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Comparative Analysis of Sound and Smell Trademark

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The brand name plays a very important role to increase the goodwill and reputation of the business, as it acts as the source indicator or indicator of the origin of the products sold by the entities. The traditional method used for increasing the brand value and profits of a company is to use various logos, letters, numbers, graphics, words, etc. to represent the same. However, in recent years, the world has also witnessed the rise of the non-traditional trademark which includes sound, scent, colour, taste, motion, etc. as an indicator of the source of the product. The consumers not only recognize the product by its visual presentation but also by its colour, scent, shape, and sound accompanying the product/ service, thus in turn making the trademark distinctive from those of others. This article focuses on the trademark laws of India, the European Union, and the USA regarding sound trademarks and olfactory trademarks along with a comparison of the laws of all three countries.

Keywords: *sound marks, smell marks, shape marks.*

INTRODUCTION

Whenever we hear the jingle, 'ting-ting-tiding', we immediately recognize that the product advertised is of Britannia brand, or when we see the purple colour of chocolate we know that it belongs to Cadbury, or we can immediately recognize that the chocolate belongs to Toblerone when we see the triangular shape of the chocolates, etc. This is because the colour, sound, shape,

or smell of a product has gained renowned recognition, other than the visual representation of the same product, the colour, sound, shape or smell acts as a source indicator of the product or the service. These marks are known as non-traditional trademarks. Non-Traditional Trademarks or Non-Conventional Trademarks are trademarks that deviate from the conventional trademark and are perceived by sense.

SOUND TRADEMARK

INTRODUCTION

A sound or jingle or music composition when linked to a brand, plays a very important role to increase the brand value of a business as it becomes easy for the consumers to remember the same. The first sound mark to be registered in India was the yodel of a human voice, yodelling Yahoo in 2008. The first Indian company to register a sound trademark was ICICI Bank's "Dhin Chik Dhin Chik". The Netflix sound of "Ta-Dum", the Baby Looney Tunes theme song by Time Warner Entertainment, the Loin Roar of MGM Entertainment, and the sound of Guitar while switching to mobile Nokia are examples of registered sound trademarks in India as well as other jurisdictions.

SOUND TRADEMARK LAWS IN INDIA, EUROPEAN UNION (EU) & USA

Laws of India: The Trademark Act defines the term trademark under Section 2(zb) which means 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 the shape of goods, their packaging, and combination of colours.[1] The purpose of the trademark is two-fold–

- To indicate the source of origin of the goods or service and
- To distinguish the goods or services from others available in the market.

Thus, through graphical representation or visual representation, the trademark can be registered.

[1] Indian Trademark Act 1999

The term sound trademark is not defined under the Act. However, the Trademark Rules ('the Rules') were amended in 2017 to include registration of sound trademark according to Rule 26(5) under which –

- An applicant must declare that the mark to be registered is a sound mark and
- The applicant must submit an MP3 reproduction of the sound mark that is no longer than 30 seconds long, as well as a graphical depiction of the sound mark in the form of musical notations, along with the application.[2]

Thus, from the above, it can be concluded that as long as the sound trademark can be registered graphically in the form of musical notation, it can be registered, provided that the other characteristics of the trademark are fulfilled.

Laws of the EU: The term sound trademark is also not defined under EU laws. However, According to Article 4 of the Regulation requires that an EU trademark may consist of any sign, in particular words, including personal names, or designs, letters, numerals, colours, the shape of goods, or of the packaging of goods or sounds, provided that such signs are capable of –

- Distinguishing the goods or services of one undertaking from those of other undertakings; and
- Being represented on the Register of European Union trademark ('the Register'), in a manner that enables the competent authorities and the public to determine the clear and precise subject matter of the protection afforded to its proprietors.

European Union Trademark Implementing Regulation (EU) 2018/626, lays down detailed rules for implementing certain provisions of Regulation (EU) 2017/1001 of the European Parliament and the Council on the European Union trademark and repealing Implementing Regulation (EU) 2017/1431. According to Article 3(g) in the case of a trademark consisting exclusively of a sound or combination of sounds (sound mark), the mark shall be represented by submitting an audio file of 2 MB reproducing the sound or by an accurate representation of the sound in

[2] Trademark Rules 2017

musical notation. Thus, for a sound mark to be registered under EUTM, it should be able to distinguish the product it is used for from the products available in the market and it should be submitted through graphical representation and audio file.

***Laws of the* USA:** According to 15 US Code Section 1127, the term 'trademark' includes any word, name, symbol, device, or any combination thereof –

- Used by a person, or
- Which a person has a bona fide intention to use in commerce and applies to register on the principal register established by this chapter,

To identify or distinguish his or her goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown. Thus, a trademark includes a graphical representation that will help the consumers to differentiate the goods and services of one product from others and to indicate the source or origin of it. According to TMEP Section 807.09, the applicant who has applied for registration of a sound trademark is not required to produce drawings of the mark, but rather has to submit the description of the same along with an audio reproduction of the sound trademark in an electronic file (.wav, .wmv, .wma, .mp3, .mpg, or .avi format) and should not exceed 5 MB in size. For paper filing, the reproduction of sound trademark should be submitted on CDs, DVDs, videotapes, or audiotapes. While filing the applicant has to mention that the audiotape or electronic file is meant to supplement the description of the mark and should not be discarded.

COMPARATIVE ANALYSIS

Graphical Representation: In India and the EU, the sound trademark has to be represented through musical notes for it to be registered. However, the Courts of the EU have strictly interpreted the word graphical representation which includes, melody, clef, and musical notes only. The description of a lion's roar or onomatopoeia like 'mew-mew' is excluded as the description lacks clarity and precision while onomatopoeia lacks consistency which is there between the actual sounds and the pronounced onomatopoeia itself. The Indian Registry decides the registration of a sound trademark on a case-to-case basis. In the USA, the registration

process is not as stringent as in the EU because the applicant is required to submit a description of the sound trademark. Thus, restriction of types of sound trademarks that can be registered under EU laws does not arise under USA and Indian laws.

Audio Filings: In India and the EU, it is compulsory to file audio files while applying for registration of a sound trademark. But in the USA, it is optional to file the audio files. In the USA the type of audio files filed while applying electronically or through paperwork is different.

OLFACTORY TRADEMARK

INTRODUCTION

To be more innovative in doing business and marketing, the entities try to pair their products with some fragrance, which will be embedded in the memory of the consumers. From minty pain relief patches registered by Hisamitsu Pharmaceutical Company to Strawberry toothbrushes by Lactona are all registered olfactory trademarks.

OLFACTORY TRADEMARK LAWS IN INDIA, THE EU, AND THE USA

Laws of India: The Trademark Act does not define an olfactory trademark. According to Section 2(1)(zb), the trademark to be registered has to be represented graphically as provided under the Act. The Trademark Rules, 2017 have also elaborated the scope of graphical representation of goods and services in both paper and digitalized format. However, it is very difficult to include or elaborate on scent in a graphical representation. Thus, the Indian laws per se do not include any laws regarding the registration of olfactory trademarks.

Laws of the EU: The first olfactory trademark that was registered was the rose fragrance in tiers by Sumitomo Rubber. According to Article 4, the trademark applied for registration has to be presented graphically. However, the European Court of Justice, in the case of ***Ralf Sieckmann v Deutsches*** case, laid down the seven representations requirement for a trademark i.e. clear, precise, self-contained, easily accessible, intelligible, durable, and objective. Thus, for an olfactory trademark to be registered, it has to satisfy the test mentioned in the Sieckmann case and this has widened the scope of graphical representation.

Laws of the USA: The first trademark to be registered in the USA was by OSEWEZ for thread yarn which contained the scent of plumeria blossoms. Some other examples of olfactory registered in the USA are bubble gum scent for sandals (Reg. 4754435) by footwear company Grendene, Pina Colada scent to coat ukuleles (Reg. 4144511) by Eddy Finn Ukulele Company, etc. For an olfactory to be registered in the USA, the applicant is required to submit the description of the mark according to TMEP of Section 904.03(m). The applicant is also required to submit a sample of the scent which is to be trademarked and it should be similar to its description made.

COMPARATIVE ANALYSIS

Graphical Representation: In India, since the law is silent about the registration of the olfactory trademark and due to compulsory graphical representation of the same, has made it difficult to file for the registration of the same. However, the Indian Courts have yet to face the case laws for the registration of the olfactory trademark. Though as per the law, there is a process for registration of an olfactory trademark in the EU, practically it is quite difficult to do the same. On a case-to-case basis, it will be decided whether the olfactory trademark is to be registered provided that the mark indicates the origin of the goods. The EU and Indian laws require a graphical representation of the trademark, but the US laws require a description of the mark. However, since the scent of a trademark can be perceived differently by people and the scent changes due to climatic and weather conditions, then so, people shall interpret the description of the trademark subjectively.

The chemical formula of the mark can also not be considered as the graphical representation of the olfactory trademark, as the chemical formula does not per se represent the sent but instead the substance of the product. It is important to note that the olfactory trademark to be registered itself should not add substantial value to the goods or is necessary to obtain a technical result. The sample collected or submitted along with the description of the product under US laws is not durable as it is subject to decay over some time. Due to the nature of the scent, the sample is to be redeposited before the scent disappears. The comparison of two olfactory trademarks shall become difficult as the same has to be evaluated from the perspective of the average consumer

and as per the market it intends to tackle along with the goods or services for which it is used. In the internet era, only the description of the trademark shall help the consumer or the applicant to compare or conduct a search regarding the registered olfactory trademark.

CONCLUSION

Thus, from the above, it can be concluded that for sound trademarks, the graphical representation is still differently perceived in the three countries, but more liberally analyzed as per the US legal system. The olfactory trademark requires more clarification as its graphical representation and the advanced technology available in today's era might come to its aid.