

**TOO MUCH SCENT, TOO LITTLE MARK: INCENSE SMOKE, AFTER-USE SIGNS,
AND THE COLLAPSE OF DISTINCTIVENESS**

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ABSTRACT

Indian trade mark law's treatment of olfactory signs took a turn after the Trade Marks Registry's 21 November 2025 order accepting, and directing advertisement of, an olfactory mark described as a floral fragrance reminiscent of roses as applied to tyres. That administrative move makes smell marks institutionally workable by treating representation as a register-notice device and by asking whether the filing yields clear and precise subject matter that others can read, oppose, and later have adjudicated. The inquiry tests how far that logic can travel when the claimed sign is "incense smoke"; an after-use, combustion-produced scent that comes into existence only through ordinary consumption and varies across burn-time and surroundings. This article asks whether, once representation is reconceived as register-notice under section 2(1)(zb), an after-use, combustion-produced scent can ever satisfy the Act's demand for clear, stable, and opposable subject matter. A two-axis containment is developed to discipline the problem: the temporality of encounter (pre-sale, point-of-sale, after-use) and the role of the scent in relation to the goods (ancillary add-on versus essential characteristic). Using this taxonomy, the debate is shifted from whether smells can be represented at all to which smells can function as marks within the Trade Marks Act, 1999 once the Register's notice function is taken seriously. The analysis concludes that after-use essential-characteristic scents collapse distinctiveness internally and cannot be stably contained within register notice: the claimed subject matter becomes boundary-indeterminate, while consumer recognition tracks product identity and performance rather than separable trade origin, so the statutory requirements cannot be coherently satisfied. Existing writing tends to treat olfactory marks as one class; a differentiated doctrinal framework is derived from within the Act to preserve space for ancillary scents and controlled ambient scents, while preventing registration from operating as an indirect monopoly over product-defining sensory features.

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“The map is not the territory.”

-Alfred Korzybski.¹

I. INTRODUCTION

On 21 November 2025, the Trade Marks Registry accepted and directed advertisement of an application framed as an olfactory trade mark for a floral fragrance or smell reminiscent of roses as applied to tyres.² The moment matters because it makes smell marks institutionally thinkable: the Registry treated a scientific representation as capable of fixing the sign for the Register, instead of treating smell as a category destined to collapse into vagueness. Practice materials had long absorbed the Sieckmann insistence that representation must be clear and precise, self-contained, durable and objective, so that the protected sign has a stable boundary that others can read.³ What changes in November 2025 is not the ambition of those criteria, but the institutional willingness to treat a scientific description as something that can satisfy them.

That insistence is not ornamental. The Register is an information system organised around publication and contestability.⁴ Once an application is accepted, the Registrar must advertise it, and the advertisement exists so that the public can oppose within a window.⁵ This matters more for non-visual signs because the entry has to tell competitors what to avoid, and has to tell potential opponents what to contest.⁶ If the entry is vague, the statutory promise of opposition remains on paper while the practical burden shifts back into private uncertainty and selective enforcement.⁷

¹ ALFRED KORZYBSKI, SCIENCE AND SANITY: AN INTRODUCTION TOO NON-ARISTOTELIAN SYSTEMS AND GENERAL SEMANTICS 58 (1st ed. 1933).

² CONTROLLER GENERAL OF PATENTS, DESIGNS AND TRADE MARKS, *Order in Trade Mark Application No. 5860303, Class 12, NO. TMR/DEL/SCH/2025/16* (Issued on Nov. 21, 2025) (India), https://images.assettype.com/theleaflet/2025-11-27/g2hg4aog/Order_21_11_2025.pdf; Ayushi Shukla, *India's Trademark Registry Accepts Its First Smell Trademark For Japanese Company's Rose-Scented Tyres*, LIVE LAW (Nov. 21, 2025), <https://www.livelaw.in/ipr/india-first-smell-trademark-sumitomo-rubber-rose-fragrance-tyres-310803>; Tanishka Goswami, *The Scent of the Sumitomo Trademark: What is the Celebration About?*, SPICYIP (Nov. 26, 2025), <https://spicyip.com/2025/11/the-scent-of-the-sumitomo-trademark-what-is-the-celebration-about.html>.

³ Sieckmann v. Deutsches Patent- und Markenamt, 2002 E.C.R. I-11737; World Intellectual Property Organization (WIPO), Standing Comm. on the L. of Trademarks, Indus. Designs & Geographical Indications, *Methods of Representation and Description of Marks*, WIPO DOC. SCT/17/2 (Mar. 29, 2007), https://www.wipo.int/edocs/mdocs/sct/en/sct_17/sct_17_2.pdf; IP and Legal Filings, Saurav, *The Scent of Progress: India's Olfactory Trademark Breakthrough*, IP AND LEGAL FILINGS (Jan. 2, 2026), <https://www.ipandlegalfilings.com/the-scent-of-progress-indias-olfactory-trademark-breakthrough-and-its-ripple-effect-on-non-conventional-marks/>.

⁴ Robert Burrell & Michael Handler, *Who Reads the Trade Marks Register?* (Oxford Univ. Rsch. Archive, Working Paper, 2025), <https://ora.ox.ac.uk/objects/uuid:de92a1a2-41e0-4f0c-b2d0-37e2c7d9bb01>; Dev Gangjee, *Non-conventional Trade Marks in India: An Empirical Study*, 3(1) NUJS L. REV. 203 (2010).

⁵ Shailendra Bhandare et al., *Trade Marks Laws and Regulations: India*, in INT'L COMPL. L. GUIDE (2026; WIPO, *supra* note 3).

⁶ Gangjee, *supra* note 4; WIPO, *supra* note 3.

⁷ Burrell & Handler, *supra* note 4; M.P. Ram Mohan & Pratishtha Agarwal, *The Proustian Predicament in Trademark Law* (IIMA Working Paper No. 2025-08-01, 2025), <https://www.iima.ac.in/sites/default/files/2025-08/WP%20No.2025-08-01.pdf>.

The November 2025 acceptance does more than admit “smell” as a category. It treats the Register’s definitional task as satisfiable through representational technology, and it ties that technology to Section 2(1)(zb). This makes the representability and distinguishing capability cumulative.⁸ The author puts forth and points out that the Registry initially objected to the application under Section 9(1)(a) and Section 2(1)(zb), and that the applicant responded by offering a “7D scent vector”, with the Registry ultimately treating that response as adequate to proceed.⁹ The structural point is that the Register’s notice function is being made to run on a scientific proxy for the sign, and that proxy is being treated as a boundary-marker that can ground both examination and third-party contest.¹⁰

Graphical Representation of Rose-like Smell

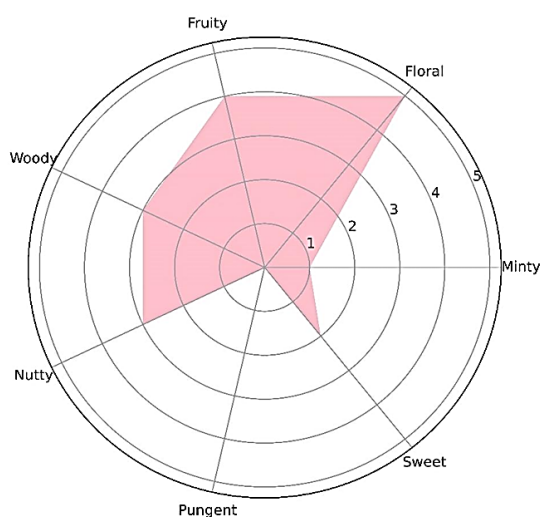


Figure 1: Seven-dimensional olfactory vector accepted by the Trade Marks Registry (21 November 2025) as the graphical representation of a “rose-like” scent. Source: Trade Marks Registry, Order dated 21 November 2025 in TM Application No. 5860303 (Floral Fragrance/ Smell Reminiscent of Roses as Applied to Tyres)

Incense signature smoke does not sit comfortably within that structure, even if it is also experienced after purchase.¹¹ It is a combustion-produced after-use sign.¹² It is not a scent applied

⁸ Controller General, *supra* note 2; Harsh Gour, *Decoding India’s first accepted Smell Trademark: “Rose-fragranced tyres”*, THE LEAFLET (Nov. 27, 2025), <https://theleaflet.in/digital-rights/law-and-technology/decoding-indias-first-accepted-smell-trademark-rose-fragranced-tyres>.

⁹ Controller General, *supra* note 2; Har, *supra* note 8; Jaya Bhatnagar, *India’s first smell (olfactory) trade mark gets the green light*, FICPI (Dec. 11, 2025), <https://ficpi.org/ip-news/indias-first-smell-olfactory-trade-mark-gets-green-light>.

¹⁰ Harsh Gour, *supra* note 8; Arul George Scaria, *Sorry, Not All Roses Smell The Same: A Critical Look At The Decision In Sumitomo’s Smell Mark Application*, LIVE LAW (Nov. 23, 2025), <https://www.livelaw.in/articles/sorry-not-all-roses-smell-the-same-a-critical-look-at-the-decision-in-sumitomos-smell-mark-application-310913>.

¹¹ *Supra* note 7; WIPO, *supra* note 3.

¹² T.C. Lin et al., *Incense smoke: clinical, structural and molecular effects on airway disease*, 6 CLINICAL & MOLECULAR ALLERGY 1 (2008), <https://pmc.ncbi.nlm.nih.gov/articles/PMC2377255/>; V.K. Yadav et al., *Health and Environmental Risks of Incense Smoke*, 15 J. INFLAMMATION RSCH. 1201 (2022), <https://www.tandfonline.com/doi/full/10.2147/JIR.S347489>.

to a product as sold, but a sensory trace produced only when the goods are consumed normally.¹³ It emerges after ignition, shifts as the stick burns, and then lingers as residue in the air and on surfaces, often unevenly across settings. The content of the trace is shaped by burn-time, ventilation, humidity, and proximity, so the “same” incense can yield different impressions without anyone changing the goods.¹⁴ The legal object being claimed is not “incense” as a category and not “a pleasant smell” in the abstract, but the after-use signature the claimant seeks to have recorded on the Trade Marks Register to be recognised as the mark.

Once the object is stated that way, the paper’s core puzzle becomes narrow and concrete, and it can be contained on two axes: temporality and essential-characteristic status.¹⁵ A representation can support notice only if it fixes the sign as the same sign across encounters.¹⁶ For incense smoke, temporality is not merely the circumstance of perception; it is part of the sign’s identity.¹⁷ A capture at one moment risks either over-including; by claiming an entire family of smoke impressions as the mark, or under-including; by freezing one phase of a changing trace and treating it as the whole.¹⁸ The second axis is essential-characteristic status, an internal analogue of Section 9(3), even though the text speaks to shape.¹⁹ Incense is sold to be burnt, and smoke and smell are outputs of that combustion. If the sign tracks that output too closely, distinctiveness begins doing the work of boundary-setting, and the mark starts to resemble a claim over the goods themselves.²⁰

The statutory hinges follow from these pressures and remain narrow. Section 2(1)(zb) forces the question of representation for a sign that is time-extended. Section 9 forces the question of whether the proposed sign is more than an inevitable after-use trace of the goods.²¹ Section 29 sits downstream because infringement analysis presupposes a stable mark-object that can be compared to the defendant’s use, and “use” itself looks different when the alleged sign arises only through the consumer’s act of burning.²² The discussion first fixes “incense signature smoke” as a legal object, then maps where the clarity commitment of the Register begins to strain when the sign is

¹³ Lin et al., *supra* note 12; Yadav et al., *supra* note 12.

¹⁴ A. Goel et al., *Characteristics of Exposure to Particles due to Incense Burning inside Temples in Kanpur, India*, 17 AEROSOL & AIR QUALITY RSCH. 608 (2017), <https://aaqr.org/articles/aaqr-16-04-2015aac-0146.pdf>; T.T. Yang et al., *Effect of Relative Humidity on Polycyclic Aromatic Hydrocarbons and Particulate Matter Emissions from Incense Burning*, 13 AEROSOL & AIR QUALITY RSCH. 1195 (2013), <https://aaqr.org/articles/aaqr-12-07-0a-0182.pdf>.

¹⁵ Harsh Gour, *supra* note 8; Ram Mohan & Agarwal, *supra* note 7.

¹⁶ Sieckmann, *supra* note 3; WIPO, *supra* note 3.

¹⁷ WIPO, *supra* note 3; Ram Mohan & Agarwal, *supra* note 7.

¹⁸ WIPO, *supra* note 3; Scaria, *supra* note 10.

¹⁹ Gangjee, *supra* note 4; Ram Mohan & Agarwal, *supra* note 7.

²⁰ Gangjee, *supra* note 4; Scaria, *supra* note 10.

²¹ Scaria, *supra* note 10; WIPO, *supra* note 3.

²² Gangjee, *supra* note 4; Burrell & Handler, *supra* note 4.

an after-use trace, then returns to a contained reading of distinctiveness and infringement that keeps the registerable object narrow. The point is to keep the question precise: how far the November 2025 move can be carried when the sign is generated by consumption, and when the boundary between sign and goods is easiest to lose, in practice and in pleading.

II. THE OBJECT AND ITS TAXONOMY

A. Incense smoke as an after-use sign

On 21 November 2025, the Trade Marks Registry accepted a rose-fragrance mark for tyres, and the institutional signal was straightforward: smell can sit on the Register, but only if the Register can state, with precision, what the claimed subject matter is.²³ That starting point makes the present object visible. A tyre scent is a smell carried by a durable thing; it can be sampled from the product itself, and the product remains the same object over time. Incense smoke is also experienced after purchase, yet it comes into existence only by use, as a by-product of combustion.²⁴ The incense stick can be bought, stored, transported, and displayed without producing the sign that is being claimed, because the claimed sign begins only when burning begins, and it is not present as the consumer-facing sign at the point of sale.²⁵

The goods are not the puzzle. An incense stick or cone, its ingredients, its packaging, and the marks printed on the pack are ordinary trade mark goods and ordinary trade mark signs.²⁶ The claimed sign, however, the author argues, is separate. “Incense signature smoke” refers to the combustion-produced smell emitted during burning, in the air, in the space where burning happens. It is not the unburnt stick’s base aroma inside a sealed pack. It is not the smell of a raw ingredient. It is the smoke smell as encountered after ignition, and as it develops over the burn cycle. This definition matters because it fixes what is being claimed as a sign, and it stops the argument from sliding back into the easier object, the physical product.

Calling this an “after-use” sign is therefore not a casual timeline label. It places the sign at a particular point in the consumer’s lifecycle with the goods, and that placement affects what can be treated as a stable sign. Trade mark law turns on use in relation to goods and on how the market

²³ Controller General, *supra* note 2; The European Parliament and the Council, Council Directive 2015/2436 (Issued on Dec. 16, 2015).

²⁴ Chiang-Wen Lee et al., *The Adverse Impact of Incense Smoke on Human Health: From Mechanisms to Implications*, 14 J. INFLAMMATION RSCH. 5451 (2021).

²⁵ H.C. Chuang et al., *The Contribution of Burning Incense on Indoor Air Pollution Levels and on the Exposure of the Public to Airborne Particles*, 46 ATMOSPHERIC ENV'T 213 (2012).

²⁶ The Trade Marks Act, 1999, India Code (2000), vol. 42, §§ 2(1)(m), 2(1)(zb) (India).

meets the sign.²⁷ Pre-sale scents are met before any purchase commitment, for example, as ambient cues in service environments.²⁸ Point-of-sale scents are met at or around the transaction, when packaging is opened, or the product is first handled. An after-use scent is met only once the consumer has already committed to the purchase and begins consuming the good.²⁹ With incense, the claimed sign is therefore displaced from the goods-as-sold to the goods-as-burnt, and from trader-controlled presentation to consumer-controlled conditions.

Once the sign is placed there, its identity becomes contingent in a way specific to combustion outputs.³⁰ Incense smoke is produced under variable conditions external to formulation. Airflow changes dispersion and perceived intensity.³¹ Humidity affects how smoke and aromatic compounds travel and settle.³² Burn rate affects concentration and duration. Room volume changes density, so the same stick in a small room can present as sharp and heavy, while in a large room it can present as light and diffuse. This variability is not being offered as a laboratory claim. It matters because the sign's perceptual identity is being claimed as a boundary, and boundaries require a stable referent. If the sign's identity drifts within ordinary conditions of use, the drift becomes a notice problem: even a careful reader of the Register cannot confidently tell where the claim begins and ends, because what is being claimed is a range of encounters rather than a single object.

Representational formats do not fully close the gap. Indian law still insists on graphical representation as part of the trademark form, and the Rules govern filing, advertisement, and opposition.³³ The European representation criteria, formulated in Sieckmann, demanded a sign that is clear, precise, self-contained, easily accessible, intelligible, durable, and objective.³⁴ Those criteria were devised to make registers workable as public notice instruments, and later European

²⁷ The Trade Marks Act, 1999, India Code (2000), vol. 42, §§ 2(2)(b), 29(6) (India); DAVID KEELING et al., *KERLY'S LAW OF TRADE MARKS AND TRADE NAMES* (16th ed. 2018).

²⁸ Eric R. Spangenberg et al., *Improving the Store Environment: Do Olfactory Cues Affect Evaluations and Behaviors?*, 60 J. MKTG. 67 (1996).

²⁹ Niklas Oberwegner et al., *Unpacking Olfactory Marketing: Initial Evidence for the Positive Effects of Scented Parcels on Post-Order Consumer Responses in E-Commerce*, 36(4) MKTG. LETTERS 903 (2025).

³⁰ Tzu-Ting Yang et al., *Effect of Airflow Rate and Humidity on Concentrations of Gaseous Pollutants in the Smoke from Smoldering Incense*, 7 AEROSOL & AIR QUALITY RSCH. 405 (2007).

³¹ Bo Chen et al., *Olfactory Perception Depends on Airflow: A Study on the Effect of Nasal Resistance*, 58 RHINOLOGY 155 (2020); Yang et al., *supra* note 30.

³² WILLIAM C. HINDS, *AEROSOL TECHNOLOGY: PROPERTIES, BEHAVIOR, AND MEASUREMENT OF AIRBORNE PARTICLES* (2nd ed. 1999); Yang et al., *supra* note 30.

³³ The Trade Marks Act, 1999, India Code (2000), vol. 42, § 2(1)(zb) (India); Trade Marks Rules, 2017 (India); Ram Mohan & Agarwal, *supra* note 7.

³⁴ *Sieckmann*, *supra* note 3; Simon Geiregat, *Trade Mark Protection for Smells, Tastes and Feels – Critical Analysis of Three Non-Visual Signs in the EU*, 2(53) INT'L R. OF INTELLECTUAL PROPERTY AND COMPETITION L. (2022).

reforms relaxed “graphical” form while retaining the core demand of clarity and precision.³⁵ Identity drift matters because it blurs the register notice boundary. A combustion-produced smoke smell sits awkwardly in that framework because its identity is inseparable from conditions that are not part of the filed specimen, and because those conditions are not a side detail but part of what produces the sign.³⁶

Incense signature smoke should therefore be treated as a defined object with tight edges: a combustion-produced olfactory output that arises after sale, in consumer-controlled conditions, and whose perceived identity is inseparable from the conditions of its production. Treating it as such prevents a silent slide from the goods to the sign, and it prevents the opposite slide where “smell of incense” is treated as an abstract category rather than a claimed sign.

B. Two-axis containment: time and role

With the object fixed, the classification that follows is meant to avoid the common mistake of treating all scent marks as one problem. The first axis is *time*: when the scent is encountered in the commercial lifecycle. The second axis is *role*: what the scent is doing in relation to the goods.

Axis A divides encounter into pre-sale, point-of-sale, and after-use. Pre-sale and point-of-sale encounters are where many non-visual signs do their work because the consumer meets the sign before or during the decision to buy. After-use encounters are different because the consumer meets the sign only once the transaction is complete, and the sign’s communicative function is filtered through consumption conditions.³⁷ This is not a legal conclusion about validity. It is a categorical boundary that prevents later analysis from treating “experienced post-sale” as a single, uniform feature across scent marks, when the mode of encounter can be materially different.

Axis B divides scents into ancillary cues and essential characteristics. An ancillary scent is an added feature that can function as a brand cue without being what the product is bought for. A scent infused into a durable good can sit here because the goods remain intelligible without the scent, and the scent can operate as an added association while still being carried by a stable object.³⁸ An

³⁵ Council Directive 2015/2436, *supra* note 23, art. 3; The European Parliament and the Council, Regulation (EU) 2017/1001 (Issued on 14 June 2017). ; Barbara Pietrzyk-Tobiasz, *Olfactory Marks Before and After Directive 2015/2436*, 28 *STUDIA IURIDICA LUBLINENSIA* 137 (2019).

³⁶ Yang et al., *supra* note 30; Ram Mohan & Agarwal, *supra* note 7.

³⁷ The Trade Marks Act, 1999, India Code (2000), vol. 42, § 29(6) (India); Katherine N. Lemon & Peter C. Verhoef, *Understanding Customer Experience Throughout the Customer Journey*, 80 *J. MKTG.* 69 (2016).

³⁸ Controller General, *supra* note 2; In re Clarke, 17 U.S.P.Q.2d (BNA) 1238 (T.T.A.B. 1990).

essential characteristic scent is different: the goods are bought for that smell, and the smell is part of the goods' commercial identity.³⁹ Incense is a simple illustration. The market's primary differentiation is often the smell category itself, and the after-use smell is the product's point, not an added flourish.

Placing the two axes together yields three categories that the paper can apply repeatedly without redefinition. First, ambient or service scents: scents encountered pre-sale or at point-of-sale in service settings, typically ancillary to the service. Secondly, applied ancillary scents on durable goods: scents infused into or applied on goods where the scent is an added cue rather than the product's essence, the November 2025 tyre acceptance being the institutional reference point.⁴⁰ Third, after-use essential-characteristic scents: scents encountered only through consumption, where the scent is not an accessory but the product's defining competitive attribute, incense smoke being the central instance.

	Pre-sale	Point-of-sale	After-use
Ancillary / Arbitrary	N: High / D: High	N: High / D: Medium-High	N: Medium / D: Medium
Essential characteristic	N: Medium / D: Low	N: Low / D: Low	N: Low / D: Very Low (Incense)

Figure 2: Two-axis containment as a registrability-risk map: notice stability (N) and distinctiveness plausibility (D) shift sharply when after-use combines with essential-characteristic status.

Locking these categories has a limited purpose. It prevents the paper from collapsing into the crude claim that “after-use scents can never be marks”, and it also prevents a false equivalence between a durable infused scent and a combustion-produced smoke output. The latter analysis can test legal standards against a stable object and a stable set of categories, instead of trying to settle the object mid-argument, and it can do so without treating the Register as hostile to scent marks as a class.⁴¹

III. THEORETICAL FRAMEWORKS

This paper deploys two external theoretical lenses to discipline the doctrinal analysis. *The first*, from Peircean semiotics, distinguishes indexical recognition of kind or quality from symbolic recognition of source. Together, they make visible the recognition-structure and boundary-

³⁹ Geiregat, *supra* note 34; *Smell, Sound and Taste – Getting a Sense of Non-Traditional Marks*, WIPO MAG. (Feb. 25, 2009), <https://www.wipo.int/en/web/wipo-magazine/articles/smell-sound-and-taste-getting-a-sense-of-non-traditional-marks-36622>.

⁴⁰ Controller General, *supra* note 2; Ram Mohan & Agarwal, *supra* note 7; Geiregat, *supra* note 34; *In re Clarke*, 17 U.S.P.Q.2d (BNA) 1238.

⁴¹ *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159 (1995).

structure that the Trade Marks Act, 1999 tests through “capable of distinguishing,” representation, and the Register’s public-facing role.

A. Index and symbol

Peirce’s split between index and symbol gives a clean way to talk about what “recognition” is actually doing when a smell is put forward as a trademark.⁴² An index points by a real connection: it is read as a trace, effect, or aftermath of something in the world.⁴³ A symbol points by learned convention: it works because a community has learned to treat it as meaning something, even when the sensory event itself does not contain that meaning.⁴⁴ The legal stakes are straightforward. A person can recognise what kind of thing is present, and a person can recognise who it comes from. Those recognitions can feel equally certain to the consumer, but they are not the same operation.

Incense-smell recognition tends to sit on the index side. The smell arrives as the after-effect of burning and as a cue about ingredients, strength, and quality. The ordinary interpretation is causal: something has been combusted, and this smell is what that combustion produces. Peirce’s shorthand example is smoke because it directs attention to a cause without needing to describe it.⁴⁵ If someone says “incense is being lit here”, the recognition is anchored in that causal chain: burning-resins-smoke-smell. Even when the person can go further and say “that smells like sandalwood,” the recognition still often stays attached to kind and composition, and thus, it is product-identity work.

Trademark law, by contrast, needs recognition that can attach to the trade origin.⁴⁶ “Capable of distinguishing” assumes that the sign can operate as a differentiator between traders, not merely as a reliable product cue.⁴⁷ Distinctiveness under Section 9 also assumes a public that treats the sign as pointing outward to a source, rather than inward to the nature of the goods.⁴⁸ Semiotics

⁴² 2 CHARLES SANDERS PEIRCE, COLLECTED PAPERS OF CHARLES SANDERS PEIRCE (Charles Hartshorne & Paul Weiss eds., 1932); Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. REV. 621 (2004).

⁴³ Peirce, *supra* note 42; Arthur W. Burks, *Icon, Index, and Symbol*, 20(4) PHIL. & PHENOMENOLOGICAL RSCH. 673 (1949).

⁴⁴ Peirce, *supra* note 42; Albert Atkin, *Peirce’s Theory of Signs*, STAN. ENCYCLOPEDIA OF PHILOSOPHY (Oct. 13, 2006), <https://plato.stanford.edu/entries/peirce-semiotics/>.

⁴⁵ Albert Atkin, *Peirce on the Index and Indexical Reference*, 41 TRANSACTIONS CHARLES S. PEIRCE SOC’Y 161 (2005); Peirce, *supra* note 42.

⁴⁶ Po Jen Yap, *Essential Function of a Trade Mark: From BMW to O2*, 31(2) EUR. INTELL. PROP. REV. 81 (2009).

⁴⁷ The Trade Marks Act, 1999, India Code (2000), vol. 42, § 2(1)(zb) (India); *Windsurfing Chiemsee Produktions- und Vertriebs GmbH v. Boots- und Segelzubehör Walter Huber*, 1999 E.C.R. I-2779, ¶¶ 25–27; Mark A. Lemley & Mark P. McKenna, *Trademark Spaces and Trademark Law’s Secret Step Zero*, 75 STAN. L. REV. 1 (2023).

⁴⁸ The Trade Marks Act, 1999, India Code (2000), vol. 42, § 9(1)(a) (India); *Windsurfing Chiemsee*, *supra* note 47, ¶ 25; *Godfrey Phillips India Ltd. v. Ginnar Food & Beverages (P) Ltd.*, (2004) 5 S.C.C. 257 (India).

helps because it makes visible how a sign can be stable and memorable and yet still pull recognition toward product identity. The consumer can genuinely “identify” the smell, but what is being identified may be the goods as goods, not the goods as coming from one undertaking.

A scent can behave symbolically when it is experienced as a detachable badge. The 2025 tyre order matters because the smell is engineered into a durable good that does not need it to be itself.⁴⁹ In that setting, the scent can operate as an arbitrary overlay, learnable as a brand cue. Recognition can then shift into the symbolic mode: the smell means this trader, not this kind of object. Even if post-sale, it is experienced as a chosen signal, not as the product’s own performance.

Incense smoke resists this move for structural reasons. The product as used is the burning event, and the smell is that event’s defining output. It is experienced as what the thing is for, not as an added layer. Recognition therefore, remains indexical: the smell points to composition and occurrence, not to source. This is not about consumer sophistication, but about the kind of link the sign structurally invites.

This supplies the footing for the two-axis containment. After-use cues tend to be read as traces, and traces are index-like. The closer a scent is to an essential product characteristic, the more recognition is pulled toward product identity rather than source. Semiotics keeps these pressures visible while the doctrine does its work.

B. Boundary objects and register notice

Boundary objects are coordination devices: things that let different groups work together even when they do not share a single full understanding of what the thing is.⁵⁰ Star and Griesemer describe them as plastic enough to meet local needs, yet robust enough to maintain identity across sites.⁵¹ The key point is that some representations are designed to travel. They allow shared reference across different practices, even if each practice reads the object differently. Later reflections make the caution clearer too; boundary objects can stabilise cooperation without making the object sharp-edged for every institutional purpose.⁵²

⁴⁹ Controller General, *supra* note 2; Harsh Gour *supra* note 8; FICPI, *supra* note 9.

⁵⁰ Susan Leigh Star & James R. Griesemer, *Institutional Ecology, “Translations” and Boundary Objects: Amateurs and Professionals in Berkeley’s Museum of Vertebrate Zoology, 1907–39*, 19(3) SOC. STUD. SCI. 387 (1989); Susan Leigh Star, *This is Not a Boundary Object: Reflections on the Origin of a Concept*, 35(5) SCI. TECH. & HUM. VALUES 601 (2010).

⁵¹ Star & Griesemer, *supra* note 49; GEOFFREY C. BOWKER & SUSAN LEIGH STAR, SORTING THINGS OUT: CLASSIFICATION AND ITS CONSEQUENCES (1999).

⁵² Star, *supra* note 50.

The 2025 Registry order's use of a "vector representation" can be read in exactly this way.⁵³ It supplies a format that can travel across laboratories, examiners, applicants, and competitors, and it allows each of them to treat the representation as "the smell" while still doing different work with it: A scientist can treat it as measurement output, an examiner can treat it as a way of representing the mark as a definable subject matter, and a lawyer can treat it as setting the perimeter of what is claimed. The representation succeeds institutionally if it allows these actors to coordinate around a shared referent without constant renegotiation of description.

The register notice asks for more than a shared reference.⁵⁴ A register entry is supposed to draw boundaries that competitors can understand and that an adjudicator can police. European law framed this as a representational demand in *Sieckmann*: the representation must be clear, precise, self-contained, easily accessible, intelligible, durable, and objective.⁵⁵ That list is often repeated as a formula, but its practical core is contestability.⁵⁶ Others must be able to see what is fenced off, to stay outside it, and to challenge it if needed.

Combustion-variable scents expose the gap between a boundary object and a notice object.⁵⁷ Incense smoke varies with ordinary conditions of use. The question is not whether science can describe a sample, but whether any representation can yield a legally stable object when the product's normal performance generates normal variation. If a vector is "good enough" only for coordination, it still fails as notice, because the monopoly's edges drift with use.⁵⁸ That is the institutional translation problem the later sections will have to confront, and why the question here is representation-as-notice, not representation-as-technology.

IV. THE DEFINITION GATE: SECTION 2(1)(ZB)

Section 2(1)(zb) of the Trade Marks Act 1999 defines a "trade mark" through two linked capabilities: the sign must be capable of being represented graphically and it must be capable of distinguishing the goods or services of one person from those of others.⁵⁹ The November 2025 Registry order matters because it turns that definition into a workable gate for olfactory marks

⁵³ Controller General, *supra* note 2; Harsh Gour, *supra* note 8.

⁵⁴ Robert Burrell & Michael Handler, *Who Reads the Trade Marks Register?*, 45(2) OXFORD J. LEGAL STUD. 272 (2025); EUIPO, *9.1 Representation – EUIPO Guidelines*, <https://guidelines.euipo.europa.eu/1803468/1788866/trade-mark-guidelines/9-1-representation>.

⁵⁵ Sieckmann, *supra* note 3, ¶ 55; EUIPO, *supra* note 54.

⁵⁶ Dev S. Gangjee, *Paying the Price for Admission: Non-Traditional Marks across Registration and Enforcement*, in *THE PROTECTION OF NON-TRADITIONAL TRADEMARKS: CRITICAL PERSPECTIVES* 59 (Irene Calboli & Martin Senftleben eds., 2018); Burrell & Handler, *supra* note 54.

⁵⁷ Gangjee, *supra* note 56; Geiregat, *supra* note 34; Ram Mohan & Agarwal, *supra* note 7.

⁵⁸ EUIPO, *supra* note 54; Gangjee, *supra* note 56; Burrell & Handler, *supra* note 54.

⁵⁹ The Trade Marks Act, 1999, India Code (2000), vol. 42, § 2(1)(zb) (India).

without pretending that smell marks sit outside the statutory text. It treats “graphical representation” as a notice device for the Register, and it treats “capable of distinguishing” as a requirement that cannot be assessed in the abstract once the claimed subject matter is unclear.⁶⁰ The order’s deeper commitment is that the Register must communicate a clear and precise subject matter, and that commitment ends up restructuring how the definition is applied.⁶¹

That shift is easiest to see against the pre-2025 architecture. Rule 2(1)(k) of the Trade Marks Rules 2017 defines “graphical representation” as representation in paper form, including representation in digitised form.⁶² The Rules then specify submission formats for some non-visual marks, most clearly sound marks under Rule 26(5), which require both an MP3 file and a graphic notation.⁶³ There is no comparable provision for smells. The gap does not formally declare olfactory marks impossible, but it encourages a low-level, medium-based objection: a smell cannot be “drawn,” so it cannot be represented.⁶⁴ The order resolves that practical deadlock by reordering what counts as “graphical.”⁶⁵ It draws from the Sieckmann line of reasoning and treats the core test as whether the representation yields a clear, precise, self-contained, accessible, intelligible, durable, and objective subject matter for registration.⁶⁶

The seven-dimensional olfactory vector is accepted because it converts a scent into a quantified profile, visualised through a radar or polygon plot, and supported by a brief verbal anchor.⁶⁷ In other words, the register is not asked to store a smell as an impression, it is asked to store a stable description that third parties can consult and contest.⁶⁸ That is why the order’s practical centre of gravity is no longer “can a smell be represented at all,” but “does representation produce something the Register can publish and police as a bounded monopoly.” Once representation is understood this way, the two limbs of Section 2(1)(zb) stop looking like separable compliance

⁶⁰ Controller General, *supra* note 2; Goswami, *supra* note 2.

⁶¹ Ram Mohan & Agarwal, *supra* note 7; Maheshwari & Co., *Branding by Scent - Landmark Registration of India's First Smell Mark*, LEXOLOGY (Nov. 28, 2025), <https://www.lexology.com/library/detail.aspx?g=e4f4e2a1-3b7c-4d5e-8f9a-1b2c3d4e5f6g>.

⁶² Trade Marks Rules, 2017, Rule 2(1)(k) (India).

⁶³ Trade Marks Rules, 2017, Rule 26(5) (India).

⁶⁴ Brian Moeran, *Marketing Scents and the Anthropology of Smell*, 15(2) SOC. ANTHROPOLOGY 153 (2007); IMARC GROUP, *India Incense Sticks (Agarbatti & Dhoop) Market Overview*, <https://www.imarcgroup.com/india-incense-sticks-agarbatti-dhoop-market>.

⁶⁵ Mark P. McKenna, *Trademark Use and the Problem of Source*, 2009 UNIV. ILL. L. REV. 773; Graeme B. Dinwoodie, *The Death of Ontology: A Teleological Approach to Trademark Law*, 84 IOWA L. REV. 611 (1999).

⁶⁶ *Sieckmann*, *supra* note 3, ¶¶ 46–55.

⁶⁷ Controller General, *supra* note 2; Moeran, *supra* note 64; Aradhna Krishna, *An Integrative Review of Sensory Marketing: Engaging the Senses to Affect Perception, Judgment and Behavior*, 22 J. CONSUMER PSYCHOL. 332 (2012).

⁶⁸ Robert G. Bone, *Trademark Functionality Revisited*, 7 HARV. L. & POL'Y REV. 1 (2015); Ram Mohan & Agarwal, *supra* note 7.

boxes. The grammar is cumulative, but the institutional function is integrated. A representation that fails to fix the subject matter makes it impossible to ask whether the sign is capable of distinguishing, because distinctiveness analysis presupposes an identifiable sign with boundaries that persist across use.⁶⁹ At the same time, if a sign can only be “distinguished” through expert reconstruction that does not translate into what the public can understand from the register, then the claimed capability becomes fragile in the exact place where registration is meant to supply stability.⁷⁰

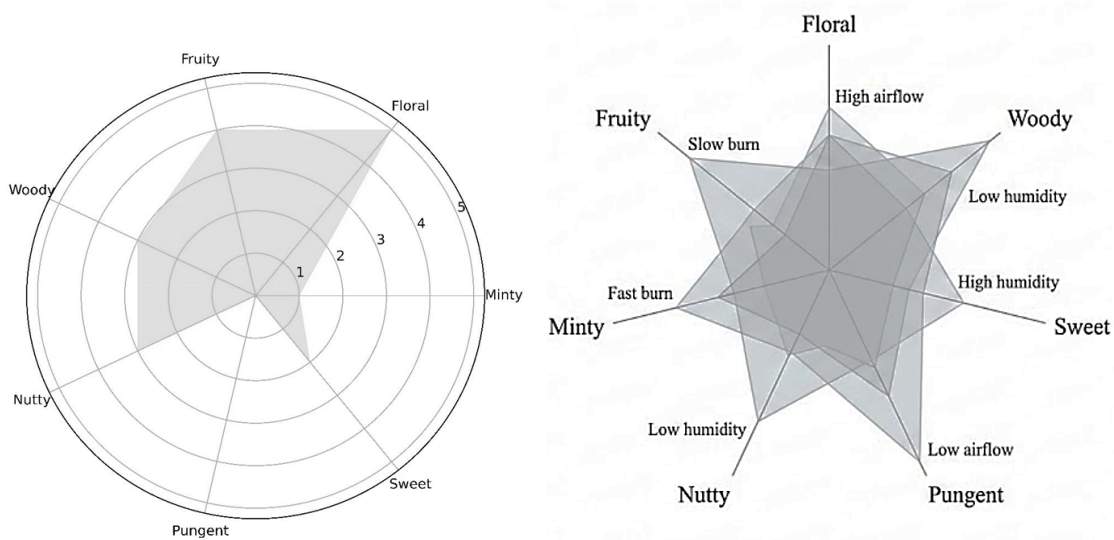


Figure 3: Olfactory Vector Stability vs Performance Drift. Source (Left Panel): Trade Marks Registry, Order dated 21 November 2025 in TM Application No. 5860303 (Floral Fragrance/Smell Reminiscent of Roses as Applied to Tyres). Source (Right Panel): author's self made schematic illustrating performance-contingent drift for combustion-produced incense smoke across ordinary use conditions.

Figure 3 shows that even with a seven-dimensional vector, ancillary scents yield a single bounded profile, while combustion-produced scents drift across ordinary use. The failure is not scientific description, but legal boundary stability.

The order itself reflects this integration. The vector is treated not as a filing formality but as the perimeter of protection.⁷¹ It is supposed to be something a competitor can consult in the Trade Marks Journal and use to decide whether to oppose, design around, or risk infringement.⁷² The

⁶⁹ Sieckmann, *supra* note 3, ¶¶ 50–55; Dev S. Gangjee, *Non Conventional Trade Marks in India*, 22(1) NAT'L L. SCH. INDIA REV. 67 (2010).

⁷⁰ *India Incense Sticks Market Assessment, By Category*, MARKETS AND DATA, <https://www.marketsanddata.com/industry-reports/india-incense-sticks-market>; IMARC Group, *supra* note 64.

⁷¹ Andreas Hörberg, Maria Larsson & Jonas K. Olofsson, *Semantic Organization of English Odor Vocabulary*, COGN. SCI. 46(11) (2022); Moeran, *supra* note 64.

⁷² Ministry of Consumer Affairs, Food & Public Distribution, *Union Minister Sibri Pralhad Joshi Releases New BIS Standard for Incense Sticks to Enhance Consumer Safety and Product Quality*, PRESS INFORMATION BUREAU (Dec. 26, 2025), <https://www.pib.gov.in/PressReleasePage.aspx?PRID=2208829>; IMARC Group, *supra* note 64.

same material exposes a stress point: the vector's precision lacks any margin of error or similarity threshold, leaving third parties unable to tell when a profile is "the same" sign or safely outside it.⁷³ Notice depends not just on having a format, but on whether it can stabilise boundaries across real-world variation.⁷⁴

Incense smoke makes this fragility structural. The claimed sign is not the stick or the packaging as sold. It is the smoke-smell produced only after the consumer uses the good, through combustion, in a particular space. The experienced sign is therefore contingent on outside the proprietor's control at the point of encounter: airflow, humidity, burn rate, temperature, room volume, and ambient odours.⁷⁵ This variability matters here as a register-notice problem. If the sign's perceptual identity drifts with conditions of use, then a single published representation risks becoming either under-inclusive (covering only a lab-burn snapshot) or over-inclusive (functioning as shorthand for a shifting family of outputs).⁷⁶ The Register is then asked to grant an exclusive right where the boundary question has been displaced from registration to later dispute, and the definition gate is exactly where that displacement becomes visible.

The tyre scent can plausibly be treated as a controlled additive. The order accepts that the fragrance is added to the goods in a controlled manner and operates as an extraneous identifier, rather than as part of what makes the product work.⁷⁷ That framing makes representation tractable. A lab can analyse the goods, generate the corresponding profile, and reproduce it without needing to simulate diverse consumer environments. With incense smoke, the sign is generated by consuming the good. Combustion changes the chemical profile over time and across conditions, and those conditions are part of what the consumer experiences as the "same" incense in ordinary life. If the applicant supplies a single vector derived from controlled testing, that representation fixes only one slice of the after-use experience. Competitors are then left with an indeterminacy: does the monopoly cover only the lab-burn profile, or does it cover the range of smells that arise when the same stick is burned in ordinary environments. If the applicant supplies multiple vectors to capture variability, the object becomes a range or family. A range-claim may be scientifically honest, but it

⁷³ Krishna, *supra* note 67; Moeran, *supra* note 64.

⁷⁴ Bone, *supra* note 68; Margaret Churovich, *Scents, Sense, and Scent Marks: Something Stinks in the Lanham Act*, 20 ST. LOUIS U. PUB. L. REV. 293 (2001).

⁷⁵ Goel et al., *supra* note 14; S. Pervez et al., *Indoor VOCs from Religious and Ritual Burning Practices in India*, 14 AEROSOL & AIR QUALITY RSCH. 1418 (2014).

⁷⁶ McKenna, *supra* note 65; Dinwoodie, *supra* note 65.

⁷⁷ Controller General, *supra* note 2.

weakens the register's basic promise that the monopoly has contestable boundaries that can be understood without reconstructing the entire world of use.⁷⁸

That gap cannot be treated as a merely evidentiary inconvenience, because it interacts with how publication and opposition are designed. Under Section 20–21 and the Rules governing advertisement and opposition, the scheme assumes that publication makes the mark intelligible enough for “any person” to oppose within the fixed window, and that the grounds of opposition can be pleaded on a stable record.⁷⁹ When the representation is a family of possible after-use outputs, oppositions become less about whether the sign should be monopolised and more about how the monopoly should be parameterised. That is a different kind of contest, and the statute does not provide the Register with a comfortable mechanism to grant monopolies whose content depends on later administrative calibration of error bands, similarity thresholds, or permissible ranges.⁸⁰

Furthermore, the Act does not insist that a sign be affixed on the goods. Section 2(2)(b) extends “use” of a mark in relation to goods to use upon, or in any physical or other relation whatsoever to, the goods.⁸¹ The Supreme Court has read this relation language broadly, treating “in relation to” as a wide connective rather than a narrow attachment requirement.⁸² Section 29(6) similarly treats use on packaging, labels, business papers, and in advertising as use.⁸³ Taken together, these provisions allow a scent encountered only in use to count as a mark in principle, but they increase the dependence on the Register to publish boundaries that outsiders can consult. Where the claimed sign is combustion-produced smoke smell, that openness does not help unless representation can specify what counts as the same sign across burns in advance of dispute.

The second limb of Section 2(1)(zb) pulls the same way. The definition requires capability of distinguishing the goods of one person from those of others. Distinguishing capability is meaningful only when the sign can be treated as a stable badge across encounters. Distinctiveness

⁷⁸ European Innovation Council and SMEs Executive Agency, *The Legal Challenges of Protecting Olfactory Trademarks in the European Union before going to India*, EUR. IP HELPDESK (Dec. 22, 2025), https://intellectual-property-helpdesk.ec.europa.eu/news-events/news/legal-challenges-protecting-olfactory-trademarks-european-union-going-india-2025-12-22_en; Ram Mohan & Agarwal, *supra* note 7.

⁷⁹ The Trade Marks Act, 1999, India Code (2000), vol. 42, §§ 20–21 (India); Trade Marks Rules, 2017, Rules 38–45 (India).

⁸⁰ Vishakha Sharma & Zachary J. Estes, *Seeing is Smelling: Pictures Improve Product Evaluations by Evoking Olfactory Imagery* (International Journal of Research in Marketing Volume 41, Issue 2, Working Paper, 2024), <https://ssrn.com/abstract=4567890>; Consumer Protection (E-Commerce) Rules, 2020 (India).

⁸¹ The Trade Marks Act, 1999, India Code (2000), vol. 42, § 2(2)(b) (India).

⁸² *Hardie Trading Ltd. v. Addisons Paint & Chemicals Ltd.*, (2003) 11 S.C.C. 92 (India).

⁸³ The Trade Marks Act, 1999, India Code (2000), vol. 42, § 29(6) (India).

under trademark law, whether framed as inherent distinctiveness or acquired distinctiveness, is built around that stability assumption.⁸⁴ For incense smoke, the consumer's recognition is typically directed to product identity and performance, because the smell is the product's defining output. Even if a consumer can recognise "this is sandalwood incense" or "this is temple incense," the sign being recognised is anchored to kind and quality, while the register requires a sign whose boundaries are sufficiently stable that it can operate as an indicator of origin and be policed as such. Under the post-2025 register-notice premise, representation and distinguishing capability are therefore mutually dependent for incense smoke in a way that they were not for the tyre scent. Representation is asked to deliver a clear perimeter in circumstances where the sign's identity is contingent on use, while the capability of distinguishing is asked to be assessed even though the sign, as published, cannot tell third parties what counts as the "same" smell across ordinary burns. The 2025 order makes smell marks possible by insisting on clear and precise subject matter, but it also makes the definition gate the place where, after use, combustion-variable scent objects begin to fail as registrable signs.

V. DISTINCTIVENESS COLLAPSE: SECTION 9 AND TRADE-TIME USE

A. Variety-recognition and Section 9(1)

Once a scent is treated as a possible mark, the next question is whether it can do the job the Act assigns to marks in the first place. Under Section 9(1), that job is a competence test: can this sign distinguish one trader's goods from another's, in the way trademarks are expected to work?⁸⁵ The 21 November 2025 order made one scent object institutionally legible by treating it as an added feature applied to a durable good, and by stating that consumers can associate that feature with a single source.⁸⁶ That is the sort of case where "distinctive character" can be narrated as an association between an extra-sensory element and a trader, rather than as the market's normal way of describing the product itself.⁸⁷

Incense makes that separability hard to sustain. The relevant sensory event is not the dry stick, or the packet, or a pre-burn fragrance. The claimed sign is the smell of smoke produced by

⁸⁴ Krishna, *supra* note 67; Sharma & Estes, *supra* note 80.

⁸⁵ The Trade Marks Act, 1999, India Code (2000), vol. 42, § 9(1) (India).

⁸⁶ Controller General of Patents, Designs and Trade Marks, Order in Trade Mark Application No. 5860303, Class 12 (Issued on Nov. 21, 2025) (India); Tanishka Goswami, *The Scent of the Sumitomo Trademark: What is the Celebration About?*, SPICYIP (Nov. 26, 2025), <https://spicyip.com/2025/11/the-scent-of-the-sumitomo-trademark-what-is-the-celebration-about.html>.

⁸⁷ Anannya Mohan, *The Proustian Predicament: Protecting Olfactory Trademarks in India's Contemporary Trade Mark Jurisprudence* (IIMA Working Paper No. 2025-08-01, 2025); Maheshwari & Co., *Branding by Scent - Landmark Registration of India's First Smell Mark*, LEXOLOGY (Nov. 28, 2025).

combustion in a room. That after-use moment is not an incidental stage of the goods, it is the stage for which the goods are bought. So when a consumer recognises an incense smell, recognition ordinarily tracks type and expected performance: sandal versus rose, sharp versus mild, clean burn versus smoky, long lasting versus short.⁸⁸ The recognition is accurate, sometimes refined, and yet it is aimed at what the product is doing, not who put it into circulation.⁸⁹

That mismatch matters under Section 9(1)(a) because “distinctive character” is not satisfied by any form of discrimination.⁹⁰ Incense-smell recognition separates products in the market, but it does so on axes that are product-facing.⁹¹ A consumer can correctly identify that a room has been scented by rose incense and still have no reason, in that act of identification, to infer the trader. The distinction the Act requires is of one person from others, and that is a different mental task.⁹² If the scent is experienced as the performance of the goods, then recognition can be intense and still remain non-original.

The same pressure appears more explicitly once Section 9(1)(b) and (c) are kept in view. Section 9(1)(b) refuses signs that may serve in trade to designate kind, quality, intended purpose, or other characteristics.⁹³ For incense, smoke-smell is not a marginal characteristic.⁹⁴ It is the characteristic around which buying and substitution are organised, and it is the characteristic that is repeatedly named and compared in trade.⁹⁵ A claim to an “incense signature smoke” therefore drifts, very quickly, toward a claim over a characteristic used to describe what the buyer is selecting. Section 9(1)(c) adds the related constraint where a sign becomes customary in the current language or in bona fide and established practices of the trade.⁹⁶ In an incense market structured around scent categories, the descriptive vocabulary does not sit outside the goods, it is the ordinary grammar of choosing them.

⁸⁸ Brian Moeran, *Marketing Scents and the Anthropology of Smell*, 15(2) SOC. ANTHROPOLOGY 153 (2007); IMARC Group, *India Incense Sticks (Agarbatti & Dhoop) Market Overview*, <https://www.imarcgroup.com/india-incense-sticks-agarbatti-dhoop-market>.

⁸⁹ Mark P. McKenna, *Trademark Use and the Problem of Source*, 2009 UNIV. ILL. L. REV. 773; Graeme B. Dinwoodie, *The Death of Ontology: A Teleological Approach to Trademark Law*, 84 IOWA L. REV. 611 (1999).

⁹⁰ The Trade Marks Act, 1999, India Code (2000), vol. 42, § 9(1)(a) (India).

⁹¹ Moeran, *supra* note 88; Aradhna Krishna, *An Integrative Review of Sensory Marketing: Engaging the Senses to Affect Perception, Judgment and Behavior*, 22 J. CONSUMER PSYCHOL. 332 (2012).

⁹² The Trade Marks Act, 1999, India Code (2000), vol. 42, § 9(1) (India); Kaviraj Pandit Durga Dutt Sharma v. Navaratna Pharm. Labs., A.I.R. 1965 SC 980 (India).

⁹³ The Trade Marks Act, 1999, India Code (2000), vol. 42, § 9(1)(b) (India).

⁹⁴ Ministry of Consumer Affairs, Food & Public Distribution, *Union Minister Shri Pralhad Joshi Releases New BIS Standard for Incense Sticks to Enhance Consumer Safety and Product Quality*, PRESS INFORMATION BUREAU (Dec. 26, 2025), <https://www.pib.gov.in/PressReleasePage.aspx?PRID=2208829>; IMARC Group, *supra* note 88.

⁹⁵ *India Incense Sticks Market Assessment, By Category*, MARKET XCEL, <https://www.marketresearch.com/Market-Xcel-v4077/India-Incense-Sticks-Assessment-Category-32456789/>; IMARC Group, *supra* note 88.

⁹⁶ The Trade Marks Act, 1999, India Code (2000), vol. 42, § 9(1)(c) (India).

Indian distinctiveness law keeps returning to this market-reading point. Courts ask whether the sign is perceived as indicating origin, and not merely as conveying a message about the goods.⁹⁷ Where a sign begins life with descriptive or customary meaning, the question becomes whether that earlier meaning has been displaced by a new association tied to one trader.⁹⁸ In *Godfrey Phillips v Gurnar Food*, the Supreme Court treated acquired distinctiveness as a heavy factual burden, especially where the sign naturally describes the goods.⁹⁹ The problem for incense is that the “natural” meaning is strong because it is anchored in sensory experience, and sensory experience is what the goods are sold for. In that setting, the sign does not behave like a detachable badge; it behaves like the product identity itself, translated into smell.

This also explains why timing by itself does not decide the outcome. Post-sale experience can support source association in some settings, and the 2025 order is an institutional example since it treats smell perception after the tyres are in use as compatible with trade mark work.¹⁰⁰ The incense case is different because the after-use moment is the main moment in which the goods exist to the consumer. Recognition at that moment is still recognition of the goods. Distinctiveness collapses because the trade mark function cannot be detached from the product function without altering how the smell is ordinarily understood.

The proviso to Section 9(1) allows registration if distinctiveness is acquired through use, but that assumes use teaches the public to treat the sign as origin.¹⁰¹ For incense, repetition entrenches the product reading: the consumer learns one trader’s rose as *stronger*, not rose smoke as a detachable badge. Where ordinary meaning persists even after long use, courts remain sceptical of distinctiveness.¹⁰²

B. Visualised use and descriptive mediation

The Act’s treatment of “use” adds a second pressure. Trade mark function is assessed through how the sign is put into the market, and how that market exposure creates a commercial connection.¹⁰³ For ordinary word and device marks the route is straightforward: the sign is printed

⁹⁷ Durga Dutt Sharma, A.I.R. 1965 SC 980; N.R. Dongre v. Whirlpool Corp., (1996) 5 S.C.C. 714 (India).

⁹⁸ Godfrey Phillips India Ltd. v. Gurnar Food & Beverages (P) Ltd., (2004) 5 S.C.C. 627 (India).

⁹⁹ Id.

¹⁰⁰ Controller General, *supra* note 2.

¹⁰¹ The Trade Marks Act, 1999, India Code (2000), vol. 42, § 9(1) (India).

¹⁰² ITC Ltd. v. Nestle India Ltd., 2020 SCC OnLine Mad 6652 (India); Red Bull AG v. Pepsico India Holdings (P) Ltd., 2023 SCC OnLine Del 761 (India).

¹⁰³ The Trade Marks Act, 1999, India Code (2000), vol. 42, §§ 2(2)(b), 2(2)(c) (India).

on the packet, displayed at the shop, repeated in advertising, and carried into listings and invoices. The statute then describes use upon the goods, in relation to the goods, and in advertising.¹⁰⁴

For scent marks, that produces a mediation problem. A smell cannot operate in trade without some visible surrogate. Even where the sensory experience happens later, trade-time “use” is routed through packaging claims, product descriptions, point-of-sale displays, and advertising copy. That is how a consumer is invited to treat the scent as part of the offering, and that is how a trader tries to build association over time. Section 29(6) makes this explicit by treating use in advertising and use in business papers as use of the mark.¹⁰⁵

Incense sits at the sharp edge of that structure because the only practical way to communicate an after-use smell in trade is to name it. Buying normally precedes burning, so the trader cannot depend on consumers encountering the smoke first and then discovering source later. The scent is therefore described on the packet and in listings with scent vocabulary, often with added cues about intensity and “long lasting” performance. Those cues are not decorative. They are the mechanism by which the product is made legible at the moment of purchase.

That necessary mediation tightens the statutory trap. The more the scent must be communicated in visible language to operate in trade, the more it begins to function as an indication of kind or quality rather than as an origin sign.¹⁰⁶ The same logic is visible in disputes over descriptive terms and promotional phrases, where courts have treated trade-facing language as closer to description than to badge.¹⁰⁷ Once communication is routed through descriptive language, disputes about “use” and similarity will often be disputes about the permissible use of scent descriptors, and the scent claim becomes difficult to separate from the vocabulary of the trade.

Packaging regulation reinforces the legal visualisation of use. Labelling law is structured around visible disclosure and policing of misleading statements about quality and composition.¹⁰⁸ For incense, the attribute most likely to be disclosed and traded upon is the scent category itself, since it is the primary basis of consumer choice at the point of purchase. So even if a proprietor insists

¹⁰⁴ The Trade Marks Act, 1999, India Code (2000), vol. 42, §§ 29(6), 29(8) (India).

¹⁰⁵ The Trade Marks Act, 1999, India Code (2000), vol. 42, § 29(6) (India).

¹⁰⁶ The Trade Marks Act, 1999, India Code (2000), vol. 42, § 9(1)(b) (India).

¹⁰⁷ *TTC Ltd.*, 2020 SCC OnLine Mad 6652; *Red Bull AG*, 2023 SCC OnLine Del 761.

¹⁰⁸ Legal Metrology (Packaged Commodities) Rules, 2011, Rules 6–7 (India); The Consumer Protection Act, 2019, § 2(47) (India).

that the protected sign is the smell itself, competitors will encounter the claimed monopoly through the visible descriptors by which the smell is sold.

This is also why the problem cannot be solved by saying the smell is “used” through the goods alone. The Act’s idea of use is wide, but it is organised around communicative acts that are visible and contestable.¹⁰⁹ Scent cannot be affixed like a label, so trade-time use relies on trade descriptions and packaging claims. The statute defines trade description broadly, including indications as to the material of which goods are composed.¹¹⁰ Packaging and consumer-protection law already police scent claims at the point of sale. The doctrinal point, thus becomes, narrower: where an after-use scent is the product’s essential performance and can exist in trade only through descriptive mediation, the Act’s own structure pushes the claim away from distinctiveness before enforcement is even reached.

VI. FEATURE MONOPOLY LIMITS: SECTION 9(3) AND SECTION 29

A. S.9(3) as the Act’s “essential feature” alarm bell

Section 9(3) is the Act’s clearest signal that registration is not meant to become a backdoor way of owning product-defining features.¹¹¹ It is placed within the absolute grounds and drafted as a hard exclusion: “shall not be registered”.¹¹² It is also written without the usual escape hatch of acquired distinctiveness. That contrast is deliberate. Elsewhere, the Act accepts that trade-time learning can convert a weak sign into a trade mark; the proviso to Section 9(1) is built on that possibility.¹¹³ Section 9(3) does not let the applicant run that route. The register is not meant to become a perpetual exclusivity instrument for attributes that the goods, in substance, must carry.¹¹⁴

The three limbs express the same posture through three routes. Section 9(3)(a) targets features that “result from the nature of the goods”, meaning the attribute that follows from what the goods are, rather than from who made them.¹¹⁵ Section 9(3)(b) blocks features “necessary to obtain a technical result”, because registration is not meant to operate like an indefinite control right over

¹⁰⁹ The Trade Marks Act, 1999, § 29(6) (India).

¹¹⁰ The Trade Marks Act, 1999, § 2(1)(za) (India).

¹¹¹ Controller General of Patents, Designs and Trade Marks, Draft Manual of Trade Marks Practice and Procedure, ¶ 4.127 (2015) (India); Dev Gangjee, *Non Conventional Trade Marks in India*, 22(1) NAT’L L. SCH. INDIA REV. 67 (2010).

¹¹² The Trade Marks Act, 1999, India Code (2000), vol. 42, § 9(3) (India).

¹¹³ The Trade Marks Act, 1999, § 9(1) (India).

¹¹⁴ Glynn S. Lunney Jr., *Trademark Monopolies*, 48 EMORY L.J. 367 (1999); Mark A. Lemley & Mark P. McKenna, *Owning Mark(et)s*, 109 MICH. L. REV. 137 (2010).

¹¹⁵ The Trade Marks Act, 1999, § 9(3)(a) (India).

performance-critical design.¹¹⁶ Section 9(3)(c) bars features that “give substantial value to the goods”, capturing the case where the claimed feature is a primary driver of purchase and not a badge of trade origin.¹¹⁷ Across these limbs, the common idea is simple: even if consumers recognise a feature, that recognition does not automatically justify converting the feature into exclusive territory through the register.¹¹⁸

Registry materials frame Section 9(3) in those terms.¹¹⁹ The Draft Manual of Trade Marks Practice and Procedure treats an objection under Section 9(3) as not curable by acquired distinctiveness and links it to preventing monopolisation of intrinsic product features.¹²⁰ Courts, when policing the border between protectable non-traditional signs and ordinary product characteristics, have also insisted that claims must be delimited with care, because broad claims risk converting features of the goods into control rights that competitors cannot practically avoid.¹²¹ In *Knitpro*, while dealing with a colour-combination claim, the Delhi High Court emphasised the need for clarity and specificity in what is being claimed, and warned against abstract, shifting formulations that would let the claimant occupy more than what trade mark law can legitimately give.¹²² That posture matters here not because Section 9(3) “applies” to smells, but because it reveals an internal design choice: the statute is hostile to feature monopolies, and it expresses that hostility inside its own registration architecture.¹²³

B. Translating the anti-feature posture to scents without importing “functionality”

The same constraint can be reached for scents without treating Section 9(3) as directly applicable to smells, and without importing foreign functionality doctrine. The route is internal and it runs through the definition and distinctiveness structure already doing work for non-traditional marks. Section 2(1)(zb) requires a “mark” that is capable of distinguishing, and that is meant to indicate a trade connection between goods and the proprietor.¹²⁴ Section 9(1) then refuses registration where

¹¹⁶ The Trade Marks Act, 1999, § 9(3)(b) (India).

¹¹⁷ The Trade Marks Act, 1999, § 9(3)(c) (India).

¹¹⁸ *Philips Elecs. NV v. Remington Consumer Prods. Ltd.*, 2002 E.C.R. I-05475; *Lego Juris A/S v. OHIM*, 2010 E.C.R. I-08403.

¹¹⁹ Trade Marks Registry, Manual of Procedure for Examination of Trade Mark Applications, § 5.2.5.1 (Draft, Jan. 23, 2009) (India); Controller General, *supra* note 111.

¹²⁰ Office of the Controller General of Patents, Designs & Trade Marks, Draft Manual of Trade Marks Practice and Procedure (2009) (India).

¹²¹ *Sieckmann v. Deutsches Patent- und Markenamt*, 2002 E.C.R. I-11737; *Société des Produits Nestlé SA v. Cadbury UK Ltd.*, (2014) EWCA (Civ) 16 (Eng.).

¹²² *Knitpro Int'l v. Examiner of Trade Marks*, (July 13, 2022) (Delhi HC) (India).

¹²³ *Hauck GmbH & Co. KG v. Stokke A/S*, ECLI:EU:C:2014:2233; *THE PROTECTION OF NON-TRADITIONAL TRADEMARKS: CRITICAL PERSPECTIVES* (Irene Calboli & Martin Senfleben eds., 2018).

¹²⁴ The Trade Marks Act, 1999, India Code (2000), vol. 42, § 2(1)(zb) (India).

the mark lacks distinctive character, and where it consists exclusively of indications that may serve in trade to designate kind, quality, or other characteristics of the goods.¹²⁵ Read together, these provisions assume a separable sign: something that can attach to goods and point to origin, without collapsing into the goods' own identity.¹²⁶

That assumption is easy to satisfy where the scent is an added layer. The Trade Marks Registry's November order accepting Sumitomo's "floral fragrance / smell reminiscent of roses as applied to tyres" proceeded on the premise that the fragrance was arbitrary for tyres and was introduced as a branding choice rather than as the tyre's defining attribute.¹²⁷ Tyres do not exist to smell like roses! On that framing, the scent can be understood as an overlay, capable in principle of doing origin-work even if consumers encounter it after purchase. The sign remains conceptually detachable: the goods can be described, compared, and purchased without needing the scent as part of their essential character.¹²⁸

The difficulty begins in the after-use essential-characteristic class. For incense sticks, the smell is not an overlay applied to the goods as a distinct branding device. It is the combustion-produced output that comes into existence only through use, and it is the primary sensory reason the goods are bought. In that setting, consumer recognition tends to track variety, intensity, and burn performance, because those are the properties by which incense is chosen and compared. Even if that recognition is stable, it is recognition of product character and performance, not of a separable sign hovering above the goods.¹²⁹

The internal constraint becomes visible when "use in trade" is kept in view, not as an infringement question, but as part of what "capable of distinguishing" presupposes. A scent cannot function as an origin-indicator unless it can be communicated in the market in a way that distinguishes one trader's goods from another's. For after-use incense smells, the shelf encounter is not with the combustion smell itself in a stable, comparable form. The trade-time encounter is mediated through visible surrogates: labels, names, packaging claims, and descriptive vocabulary.¹³⁰ And the

¹²⁵ The Trade Marks Act, 1999, India Code (2000), vol. 42, §§ 9(1)(a)–(b) (India).

¹²⁶ LIONEL BENTLY & BRAD SHERMAN, *INTELLECTUAL PROPERTY LAW* (5th ed. 2018); *Arsenal Football Club plc v. Reed*, 2002 E.C.R. I-10273.

¹²⁷ Controller General, *supra* note 2.

¹²⁸ G.E. Brill, *Make Some Sense of Scent Trademarks: The United States Needs a More Coherent Approach*, 56 U. RICH. L. REV. 807 (2022); WIPO, Standing Comm. on the L. of Trademarks, Indus. Designs & Geographical Indications, *New Types of Marks*, ¶¶ 46–52, WIPO Doc. SCT/16/2 (Issued on Sept. 1, 2006).

¹²⁹ Douglas D Churovich, *Scents, Sense, and Scent Marks: Something Stinks in the Lanham Act*, 20 ST. LOUIS U. PUB. L. REV. 293 (2001); Brill, *supra* note 128.

¹³⁰ Lee B. Burgunder, *Trademark Protection of Smells: Sense or Nonsense*, 29(3) AM. BUS. L.J. 459 (1991); WIPO, *supra* note 128.

vocabulary that incense markets use is, structurally, characteristic-language: sandalwood, jasmine, rose, “temple”, “*dhooop*”, “strong”, “mild”, “long-lasting”, “premium”, “soothing”.¹³¹ That communicative routing pushes the claimed scent straight into the space Section 9(1) treats with suspicion, because it is exactly the language by which the trade designates kind and quality.¹³²

So, the constraint is reachable without a foreign “functionality” filter. If the claimed smell is inseparable from what the goods are for, then Section 2(1)(zb)’s capability requirement is strained because the sign is not conceptually detachable from the goods’ identity and performance. And if the only realistic way to make the smell operate “in trade” is through characteristic descriptions, Section 9(1) blocks the claim because the sign is not operating as a badge of origin but as an indicator of product kind and quality. The statute’s own architecture does the work: it resists the conversion of essential product features into exclusive marks, even when those features are sensory.¹³³

This is where the two-axis taxonomy does its work. After-use alone is not fatal, because an ancillary scent can still function as branding. The trigger is an essential characteristic status, which collapses the sign and goods into one object.¹³⁴ At that point, Section 2(1)(zb) and Section 9(1) perform the same anti-monopoly function that Section 9(3) performs for shapes: they block exclusive control over features that define the goods themselves.

C. S.29 used only as a temporal discipline device

Section 29 matters here only to keep the analysis anchored to market-facing use. Infringement depends on “use in the course of trade”, and Section 29(6) lists the familiar modalities: affixing the mark to goods or packaging, offering or exposing goods for sale under the mark, importing under the mark, and use in advertising or business papers.¹³⁵ The common feature is temporal and practical. The sign must be deployed during the transactional window in a way that the market can encounter as a sign.

¹³¹ Cycle Care, *Ultimate Guide to Agarbatti and Incense Sticks in India*, CYCLE.IN (Nov. 5, 2025), <https://cycle.in/blogs/all/ultimate-guide-agarbatti-incense-sticks-india>; *India Incense Sticks Market Size, Share & Forecast to 2031*, RSCH. & MKTS. (Dec. 5, 2025).

¹³² The Trade Marks Act, 1999, India Code (2000), vol. 42, §§ 9(1)(a)–(b) (India); *Windsurfing Chiemsee Produktions- und Vertriebs GmbH v. Boots- und Segelzubehör Walter Huber*, 1999 E.C.R. I-2779; *OHIM v. Wm. Wrigley Jr. Co.*, 2003 E.C.R. I-12447.

¹³³ *Hauck*, ECLI:EU:C:2014:2233; WIPO, Standing Comm. on the L. of Trademarks, Indus. Designs & Geographical Indications, *Issues Concerning Non-Visible Marks*, WIPO DOC. SCT/17/3 (Mar. 30, 2007).

¹³⁴ *Lego Juris*, 2010 E.C.R. I-08403; *Hauck*, ECLI:EU:C:2014:2233.

¹³⁵ The Trade Marks Act, 1999, India Code (2000), vol. 42, §§ 29(1)–(2), 29(6) (India).

After-use essential-characteristic scents do not fit that temporal structure cleanly.¹³⁶ The smell emerges after consumption begins, and the market-facing communication of it is ordinarily indirect, through labels and descriptive claims rather than through the sensory event itself at the point of sale. That temporal gap does not decide infringement questions on its own, and it does not turn Section 29 into a new filter. It simply reinforces, at the level of “use”, why these objects struggle to operate as marks in the statutory sense: the sign-function is hard to perform when the alleged mark exists mainly post-consumption and is traded as description, not as a market-facing identifier.¹³⁷

VII. THE 2025 ORDER AS OPENING AND LIMIT

A. What does the tyre order actually hold?

The 2025 November order matters, the author has established, because it makes smell marks institutionally thinkable without treating them as a category outside the Trade Marks Act. It begins from the Act’s open-ended idea of a “mark” and then narrows the inquiry to the Register’s task: recording a sign in a way that communicates a clear and precise subject-matter to everyone who consults the Register.¹³⁸ Representability is therefore handled as notice, not as an aesthetic demand that the sign must be drawable.¹³⁹

The order stabilises the novelty by positioning the tyre scent as ancillary and arbitrary. The goods remain tyres; the claimed sign is a rose-like fragrance applied to the tyres.¹⁴⁰ The fragrance is not framed as the goods’ sensory identity or as an output the product is meant to generate. It is presented as an added attribute that can sit alongside the goods’ commercial identity and still operate as a separable badge. That framing matters because after-use exposure, by itself, is not conceptually fatal so long as the sign is separable from the goods and can be fixed for notice.¹⁴¹

The representation move follows the same internal logic. The order treats “graphical representation” as the route through which the Register defines what is claimed.¹⁴² It accepts a

¹³⁶ WIPO, *supra* note 128; M.P. Ram Mohan & Pratihtha Agarwal, *The Proustian Predicament in Trademark Law* (IIMA Working Paper No. 2025-08-01, 2025).

¹³⁷ Ram Mohan & Agarwal, *supra* note 137; *Toward a Scented Jurisprudence*, ILL. L. REV. ONLINE (Sept. 18, 2025), <https://illinoislawreview.org/online/toward-a-scented-jurisprudence/>.

¹³⁸ The Trade Marks Act, 1999, India Code (2000), vol. 42, § 2(1)(zb) (India); Sieckmann, *supra* note 3.

¹³⁹ Sieckmann, *supra* note 3, ¶ 55; EUIPO, Guidelines for Examination of European Union Trade Marks, Part B: Examination, Section 2: Formalities (Oct. 1, 2017).

¹⁴⁰ Controller General, *supra* note 86.

¹⁴¹ WIPO, Standing Comm. on the L. of Trademarks, Indus. Designs & Geographical Indications, *New Types of Marks*, WIPO DOC. SCT/22/2 (Oct. 9, 2009); Erin M. Reimer, *A Semiotic Analysis: Developing a New Standard for Scent Marks*, 14 VAND. J. ENT. & TECH. L. 693 (2012).

¹⁴² The Trade Marks Act, 1999, India Code (2000), vol. 42, § 2(1)(zb) (India); Trade Marks Rules, 2017, Rules 23, 26 (India).

“vector representation” prepared with technical assistance, plotting the scent across multiple olfactory axes.¹⁴³ The point of accepting that proxy is not a promise of scientific perfection.¹⁴⁴ It is the institutional claim that a stable proxy can anchor the Register’s notice function, so competitors can see what is taken off the market and decide what to oppose.¹⁴⁵

Distinctiveness is accepted on a plausibility footing rather than on completed market proof. The application is recorded as “proposed to be used”, yet the order proceeds on the view that an arbitrary fragrance on tyres can, in principle, be capable of distinguishing because it is not naturally connected to tyres and is not presented as necessary for tyre performance.¹⁴⁶ The procedural posture reflects that limited confidence. The mark is accepted for advertisement under section 20, leaving the opposition stage and later use evidence to test it.¹⁴⁷

B. The order’s internal limits: notice precision and boundary-policing

Read as a notice decision, the order carries internal limits. A Register entry is not merely a record for the applicant.¹⁴⁸ It is a communication to competitors about what is taken out of circulation, and a reference point for tribunals when similarity, confusion, and scope are later contested.¹⁴⁹ That architecture assumes boundaries that can be stated at registration and then policed.¹⁵⁰ The order’s reliance on a published proxy is best understood as an attempt to meet that demand for contestable boundaries. That is why the order’s emphasis on publication matters; the proxy must be something rivals can challenge early, and police.

The tyre scent fits that demand because it is framed as an applied, manufactured feature that can be engineered to a stable profile at the point of production.¹⁵¹ Variation can be treated as quality

¹⁴³ Controller General, *supra* note 86; Shield Mark BV v. Joost Kist, 2003 E.C.R. I-14313.

¹⁴⁴ Danny Friedmann, *EU Opens Door for Sound Marks: Will Scent Marks Follow?*, 10(12) J. INTELL. PROP. L. & PRAC. 931 (2015); WIPO, *supra* note 134.

¹⁴⁵ EUIPO, Trade Mark Guidelines, § 1.3; Rebecca Tushnet, *Registering Disagreement: Registration in Modern American Trademark Law*, 130 HARV. L. REV. 867 (2017).

¹⁴⁶ The Trade Marks Act, 1999, India Code (2000), vol. 42, § 9(1)(a) (India); Gangjee, *supra* note 110.

¹⁴⁷ The Trade Marks Act, 1999, India Code (2000), vol. 42, §§ 18(1), 20, 21 (India).

¹⁴⁸ Tushnet, *supra* note 146; Annette Kur, *Convergence After All? A Comparative View on the U.S. and EU Trade Mark Reform*, 13 J. INTELL. PROP. L. 353 (2012).

¹⁴⁹ The Trade Marks Act, 1999, India Code (2000), vol. 42, §§ 20, 21, 28 (India); Trade Marks Registry, *supra* note 110; Stacey L. Dogan & Mark A. Lemley, *A Search-Costs Theory of Limiting Doctrines in Trademark Law*, 97 TRADEMARK REP. 1223 (2007); Tushnet, *supra* note 146.

¹⁵⁰ Max Planck Institute for Intellectual Property and Competition Law, *Study on the Overall Functioning of the European Trade Mark System* (Feb. 15, 2011); EUIPO, *supra* note 146.

¹⁵¹ Controller General, *supra* note 86; *India’s First Smell Mark: “Rose Scent” for Tyres*, THE LEAFLET (Nov. 2025).

drift around a target, rather than as a constitutive feature of the sign.¹⁵² If a rival uses a fragrance that maps closely onto the registered profile, the proxy supplies a contestable object for comparison. The comparison may be difficult, but the Register can still point to an object that purports to be fixed.

A combustion-produced incense smoke claim changes the object that the Register is asked to hold still.¹⁵³ The goods may be a stick and its packaging, but the claimed sign is the smell produced by burning, and it emerges only after the sale is complete.¹⁵⁴ More importantly, its perceptual identity is contingent on conditions that sit outside the applicant's control in ordinary use: airflow, humidity, burn rate, room size, and duration of burning. That contingency means that what counts as "the same smell" drifts across contexts even when the same stick is burned, and the claimed sign starts to behave like a moving boundary.¹⁵⁵

That boundary drift matters because the order's opening premise is that the Register must publish clear and precise subject-matter. If the claimed smell cannot be bounded in a way that competitors can understand, the monopoly becomes hard to contest *ex ante* and hard to police *ex post*, and the Register starts to function as fog rather than as notice.¹⁵⁶ The problem is therefore juridical rather than technical, it concerns notice and contestability, not whether chemistry can describe smell.¹⁵⁷

This is where the order supplies its limit. After-use alone survived in the tyre context because the scent's role is ancillary and arbitrary. Incense smoke combines after-use with an essential-characteristic role: it is experienced as the product's defining output, and recognition ordinarily tracks kind, strength, and expected performance rather than source.¹⁵⁸ When that combination is

¹⁵² Raman Mittal, *Analysis of the Mysterious Element of Quality Control in Trademark Licensing*, 15 J. INTELL. PROP. RTS. 101 (2010); Anand and Anand, *India Grants its First Smell Mark: A Comprehensive Analysis of the Rose Scented Tyre Trademark*, CHAMBERS (Nov. 30, 2025).

¹⁵³ Ta-Chang Lin, Guha Krishnaswamy & David S. Chi, *Incense Smoke: Clinical, Structural and Molecular Effects on Airway Disease*, 6 CLINICAL & MOLECULAR ALLERGY 3 (2008); James J. Jetter et al., *Characterization of Emissions from Burning Incense*, 295 SCI. TOTAL ENV'T 51 (2002).

¹⁵⁴ The Trade Marks Act, 1999, India Code (2000), vol. 42, § 2(2)(b) (India); *Hardie Trading Ltd. v. Addisons Paint & Chemicals Ltd.*, A.I.R. 2003 SC 3377 (India).

¹⁵⁵ Tzu-Ting Yang et al., *Effect of Relative Humidity on Polycyclic Aromatic Hydrocarbon Emissions from Smoldering Incense*, 13 AEROSOL & AIR QUALITY RSCH. 662 (2013); Lin et al., *supra* note 154.

¹⁵⁶ Ram Mohan & Agarwal, *supra* note 137; Tushnet, *supra* note 146.

¹⁵⁷ WIPO, *supra* note 134; EUIPO, *supra* note 140.

¹⁵⁸ The Trade Marks Act, 1999, India Code (2000), vol. 42, §§ 9(1)(a)–(c) (India); *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159 (1995).

present, boundary instability and distinctiveness pressure reinforce each other.¹⁵⁹ The more a scent must be communicated as the product itself, the more it becomes descriptive.

Read this way, the containment result does not repudiate the 2025 order. It continues the order's premise that the Register must communicate clear and precise subject-matter, and that separable signs are the ones that can plausibly function as marks in trade. Where the sign is a controlled add-on, the order's proxy logic can work.¹⁶⁰ Where the sign is an after-use performance output whose identity is combustion-contingent, the same logic supplies the limit.¹⁶¹

VIII. "PROPOSED TO BE USED" AS A STRESS POINT

The Trademark Act, 1999 allows an application for a mark that is "used or proposed to be used".¹⁶² For ordinary word or device marks this phrase usually functions as a timing choice, because many marks can be examined for distinctiveness at filing. A coined word or an arbitrary logo is separable from the goods, and the Registry can treat distinctiveness as a quality of the sign as filed, not as a question of consumer training.¹⁶³

Scent marks change that balance because their meaning in trade is rarely readable from the sign alone.¹⁶⁴ A scent becomes a trade mark only if consumers learn to treat it as pointing to one trader rather than as a product quality, a variety cue, or a performance promise.¹⁶⁵ Incense-class claims sit close to product identity.¹⁶⁶ The smell emerges when the goods are consumed, and buyers often recognise it as "that kind of incense" rather than as a badge of origin.¹⁶⁷ In that setting, inherent distinctiveness is structurally doubtful at filing, because the scent is still performing the goods rather than signalling a trader.¹⁶⁸

¹⁵⁹ Reimer, *supra* note 142; Friedmann, *supra* note 145.

¹⁶⁰ Anand and Anand, *supra* note 153; *India Grants its First Smell Mark: Rose-scented Tyres*, SPICY IP (Nov. 2025).

¹⁶¹ Ram Mohan & Agarwal, *supra* note 137; Yang et al., *supra* note 156.

¹⁶² The Trade Marks Act, 1999, India Code (2000), vol. 42, § 18(1) (India).

¹⁶³ *Godfrey Phillips India Ltd. v. Girnar Food & Beverages (P) Ltd.*, (2004) 5 S.C.C. 257 (India).

¹⁶⁴ Jane C. Ginsburg, "See Me, Feel Me, Touch Me, Hear Me" (and Maybe Smell and Taste Me, Too): *I am a Trademark—A US Perspective*, in *TRADE MARKS AND BRANDS: AN INTERDISCIPLINARY CRITIQUE* (Lionel Bently, Jennifer Davis & Jane C. Ginsburg eds., 2008); Ram Mohan & Agarwal, *supra* note 137.

¹⁶⁵ LIONEL BENTLY ET AL., *INTELLECTUAL PROPERTY LAW* (6th ed. 2025); Burgunder, *supra* note 131; Yafei Pan, *Research on the Distinctiveness Examination Criteria of Scent Trademarks*, 2 SCI. L.J. 48 (2023).

¹⁶⁶ Apoorva B.N., *Legal Status of Olfactory Marks under the Trademark Law Regime*, 1(2) NLUA J. INTELL. PROP. RTS. 37; *Smell, Sound and Taste – Getting a Sense of Non-Traditional Marks*, WIPO MAG. (Feb. 25, 2009).

¹⁶⁷ Cf. *Cadila Healthcare Ltd. v. Cadila Pharm. Ltd.*, (2001) 5 S.C.C. 73 (India).

¹⁶⁸ WIPO, *supra* note 128; Faye Hammersley, *The Smell of Success: Trade Dress Protection for Scent Marks*, 2 MARQ. INTELL. PROP. L. REV. 105 (1998).

Once inherent distinctiveness is doubtful, the statute pushes the applicant toward the proviso to Section 9(1), which saves marks that have acquired a distinctive character as a result of use, before the date of application.¹⁶⁹ The proviso is drafted as a proof hinge tied to time. If the applicant cannot show acquisition before filing, the proviso cannot do any work, and the application remains exposed to refusal under the main part of Section 9(1).

This is where “proposed to be used” becomes unstable. A proposed-use filing, by definition, does not assert pre-application use. The Rules and Registry practice makes that difference concrete, because a prior-use claim requires a stated date and supporting documents that can be examined and opposed, while a proposed-use claim does not generate an equivalent evidentiary trail at the threshold.¹⁷⁰ For marks whose distinctiveness depends on market conditioning, that absence is not an administrative inconvenience; it removes the statutory material that allows Section 9’s proviso to be applied at all.¹⁷¹

Later-stage mechanisms do not solve that gap. Removal for non-use and Section 32 operate after registration and cannot substitute for the proviso’s pre-application condition.¹⁷²

The post-2025 opening intensifies the pressure. The November order makes scent marks institutionally thinkable, and it also normalises examination moves on a “proposed to be used” footing where the scent is treated as an arbitrary add-on and distinctiveness is accepted on plausibility.¹⁷³ That posture can make sense when the sign is conceptually separable from the goods at filing.¹⁷⁴ It becomes unstable when the sign is the goods’ defining sensory performance, because the statute’s own structure requires the applicant to rely on the proviso, and the proviso requires proof that proposed use cannot supply.¹⁷⁵

¹⁶⁹ The Trade Marks Act, 1999, India Code (2000), vol. 42, § 9(1) (India).

¹⁷⁰ Trade Marks Rules, 2017, Rule 27 (India); The Trade Marks Act, 1999, India Code (2000), vol. 42, § 18(1) (India).

¹⁷¹ EUIPO, Guidelines for Examination of European Union Trade Marks, Part B: Examination, Section 4, Chapter 14: Article 7(3) EUTMR: Acquired Distinctiveness (Oct. 1, 2017); WIPO, Standing Comm. on the L. of Trademarks, Indus. Designs & Geographical Indications, *Relation of Established Trademark Principles to New Types of Marks*, WIPO DOC. SCT/17/3 (Mar. 30, 2007).

¹⁷² The Trade Marks Act, 1999, India Code (2000), vol. 42, §§ 32, 47 (India).

¹⁷³ Trade Marks Registry (New Delhi), Order in TM Application No. 5860303, Class 12 (Nov. 21, 2025) (India); Swaraj Paul Barooah, *The Scent of the Sumitomo Trademark: What is the Celebration About?*, SPICY IP (Nov. 26, 2025); Ayushi Shukla, *India’s Trademark Registry Accepts Its First Smell Trademark For Japanese Company’s Rose-Scented Tyres*, LIVE LAW (Nov. 21, 2025).

¹⁷⁴ Gangjee, *supra* note 111; Justin Hughes, *Aesthetic Functionality*, in THE OXFORD HANDBOOK OF INTERNATIONAL TRADEMARK LAW 252 (Lisa P. Ramsey ed., 2018).

¹⁷⁵ EUIPO, *supra* note 172; *Order of the Rose: Sets Olfactory Trademark Standards*, BANANA IP (Nov. 27, 2025).

The problem is not that scent marks are difficult, and it is not that examiners should demand impossible precision. The problem is internal coherence. For incense-class scent claims the only plausible route is evidence-heavy and time-bound;¹⁷⁶ and treating “proposed to be used” as doing the same work here that it does for ordinary marks risks flattening the difference between inherent distinctiveness and the proviso’s acquired distinctiveness route, which is where Section 9 does its sorting.¹⁷⁷

IX. A CROSS-JURISDICTIONAL PERSPECTIVE

A. EU/UK: register-notice discipline for non-traditional marks

European trade mark law treats “representation” as a register-notice discipline.¹⁷⁸ The hinge is the decision of the European Court of Justice in *Case C-273/00, Sieckmann v. Deutsches Patent- und Markenamt.* A smell can be described, sampled, or specified by chemical formula, and still fail because the register cannot tell third parties what monopoly boundary has been claimed. The Court required a representation that lets authorities and the public determine the subject matter of protection with clarity and precision, and it expressed this through the familiar attributes: clear, precise, self-contained, easily accessible, intelligible, durable and objective.¹⁷⁹ The emphasis is institutional: competitors clear the field off the register and disputes later rely on the same entry to anchor what was claimed, so any representation that leaves room for shifting perception defeats the register’s function.¹⁸⁰

Sieckmann’s rejection of the offered formats tracks that notice logic.¹⁸¹ A verbal description breaks at objectivity because different readers map words onto different experiences.¹⁸² A chemical formula identifies a substance, not the odour as perceived, and it is not intelligible to the register’s audience.¹⁸³ A deposit sample changes over time, so the register would store a moving reference.¹⁸⁴

¹⁷⁶ *India’s First Olfactory Trade Mark*, EU IP HELPDESK (Dec. 10, 2025), https://intellectual-property-helpdesk.ec.europa.eu/news-events/news/indias-first-olfactory-trade-mark-2025-12-10_en; *India’s First Smell Mark: A Comprehensive Analysis of the Rose-Scented Tyre Trademark*, CHAMBERS (Nov. 30, 2025).

¹⁷⁷ Barton Beebe, *Search and Persuasion in Trademark Law*, 103 MICH. L. REV. 2020 (2005); Wee Loon Ng-Loy, *Trade Marks, Language and Culture: The Concept of Distinctiveness and Publici Juris*, 2009 SING. J. LEGAL STUD. 509.

¹⁷⁸ The European Parliament and the Council, Regulation (EU) 2017/1001 (Issued on Jun. 14, 2017); MARTIN SENFLEBEN, *Signs Eligible for Trademark Protection in the European Union*, in THE CAMBRIDGE HANDBOOK OF INTERNATIONAL AND COMPARATIVE TRADEMARK LAW (Irene Calboli & Jane C. Ginsburg eds., 2020).

¹⁷⁹ Sieckmann, *supra* note 3.

¹⁸⁰ Robert Burrell, *Who Reads the Trade Marks Register?*, 45(2) OXFORD J. LEGAL STUD. 272 (2025); INT’L TRADEMARK ASS’N, MODEL TRADEMARK LAW GUIDELINES pt. 7 (Nov. 1, 2024).

¹⁸¹ Sieckmann, *supra* note 3; Simon Geiregat, *What We Don’t Talk about When We Talk about “Clear and Precise”*: *Si(e)ckmann Revisited*, 53(5) IIC – INT’L REV. INTEL. PROP. & COMPETITION L. 628 (2022).

¹⁸² Sieckmann, *supra* note 3.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

The EU later removed “graphical” without abandoning the logic. The 2017 EU Trade Mark Regulation¹⁸⁵ allows any appropriate form using generally available technology, but keeps the requirement that the register must enable authorities and the public to determine the clear and precise subject matter of protection, carrying forward the *Sieckmann* criteria as the threshold.¹⁸⁶ That is why sound and motion marks benefit from standard file formats while European Union Intellectual Property Office (EUIPO) guidance still treats smell marks as failing clarity and precision.¹⁸⁷ UK law now uses the same formula in section 1 of the Trade Marks Act 1994 (as amended), and United Kingdom Intellectual Property Office (UKIPO) practice treats the *Sieckmann* discipline as controlling.¹⁸⁸

This vocabulary clarifies what India’s 2025 order is attempting when it frames representation as notice while still speaking in “graphical” terms.¹⁸⁹ The hard question is not whether science can map a smell.¹⁹⁰ It is whether the mapping yields a stable, contestable object that competitors can understand and that adjudicators can police.¹⁹¹ That distinction helps explain why a tyre-applied scent can be fenced as an add-on, while combustion-variable smoke is harder to bound because the perceived sign shifts with burn conditions and space, so the register entry struggles to mark where the monopoly begins and ends.¹⁹²

B. US: sensory feature-monopoly intuition

US trade mark law supplies a separate confirmation about feature monopolies.¹⁹³ The Supreme Court treats functionality as a structural safeguard against using trade mark law to control product features that competitors need in order to compete. *Qualitex* accepted that colour can serve as a mark, but insisted that functionality prevents trade mark law from inhibiting competition by allowing control over useful product features.¹⁹⁴ *TrafFix* sharpened the point: where a feature is

¹⁸⁵ Regulation 2017/1001, *supra* note 179..

¹⁸⁶ *Id.*, art. 4; The European Parliament and the Council, Council Directive 2015/2436 (Issued on Dec. 16, 2015).

¹⁸⁷ Commission Implementing Regulation (EU) 2018/626, of 5 March 2018, 2018 O.J. (L 104) 37; EUIPO, Guidelines for Examination of European Union Trade Marks, Part B (Examination), Section 4 (Absolute Grounds) (2025); S. Geiregat, *supra* note 182.

¹⁸⁸ Trade Marks Act, 1994, India Code (2000), vol. 42, § 1 (U.K.); UKIPO, TRADE MARKS MANUAL.

¹⁸⁹ Registrar of Trade Marks (India), Order in TM Application No. 5860303, Class 12 (Issued on Nov. 21, 2025); Anand and Anand, *A Scent of Protection: Indian Registrar allows registration of smell mark*, LEXOLOGY (Nov. 27, 2025).

¹⁹⁰ Andreas Keller et al., *Predicting Human Olfactory Perception from Chemical Features of Odor Molecules*, 355(6327) SCIENCE 820 (2017); Risheng Zhong et al., *Bridging Odorants and Olfactory Perception through Machine Learning: A Review*, 153 TRENDS FOOD SCI. & TECH. 104700 (2024).

¹⁹¹ Regulation (EU) 2017/1001, *supra* note 179, art. 4; WIPO, *supra* note 128.

¹⁹² Registrar of Trade Marks, *supra* note 189; Ram Mohan & Agarwal, *supra* note 137; *Smoke Chemistry*, NCBI BOOKSHELF.

¹⁹³ *Qualitex Co. v. Jacobson Products Co.*, 514 U.S. 159; Robert G. Bone, *Trademark Functionality Reexamined*, 7(1) J. LEGAL ANALYSIS 183 (2015).

¹⁹⁴ *Qualitex Co v. Jacobson Products Co.*, 514 U.S. 159.

essential to use or purpose, secondary meaning does not rescue it, because trade mark protection cannot be used to recapture what the patent bargain must leave in the public domain.¹⁹⁵

United States Patent and Trademark Office [“USPTO”] practice for scents tracks the same intuition.¹⁹⁶ Examination guidance treats scents as incapable of inherent distinctiveness, demands substantial proof that the scent is perceived as a source indicator rather than a product attribute, and excludes categories where scent is the product or serves a utilitarian role.¹⁹⁷

The line, thus, the author argues, is conceptual: trademarks protect source signals, not product experience alone.¹⁹⁸ This does not need to be imported into Indian law as a test. It validates a narrower proposition already reachable internally: when an after-use scent is also an essential characteristic, recognition tends to attach to product identity and performance rather than trade origin, so the claim begins to look like exclusivity over the product’s sensory identity.¹⁹⁹ That is the same kind of overreach US law is designed to block, and it supports reading the Indian scheme’s “capable of distinguishing” requirement and distinctiveness bar as already carrying a limit against turning product-defining sensory features into marks, reinforced by the Act’s own anti-feature posture elsewhere.²⁰⁰

X. THE RESULT OF DOCTRINAL CONTAINMENT

A. The rule-statement: the two-axis containment in statutory language

“Capable of distinguishing” in Section 2(1)(zb) assumes more than a sign that can be talked about or vaguely recognised. It assumes a sign that can be held apart from the goods so that origin can be read off it in trade, and so competitors can tell what must be avoided.²⁰¹ For after-use essential-characteristic scents, that separability fails at the level of the thing being claimed.²⁰² The scent is generated only on consumption, and its sensory identity is produced through combustion and

¹⁹⁵ *Traffix Devices, Inc. v. Mktg. Displays, Inc.*, 532 U.S. 23 (2001).

¹⁹⁶ USPTO, Trademark Manual Of Examining Procedure § 1202.13 (Oct. 2018); USPTO, *Non-Traditional Marks* (Dec. 16, 2025).

¹⁹⁷ USPTO, Trademark Manual Of Examining Procedure § 1202.13 (Scent and Fragrance Marks).

¹⁹⁸ William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30(2) J.L. & ECON. 265 (1987); Barton Beebe, *The Semiotic Analysis of Trademark Law*, 51 UCLA L. REV. 621 (2004).

¹⁹⁹ Bethany M. Brill, *Scent Marks: The Next Frontier or a Bridge Too Far?*, 56(1) RICH. L. REV. 1 (2022); Rena L. Churovich, *The Scent of a Mark: Can Olfactory Trademarks Be Registered*, 19(1) CARDOZO ARTS & ENT. L.J. 1 (2001).

²⁰⁰ *Traffix Devices, Inc. v. Marketing Displays, Inc.*, 532 U.S. 23; Sandra L. Rierson, *Toward a More Coherent Doctrine of Trademark Genericism and Functionality: Focusing on Fair Competition*, 27 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 691 (2017); Registrar of Trade Marks, *supra* note 189.

²⁰¹ The Trade Marks Act, 1999, India Code (2000), vol. 42, § 2(1)(zb) (India); Beebe, *supra* note 198; McKenna, *supra* note 89.

²⁰² Sieckmann, *supra* note 3; Simon Geiregat, *Trade Mark Protection for Smells, Tastes and Feels*, 13(2) JIPITEC 1 (2022); M.P. Ram Mohan, *The Proustian Predicament in Trademark Law* (IIMA, Working Paper No. 2025-08-01, 2025).

residue rather than through a stable attribute that can be fixed to the goods at the moment of trade. Once the Register is treated as a notice instrument, the subject matter must be capable of being stated with contestable boundaries, because notice without boundary is not notice.²⁰³

Read with Section 9(1), the result is an internal failure of distinctiveness. Where the scent is experienced as the product's defining performance, consumer "identification" tends to track kind and expected sensory character, not a badge of trade origin.²⁰⁴ The Act already signals hostility to feature monopolies through Section 9(3): although it is framed for shapes, its design choice is transparent.²⁰⁵ Registration is not meant to become a backdoor right over what the product must be in order for others to compete.²⁰⁶ Taken seriously, that posture means Section 2(1)(zb) and Section 9(1) cannot treat an after-use essential-characteristic scent as capable of distinguishing, because the claim collapses into control over product identity, not a separable mark. In the Act's own grammar: where a scent arises only after use and is inseparable from the goods' essential sensory character, it is incapable of distinguishing under Section 2(1)(zb) and must fail under Section 9(1).²⁰⁷

B. Residual space preserved and why it survives

This containment does not shut down olfactory marks. It preserves the space where a scent can plausibly operate as an arbitrary identifier because it is ancillary to the goods. The November 2025 tyre order survives on that footing: the scent is framed as a rose-like fragrance applied to a durable good whose ordinary sensory identity is rubber, and distinctiveness is treated as plausible on a "proposed to be used" posture rather than as an essential product attribute.²⁰⁸

²⁰³ *Sieckmann*, 2002 E.C.R. I-11737; David V. Roy & Mohamed Marsoof, *Trademarks, Free Speech, and Fair Competition in a World Without Borders*, 111 TRADEMARK REP. 943 (2021); Peter S. Menell & Michael J. Meurer, *Notice Failure and Notice Externalities*, 5 J. LEGAL ANALYSIS 1 (2013).

²⁰⁴ *Kaviraj Pandit Durga Dutt Sharma v. Navaratna Pharm. Lab'ys*, A.I.R. 1965 SC 980 (India); Karima Errajaa et al., *Consumer Reactions to Olfactory Congruence with Brand Image*, 29 J. RETAILING & CONSUMER SERVS. 102 (2020); Marta Grybś-Kabocik, *The Scent Marketing: Consumers Perception*, 9(4) BUS. & MGMT. REV. 483 (2018).

²⁰⁵ Dev Gangjee, *Non Conventional Trade Marks in India*, 22(1) NAT'L L. SCH. INDIA REV. 67 (2010); *The Shape of Shape Marks in India*, SPICY IP (Nov. 9, 2022); *The Case of Unconventional Trade Marks—Does the Trade Marks Act, 1999 Need Reform?*, SCC ONLINE BLOG (Mar. 18, 2023).

²⁰⁶ The Trade Marks Act, 1999, India Code (2000), vol. 42, § 9(3) (India); Robert G. Bone, *Trademark Functionality Reexamined*, 7 J. LEGAL ANALYSIS 183 (2015); C. Farmer, *The Case for Aesthetic Functionality*, 28 BERKELEY TECH. L.J. 777 (1996); Dennis D. Churovich, *Scents, Sense or Cents: Something Stinks in the Lanham Act*, 46 ST. LOUIS U. PUB. L. REV. 293 (2001).

²⁰⁷ The Trade Marks Act, 1999, India Code (2000), vol. 42, §§ 9(1)(a)–(b) (India).

²⁰⁸ Controller General, *supra* note 2.

Two categories remain intelligible.²⁰⁹ Ambient or service scents can still function where the scent marks a service environment or retail experience and is presented in a controlled, repeatable way, so that the sign is not the product's defining performance. Ancillary scents applied to durable goods can also survive where the scent is positioned as added and arbitrary, and where the claim can be bounded with reasonable precision on the Register.²¹⁰ What is excluded is narrower: after-use essential-characteristic scents that, by their role and temporality together, slide into product identity and leave no workable boundary for notice or competition.²¹¹

C. Registration discipline: “proposed to be used” and proof architecture

For incense-class scent claims, inherent distinctiveness is structurally doubtful, so the only plausible route is acquired distinctiveness.²¹² The proviso to Section 9 presupposes distinctive character acquired before the date of application as a result of use, so intention cannot do the work that evidence is meant to do.²¹³ Treating “proposed to be used” as equivalent here collapses Section 9's timing logic, and it quietly converts registration into a wager on future conditioning rather than a record of present distinguishability, which the Act does not contemplate.²¹⁴

XI. CONCLUSION

Incense smoke sits at the hard edge of trade mark form. It arrives only after the sale, through burning, and it is experienced as the goods' performance rather than as a detachable signal. When a scent functions this way, recognition may be strong, yet it points inward to variety, intensity, and expected effect, not outward to trade origin.²¹⁵ The mismatch, therefore, we can conclude, is structural:²¹⁶ The Act protects signs that can stand apart from the goods, but an after-use essential characteristic pulls the sign back into product identity.

²⁰⁹ GEORGE E. BRILL, MAKE SOME SENSE OF SCENT TRADEMARKS: THE UNITED STATES NEEDS A MODERN STANDARD (2022) (unpublished manuscript); WIPO, *New Types of Marks*, SCT/16/2 (Sept. 1, 2006); *Making Scents of Olfactory Marks*, ASIA IP (Nov. 2017).

²¹⁰ Controller General, *supra* note 2; Sieckmann, *supra* note 3.

²¹¹ *Sieckmann*, *supra* note 202; Mohan, *supra* note 202; Menell & Meurer, *supra* note 203.

²¹² The Trade Marks Act, 1999, India Code (2000), vol. 42, § 9(1), proviso to § 9 (India).

²¹³ The Trade Marks Act, 1999, India Code (2000), vol. 42, proviso to § 9 (India).

²¹⁴ The Trade Marks Act, 1999, India Code (2000), vol. 42, § 18(1) (India); *The Shape of Shape Marks in India*, SPICY IP (Nov. 9, 2022); Imperial Tobacco Co. of India Ltd. v. Registrar of Trade Marks, A.I.R. 1968 Cal 582 (India); *Trademarks: Distinctiveness is an Exception of Rule*, SCC ONLINE BLOG (Aug. 24, 2021); Stacey L. Dogan & Mark A. Lemley, *Grounding Trademark Law Through Trademark Use*, 92 IOWA L. REV. 1669 (2007).

²¹⁵ Ellen M. Reimer, A Semiotic Analysis: Developing a New Standard for Scent Marks, 14(3) VAND. J. ENT. & TECH. L. 693 (2012); G.E. Brill, Make Some Sense of Scent Trademarks, 56 U. RICH. L. REV. 19 (2022); Dev Gangjee, Non-Conventional Trade Marks in India, 5(2) NAT'L L. SCH. INDIA REV. 51 (2010).

²¹⁶ Mark P. McKenna, *(Dys)Functionality*, 48 HOUS. L. REV. 823 (2011); Justin Hughes, *Cognitive and Aesthetic Functionality in Trademark Law*, 36 CARDOZO L. REV. 1227 (2015); Michael Handler, *Disentangling Functionality, Distinctiveness and Use in Australian Trade Mark Law*, 42(1) MELB. U. L. REV. (advance copy) (2018).

The 21 November 2025 Registry acceptance made olfactory entries thinkable by treating representation as a notice device that must let others read what is claimed and contest it on the register.²¹⁷ That same commitment supplies the limit. A combustion-produced trace does not hold still across ordinary conditions of use, so the register entry cannot mark where exclusivity begins and ends, and opposition becomes guesswork rather than a contest over a bounded object.²¹⁸

Space remains where scent is ancillary and can be stated with precision, including applied fragrances on durable goods and controlled ambient scents. But where after-use coincides with essential character, there is too much smell, not enough mark, and the statute's grammar refuses the monopoly.²¹⁹

²¹⁷ OFFICE OF THE CONTROLLER GEN. OF PATENTS, DESIGNS AND TRADE MARKS, *Order in Application No. 5860303* (Issued on Nov. 21, 2025), http://images.assettype.com/theleaflet/2025-11-27/g2hg4aog/Order_21_11_2025.pdf; Ayushi Shukla, *India's Trademark Registry Accepts Its First Smell Trademark For Japanese Company's Rose-Scented Tyres*, LIVE LAW (Nov. 21, 2025); Tanishka Goswami, *The Scent of the Sumitomo Trademark: What is the Celebration About?*, SPICY IP (Nov. 26, 2025); Sieckmann, *supra* note 202.

²¹⁸ Kanako Sekimoto et al., *Fuel-Type Independent Parameterization of Volatile Organic Compound Emissions from Western US Wildfires*, 57(35) ENV'T SCI. & TECH. 13193 (2023); K.I. Fesomade & R.A. Walker, *Prescribed Fire Smoke: A Review of Composition, Measurement Methods, and Analysis*, 8 FIRE 241 (2025); Giulia Brattoli et al., *An Overview of Odour Detection Methods: Olfactometry and Sensor Arrays*, 11 SENSORS 5290 (2011); Simon Geiregat, *Scent Marks in the European Union: A Theory of Distinctiveness*, 53 I.I.C. 1233 (2022).

²¹⁹ Annette Kur, *Too Common, Too Splendid, or "Just Right"? Trade Mark Protection for Product Shapes in the Light of CJEU Case Law* (Max Planck Inst. for Innovation & Competition, Research Paper No. 14-17, Dec. 12, 2014); Justin Hughes, *Non-Traditional Trademarks and the Dilemma of Aesthetic Functionality*, in *THE PROTECTION OF NON-TRADITIONAL TRADEMARKS: CRITICAL PERSPECTIVES* (Irene Calboli & Martin Senftleben eds., 2018); Tim W. Dornis, *Colour Marks* (Mar. 17, 2021) (unpublished manuscript); *Lego Juris A/S v. OHIM*, Case C-48/09 P, ECLI:EU:C:2010:516.