

# *Analysis of Legal Protection of Non-traditional Trademarks from a Global Perspective*

## *—Taking Scent Trademarks as an Example*

Xinyu Mao<sup>1,a,\*</sup>

<sup>1</sup>College of Humanities and Law, Wuhan Donghu University, Wuhan, 430200, China

a. 2621575455@qq.com

\*corresponding author

**Abstract:** With the constant advancement of the economy and technology, especially the development of high-tech technology, the traditional trademark can no longer meet the needs of social and enterprise development. From traditional visual trademarks to three-dimensional trademarks, sound marks, and even scent marks, non-traditional trademarks are playing an increasingly important role in transactions. Therefore, the legal protection of non-traditional trademarks is particularly important. By collecting and reading the relevant references and materials, this paper adopts the methods of literature analysis, comparison method, and case analysis to analyze of Legal protection of non-traditional trademarks from a global perspective—taking scent trademarks as an example. The paper points out the current situation in the protection of non-traditional trademarks, taking scent marks as an example, and puts forward some feasible suggestions, such as: Reference the "staff " representation method, Promoting scientific and technological progress, and Scent branding prompts in the product. It can be concluded that the registration and protection systems of scent trademarks in various countries are not perfect, they can be shown in the strict requirements for registrable trademarks regarding the representation of odor, the distinctiveness of trademark registration, and the functional of marks. Countries should pay more attention to them. The study suggests that it is necessary to improve the scent trademark legislation, which is conducive to better protection of intellectual property rights, encourage innovation of enterprises, and safeguard the interests of enterprises.

**Keywords:** Scent trademark, legal protection, non-traditional trademark, protection suggestion

## 1. Introduction

In the ongoing development of worldwide business turnover of labor and products, there are expanding requests for methods of individualization. Regarding customer reliability, a few organizations have chosen to go past drawing. Why not keep clients through their noses? As needs be, the aroma showcasing industry is blasting. Jennifer Dublino, VP of Advancement at Fragrance World Occasions, comments that "smell is one of the most extraordinary of human detects. Fragrance enters the limbic framework and sidesteps the mental and consistent points of view in general and

goes straightforwardly to the close to home and memory region of the cerebrum [1]." Companies like ScentAir have been established solely to assist retail establishments in creating fragrances that are most in line with their brand's image and goals to boost investment returns [2]. Fragrances' solid connections to memory and feelings can make them a strong marking instrument. An investigation discovered that players burned through 45% more cash when there was a botanical fragrance present around a gaming machine than when there was not [3]. 400 customers, who were reviewed in the wake of shopping in Nike, detailed that a "lovely surrounding fragrance" worked on not just their assessment of the store and its items but also the probability they would shop there again [4]. A few common freedoms activists have even recommended that utilizing fragrances to distinguish products could be valuable to individuals who are outwardly debilitated and can't receive the rewards of visual brand names [5]. Overall, scents appear to both attract customers and increase their affinity to a particular good or service from a specific source, much like a mesmerizing logo or catchy slogan. Therefore, the protection of non-traditional trademarks is particularly important. The protection of odor trademarks conforms to the needs of economic globalization and scientific and technological development. However, the legal protection of odor trademarks in various countries' legal systems is still blank. Therefore, it is urgent to find out the related issues of odor trademarks, to make the relevant legislation of trademarks more international and contemporary. Through comparison and case analysis, this essay expounds on the dilemma of the protection of non-traditional trademarks represented by odor trademarks and suggests measures.

## **2. Research the basis of scent trademark protection**

Trademarks are methods for individualization in business courses that permit a possible buyer to recognize and recognize an appealing item or administration. Physiologists note that the main effect on human memory is applied by the compound organic faculties through smell, which is a long way in front of sight and hearing among human detects. Science demonstrates that olfactory prompts are more successful than obvious signs at setting off memory [6]. Fragrances' solid connections to memory and feelings can make them a strong marking instrument. An investigation discovered that players burned through 45% more cash when there was a flower fragrance present around a gaming machine than when there was not [7]. 400 customers, who were reviewed in the wake of shopping in a Nike store, detailed that a "wonderful encompassing fragrance" worked on not just their assessment of the store and its items but additionally the probability they would shop there again [8]. A few basic liberties activists have even proposed that utilizing fragrances to recognize merchandise could be helpful to individuals who are outwardly weakened and can't receive the rewards of visual brand names [9]. Generally speaking, fragrances appear to both draw in clients and increment their proclivity to a specific decent or administration from a particular source, similar to a hypnotizing logo or snappy trademark.

A fragrance's capacity to make solid marking ties and increment buyer loyalty upholds the hidden reason for brand name regulation: to stretch out lawful insurances to source pointers. However, even though scents can be useful source identifiers and make sense as trademarks, how scents are registered and protected varies greatly from country to country. A few nations, similar to China, don't allow fragrances to be reserved [10]. Other countries, including the United States, have determined that scent marks can be registered, but the registration requirements vary. Several nations currently require (or until very recently have required) a scent to be graphically represented or visually perceptible to be registrant.

### **3. Current situation of scent trademark protection**

#### **3.1. The practical problems of scent mark registration**

##### **3.1.1. Properties of odor**

Odor has the characteristics of natural diffusion and volatilization, which brings a series of problems for trademark registration and use, such as odor mixing, odor storage, odor dissipation, and so on. It cannot leave a consistent impression on the public like a visual sign, so it is not considered suitable for registration as a trademark.

The non-virtualization odor sign brings a greater challenge to the realization of its distinctiveness. Advertising campaigns are an important means for visual trademark holders to enhance the distinctiveness of their trademarks, but the non-virtualizable odor makes it almost impossible to publicize through virtual media and naturally loses the important means of obtaining distinctiveness.

##### **3.1.2. Defect in the human sense of smell**

Research has shown that the human body's sense of smell is very insensitive compared with sight and hearing. Compared to the many receptors in the body for vision and hearing, there is only one relevant olfactory receptor. Studies have shown that the human body can distinguish 26% or less of odor differences, that is, when there is more than 26% difference between different odors, the body can pick up the difference. Compared with the human auditory system, when the difference between the two sounds reaches 0.3%, the human auditory system can keenly perceive the difference. Another study, in which participants were shown one scent and then, a few seconds later, were asked to distinguish the first scent with only 70 percent accuracy, compared with 99.7 percent accuracy for two visual shapes. In addition, the olfactory sensitivity of individuals in the public group is also different, so the effectiveness of odor trademarks has to depend on the ability of customers to distinguish between different smells. In summary, all kinds of studies show that smell is not reliable compared with sight and hearing, so smell is not suitable for trademark registration.

#### **3.2. The legal issues of scent marks registration**

Smell marks are challenging to address. In addition to the fact that it is emotional, recording is difficult. For instance, the scent of Play-Doh has been used in commerce since 1955, and on Valentine's Day 2017, Hasbro filed a petition to safeguard the scent of the toy modeling compound [11]. Hasbro portrays the fragrance of Play-Doh as a "sweet, marginally musky, vanilla scent, with slight suggestions of cherry, joined with the smell of a salted, wheat-based mixture [12]." However, when reading this description, the scent that comes to mind could not even be Play-Doh. In like manner, if you sat a room brimming with individuals down with a holder of Play-Doh and requested them to give a sentence-long composed portrayal of its fragrance, each individual would presumably offer an alternate response. Describing a smell with written words is, at best, a wordsmithing approximation of what the smell is. Some scholars, like intellectual property practitioner Douglas Churovich, argue that "accurate scent descriptions cannot effectively be communicated through language [13]." That's why in many countries such as Brazil and India, scent marks cannot be registered because they are not the "visually perceptive distinctive sign" [14] and cannot be represented "graphically" [15].

Furthermore, uniqueness is likewise an insurance boundary. As indicated by the Brand name Manual of Looking at System ("TMEP"), an aroma can never be innately particular [16], and there is a significant measure of proof expected to lay out that an aroma or scent capabilities as an imprint [17]. On account of Myles Limited's Application, the candidate enlisted the scent brand name

"raspberry smell" for its fuel items. The application was dismissed for the absence of peculiarity. When the "raspberry's smell" is referenced, it is straightforwardly connected with a natural product by the customer, and the smell rules out the shoppers to contemplate the profound significance. The raspberry smell, as an exceptional natural product smell, can't be related to the candidate's fuel items. In addition, one of its characteristics is the raspberry scent that is produced when the product is burned. Shoppers will just view the smell as an improvement made by dealers to work on the nature of their items, and it doesn't have the capability of recognizing the wellspring of merchandise, so it can't meet the uniqueness necessities of brand name enlistment. What is more, the functionality of scent is also an important aspect that cannot be ignored. Take the United States, a country that has agreed to register odor trademarks. In the United States, it is not easy to obtain registered scent trademarks, and there are currently only thirteen active scent trademark registrations [18]. The recognition of scents as registrable trademarks began in *In re Clarke* when a woman named Celia Clarke began selling yarn that smelled of plumeria blossoms. The USPTO rejected Ms. Clarke's trademark application, arguing that consumers would not recognize the plumeria blossom scent as an "indicate[or] of origin" but would merely view it as a nice side effect of the product. In the initial rejection, the examining attorney cited a "competitive need for free access to pleasant scents or fragrances." Ultimately, the Trademark Trial and Appeal Board ("TTAB") held that the scent of plumeria blossoms functioned as a registrable mark for "sewing thread and embroidery yarn" because it found the scent was "not an inherent attribute or natural characteristic" of the yarn. *In re Clarke* established that scent trademarks are registrable if the scent is used in a nonfunctional manner. Scents that serve a utilitarian purpose, such as the scent of perfume, are functional and not registrable. All of the scents currently registered are considerably nonfunctional—for example, strawberry, cherry, and grape-scented lubricants for combustion engines.

#### **4. Suggestions for scent trademark protection**

##### **4.1. Reference "staff " representation method**

Both sound and smell are non-traditional and non-visible trademarks, which have certain references in the expression of ideas. In the cases of *Shield* and *Joost*, a "staff " approach is adopted for sound trademarks. *Four on a Musical Stave*—The trademarks consisted of the representation of the melody formed by the notes (graphically) transcribed on the stave; Four other trademarks consisted of the first nine notes of *Für Elise*. These details of the same in their form and manner of presentation in the application are provided below: The melody that was described was included in the trademark, as well as being played on a piano in one instance. The sequence of musical notes E, D#, E, D#, E, B, D, C, and A is included in three additional marks. The exchange marks comprised of the propagation of the tune shaped by the succession of notes. Two of the exchange marks enrolled by *Safeguard Imprint* comprised of the group *Kukelekuuuuu* (a likeness in sound recommending, in Dutch, a cockcrow); The Last mark comprised of a cockcrow and expressed: Sound imprint, the exchange mark comprises of the cockcrow as portrayed. For the enlistment of smell brand names, we can effectively attempt to order scent exhaustively and set a uniform reference standard.

##### **4.2. Promote scientific and technological progress**

Whether it's old workout clothes, a wet canine, or solid personal stench - - our minds are surprisingly great at disregarding unavoidable scents. A peculiarity of our olfactory framework is called adjustment, which increments center around new and compromising scents. For past purposes in our cerebrum, researchers accept a type of adjustment that can be utilized by A.I. to handle gigantic measures of information. Getting brain hardware from a natural product fly, researchers have planned a calculation to impersonate this neurobiological peculiarity, expecting to dive more deeply into

adjustment. Specialists figure this calculation could plan an electronic nose to track down contamination in urban areas or substance weapons in battle.

As Sarah Wells said: “Robots and ‘electronic noses’ that can sniff out chemical weapons and pollution may be coming soon, but our technology is not there yet [19].” It will be convenient if we have a machine or master some approaches that can analyze the composition of the odor specifically and describe it accurately. This is a useful solution to the problem that scents are difficult to represent.

### 4.3. Scent branding prompts in the product

In the sale of goods, some goods using odor trademarks may face the situation that there is no effective information on the packaging of goods, and consumers are not aware of the existence of odor trademarks. Refer to MGM’s “Lion’s Roaring” sound trademark, which displays its sound trademark with the words “Trade Mark” next to the lion’s head to remind viewers. Odor trademarks can imitate this form, and indicate the words “scent trademark” on the package of goods to serve as a reminder.

## 5. Conclusion

In conclusion, scent trademarks and other non-traditional trademarks are playing an increasingly important role in the world's economic activities, and the protection system of odor trademarks in various countries needs to be improved. This is an issue that needs the attention of the state and relevant institutions. At present, even if there are a few cases of registered odor trademarks in a few countries, the successful approval of odor trademarks is rare. This is not only because countries do not have a system for the registration of licensed scent trademarks (some countries explicitly prohibit the registration of odor trademarks, such as China, Brazil, etc.), but also because of the characteristics of odor and the human body's defects. As technology continues to improve, one day we could have a reliable type of robot to sort out scents for us. For now, a merely written description and scent sample are not enough to provide consistent judicial administration for the likelihood of confusion analyses, it is a good choice to learn from the above-mentioned “staff” representation method to more accurately and appropriately express the scent trademark. Since there are few cases of successful registration of odor trademarks and infringement of odor trademarks that can be found in the literature, the analysis of how to avoid infringement of scent trademarks in this paper is insufficient and needs to be improved. It is hoped that this paper can help to promote the legal protection of odor trademarks.

## References

- [1] Annie Pilon, *Want More Sales? Your Store Needs a Scent*, *SMALL BUSINESS TRENDS* (Nov. 3, 2014) (alteration in original), [https://smallbiztrends.com/2014/11/your-store-needs-a-scent.html?tr=sb\\_pop\\_tcs](https://smallbiztrends.com/2014/11/your-store-needs-a-scent.html?tr=sb_pop_tcs) [<https://perma.cc/ZLP9-MAR6>].
- [2] SCENTAIR, <https://scentair.com> [<https://perma.cc/7PFX-N2ZQ>].
- [3] Suzanne Bopp, *Now Smell This*, *SALON* (Sept. 17, 2008), [https://www.salon.com/2008/09/17/scent\\_marketing](https://www.salon.com/2008/09/17/scent_marketing) [<https://perma.cc/6KW8-WY96>].
- [4] Rym Bouzaabia, *The Effect of Ambient Scents on Consumer Responses: Consumer Type and His Accompaniment State as Moderating Variables*, 6 *INT’L J. MKT. STUD.* 155 (2014), <https://www.ccsenet.org/journal/index.php/ijms/article/view/33672> [<https://perma.cc/RW4J-HSFF>].
- [5] Raja Selvam, *What Is Smell Trademark or Scent Trademark? – With Examples*, *SELVAM & SELVAM* (Mar. 13, 2011), <https://selvams.com/blog/smell-trademark> [<https://perma.cc/HB7J-TFXP>].
- [6] Maaikje J. de Bruijn & Michael Bender, *Olfactory Cues Are More Effective than Visual Cues in Experimentally Triggering Autobiographical Memories*, 26 *MEMORY* 547 (2017), <https://www.tandfonline.com/doi/full/10.1080/09658211.2017.1381744> [<https://perma.cc/5UYH-LASC>].
- [7] Suzanne Bopp, *Now Smell This*, *SALON* (Sept. 17, 2008), [https://www.salon.com/2008/09/17/scent\\_marketing](https://www.salon.com/2008/09/17/scent_marketing) [<https://perma.cc/6KW8-WY96>].

- [8] Rym Bouzaabia, *The Effect of Ambient Scents on Consumer Responses: Consumer Type and His Accompaniment State as Moderating Variables*, 6 INT'L J. MKT. STUD. 155 (2014), <https://www.ccsenet.org/journal/index.php/ijms/article/view/33672> [<https://perma.cc/RW4J-HSFF>].
- [9] Raja Selvam, *What Is Smell Trademark or Scent Trademark? – With Examples*, SELVAM & SELVAM (Mar. 13, 2011), <https://selvams.com/blog/smell-trademark> [<https://perma.cc/HB7J-TFXP>].
- [10] *Trademark Procedures and Strategies: China*, WORLD TRADEMARK REV. (Mar. 29, 2017), <https://www.worldtrademarkreview.com/portfolio-management/trademark-procedures-and-strategies-china> [<https://perma.cc/C5FM-WRM9>].
- [11] *Id.*
- [12] Registration No. 5,467,089.
- [13] Douglas D. Churovich, *Scents, Sense or Cents?; Something Stinks in the Lanham Act*, 20 ST. LOUIS U. PUB. L. REV. 293, 312 (2001).
- [14] *Brazil Industrial Property Law*, 9.279, Art. 122 (2013), [https://www.jpo.go.jp/e/system/laws/gaikoku/document/index/brazil-e\\_industrial\\_property\\_law.pdf](https://www.jpo.go.jp/e/system/laws/gaikoku/document/index/brazil-e_industrial_property_law.pdf) [<https://perma.cc/3J4S-RTV4>].
- [15] *Potentiality of 'Smell' as a Trademark and its Limitations*, IPR LAW INDIA (Jan. 15, 2021), <https://iprlawindia.org/potentiality-of-smell-as-a-trademark-and-its-limitations> [<https://Perma.cc/N57U-W6DC>] (quoting Indian Trade Marks Act, Sec. 2 (1999)).
- [16] TMEP Chapter index, Chapter 1200: Substantive Examination of Applications 1202: Use of Subject Matter as Trademark.
- [17] *See In re Pohl-Boskamp GmbH & Co.*, 106 U.S.P.Q.2d 1042, 1052 (T.T.A.B. 2013) (noting the insufficiency of applicant's evidence of acquired distinctiveness in light of evidence that the use of peppermint scent by others in the relevant marketplace (i.e., pharmaceuticals) tends to show that such scents are more likely to be perceived as attributes of ingestible products than as indicators of source); *In re Owens-Corning Fiberglas Corp.*, 774 F.2d 1116, 1125 (Fed. Cir. 1985) (requiring concrete evidence that the mark is perceived as a mark to establish distinctiveness).
- [18] TRADEMARK ELEC. SEARCH SYS., [https://tmsearch.uspto.gov/bin/gate.exe?f=&login=&p\\_lang=english&p\\_d=trmk](https://tmsearch.uspto.gov/bin/gate.exe?f=&login=&p_lang=english&p_d=trmk) [<https://perma.cc/9L3D-7ELY>] (follow "Word and/or Design Mark Search (Free Form)" hyperlink; then search "6 [MD] and 'scent' and live [LD]").
- [19] Sarah Wells, *Robots that Can Sniff Out Chemical Weapons and Pollution Are Coming Soon—Study*, INVERSE, <https://www.inverse.com/innovation/sense-of-smell-robots> [<https://perma.cc/46L3-R572>].