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Comparative Analysis of the Registrability of Scent Marks in Trademark Law: Legal Frameworks, Challenges, and Future Perspectives

Introduction

Non-traditional trademarks represent a new frontier in intellectual property in the ever-changing world of modern business, where the search for unique branding techniques has led to new developments. Among these, scent markings stand out as a special and fascinating way for companies to differentiate themselves from rivals and create enduring relationships with customers. However, considering the subjective nature of fragrance experiences and the complications brought by various countries' legal frameworks, the road to obtaining legal protection for olfactory indicators is paved with obstacles.

This extensive study dives into the complicated world of smell marks, examining their importance in modern branding strategies as well as the complex legal environment around their registration. This research explores the development of trademark laws and the practical ramifications for companies looking to safeguard their olfactory brand identity, from the elimination of the graphic representation requirement in the European Union to the sophisticated approaches in the US, UK, Australia, and other countries.

The subjectivity of smell sensations and the requirement for clear and precise graphical representation are just two of the many difficulties that scent markers face. This paper analyzes the challenges companies have while registering these non-conventional trademarks, based on real-world examples and significant court decisions.

This article clarifies the various viewpoints and regulations pertaining to fragrance marking as it examines the legal systems of various nations and examines the effects of these differing legal environments -from the stricter Sieckmann standards¹ in the European Union to the more accommodating regulations in the US- on the viability and accomplishment of olfactory sign registration.

Looking beyond the finer points of law, this study explores the complex world of scent marks. The investigation seeks to clarify the increasing practice of many businesses deliberately integrating fragrances into their marketing campaigns, given the strong influence of scents on memory and emotion.

To sum up, the purpose of this article is to give a thorough understanding of the potential and problems that smell marks present in the global trademark landscape. Businesses can ensure a long-lasting and unique presence in the market by using fragrances into their branding strategies after carefully considering the legal, commercial, and psychological aspects of olfactory signals.

1. NON-TRADITIONAL TRADEMARKS: SCENT MARKS

Businesses today employ redesigned and innovative branding strategies, such as unusual names, to set themselves apart from the competition and draw in clients. Because of their unique creative distinctiveness, these creative non-conventional marks leave a lasting impression on consumers, so owners of goods or services can also use them to protect the exclusive rights to their products and to help build their brands. The reason behind the term "non-conventional marks" is that they

¹ The Sieckmann criteria, which state that a representation must be precise, self-contained, easily accessible, intelligible, durable, and objective, must be met in order for a sign to be eligible for inclusion on the Register.

encompass certain mark modifications that do not fit into any of the established usual trademark classifications. Since any mark that doesn't fit into one of the conventional or traditional categories is included, the term "non-conventional mark" has a broad definition.

A non-conventional mark must be sufficiently distinctive and expressive, just like any other indication that is intended to be protected as a trademark, according to Section 2, Article 15 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).² Unconventional marks do not fully fit into the traditional classifications of trademarks found in the present statutes. It goes beyond what has been characterized and declared.³

Typically, a traditional trademark consists of one or more of the following: a name, word, phrase, logo, symbol, design, image, or combination of these. Nonetheless, a few unconventional trademarks, such as sound, smell, color, shape, and taste marks, have become more well-known in recent years.⁴

"Non-traditional trademarks," on the other hand, encompass holographic marks, motion of a product, and sensory marks including sound, color, aroma, taste, and tactile marks. They are becoming more and more crucial to certain people's strategy for "extreme branding." Non-traditional source indicators are said to qualify as a legitimate trademark when they are distinctive of the good or service they are used on and help customers recognize a consistent source or origin for that good or service.⁵

1.1.Scent Marks

A potential customer can recognize and differentiate an appealing (acceptable, necessary) good or service by using a trademark, which is a means of individualization in commercial circulation. Psychologists and physiologists have noted that scent, far more than sight or hearing, is the chemical-biological sense that has the greatest influence on human memory (Engen, 1991⁶). Scents (aromas) are frequently used in conjunction with products and services during advertising campaigns since they may be a highly powerful tool for drawing in customers. This is why aroma-marketing, as it is known, is fully developed in the majority of the world's countries.⁷

Due to their capacity to jog people's memories, scents have always been regarded as potent information carriers. Businesses have always been drawn to that capacity and have attempted to capitalize on it. One way to achieve this is by giving various goods -some of which are not even edible- specific scents. The same holds true for services, which companies try to associate with a

² Section 2, Art. 15/1, Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [TRIPS Agreement].

³ SUMEDHA SAINATH: *A Critical Comparative Analysis of the Contemporary Challenges Revolving Non-Conventional Trademarks and Its Registerability in India and the USA*. 4 Indian J.L. & Legal Rsch. 1, 2022. p. 3.

⁴ BABAKULOV ZAFAR KURBANNAZAROVICH: *Comparative Analysis Registration of Non-Traditional Trademarks in Uzbekistan and Some Foreign Countries (Legislation and Practice Revision)*. World Bulletin of Management and Law (WBML), June-July 2021. p. 22.
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⁵ KENNETH L. PORT: *On Nontraditional Trademarks*. 38 N. Ky. L. Rev. 1, 2011. p. 2.

⁶ TRYGG ENGEN: *Odor sensation and memory*. Praeger Publishers, 1991.

⁷ STANISLAV V. ODINTSOV, MARINA V. TRUBINA, MOHAMMAD MANSOUR: *Comparative Legal Analysis of Protectability of Olfactory Trademarks*. Amazonia Investiga, March 2020. p. 130
<http://dx.doi.org/10.34069/AI/2020.27.03.13>

specific scent to help consumers remember and identify them. Those who are successful in doing so may attempt to trademark it in order to stop any unfair competition practices.⁸

A scent is a trademark that can be protected. A scent trade mark is a distinctive smell that sets one company's products or services apart from competitors'. For a fragrance to be identified as a trade mark, it must be connected to a particular good or service that it is used on to give it a distinctive or unusual scent. The provision of a service may also be associated with a particular scent. The perfume by itself cannot serve as a trademark for a fragrance.⁹

Intellectual property law's primary goal should be taken for granted: to promote technological innovation (Bartholomew and McArdle, 2011¹⁰). A substantial body of intellectual work is required to provide legal protection for scents because they can be fully utilized as trademarks and are subject to individualization and objectification.¹¹

On the other hand, since everyone's subjective sense of smell is different and fragrances are perceived differently over time, scent trademarks lack the consistency needed to qualify for trademark protection most of the time.¹²

2. SEDUCTIVE SCENTS: NAVIGATING TRADEMARKS ACROSS JURISDICTIONS

2.1. The European Union

The protection and identification of non-traditional trademarks have changed significantly in the ever-changing world of intellectual property. This section explores the legislative changes, historic cases, and eligibility requirements for fragrance marks as it follows the development of fragrance markings in the European Union (EU) trademark law over time.

Prior to the EU trade mark reform in 2015¹³, "a Community trade mark may consist of any signs capable of being represented graphically," according to Council Regulation (EC) No 207/2009 (the "CTMR")¹⁴. Theoretically, the latter CTMR provision permitted any signs to be registered under EU trade mark law, even if they cannot be perceived visually. This is provided that the signs are able to graphically represent and differentiate the goods or services of one undertaking from those of another.¹⁵

As an illustration, Venootschap onder Firma Senta Aromatic Marketing was granted the first-ever smell mark under the EU. The decision had significance because it recognized the tennis ball's

⁸ VLADYSLAV RUCHKIN: *Non-Conventional Trademarks in The European Union and The United States of America. Comparative Analysis of the Approaches to the Registrability Question*. Vilnius, 2020. p. 50.

⁹ SUMEDHA SAINATH: *A Critical Comparative Analysis of the Contemporary Challenges Revolving Non-Conventional Trademarks and Its Registerability in India and the USA*. 4 Indian J.L. & Legal Rsch. 1, 2022. p. 4.

¹⁰ MARK BARTHOLOMEW, PATRICK F. MCARDLE: *Causing Infringement*. 64 VAND. L. REV. 675, 2011. https://digitalcommons.law.buffalo.edu/journal_articles/42

¹¹ STANISLAV V. ODINTSOV, MARINA V. TRUBINA, MOHAMMAD MANSOUR: *Comparative Legal Analysis of Protectability of Olfactory Trademarks*. Amazonia Investiga, March 2020. p. 130. <http://dx.doi.org/10.34069/AI/2020.27.03.13>

¹² KENNETH L. PORT: *On Nontraditional Trademarks*. 38 N. Ky. L. Rev. 1, 2011. p. 25.

¹³ Regulation (EU) 2015/2424

¹⁴ Section 1, Art. 4, Council Regulation (EC) 207/2009

¹⁵ INES RIBEIRO DA CUNHA, JURGITA RANDAKEVICIUTE-ALPMAN: *New Types of Marks Available after the European Union Trade Mark Reform: An Analysis in the Light of the U.S. Trade Mark Law*. 10 J. INTELL. PROP. INFO. TECH. & ELEC. COM. L. 375, 2019. p. 377.

linguistic description of the scent as "freshly cut grass."¹⁶ The Board of Appeal determined that the scent of recently cut grass is unique enough to be identified from experience and brings back good memories for people.

Later, Myles Ltd. made a trademark application for the "smell of raspberries"¹⁷ added to motor fuels. The application was denied by the court due to the aroma not being distinctive to the product it represented.¹⁸

The aroma of freshly cut grass for tennis balls and the scent of raspberries for motor fuels was historically sufficient to describe the mark in words. Therefore, the EU's need for graphic representation was satisfied by these descriptions. However, after these applications, the Court in Sieckmann¹⁹ appropriately limited the acceptance of a verbal description.²⁰

This case law from the CJEU (Sieckmann case) states that a graphical representation of this kind, especially one that uses lines, images, or characters, must be clear, precise, self-contained, easily accessible, intelligible, durable and objective.

If we examine this instance in more detail, Ralf Sieckmann v. Deutsches Patent and Markenamt was a landmark case in which Mr. Sieckmann sought trademark protection for his conglomerate of enterprises. He exhibited a sample and indicated that the mark's typical description was "balsamically fruity with a slight hint of cinnamon." He also depicted the mark by indicating its chemical makeup, which is "C6H5-CH = CHCOOCH3." The ECJ determined that graphical representation alone is insufficient for registration and that it must satisfy the subsequent requirements after the application was denied on many occasions.

After this Sieckmann case, European Union (EU) legislation sets strict requirements that a fragrance mark must meet in order to be eligible for registration. These criteria are twofold: first, the fragrance depiction must be accurate, clear, and comprehensive enough to make the trademark's exclusive rights instantly apparent. The depiction should also be understandable to a wide range of people, especially those who have a stake in reviewing the trademark registry, such as customers and rival manufacturers. The purpose of these regulations is to protect the rights and interests of trademark owners and other stakeholders in the EU by requiring fragrance marks to be transparent, understandable, and distinctive.²¹

Moreover, in the EU, certain items are not eligible to be trademarks, so that concepts which are abstract are not accepted; signs must have a certain format. In Sieckmann, the Court did clarify that visual perception of the sign is not a prerequisite. In particular, limiting the range of what can be considered an EU trademark serves to prevent the misuse of trademark law in order to gain an unfair competitive advantage unrelated to reputation.²²

As it can be seen above, according to former EU legislations, a sign must be able to be displayed graphically, as well as clear, precise, self-contained, easily accessible, intelligible, durable,

¹⁶ Vennootschap Onder Firma Senta Aromatic Marketing's Application [1999] E.T.M.R. 429 (Case R 156/1998-2).

¹⁷ Myles Limited's Community Trade Mark Application No: 1 222 090 (Case R 711/1999-3).

¹⁸ HARIKA KOTA, LALITHA LAKSHMI: *Opening The Doors for Non-Conventional Trademarks: A Study of Olfactory and Aural Mark*. Diss. National Law School of Indian University, Bangalore, 2021. p. 24-25.

¹⁹ Sieckmann v. Deutsches Patent-und Markenamt, Case C-273/00, [2002] ECR I-11737.

²⁰ ROBIN KLINGBERG: *The Future of Scent as Trademarks in the European Union - A Comparative Study of the Challenges and Possibilities for Protection of Olfactory Signs in the European Union and the United States*. Göteborg University/Department of Law, 2017. p. 30.

²¹ SANYA KAPOOR, RIYA GUPTA: *The Five Senses and Non Traditional Trademarks*. 8 *Supremo Amicus* 214, 2018. p. 224.

²² ROBIN KLINGBERG: *The Future of Scent as Trademarks in the European Union - A Comparative Study of the Challenges and Possibilities for Protection of Olfactory Signs in the European Union and the United States*. Göteborg University/Department of Law, 2017. p. 16-17.

objective, and not restrict trade or the public's access to signs that the directive or regulation requires to be freely available to all.²³

Nevertheless, The European Union trade mark law underwent several changes as a result of the amending Regulation (EU) No 2015/2424 of the European Parliament and the Council, which became effective on March 23, 2016. This regulation is now codified as 2017/1001 (the "EUTMR")²⁴. One of the modifications is the removal of the requirement for graphic representation, which stipulates that a trademark may be represented in any way on the Register of European Union Trade Marks, provided that the public and authorities, such as the European Union Intellectual Property Office, can distinguish between the precise protected elements. Many more signs can now be registered as EU trade marks as a result of this update.²⁵

In brief, the requirement that a sign must be graphically displayed has been altered by the recent trademark reform in the EU [2017/1001 (the "EUTMR")] to be represented in any appropriate manner utilizing generally available technology.²⁶

Now, concerning the registration of non-traditional marks, the crucial provision can be found in Article 4 of the EUTMR. This article stipulates that for a trademark to be eligible for registration, it must not only be capable of distinguishing the goods or services of one business from those of others but also be represented on the register in a manner that allows competent authorities and the public to determine the clear and precise subject matter of the protection granted to its proprietor.²⁷ The EU's fragrance trademark landscape has evolved with key cases and legislative changes. Beginning with the first scent mark related to tennis ball grass, subsequent developments emphasize uniqueness and clear graphical representation, notably in the Sieckmann case. Post-2015, stricter regulations emerged, followed by the 2017 EUTMR amendments removing graphic representation requirements for a more inclusive registration process. These measures ensure transparency, preventing misuse and balancing flexibility with stringency in EU trademark law.

2.2.The USA

This section focuses on the US, where trademarks for fragrances must traverse a different regulatory environment than in the EU. Examining the complicated legal issues surrounding smell trademarks, from important court cases to the intricate processes described by the U.S. Patent and Trademark Office (USPTO), and figuring out how they are recognized and protected.

²³ BABAKULOV ZAFAR KURBANNAZAROVICH: *Comparative Analysis Registration of Non-Traditional Trademarks in Uzbekistan and Some Foreign Countries (Legislation and Practice Revision)*. World Bulletin of Management and Law (WBML), June-July 2021. p. 22.
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²⁴ Regulation (EU) 2017/1001

²⁵ INES RIBEIRO DA CUNHA, JURGITA RANDAKEVICIUTE-ALPMAN: *New Types of Marks Available after the European Union Trade Mark Reform: An Analysis in the Light of the U.S. Trade Mark Law*. 10 J. INTELL. PROP. INFO. TECH. & ELEC. COM. L. 375, 2019. p. 375-376.

²⁶ ROBIN KLINGBERG: *The Future of Scent as Trademarks in the European Union - A Comparative Study of the Challenges and Possibilities for Protection of Olfactory Signs in the European Union and the United States*. Göteborg University/Department of Law, 2017. p. 31.

²⁷ INES RIBEIRO DA CUNHA, JURGITA RANDAKEVICIUTE-ALPMAN: *New Types of Marks Available after the European Union Trade Mark Reform: An Analysis in the Light of the U.S. Trade Mark Law*. 10 J. INTELL. PROP. INFO. TECH. & ELEC. COM. L. 375, 2019. p. 386-387.

According to the United States Lanham Act, any term, name, symbol, or combination of these components used to differentiate the goods or services of one from those of others is considered a trademark.²⁸

As stated above, the registration of scent marks is not expressly prohibited under the Lanham Act, which means that their registration is permitted. Significantly, the USPTO has adopted a favorable position regarding scent mark registration, acknowledging that these marks can fulfill traditional trademark goals. Scent marks are therefore eligible for registration on the primary register.²⁹

A sign is protected as a trademark under the US system if it is utilized in commerce, is distinctive, and indicates origin. This is a more inclusive and comprehensive definition than what the European system allows. Especially, after the Sieckmann case, the EU added a new criterion to the list of prerequisites: the sign must be able to be depicted sufficiently precisely and clearly to be protected as a trademark.³⁰

According to the former EU and some of other jurisdictions' trademark law, encouraging competitors and the general public to identify the trademarked product and communicate that the mark is already in use is the goal of graphical representation in trademark registration. In order for competitors and the general public to be aware of a trademark, it is implied that it must be visible, clear, self-contained, easily accessible, comprehensible, durable, and impartial before it can be registered. For trademark registration in the United States, however, graphical representation of a trademark is not required.³¹

To put it explicitly, similar to the most recent modification of EU law, US law does not make graphic representation a prerequisite for federal trademark registration.

The requirement in the US to produce a clear drawing that shows the mark at the time of application filing can be compared to the earlier requirement for graphical representation in the EU. In contrast, the US systems only demand a thorough description when it comes to sound, scent, and other non-visual markings. This description can be expressed in words, as demonstrated by the application of successfully registered trademarks. Conversely, a verbal description of a scent was not recognized as a mark in the EU since it is deemed subjective and open to interpretation, meaning that different persons may interpret it in various ways.³²

The USPTO allows applicants to create a detailed description of a scent mark, which, in the creator's view, is insufficient for understanding such marks. Along with the description, a specimen must be included.³³

As it is aforementioned, scents can be trademarked, according to the US Patent and Trademark Office, however little use of this option has occurred. Filings for olfactory trademarks are surprisingly rare, compared to the millions of conventional trademarks, including phrases and emblems, that have been registered. Our count indicates that there are presently fewer than a dozen

²⁸ 15.2 Definition - Trademark (The Lanham Act, 15 U.S.C. § 1127)

²⁹ SUMEDHA SAINATH: *A Critical Comparative Analysis of the Contemporary Challenges Revolving Non-Conventional Trademarks and Its Registerability in India and the USA*. 4 Indian J.L. & Legal Rsch. 1, 2022. p. 14.

³⁰ ROBIN KLINGBERG: *The Future of Scent as Trademarks in the European Union - A Comparative Study of the Challenges and Possibilities for Protection of Olfactory Signs in the European Union and the United States*. Göteborg University/Department of Law, 2017. p. 13.

³¹ SUMEDHA SAINATH: *A Critical Comparative Analysis of the Contemporary Challenges Revolving Non-Conventional Trademarks and Its Registerability in India and the USA*. 4 Indian J.L. & Legal Rsch. 1, 2022. p. 12.

³² ROBIN KLINGBERG: *The Future of Scent as Trademarks in the European Union - A Comparative Study of the Challenges and Possibilities for Protection of Olfactory Signs in the European Union and the United States*. Göteborg University/Department of Law, 2017. p. 30.

³³ VLADYSLAV RUCHKIN: *Non-Conventional Trademarks in The European Union and The United States of America. Comparative Analysis of the Approaches to the Registrability Question*. Vilnius, 2020. p. 50.

fragrances that are trademarked, underscoring the limited uptake of scent trademarks even if they are a possibility.³⁴

Upon accepting an application to register a written description of the perfume as "a high-impact, fresh, floral fragrance reminiscent of Plumeria blossoms"³⁵ for sewing thread and embroidery yarn, trademark protection was granted in the USA for the first time.

The application was first denied by United States Patent and Trademark Office (USPTO), which claimed that the pleasant aroma of the flowers would not be viewed by customers as a "indication of origin" but rather as an additional feature. Trademark Trial and Appeal Board (TTAB) position, however, was different. The TTAB came to the conclusion that the applicant in this instance had effectively shown secondary meaning in her smell mark. Based on the applicant's usage of the fragrance in her marketing campaigns and the rapport she had built with customers who connected the fragrance to her product, this decision was made. The claimant had successfully demonstrated the conventional trademark function of the plumeria smell.³⁶

In response to the TTAB's ruling in the Clarke case, the USPTO modified its procedures to allow non-traditional trademark registration. The Trademark Manual of Examination Procedures (TMEP) states that trademark examiners must follow standard trademark standards, such as the functioning test, while evaluating smell marks. Smell marks don't require a visual representation to be registered, unlike traditional trademarks. Rather, they want a thorough written explanation of the mark; nevertheless, the TMEP is silent on what exactly qualifies as a thorough written description, what terminology to employ, or the degree of accuracy needed. In order to receive an aromatic mark, the USPTO additionally requires the production of a specimen; however, the document does not specify under what circumstances an appropriate specimen must be submitted.³⁷

In a subsequent instance, a lemon scent was authorized as a trademark for laser printers and photocopiers³⁸ because of its natural uniqueness. However, it is uncommon for a smell to be inherently recognizable, indicating that "it can be a very challenging task for the applicants." For example, there are only four legitimate fragrance mark registrations on the Principal Register. They were given approval following the presentation of evidence supporting their acquired distinctiveness. It appears that there are strict requirements for smell markers to be unique.³⁹

Subsequently, for "synthetic lubricants for high performance racing and recreational vehicles," the USPTO has registered the "cherry scent."⁴⁰ The strawberry scent of the goods and the grape scent of the goods are two registrations held by the same registrant on the Supplemental Register for "lubricants and motor fuels for land vehicles, aircraft, and watercraft."⁴¹

Afterward, the aroma of bubble gum for sandals, flip flops, shoes, and flip flop bags⁴² can be mentioned as an illustration of a successfully registered conveyed mark. The mark's owner,

³⁴ NICK GREENE: *The 10 Current Scent Trademarks Currently Recognized by the U.S. Patent Office*, Oct 13, 2015. <https://www.mentalfloss.com/article/69760/10-scent-trademarks-currently-recognized-us-patent-office>

³⁵ Serial No. – 73758429. The mark was filed Oct. 18, 1988 and published Jan. 01, 1991.

³⁶ In re Clarke, 17 U.S.P.Q.2d 1238 (T.T.A.B.1990).

³⁷ SUMEDHA SAINATH: *A Critical Comparative Analysis of the Contemporary Challenges Revolving Non-Conventional Trademarks and Its Registerability in India and the USA*. 4 Indian J.L. & Legal Rsch. 1, 2022. p. 14-15.

³⁸ Serial No. – 75-120036. The mark was filed June 17, 1996 and published February 11, 1997.

³⁹ INES RIBEIRO DA CUNHA, JURGITA RANDAKEVICIUTE-ALPMAN: *New Types of Marks Available after the European Union Trade Mark Reform: An Analysis in the Light of the U.S. Trade Mark Law*. 10 J. INTELL. PROP. INFO. TECH. & ELEC. COM. L. 375, 2019. p. 383-384.

⁴⁰ Serial No. – 74720993. The mark was filed Aug. 25, 1995 and published Jan. 27, 1998.

⁴¹ ASHITHA BHAGWAN, NAMITA KULKARNI, PADMANABHA RAMANUJAM: *Economic Rationale for Extending Protection to Smell Marks*. SSRN 1027281, 2007. p. 10-11.

⁴² Serial No. – 86265443. The mark was filed Apr. 29, 2014 and published Mar. 31, 2015.

Grendene S.A., initially submitted the application to the USPTO citing intrinsic distinctiveness and sending a sandal displaying the mark as a specimen. The applicant responded by changing the application's foundation and supplying a sizable amount of proof of acquired distinctiveness -many pieces published in publications and online totaling 160 pages- which the examiner approved and enabled the registration.⁴³

On the other hand, one defense used in cases where perfumes are refused trademark registration is that they have a functional utility and that there is a market requirement for consumers to have access to enticing fragrances. Although there is not much information on how smell marks work, it seems that U.S. law requires a lot of evidence, therefore, it's a complicated procedure. The comparatively limited amount of scent marks in the USPTO's Principal Register may be explained by this intricacy.⁴⁴

In summary, the legal framework for scent trademarks in the United States differs from that of the European Union. The U.S. relies on thorough written explanations instead of requiring visual representation, as does the EU. The difficult issue of demonstrating fragrance uniqueness is evident in the small number of successful registrations, nonetheless.

2.3.The UK

This section discusses UK fragrance trademarks, highlighting the wide variety of indications that qualify for trademark protection. The United Kingdom distinguishes itself from its peers by offering a distinctive framework for olfactory markings within the complex field of trademark law. A trademark is any sign which is capable of distinguishing goods and services of one undertaking from that other undertakings, according to the UK Trade Marks Act Part 1/1. Specifically, a trademark may in particular consist of words, designs, letters, numerals, or shape of other goods or packaging.⁴⁵

There is a limitation on what could be considered a trademark in the UK, in contrast to the US approach. Notwithstanding the possibility that the mark must be visually perceptible, the TRIPS Agreement's Article 15/1 stipulates that any sign or combination of signs may be registered as a trademark.⁴⁶

Upon reviewing certain applications; Chanel, a well-known brand, applied to have their signature perfume scent product, "Chanel No. 5," registered in the UK in 1994.⁴⁷ By characterizing the perfume as "The scent of aldehydic-floral fragrance product" in their application, they attempted to graphically represent their smell mark; however, this application was rejected because the perfume was also the end product in its finality. In the end, the application did not proceed. Moreover, the trademark could not be regarded as representative of the product's origin.⁴⁸

⁴³ VLADYSLAV RUCHKIN: *Non-Conventional Trademarks in The European Union and The United States of America. Comparative Analysis of the Approaches to the Registrability Question*. Vilnius, 2020. p. 52.

⁴⁴ INES RIBEIRO DA CUNHA, JURGITA RANDAKEVICIUTE-ALPMAN: *New Types of Marks Available after the European Union Trade Mark Reform: An Analysis in the Light of the U.S. Trade Mark Law*. 10 J. INTELL. PROP. INFO. TECH. & ELEC. COM. L. 375, 2019. p. 384.

⁴⁵ The UK Trade Marks Act 1994 c. 26, Part 1, Section 1

⁴⁶ BABAKULOV ZAFAR KURBANNAZAROVICH: *Comparative Analysis Registration of Non-Traditional Trademarks in Uzbekistan and Some Foreign Countries (Legislation and Practice Revision)*. World Bulletin of Management and Law (WBML), June-July 2021. p. 22.

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⁴⁷ Chanel's No. 5 Application, 31.11.1994.

⁴⁸ SANYA KAPOOR, RIYA GUPTA: *The Five Senses and Non Traditional Trademarks*. 8 *Supremo Amicus* 214, 2018. p. 223.

Subsequently, the UK Court denied an application for "the smell, aroma or essence of cinnamon" as a trademark for the furniture in the case of *R v. John Lewis*⁴⁹ because a verbal description of a smell was insufficient to create a graphical representation. However, the case would have been handled in accordance with particular guidelines.⁵⁰

In this application, the applicant's inaccurate claim that the stench is widely recognized is their weak point. Scent samples are required for comparison, thus it is difficult to evaluate on the basis of relative grounds due to the ambiguous meaning of the term "smell, aroma, and essence of cinnamon" in their trademark registration and a subsequent application for a comparable scent.

Based on an examination of the applicant's ads, it appears that other furniture manufacturers would consider including comparable cinnamon-like fragrances into their offerings. Consequently, the choice was made to deny the application for registration of the designated name.⁵¹

In contrast, Sumitomo Rubber Company was able to register a fragrance for use on tires⁵² that is described as "a floral scent reminiscent of roses" with success. Moreover, the world's largest dart manufacturer, Unicorn Products, was granted a trademark for their darts⁵³ "strong odor of bitter beer on the flight".⁵⁴

Arguably, the EU's lack of an abundance of olfactory trade marks stems from the Sieckmann Seven (clear, precise, self-contained, easily accessible, intelligible, durable and objective), which were incorporated into EU trade mark legislation. But the Sieckmann Seven are not included in the TMA in the UK. Theoretically, if olfactory trade marks satisfy the TMA's requirements, they can be registered in the UK already. However, since Sieckmann, no successful olfactory trade mark has been registered in the UK or the EU.

For instance, Eden SARL had a post-Sieckmann application for an olfactory mark and it was rejected.⁵⁵ For a variety of products, including clothes and laundry detergent, the applicant in this instance included a picture of a strawberry along with the description, "smell of ripe strawberries." It could be useful to compare the two scenarios. As previously mentioned, a sample, the chemical formula, and a description were all given in Sieckmann. All that was provided in Eden SARL was an image and a description. Since the scent of ripe strawberries varies depending on the variety and the season, there was no one particular scent. For that reason, this description is imprecise.⁵⁶

To sum up, citing instances such as Chanel's denial and approvals for Sumitomo Rubber Company and Unicorn Products, it draws comparisons between the UK, EU, and USA approaches. The rejection of Eden SARL's application is a clear example of the significance of accurate

⁴⁹ Trade Mark Application Decision in the Name of John Lewis of Hungerford PLC, Application Number: 2,000, 169.

⁵⁰ BABAKULOV ZAFAR KURBANNAZAROVICH: *Comparative Analysis Registration of Non-Traditional Trademarks in Uzbekistan and Some Foreign Countries (Legislation and Practice Revision)*. World Bulletin of Management and Law (WBML), June-July 2021. p. 23.

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⁵¹ STANISLAV V. ODINTSOV, MARINA V. TRUBINA, MOHAMMAD MANSOUR: *Comparative Legal Analysis of Protectability of Olfactory Trademarks*. Amazonia Investiga, March 2020. p. 135.

<http://dx.doi.org/10.34069/AI/2020.27.03.13>

⁵² Known as the first UK's olfactory trademark with the no. GB 2001416.

⁵³ This olfactory trademark was recorded by the UK Register Office under no. GB 2000234.

⁵⁴ SANYA KAPOOR, RIYA GUPTA: *The Five Senses and Non Traditional Trademarks*. 8 *Supremo Amicus* 214, 2018. p. 224.

⁵⁵ *Eden SARL v OHIM* [2005] ECR II-4705

⁵⁶ *Should Uk Trade Mark Law Wake Up and Smell the Coffee? An Argument for The Registration of Olfactory Trade Marks in The United Kingdom*, Submitted in Part Fulfilment of the Degree of LL.M. in the University of Glasgow, Supervisor Dr Péter Mezei, August 2023. p. 7-8.

representation. Olfactory trademarks are a fascinating topic for intellectual property analysis because of their dynamic status in the UK.

2.4. New Zealand and Australia

Scents have been registered as trademarks before by the Anglo-Saxon legal system, which includes the United States, the United Kingdom, New Zealand, and Australia. Olfactory trademarks are permitted in New Zealand, although they may encounter challenges because of the demands for graphic representation.

In Australia, verbal descriptions of an aroma are permissible as long as they clearly identify it as a trademark; visual representation is required for trademark registration. High-tech tools like "e-nose" are prohibited, nevertheless. It could be necessary to provide a scent sample, and it needs to be made clear which particular good or service is utilizing the fragrance.

Olfactory trademark registration in Australia is subject to certain limitations, including the inability to register fragrances that are masking or natural product scents. A product or service's smell needs to be distinct and unexpected in order for it to stick out. One instance is the 2008 registration of the scent of eucalyptus⁵⁷ for golf ball stands.⁵⁸

2.5. India

In India, Section 2(1) (zb) of the Indian Trademarks Act⁵⁹ specifies that any mark which is distinctive i.e. capable of distinguishing goods and services of one undertaking from another, and capable of being represented graphically can be a trademark.⁶⁰

To ascertain whether odors can be registered as trademarks in India, the Registry has directly applied the Sieckmann test. Although it admits that odors can be detected, it finds it difficult to satisfy Sieckmann's requirements for graphical depiction. Although odors are registrable, it is regrettable that the Registry has not suggested a different graphical depiction technique.

Moreover, the Draft Manual notes that based only on aroma, consumers are unlikely to link the origin of scented goods to a specific dealer. However, a scent mark needs to have a distinct pictorial representation in order to be registered as a trademark in India. Enabling consumers to easily distinguish one product from another is the main objective.⁶¹

⁵⁷ IP Australia trade mark No 1241420 represented as the Eucalyptus Radiata scent for golf tees.

⁵⁸ STANISLAV V. ODINTSOV, MARINA V. TRUBINA, MOHAMMAD MANSOUR: *Comparative Legal Analysis of Protectability of Olfactory Trademarks*. Amazonia Investiga, March 2020. p. 135-136.
<http://dx.doi.org/10.34069/AI/2020.27.03.13>

⁵⁹ Under Section 2 (zb) of the Trade Marks Act, 1999.

⁶⁰ BABAKULOV ZAFAR KURBANAZAROVICH: *Comparative Analysis Registration of Non-Traditional Trademarks in Uzbekistan and Some Foreign Countries (Legislation and Practice Revision)*. World Bulletin of Management and Law (WBML), June-July 2021. p. 22.
<https://www.scholarexpress.net> Vol. 1 No. 1

⁶¹ SANYA KAPOOR, RIYA GUPTA: *The Five Senses and Non Traditional Trademarks*. 8 *Supremo Amicus* 214, 2018. p. 224-225.

3. CHALLENGES AND CONSIDERATIONS REGARDING SCENT MARK REGISTRATION

Scents are subjective and non-standardized, which makes it difficult to register scent marks. Among these difficulties include the potential functional elements of fragrances, the absence of standardized representation, the subjective interpretation of scents by individuals, and the difficulty of demonstrating distinctiveness. In addition, scent marks are particularly challenging to register as trademarks because of the lack of established legal precedent. For a smell to be successfully registered, it must be shown that it is unique, non-functional, connected to a particular brand, and satisfies the requirements established by the applicable trademark authority.

A trademark needs to be distinctive in order to serve its primary purpose of identifying the source of a product. Customers can find things with distinctive attributes even if they can't remember the name. Olfactory memory is triggered by scents, which can help in product identification. However, in order for scent marks to be eligible for trademark protection, they need to pass the uniqueness test and create a mental association. One sign affixed to the product or its packaging can all contribute to its uniqueness.⁶²

It may be argued that smells are not unique because they are frequently features of the product, possibly even necessary and hence functional. A customer could be able to identify paint, for example, only by smelling it. Though it is a universal scent that results from the mix of paint is unable to copyright the scent. On the other hand, one could counter that trademark protection should be given to brands that customers have come to identify with a particular scent, the best example of this being the rose scent and Sumitomo tires. As a result, there is no way to establish a generalization about this problem; instead, it can only be resolved on a case-by-case basis.⁶³

An enduring and identifiable bond between a fragrance and the particular products or services it stands for, regularly affecting consumers' purchase decisions, is necessary for a scent to be considered inherently distinctive in trademark criteria. You can accomplish this by adding a really special smell to things that are otherwise odorless. An amazing mental association between an uncommon aroma and a product can create instant consumer awareness, as evidenced by cases such as the registration of "the smell of fresh-cut grass" for tennis balls. Scent marks are really unique only if they establish a strong and identifiable connection with the product, which is typically accomplished by combining scents in novel and original ways.⁶⁴

The trademark applicant must exhibit the sign in issue in a precise and thorough graphic form, such as by writing, drawing, or graph, in order to comply with the strictly technical criteria for registration purposes, as previously established. Regarding the graphical representation criteria, the question was whether or not a third party received sufficient information to comprehend and have a clear understanding of the claims being made.⁶⁵

⁶² ADVOCATE MARILENA SHAMBARTA: *Can Non-Traditional Signs, such as Colours, Scents and Sounds Be Protected under Trade Mark Law? If Not, What Are the Alternatives to Do So? A Comparative Analysis between Europe and United States of America*. M. Shambartas Advocates and Legal Consultants, 2014. p. 9.

http://www.msllawyers.eu/images/publication_documents/Can_non-traditional_signs,_such_as_colours,_scents_and_sounds_be_protected_under_Trade_Mark_Law.pdf

⁶³ VATSALA SAHAY: *Conventionalising Non-Conventional Trademarks of Sounds and Scents: A Cross-Jurisdictional Study*. 6 NALSAR Stud. L. REV. 128, 2011. p. 138-139.

⁶⁴ LINDA ANNIKA ERLANDSSON: *The Future of Scents as Trademarks in the European Community - Based on a Comparison to the American Experience*. Lund University Publications (LUP), Spring 2004. p. 15-16.

⁶⁵ ADVOCATE MARILENA SHAMBARTA: *Can Non-Traditional Signs, such as Colours, Scents and Sounds Be Protected under Trade Mark Law? If Not, What Are the Alternatives to Do So? A Comparative Analysis between Europe and United States of America*. M. Shambartas Advocates and Legal Consultants, 2014. p. 10.

The European Court of Justice rejected a comprehensive list of techniques of representation and did not provide a new approach. The argument posits that if the European Court of Justice could recognise musical notes as legitimate representation despite their lack of "immediate intelligibility," then chemical formulae need to be subjected to the same scrutiny and judged legitimate in relation to fragrances.

Formulas are represented in a clear and precise manner. It is true that formulae only indicate the substances, that is, the source of the fragrance. An appropriate substitute might be, in addition to the chemical formulae, the technique of manufacturing the item under specified temperature and other conditions, and a written description of the fragrance. Therefore, even if it is asserted that chemical equations are not typically understandable, this will change with the extra explanation.⁶⁶

4. FUTURE PERSPECTIVES AND PRACTICES

There existed other obstacles to registering an olfactory sign beside the graphical requirement. The inherent difficulties emerge from the intangible quality and personal experience linked to fragrances, which make it difficult to secure protection in a system based on trademark registration. Although there remains a theoretical possibility to register olfactory signs legally, other requirements that hinder their registration remain in place even with the removal of the graphical requirement. This is so that the sign may still be recognized and identified using the register.

Odor receptors in the brain analyze information about scents that are received, leading to the extremely subjective phenomenon known as sense of smell. Writing about a sensory experience, such as a smell, does not ensure that other people will understand it in the same manner for a given person because scents are subjective and limited by language's lack of a uniform nomenclature. This is because, in all likelihood, the description only captures the subjective impression of the smeller rather than the actual scent, making it second-hand knowledge based on someone else's sensory experience.⁶⁷

In light of the preceding discussion, it can be concluded that while the elimination of the requirement for graphic representation and the introduction of clearer conditions for registering specific trademarks are indisputable, it is essential to acknowledge that, in practical terms, the EU trademark system after the reform embodies the "what you see is what you get" (WYSIWYG) approach. The representation of a mark plays a crucial role in defining the scope of protection for the trademark, subject to compliance with Sieckmann criteria. This situation appears to limit the possibility, in the current stage of technological advancement, of registering certain non-visual, non-traditional trademarks, such as those related to smell or taste.⁶⁸

On the other hand, the employment of color, sound, scent, motion, or holograms as trademarks is certain to increase in the near future in the more globalized globe. As a result, we ought to broaden

http://www.mslawyers.eu/images/publication_documents/Can_non-traditional_signs,_such_as_colours,_scents_and_sounds_be_protected_under_Trade_Mark_Law.pdf

⁶⁶ VATSALA SAHAY: *Conventionalising Non-Conventional Trademarks of Sounds and Scents: A Cross-Jurisdictional Study*. 6 NALSAR Stud. L. REV. 128, 2011. p. 140.

⁶⁷ ROBIN KLINGBERG: *The Future of Scent as Trademarks in the European Union - A Comparative Study of the Challenges and Possibilities for Protection of Olfactory Signs in the European Union and the United States*. Göteborg University/Department of Law, 2017. p. 38.

⁶⁸ INES RIBEIRO DA CUNHA, JURGITA RANDAKEVICIUTE-ALPMAN: *New Types of Marks Available after the European Union Trade Mark Reform: An Analysis in the Light of the U.S. Trade Mark Law*. 10 J. INTELL. PROP. INFO. TECH. & ELEC. COM. L. 375, 2019. p. 392-393.

the scope of our trademark laws by requiring graphical representation for non-conventional trademarks.⁶⁹

Olfactory indicators do not appear to have a better future than what Mr. Sieckmann encountered. As such, one may wonder if it makes sense to spend time, money, and energy using smells in marketing campaigns. Studies show that our sense of smell, which is closely associated with memory, plays a major role. After a year, the brain registers and recalls scents at a rate of 65% accuracy, which is higher than the visual recall rate of 50% after three months. odors have a powerful effect; 75% of the emotions we feel on a daily basis are linked to odors. This insight is consistent with the market's belief that odours have a stronger and more lasting memory-evoking power than just visual cues.

Consequently, it should come as no surprise that fragrances are being utilized more and more as a key component of creative marketing campaigns in a variety of sectors, from apparel retailers like Abercrombie & Fitch to hotels like the Ritz-Carlton.⁷⁰

5. CONCLUSION

In conclusion, this thorough investigation into the world of non-traditional trademarks, with a particular emphasis on fragrance marks, concludes by illuminating the complex interplay between legal frameworks, marketing strategies, and purchaser perspectives.⁷¹ In the context of trademark registration, fragrance markings pose a distinct set of issues due to their complex nature, which is characterized by their subjective, non-standardized, and intensely personal nature.

The legal environment around scent marks varies from one country to the next; this paper explores the legal frameworks in the US, UK, EU, Australia, New Zealand, and India. An important development that makes it possible to register non-visual trademarks is the EU's decision to remove the requirement for graphical representation. Olfactory trademarks still offer difficulties, nevertheless, as registration calls for clear and precise representation.

Scent mark registration is complicated, as demonstrated by the analysis of case law, such as the Sieckmann case. Obstacles to trademark protection include the need for distinctiveness, the possibility of functional components in scents, and the challenge of graphical representation. The study emphasizes how critical it is to create a distinct and strong bond between a fragrance and the goods or services it stands for.

Important insights can be gained from the empirical study of trademark practices in various jurisdictions, including successful registrations and rejections. The practical obstacles of smell mark registration are exemplified by instances like the registration of the aroma of freshly cut grass for tennis balls and the difficulty that applicants encounter when characterizing scents like cinnamon in the UK.

Notwithstanding these obstacles, the research acknowledges the increasing importance of olfactory components in branding and marketing. Due of the strong emotional and memory-boosting effects of fragrances, a growing number of businesses are using them in their marketing initiatives. From

⁶⁹ SANYA KAPOOR, RIYA GUPTA: *The Five Senses and Non Traditional Trademarks*. 8 *Supremo Amicus* 214, 2018. p. 231.

⁷⁰ ROBIN KLINGBERG: *The Future of Scent as Trademarks in the European Union - A Comparative Study of the Challenges and Possibilities for Protection of Olfactory Signs in the European Union and the United States*. Göteborg University/Department of Law, 2017. p. 6.

⁷¹ SUMEDHA SAINATH: *A Critical Comparative Analysis of the Contemporary Challenges Revolving Non-Conventional Trademarks and Its Registerability in India and the USA*. 4 *Indian J.L. & Legal Rsch.* 1, 2022. p. 18.

my point of view, scent marks have the power to forge a strong and distinctive bond between a good or service and its customers.

In light of the future developments of globalized markets, the study recommends that trademark rules be expanded and reviewed in order to take into account the subtleties of non-conventional trademarks. Though it acknowledges its limitations, the EU trademark system's "what you see is what you get" (WYSIWYG) approach begs the question of whether the dynamic nature of sensory branding is compatible with the existing legal frameworks.

This article finds that scent marks constitute an intriguing yet challenging frontier in the context of intellectual property law's core purpose of promoting innovation. The complex interactions among legal and marketing aspects highlight the necessity of continual discussion and modification of legal frameworks to handle the particular difficulties presented by olfactory trademarks.

This research paper advocates for a sophisticated and adaptable approach to trademark regulation in order to stay up with the cutting edge and sensory-driven landscape of modern marketing strategies, as businesses increasingly leverage the power of fragrances in their branding.