



SCENT WITHOUT SENSE: WHY INDIA'S TRADEMARK LAW MIGHT NOT BE READY FOR OLFACTORY MARKS

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In a pioneering decision relating to *Sumitomo Rubber Industries Ltd.'s* trade mark for “**FLORAL FRAGRANCE / SMELL REMINISCENT OF ROSES AS APPLIED TO TYRES,**” marks the first time the Trade Marks Registry (hereafter “the Registry”) has accepted an olfactory mark as registrable under the Trade Marks Act, 1999 (hereafter “the Act”).

The Controller General of Patents, Designs, and Trademarks (CGPDT), has recently accepted a smell mark under India's trademark regime, generating significant attention and commentary. This development, hailed as a “watershed” moment for non-traditional trademarks, presents an important opportunity to reassess whether or not the statutory framework in India is equipped to accommodate an olfactory mark.

Although the Indian trademarks regime does not explicitly identify smell marks, it certainly does not bar their registration, provided they fulfill the registration requirements enumerated in the Act. On 21st November 2025, the smell mark was accepted for advertisement, and the Registry held that the applicant had satisfied the requirements of clarity, precision, self-containment, intelligibility, objectivity and graphical representation under Section 2(1)(zb) of the Act.

To overcome the conventional hurdle of graphical representation, traditionally interpreted as a visual requirement, the applicant submitted a scientific “seven-dimensional vector,” developed by researchers at IIT Allahabad, to describe the scent's attributes across floral, nutty, sweet, woody, among other parameters. Whereas distinctiveness was found on the basis that the rose scent has no natural connection to tyres.

While the scientific creativity is commendable, a reasoned dissent remains essential. The disagreement is not with sensory branding or innovation, but with the legal framework into which this unprecedented recognition has been placed. In view of the present trademark regime in India, the decision seems premature, doctrinally and statutorily fragile and therefore risks generating further legal uncertainty rather than clarity.

1. Statutory interpretation stretched beyond design

The foundation of this disagreement and critique rests on statutory text. Section 2(1)(zb) requires a trademark to be capable of being represented graphically and capable of distinguishing goods or services. The statutory illustrations, such as shape, packaging,

combination of colours, are all visually perceived. Smell is conspicuously absent, and for good reason: the Act was built on a visual paradigm.

The reliance on a seven-dimensional vector is a striking signal that the law, as presently drafted, is not ready for olfactory marks. When a mark requires a specialised, scientifically complex representational technique to “fit” into the statute, it is not an indicator of progress but of structural mismatch. If the test of registrability demands a representational mechanism that did not exist when the law was enacted, and is intelligible only to technical experts, it raises the question whether “graphical representation” remains an appropriate prerequisite at all for olfactory marks.

This is not merely a conceptual point; it is an institutional one empowering the Registry and Courts alike to step on the toes of the legislature. Expanding “graphical representation” to include scientific vectors is a form of administrative rewriting. Such a transformation should occur, if at all, through legislative amendment after consultation, not through individual adjudicative innovation.

2. Subjectivity, impression, and lack of universal standards

It is a fact that smell perception varies significantly among individuals. This difference may be influenced by psychology, environment, physiology and personal experiences. Unlike colours which have universally recognised colour codes, or sounds which have musical notes and notations, scents have no universally acceptable or applied system used for representation. The seven-dimensional vector model used here is neither globally recognized nor normatively tested. The acceptance of such a model and allowing it to become a precedent risks producing arbitrary outcomes. What happens when another applicant uses a different scientific visualisation equally capable of representing the scent? Such subjectivity undermines the purpose of trademarks which provide stable, consistent, reproducible, timeless and enduring identifiers.

3. Concerns regarding functionality heightened

A fundamental principle of trademark law is that functional features cannot be monopolised. Olfactory marks sharpen this problem. The very argument for distinctiveness here, that the rose scent evokes a sensory reaction, points to its inherent sensory function. If a fragrance stimulates any of the five senses (as scents necessarily do), does it not, by definition, carry an experiential function?

The U.S. standard captures this well: *“a fragrance is protectable only if it serves no important practical function other than identifying the source.”* In practice, distinguishing “purely source-identifying scent” from “functional scent that enhances appeal or masks undesirable odour” will be extraordinarily difficult. This jeopardises granting perpetual exclusivity over aspects of product experience traditionally guarded by patent, design or consumer law, not trademark law.

4. Evidentiary insecurity and enforcement challenges

A significant aftermath of the acceptance of the latest smell mark is the plethora of questions that have been left unanswered. Applicability of which law takes precedence? Which aspects constitute functionality? How will infringement be tested? Let’s say infringement is contested for an olfactory mark, what procedure or grounds have been laid down? Would it be tested through consumer surveys? Through chemical or scientific analysis? Through expert “sniff-tests”? Each method risks biasness, and inconsistency, and judicial fact-finding becomes cumbersome and technical. If two rose-scents differ in one vector dimension, but remain similar in others, does that constitute infringement or risk likelihood of confusion? If competitors use a similar but not identical fragrance, how close is considered “too close”? The present decision provides no guidance.

5. Arbitrary application without clearly defined standards

Reasonably, without harmonised, clearly defined guidelines on what constitutes representation as inclined with distinctiveness, non-functionality or reproducibility, the Registry risks ad hoc decision-making. The consequences of an arbitrary and vague registration regime would only result in unpredictability for applicants, examiners and the courts alike.

Conclusion

There is no doubt that one day India may be ready to embrace olfactory marks, but presently, the statutory infrastructure is not designed to harbour such unconventional trademarks. This contemporary decision exposes India's limits more than its adaptability. If a seven-dimensional vector representation is required to satisfy the mere requirement of graphical representation, then the disadvantage lies not with the applicant but with the law itself. Until the legislature reconsiders the prerequisites for non-conventional trademarks and stipulates clear, reasoned and universally acceptable standards, the recognition and acceptance of olfactory marks in India remains within the reach of uncertainty, insecurity and statutory conflict.