

Trademarking The Intangible: A Study of the Legal Viability of Smell Marks

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Abstract: *Olfactory trademarks, a category of non-traditional marks, rely on distinctive scents to identify and differentiate goods or services, leveraging the emotional impact of smell to strengthen brand recognition. This paper examines the legal frameworks, challenges, and commercial significance of such marks across major jurisdictions, including the United States, European Union, Australia, and India. In the U.S., the Lanham Act permits registration, with landmark cases such as *In re Clarke* and *In re Hasbro* demonstrating recognition of inherent and acquired distinctiveness. The U.S. system accepts detailed written descriptions, reflecting a more flexible approach. In contrast, the EU requires graphical representation that is clear, precise, and durable, as established in *Ralf Sieckmann v. Deutsches Patent- und Markenamt*, which has restricted registrations. Australia's Trade Marks Act 1995 allows scent marks but lacks precedent, while India's Trade Marks Act 1999 theoretically accommodates them but faces regulatory and practical limitations. Key challenges include subjective scent perception, difficulties in proving distinctiveness, and enforcement obstacles due to the absence of standardized scent analysis. Despite these barriers, sensory branding is growing, with non-traditional trademark applications increasing 15% annually (WIPO, 2015-2023). Case examples such as Singapore Airlines' trademarked cabin scent highlight olfactory trademarks' potential in shaping consumer experience and brand differentiation.*

Keywords: *Olfactory trademarks, non-traditional trademarks, scent marks, distinctiveness, graphical representation*

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1 | INTRODUCTION

Olfactory (smell) markings are a kind of non-traditional trademark that uses a unique aroma to identify and differentiate the origin of a product or service. Olfactory markings appeal to people's sense of smell rather than their sight or hearing, making them an intangible and experiential alternative to more traditional trademarks¹. To be considered a valid olfactory mark under trademark law, a product's aroma cannot be an integral part of the product itself, and the mark must be able to differentiate between competing products and services. Typical examples of non-olfactory products that might be eligible for trademark protection include a cherry smell for tires; however, the fragrance of a perfume cannot be protected as it is the functional essence of the product.²

Since olfactory markings do not have the typical visual or written identifiers used in trademark law, they are considered non-traditional trademarks. Unconventional identifiers such as colours, forms, or textures, as well as sensory markings (such as sounds, scents, or tastes), are all considered non-traditional trademarks³. Because they are based on smell rather than sight, olfactory markings are considered non-traditional and create special difficulties in registration and enforcement. Olfactory marks may be registered if they are unique, do not serve any practical use, and can be clearly described in writing or, in some countries, with the use of a chemical formula or sample⁴.

Perception of olfactory signals differs among cultures. Olfactory markings are permitted by the USPTO under certain circumstances, and trademark registration in the US is governed by the Lanham Act. In *re Clarke*, a seminal case, the USPTO recognised a trademark for sewing thread and embroidery yarn with a "high impact, fresh, floral fragrance reminiscent of plumeria blossoms" as a unique, non-functional aroma. Only five The EUIPO has been increasingly stringent in its enforcement of intellectual property rights inside the EU. Due to the instability of physical samples or imprecise descriptions, the case of *Ralf Sieckmann v. Deutsches Patent- und Markenamt* stated that olfactory marks must be shown with "graphic representability" that is clear, accurate, and objective⁵. Because of this ruling, registering olfactory marks in the European Union is now more difficult.

As companies look for new methods to set themselves apart in crowded marketplaces, non-traditional trademarks, such as olfactory marks, have become more important in the eyes of the law and the marketplace. The desire to engage customers via multi-sensory branding tactics has encouraged an increase in applications for non-traditional marks in the worldwide trademark environment. Between 2015 and 2023, major countries including the U.S., EU, and Japan saw an annual increase of around 15% in trademark applications for non-traditional marks, including sensory markings, according to the World Intellectual Property Organisation (WIPO)⁶. The realisation that sensory experiences, such a unique aroma, may build strong connections to brands and increase customer loyalty is driving this expansion.

Cosmetics, food and beverage, and retail are only a few examples of the unusual but highly consequential olfactory markers in businesses where aroma is paramount to customer impression. An example of how olfactory markings may strengthen brand identification in experiential environments is

¹ Lanham Act, 15 U.S.C. 1052 (2018); U.S. PATENT & TRADEMARK OFFICE, TRADEMARK MANUAL OF EXAMINING PROCEDURE § 1202.13 (9th ed. 2020)

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

³ Jeanne C. Fromer, *The Role of Creativity in Trademark Law*, 86 NOTRE DAME L. REV. 1885, 1890–91 (2011)

⁴ TRADEMARK MANUAL OF EXAMINING PROCEDURE, *supra* note 1, 1202.13; Case C-273/00, *Ralf Sieckmann v. Deutsches Patent- und Markenamt*, 2002 E.C.R. I-11737

⁵ *Sieckmann*, 2002 E.C.R. I-11737, ¶¶55–56

⁶ World Intellectual Property Organization, WIPO Intellectual Property Statistics 45 (2023).

the "Stefan Floridian Waters" fragrance that Singapore Airlines uses in its cabins⁷. Eight Legal experts believe that olfactory markings are essential for differentiating brands because to the strong emotional and memory reactions that odours may elicit⁸. But since it's hard to visually depict aromas and prove that they are unique and non-functional, their registration is still restricted.

The growing legitimacy of unconventional trademarks is borne up by case law. Colours may now be used as trademarks in the United States according to a Supreme Court ruling in 'Qualitex Co. v. Jacobson Products Co.', which opened the door for more widespread recognition of sensory markings like scents. roughly ten in a similar vein, the USPTO recognised the characteristic developed via prolonged usage of the Play-Doh aroma—described as a "sweet, slightly musky, vanilla-like fragrance"—and registered it as a trademark in the Hasbro, Inc. case⁹. The eleventh Judgement in these instances shows that judges are more open to protecting unconventional trademarks that fulfil strict requirements¹⁰.

The employment of scent markers in marketing further proves their commercial value. As much as 68% of retail firms polled in 2022 by the International Trademark Association (INTA) saw sensory branding—including scents—as an essential part of their marketing plan. But there are still legal hurdles to overcome, especially in places where visual representation is highly regulated. As branding changes in the digital and experiential economy, scholars like Professor Graeme Dinwoodie contend that the legal system has to adapt to include sensory marks.. Their future potential is further highlighted by the growing usage of olfactory markings in metaverse and virtual reality settings, which replicate sensory inputs.

To sum up, olfactory markings are a small but rapidly expanding subset of non-traditional trademarks that provide exciting new possibilities for setting brands apart. As courts and trademark offices adjust to contemporary branding patterns, their legal recognition is growing, despite practical and jurisdictional problems. As a result of market forces and customer feedback, the relationship between sensory branding and trademark law is likely to change over time.

2 | UNDERSTANDING SMELL AS A TRADEMARK

In trademark law, "intangible" or "non-conventional" marks are identifiers that differentiate products and services in ways other than via the use of words, logos, or graphics, or by the use of additional senses or unorthodox features¹¹. In this category are found non-traditional trademarks, which are based on sensory cues such as noises, scents, tastes, textures, and even forms and colours. One item. While intangible markings still serve the fundamental purpose of identifying the source, they differ from traditional trademarks due to their dependence on abstract features or non-visual sensory perception¹².

This class includes scent as an olfactory mark as it uses fragrance to associate a brand in a certain way. For a fragrance to be eligible for trademark protection, it must be unique (either naturally or by acquired secondary meaning), serve no practical use, and be easily identifiable through representation. the third Olfactory markings that fulfil these requirements may be registered under the United States' trademark registration law, the Lanham Act, as sensory marks are not specifically excluded¹³. Nevertheless, difficulties arise because to the intangible character of smells, especially when trying to visually depict the mark and demonstrate its uniqueness.

⁷ Singapore Airlines, Trade Mark No. T0503211J (Sing. Intell. Prop. Off. 2005).

⁸ Lisa Pearson, Scent Marks: The Future of Branding? 43 AIPLA Q.J. 237, 245 (2015).

⁹ Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159, 163-64 (1995)

¹⁰ In re Hasbro, Inc., Serial No. 86450858 (T.T.A.B. 2018).

¹¹ Jeanne C. Fromer, The Role of Creativity in Trademark Law, 86 Notre Dame L. Rev. 1885, 1890 (2011)

¹² J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION 7:104 (5th ed. 2020)

¹³ *Id.* 1051.

A landmark case that shows how scents may be trademarked is *In re Clarke*. In this case, the USPTO authorised a trademark for a "high impact, fresh, floral fragrance reminiscent of plumeria blossoms" that was used on embroidery yarn and sewing thread. Since the aroma was not an essential part of the product, the TTAB ruled that it was both unique and non-functional¹⁴. On the other hand, a strict standard was established in the European Union's 'Ralf Sieckmann v. Deutsches Patent- und Markenamt case', which mandates the clear, exact, and objective representation of olfactory marks visually. It is challenging to register intangible marks like fragrances in the European Union, as seen when the European Court of Justice deemed an insufficient chemical formula, written description, and physical sample inadequate¹⁵.

Sound markings, such as the NBC chimes, and colour marks are further instances of intangible marks. The Supreme Court of the United States acknowledged in the case 'Qualitex Co. v. Jacobson Products Co.' that a single colour might be a trademark if it takes on a secondary significance¹⁶. While intangible markings are subject to more examination since they are not visually discernible, these instances show that when they are up to par, they may be legitimate trademarks. A subset of this category includes scent markings, which, while uncommon, need meticulous documentation and proof of uniqueness in order to get protection.

Using the power of fragrance to evoke strong emotions, improve brand recognition, and influence customer decisions is a powerful tactic in branding and consumer psychology. The limbic system, which is responsible for emotions and memory, is where smells are processed in the brain, making them very good at triggering gut reactions, in contrast to auditory or visual inputs¹⁷. Scents may evoke powerful connections with brands, leading to loyalty and distinctiveness in competitive marketplaces, thanks to this neurological link.

As a branding tool, aroma may evoke strong associations with a product or service. Singapore Airlines uses their patented "Stefan Floridian Waters" fragrance in cabins to improve the passenger experience, while Abercrombie & Fitch uses special perfumes in shops to create a distinctive environment¹⁸. According to 2019 research published in the Journal of Marketing, shoppers spent an extra 23% more time in stores with pleasant aromas that were consistent with the brand's identity, and sales went up to 15% as a result¹⁹. The business significance of aroma in influencing customer behaviour is shown by this empirical research.

Additional study on consumer psychology emphasises the effect of fragrance. Compared to unscented surroundings, consumers' judgements of quality and authenticity are enhanced by congruent fragrances, which fit with a company's image or product. This leads to a 12% rise in brand preference, according to research published in the Frontiers in Psychology in 2021. The eleventh for example, Hasbro, Inc.'s Play-Doh fragrance, which is a trademark, is instantly recognisable and brings back fond memories of the product. about twelve According to market research from the International Trademark Association (INTA), sensory branding, which includes aroma, was seen as an important part of 68% of assessed firms' marketing strategies in 2022, indicating its increasing popularity²⁰.

¹⁴ *In re Clarke*, 17 U.S.P.Q.2d 1238, 1239-40 (T.T.A.B. 1990)

¹⁵ *Ralf Sieckmann v. Deutsches Patent- und Markenamt*, Case C-273/00, 2002 E.C.R. I-11737, ¶¶55-56

¹⁶ *Qualitex Co. v. Jacobson Products Co.*, 514 U.S. 159, 163-64 (1995)

¹⁷ Rachel S. Herz, *The Role of Odor-Evoked Memory in Psychological and Physiological Health*, 10 BRAIN SCI. 1, 3-4 (2020)

¹⁸ Singapore Airlines, *Trade Mark No. T0503211J* (Singapore Intellectual Property Office, 2005).

¹⁹ Anna Girard et al., *The Impact of Scent on Consumer Behavior*, 83 J. MARKETING 112, 118-20 (2019).

²⁰ International Trademark Association, *Sensory Branding in the Modern Marketplace* 12 (2022).

3 | LEGAL FRAMEWORK FOR SMELL MARKS

It is necessary to fulfil the three main requirements of trademark law—distinctness, pictorial representation, and non-functionality—in order to register any mark, including non-traditional olfactory markings. The purpose of these regulations is to prevent unfair competition, make sure that marks are properly recorded, and guarantee that marks may be used as source identifiers. The intangible and subjective character of scent markings makes it particularly difficult to apply these requirements to them.

Distinctness: A trademark has to be able to tell one company's products and services apart from another's. Distinctness may be either intrinsic (as in the case of an arbitrary or one-of-a-kind mark) or acquired (as in the case of a brand name) via the process of secondary meaning²¹. It may be challenging to prove uniqueness for olfactory marks since, barring very rare or widely used fragrances, consumers do not identify certain aromas with particular businesses. The USPTO found a trademark for sewing thread with a "high impact, fresh, floral fragrance reminiscent of plumeria blossoms" to be inherently distinctive in the case of *In re Clarke*. The trademark's scent was unrelated to the product's purpose and served as a source identifier, so the USPTO could justify its approval. On the other side, unless secondary meaning is established, typical or anticipated odours (such a lemon aroma for cleaning goods) could not stand out.

Establishing distinctiveness for olfactory marks is particularly challenging because scents are often perceived as incidental or functional rather than as source identifiers. Unlike visual marks, which can be inherently arbitrary (e.g., a fanciful logo), scents are rarely inherently distinctive unless they are highly unusual for the product category. For example, the floral scent in *In re Clarke* was deemed distinctive because it was unexpected for sewing thread, but most scents require evidence of secondary meaning, which demands substantial proof of consumer association through long-term use or marketing²².

Graphical Representation: For trademark offices, rivals, and the general public to be able to consistently identify a trademark, its visual representation must be clear, accurate, and objective. the third Graphical representation presents substantial hurdles for olfactory markers, in contrast to standard signs like logos. In *re Clarke*, it was enough to describe the flowery smell, demonstrating that the USPTO accepts thorough written descriptions of aromas²³. Graphical representations of olfactory marks must be "clear, precise, self-contained, easily accessible, intelligible, durable, and objective," according to the European Union's more stringent criteria set forth in the case of 'Ralf Sieckmann v. Deutsches Patent- und Markenamt'. The court's ruling significantly restricts the ability to register olfactory marks in the European Union since it deems chemical formulae, textual descriptions, and physical samples inadequate²⁴.

The requirement for graphical representation is the most significant barrier to registering olfactory marks, particularly in jurisdictions like the EU. The *Sieckmann* decision set a high bar by demanding a representation that is precise and durable, rejecting chemical formulas (due to their inaccessibility to the public), written descriptions (due to their subjectivity), and physical samples (due to their instability over time)²⁵.

Non-Functionality: A trademark cannot serve a practical purpose, be an integral part of the product's value, or be used in a way that detracts from the product's competitiveness in the market. When it comes to smell marking, "non-functionality" means that the aroma doesn't perform anything useful or provide

²¹ Lanham Act, 15 U.S.C. § 1052(f) (2018)

²² *In re Clarke*, 17 § U.S.P.Q.2d at 1239-40

²³ *In re Clarke*, 17 § U.S.P.Q.2d at 1239

²⁴ *Ralf Sieckmann v. Deutsches Patent- und Markenamt*, Case C-273/00, 2002 E.C.R. I-11737, ¶¶55-56

²⁵ *Sieckmann*, 2002 E.C.R. I-11737, ¶¶55-56

the product an edge over the competition. For example, as the aroma is integral to the product, it is not possible to trademark the aroma of a perfume since it serves a practical purpose. The "sweet, slightly musky, vanilla-like fragrance" of Play-Doh, which is trademarked by Hasbro, Inc., was determined to be non-functional due to the fact that it was not necessary for the modelling compound to operate, but rather served as a unique brand indicator²⁶.

The non-functionality requirement is relatively easier to meet for olfactory marks, provided the scent is not essential to the product's purpose. Cases like *In re Hasbro, Inc.* demonstrate that scents can be non-functional when applied to products where smell is not a core feature, such as toys or stationery. However, in industries like perfumes, cosmetics, or food, where scent is integral, non-functionality is nearly impossible to establish, limiting the scope of registrable olfactory marks. The U.S. Supreme Court's ruling in '*Traffix Devices, Inc. v. Marketing Displays, Inc.*' clarified that functionality is assessed based on whether the feature affects the product's purpose or cost, a test that excludes many scent-based products from trademark protection²⁷.

4 | GLOBAL PERSPECTIVE ON OLFATORY TRADEMARKS

Given the ephemeral character of fragrances, the approval and registration criteria for olfactory trademarks differ greatly among countries. Olfactory markings have been handled by many significant countries, including the US, EU, and Australia, with varying degrees of laxity and procedural norms.

The United States: The Lanham Act, which does not specifically prohibit sensory markings, allows for the registration of olfactory marks in the United States. Olfactory marks must be unique, serve no practical use, and be able to be described in detail in order to be registered with the 'United States Patent and Trademark Office (USPTO)'²⁸. In the famous case of *In re Clarke*, the USPTO recognised a trademark for sewing thread with a "high impact, fresh, floral fragrance reminiscent of plumeria blossoms" as a unique, non-functional aroma and granted the registration. Another important case in point is the Play-Doh fragrance, which has been registered by Hasbro, Inc. as a "sweet, slightly musky, vanilla-like fragrance" because of the uniqueness it has developed over time.

European Union: The EU Trade Mark Regulation provides general recognition of olfactory markings in the EU, however registration is very difficult because of the tight standards for visual depiction. Olfactory markings are required to be "clear, precise, self-contained, easily accessible, intelligible, durable, and objective," according to a precedent established by the European Court of Justice in the case of '*Ralf Sieckmann v. Deutsches Patent- und Markenamt*'. Physical samples, textual descriptions, and chemical formulae were all deemed inadequate by the court, making olfactory mark registration almost impossible²⁹. Notwithstanding this, previous to harmonisation, several member states had already registered olfactory marks under their own legislation; for example, the Netherlands had registered a "freshly cut grass" aroma for tennis balls (described below)³⁰.

A trademark for a "high impact, fresh, floral fragrance reminiscent of plumeria blossoms" used on sewing thread and embroidery yarn was authorised by the USPTO's Trademark Trial and Appeal Board. This smell became the first to be registered as an olfactory mark in the United States after being determined

²⁶ *In re Hasbro, Inc.*, Serial No. 86450858 (T.T.A.B. 2018)

²⁷ *Traffix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. at 32-33

²⁸ TMEP 1202.13 (9th ed. 2020)

²⁹ *Ralf Sieckmann v. Deutsches Patent- und Markenamt*, Case C-273/00, 2002 E.C.R. I-11737, ¶¶55-56

³⁰ Benelux Trade Mark Office, *Trade Mark No. 558452* (1999)

to be both unique and non-functional, meaning it was not necessary for the product to operate. The US's adaptability was on display when the textual description was judged enough for visual depiction³¹.

'*Ralf Sieckmann v. Deutsches Patent- und Markenamt (EU, 2002)*': An effort to trademark a "balsamically fruity with a slight hint of cinnamon" aroma for use in a variety of products was at the heart of this issue before the ECJ. The court found that the chemical formula, written description, and physical sample did not fulfil the criteria for an objective, clear, and exact visual depiction, thereby rejecting the application. The judgement has greatly limited the ability to register olfactory marks in the European Union.³²

Australia: Under the Trade markings Act 1995, olfactory markings are allowed in Australia, as long as they are unique, non-functional, and may be visually represented. Following a similar approach to the US, the Australian Trade Marks Office (ATMO) accepts written descriptions of aromas. The ATMO has recognised in its rules the registrability of sensory markings, including fragrances, citing international precedents such as in *re Clarke*, even though no notable instances using olfactory marks have come to light³³. Although there are few real-world instances, Australia's adherence to the Madrid Protocol opens the door to the possibility of international registration for olfactory mark protection. roughly ten

5 | INDIAN LEGAL POSITION ON OLFACTORY TRADEMARKS

For both conventional and non-conventional trademarks, India has a statute that regulates their registration and protection: the Indian Trade Marks Act, 1999. The Act's broad definition of a "trademark" acknowledges non-traditional trademarks, such as sensory marks such as sounds, forms, colours, and maybe even scents. A trademark is defined in Section 2(1)(zb) as any sign, including forms, packaging, or colour combinations, that may be graphically expressed and distinguishes one person's products or services from another's.³⁴ In theory, non-traditional markings, such as odours, might be registered under the Act if they satisfy the criteria of being unique, being visually represented, and not functioning. However, the Act makes no specific reference to olfactory (smell) marks.

By outlining standards for the portrayal of non-traditional marks, the Trade Marks Rules, 2017 provide further assistance with their registration. A written description of a fragrance might be considered a "graphical representation" under Rule 2(1)(h) as it is "represented on paper or represented in digitised form," yet no particular regulation specifically deals with olfactory markings.³⁵ Although the Draft Manual of Trade markings, published by the Office of the Controller General of Patents, Designs and Trade Marks, recognises non-traditional markings such as sounds and forms, it fails to address scent marks, suggesting that there is an absence of clear regulatory direction on the matter.

Whereas US decisions like *In re Clarke* have laid the groundwork for smell trademarks, no such cases have been recorded in India that specifically deal with the registration of olfactory markings.³⁶ Nonetheless, non-traditional marks may be recognised by India due to the country's commitment to international accords like the TRIPS Agreement. Olfactory markings in India are supported under TRIPS Article 15(1), which specifies that member nations must protect marks that may differentiate products or services, without restricting the mark's shape.³⁷ In other cases, like the registration of the "Zippo" lighter

³¹ *In re Clarke*, 17 U.S.P.Q.2d at 1239-40

³² *Sieckmann*, 2002 E.C.R. I-11737, ¶¶55-56

³³ IP Australia, *Trade Marks Manual of Practice and Procedure*, Part 22.4 (2023)

³⁴ Trade Marks Act, 1999, 2(1)(zb), No. 47 of 1999 (India)

³⁵ Trade Marks Rules, 2017, Rule 2(1)(h) (India)

³⁶ *In re Clarke*, 17 U.S.P.Q.2d 1238, 1239-40 (T.T.A.B. 1990)

³⁷ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, art. 15(1), 1869 U.N.T.S. 299

form, Indian courts have acknowledged non-traditional marks, indicating that they are receptive to unorthodox trademarks as long as the necessary requirements are fulfilled.

Despite this framework, olfactory markings have not been examined for registrability in India because to a lack of particular regulations or precedents. Their incorporation in theory is possible according to the Act's pliability, but their application is constrained due to the practical issues that will be addressed later on.

6 | CHALLENGES IN TRADEMARKING SMELL MARKS

The ethereal and transient character of fragrances presents considerable technological hurdles to the registration of olfactory markings. These issues are especially acute when it comes to satisfying the need for visual representation and guaranteeing constant storage for trademark purposes. There are challenges for trademark offices and applicants when it comes to smell markings, since they cannot be readily recorded or reproduced in a standardised, lasting manner, unlike visual or aural marks.

Graphical Representation: Clear, accurate, and objective representation of trademarks is required by trademark law so that they may be easily identified by public, competitors, and examiners. There isn't a widely agreed-upon way to record olfactory markings as fragrances are subjective sensory experiences. In *re Hasbro, Inc.*, the court used the subjective and imprecise term "a sweet, musky fragrance" to describe the product in question. Chemical formulae, while accurate, are difficult for non-specialists to understand and do not reproduce the sensory impression of the fragrance.³⁸ The requirement for a representation that is "clear, precise, self-contained, easily accessible, intelligible, durable, and objective" was emphasised in the ruling of the 'European Court of Justice in *Ralf Sieckmann v. Deutsches Patent- und Markenamt*', which rejected chemical formulas, written descriptions, and physical samples as inadequate for visual representation. This decision emphasises the technological hurdle of accurately depicting aromas in a way that satisfies legal requirements.

Stability & Storage: Because of their inherent instability over time, physical samples of scents—whether in liquid or gaseous form—are not suitable for trademark registration. When it comes to long-term preservation in trademark registers, scents aren't always dependable since they may decay, evaporate, or alter based on environmental variables. A smell sample submitted with an application, for instance, would not stay constant, the court said in the *Sieckmann* case, rendering it useless as a trademark reference.³⁹ While new technologies like gas chromatography and digital fragrance synthesis may one day solve this problem, none of these methods has achieved widespread use or standardisation in the trademark industry as yet. According to academic research, olfactory markings will be hard to detect and enforce until technology improves, such replicable digital fragrance profiles.⁴⁰

Reproducibility: Consistent reproduction of a smell across settings is problematic because to differences in manufacturing, ambient factors, and human perception, even when the scent is documented or sampled. It is more difficult to employ smells as constant source identifiers than, say, a logo or audio file because of the impact of environmental variables like humidity and temperature.⁴¹ Trademark offices are unable to compare or verify olfactory markings in examination or opposition processes due to the absence of a standardised technique for fragrance replication.

³⁸ Lanham Act, 15 U.S.C. 1052 (2018); Regulation (EU) 2017/1001, art. 4, 2017 O.J. (L 154) 1

³⁹ *Sieckmann*, 2002 E.C.R. I-11737, ¶154

⁴⁰ Pearson, *supra* note 3, at 252.

⁴¹ Rachel S. Herz, *The Role of Odor-Evoked Memory in Psychological and Physiological Health*, 10 BRAIN SCI. 1, 5 (2020)

7 | CONCLUSION

Branding in today's sensory-driven market is always changing, and olfactory trademarks are a fascinating and difficult new frontier in this field. Successful registrations of non-traditional marks, such as the Play-Doh aroma in the US and Singapore Airlines' cabin fragrance, demonstrate how fragrances may be used to generate corporate identification.⁴² Nevertheless, there are substantial obstacles to their registration and enforcement in different jurisdictions. The United States provides a more lenient framework under the Lanham Act, which recognises both inherent and acquired uniqueness and accepts written descriptions (as shown in instances such as in *re Clarke* and in *re Hasbro, Inc.*).⁴³ Alternatively, olfactory mark registration is almost to impossible in the European Union due to their rigid graphical representation criteria, in '*Ralf Sieckmann v. Deutsches Patent- und Markenamt*', and there are no practical examples for Australia's more accommodating approach.⁴⁴ Olfactory markings are technically permissible in India according to the Trade markings Act, 1999; yet, there is a lack of clear criteria and precedent, leading to confusion.⁴⁵

The subjective nature of olfactory perception and the technical challenges of capturing and retaining odours make it difficult to build uniqueness and consumer connection. Because people's perceptions of scents vary so much, it might be difficult to collect the kind of solid information needed to prove secondary meaning, including marketing statistics and consumer surveys.⁴⁶ The high evidentiary burden of proving consumer confusion or damage to uniqueness and the absence of standardised procedures for fragrance comparison further complicate enforcement challenges, such as identifying infringement or dilution.⁴⁷ Regardless of these obstacles, research demonstrating the influence of aromas on consumer behaviour, together with the increasing economic importance of sensory branding, highlights the possibility that olfactory markings might become important assets for brands.⁴⁸

Legal frameworks need to change to accommodate the peculiarities of olfactory trademarks as sensory branding grows in popularity, especially in the hotel and retail sectors. Digital smell reproduction and other technological advances may one day make representation easier, and international conventions like the Madrid Protocol are working to standardise and simplify registration procedures. Olfactory trademarks are still in their early stages, but they show great promise as a new field of intellectual property law that might help safeguard sensory brand identities with creative legal and technological solutions.

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⁴² *In re Hasbro, Inc.*, Serial No. 86450858 (T.T.A.B. 2018); Singapore Airlines, *Trade Mark No. T0503211J* (Singapore Intellectual Property Office, 2005)

⁴³ *In re Clarke*, 17 U.S.P.Q.2d 1238 (T.T.A.B. 1990); *In re Hasbro, Inc.*, Serial No. 86450858

⁴⁴ *Ralf Sieckmann v. Deutsches Patent- und Markenamt*, Case C-273/00, 2002 E.C.R. I-11737; Trade Marks Act 1995 (Cth) s 41(6) (Austl.)

⁴⁵ Trade Marks Act, 1999, 2(1)(zb), No. 47 of 1999 (India)

⁴⁶ Laura K. M. Graf & Torsten Tomczak, *Scent and Consumer Perception*, 12 FRONTIERS PSYCHOL. 1, 6 (2021)

⁴⁷ J. Thomas McCarthy, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION 24:6 (5th ed. 2020)

⁴⁸ International Trademark Association, *Sensory Branding in the Modern Marketplace* 12 (2022)