



PROTECTION OF NON-CONVENTIONAL TRADE MARKS: A LEGAL ANALYSIS

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ABSTRACT

Corporate houses have always spent a huge amount of their resources on building their brand image, a very important aspect of which includes distinguishing their goods and services from those of others. This function is generally performed by trade marks. Trade marks traditionally comprise of slogans, words, images etc. but these traditionally accepted categories did not appear to meet the requirements of modern-day consumers and corporate houses who are always looking for something new. This has also been augmented by rapid technological development making it easier to develop new kinds of trade marks like motion marks, holograms etc. and an increase in cross border trade, making it imperative to have as unique trade mark as possible. All this has led to the development of many new varieties of trade marks like touch and feel marks, olfactory marks, sound marks, posture marks etc. Even consumers feel an immediate connection with these new categories of trade marks like Britannia's sound mark or Hershey's tear drop shaped chocolates, we can talk about many such examples where consumers immediately relate these non-traditional trade marks to their brands. In these circumstances, it becomes imperative to analyse whether our laws are capable of protecting these new categories of trade marks or not. This paper is an attempt to delve into the Indian Trade Marks legislation to find out how far it is capable of protecting these new categories of trade marks.

I. INTRODUCTION

The importance of our sensory organs can never be understated. They help us identify so many things, at times even without looking at them. Even before we see, our nose informs us that the fragrance we are getting from the kitchen is of freshly cut lemon or of coriander leaves. Even before we read the words coca over a bottle our eyes, just by looking at the shape of the bottle, inform us that what lies on the shelf is a bottle of Coca-Cola. When a mobile phone is switched on, we get to know which brand's phone it is, just by listening to the sound. These senses help us identify as well as differentiate between so many products, apart from doing many other important bodily functions. In our day-to-day life when we are not able to recognise something by looking at it, we use our other sensory organs to know what it is. The function of trade marks is also somewhat similar, as they also help us differentiate between the products of different manufacturers.

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Like our sensory organs, the importance of trade marks can never be trivialised. They are one of the most important forms of intellectual property rights. Trade marks perform a variety of functions, the most important being its identification function. Trade marks let us know from where a particular product is coming and assure us about the quality of the product. Every day people even without knowing anything about the concept of trade marks or its importance use it, from buying a KwalityWall's ice cream to purchasing Skechers' shoes everything has something to do with the concept of trade marks. By just looking at the triangular box or purple wrapper we get to know which brand of chocolate we are purchasing. This clearly shows that these colours or shapes perform the function of trade marks pretty well.

The concept of trade marks is more than two thousand years old when Roman people use to leave their marks on almost everything that belonged to them¹ and since then, the concept of trade marks is ever developing. Our ancestors have never underestimated the importance of trade marks and always gave due importance to them nor do our present lawmakers are leaving any stones unturned to provide the best protection to trade marks. Trade marks are important both from the perspective of manufacturers as well as consumers, they protect the rights of manufacturers on one hand and protect the consumers from being fooled on the other. It is this dual function of trade mark that makes it all the more important. This is also the reason why every new addition in the definition of the trade mark becomes a matter of academic debate and policy discussion. This also leads to the development of the concept of non-conventional trade marks.

II. NON-CONVENTIONAL TRADEMARKS

The concept of non-conventional trade marks is of comparatively recent origin and can be said to be around 100 years old, since then they are being debated. The non-conventional trade marks are those trade marks that do not fit within the realms of the traditional concept of trade marks, though they perform pretty much the same function. Generally speaking, a trade mark comprises of words and figurative representation, but non-conventional trade marks are different, meaning thereby that they may be described in words or are capable of graphical representation but they do not necessarily comprise of words and figurative

¹Dennemeyer, "Luxembourg: The Evolution of Trademarks - From Ancient Egypt to Modern Times" *available at*: <https://www.mondaq.com/trademark/873224/the-evolution-of-trademarks--from-ancient-egypt-to-modern-times> (last visited on January 7, 2022).

representation like the use of sound or smell as a trade mark. Registration of a fragrance or taste as a trade mark is non-conventional, but if registered these trade marks could be of great value not only to their owners but to their intended consumers as well.

The World Intellectual Property Organisation's (WIPO) Standing Committee on Law of Trade Marks, Designs and Geographical Indications in its 16th session in 2006 discussed about new types of trade marks. The discussion and classification is based on the response to questionnaire administered by the WIPO. The committee considered the fact that the subject matter of trade marks has now expanded beyond words and figurative devices and has classified new kinds of trade marks into two categories: visual (shape, colour etc.) and non-visual trade marks (smell, sound, taste etc.).² One of the most important international agreements on intellectual property rights is the agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). It lays down the minimum standard for the protection of Intellectual Property Rights for its member nations. TRIPS defines trade mark on the basis of its identification function. The definition neither expressly excludes nor includes non-conventional trade mark within its sweep.

In India, trade marks are governed by the Trade Marks Act of 1999. Section 2(zb) of the Act defines trade marks to mean:

“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 colours.”³

The term mark has been defined to include “a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or combination of colours or any combination thereof.”⁴

The definition of trade mark under the Indian trade mark legislation is clearly based on its identification function and is wide enough to include within its sweep different kinds of trade marks, even those which we never thought could be used as trade marks provided that they are capable of graphical representation. Rule 26 of the Trade Marks Rules explains how non-conventional trademarks could be represented graphically for example a three-dimensional

²https://www.wipo.int/edocs/mdocs/sct/en/sct_16/sct_16_2.pdf (last visited on January 7, 2022).

³The Trade Marks Act, 1999, s. 2(zb).

⁴*Id.*, s. 2(m).

trade mark could be reduced into two-dimensional graphic representation or a photograph consisting of three different views of the trade marks.

The Draft Manual of Trade Marks Practice and Procedure prepared by the Office of Controller General of Patents, Designs and Trade Marks also talks about non-conventional trade marks. This manual is meant to bring uniformity and consistency of practice with respect to the various procedures involved in the administration of the Trade Marks Act.⁵ As per the manual following types of marks come under the category non-conventional trade marks:

1. Colourtrade marks,
2. Sound marks,
3. Shape of goods, packaging,
4. Smell trade marks.⁶

Let us now discuss each of these kinds of trade marks.

Colour Trade Marks

If we look at the definition of the term ‘marks’ under the Trade Marks Act it does talk about the combination of colours but not about the use of single colour as a trade mark. It may be because of the fact that people hardly identify the goods based on their colour. Moreover, the application of registration of a single colour as a trade mark may lead to an objection under section 9 of the Trade Marks Act which deals with the absolute grounds of refusal with regard to registration. It is believed that colours are inherently incapable of distinguishing the goods and services of one person from another. Though that does not mean that a single colour cannot be considered for registration as a trade mark, it can be registered only if it is of such nature as to differentiate between the goods and services of one trader from those of another.⁷ The application for registration for a combination of colours or a single colour will only be considered if it contains a statement to that effect.⁸

There have been a lot of disputes regarding the registration of colour *per se* or a combination of colours as trade marks. Colours usually fall within the public domain and giving a

⁵https://ipindia.gov.in/writereaddata/Portal/IPOGuidelinesManuals/1_32_1_tmr-draft-manual.pdf (last visited on January 7, 2022).

⁶A Draft Manual of Trade Marks Practice and Procedure, p. no. 84.

⁷*Ibid.*

⁸*Ibid.*

monopoly to someone over a particular colour or combination of colour requires a lot of caution. Though, a particular pattern made with a single colour or combination of colours may not require a lot of deliberation for registration.

Another issue with respect to the registration of colours as trade marks is their graphical representation. The manual of the trade mark office very clearly states that every application for registration of colours as trade mark must very clearly state the details of the colour or combination of colours as per the international classification system and should concisely contain an accurate description of the mark.⁹ At times it is difficult to explain the exact shade of colour or combination of colours and the samples may fade over a period of time and that's another reason that leads to disqualification of a single or a combination of colours as trade marks.

As per the Trade Marks Rules, it is for the applicants to prove that the manner in which the colour or the colours have been used forms an essential part of the trade mark and thus requires protection under the Act. So, if evidence of acquired distinctiveness is given by the applicant like in the case of the trade mark of HP, the right over those colours limited to those shapes or geometrical patterns could be given to the applicant.¹⁰

In *Philmac Case*,¹¹ the Australian court discussed about situations where the colour or combination of colours will be considered registrable without evidence of use and stated:

“Colour is only inherently adapted to distinguish goods where it has: no utilitarian function – the colour imparts no physical or chemical properties such as light reflection or heat absorption; no ornamental function – the colour has no ordinarily recognised meaning such as heat, danger or environmentally friendly; no economic function – the colour is not naturally occurring in that product such that competitors would be required to use extraordinary manufacturing processes, at extra expense, to avoid infringement; no other competitive advantage – other properly motivated traders might naturally use the colour in a similar manner in respect of their similar goods.”¹²

⁹*Id.*, at 17.

¹⁰*Id.* at 85.

¹¹*Philmac Pty Ltd v. The Registrar of Trade Marks*, [2002] FCA 1551.

¹²*Id.*, para 65.

Another important case on the registration of colour trade mark is the case for registration of purple colour (Panatone 2685C) for Cadbury chocolates.¹³ In 2019, the UK Court of appeal rejected the claim of Cadbury over the colour purple, the claim was challenged by Nestle, who said that the colour is inherently incapable to distinguish. The court disallowed the registration of the colour purple as the application is based predominantly on the registration of a single mark i.e., colour purple and stated:

“In my judgment, the reader would conclude that the 876 registration was an attempt to register a single mark which falls foul of the requirements of clarity and precision.”¹⁴

This judgment clearly highlights the fact that the graphical representation is of utmost importance, if the graphical representation is not clear and precise then the registration could not be granted.

Another area in which the colour trade mark leads to great debate is the pharmaceutical industry. The pharmaceutical industry apart from patents tries to monopolise the market with the use of trade marks. The matter was discussed by the European Court of Justice,¹⁵ where the court dismissed the claim of Glaxo Smithkline that sandoz was confusingly similar to galaxy in using the same purple colour over inhalers. In cases surrounding pharmaceutical products, the court should be doubly cautious as they are dealing with substances that can affect the life and limb of an individual.

In *Qualitex Co. v. Jacobson Products Co. Inc.*,¹⁶ the court has discussed the registration of colour trade marks on the basis of functionality. The court, in this case, has held that colour could be registered as a trade mark if it is not *de jure* functional and stated:

“The word ‘symbol or device’ so as not to preclude the registration of colours, shapes, sounds or configurations where they function as trade marks.”

Based on the entire discussion it can be stated that colour could be registered as a trade mark provided it could be graphically represented and does not try to monopolise a particular

¹³*Cadbury Limited v. The Comptroller General of Patents Designs and Trade Marks*, [2018] EWCA Civ 2715.

¹⁴<https://www.bailii.org/ew/cases/EWCA/Civ/2018/2715.html> (last visited on January 7, 2022).

¹⁵Swaraj Paul Barooah, “The Monopoly Purple – Colours, Shapes and Sizes in the Pharmaceutical World” available at: <https://spicyip.com/2021/04/the-monopoly-purple-colours-shapes-and-sizes-in-the-pharmaceutical-world.html> (last visited on January 7, 2022).

¹⁶*Qualitex Co. v. Jacobson Products Co. Inc.*, 514 U.S. 159 (1995), available at: <https://www.law.cornell.edu/supct/html/93-1577.ZO.html> (last visited on April 6, 2022).

colour or the colour does not have any reference to the functional characteristics of the product.

In India, the courts have long before recognised that colour can perform the identification function of trade marks. In the case of *Colgate v. Anchor*,¹⁷ the court has recognised that the red and white colour packaging of Colgate identifies the product of Colgate and though no monopoly can be created over a particular colour but if people start recognising a particular colour to a manufacturer it needs to be protected in order to prevent further deception and confusion.

Sound Marks

Another kind of non-traditional trade mark that is widely recognised all over the world is sound trade mark. Sound marks could be musical or non-musical like a lion's roar before a movie or Britannia's ting ding ding. Sound marks can be represented graphically by musical notations and are considered to be capable of distinguishing the goods and services of one person from other. Simply put sounds are used as trade marks instead of words and devices. In India, sound marks are registrable only on the proof of factual distinctiveness. The Trade Mark Rules, 2017 under rule 26 gives the following guidelines for the registration of sound trade marks:

“Where an application for the registration of a trade mark consists of a sound as a trade mark, the reproduction of the same shall be submitted in the MP3 format not exceeding thirty seconds' length recorded on a medium which allows for easy and clearly audible replaying accompanied with a graphical representation of its notations.”

Further form 6 of the rules states that in the column for description of marks “representation of specific musical notes must be submitted at the place provided for the trade mark.”

As per the trade mark manual sound marks will be accepted for registration depending upon whether the sound is or has become distinctive. This means that sound marks will be registered only when people start associating a sound with a particular manufacturer something like Britannia's ting ding ding or as formally called the four-note bell sound.

¹⁷*Colgate Palmolive Company v. Anchor Health and Beauty Care Pvt.*, 2003 (27) PTC 478 Del.

The first company to be granted registration for sound marks in India is yahoo and there is no looking back after that. Though there are various questions regarding the registration of sound marks like it has been argued that the musical notations or sonograms (graphs depicting the distribution of sound frequencies at different levels) are the arena of experts and not everyone could read and understand them. Discussing about sound marks ECJ in the case of *Shield Mark BV*,¹⁸ stated that:

“Even if such a representation is not immediately intelligible, the fact remains that it may be easily intelligible, thus allowing the competent authorities and the public, in particularly traders to know precisely the sign whose registration as a trade mark is sought.”¹⁹

In *Edgar Rice Burroughs Inc.*,²⁰ while dealing with sonograms court stated:

“The representation of a sound by any way other than musical notation is so difficult that the legislature has allowed filing of a sound file electronically in 2005. This makes it easily accessible and self-contained.”

Shape of Goods, Packaging etc.

We relate so many products to their shape or packaging, we can recognise Kit Kat chocolates just by looking at them or we can recognise Coca-Cola just by looking at the shape of its bottle. In these cases, the shape of these products seems to perform exactly the same function that we attribute to trade marks hence their protection becomes inevitable. The definition of the term 'Trade Mark' under the Act clearly states that the shape of the goods and their packaging can be registered as a trade mark as long as it can be graphically represented. The Manual of Trade mark Practice and Procedure also talks about registration of shape trade marks and states that every application for registration for a shape trade mark should clearly state so and if it is not clearly stated and it is clear from the three-dimensional drawings or any other details of the application, then it is the responsibility of the applicant to verify the same. It also empowers trade mark registrar to ask for more views of the trade mark under registration in case the one submitted by the applicant is not clear. A black and white

¹⁸*Shield Mark B.V. v. Joost Kist*, CASE C-283/01, available at: <https://ipcuria.eu/case?reference=C-283/01> (last visited January 7, 2022).

¹⁹*Id.*, para. 63.

²⁰*Edgar Rice Burroughs Inc. v. OHIM*, R708/2006-4, available at: <https://indiancaselaws.wordpress.com/2020/01/01/edgar-rice-burroughs-inc-v-ohim/> (last visited on April 6, 2022).

photograph of the shape trade mark mounted on good quality paper which is capable of being used for advertising purposes will be accepted as the representation of the trade mark.

Registration of shape trade mark brings with it a lot of concerns. Giving monopoly over these three-dimensional trade marks can lead to an increase in anticompetitive practices, not in every case but at least in those cases where the shapes are inherently incapable of registration. Section 9 of the Trade Marks Act which is dealing with absolute grounds of refusal for registration of trade marks specifies certain shapes can be considered to be inherently incapable to be registered as a trade mark. As per section 9(3) of the Trade Mark Act following shapes cannot be registered:

“a mark is not registrable as a trade mark if it consists exclusively of –

- a) the shape of goods which results from the nature of the goods themselves; or
- b) the shape of goods which is necessary to obtain a technical result; or
- c) the shape which gives substantial value to the goods.”²¹

So, trade marks which consists of a shape that is essentially a result of the nature of goods themselves, or a shape that leads to technical results or which adds substantial value to the product cannot be registered even if it has acquired distinctiveness, for example, the shape of an egg tray, a regular bottle, a ceiling fan are few shapes that cannot be registered as they fall in one of the three specified categories. The provision makes sure that future traders are not put at loss by giving monopoly of a particular shape or packaging and also guards against anti-competitive practices.

Almost similar provisions exist with regard to shape trade marks in almost all corners of the world. Explaining the purpose of such provisions the English Court of Appeal in the case of *Philips Electronics N.V. v. Remington Consumers Product Ltd.*,²² stated:

“The sub-section must be construed so that its ambit coincides with its purpose. That purpose is to exclude from registration shapes which are merely functional in the sense that they are motivated by and are the result of technical considerations. Those are the types of shapes which come from manufacture of patentable inventions. It is those types of shapes which should not be monopolised for an unlimited period by reason of trade mark registration, thereby stifling competition. Registrable trade marks are those which have some characteristic which is capable of and does denote origin. In my judgment

²¹ *Supra* note 3, s. 9(3).

²² [1999] RPC 809.

the restriction upon registration imposed by the words ‘which are necessary to obtain a technical result’ is not overcome by establishing that there are other shapes which can obtain the same technical result. All that has to be shown is that the essential features of the shape are attributable only to the technical result.”²³

In the case of *Lego Juris v. Office for Harmonisation of Internal Market*,²⁴ the CJEU while dealing with functional shapes stated:

“Once the sign’s essential characteristics have been identified, the competent authority still has to ascertain whether they all perform the technical function of the goods at issue. Article 7(1)(e)(ii) of Regulation No 40/94 cannot be applicable where the application for registration as a trade mark relates to a shape of goods in which a non-functional element, such as a decorative or imaginative element, plays an important role. In that case, competitor undertakings easily have access to alternative shapes with equivalent functionality, so that there is no risk that the availability of the technical solution will be impaired. That solution may, in that case, be incorporated without difficulty by the competitors of the mark’s proprietor in shapes which do not have the same non-functional element as that contained in the proprietor’s shape and which are therefore neither identical nor similar to that shape.”²⁵

In the case of *Hauk v. Stokke*,²⁶ the CJEU again pointed out that a shape to be registrable should add sufficient aesthetic value in addition to the functional characteristics.

Speaking particularly about India, Indian courts have on numerous occasions referred to the concept of shape trade marks and provided registration to the same or at least upheld their rights in the same. In the case of *Apollo Tyres v. Pioneer Trading Corporation*,²⁷ the Delhi High Court while dealing with the registration ‘tread pattern tyres’ stated that:

“...No party can claim propriety over the technique/practice of providing treads in a tyre, since treads are functional, i.e., they afford the necessary grip between the tyre and the ground during movement of the vehicle to keep it substantially stable. No party can

²³*Id.*, at 830.

²⁴*Lego Juris v. Office for Harmonisation of Internal Market*, Case C-48/09 P, available at: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=82838&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=378236> (last visited on January 7, 2022).

²⁵*Id.*, para. 72.

²⁶*Hauck GmbH & Co KG v. Stokke A/S*, Case C-205/13, EU:C:2014:2233.

²⁷*Apollo Tyres v. Pioneer Trading Corporation*, CS(OS) 2802/2015.

claim proprietary over the technique/practice of a plurality of ribs, separated by grooves, which create the tread on the tyre. However, that does not mean that the unique pattern of the tread adopted by a particular manufacturer, which constitutes its unique design and shape, would not be entitled to protection as a design if it is registered, and also as a trade mark - if the tread pattern has been exploited as a trade mark, i.e., a source identifier. What is functional in a tyre are the treads and the tread pattern.”²⁸

While dealing with the shape trade mark, it becomes essential to discuss its relationship with the Designs Act, as in many cases the applicant argues that the design of their shape is distinctive and people have started associating it with their products. One of the leading and most discussed case on this point is *Crocs v. Bata*,²⁹ where the court clearly highlighted that the elements of design cannot be considered as trade mark and they can only form a part of larger trade dress or get up.

Smell Trade Marks

Smell trade marks or as we call them olfactory marks is another category of non-traditional trade mark recognised in India. If we look at the definition of trade marks under the Indian Trade Marks Act clearly these olfactory marks nowhere fit in it as they are not capable of being represented graphically and the same has also been reiterated in the Indian Draft Manual of Trade Marks 2015.³⁰

The question of registration of smell trade mark came in the case of *Ralph Sieckmann v. Deutsches*,³¹ where the question related to the registration of fragrance of methyl cinnamate came in front of European courts. The court discussed in detail about the graphical representation and stated:

“Finally, the object of the representation is specifically to avoid any element of subjectivity in the process of identifying and perceiving the sign. Consequently, the means of graphic representation must be unequivocal and objective.”³²

²⁸ *Id.*, para. 87.

²⁹ *Crocs v. Bata*, 2019 SCC OnLine Del 6808.

³⁰ *Supra* note 6 at 87.

³¹ *Ralph Sieckmann v. Deutsches*, C-273/00, available at: <https://eur-lex.europa.eu/legalcontent/EN/TXT/?uri=CELEX%3A62000CJ0273> (last visited on January 7, 2022).

³² *Id.*, para. 54.

In the light of the foregoing observations, it can be said that a mark may consist of a sign which is not in itself capable of being perceived visually, provided that it can be represented graphically, particularly by means of images, lines or characters, and that the representation is clear, precise, self-contained, easily accessible, intelligible, durable and objective.

The representation of an olfactory mark with a chemical formula does not fulfil the requirement of graphical representation as the graphical representation of an odour does not recognize the odour itself. That is the reason why the court held that the said trade mark is not registrable.³³

Despite all the difficulties many manufacturers today want to make optimum use of the fragrance that they have developed for their product and want to monopolise them. The fragrance is important for consumers in the case of a number of products like deodorants, perfumes, home cleaning products, cleaning products etc. and thus has good significance among the stakeholders. The biggest obstacle for the registration of the olfactory mark is the graphical representation. It is very difficult to graphically represent a scent trade mark without associating it with a commodity.

Another major challenge for the registration of a smell trade mark is the functionality doctrine. This doctrine is widely applied in courts around the world in cases of trade mark registration. This doctrine ensures that legitimate competition is not hampered by granting a monopoly over an essential function of a product. The doctrine is recognised under the Indian Trade Mark Act in relation to shape trade marks under section 9(3). Sometimes the scent or the smell of a product is indicative of its function and thus cannot be monopolised. The *Pohl-Boskamp*³⁴ case indicates how functionality doctrine work where the registration of peppermint fragrance was denied to a pharmaceutical company for treating certain categories of chest complications as the registrar found that peppermint fragrance has properties that can treat a different kind of chest complications and thus ineligible for registration. Though, it has been argued that at least the fragrance of certain well-known beauty and skincare products should be allowed to be protected especially when they are widely recognised by the consumers.

Of late the countries owing to the commercial significance have started registering scent marks but a lot of questions still need to be answered. A clear-cut definition as to what is

³³ <https://curia.europa.eu/juris/showPdf.jsf?docid=47585&doclang=EN> (last visited on January 7, 2022).

³⁴ *In re Pohl-Boskamp GmbH & Co.*, 106 U.S.P.Q.2d 1042.

protectable and what is not in cases of smell marks is required. Other question is with regard to the graphical representation of these marks, what standard will be adopted or whether the graphical representation has to be done with reference to a commodity. Moreover, the fragrances in public domain also need a clear-cut mention, as these are the fragrances that help small businesses to make their product attractive.

Unorthodox Trade Marks

Mentioned above are some of the kinds of non-conventional trade marks which do find a mention somewhere or the other in our legal regime. But we can discuss about many other kinds of non-conventional trade marks like motion marks, holograms etc.

Motion trade mark was registered for the first time in India by Nokia for their joining hand trademark. As it is difficult to graphically represent a motion mark prima facie their registration is very difficult under the Indian Trade Mark Act. However, in the case of Nokia Trade Mark many screenshots of the motion trade mark of Nokia were attached in order to step by step graphically represent their trade mark. This method of registration is adopted by many countries around the world though many accept the motion trade marks in the form of multimedia clips as well. Ideally, a motion mark comprises of animated work along with the sound, clearly not capable of being registered under the Trade Mark Act as it is very difficult to depict the entire trade mark graphically.³⁵

Another category of unorthodox trade mark we can talk about is holograms. Holograms as per Cambridge University Dictionary means “a special type of photograph or image made with a laser in which the object shown looks solid, as if they are real, rather than flat.”³⁶ These are basically three-dimensional trade marks which look different when viewed from different angles. It is again very difficult to represent them graphically. Moreover, their role as source identifiers is also very doubtful. India so far does not have any registration of hologram trade mark. Though many other countries have given registration to holograms.

We can talk on and on about these new categories of trademarks gesture, posture, texture, touch and fee marks, the list is growing every day.

³⁵Jain & Partners, “Motion Trade Mark: Unconventional TradeMarks” available at: <https://www.jainandpartners.com/blog/details/motion-trademark/29> (last visited on March 29, 2022).

³⁶ <https://dictionary.cambridge.org/dictionary/english/hologram> (last visited on March 29, 2022).

III. CONCLUSION

Discussed above are only those non-traditional trade marks which are widely recognised around the world but apart from these many other kind of trade marks are developing these days that need the attention of our policy makers. We can talk about taste trade marks, touch or feel marks, motion marks like moving images, holograms, gestures, position trade marks etc. which are hardly recognised in our trade mark legislation. The policies behind registration of these widely accepted non-traditional trade marks is itself not clear and these new categories will add fuel to the fire. In these circumstances, it becomes responsibility of our policy makers to pay some attention to these new categories of trade marks as well.

The *Sieckmann case*³⁷ has rightly given the due importance to the aspect of graphical representation and its necessity even in cases of non-traditional trade marks. In fact, the same criteria seems to be adopted by India in the draft manual but it becomes imperative to mention here that the requirement of graphical representation was waived of by EU Trade Marks Reforms, 2017. The reason appears to be simple and that is easy registrability of non-traditional trade marks. The United States has always focused more on acquired distinctiveness thus making registration of non-traditional marks easier.

It seems that the world has already opened its door for new and emerging non-traditional trade marks. In these circumstances it becomes essential for us to stop and analyse whether the laws are capable of protecting these ever-emerging different kinds of non-traditional trade marks. No doubt we have taken few steps forward but a lot is yet to be done.

³⁷*Supra* note 31.