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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

# **“CONVENTIONALIZING NON-CONVENTIONAL TRADEMARK WITH SPECIAL REFERENCE TO OLFACTORY MARK”**

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## **1 CONVENTIONALIZING NON-CONVENTIONAL TRADEMARK**

### 1.1 Evolution of Trademark

#### 1.1.1 History

The narrative of trademark law’s evolution is both complex and intriguing, charting a course from simple trademarks found in prehistoric times to the sophisticated legal frameworks of today. This journey spans several millennia, with the first indications of trademark use potentially seen in the ancient cave paintings of Lascaux, France. These depictions believed to be around 15,000 years old show bulls marked with unique symbols suggesting an early form of ownership representation predating written language. Ancient marks believed to represent ownership found in Lascaux cave paintings suggesting early use of trademarks.<sup>1</sup>



Figure - 1<sup>2</sup>

As civilizations advanced, the application of trademarks became increasingly refined. In ancient

<sup>1</sup> Olivier Pierre, ‘A History of Trademarks: From the Ancient World to the 19th Century’ (WIPO, 6 December 2021) <[https://www.wipo.int/podcasts/en/madrid/transcripts/international\\_trademark\\_system\\_talk\\_01.html#:~:text=Some%20of%20the%20earliest%20forms,livestock%2C%20long%20before%20literate%20societies.](https://www.wipo.int/podcasts/en/madrid/transcripts/international_trademark_system_talk_01.html#:~:text=Some%20of%20the%20earliest%20forms,livestock%2C%20long%20before%20literate%20societies.)> accessed 24 march 2024

<sup>2</sup> ‘History of Trademarks’ (*Respect for Trademarks*) <<https://respectfortrademarks.org/tricks-of-the-trademark/history-of-trademarks/>> accessed 24 march 2024

Egypt some 6,000 years ago distinctive symbols were utilized by stonecutters and on quarries to identify the source of stones and the workers responsible laying the groundwork for the later marketing of products.<sup>3</sup> This practice was not unique to Egypt; evidence from ancient China, Greece, and Rome also indicates the use of marked goods to signify origin and quality demonstrating an early grasp of branding principles. Distinctive signs used by ancient Egyptians to mark stone origins; similar practices noted in China, Greece, and Rome.<sup>4</sup>



Figure - 2<sup>5</sup>

The Middle Ages saw a significant rise in trademark usage as trade expanded across Europe. Merchants and craftsmen began to mark their goods as a guarantee of quality with some laws supporting this practice. The ‘Assize of Bread and Ale’ in 1266 in England is one of the earliest examples of trademark legislation requiring bakers to stamp their bread. This period also saw the widespread use of merchants’ marks throughout Europe serving as early precursors to today’s trademarks by denoting product quality and source. Medieval legislation like England’s ‘Assize of Bread and Ale’ required goods marking merchants’ marks symbolized product quality.<sup>6</sup>

A critical shift in trademarks’ perception occurred with their recognition as property. A notion reinforced by the introduction of severe penalties for trademark infringement from the 13th century onward. French legislation from the 14th to 16th centuries prescribed severe penalties for trademark infringement including mutilation and death for those who caught selling fake wine, underscoring the

<sup>3</sup> Olivier Pierre, ‘A History of Trademarks: From the Ancient World to the 19th Century’ (*WIPO*, 6 December 2021) <[https://www.wipo.int/podcasts/en/madrid/transcripts/international\\_trademark\\_system\\_talk\\_01.html#:~:text=Some%20of%20the%20earliest%20forms,livestock%2C%20long%20before%20literate%20societies.](https://www.wipo.int/podcasts/en/madrid/transcripts/international_trademark_system_talk_01.html#:~:text=Some%20of%20the%20earliest%20forms,livestock%2C%20long%20before%20literate%20societies.)> accessed 24 march 2024

<sup>4</sup> Robert Jones, ‘The history of branding’ (*Oxford Academic*, 22 June 2017), <<https://doi.org/10.1093/actrade/9780198749912.003.0004>> accessed 23 March 2024

<sup>5</sup> ‘History of Trademarks’ (*Respect for Trademarks*) <<https://respectfortrademarks.org/tricks-of-the-trademark/history-of-trademarks/>> accessed 24 march 2024

<sup>6</sup> Christopher Dyer, ‘A simple food with many meanings: bread in late medieval England’ (2023) 49(5) *JOURNAL OF MEDIEVAL HISTORY* <<https://doi.org/10.1080/03044181.2023.2250947>> accessed 24 march 2024



increasing importance of trademarks.<sup>7</sup>

A pivotal moment in the history of trademark law was the transformation of the conceptualization of trademarks from merely a form of communication to being recognized as a form of property. This shift occurred primarily in the second half of the 19th century in English law without a simultaneous expansion of rights. For instance, in the 1870s or 1880s English law did not extend trademark rights to the use of the protected sign on dissimilar goods. This raises questions about the transformation in the meaning of property rights over time and its impact on trademark protection.<sup>8</sup>

In the United States, trademark law has undergone notable changes, especially towards the end of the 20th century. This period saw a strengthening of trademark laws, including modifications that protected trademark holders against ‘dilution’ or loss of value due to actions of non-competitors. This shift is significant in understanding the changing perspectives and policies surrounding trademarks in the context of intellectual property rights.<sup>9</sup>

The history of trademark law is characterized by its dynamic evolution, shaped by economic, cultural, and legal shifts. The conceptualization of trademarks as property, the strengthening of trademark laws, international conflicts arising from digital commerce and the diverse interpretations across legal systems all contribute to the complex tapestry of trademark law’s history.

### **1.1.2 Purpose of trademark**

Trademarks serve multiple essential purposes in the realm of commerce and consumer protection. Traditionally, the primary purpose of a trademark is to protect against consumer confusion when selecting products or services ensuring that consumers can reliably identify the source or brand of a

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<sup>7</sup> Dennemeyer & Associates ‘The Evolution of Trademarks - from Ancient Egypt to Modern Times’ (*Dennemeyer*, 06 December 2019) <<https://www.dennemeyer.com/ip-blog/news/the-evolution-of-trademarks-from-ancient-egypt-to-modern-times/>> accessed 24 march 2024

<sup>8</sup> Lionel A. F. Bently, ‘From Communication to Thing: Historical Aspects of the Conceptualisation of Trade Marks as Property’ (2007) *TRADEMARK LAW AND THEORY: A HANDBOOK OF CONTEMPORARY RESEARCH* <<https://doi.org/10.4337/9781848441316.00006>> accessed 24 march 2024

<sup>9</sup> Thomas S. O’Connor, ‘Patents, Copyrights, and Trademarks in the Early Twenty-First Century: The New Relevance of Some Old Concepts of Intellectual Property Rights’ (2015) 13 *Journal of Nonprofit & Public Sector Marketing* 37 - 150 <[https://doi.org/10.1300/J054v13n01\\_08](https://doi.org/10.1300/J054v13n01_08)> accessed 24 march 2024

product. This protection extends to safeguarding the goodwill associated with a brand and preventing trade diversion through commercial misrepresentations.<sup>10</sup>

Trademarks encompassing words, signs, symbols, or combinations thereof, play a pivotal role in enabling consumers to distinguish between goods from different sources. This distinction is critical in markets where multiple producers offer similar or identical goods, thereby helping consumers make informed choices based on their preferences or past experiences.<sup>11</sup> Trademarks are instrumental in forming and maintaining consumer preferences as they often represent not just the product but also the quality and reputation associated with it. The creation and promotion of goods under a trademark require significant marketing efforts and costs thereby necessitating legal protection through registration to safeguard the interests of the trademark owners.

In the context of global marketing and international trade, trademarks acquire an added dimension of attracting public attention and influencing consumer behaviour. This aspect emphasizes the economic value of trademarks in attracting consumers and necessitates that firms manage and protect them comparably to other significant assets.<sup>12</sup> The translation and cultural adaptation of trademarks also highlight their role in reflecting national cultures and creating a desired advertising effect to resonate with target customers across different cultural contexts.

Trademarks are essential tools for distinguishing products, building and maintaining consumer trust and embodying the quality and reputation of the goods and services they represent playing a crucial role in modern enterprise management and global commerce.

### **1.1.3 Importance of trademark**

Trademark law plays a crucial role in the modern market economy by offering vital protection for both businesses and consumers. It encompasses specific provisions dealing with the protection of distinctive signs, which significantly impact innovation and ensure the social value of trademark protection systems. The importance of adopting adequate policies to safeguard trademarks cannot be

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<sup>10</sup> Joshua Clowers, 'On International Trademark and The Internet: The Lanham Act's Long Arms' (2006) 13(4) *Richmond Journal of Law and Technology* <<https://scholarship.richmond.edu/jolt/vol13/iss1/5>> accessed 24 march 2024

<sup>11</sup> Eugenia Baroncelli, Carsten Fink and Beata Smarzynska Javorcik, 'The Global Distribution of Trademarks: Some Stylised Facts' (2005) 28 *The World Economy* 765 <<http://dx.doi.org/10.1111/j.1467-9701.2005.00706.x>> accessed 24 march 2024

<sup>12</sup> Shahbaz Akhtar, 'Trips Agreement – World Trade Organization' (*SSRN*, 16 August 2021) <<https://doi.org/10.2139/ssrn.3905761>> accessed 24 march 2024

overstated as it supports both the creative endeavours of businesses and the informed choices of consumers.<sup>13</sup>

Trademarks have gained increased significance especially with the advent of the internet. Businesses invest heavily in their trademarks evident in the substantial funds allocated to develop and protect their brand identities. Trademark law facilitates this by granting protection against unauthorized use of a mark thereby safeguarding the business's reputation and consumer trust.<sup>14</sup> Moreover, the legal protection of unregistered trademarks is equally vital as it secures the rights and interests of enterprises. Trademark law plays a critical role in establishing brand identity securing business investments and safeguarding consumer interests.

## 1.2 Non-Conventional Trademark

**Aishwarya Vatsa** (2019) describes non-conventional trademarks as marks that '*employ senses other than our eyes and have gained popularity and acceptance in various countries*'. They perform the same function as conventional trademarks, which is to facilitate profit and strengthen the identity of a business, despite the challenges in registration due to their non-visual nature.<sup>15</sup> **A. Setyawan** (2017) defines non-traditional (non-conventional) trademarks as '*Marks that develop due to business demands, encompassing sounds, scents, three-dimensional shapes, and holograms*'.<sup>16</sup> **Lisa P. Ramsey** (2018) argues that '*Non-traditional trademarks such as product configurations, colors, scents, and sounds, convey expression protected by freedom of expression rights*'. These marks not only communicate source-identifying information but may also convey inherently valuable messages unrelated to the trademark owner.<sup>17</sup>

Non-conventional trademark law is an evolving field responding to the dynamic nature of communication and marketing strategies. They represent a shift from traditional symbols to more immersive and sensory forms of brand identification such as sounds, scents, and three-dimensional

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<sup>13</sup> Michael Grynberg, 'Trademark Law' (2023) *SSRN Electronic Journal* <<https://doi.org/10.2139/ssrn.3894036>> accessed 24 march 2024

<sup>14</sup> Jonathan O. Nilsen, 'Mixing Oil with Water: Resolving the Differences between Domain Names and Trademark Law' (2002) 1(1) *Journal of High Technology Law* 47

<sup>15</sup> Aishwarya Vatsa, 'Subject Matter and Pre-Requisites for Protection of Non-Conventional Trademark' (2019) 8(1) *Christ University Law Journal* <<https://doi.org/10.12728/CULJ.14.3>> accessed 24 march 2024

<sup>16</sup> Andry Setyawan, Dewi Sulistianingsih and Ivan Bhakti Yudistira, 'Non-Traditional Trademarks in Indonesia: Protection under the Laws and Regulations (An Intellectual Property Law)' (2017) 2(2) *Journal of Indonesian Legal Studies* 123-130 <<https://doi.org/10.15294/jils.v2i02.19443>> accessed 24 march 2024

<sup>17</sup> Lisa P. Ramsey, 'Non-Traditional Trademarks and Inherently Valuable Expression' (2018) *Intellectual Property: Trademark Law eJournal* <<https://doi.org/10.1093/oso/9780198826576.003.0018>> accessed 24 march 2024

shapes. Contemporary international trademark law now recognizes non-traditional signs, such as sound, scent, and holograms as trademarks in international trade. The development of these non-traditional trademarks reflects a shift from traditional word, symbol, or design marks aiming to utilize sensory appeal to distinguish products in the marketplace.<sup>18</sup> Although these types of trademarks have gained popularity their statutory recognition often faces hurdles due to difficulties in graphical representation and description.<sup>19</sup>

Various countries have started to recognize and provide legal protection for non-conventional trademarks. For instance, the United States has included non-conventional marks under its trademark protection umbrella, while countries like India are still navigating the complexities involved in such an expansion. The prerequisites for registering these marks are evolving reflecting a broader understanding of trademarks in the global market.<sup>20</sup>

In Indonesia, for example, non-traditional trademarks such as sound, scent, and three-dimensional marks are acknowledged in legislation, but the implementation of regulations and the development of necessary facilities and human resources still lag behind more developed jurisdictions.<sup>21</sup>

Moreover, non-traditional trademarks also raise important questions regarding competition policy. The aggressive enforcement of both traditional and nontraditional marks may lead to significant foreclosure effects indicating a need for balancing trademark rights with competitive market dynamics.<sup>22</sup> Non-conventional trademark law represents an important adaptation to modern marketing needs expanding the scope of trademark protection to encompass a variety of sensory and non-traditional signs. This evolution underscores the importance of continual legal development to accommodate the changing landscape of trade and commerce.

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<sup>18</sup> Qian Zhan, 'The International Registration of Non-traditional Trademarks: Compliance with the TRIPS Agreement and the Paris Convention' (2016) 16(1) *World Trade Review* 111-140 <<https://doi.org/10.1017/S1474745616000392>> accessed 24 march 2024

<sup>19</sup> Reshma H G, 'Non-Conventional Trademarks: A Legal Analysis' (2022) 8(4) *International Journal of Legal Developments & Allied Issues* 1-11 <<https://doi.org/10.55662/ijldai.2022.8401>> accessed 24 march 2024

<sup>20</sup> Aishwarya Vatsa, 'Subject Matter and Pre-Requisites for Protection of Non-Conventional Trademark' (2019) 8(1) *Christ University Law Journal* <<https://doi.org/10.12728/CULJ.14.3>> accessed 24 march 2024

<sup>21</sup> Andry Setyawan, Dewi Sulistianingsih and Ivan Bhakti Yudistira, 'Non-Traditional Trademarks in Indonesia: Protection under the Laws and Regulations (An Intellectual Property Law)' (2017) 2(2) *Journal of Indonesian Legal Studies* 123-130 <<https://doi.org/10.15294/jils.v2i02.19443>> accessed 24 march 2024

<sup>22</sup> Kexin Li, 'Coordinating Extensive Trademark Rights and Competition Policy' (2013) *American Antitrust Institute Working Paper No. 13-04* <<https://doi.org/10.2139/ssrn.2231558>> accessed 24 march 2024

### 1.2.1 Importance in brand Building and importance

Non-conventional trademarks play a pivotal role in brand building and are increasingly important in modern marketing strategies. These unique forms of trademarks enable brands to connect with consumers on a more personal and experiential level creating a deeper brand association and loyalty.<sup>23</sup>

In the context of globalization and digitalization, non-conventional trademarks have become essential tools for distinguishing products and services in a crowded market. They provide unique benefits to rights holders by enhancing brand visibility and distinctiveness thereby adding to the competitive edge of the brand.<sup>24</sup>

It is crucial for safeguarding the creative efforts of businesses in developing their unique brand identities. This protection also encourages innovation in marketing and branding strategies allowing brands to exploit various sensory experiences for brand differentiation.<sup>25</sup> Moreover, non-conventional trademarks have redefined the role of brands in the service-dominated economy. By extending beyond mere logos or symbols, these trademarks become integral to the overall consumer experience, thus playing a critical role in building and maintaining brand equity.<sup>26</sup>

### 1.3 Olfactory Mark as Non-Conventional Trademark

An olfactory mark also known as a scent mark is an innovative type of trademark that utilizes a unique scent to identify and distinguish a product or service in the marketplace. Unlike traditional visual or auditory trademarks olfactory marks appeal directly to the sense of smell offering a distinctive way for brands to connect with consumers on a sensory level.<sup>27</sup> This form of trademark represents a departure from conventional trademarks.

The importance and benefits of olfactory marks lie in their ability to create a memorable brand

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<sup>23</sup> Katya Assaf-Zakharov, 'Non-Traditional Trademark Protection as (Non-Traditional) Means of Cultural Control' (2018) *The Protection of Non-Traditional Trademarks* 363–382 <<https://doi.org/10.1093/OSO/9780198826576.003.0019>> accessed 24 march 2024

<sup>24</sup> Constantin Anechitoae and Cornel Grigorum, 'The Trademark and Its Dismemberments' (2010) 10 *Ovidius University Annals: Economic Sciences Series* 863-864

<sup>25</sup> Andry Setyawan, Dewi Sulistianingsih and Ivan Bhakti Yudistira, 'Non-Traditional Trademarks in Indonesia: Protection under the Laws and Regulations (An Intellectual Property Law)' (2017) 2(2) *Journal of Indonesian Legal Studies* 123-130 <<https://doi.org/10.15294/jils.v2i02.19443>> accessed 24 march 2024

<sup>26</sup> Philipp Klaus and Stan Maklan, 'The role of brands in a service-dominated world' (2007) 15 *Journal of Brand Management* 115-122 <<https://doi.org/10.1057/PALGRAVE.BM.2550121>> accessed 24 march 2024

<sup>27</sup> Dev Saif Gangjee, 'Non-Conventional Trade Marks in India' (2010) 22(1) *National Law School of India Review* 67-96

experience. Scents are closely linked to memory and emotion, making them powerful tools for brand recognition and consumer loyalty. An effective olfactory mark can evoke specific feelings or memories, enhancing the overall appeal of a product and fostering a deeper emotional connection with the brand.<sup>28</sup> This unique form of trademark can serve as a significant differentiator in competitive markets, where traditional forms of branding may not be sufficient.<sup>29</sup> Olfactory mark can provide valuable intellectual property protection securing a brand's unique sensory identity in the marketplace.<sup>30</sup>

### 1.3.1 Olfactory marks in the commercial industry

Notable examples of olfactory marks in the industry demonstrate the creative use of scents in branding and marketing. One of the earliest and most famous examples is the scent of Play-Doh, a distinctive smell that was registered as a trademark. This unique slightly sweet and salty aroma associated with the modelling compound is immediately recognizable and evokes nostalgia and brand identity.<sup>31</sup>

Another example is the floral fragrance of Verizon Wireless stores, a scent specifically designed and trademarked to enhance customer experience and reinforce brand recognition in a subtle yet powerful way. This innovative approach to olfactory branding showcases the potential of scents to create a memorable and unique brand environment.<sup>32</sup>

Dutch fashion house Viktor & Rolf trademarked the smell of freshly cut grass for their boutique, using it to create a distinctive and inviting atmosphere. This demonstrates how olfactory marks can be used creatively to evoke specific emotions and associations, enhancing the overall consumer experience. Singapore Airlines is known for its signature scent, Stefan Floridian Waters used on its hot towels and flight attendants' perfume. This scent has become a part of the airline's branding, creating a unique and pleasant experience for passengers and distinguishing the airline from its competitors.

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<sup>28</sup> Marisa Sanfilippo, 'The Smells That Make Shoppers Spend More' (*Business News Daily*, 24 January 2024) <<https://www.businessnewsdaily.com/3469-smells-shoppers-spend-more.html>> accessed 24 march 2024

<sup>29</sup> Nikhil Verma, 'Olfactory Mark Is One Such Non-Conventional Trademark In India : A Legal Enigma' (*Trademark - India*, 30 March 2022) <<https://www.mondaq.com/india/trademark/1177138/olfactory-mark-is-one-such-non-conventional-trademark-in-india--a-legal-enigma>> accessed 24 march 2024

<sup>30</sup> Arka Majumdar, Subhojit Sandhu and Sunandan Majumdar, 'The Requirement of Graphical Representability for Non-Conventional Trademark' (2006) 11 *Journal of Intellectual Property Rights* 313

<sup>31</sup> Irene Calboli, 'Hands Off "My" Colors, Patterns, and Shapes! How Non-Traditional Trademarks Promote Standardization and May Negatively Impact Creativity and Innovation' (2018) *The Protection of Non-Traditional Trademarks* <<https://doi.org/10.1093/OSO/9780198826576.003.0016>> accessed 24 march 2024

<sup>32</sup> Biswaksen Patnaik, Andrea Batch and Niklas Elmqvist, 'Information Olfaction: Harnessing Scent to Convey Data' (2019) 25(1) *IEEE Transactions on Visualization and Computer Graphics* 726-736 <<https://doi.org/10.1109/TVCG.2018.2865237>> accessed 24 march 2024

These examples illustrate the growing importance of olfactory marks in the industry where innovative uses of scent are increasingly recognized as a powerful tool for branding and customer engagement.

### 1.3.2 Importance of olfactory mark in Branding

The significance of scent in consumer perception and branding, particularly in relation to olfactory trademarks, is profound and multifaceted. In the survey conducted through questioner **71.5%** people opined that Scent influence perceptions, evaluations, and behaviors in commercial environments of people. It was observed through survey that **62.5%** people believed that they can differentiate and associate products through smell.

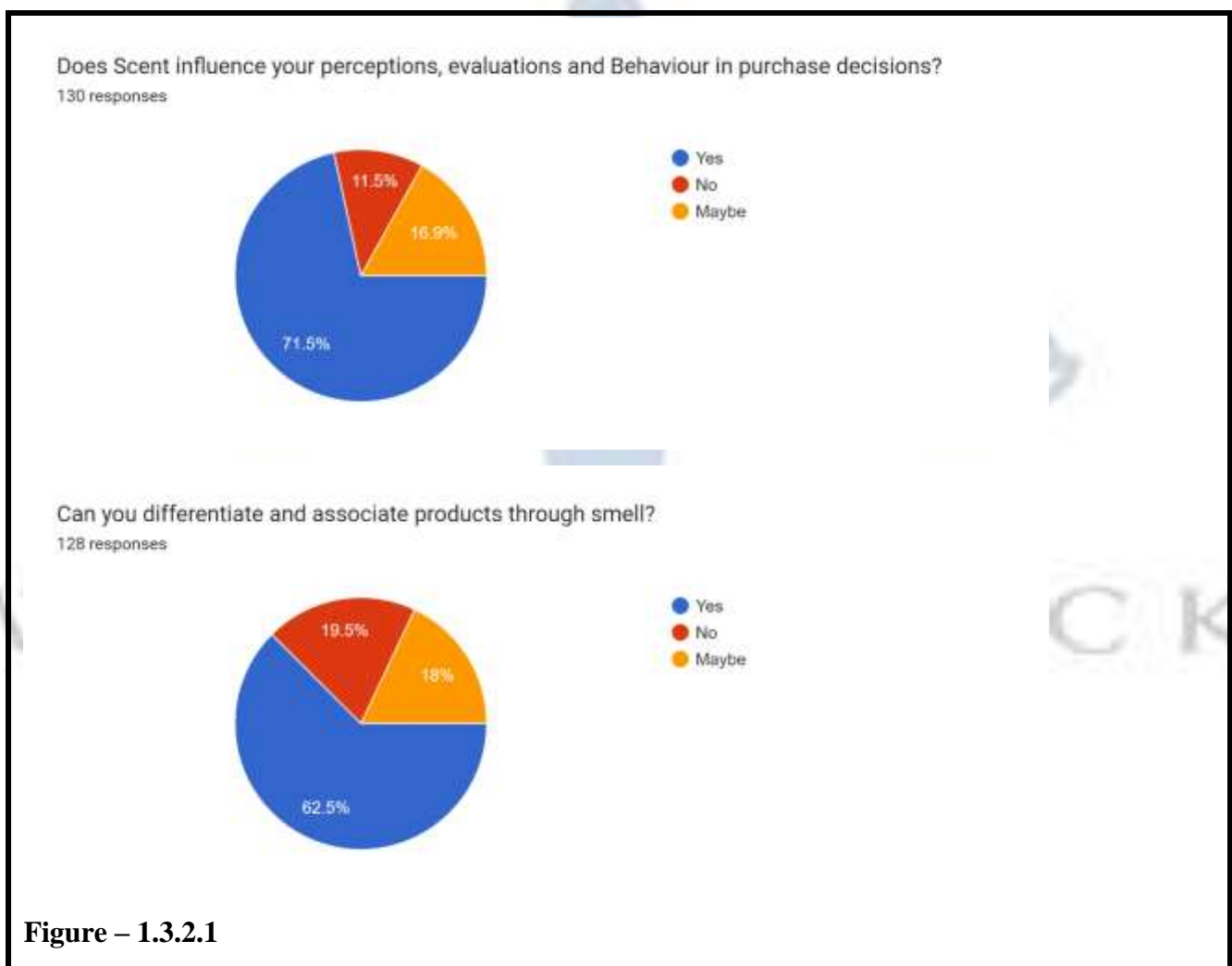
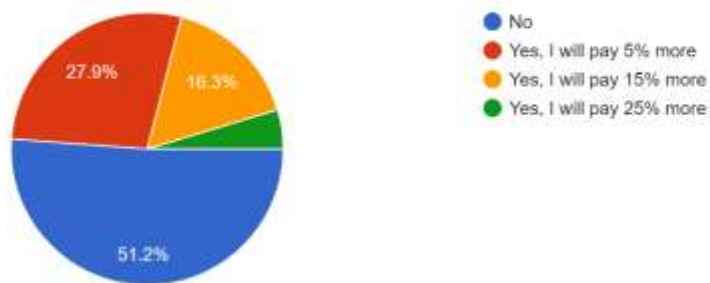


Figure – 1.3.2.1

Will you pay a premium price for the products having distinct smell?

129 responses



**Figure – 1.3.2.2**

In a study carried out through a survey among a group of people regarding their willingness to pay a premium price for the products having distinct smell, it was revealed that 27.9 % of the respondents were willing to pay more than 5% for products having distinct smell. It was observed that 16.3% people were willing to pay 15% more for having distinct smell. This significant majority indicates a strong consumer preference and perceived value for products having distinct smell.

The significance of scent in consumer perception and branding particularly in relation to olfactory trademarks is profound and multifaceted. This branding also includes non-profit settings like museums. The use of congruent scents in such environments significantly impacts consumer perceptions and their intention to revisit, indicating the powerful role of scent in creating memorable experiences.

Furthermore, ambient scents in consumer environments such as shopping malls can have a profound effect on consumers' emotions and behaviour. The presence of an ambient scent has been reported to positively influence factors related to mall perception and consumers' emotions, although it may not always directly affect behavioral variables like purchasing decisions.<sup>33</sup>

The congruence of scent with a brand's image plays a crucial role in consumer reactions. When a scent is perceived as congruent with the brand image consumer reactions in the store are more favourable. This implies that for effective scent marketing, it is not sufficient to use a scent that merely

<sup>33</sup> Christoph Teller and Charles Dennis, 'The effect of ambient scent on consumers' perception, emotions and behaviour: A critical review' (2012) 28 *Journal of Marketing Management* 14-36  
<<https://doi.org/10.1080/0267257X.2011.560719>> accessed 24 march 2024



'smells good'; it must align with the brand's identity and image.<sup>34</sup> This approach not only creates an experiential environment but also aids in converting potential customers into buyers by associating a specific aroma with the brand in the consumer's memory.<sup>35</sup>

In summary, the integration of scents into branding and marketing strategies, particularly as olfactory trademarks, significantly influences consumer perception and behavior. The effectiveness of such strategies lies in the careful selection and congruence of scents with the brand image thereby enhancing the consumer experience and strengthening brand identity.

### **1.3.3 Cultural and psychological aspects of scent in trademarks**

The cultural and psychological aspects of scent in trademarks are deeply intertwined with human perception, memory, and emotional response, influencing consumer behavior in profound ways. The economic rationale for extending protection to smell marks is rooted in their ability to serve as powerful brand-identifying tools leveraging the unique connection between scent and memory to enhance brand recognition and loyalty.<sup>36</sup>

Scented scenographics in museums and similar environments highlight the role of scent as a tool for creating immersive, multisensory experiences. These scents often carry cultural and historical significances contributing to the meaning and understanding of the displayed items and enhancing the overall visitor experience.<sup>37</sup>

Scent's impact on memory and emotion in virtual environments further underscores its powerful influence on human perception. When appropriately matched to an environment or experience scents can significantly enhance recall and emotional engagement thereby becoming a valuable tool in branding and marketing.<sup>38</sup>

These psychological aspects are critical in the effective use of scent in branding and marketing

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<sup>34</sup> Karim Errajaa and others, 'Scent marketing: linking the scent congruence with brand image' (2020) 33 *International Journal of Contemporary Hospitality Management* 402-427 <<https://doi.org/10.1108/IJCHM-06-2020-0637>> accessed 24 march 2024

<sup>35</sup> Shuvam Chatterjee, 'Olfactory branding: a new trend for defining brands through smell - a case of ITC Sonar Hotel in Kolkata, India' (2015) 8 *International Journal of Trade and Global Markets* 196-206 <<https://doi.org/10.1504/ijtg.2015.071603>> accessed 24 march 2024

<sup>36</sup> Ashitha Bhagwan, Namita Kulkarni and Padmanabha Ramanujam, 'Economic Rationale for Extending Protection to Smell Marks' (2007) *IO: Productivity, Innovation & Technology eJournal* <<https://doi.org/10.2139/ssrn.1027281>> accessed 24 march 2024

<sup>37</sup> Viveka Kjellmer, 'Scented Scenographics and Olfactory Art: Making Sense of Scent in the Museum' (2021) 90 *Konsthistorisk tidskrift/Journal of Art History* 72-87 <<https://doi.org/10.1080/00233609.2020.1775696>> accessed 24 march 2024

<sup>38</sup> R. Tortell and others, 'The effects of scent and game play experience on memory of a virtual environment' (2007) 11 *Virtual Reality* 61-68 <<https://doi.org/10.1007/s10055-006-0056-0>> accessed 24 march 2024

strategies, enabling brands to create deeper and more meaningful connections with their audience.

### **1.3.4 Impact of technological advancements on olfactory trademarks**

Technological advancements have significantly impacted the realm of olfactory trademarks in trademark law offering new possibilities and challenges. The growing demand for the registration of smell trademarks and olfactory marks aligns with advancements in science and biotechnology. These technological developments raise important questions about the ability of legal frameworks to keep pace with technological progress particularly in the protection and registration of innovative scent-based trademarks.<sup>39</sup>

### **1.3.5 Importance of studying olfactory marks as non-conventional trademarks in contemporary commerce**

The growing global commercial turnover of goods and services demands individualization methods that extend beyond traditional trademarks to include olfactory marks. This approach reflects the evolving nature of brand differentiation and consumer engagement in a competitive marketplace.

The abolition of the requirement for graphic representation in the registration of non-traditional trademarks has been pivotal for olfactory marks. This change addresses the challenge of representing scents graphically thereby facilitating their registration and protection as trademarks. It highlights the need to adapt legal frameworks to keep pace with the demands of modern marketing strategies.

Olfactory marks as non-conventional trademarks is essential in contemporary commerce due to their ability to offer distinctive brand experiences and create lasting impressions on consumers. This field is crucial for understanding and leveraging the potential of sensory branding in a rapidly evolving commercial landscape.

## **1.4 Conclusion - Conventionalizing non-conventional Trademarks**

The evolution of trademark law to include non-conventional trademarks marks a significant shift in the understanding and application of intellectual property protections. Initially, trademarks were confined to symbols, words, and logos that could be visually perceived and easily recognized. However, the advent of non-conventional trademarks, which include sensory marks such as sounds,

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<sup>39</sup> Sunil Thacker, 'Don't Steal My Smell' (2014) Court Uncourt Vol. 2  
<[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2456304](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2456304)> accessed 24 march 2024

scents, and even tactile sensations, has expanded the parameters of what can be legally protected. This expansion is not merely a legal formality but it represents a deeper recognition of the diverse ways consumers interact with and remember brands.

Non-conventional trademarks have transitioned from being an innovative outlier to a standard component of brand strategy due to several key factors. First, the global marketplace has become increasingly saturated, prompting businesses to seek unique identifiers that set their products and services apart from competitors. Non-conventional trademarks cater to this need by employing the human senses in ways traditional marks cannot, creating memorable and distinctive brand experiences.<sup>40</sup>

Legal systems around the world have recognized and adapted to this shift. Countries have gradually amended their trademark laws to accommodate the registration and protection of non-conventional marks, acknowledging their efficacy in brand identification and consumer engagement. The legal recognition of non-conventional trademarks reflects a broader understanding of brand interaction as a multi-sensory experience that extends beyond visual symbols to include sounds, smells, and even textures.<sup>41</sup>

The journey towards widespread acceptance of non-conventional trademarks has not been without challenges, particularly concerning their registration. Traditionally, trademarks required graphical representability, posing a hurdle for non-visual marks. However, the evolving legal landscape has begun to address these challenges, offering new methods for representing and protecting such marks. This adaptation underscores a shift in legal paradigms towards greater inclusivity and flexibility, aligning trademark law with the realities of modern marketing and brand differentiation.<sup>42</sup>

The economic rationale for protecting non-conventional trademarks has gained recognition. Trademarks serve as public goods that enrich the market with valuable information about products and their origins. By extending protection to non-conventional trademarks, the law acknowledges their role in contributing to this public stock of information, enhancing consumer choice and market

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<sup>40</sup> Aishwarya Vatsa, 'Subject Matter and Pre-Requisites for Protection of Non-Conventional Trademark' (2019) 8(1) Christ University Law Journal <<https://doi.org/10.12728/CULJ.14.3>> accessed 24 march 2024

<sup>41</sup> Andry Setyawan, Dewi Sulistianingsih and Ivan Bhakti Yudistira, 'Non-Traditional Trademarks in Indonesia: Protection under the Laws and Regulations (An Intellectual Property Law)' (2017) 2(2) Journal of Indonesian Legal Studies 123-130 <<https://doi.org/10.15294/jils.v2i02.19443>> accessed 24 march 2024

<sup>42</sup> Ilham Azenal Sacabrata, 'GRAPHICAL REPRESENTATION IN THE FORM OF LABEL MEREK/MARK ETIQUETTE IN RELATION WITH NON-CONVENTIONAL TRADEMARKS REGISTRATION IN INDONESIA' (2019) 9(1) Indonesia Law Review <<https://doi.org/10.15742/ILREV.V1N9.482>> accessed 24 march 2024

efficiency.<sup>43</sup>

In conclusion, non-conventional trademarks are no longer viewed as an exception within the realm of intellectual property law but as an essential and standard aspect of trademark protection. This shift reflects a nuanced understanding of consumer behaviour, the creative demands of modern branding and a legal system that evolves to accommodate the changing landscape of commerce and communication.



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<sup>43</sup> David W. Barnes, 'A New Economics of Trademarks' (2006) 5(1) *Northwestern Journal of Technology and Intellectual Property* <<https://doi.org/10.2139/ssrn.886045>> accessed 24 march 2024