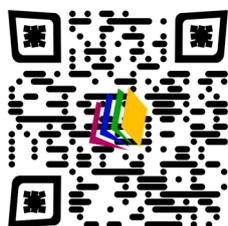


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Graphical Representation of ‘Smell’ and ‘Sound’ Mark - Critical Analysis

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ABSTRACT:

In recent years, a development has been seen in the arena of trademark apart from the regime of traditional trademarks the trade mark registries has seen an increase in the applications for sound, smell, color, tastes, Tarzan’s yell, textures, scent, shapes etc. It is these marks which are termed as non-traditional or non-conventional trademarks. Now a question comes, from where if at all such non-conventional trademarks are entering the domain of intellectual property? Reason behind this invasion lies in the broad and inclusive definition of trademark as it has been kept wide open for interpretation. On one side the trademark has registered in past only those subject matters which are conventional in nature or such mark which are capable of being represented graphically i.e. in visual manner and contains words, figures, signs, symbols etc. On the other side with the development of law relating to trademarks emphasis has shifted towards functional character rather than traditional ontological stand of sign. Anything and everything that is capable of communicating to the public at large the origin of goods and services and is possess distinctive feature, becomes capable of being registered as trademark. This paper evaluates the different position with respect to non-conventional trademarks and their graphical representation and how law has developed with time. In this paper particularly law relating to sound and smell has been dealt in detail. The aim of the paper is to analyze the requirement of graphical representation of Non-conventional trademarks. In this paper in particular ‘sound’ and ‘smell’ marks will be dealt more elaborately. The objective is to critically analyze the position prevailing in US, EU, Germany, Australia and India.

The scope of this paper is limited to the comparative study of ‘graphical representation’ requirement in US, EU, Germany and India with respect to ‘sound’ and ‘smell’. The questions sought to be answered by the paper Is Graphical Representation requirement a pre-requisite for granting trademark? Assuming that it is a pre-requisite then how sound and smell can be represented graphically? Whether requirement of distinctive character alone would ensure the trademark

protection?

KEY WORDS: Intellectual Property, Smell, Sound, Trademark, TRIP, Trade, Conventional Trademark

Hypothesis

Under Article 15 of TRIPS agreement the criteria on which a mark will be eligible for registration as a trademark has been kept open for wide interpretation. Depending upon TRIPS provision different countries have accordingly incorporated it in their national legislation. The traditional approach followed by countries like European Union, United Kingdom, India, USA, and Germany has been that ‘graphical representation’ of trademark is required in form of sign, symbol, numerals, combination of color, letters etc. But with passage of time there has been a shift from traditional or conventional trademark towards non-conventional trademarks and trademark has been granted for sounds, olfactory mark, gustatory mark etc. Seeing the change of position it is a matter of debate that how far such marks and in particular ‘sound’ and ‘smell mark have been able to fulfill the ‘graphical requirement’ and how far they have reached in different jurisdictions.

Non-Conventional Trademarks:

Graphical Representation Requirement

The Madrid Agreement for the International Registration, 1891, Protocol relation to the Madrid Agreement concerning the International Registration of Marks 1989, The Trademark Law Treaty(TLT) 1994 Geneva, TRIPS Agreement 1994 (herein after called TRIPS), Paris Convention 1967, deals with Trademark. The Madrid Agreement or Madrid Protocol does not define “trademark”. However, TLT is the only international treaty which has excluded smell and sound marks from

being eligible for registration as a trademark.³²

Section 2 of TRIPS deals with Trademarks and Article 15 provides provision relating to protectable subject matter. Under Article 15 of TRIPS the subject matter which is capable of getting trademark protection is not exhaustive and open ended. Any sign or combination of signs shall be capable of getting trademark protection if they are capable of distinguishing goods or services of one person from that of another.³³ Article 15 further provides few examples as to what signs qualify for trademark registration. The list is only indicative and not exhaustive and they have not mentioned about Graphical Representation criteria as a mandatory one for members and have left it upon members to decide. Further Article 6bis of Paris Convention lays down provision relating to marks. The Convention provides that registration shall not be denied except in the cases where firstly trademarks are devoid of any distinctive character or secondly if contains such signs which indicates intended purpose, quality, origin etc. of the goods.³⁴ Under Paris Convention also trademark has not been defined and there is no provision imposing condition on member countries or providing them with an option that Graphical Representation can be considered as a condition for granting Trademark protection. It allows member countries to decide what marks are registrable in their national legislation.

According to the Indian Trade Marks Act, 1999, trademark shall be capable of being represented graphically and it must be capable of distinguishing goods and services of one person from that of