

# Protection of Non-Conventional Trademarks: Issues and the Road Ahead

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## Abstract:

Trademark as discussed under TRIPS agreement are referred to as “*any sign, or combination of signs, capable of distinguishing goods or services of one person or entity from those of others*”. The major rationale behind the emergence of trademark law is to protect the business, goodwill and reputation associated with the goods and services thereby facilitating the consumers to distinguish between goods or services originating from different sources and eliminating the confusion regarding the origin of the product.

Traditionally, a trademark was referred to in its conventional form as any sign, word, slogan or symbol in two-dimensional form which is used to distinguish the products and services of one proprietor from others. In the present time of aggressive marketing, various new techniques are adopted by manufacturers and sellers of goods and services to make their product distinct from those of other potential competitors present in the market and to capture the attention of the consumers. This brought the idea of non-conventional marks in picture. With the change in time, the trademark law is also expanding its horizon from the traditional notion of marks which earlier used to include only two dimensional marks including words, signs, symbols etc. to new form of non-conventional marks such as marks including or originating through color, smell, shape, taste, touch, sound, position and various other forms of non-conventional marks.

The use of new forms of marks to distinguish the goods and services from others had also raised several issues for the registration, functioning, distinctiveness and acceptance of these marks as trademark while breaking the old conventionalities. Also, there is an issue related to the non-availability of any uniform standard for the protection of these non-conventional marks. In this research paper, the researchers will look into the various types of non-conventional marks and the various problems pertaining to their registration, graphical representation, working, distinctiveness and absence of uniform standard for protection of non-conventional marks.

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## 1. TRADEMARK & NON-CONVENTIONAL MARK- A BRIEF INTRODUCTION

Before the authors discuss the above-stated issues mentioned in the abstract related to the protection of the non-conventional marks, it is necessary to briefly discuss about Trademarks and non-conventional marks.

### 1.1 TRADEMARK

Trademark is referred to as a product of the modern competitive market where in case of presence of more than one seller for the same product, it identifies the origin and is used to distinguish between the two similar products.[2] Trademark portrays the nature, kind, quality and origin of

a product. It symbolizes the reputation earned by the product over a period of time. It prevents the customer from confusion and ensures that it is not misleading to the customers about the quality and origin of the product from those of others.[3]

Article 15(1) of the TRIPS agreement defines trademark as –

*“Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark. Such signs, in particular words including personal names, letters, numerals, figurative elements and combinations of colors as well as any combination of such sign.”*[4]

Here, under the TRIPS agreement it further states that in those cases where the signs are not capable of being inherently distinctive, in those circumstances the member countries may allow the registration of the trademark on the ground of acquired distinctiveness through use.[5] The member nations are free to include or not, the criteria of visually perceptible for a mark to be qualified as a trademark in their domestic trademark legislation. Here, the criterion of visually perceptibility is not made mandatory by the TRIPS agreement. It is at the discretion of that particular member country to include it as an essential requirement for registration or not. It has long been regarded as a valuable framework for defining and categorizing instructional targets. [6]

Looking at the Indian scenario, the Indian trademark act specifically mentions about the criteria of graphical representation as a necessary requirement for a mark that is qualified to be registered as a trademark which essentially require the paper illustration of a trademark for related products or services.[7] Before discussing trademark description as per the Indian trademark act, 1999, first we will discuss the word mark. The mark as defined under section 2(1)(m) of the trademark act, 1999, includes -

*“a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or combination of colors or any combination thereof”*[8]

Here, the definition of ‘mark’ as defined under section 2(1)(m) of the Trademark Act, 1999 is an inclusive definition so it can also include any other thing or factor which may fall within the scope of the term's general and simple sense above discussed definition of ‘mark’. Further, under Section 2 (1) (zb) of the Indian Trademark Act, 1999 it defines trademark as –

*“a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colors.”*[9]

Hence, we can conclude that in literal word trademark is a label that is added to any product or service available for sale in the market in order to differentiate it from all related products and services available in the same market. They are not motivated by a need to make money.[10] A trademark's main purpose is to define the product and its sources, sell the product, and generate a picture of the product in people's minds.[11]

## 1.2 NON-CONVENTIONAL MARKS

Today, the advent of technology in the present market driven economy has evolved new methods of selling, distributing and advertising goods and services. The use of non-conventional marks had revolutionized the domain of trademark law. Through the use of non-conventional marks, trademarks now appear in new and innovative form.

Nowadays companies employ new branding techniques that include use of non-conventional names to set themselves apart from the competition and entice consumers. The proprietors of goods or services also use these creative non-conventional marks for securing exclusive rights over their products and to enable the development of their brands using these marks which have a significant impact on the mind of consumers because of their specialized creative distinctiveness.

These marks are called non-conventional marks because they include specific varieties of marks that do not fall under any of the pre-existing conventional categories of trademarks. The word "non-conventional mark" is general in scope, since it refers to any mark that does not fall within the traditional and conventional categories. Such as letters, numbers, figures, symbols, pictures or combination thereof; but instead includes all other remaining marks such as which are based on sound, smell, taste, color and shape etc.

Under the ambit of non-conventional marks, it includes broadly two categories of marks which include first, visual/visible marks which can be seen by eyes and second, non-visible marks which need other sensory organs to recognize them. Visual non-conventional marks include signs such as – motion mark, color mark, shape mark including 3D mark and holograms whereas non-visible categories of non-conventional mark include marks such as sound mark, smell mark, taste mark, touch or feel mark etc.

Here, since the definition of trademark is an inclusive definition, it can be given a wider interpretation to have non-traditional trademarks in its scope. But still there are several issues with respect to protection of these non-conventional marks under the ambit of trademark. It is highly regarded due to its many beneficial characteristics. [12]

The most important factor for a trademark is its distinctiveness but in case of non-conventional marks even after fulfilling the essential purpose of trademark i.e. differentiating the goods and services of proprietor of mark of those from others, non-conventional marks are often difficult to register due to various issues such as functionality issue, issue of graphical representation and similar other issues, which shall be discussed below.

## 2. ISSUES WITH NON-CONVENTIONAL MARKS

Today, looking at the competitive market, proprietors seek to obtain diversity of marks which are not limited to old conventional marks. This clearly shows that the trademark is a constant and dynamic concept where every day new types of marks are constantly evolved and used widely. Despite the fact that the TRIPS agreement stipulates a minimum level, for protection of trademark such as an adequate subject matter which can be guarded under the ambit of trademark

but also leaves a number of factors on the discretion of the member countries such as the discretion to keep or not the requirements as in related to visual perceptibility etc. in their domestic legislation. The discretion provided to the member countries raises a number of issues for the registration and protection of non-conventional marks in different jurisdictions around the globe. The issues related to the protection of non-conventional marks are as follows

## 2.1 FUNCTIONALITY ISSUES

Under the trademark law, it strictly prohibits the registration over the functional aspect of a product. Here, the functional aspect refers to those features of the mark which are evolved out of the nature of the good or because of any essential element present in the good or service. In the case of *Nor-Am Chemical v. O.M. Scott & Sons Co.* [13], the bench held that the color - blue of the fertilizers is basically because of the presence of nitrogen in it. So, the blue color is the functional aspect of the fertilizer which has evolved because of the presence of nitrogen in it. Hence, no protection can be sought on the blue color of the fertilizer which has been evolved because of the presence of nitrogen in it.

In the case of *Traffix Devices Inc. v. Marketing Displays Inc.* [14] The court held that though the basic purpose of the trademark is to distinguish the goods and services of one proprietor that of some, except if the identifying features are functional in character then even being distinctive, the functional character of the product is not eligible for registration under the trademark law.

In the case of *Qualitex Co. v. Jacobson Products Co. Inc* [15] The court held that the protection cannot be given on the functional character of the mark because if the functional character will be given protection then it will create a monopoly and will end the competition in the market. Further in the case of *Kellogg Co. v. National Biscuit Co.* [16], the court while discussing the functionality issue stated that in general terms, the features of a product are functional in nature and hence, they cannot serve as a trademark.

Here, the case of *Kellogg Co.* is also referred to as the foundation of the functionality doctrine where the court held that those product designs which are intrinsic to the functionality cannot be protected under the ambit of trademark because granting protection to the functional characteristics of a product would impede the competition in the market. Hence, based on the above reasoning the court did not allow trademark protection to the shape of the biscuit on the ground that the shape was functional in nature.

In the case of *In wood laboratories Inc.* [17] the court stated that the protection to the functional aspect will put the subsequent competitor to a significant disadvantage because the functional features of a product are essential for using the product or service. Here, according to the court, the grant of trademark protection to the functional feature will restrict the entry of competitive product or service in the market and will ultimately hinder the competition in the market. Hence, the trademark protection over the functional aspects of the product should not be granted at any cost.

In the case of *Nor-Am Chemical v. O.M. Scott & Sons Co* [18] the court further while discussing the concept of aesthetic functionality stated that to check the functionality, the best test of the

aesthetic functionality is to check that whether the protection to the mark would significantly hinder or negatively affect the competition in the market. Here, if the protection to the trademark restricts the entry of competitors in the market and affects the competition negatively then it is referred to as aesthetic functionality.

As discussed in the above cases, it is an undisputed fact that the trademark protection to functional features acts as an obstacle to the legitimate competition in the market. In case of trademark, since it is right in perpetuity so if protection is granted on functional features of the product then it can be used forever by further renewals and it would not let the competitors to ever enter in the market. Here, for the purpose of protection over the utilitarian features of a product, the proprietors should seek protection through patents where rights are granted for limited time duration but the monopoly rights over the functional features of a product for perpetuity is not justified. Hence, the functionality doctrine was formed to specifically prohibit the trademark protection to the functional aspects and hence, promotes competition and restricts monopoly on the functional features of a product.

In the case of *Traffix Devices, Inc. v. Marketing Displays, Inc.* [19] The court further on the ground of acquired distinctiveness held that the functionality doctrine strictly prohibits the trademark protection to the functional aspects of a product and even on presenting sufficient proof to show the acquired distinctiveness it is beyond doubt that the protection cannot be granted to the functional aspects of a product. Here, the court further added that even if the evidences clearly proves that customers associate the functional feature of the product only with a single source i.e. the product itself then also the trademark protection will not be granted over the functional aspect of the product in light of the public policy reasons. Hence, this clearly shows that functionality doctrine is not even affected by the evidence of acquired distinctiveness.

Here, in order to prove functionality, there is need to prove some specific utilitarian advantages but, in those cases, where the proprietor can prove that there is no utilitarian advantage but the mark is just innovative and feasible and does not include any functional or utilitarian feature then such a mark can be registered.

In the case of *In re Morton-Norwich Prods., Inc.*[20]The court laid down four factors to determine the presence of functionality features. The four factors are as follows –

- (1) “The existence of a utility patent;
- (2) Advertising by the applicant that touts the utilitarian advantages;
- (3) Availability of alternative options; and
- (4) Evidence of Manufacturing Advantages”[21]

In the case of *In re NV Organon* [22], the court while ruling on the issue that applicant's orange flavor mark is functional or not held that the competitive need is an important consideration in the functionality analysis. Here, the court further emphasized on the fact that while granting trademark protection to any mark the courts should take into consideration that the mark should not restrict or hinder the competition in the market.

Hence, we can easily witness in the above cases that under any circumstance, the trademark protection cannot be granted to the functional feature of a trademark even on acquired distinctiveness to promote competition and to restrict monopoly in the market. Hence, the functionality doctrine acts as a reasonable and justified restriction for the trademark protection to the functional features of a mark in order to promote competition in the market.

## 2.2 GRAPHICAL REPRESENTATION

Under the criteria of graphical representation of a mark, it states that in order to seek protection, a mark should be capable of being represented graphically. The criterion of graphical representation of a mark is important because it provides a clear, precise and specific reference about what the mark is. The graphical representation is also important to clearly define and identify the mark and its scope.

Under the Article 15 of the TRIPS agreement, though it does not mandate the criteria of visual perceptibility of the trademark, it keeps it on the discretion of the member countries to include the criteria of visual perceptibility or not under their domestic trademark legislation. Here, using their discretion power, a majority of countries had included the criteria of graphical representation of mark as a mandatory requirement for the registration of a mark as trademark in their trademark legislation. Hence, for the purpose of seeking trademark protection in those countries, the trademark should also fulfill the criteria of graphical representation of mark.

The Indian Trademark Act, 1999 while defining the word trademark under section – 2(1)(zb) includes the words, "capable of being represented graphically" which means that the mark should be capable of being represented on paper and should be such that it can be published in the official journal of the trademark.[23] Here, the criterion of graphical representation is often referred as not an objective idea because it is nowhere precisely mentioned that what will render it identifiable. However, a cursory reading of the relevant provision reflects that the representation of the mark should be such that it is sufficient to permit full and effective implementation of the same. The organization's commitment may be in the form of workforce recruitment and growth..[24]

Similarly, the requirement of 'graphical representation' of a trade mark is also mentioned in Art. 2 of the 89/104/EEC Directive for seeking protection under the European trademark regime thus making it mandatory to satisfy the requirement of graphical representation in order to seek protection under the European trademark regime.[25]

In the case of *Swizzels Matlow Ltd. (Application NO. – 2)*[26], the court had explained two main reasons for the requirement of graphical representation -

1. *"The criterion of graphical representation enables the traders to identify what other traders have applied for registration*
2. *To enable the public to determine with precision the sign that forms the subject of trademark registration."*[27]

The requirement of graphical representation is considered as a relevant and useful criterion for the registration of a trademark because using graphical representation, it discloses the identity of the mark or sign which it purports to represent unmistakably. The graphical representation makes it possible to ascertain marks without need for any supporting documents. Here, graphical representation makes it reasonably practical for the user to compare the mark with any pre-existing mark. However, these criteria are majorly relevant for traditional forms of marks. Nowadays, countries adopt a wider interpretation to the graphical representation criteria so as to provide protection to non-conventional marks as well.

The graphical representation of non-conventional marks is really a practical problem especially with respect to non-visible marks such as sound and olfactory/smell marks. Here, the issue of graphical representation has remained in a long debate since years and the debate is still continuous.

In the *Sieckmann*[28] case, the court while discussing the issues observed that in case of non-visible marks it is undisputed that the graphical representation of non-conventional marks in the form of drawings is clearly not possible. Further, the court while discussing smell marks stated that the chemical formula alone will not suffice because the chemical formula can only specify the substance but not its smell. And since the submission of samples is not a feasible alternative so protection just on the basis of chemical formula lacks clarity and precision. Here, according to the *Sieckmann criteria*, it states that the graphical representation of a mark must be “clear, precise, self-contained, easily accessible, intelligible, durable and objective”.[29] Hence, the ECJ finally rejected the protection to smell mark due to non-fulfillment of the criteria of smell marks.

However, with reference to some of the non-conventional marks the court had adopted a liberal approach while giving a wide interpretation to the graphical representation requirement like as was done in the cases of *Libertel*[30] and *Qualitex*[31] where the court allowed the protection to the color marks where the proprietors were allowed to seek protection using the pantone color system. Here, a similar reasonably possible approach should be adopted by all the member countries with reference to all the non-conventional marks.

In the case of *Shield mark v. Kist*[32], the court had addressed the issue of graphical representation in respect to the registration sound mark. In this case, the court took note of the point that even if it is not “*immediately intelligible but the graphical representation is still easily intelligible*”. Here, considering the *Sieckmann criteria* the court relied on the criteria of simple, clear, precise, and more intelligible representation.

Here, we should also note the point that before this shield mark case, in the case of *Metro Goldwyn Mayer (MGM)* [33], it had also applied for the registration of sound mark for the sound of lion roar where the graphical representation of the sound was made in the form of a sonogram. In this MGM case, the Board of Appeal held that the graphical representation of any sound in the form of sonogram is a valid graphical representation (CTM - 005170113).

However, in the case of shield mark since time and frequency could not be shown or made out by use of sonogram and no such sonogram was presented so it was considered that there was no

precision and clarity with respect to the graphical representation of the sound mark. In this case, the court emphasized only on the musical notes where representation in the form of musical notes can only be extended in case of musical works and hence, the decision in instant case in not envisioning non-musical sounds had restricted the number of potential sound marks. However, in year 2005 OHIM in respect to the non-musical sound marks, suggested and started accepting representation of sound marks in the form of oscillogram or sonogram which should be accompanied by the sound file.[34] To make the graphical representation of sound mark clearer and more precise, it also suggested for providing a written description of the sound mark along with the sonograms etc.

Looking at the Indian situation, now with the change in time the scenario in India is also changing. In the recent Trademark rules 2017 notified by the Ministry of Commerce and Industry, it had opened new path for the registration of non-conventional marks by providing different supplementary requirements which are to be submitted along with the graphical representation requirement to make it more precise and clear such as in case of sound marks, it made new rules for submitting the sample of the sound in mp3 format, in case of shape marks by submitting at least five different views of the shape.[35] Here, all these submissions must be accompanied by the description of the same. So, the new rules to a great extent had resolved the issue of graphical representation where the marks can be shown using graphical representation of music notes along with description and music sample in case of sound marks and by images of five different views in case of shape mark etc.

But still the new rules had not been notified regarding various other non-conventional marks such as olfactory or smell marks, videos etc. so still the position of these marks is in question due to absence of clarity and precision in context of the graphical representation requirement. Even in the absence of adverse selection, markets can collapse, posing a problem. This will occur as a result of the phenomenon of over-litigation, in which the parties involved feel compelled to bring cases even though the wrongdoing is ambiguous or non-existent so they pay no litigation costs. [36]

Here, the issue is still under debate or unaddressed in many of the member countries which makes it really unpredictable about the protection to the non-conventional marks due to the issue of lack of clarity and precision.

### **2.3 DISTINCTIVENESS**

The criterion of distinctiveness is one of the most important criteria for the registration of a trademark. A mark is registrable under the trademark regime only if it is distinctive and capable of distinguishing the goods or services of one proprietor from those of others. However, the distinctiveness of a mark can either be inherent distinctiveness or acquired distinctiveness.

Here, the distinctiveness of a mark is generally seen in respect of the good or service it is attached with and not in abstract. Here, it is seen while taking in consideration of the context in which the mark is actually in use or is intended to be used in connection with the referred good or service. In order to seek protection, the mark should be of significance and distinctive to an average

consumer present in that relevant market. Here, the registration of the trademark will depend on the distinctive character of the trademark.

Under the TRIPS agreement, it leaves this at the discretion of member country to adopt the criteria of inherent distinctiveness or acquired distinctiveness or both in their domestic legislation. [37] Inherent distinctiveness refers to those marks which are distinctive in itself whereas in case of acquired distinctiveness or acquired secondary meaning it is achieved through use or promotion or advertising etc. The mark will be called to have acquired distinctiveness only on furnishing evidence that it has been unique as applicable to the applicant's products or services in trade. [38] In case of those marks which are normally not the standards of acquired distinctiveness are necessarily distinctive is one of the most appreciated practice for seeking protection for those marks under the trademark act like in case of non-conventional marks.

The criterion for assessing the distinctiveness of a non-conventional mark is not different from that applied for conventional form of trademark. In case of non-conventional marks, the trademark office should adopt a cautious approach in accessing the distinctiveness of mark because there are a number of category of non-conventional marks which are though not inherently distinctive but had acquired distinctiveness or secondary meaning through widespread recognition either by use or the context in which they are used e.g. the smell of grass is though not inherently distinctive but may have acquired distinctiveness or secondary meaning through use when was used on a tennis ball.

As discussed above in case of non-conventional marks the protection can also be sought through the acquired distinctiveness or secondary meaning in those cases where the term "mark" isn't necessarily defining. The standard of proof for acquired distinctiveness, also known as secondary significance, falls on the owner of the logo to show the quantity and nature of acquired distinctiveness. For the registration of a mark that attempts to seek defense by acquired distinctiveness, proof of substantive distinctiveness accompanied by trade evidence is needed.

In case of non-conventional marks there is one other issue related to distinctiveness of mark i.e. the issue of presence of other close marks e.g. in case of color mark the protection to two close but different shades of same color are though ideally distinctiveness but practically it is very hard to recognize the difference between two close shades of same color. Like in the case of color mark, the issue of shade confusion is really a very serious issue. Similarly, in other non-conventional marks as well this issue of closely connected marks should not be ignored. Here, looking at the seriousness of the issue, there is a strong need to check the practical distinctiveness of the closely connected marks that determine whether the marks are genuinely "capable of distinguishing" as required under the trademark act. Here, distinctiveness is the essence of trademark so the issue should be dealt with utmost care and caution. [39]

The issue should be addressed with some flavor of practicality where those marks which are not practically distinctive e.g. in cases of color marks where though according to color codes some marks are distinctive but actually they are so close that they practically lack distinctiveness. Here, such marks should not be allowed protection or at least should be mandatorily required to establish distinctiveness. The distinctiveness must be proved in relation to the good or service in

practical and not in abstract. Further, in relation to the meaning, attention should be granted in which mark is being used.

### 3. CONCLUSION

Protection can be granted over any form of non-conventional marks under the ambit of trademark provided it is capable of being served as trademark. Here, in order to be used as a trademark, the symbol must be unique enough to differentiate one proprietor's products or services from that of other potential competitors present in the market. Further, the mark under no cost should include any functional element or merely the features of design including the ornamental or decorative features. Also, the mark should be represented in a simple and accurate manner form which includes every distinctive feature of that mark in detail.

Though there are also several criticisms to the grant of protection to non-conventional marks especially in case of non-visible marks, such criticisms are not a new thing and are part of an ongoing phenomenon since the introduction of the concept of non-conventional marks. The need for the protection of these non-conventional marks considering the economic significance of these marks and the need of expanding the horizon of trademark and promoting new forms of mark holds more value than such criticisms.

Considering the above discussion, we can conclude that in present time, though the horizon of trademark is now expanded to include protection to various forms of non-conventional marks but still there is lack of uniformity with reference to protection of these non-conventional category of marks due to the differences in approach and absence of any standard criteria for protection of these marks. We can see that in those jurisdictions which are having liberal approach for protection of non-conventional marks, there these marks are successfully serving as trademark and are distinguishing one proprietor's goods and services from those of others.[40] Hence, every jurisdiction should adopt a uniform and standard liberal criterion for non-conventional trademarks are protected so as to expand the horizon of trademark by including these new categories of non-conventional marks which are non-functional, distinctive and capable of being served as trademark.

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