

# All Things IP



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### UNCONVENTIONAL TRADEMARKS- AN OVERVIEW OF THEIR REGISTRABILITY UNDER THE INDIAN TRADE MARKS ACT, 1999

A trademark is understood in common parlance as any word or words or a logo used in relation to any trade or business that is primarily intended to indicate source from which any goods or service offerings have originated. Trademarks also help such businesses and brand owners to differentiate their products and services from other persons and business owners.

However, over the years the concept of branding has constantly evolved owing to changing consumer choices and ease of availability of competitive products and services, which has led to brand owners innovating and infusing fresh thoughts in their branding to keep consumers engaged. This has consequentially also led to brand owners become very conscious about protection of their novel branding ideas to create exclusivity in their favour in respect of such trademarks. Brand and trademark owners have constantly tested the law relating to trademarks in seeking legal protection of these novel and unconventional trademarks and have over the years been successful in securing such protection. The trademark law has also evolved over the years to accommodate such brand and trademark protection strategies adopted by trademark proprietors.

The Trademarks Act, 1999 (the “Act”) defines the word trademark as a mark capable of being **“represented graphically”** and hence registration can be sought on any mark that is capable of being registered graphically. In this note we provide hereinbelow a brief overview of the kinds of unconventional trademarks that are capable of being protected under the Act. Such unconventional trademarks may be in the nature of:

- a. **SOUND MARKS-** Sound marks, in the context of a trademark, are extremely rare. Accordingly, a trademark may consist of a sound and represented by a series of musical notes with or without words. The acceptability of a sound mark depends upon whether the sound has become a distinctive mark that even an average consumer will perceive the sound as being exclusively associated with one person. Some common and popular illustrations of such marks include the 4 bell musical note of Britannia, Yahoo’s yodel, roar of a lion in MGM productions. Recently in India Mastercard successfully secured in its favour a sound mark registration over its Mastercard acceptance tone. Also, Eicher Motors Limited has secured a registration over the thunderous engine sound of Bullet moto bikes.
- b. **COLOUR MARK-** A colour or combination of colours, as applied to the goods or their packaging or as used in relation to their services, may be protected as a trademark, as a colour mark. This is common in relation to a particular colour combination of capsules or tablets adopted by pharmaceutical companies. Recently, Nivea Blue- Pantone 280 C has been granted protection as a in Germany as colour mark. Few other instances of colour marks are the distinctive shade of purple (Pantone 2865C) on the wrappers packaging of milk chocolates of Cadbury, green and yellow colour combination used uniquely on the tractors of Deere & Co.
- c. **MOTION MARKS-** Any moving or animated object or logo that is adopted as a trademark, which is capable of being recognised as a unique source identifier to a particular brand owner is capable of being registered as a trademark under the Act. A popular example of a motion mark is that of the Microsoft windows logo that one notices in the opening screen of a windows PC or laptop.



- d. **HOLOGRAM MARKS-** A hologram is a three dimensional graphical representation technique of an image that was conventionally used primarily for adding authenticity to a particular product or document as having originated from a particular source and to prevent counterfeits and fake products. In India no hologram marks have been registered until date. American Express has been able to secure a trademark registration in the USA in respect of a hologram that is applied by it on the surface of its credit cards.

There are also other instances of unconventional trademarks are: (a) Taste Marks, (b) Smell Marks, (c) Texture Marks. But these marks are today not capable of being registered as a trademark under the Indian trademark law owing to the fact that these marks are incapable of being represented graphically. Nevertheless, some jurisdictions permit registration of such unconventional marks though not capable of being represented graphically.

Few other important kinds of trademarks include Shape marks (for e.g.: Shape or outline of Coca-Cola bottle, Shape of Zippo Lighters, Triangle shape of Toblerone chocolates, etc.,)

**FLUID TRADEMARKS-** Another evolving area of branding that is relevant in the context of trademark laws is the increase in the usage of “Fluid Trademarks”. Fluid trademarks are marks that are based on an original popular and well-known trademark but which have been rejigged intentionally to appear as a number of variants while retaining some basic and important elements and features of the original mark in order to maintain brand recognition and source identification. Google ‘Doodle’ is the quintessential “fluid trademark”. While its primary mark and logo remain intact, from time to time—and for one day only – Google changes its conventional, static mark for a colorful, whimsical, and often dynamic alter-ego. Some of the other famous fluid marks are Perrier bottles, Absolut Vodka, MTV Channel logo, etc.,

We at Eshwars regularly advise our clients on various brand and trademark protection strategies. For more information please reach out to us at: [saisunder@eshwars.com](mailto:saisunder@eshwars.com).