



Making scents of olfactory marks

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*Not only do scents add commercial value to a product, they can also be a distinctive feature of a product. Manish Biala and Ashutosh Upadhyaya explore the use of scent marks in Europe, the United States and – perhaps one day – India. We understand that a trademark is a commercial identity which provides a business an absolute protection against infringement and misuse. The common understanding in case of trademark infringement or passing off is how the impugned mark creates [confusion for a consumer](#) with “average intelligence” and “imperfect recollection”. This rule is limited to the visual memory and identification of a consumer. However, it is neither impossible nor difficult for such a consumer to identify the source of a product merely by the smell or scent of the product. Not only do scents add commercial value to a product, but scents can also perform as a [distinctive feature](#) of a product and can further help the consumer identify the product without having to know its trade name. However, this is only possible once the scent of the product is used uninterruptedly as a mark and has acquired distinctiveness amongst its users. *This article was published in [Asia IP](#).**



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