

Taste and Texture as Trademarks: Testing the Limits of Trademark Subject Matter in India

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Abstract:

Trademark law has traditionally been concerned with signs that can be readily seen, reproduced and associated with a particular source. The changing nature of branding, however, has made this understanding increasingly difficult to sustain. Brands today are not experienced only through words, logos or packaging; they can also be recognised through sensory experiences. Against this background, this paper examines whether taste and texture can legitimately function as trademarks under Indian law. The question is particularly difficult because taste and texture are often inseparable from the product itself and may therefore be more than mere indicators of commercial origin.

The paper examines the position under the Trade Marks Act, 1999 and the Trade Marks Rules, 2017, with particular emphasis on distinctiveness, representation and the limits imposed by functionality. It argues that the absence of an express prohibition on sensory marks does not, by itself, make their registration practically or doctrinally straightforward. Taste raises concerns relating to subjective perception, reproducibility and the difficulty of establishing a clear and precise representation. Texture presents similar difficulties, particularly where the tactile quality contributes to the utility, comfort, durability or aesthetic appeal of a product. In both cases, the central question is whether consumers perceive the sensory characteristic as an indicator of origin or merely as a desirable feature of the product.

Drawing upon Indian law and comparative developments, the paper argues for a cautious but flexible approach. Sensory characteristics should not be excluded simply because they are perceived through senses other than sight; at the same time, trademark protection should not become a means of securing perpetual control over ordinary product features. The paper therefore proposes a framework based on source identification, objective representation, acquired distinctiveness and a strong functionality safeguard.

Keywords: Sensory Trademarks; Taste Marks; Texture Marks; Non-Traditional Trademarks; Indian Trademark Law

Conceptualising Non-Traditional Trademarks: The Expanding Boundaries of Trademark Subject Matter

Trademark law has traditionally focused on familiar forms of identification such as words, names, symbols, labels and devices. These signs help consumers recognise where a product or service comes from and distinguish it from those offered by competitors. For a long time, this source-identifying role was closely associated with things that could be seen and reproduced on a trademark register. The marketplace, however, has changed considerably. Businesses today do not rely only on names and logos to build their identity. Sounds, colours, shapes, movements, holograms, scents and other sensory features are increasingly used to create a particular impression of a brand and to make it recognisable to consumers. This shift has gradually brought non-traditional trademarks into the discussion and has forced trademark law to reconsider what can legitimately constitute a trademark.

The significance of non-traditional trademarks lies not simply in the addition of new categories of marks. More importantly, they encourage us to look at the *function* of a trademark rather than only its *form*. A trademark does not necessarily have to be a word or a visual symbol if another feature can perform the same basic task of identifying commercial origin. Consumers may, for example, come to associate a particular sound with a particular business in much the same way that they associate its name or logo with that business. In the same way, a particular colour combination, shape or movement may become closely connected with a brand after being used consistently over a period. What matters, therefore, is not simply whether a sign looks like a traditional trademark, but whether it can distinguish one undertaking's goods or services from those of others.

At the same time, expanding the scope of trademark protection cannot mean that every feature that consumers notice or remember should become capable of registration. Trademark rights can potentially continue indefinitely through successive renewals. This makes the limits of protection particularly important. If a business were allowed to claim exclusive rights over a feature that competitors genuinely need to make or market their products, trademark law could end up creating a continuing monopoly over the product itself rather than protecting a sign that identifies its source. This is why requirements such as distinctiveness, non-functionality and adequate representation remain central to the treatment of non-traditional marks.

These concerns become even more complicated when the proposed trademark is based on taste or texture. Unlike a logo placed on a product, taste and texture may be part of the product itself. The flavour of a food or pharmaceutical product, for instance, may be closely connected with what the product is. Similarly, the texture of a material or object may affect how it is used, how comfortable it feels, or how consumers judge its quality. This creates an important legal question: at what point does a sensory feature move beyond being simply a characteristic of a product and begin to function as an indicator of its commercial origin?

This question is particularly important when considering acquired distinctiveness. A sensory characteristic could, in principle, become associated with a particular business through repeated use and consumer exposure. But consumer recognition by itself should not be enough. Consumers may recognise or prefer a particular taste or texture simply because they like it, not

because they understand it as a sign of where the product comes from. The law must therefore distinguish between a sensory feature that helps identify a brand and one that merely adds to the quality, attractiveness or usefulness of the product. In other words, the relevant question is whether the sensory characteristic operates as a genuine badge of origin or remains part of the product's ordinary qualities.

The Indian legal framework provides an important setting in which to examine this issue. The Trade Marks Act, 1999 adopts a relatively broad understanding of a “mark” and focuses on its ability to distinguish the goods or services of one person from those of others. At the same time, the traditional requirement of graphical representation has created difficulties for forms of marks that cannot easily be captured through ordinary visual means. Although this requirement has not prevented the development of certain non-traditional marks, sensory characteristics such as taste and texture raise a more difficult problem. The question is therefore not simply whether these characteristics can be experienced by consumers, but whether they can be represented in a way that is sufficiently clear and precise for the purposes of registration and enforcement.

The development of non-traditional trademarks thus reflects a broader tension within trademark law. On one side is the need to allow businesses to respond to changing forms of branding and consumer experience. On the other is the need to ensure that features which belong in the competitive marketplace are not placed under private control. An approach that is too restrictive may leave the law unable to respond to genuine developments in branding. An approach that is too broad, however, may allow trademark protection to extend to functional or aesthetically important features of products. The purpose of trademark law must therefore remain at the centre of the analysis: identifying commercial origin, protecting consumers from confusion and maintaining fair competition.

Within this wider debate, taste and texture represent particularly difficult forms of non-traditional trademark protection. They test a legal framework that has largely developed around things that can be seen and clearly recorded. At the same time, they challenge the distinction between a brand's identity and the qualities of the product itself. Their possible recognition as trademarks should therefore depend on whether they can satisfy the basic requirements of trademark law without giving one trader an unfair and potentially lasting advantage over competitors. Studying taste and texture in this context is useful not only for determining whether these characteristics can be protected, but also for asking a larger question: how far should trademark law extend when brand identity increasingly becomes a matter of sensory experience?

The Indian Legal Framework: Statutory Requirements and Judicial Approaches to Trademarkability

The law relating to trademarks in India is mainly governed by the Trade Marks Act, 1999 and the Trade Marks Rules, 2017. Traditionally, a trademark has been understood as a means of identifying the commercial source of goods or services. The basic idea is simple: consumers should be able to recognise that particular goods or services come from one undertaking and not from another. However, the way businesses build their brands has changed over time.

Branding is no longer limited to names, words and logos. Features such as sound, shape, colour and other sensory elements are also being used to create a particular identity for a brand. This development has made the question of what can qualify as a trademark much more interesting, particularly in the case of taste and texture.

Section 2(1)(m) of the Trade Marks Act, 1999 defines the term “mark” in an inclusive manner. It includes a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging and combination of colours, among other things. The provision is important because it does not confine the idea of a mark entirely to words or conventional symbols. It also leaves some room for forms of commercial identification that may not fit neatly within the traditional categories. At the same time, simply coming within the definition of a “mark” is not enough. The mark must still satisfy the other conditions laid down by the Act before it can receive trademark protection.

Section 2(1)(zb) is particularly relevant because it connects the idea of a trademark with two important requirements: the ability to distinguish the goods or services of one person from those of others and the ability to be represented graphically. The second requirement has historically created difficulties for non-traditional marks. With an ordinary word mark, there is little uncertainty about what is being claimed. The same is true of a logo or a simple graphic representation. The situation changes when the claimed trademark is something that is experienced rather than simply seen, such as a sound, smell, taste or texture.

The reason for this difficulty is quite practical. A trademark registration gives the proprietor an exclusive right, and the register must therefore make it reasonably clear what those right covers. Competitors should be able to look at the register and understand what they may or may not use. Consumers and courts should also be able to identify the subject matter of the registration. A written description such as “a particular sweet taste” or “a soft and velvety texture” may give some idea of the feature being claimed, but it may not necessarily tell us exactly where the boundaries of that right lie. This is one of the reasons why the traditional requirement of graphical representation has been particularly difficult for sensory marks.

The Trade Marks Rules, 2017 show that Indian trademark law has not remained completely tied to conventional forms of representation. Rule 26, for example, deals with sound marks and allows their representation through an MP3 recording along with a graphical representation of the musical notation. This is an important development because it shows that the registration system can adapt when the nature of a mark makes ordinary visual representation unsuitable. However, there is no equally developed mechanism for representing taste or texture. This leaves applicants seeking protection for such marks with a considerably more difficult problem. Apart from representation, distinctiveness is central to trademark protection. Section 9(1) prevents the registration of marks that are devoid of distinctive character or are incapable of distinguishing the goods or services of one person from those of another. It also deals with marks that merely describe characteristics of goods or services, such as their kind, quality, quantity, intended purpose, value or geographical origin. The reason behind this restriction is important. Trademark law is meant to protect indicators of commercial origin. It is not intended

to allow one trader to take exclusive control over ordinary characteristics of a product that other traders may need to describe or use.

The law does, however, recognise that a mark can acquire distinctiveness through use. The proviso to Section 9(1) allows a mark to overcome an objection where it has acquired a distinctive character because of use before the date of the application, subject to the statutory requirements. This possibility becomes especially relevant for non-traditional marks. A sensory feature may not initially have any obvious connection with a particular business. Continued use, advertising and consumer exposure may, however, gradually create such an association. What matters in such a case is not simply whether consumers notice or remember the feature, but whether they have started to understand it as identifying a particular source.

This distinction can also be seen in Indian trademark jurisprudence. In *Reckitt & Colman of India Ltd. v. M.P. Ramachandran*, the importance of distinctiveness and the association of a particular feature with a trader was recognised. The idea of acquired distinctiveness has since become relevant in disputes involving packaging, product presentation, colour combinations and other features that may help consumers identify a particular trader.

The courts have also shown some willingness to recognise protection for features that do not fall within the traditional idea of a word or logo. A useful example is *Christian Louboutin SAS v. Abu Baker*, where the Delhi High Court considered the protection claimed in relation to the red sole of footwear. The case is significant because it shows that a colour element may, in an appropriate context, acquire significance as an indicator of source. At the same time, this does not mean that a trader can claim ownership over the colour in every situation. The context in which the feature is used and the way consumers perceive it remain important.

The same basic reasoning can be seen in cases involving trade dress, shapes and product configurations. A feature may be protected when it helps consumers distinguish the goods of one trader from those of another. But there is an important qualification: trademark protection should not be used to monopolise a feature simply because it is commercially useful. This becomes particularly relevant in the case of texture. A particular texture may help consumers recognise a product, but it may also have a practical purpose. It might make a product easier to hold, more comfortable to use or more durable. In such situations, the question of functionality becomes difficult to separate from the question of trademark protection.

Taste presents an even less settled position in Indian law. There is, at present, no well-developed Indian judicial doctrine specifically recognising taste as a registrable trademark. This does not necessarily mean that taste is expressly excluded by the legislation. Rather, it points towards the practical problems an applicant would face. A person seeking registration would have to explain the claimed taste with enough precision to establish what exactly is being protected. More importantly, it would have to be shown that consumers associate that taste with a particular commercial source and do not simply regard it as one of the ordinary qualities of the product.

Texture raises a similar issue, although there may be circumstances in which a stronger case for protection can be made. A texture is often part of the product itself rather than something placed on the product in the way a logo is. The applicant would therefore have to establish that

the tactile quality has developed an independent significance as a trademark. It would also have to be shown that the texture is not simply a result of the nature of the product, its manufacturing process or its practical function.

The Indian position, therefore, is not simply a matter of deciding whether a mark is “traditional” or “non-traditional.” The more important question is whether the feature satisfies the requirements that justify trademark protection. Representation, distinctiveness, acquired distinctiveness and functionality all must be considered together. The approach of the Indian courts towards unconventional marks suggests that the focus is gradually moving towards the actual role played by a feature in the marketplace rather than its physical form alone.

Taste and texture, however, remain largely unexplored areas. Their treatment exposes a gap between a trademark system developed primarily around visible signs and a marketplace in which branding is increasingly connected with sensory experiences. This does not necessarily call for immediate or unrestricted recognition of sensory marks. What it does suggest is the need for a clearer approach to the questions of representation, consumer association and functionality. The challenge for Indian trademark law is to remain open to changing forms of branding while ensuring that trademark protection does not become a convenient way of obtaining permanent control over product features that should remain available to competitors.

Taste as a Trademark: Distinctiveness, Functionality, and the Evidentiary Challenge

Recognising taste as a trademark is one of the more difficult questions that arises when trademark law moves beyond traditional forms of branding. A word or logo can be seen and reproduced with relative ease, whereas taste can only be experienced by consuming the product. It is also closely connected to the product itself. This makes taste different from many other non-traditional marks and raises a basic question: can a particular taste do more than make a product enjoyable or distinctive and tell consumers where that product comes from? To answer this, it is necessary to consider distinctiveness, the subjective nature of taste, reproducibility, functionality and the evidence required to establish that consumers associate a particular taste with a particular business.

The first issue is whether taste can perform the source-identifying function of a trademark. There is no obvious reason why consumers must identify a brand only through something they can see. If consumers repeatedly encounter a particular taste and begin to associate it with one business, it is possible to argue that the taste is performing a trademark function. But simply being able to recognise a flavour does not make it a trademark. Consumers may remember a particular taste because they enjoy it, because it represents good quality, or because it suits the product. That is different from understanding the taste as an indication of commercial origin. This difference between a product feature and a trademark is therefore crucial.

The subjective nature of taste makes the issue even more complicated. People do not always experience flavour in exactly the same way. Individual perception can be influenced by a range of factors, including sensitivity to taste, age, personal habits and the interaction between taste and smell. Even if a flavour can be scientifically identified, the experience of that flavour may still differ from one consumer to another. This creates an obvious difficulty for trademark law. A registration should make it possible to understand exactly what has been protected, whereas

sensory experiences can be difficult to describe in terms that are sufficiently precise and objective.

Reproducibility creates a related problem. Once a trademark is registered, there must be some practical way of determining what falls within the scope of the registered right. Descriptions such as “sweet,” “minty,” “fruity” or “chocolate-like” are likely to be too general to define the boundaries of a particular trademark. On the other hand, a highly technical description of the chemical composition of a flavour may tell us what substances are present without necessarily telling us what the claimed taste feels like to the consumer. The difficulty, therefore, is finding a method of representation that describes the claimed taste accurately without making the scope of protection uncertain.

This issue becomes particularly important in the Indian context. The traditional trademark framework has placed considerable importance on graphical representation. While the Trade Marks Rules, 2017 have made it possible to accommodate certain non-traditional marks, particularly sound marks, there is no similarly established method for representing taste. A written description may not be enough if it leaves room for uncertainty about the exact nature of the claimed mark. This is more than a question of finding better technology. The way a mark is represented ultimately determines the extent of the exclusive right being claimed.

Functionality presents another major obstacle. Trademark law is not intended to give a business an indefinite monopoly over a feature that is necessary for making or using a product. This concern is particularly strong in relation to taste. In the case of food, beverages, medicines and other consumable products, flavour may be an important part of the product itself. If a business could obtain exclusive trademark rights over a taste that is naturally or necessarily associated with a particular type of product, competitors could find themselves unable to make comparable products without risking infringement. Such protection would begin to resemble patent protection, but without the time limitation that normally accompanies a patent.

For this reason, functionality cannot be considered separately from distinctiveness. A taste that simply reflects the nature of the product is unlikely to function independently as a trademark. If a product is sold as a particular flavour, consumers would naturally expect it to taste that way. Allowing one trader to claim exclusive rights over that flavour could place competitors at an unnecessary disadvantage. The position becomes more interesting where the taste is not essential to the nature of the product and, through sustained use, has come to be associated with one business. In such circumstances, the argument for trademark protection becomes considerably stronger.

Acquired distinctiveness may therefore provide the most realistic basis for recognising taste as a trademark. A taste that is not inherently distinctive could potentially acquire trademark significance if consumers, through repeated exposure, begin to associate it with a particular undertaking. Establishing this association, however, would require convincing evidence. Depending on the circumstances, relevant evidence could include consumer surveys, market research, advertising and promotional expenditure, the length and extent of use, sales figures and other material showing that consumers have developed a connection between the taste and the business claiming protection.

Consumer surveys could be particularly useful in this context, but their design would need to be approached carefully. It would not be enough to show that consumers recognise a flavour or that they particularly enjoy it. What needs to be established is whether consumers understand the taste as pointing to a particular commercial source. A survey showing that people like a certain flavour would therefore have limited value for trademark purposes. A survey demonstrating that consumers associate that flavour, independently of other branding elements, with a particular business would provide much stronger evidence. The subjective nature of taste would also have to be considered when assessing the reliability of such evidence.

There is also a timing problem. A consumer normally experiences the taste of a product only after purchasing and consuming it. A logo, name or packaging design can often identify a brand before the purchase is made, whereas taste may come into play only afterwards. This does not necessarily prevent taste from functioning as a trademark. Repeated consumption can create a strong association between a particular sensory experience and a particular brand. The more important question is whether that association has become strong enough for consumers to treat the taste itself as an indication of origin.

Enforcement would create another practical difficulty. If a taste were registered, how would a court decide whether another product infringes it? Human taste testing may produce different results because people perceive flavours differently. Scientific or chemical testing could help establish that two products contain similar ingredients, but chemical similarity does not necessarily mean that consumers experience the two products as tasting the same. Courts may therefore have to consider expert evidence, scientific testing and consumer perception evidence. The challenge would be to develop an approach that distinguishes between physical similarity in composition and actual trademark significance in the eyes of consumers.

It would therefore be too broad to say that taste can never function as a trademark simply because it is a sensory characteristic. The better approach is to apply the ordinary principles of trademark law while recognising the special difficulties created by taste. A taste could, at least in theory, qualify where it can be identified with sufficient clarity, is not dictated by the function or nature of the product, and has developed an independent association with a particular commercial source. The difficulty is that satisfying these requirements is likely to be considerably harder than it is for conventional marks.

Taste ultimately highlights a deeper problem within the traditional structure of trademark law. Trademark protection is concerned with signs that communicate commercial origin, whereas taste is usually experienced as one of the qualities of the product itself. Any attempt to recognise taste marks in India must therefore be approached carefully. The law should remain open to genuine forms of sensory branding, but it should not allow ordinary product characteristics to become the subject of indefinite exclusive rights. The real challenge is to find a balance between recognising new ways in which consumers experience brands and protecting the freedom of competitors to produce and sell ordinary products.

Texture and Tactile Marks: From Sensory Experience to Legal Identification

The growing recognition of non-traditional trademarks has gradually pushed trademark law beyond the familiar territory of words, names, logos and other visual signs. Texture or tactile

marks are particularly interesting in this regard because the feature claimed as a trademark is experienced through touch. Texture can play an important role in the way consumers experience and remember a product, especially in areas such as fashion, packaging, consumer goods and luxury products. At the same time, giving trademark protection to a particular texture raises some difficult questions. The main concerns relate to distinctiveness, representation, functionality and, more broadly, the point at which protecting a brand begins to look like giving one trader control over a feature of the product itself.

The starting point is whether a particular texture can actually function as a trademark. The fact that a texture is unusual, attractive or commercially successful does not by itself make it a trademark. What matters is whether consumers see that tactile feature as something that identifies the source of the goods. If consumers repeatedly encounter a particular texture and begin to associate it with one particular business, the texture may acquire trademark significance. But the existence of a distinctive sensory quality, on its own, is not enough. The texture must have some connection with the identity of the business in the minds of consumers. This becomes difficult because texture is very often part of the product itself. The softness of a fabric, the roughness of a material, the smoothness of packaging or the grip of an object may have a direct relationship with how the product works or feels when it is used. In such cases, giving one trader exclusive rights over the texture could make it difficult for competitors to offer products with similar practical characteristics. This is where the doctrine of functionality becomes particularly important.

The law therefore needs to distinguish between three different situations: a texture that serves a functional purpose, one chosen mainly for its aesthetic appeal, and one that has come to identify a particular commercial source. A texture that improves grip, comfort, durability or performance should generally remain available to competitors. Similarly, protection of a purely aesthetic surface treatment could raise concerns if it prevents other businesses from making legitimate design choices. Trademark law should not become an alternative way of obtaining protection over product features that would otherwise fall within areas such as patent or design law.

The strongest argument for protecting a texture arises where the tactile feature is not necessary for the product to perform its function and has developed a separate association with a particular business. This distinction is important because businesses regularly use different materials, finishes and surface treatments to make their products stand out. That kind of product differentiation does not automatically mean that the relevant feature has become a trademark. For trademark purposes, the texture must do something more: it must help consumers identify where the product comes from.

Representation creates another serious difficulty. A conventional trademark can usually be placed on the register in a form that can be seen and reproduced. A tactile sensation cannot be communicated so easily. Describing a texture as “soft,” “velvety,” “rough,” “ribbed” or “grainy” may give a general idea of what it feels like, but such descriptions may not be precise enough to establish the boundaries of the exclusive right. Different people may also understand

or experience these descriptions differently. This creates uncertainty when deciding whether another product has the same texture or a sufficiently similar one.

This is important from the perspective of legal certainty. A trademark register should give competitors and members of the public a reasonable idea of what a proprietor has exclusive rights over. If a tactile mark is described in vague or highly subjective terms, a competitor may find it difficult to know whether a similar product feature could amount to infringement. The challenge, therefore, is to find a method of representation that captures the important characteristics of the texture without leaving the scope of the right uncertain.

The traditional requirement of graphical representation under Indian trademark law makes this issue even more complicated. Section 2(1)(zb) of the Trade Marks Act, 1999 historically required a trademark to be capable of graphical representation. The Trade Marks Rules, 2017 have introduced more flexible methods for certain non-traditional marks, particularly sound marks. However, there is no similarly established system specifically designed for tactile marks. This raises the question of whether a combination of visual material, a detailed description, technical specifications or some other objective method could adequately represent a claimed texture.

The difficulty is not simply about finding better technology. Even if technology makes it possible to record or reproduce a surface accurately, the law will still have to decide what exactly forms the trademark. A photograph can show what a surface looks like, but it cannot necessarily communicate what the surface feels like. A technical description might explain the physical structure of the material without fully describing the experience of touching it. A physical sample may communicate the texture more effectively, but it could create practical problems relating to storage, accessibility and the administration of the trademark register. The method of representation must therefore provide a sensible balance between accurately communicating the sensory feature and maintaining certainty about the legal right.

Acquired distinctiveness offers another possible route for protecting tactile characteristics. A texture may not be distinctive when it is first introduced, but extensive and consistent use could eventually lead consumers to associate it with a particular undertaking. Evidence in such a case could include the duration and extent of use, advertising and promotional activities, market share, sales figures, consumer surveys and other evidence showing recognition of the texture. The important point, however, would be to establish that consumers associate the texture with a particular source rather than simply preferring it because they find it attractive, comfortable or pleasant.

Indian decisions dealing with trade dress, product configuration, colour combinations and other unconventional forms of branding suggest that courts are not necessarily restricted to traditional ideas of what a trademark should look like. A feature can acquire legal significance when it operates as an indicator of source, provided that the statutory requirements are satisfied. At the same time, these developments do not support the idea that every commercially valuable or recognisable feature should receive trademark protection. The distinction between identifying a brand and simply making a product attractive remains important.

Texture therefore sits in a particularly difficult position within the developing field of non-traditional trademarks. It lies somewhere between the identity of a brand and the physical character of the product. Its legal treatment requires consideration of how consumers perceive the feature, whether they associate it with a particular business, whether the feature serves a practical purpose and whether it can be represented with sufficient clarity.

A sensible approach would therefore be to allow the possibility of protection without assuming that every tactile feature is registrable. A texture-based mark could potentially qualify where the feature can be identified with reasonable precision, represented objectively, is not dictated by functionality and can distinguish the relevant goods or services. Where the texture is not inherently distinctive, the applicant would also need convincing evidence that consumers have come to recognise it as an indicator of commercial origin.

Such an approach would allow Indian trademark law to respond to changing forms of branding without allowing trademark rights to become a means of obtaining perpetual control over ordinary aspects of product design. In this sense, texture marks offer a useful test for the future development of Indian trademark law: the law must be open enough to recognise genuine sensory forms of brand identity, but careful enough to ensure that trademark protection remains connected to its basic purpose of identifying commercial origin rather than controlling the product itself.

Reimagining Trademark Subject Matter in India: Doctrinal Gaps, Comparative Perspectives, and the Way Forward

The growing use of sensory branding raises a simple question, although the answer is far from simple: what can a trademark actually be? Trademark law has traditionally dealt with things such as words, symbols, labels, names and other signs that can be seen and easily reproduced. Branding today, however, is not always limited to what consumers can see. A particular sound, the shape of packaging, a colour combination, or even a smell, taste or texture may become part of the way consumers experience and remember a brand. This development does not merely require trademark law to recognise a few additional categories of marks. It raises a more fundamental question about whether the existing understanding of a trademark is flexible enough to accommodate sensory forms of branding without allowing businesses to claim permanent control over ordinary features of their products.

Indian trademark law already provides some scope for dealing with unconventional marks. Section 2(1)(m) of the Trade Marks Act, 1999 adopts an inclusive definition of “mark”, while Section 2(1)(zb) focuses on the ability of a mark to distinguish the goods or services of one undertaking from those of another. This has allowed the Indian legal system to recognise and deal with certain non-traditional marks, including sound marks, shapes, colour combinations and forms of trade dress. The Trade Marks Rules, 2017 have also introduced mechanisms that make alternative forms of representation possible. Even so, the system remains much more comfortable with marks that can eventually be put into a visual or otherwise objectively accessible form. Taste and texture expose the limits of this approach much more clearly.

One of the central problems is the relationship between representation and legal certainty. A trademark register is not simply a record of who owns a particular mark. It also tells the public,

competitors and courts what the proprietor is claiming exclusive rights over. Since trademark rights can continue indefinitely through renewal, the boundaries of that right need to be reasonably clear. This is where sensory marks become difficult. Describing something as “a distinctive fruity taste” or “a soft velvet-like texture” may give a reader a general sense of what is being claimed, but it does not necessarily tell them exactly where the protected right begins and ends. At the other extreme, an overly technical description might explain the chemical or physical composition of a product without conveying the sensory quality that the applicant says functions as the trademark.

The Indian position can also be better understood by looking at developments elsewhere. International trademark law has gradually moved away from the idea that every trademark must be capable of conventional graphical representation. Under the European Union Trade Mark Regulation, for example, a sign can qualify as a trademark if it is capable of distinguishing goods or services and can be represented on the register in a manner that allows the authorities and the public to determine the subject matter of protection clearly and precisely. This is an important change in approach. Instead of asking whether a mark can be represented in one traditional way, the focus is placed on whether it can be represented with sufficient certainty. This has made it possible to register marks such as sound, motion, multimedia and hologram marks using formats suited to their nature.

The United States offers another useful comparison. Under the Lanham Act, the focus is largely on whether a designation functions as a source identifier and whether it satisfies requirements relating to distinctiveness and functionality. The American approach has generally shown greater flexibility towards non-traditional forms of branding, including certain sensory characteristics. That flexibility, however, does not mean that every unusual feature can be appropriated as a trademark. Where a feature is functional or its protection would interfere with legitimate competition, trademark protection remains restricted. The useful lesson for India is therefore not that every sensory feature should be accepted. Rather, it is that the law should concentrate on the function performed by the claimed sign instead of relying too heavily on rigid categories.

The difficulties become much more obvious when the discussion turns specifically to taste and texture. International experience suggests that both need to be approached carefully. Taste presents a particularly difficult case because flavour is normally part of the product itself, especially in relation to food, beverages and pharmaceutical products. It is also difficult to represent with the kind of precision expected from a registered trademark. Texture creates similar concerns when the tactile quality of a product affects its comfort, durability, usability or appearance. In both situations, trademark law comes close to areas traditionally dealt with through patents and designs. If trademark protection were allowed to cover such features without appropriate limits, a trader could potentially obtain a perpetual monopoly over something that should ordinarily remain available to competitors.

For this reason, Indian law would benefit from making a clearer distinction between sensory branding and sensory functionality. A feature should not become a trademark merely because consumers recognise it. The more important question is why they recognise it. If consumers

associate the feature with a particular business because it has become a badge of origin, there may be a genuine case for protection. If they recognise it simply because it is an important part of the product's function, quality or appearance, the argument is much weaker. Where a sensory feature is essential to the nature or purpose of the goods, registration should ordinarily be refused. On the other hand, where the feature is relatively independent of the product's function and has acquired a clear association with a particular source, protection may be justified.

Representation is another area where Indian law could benefit from greater flexibility. Rather than trying to create one method that applies to every type of non-traditional mark, the law could adopt a broader and technology-neutral standard. What should matter is whether the representation is clear, precise, objective, accessible, understandable, durable and sufficiently self-contained. Different types of marks could then be represented in different ways. A sound mark, for example, can reasonably be represented through an electronic recording together with an appropriate identification of the sound. A tactile mark may require a combination of technical description, measurable characteristics and, where technology permits, some form of digital or physical reference. Taste is more difficult still, and the threshold should probably remain high until a reliable method of representing flavour can be developed.

Distinctiveness would also need to be examined somewhat differently in the case of sensory marks. The familiar distinction between inherent and acquired distinctiveness remains useful, but sensory characteristics may require stronger evidence before acquired distinctiveness can be accepted. An applicant should not be able to rely merely on evidence that consumers recognise, remember or prefer a particular taste or texture. The evidence should show that consumers understand the feature as pointing to a particular commercial source. Consumer surveys, market research, advertising records, length and extent of use, sales figures and evidence of deliberate association between the sensory feature and the brand could all be relevant. The standard should nevertheless remain demanding so that ordinary product characteristics cannot be turned into exclusive rights simply through extensive marketing.

The functionality doctrine should remain a firm safeguard throughout this process. Trademark protection should not be used to give one business indefinite control over a sensory characteristic that competitors reasonably need to make or sell competing products. A texture that provides necessary grip, insulation or durability, for example, should not become unavailable to competitors simply because consumers have come to associate it with one manufacturer. The same reasoning applies to taste. Where a particular flavour is an inherent or necessary characteristic of the product, allowing trademark protection could place competitors in an unnecessarily difficult position. Features of this kind should remain outside trademark protection, leaving other forms of intellectual property protection to operate where appropriate. Even if sensory marks become registrable, however, another question remains: how would infringement be proved? This may be one of the most difficult practical issues. With a conventional word mark, a court can place the competing words side by side and assess their similarities. That approach cannot simply be transferred to taste or texture. Human sensory testing may produce different results between individuals, while laboratory testing may establish physical or chemical similarities without establishing that consumers experience the

two products in the same way. Courts may therefore have to rely on a combination of expert evidence, scientific testing and consumer perception studies. It will also be important to distinguish between physical similarity, sensory similarity and trademark confusion, since these are not necessarily the same thing.

Any meaningful reform would therefore have to involve more than changing statutory language. The Trade Marks Registry would need clearer examination guidelines dealing specifically with non-traditional and sensory marks. Such guidelines could address representation, distinctiveness, functionality and the evidence required to establish acquired significance. The Registry may also need procedures for dealing with technologically mediated forms of representation and ensuring that the public can properly access the subject matter of a registration. Courts would similarly benefit from greater familiarity with scientific evidence, technology and consumer-perception research, particularly if disputes involving sensory marks become more common.

India should, therefore, avoid two opposite approaches. The first would be to reject a mark simply because it cannot be represented in the traditional visual form. The second would be to allow businesses to appropriate sensory characteristics that properly belong to the competitive marketplace. Neither approach is satisfactory. What is needed instead is a principle of technological neutrality, under which the method of representation can develop with technology while the substantive limits of trademark protection remain intact.

Ultimately, the better way to think about the future of trademark law is to focus on what a sign does rather than on the sense through which it is experienced. A sensory characteristic should be capable of protection where it genuinely identifies commercial origin, can be represented with sufficient certainty, is distinctive and does not give the proprietor an unjustified competitive advantage. At the same time, protection should remain unavailable where the characteristic is functional, intrinsic to the product, essential to its aesthetic or practical use, or incapable of being identified with sufficient precision.

For India, the debate over taste and texture is therefore about more than adding two unusual categories to the trademark register. It offers an opportunity to rethink what should count as a trademark in a market where consumers increasingly experience brands through more than words and images. The objective should be to develop a framework that is open to genuine innovation but does not allow trademark law to become a route to perpetual control over product characteristics. A carefully balanced approach would allow India to respond to new forms of sensory branding while retaining the principles that give trademark protection its legitimacy—consumer protection, identification of commercial origin, fair competition and preservation of features that should remain available to the public.

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