



## Unconventional trademark - Sound mark

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A trademark is a brand or logo that represents one's business. In simple words, it is an identity. The conventional and traditional trademarks such as plain words, devices, logos, designs, labels and packages have been used since long for distinguishing goods and services. Over time, other elements besides words, logos, colour combinations and graphic designs have come to serve as identifiers of the source of goods/services, thus serving the function of trademarks. The concept of trademark function can be examined based on the rudimentary essentials a mark needs to satisfy such as being inherently distinctive, indicating commercial origin of products/ services, creating a nexus serving as a source identifier thereby holding an exclusive identity.

Unconventional marks go beyond the traditional trademarks in nature, characteristics, scope and economic potentials. The following are the main categories of non-traditional trademarks that can be registered.

- i. Sound/aural marks/audio signature,
- ii. Smell/scent/olfactory marks,
- iii. Tactile/touch/texture/haptic marks,
- iv. Single colour marks,
- v. Shape marks/three dimensional/3D marks,
- vi. Taste/gustatory marks,
- vii. Holograms; and
- viii. Moving images/motion/animated marks.

Each kind of unconventional trademark presents challenges in terms of meeting one of the basic criteria of a trademark i.e., 'a mark must be capable of being represented graphically'. Over the course of time, measures are undertaken in such a manner either to accommodate the requirement or amend the procedures to make way for the new emerging trends.

### Sound Mark

This write up will focus on the registrability of a Sound Mark under the Trade Marks Act, 1999. (Act). The definition of the term "mark" and "trademark" under Sections 2(1)(m) and 2(1)(zg) respectively is inclusive and not exhaustive of accommodating registration of a sound mark within the existing framework of the Act. Sound/ Music is one of the best channels to be employed for marketing a product/ service, as it

is etched in the minds of the public more rapidly than any other type of a source identifier. It acts as an audio signature.

The whole idea is to recognize and protect varied untapped potential elements in the market that serves as the origin of a source and links the public to a commercial business, sound mark being one of them. The art of launching products into the market by organizations along with a song, jingle, tune, chimes, etc., has been in practice for the longest time and subconsciously it seeks indefinite refuge in our head making it memorable and immortal which provides an edge to the organization, thereby providing exclusivity. Also, there exists a persuasive ability to embed messages in the minds of the consumers.

### **Procedure to file a Sound Mark**

There was no mention of registering a sound mark under the Trade Marks Rules, 2002 (Rules), yet few proprietors registered their sound mark. On August 18, 2008, a sound mark registration was granted to Sunnyvale, California-based Internet firm Yahoo Inc.'s three-note Yahoo yodel by the Delhi branch of the Trademark Registry. It was registered in classes 35, 38 and 42 for a series of goods including email, advertising and business services and managing websites.

Post the amendment of the Rules in 2017, Rule 26(5) provides provisions to file and register a sound as a trademark. Requirements for filing:

- a. Submit recording in MP3 format not exceeding 30 seconds,
- b. Clearly audible and capable of replaying, and
- c. Graphical representation of its musical notations.

The procedure to assess the registrability of a sound mark thereafter is same as that of any other mark filed before the Office of the Trade Marks Registry relating to preliminary objections, examination reports, evidentiary documents, acceptance and advertising a mark, opposition and registration.

Few other registered sound marks are, Tarzans yell (TM# 1748778 [2015]), National Stock Exchange (theme song) ( TM# 2152244 [2016]), ICICI Bank (Corporate jingle) (TM# 1807772 [2018]), Britannia Industries (four note bell sound) (TM# 1904243 [2011]), Eicher Motors (TM# 3044834 [2017]), Reliance Industries, (TM# 3838573 [2018]) Tata Coffee ( TM# 4211214 [2021]), Netflix (TM# 5236448 [2023]), etc.

### **Copyright and Sound mark overlap**

As per Rule 26(5) of the Rules, only a 30 second segment of a musical work is subjected to sound mark protection under the Act. The remaining music will continue to be protected under the Copyright Act, 1957. Also, Section 11(3)(b) of the Act prohibits registration of a trademark if its use in India is prevented by the law of copyright. While this being so, the circumstances surrounding each sound mark application will determine the proper course of action with respect to adducing relevant documents of evidentiary value, that includes no objection certificate, agreements between parties with respect to transfer of rights or any other form of arrangements, to ensure proper and clean title to the sound mark.

## Conclusion

The amendment of the Rules in 2017 has streamlined the process of registering a sound mark by making it fairly simple. Like any other subject matter, over a period of time, many nuances will unfold and as the unconventional nature of the mark itself, the measures to tackle them will likely differ from the conventional manner of adjudging and enforcing the rights vested in such marks.

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