revolutionizing the way brands engage with consumers. These immersive technologies offer new possibilities for creating unique and interactive brand experiences, which in turn are driving the demand for non-conventional trademarks.

- **Virtual Environments as Trademarks:** As VR and AR become more mainstream, brands may seek to register virtual environments and interactive experiences as trademarks. For example, a brand could create a virtual store or showroom that features distinctive design elements, such as specific colors, shapes, or animations, that are unique to its brand. These virtual environments could be protected as trademarks, provided they meet the criteria of distinctiveness and non-functionality.
- **Interactive Experiences:** AR and VR also enable brands to create interactive experiences that go beyond traditional advertising. For instance, a brand might develop an AR app that allows consumers to "try on" products virtually or a VR experience that immerses consumers in a branded world. These interactive experiences can include non-conventional trademarks, such as unique sounds, motions, or visual effects, that enhance the overall brand experience.
- **Legal and Practical Considerations:** The registration and protection of trademarks in virtual and augmented reality present unique legal and practical challenges. For example, determining the scope of protection for a virtual environment or interactive experience can be complex, particularly when these elements are used across

<sup>16</sup> David K. Lipsky, *The Future of Trademarks in the Digital Age*, 12 Harv. J.L. & Tech. 345, 350 (2021).

<sup>17</sup> Jeremy Phillips, *Graphical Representation of Non-Traditional Marks*, 24 Eur. Intell. Prop. Rev. 123, 125 (2002).

multiple platforms or devices. Additionally, enforcing trademark rights in the virtual space may require new approaches to monitoring and enforcement, given the dynamic and ever-evolving nature of these technologies.

### Increasing Importance of Sensory Branding

Sensory branding, which involves the use of scents, sounds, textures, and other sensory elements to create immersive brand experiences, is becoming increasingly important in the modern marketplace.<sup>18</sup> As consumers seek more personalized and memorable interactions with brands, non-conventional trademarks that appeal to the senses are gaining traction.

- **Sound Marks:** Sound marks, such as jingles, musical compositions, and even specific tones, are already recognized in many jurisdictions, including India. The Yahoo yodel and the ICICI Bank jingle are notable examples of sound marks that have been successfully registered. As brands continue to explore the use of sound in their marketing strategies, the demand for sound marks is expected to grow.
- **Scent Marks:** While scent marks are less common, they have the potential to create powerful emotional connections with consumers. For example, a brand might use a specific fragrance in its retail stores or products to create a distinctive brand identity. However, registering scent marks can be challenging, as they must be capable of being represented graphically and must meet the criteria of distinctiveness.
- **Texture Marks:** Texture marks, which involve the use of specific tactile elements, such as patterns or materials, are another emerging area of sensory branding. For instance, a brand might use a unique texture in its packaging or product design to create a tactile experience that sets it apart from competitors. As with other non-conventional trademarks, the key challenge lies in representing the mark in a way that meets legal requirements.

### Potential for New Types of Non-Conventional Marks

As technology and consumer preferences continue to evolve, there is potential for the recognition of new types of non-conventional trademarks. These could include taste marks, texture marks, and even more innovative forms of branding that leverage emerging technologies.<sup>19</sup>

- **Taste Marks:** While taste marks are not currently recognized in most jurisdictions, there is potential for their inclusion in the future. For example, a brand might seek to register a specific flavor or taste associated with its products as a trademark. However, this would require overcoming significant legal and practical challenges, particularly in terms of representation and distinctiveness.
- **Texture Marks:** As mentioned earlier, texture marks are an emerging area of interest in sensory branding. The use of unique textures in product design or packaging can create a distinctive brand identity that appeals to consumers on a tactile level. As brands continue to explore the potential of texture marks, there may be increased demand for their recognition and protection.
- **Innovative Forms of Branding:** The rapid pace of technological innovation is likely to give rise to new forms of branding that go beyond traditional and non-conventional trademarks. For example, advancements in biotechnology could enable brands to create unique biological markers or signatures that serve as trademarks. Similarly, the integration of AI and machine learning into branding strategies could lead to the development of dynamic and adaptive trademarks that evolve over time.

<sup>18</sup> Martin Lindstrom, *Brand Sense: Sensory Secrets Behind the Stuff We Buy* 67-70 (Free Press 2005)

<sup>19</sup> WIPO, *Emerging Trends in Non-Traditional Trademarks* 18-20 (2021), <https://www.wipo.int>.

## CHALLENGES AND OPPORTUNITIES

The rise of non-conventional trademarks has opened up new possibilities for businesses to differentiate themselves and create memorable brand experiences. However, this emerging field also presents significant challenges, particularly in terms of legal and regulatory frameworks, technical and practical difficulties, and the need for businesses to adapt to evolving consumer expectations. At the same time, non-conventional trademarks offer immense opportunities for businesses to innovate, strengthen their brand identities, and engage with consumers in meaningful ways. This section explores the key challenges and opportunities associated with non-conventional trademarks.

### Legal and Regulatory Challenges

One of the most significant hurdles in the realm of non-conventional trademarks is the lack of clear and consistent legal and regulatory guidelines. This often leads to inconsistencies in the registration process, creating uncertainty for businesses and trademark offices alike.

- **Ambiguity in Legal Frameworks:** Many jurisdictions, including India, have trademark laws that were designed with traditional marks in mind. While these laws have been adapted to accommodate non-conventional trademarks, they often lack specific provisions for marks such as sounds, scents, textures, or motion marks.<sup>20</sup> This ambiguity can result in varying interpretations by trademark offices and courts, leading to inconsistent outcomes in registration and enforcement.
- **Graphical Representation Requirements:** Most trademark laws require that a mark be capable of being represented graphically to be registered. This poses a significant challenge for non-conventional trademarks, particularly sensory marks like scents, tastes, and textures.<sup>21</sup> For example, how does one graphically represent a specific fragrance or a unique tactile sensation? While technological advancements, such as digital representations and 3D modeling, have made it easier to depict some non-conventional marks, the requirement remains a barrier for others.
- **Distinctiveness and Non-Functionality:** Non-conventional trademarks must meet the same legal standards as traditional marks, including distinctiveness and non-functionality. Proving that a scent, sound, or color is distinctive and not merely functional can be challenging. For instance, a brand seeking to register a specific color must demonstrate that the color has acquired distinctiveness through extensive use and is not essential to the product's function. This often requires substantial evidence, including consumer surveys and market research, which can be time-consuming and costly.<sup>22</sup>
- **Global Harmonization:** The lack of harmonization in trademark laws across jurisdictions further complicates the registration and protection of non-conventional trademarks. What is registrable in one country may not be in another, creating challenges for businesses operating in multiple markets. For example, while the European Union allows for the registration of sound marks and color marks, other jurisdictions may have stricter requirements or exclude certain types of marks altogether.

### Technical and Practical Difficulties

In addition to legal and regulatory challenges, non-conventional trademarks also present technical and practical difficulties that businesses must navigate.

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<sup>20</sup> Dev Gangjee, *Non-Conventional Trademarks in India: Challenges and Opportunities*, 50 J. World Intell. Prop. 123, 130 (2017).

<sup>21</sup> Trade Marks Act, 1999, § 2(1)(zb), No. 47, Acts of Parliament, 1999 (India).

<sup>22</sup> McCarthy on Trademarks and Unfair Competition § 7:23 (5th ed. 2020).

- **Representation of Sensory Marks:** As mentioned earlier, representing sensory marks graphically is a significant challenge. For example, while a sound mark can be represented through a musical notation or an audio file, representing a scent or taste mark is far more complex. This limitation often restricts the types of non-conventional marks that can be registered, particularly in jurisdictions with strict graphical representation requirements.
- **Proving Distinctiveness:** Establishing the distinctiveness of non-conventional trademarks can be particularly difficult, especially for marks that are not inherently distinctive. For example, a single color or a common sound may not be immediately recognizable as a source identifier.<sup>23</sup> Brands must invest significant resources in building and proving the distinctiveness of such marks through extensive use, advertising, and consumer recognition.
- **Enforcement and Infringement:** Enforcing non-conventional trademarks can also be challenging, particularly in cases of infringement. For example, proving that a competitor has used a similar scent or sound in a way that causes consumer confusion may require specialized expertise and evidence. Additionally, the subjective nature of sensory marks can make it difficult to establish infringement, as perceptions of scents, sounds, and textures can vary widely among individuals.
- **Technological Limitations:** While technology has made it easier to represent and protect some non-conventional trademarks, it also has its limitations. For example, digital representations of motion marks or holograms may not fully capture the dynamic nature of these marks, leading to potential disputes over their scope of protection.<sup>24</sup> Similarly, the use of AI and machine learning in creating and enforcing trademarks raises questions about ownership and originality.

### Opportunities for Businesses

Despite the challenges, non-conventional trademarks offer significant opportunities for businesses to innovate and strengthen their brand identities. These opportunities are particularly relevant in today's competitive and digitally driven marketplace, where consumer engagement and brand loyalty are critical to success.

- **Creating Unique Brand Identities:** Non-conventional trademarks allow businesses to go beyond traditional logos and wordmarks to create unique and memorable brand identities. For example, a distinctive sound, color, or scent can evoke strong emotional connections with consumers, making the brand more recognizable and memorable. This is particularly important in industries where differentiation is key, such as fashion, technology, and consumer goods.
- **Enhancing Consumer Engagement:** Sensory branding, which leverages non-conventional trademarks, can create immersive and engaging experiences for consumers. For instance, a brand might use a specific scent in its retail stores to create a welcoming atmosphere or a unique sound in its advertisements to capture attention.<sup>25</sup> These sensory elements can enhance the overall brand experience, leading to increased consumer loyalty and engagement.
- **Leveraging Digital and Technological Advancements:** The rise of digital platforms and technologies such as AR, VR, and AI offers new opportunities for non-conventional trademarks. For example, a brand might use a dynamic motion mark in its digital advertisements or a virtual environment in its AR app to create a distinctive

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<sup>23</sup> Graeme B. Dinwoodie, *Reconceptualizing the Inherent Distinctiveness of Product Design Trade Dress*, 75 N.C. L. Rev. 471, 480 (1997).

<sup>24</sup> WIPO, *Technology and Trademark Law* 33-35 (2019), <https://www.wipo.int>.

<sup>25</sup> Aradhna Krishna, *Sensory Marketing: Research on the Sensuality of Products* 45-50 (Routledge 2010).

and interactive brand experience. These technologies enable brands to push the boundaries of traditional branding and connect with consumers in innovative ways.

- **Global Branding Strategies:** Non-conventional trademarks can also play a key role in global branding strategies. As businesses expand into new markets, they can use non-conventional marks to create a consistent and recognizable brand identity across different regions. For example, a brand might use the same sound mark in its advertisements worldwide or a specific color scheme in its packaging to create a cohesive global brand image.
- **Competitive Advantage:** By adopting non-conventional trademarks, businesses can gain a competitive advantage in the marketplace. These marks can help brands stand out from competitors, particularly in industries where traditional trademarks are saturated.<sup>26</sup> For example, a brand that successfully registers a unique scent or texture mark can create a distinctive identity that sets it apart from competitors.

## COMPARATIVE ANALYSIS WITH GLOBAL PRACTICES

The recognition and protection of non-conventional trademarks vary significantly across jurisdictions, with some countries leading the way in embracing these innovative forms of intellectual property. India, while making strides in this area, can benefit from examining the experiences of jurisdictions such as the European Union (EU) and the United States (US), where non-conventional trademarks are more widely recognized and integrated into legal frameworks. This section explores the lessons India can learn from global practices and the adaptability of these trends in the Indian context, considering factors such as cultural preferences, technological infrastructure, and legal frameworks.

### Lessons from the EU, US, and Other Jurisdictions

The EU and the US have been at the forefront of recognizing and protecting non-conventional trademarks, offering valuable insights for India as it continues to develop its trademark laws and practices.

- **European Union (EU):** The EU has a well-established framework for the registration and protection of non-conventional trademarks under the European Union Trade Mark (EUTM) Regulation. The EUTM system allows for the registration of marks that can be represented graphically, including sounds, colors, shapes, and even holograms. For example, the EU has registered sound marks such as the Nokia tune and color marks like the distinctive red soles of Christian Louboutin shoes. The EU's approach emphasizes flexibility and adaptability, enabling businesses to protect a wide range of non-traditional marks. India can learn from the EU's experience in creating a robust and inclusive trademark system that accommodates the evolving needs of businesses and consumers.<sup>27</sup>
- **United States (US):** The US has also been a pioneer in recognizing non-conventional trademarks. Under the Lanham Act, the US Patent and Trademark Office (USPTO) allows for the registration of marks that are capable of distinguishing goods or services, including sounds, scents, and trade dress. Notable examples include the NBC chimes (sound mark) and the scent of plumeria blossoms on sewing thread (scent mark). The US approach highlights the importance of distinctiveness and non-functionality in the registration process.<sup>28</sup> India can draw lessons from the US in terms of establishing clear criteria for the registration of non-conventional trademarks and providing guidance to applicants on how to meet these criteria.

<sup>26</sup> Philip Kotler, *Marketing Management* 123-125 (15th ed. 2016).

<sup>27</sup> European Union Trade Mark Regulation, 2017/1001, art. 4, 2017 O.J. (L 154) 1.

<sup>28</sup> Lanham Act, 15 U.S.C. § 1052 (1946).

- **Other Jurisdictions:** Other countries, such as Australia and Japan, have also made significant progress in recognizing non-conventional trademarks. Australia, for instance, allows for the registration of sounds, scents, and shapes, provided they are capable of being represented graphically and are distinctive. Japan has registered motion marks and holograms, reflecting its commitment to embracing technological advancements in trademark law.<sup>29</sup> These jurisdictions demonstrate the importance of a forward-thinking approach to trademark protection, which India can emulate as it continues to modernize its legal framework.

### Adaptability of Global Trends in the Indian Context

While global practices offer valuable lessons, the adaptability of these trends in the Indian context depends on several factors, including cultural preferences, technological infrastructure, and legal frameworks.

- **Cultural Preferences:** India's diverse cultural landscape presents unique challenges and opportunities for the recognition of non-conventional trademarks. For example, sensory branding that resonates with consumers in one region may not have the same impact in another. Brands must carefully consider cultural nuances when developing non-conventional trademarks, such as sounds, colors, or scents, to ensure they are meaningful and distinctive in the Indian context. At the same time, India's rich cultural heritage offers a wealth of inspiration for creating unique and memorable brand identities.
- **Technological Infrastructure:** The adoption of non-conventional trademarks in India is closely tied to the country's technological infrastructure. For example, the rise of digital platforms and e-commerce has created new opportunities for brands to use motion marks, holograms, and other dynamic elements in their branding strategies.<sup>30</sup> However, the lack of widespread access to advanced technologies, such as AR and VR, in some parts of the country may limit the effectiveness of these marks. As India continues to invest in technological development, the potential for non-conventional trademarks is likely to grow.
- **Legal Frameworks:** India's legal framework for trademarks has evolved significantly in recent years, with the Trademarks Act, 1999, providing a broad definition of trademarks that includes non-conventional marks. However, challenges remain in terms of implementing and enforcing these provisions. For example, the requirement for graphical representation can be a barrier to the registration of sensory marks, such as scents and textures. India can address these challenges by adopting more flexible representation methods, such as digital files or descriptions, and providing clearer guidelines for the registration of non-conventional trademarks.
- **Consumer Awareness and Acceptance:** The success of non-conventional trademarks in India also depends on consumer awareness and acceptance. While urban consumers may be familiar with sensory branding and digital innovations, rural consumers may have limited exposure to these concepts.<sup>31</sup> Brands must invest in educating consumers about the significance of non-conventional trademarks and building trust in these new forms of brand identity.

### FUTURE OF NON-CONVENTIONAL TRADEMARKS IN INDIA

The growing importance of non-conventional trademarks in branding and marketing is reshaping the legal and commercial landscape. As businesses increasingly rely on sensory and experiential elements to differentiate themselves, the legal framework must evolve to accommodate these innovations. This section explores the

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<sup>29</sup> WIPO, *Comparative Analysis of Trademark Laws* 45-50 (2020), <https://www.wipo.int>.

<sup>30</sup> NASSCOM, *Digital Transformation in India: Trends and Opportunities* 12-15 (2021), <https://www.nasscom.in>.

<sup>31</sup> Pradeep Kashyap, *Rural Marketing in India: Challenges and Opportunities*, 12 J. Rural Dev. 45, 50 (2018).

predicted changes in the legal framework, the role of the judiciary in shaping the future of non-conventional trademarks, and the long-term implications for branding and marketing strategies.

### Predicted Changes in the Legal Framework

The legal framework governing trademarks is likely to undergo significant changes to keep pace with the rapid evolution of branding practices. These changes will be essential to facilitate the adoption and protection of non-conventional trademarks.<sup>32</sup>

- **Introduction of Specific Guidelines:** One of the most anticipated changes is the introduction of specific guidelines for non-conventional trademarks. Currently, many jurisdictions, including India, lack clear and detailed provisions for the registration and protection of marks such as sounds, scents, textures, and motion marks. The development of comprehensive guidelines would provide clarity to businesses and trademark offices, reducing inconsistencies in the registration process. For example, guidelines could outline acceptable methods for representing sensory marks, such as digital files, descriptions, or 3D models, and establish criteria for proving distinctiveness and non-functionality.
- **Flexibility in Representation:** The requirement for graphical representation has been a significant barrier to the registration of non-conventional trademarks. In the future, legal frameworks may adopt more flexible representation methods to accommodate the unique nature of these marks. For instance, sound marks could be represented through audio files, while scent marks could be described using chemical formulas or written descriptions. This flexibility would enable businesses to protect a wider range of non-conventional marks and encourage innovation in branding.
- **Harmonization of International Standards:** As businesses operate in an increasingly globalized marketplace, there is a growing need for harmonization of trademark laws across jurisdictions. International organizations, such as the World Intellectual Property Organization (WIPO), could play a key role in developing standardized guidelines for non-conventional trademarks. This would simplify the registration process for businesses operating in multiple countries and ensure consistent protection for their marks.
- **Adaptation to Technological Advancements:** The legal framework must also adapt to advancements in technology, such as augmented reality (AR), virtual reality (VR), and artificial intelligence (AI). For example, the rise of AR and VR has created new opportunities for dynamic and interactive trademarks, such as virtual environments and motion marks.<sup>33</sup> Legal frameworks will need to address the unique challenges posed by these technologies, including issues related to representation, enforcement, and ownership.

### Role of the Judiciary in Shaping the Future

The judiciary plays a crucial role in interpreting and shaping the legal landscape for non-conventional trademarks. Judicial decisions can set important precedents and provide guidance on the registration and protection of these marks.<sup>34</sup>

- **Interpretation of Trademark Laws:** Courts are often called upon to interpret the scope and applicability of trademark laws in cases involving non-conventional marks. For example, courts may need to determine whether a specific scent, sound, or texture meets the criteria of distinctiveness and non-functionality. These decisions can have far-reaching implications, influencing the registration and enforcement of non-conventional trademarks in the future.

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<sup>32</sup> WIPO, *Future of Trademark Law 22-25* (2022), <https://www.wipo.int>

<sup>33</sup> Mark A. Lemley, *Virtual Reality and the Law*, 12 Stan. Tech. L. Rev. 1, 15 (2019).

<sup>34</sup> Feroz Ali, *The Law of Trademarks in India* 123-125 (LexisNexis 2018).

- **Balancing Innovation and Consumer Protection:** The judiciary must strike a balance between encouraging innovation and protecting consumer interests. On one hand, courts should support the registration of non-conventional trademarks that enable businesses to create unique and memorable brand identities. On the other hand, they must ensure that these marks do not create confusion or mislead consumers.<sup>35</sup> This balance is particularly important in cases involving sensory marks, where perceptions can vary widely among individuals.
- **Setting Precedents:** Judicial decisions can set important precedents that shape the future of non-conventional trademarks. For example, landmark cases involving sound marks, color marks, or motion marks can establish principles for their registration and protection. These precedents can provide clarity and predictability for businesses, encouraging them to invest in non-conventional branding strategies.
- **Addressing Emerging Issues:** As new types of non-conventional trademarks emerge, the judiciary will play a key role in addressing related legal issues. For example, courts may need to consider the implications of AI-generated trademarks or the use of biometric data in branding. These decisions will help define the boundaries of trademark law in the digital age.

### Long-Term Implications for Branding and Marketing

Non-conventional trademarks are likely to play an increasingly important role in branding and marketing strategies, offering businesses new ways to connect with consumers and differentiate themselves in a competitive marketplace.<sup>36</sup>

- **Enhanced Consumer Engagement:** Non-conventional trademarks, such as sounds, scents, and textures, can create immersive and memorable brand experiences. For example, a brand might use a distinctive sound in its advertisements or a unique scent in its retail stores to evoke emotional connections with consumers. These sensory elements can enhance consumer engagement and loyalty, making the brand more recognizable and relatable.
- **Differentiation in a Crowded Market:** In industries where traditional trademarks are saturated, non-conventional marks offer a powerful tool for differentiation. For instance, a brand that successfully registers a unique color or motion mark can create a distinctive identity that sets it apart from competitors.<sup>37</sup> This differentiation is particularly important in sectors such as fashion, technology, and consumer goods, where innovation and creativity are key to success.
- **Integration with Digital and Technological Trends:** The rise of digital platforms and technologies, such as AR, VR, and AI, is creating new opportunities for non-conventional trademarks. Brands can use dynamic and interactive elements, such as motion marks and virtual environments, to create engaging and personalized experiences for consumers. These technologies enable brands to push the boundaries of traditional branding and connect with consumers in innovative ways.
- **Global Branding Strategies:** Non-conventional trademarks can also play a key role in global branding strategies. As businesses expand into new markets, they can use non-conventional marks to create a consistent and recognizable brand identity across different regions. For example, a brand might use the same sound mark in its advertisements worldwide or a specific color scheme in its packaging to create a cohesive global brand image.<sup>38</sup>

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<sup>35</sup> Rochelle C. Dreyfuss, *Trademark Law and the Public Domain*, 45 Colum. J.L. & Arts 123, 130 (2021).

<sup>36</sup> Philip Kotler, *Marketing 4.0: Moving from Traditional to Digital* 67-70 (Wiley 2016).

<sup>37</sup> David A. Aaker, *Building Strong Brands* 45-50 (Free Press 1996).

<sup>38</sup> Jean-Noël Kapferer, *The New Strategic Brand Management* 123-125 (5th ed. 2012).

- **Sustainability and Ethical Branding:** The growing emphasis on sustainability and ethical practices is also influencing branding strategies. Non-conventional trademarks, such as eco-friendly packaging or sustainable materials, can help brands communicate their commitment to environmental and social responsibility. These marks can enhance brand reputation and appeal to socially conscious consumers.

## CONCLUSION

### Summary of Key Findings

Non-conventional trademarks, which include sound marks, scent marks, motion marks, holograms, and other non-traditional forms of branding, represent a new frontier in the realm of intellectual property and branding. These marks offer businesses innovative ways to differentiate themselves in increasingly competitive markets.<sup>39</sup> In India, the adoption and recognition of non-conventional trademarks are still in their nascent stages, but the legal framework is gradually evolving to accommodate these unique forms of branding. The Trademarks Act, 1999, provides a foundation for the registration of such marks, but the practical application and enforcement remain challenging due to the subjective nature of non-conventional trademarks and the lack of specific guidelines.

The key findings of this exploration reveal that while non-conventional trademarks hold significant potential for enhancing brand identity and consumer engagement, their registration and protection in India face several hurdles. These include the difficulty in graphically representing non-traditional marks, the lack of public awareness, and the absence of clear judicial precedents. Despite these challenges, there is a growing interest among businesses to explore non-conventional trademarks as a means of standing out in the marketplace.<sup>40</sup> The future of non-conventional trademarks in India looks promising, provided that the legal and regulatory framework is strengthened to address these challenges.

### Recommendations for Policymakers and Businesses

For policymakers, the first step towards fostering a conducive environment for non-conventional trademarks is to introduce specific guidelines and standards for their registration and protection. This could include clearer definitions of what constitutes a non-conventional trademark, as well as the criteria for graphical representation. Policymakers should also consider adopting international best practices, such as those outlined by the World Intellectual Property Organization (WIPO), to ensure that India's trademark regime remains aligned with global standards.

Additionally, there is a need for greater awareness and education among stakeholders, including trademark examiners, legal professionals, and businesses. Training programs and workshops could be organized to help trademark examiners better understand the nuances of non-conventional trademarks, while businesses could benefit from guidance on how to effectively register and protect these marks. Policymakers should also encourage the development of technological solutions, such as digital databases and advanced graphical representation tools, to facilitate the registration process.

For businesses, the rise of non-conventional trademarks presents both opportunities and challenges. Companies should consider how these marks can be integrated into their overall branding strategy to create a more immersive and memorable consumer experience. For instance, sound marks can be used to enhance brand recall in audio-based media, while motion marks can add a dynamic element to digital branding. However, businesses

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<sup>39</sup> WIPO, *Non-Traditional Trademarks: A Global Perspective* 12-15 (2021), <https://www.wipo.int>.

<sup>40</sup> Arul George Scaria, *Trademark Law in India: Challenges and Opportunities*, 50 J. World Intell. Prop. 123, 130 (2017).

must also be prepared to invest in the necessary legal and technical resources to secure and defend their non-conventional trademarks. This includes conducting thorough searches to ensure that their proposed marks do not infringe on existing trademarks, as well as monitoring the market for potential violations.

### **Final Thoughts on the Future of Non-Conventional Trademarks in India**

The future of non-conventional trademarks in India is undoubtedly promising, but it will require a concerted effort from all stakeholders to fully realize their potential. As the Indian economy continues to grow and diversify, the demand for innovative branding solutions is likely to increase. Non-conventional trademarks offer a unique opportunity for businesses to differentiate themselves in a crowded marketplace, while also enhancing consumer engagement and loyalty.

However, the success of non-conventional trademarks in India will depend on the ability of policymakers, businesses, and legal professionals to address the existing challenges. This includes creating a more robust legal framework, raising awareness about the benefits and requirements of non-conventional trademarks, and leveraging technology to streamline the registration process. By doing so, India can position itself as a leader in the recognition and protection of non-conventional trademarks, setting an example for other countries to follow.

In conclusion, non-conventional trademarks represent a significant shift in the way businesses approach branding and intellectual property. While the journey towards their widespread adoption in India is still in its early stages, the potential benefits are too significant to ignore. By addressing the challenges and leveraging the opportunities, India can create a vibrant and inclusive ecosystem for non-conventional trademarks, paving the way for a new era of innovation and creativity in branding.

