

# Trade Mark law in an online future – coming to its senses?

*Caroline Wilson*

*GikII 2*

*September 19, 2007*

# Background

- Virtual reality environments are increasing both in sophistication and usage;

# Background

- Virtual reality environments are increasing both in sophistication and usage;
- It is assumed that trade mark law will have a role in protecting the ‘look and feel’ of the multi-sensory virtual reality environments of the future and that unconventional marks will be of increasing import;

# Background

- Virtual reality environments are increasing both in sophistication and usage;
- It is assumed that trade mark law will have a role in protecting the ‘look and feel’ of the multi-sensory virtual reality environments of the future and that unconventional marks will be of increasing import;
- We need to consider how might current UK trade mark law adapt to these challenges.

# Scope

- Exploration of the possible applicability of the olfactory (smell) and gustatory (taste) senses to future virtual reality environments (VREs), and;

# Scope

- Exploration of the possible applicability of the olfactory (smell) and gustatory (taste) senses to future virtual reality environments (VREs), and;
- Critical consideration of the received wisdom and current UK trade mark case law on the registration of olfactory and gustatory marks.

# Structure

- Exploration of the context and possible future of VREs;

# Structure

- Exploration of the context and possible future of VREs;
- Explanation of the current UK law on the registrability of olfactory (smell) and gustatory (taste) trade marks, and;

# Structure

- Exploration of the context and possible future of VREs;
- Explanation of the current UK law on the registrability of olfactory (smell) and gustatory (taste) trade marks, and;
- Consideration of whether a cognitive jurisprudential approach to trade marks should be the current and future approach of trade mark jurisprudence.

# What is Virtual Reality?

Working definition of a VRE:

“An artificial multi-sensory digital environment experienced *via* an intuitive interactive human/computer interface that faithfully renders behaviour in the physical world to that of the VRE .”

# A Possible Chronology of VREs

- *First generation VREs* (i.e. current VREs);

# A Possible Chronology of VREs

- *First generation VREs* (i.e. current VREs);
- *Second generation VREs* (i.e. VREs to come in the medium term);

# A Possible Chronology of VREs

- *First generation VREs* (i.e. current VREs);
- *Second generation VREs* (i.e. VREs to come in the medium term);
- *Third generation VREs* (i.e. VREs in the far future).

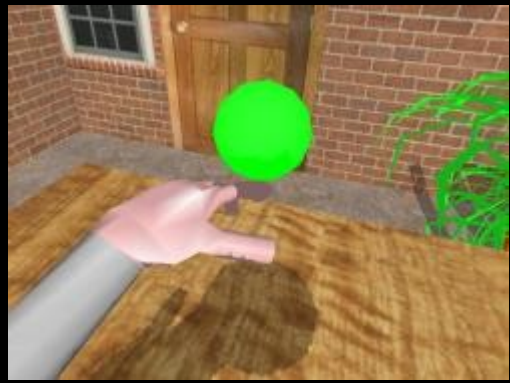
# Not just science fiction



# Purpose of First Generation VREs

- Therapeutic;

# First Generation VREs



# Purpose of First Generation VREs

- Therapeutic;
- Education and training, and;

# First Generation VREs



# First Generation VREs



# Purpose of First Generation VREs

- Therapeutic;
- Education and training, and;
- Leisure.



# Some Characteristics of First Generation VREs

- Domination of the screen/keyboard hardware as the generic interface. Usually a time delay (not truly interactive);

# First Generation VREs



# Some Characteristics of First Generation VREs

- Domination of the screen/keyboard hardware as the generic interface. Usually a time delay (not truly interactive);
- Other hardware interfaces are expensive and/or *sui generis*;

# First Generation VREs



# Some Characteristics of First Generation VREs

- Domination of the screen/keyboard hardware as the generic interface. Usually a time delay (not truly interactive);
- Other hardware interfaces are expensive and/or *sui generis*;
- Software is not usually intuitive;

# Some Characteristics of First Generation VREs

- Domination of the screen/keyboard hardware as the generic interface. Usually a time delay (not truly interactive);
- Other hardware interfaces are expensive and/or *sui generis*;
- Software is not usually intuitive;
- ‘Complex’ scenarios have to be pre-programmed;

# Some Characteristics of First Generation VREs

- Domination of the screen/keyboard hardware as the generic interface. Usually a time delay (not truly interactive);
- Other hardware interfaces are expensive and/or *sui generis*;
- Software is not usually intuitive;
- ‘Complex’ scenarios have to be pre-programmed;
- The VR is primarily an audio-visual experience, and;

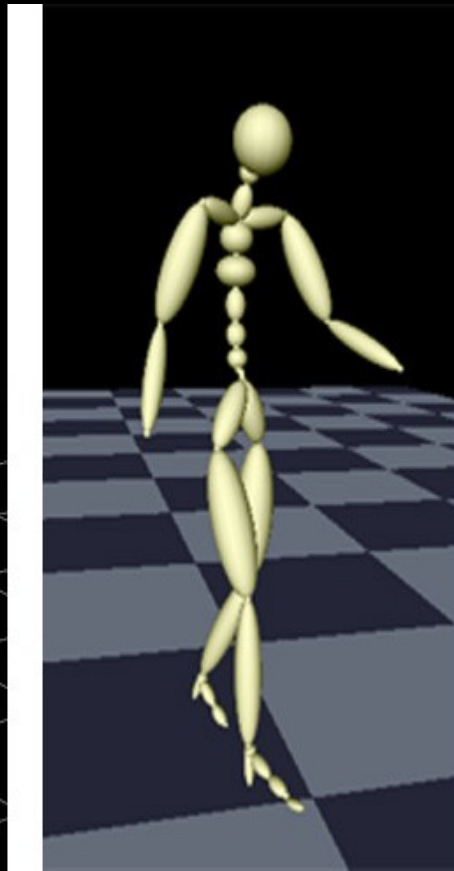
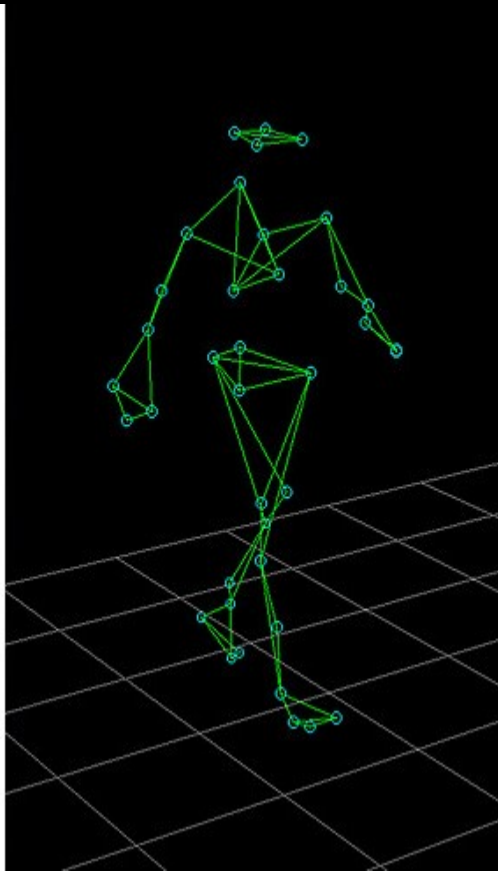
# Some Characteristics of First Generation VREs

- Domination of the screen/keyboard hardware as the generic interface. Usually a time delay (not truly interactive);
- Other hardware interfaces are expensive and/or *sui generis*;
- Software is not usually intuitive;
- ‘Complex’ scenarios have to be pre-programmed;
- The VR is primarily an audio-visual experience, and;
- ‘Unreal’ behaviours possible.

# Towards Second Generation VREs

- High fidelity movement;

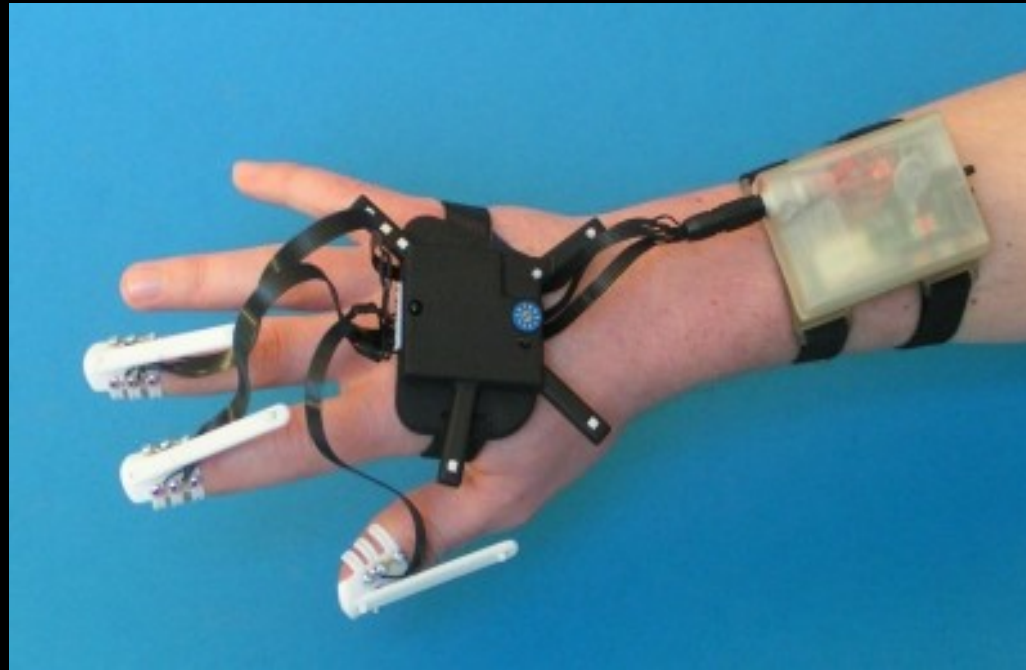
# Motion output data



# Towards Second Generation VREs

- High fidelity movement;
- High fidelity touch;

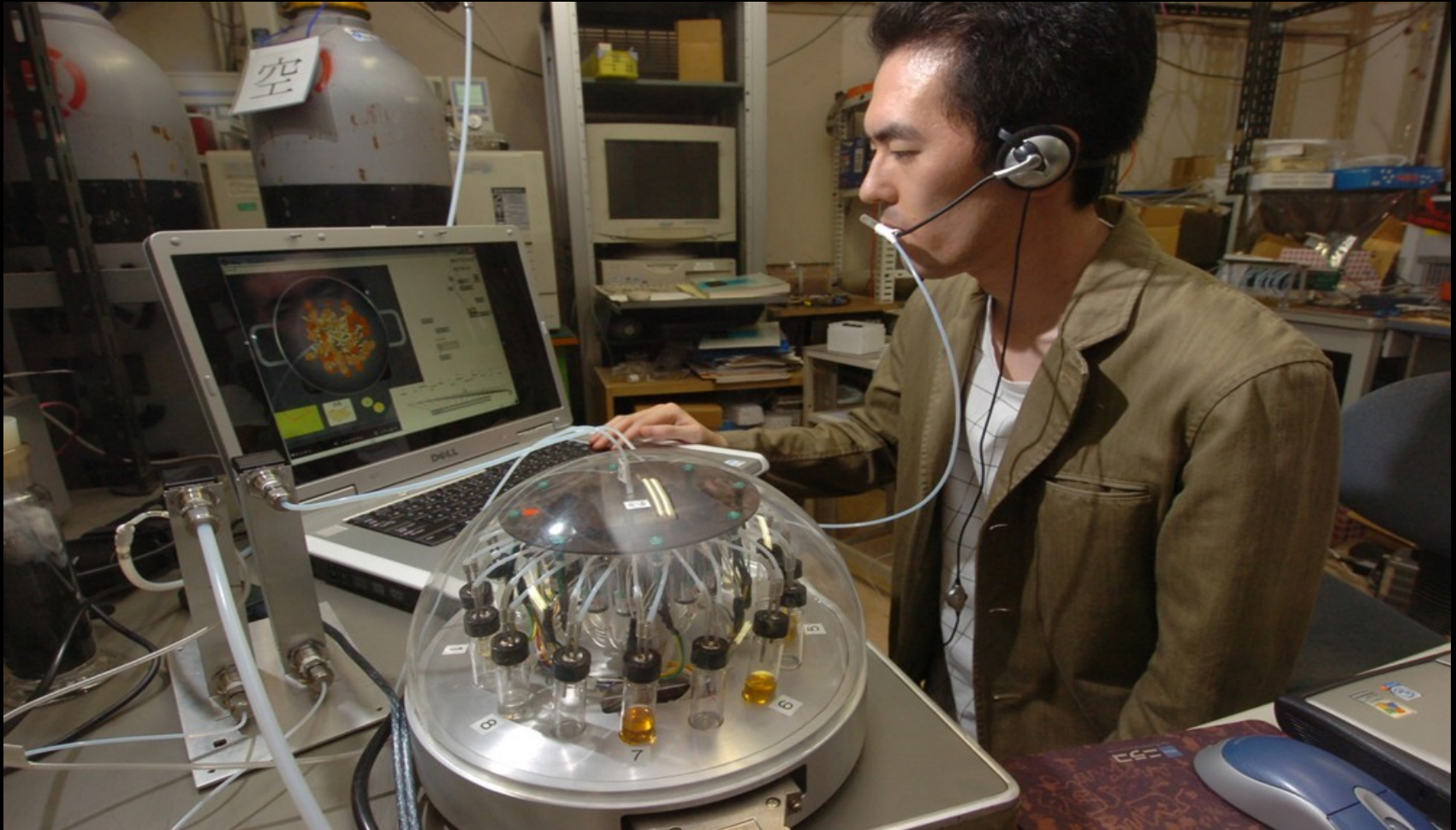
# Touch input data



# Towards Second Generation VREs

- High fidelity movement;
- High fidelity touch;
- High fidelity smell, and;

# Smell output data



# Towards Second Generation VREs

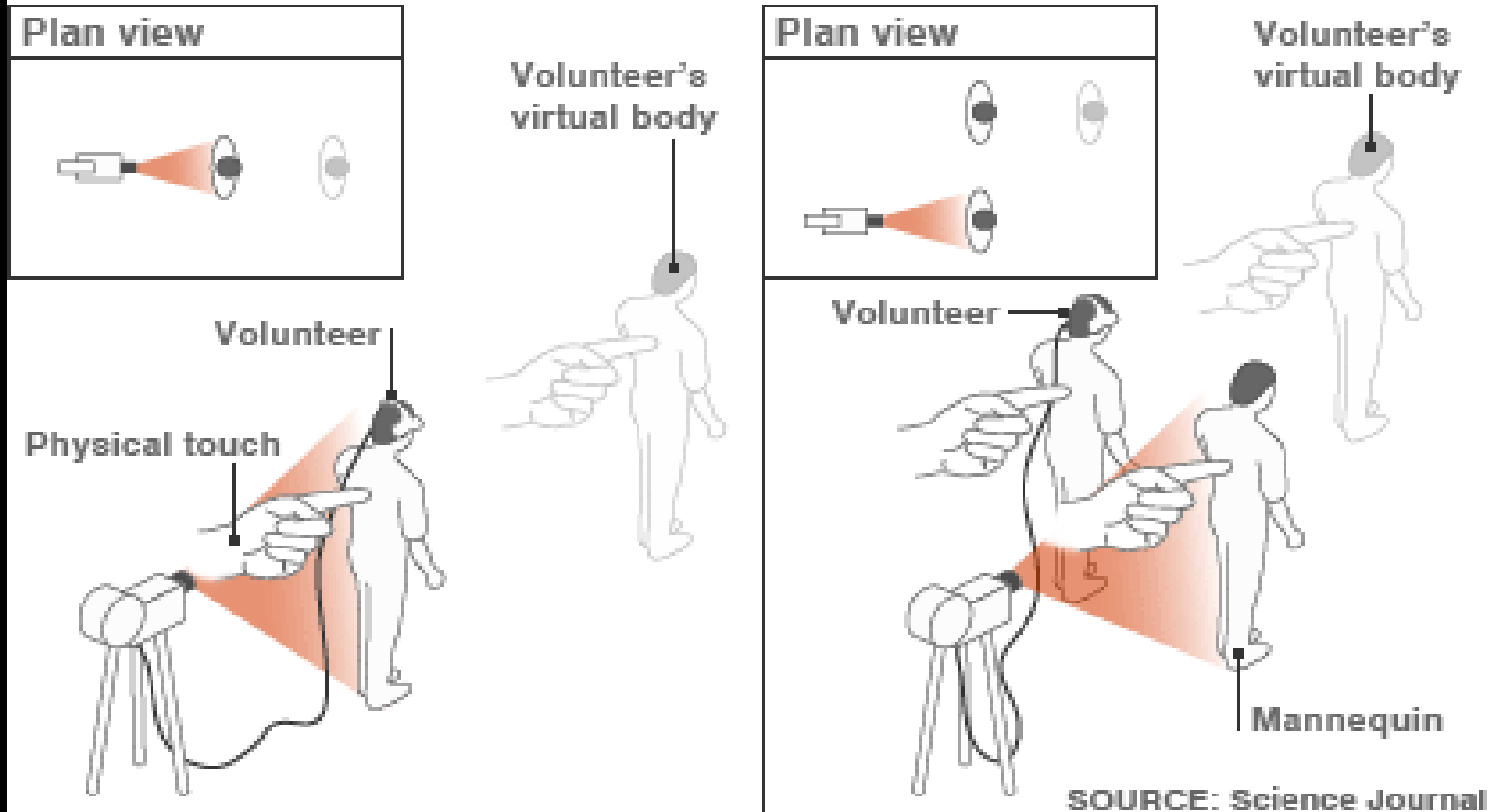
- High fidelity movement;
- High fidelity touch;
- High fidelity smell, and;
- High fidelity taste.

# Towards Third Generation VREs

- Is direct electronic stimulation of the central nervous system actually necessary?;
- See recent neurological research by teams at UCL and the Swiss Federal Institute of Technology in Lausanne.

# The OBE Paradigm

## SWISS EXPERIMENT SETUP



So.....

Now to trade mark law.....

# Routes to obtaining a Trade Mark valid in the UK

- National application to the UK Trade Marks Registry (UKIPO);

# Routes to obtaining a Trade Mark valid in the UK

- National application to the UK Trade Marks Registry (UKIPO);
- Community Trade Mark system (CTM), lodging applications at the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), or;

# Routes to obtaining a Trade Mark valid in the UK

- National application to the UK Trade Marks Registry (UKIPO);
- Community Trade Mark system (CTM), lodging applications at the Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM), or;
- Madrid Protocol.

# UK Trade Mark Law (1)

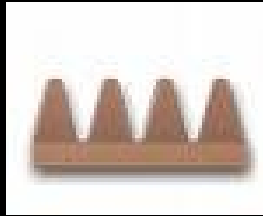
A trade mark is defined in the UK Trade Marks Act 1994 (TMA 1994) as:

“ Any *sign* which is capable of being *represented graphically* which is capable of *distinguishing* goods or services of one undertaking from those of other undertakings. A trade mark may, in particular, consist of words (including personal names), designs, letters, numerals or the shape of goods or their packaging.”

# UK Trade Mark Law (2)

- Olfactory and gustatory trade marks are examples of unconventional trade marks;

# Other Unconventional Marks



For chocolate



For soft drinks



# Other Unconventional Marks



for chocolate



for telecoms



# Other Unconventional Marks

Direct Line jingles



Use of music, e.g.  
*The Flower Duet*  
in *Lakmé* by Delibes



# UK Trade Mark Law (2)

- Olfactory and gustatory trade marks are examples of unconventional trade marks;
- Unconventional marks are more difficult to register as trade marks;

# UK Trade Mark Law (2)

- Olfactory and gustatory trade marks are examples of unconventional trade marks;
- Unconventional marks are more difficult to register as trade marks;
- With olfactory and gustatory trade marks the main barriers to registration is s.1 TMA 1994: that they are difficult to represent graphically (*Seickmann*) and are said not to be distinctive.

# The *Seickmann* test

Graphic representations uses images,  
Lines and characters and

# The *Seickmann* test

Graphic representations uses images, lines and characters and this must be:

- Clear;

# The *Seickmann* test

Graphic representations uses images, lines and characters and this must be:

- Clear;
- Precise;

# The *Seickmann* test

Graphic representations uses images, lines and characters and this must be:

- Clear;
- Precise;
- Self-contained;

# The *Seickmann* test

Graphic representations uses images, lines and characters and this must be:

- Clear;
- Precise;
- Self-contained;
- Easily accessible and intelligible;

# The *Seickmann* test

Graphic representations uses images, lines and characters and this must be:

- Clear;
- Precise;
- Self-contained;
- Easily accessible and intelligible;
- Durable, and;

# The *Seickmann* test

Graphic representations uses images, lines and characters and this must be:

- Clear;
- Precise;
- Self-contained;
- Easily accessible and intelligible;
- Durable, and;
- Objective.



# Key Questions

- *Can* one describe a scent or a taste?
- Can this been done *accurately, consistently* and by the *average person*?
- Can different scents be *distinguished*?
- *Should* scents and tastes be protected as trade marks?

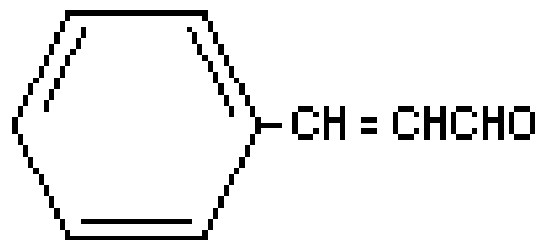
# My Argument: Graphic Representation

- Current methods of graphic representation of scents and tastes have rightly been held inadequate,

# Verbal Description

‘Smell, aroma or  
essence of cinnamon’

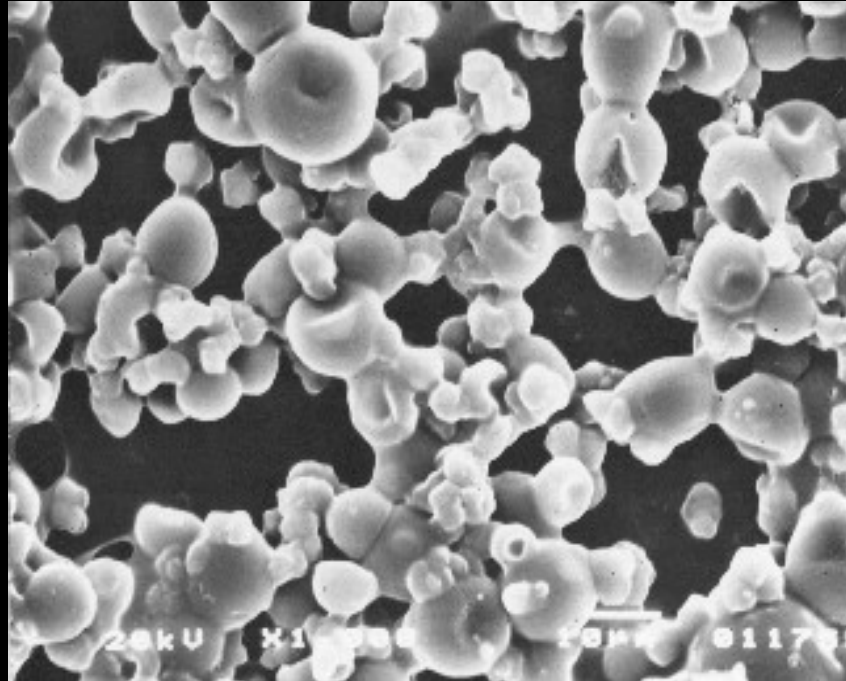
# Chemical Formula



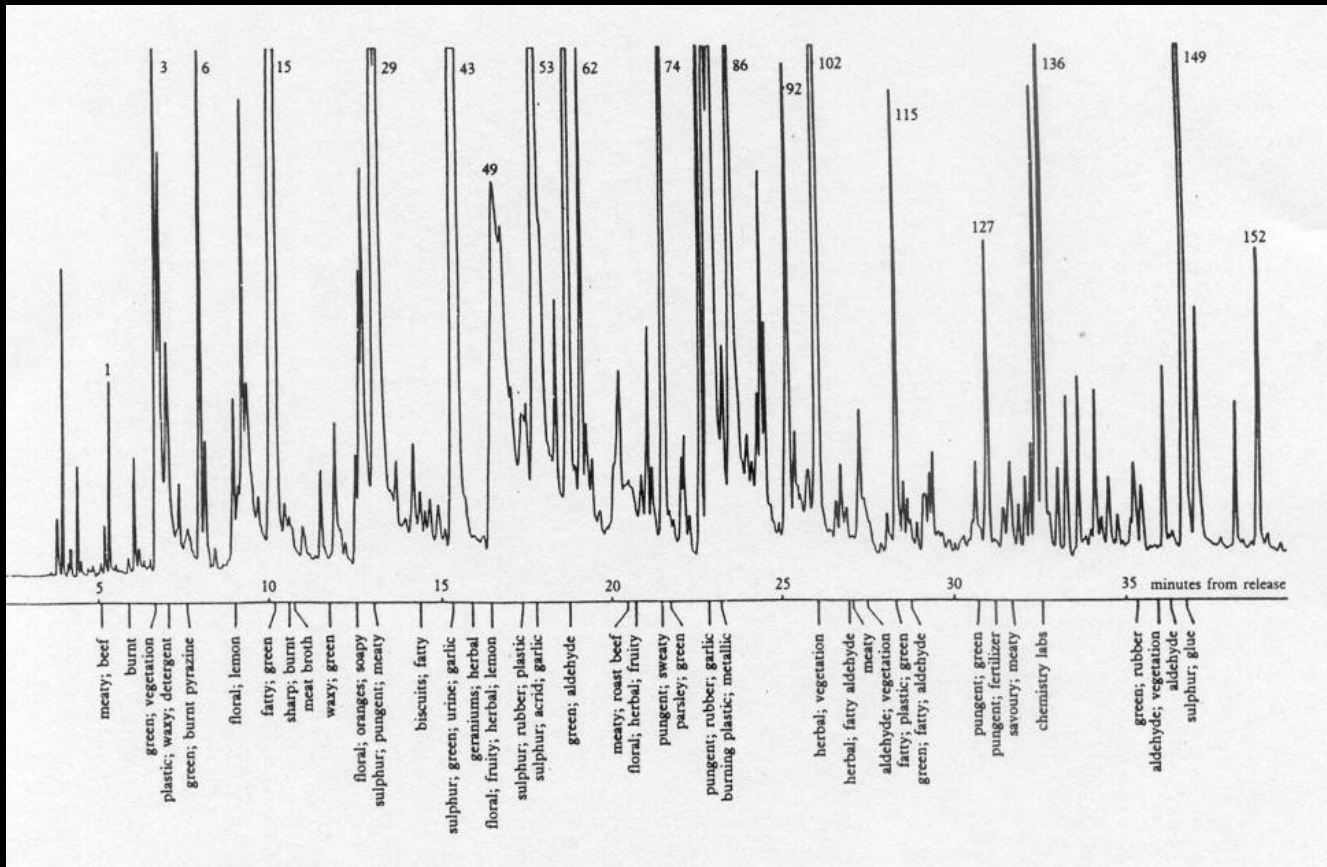
# Deposit of sample



# Scratch'n'sniff patch

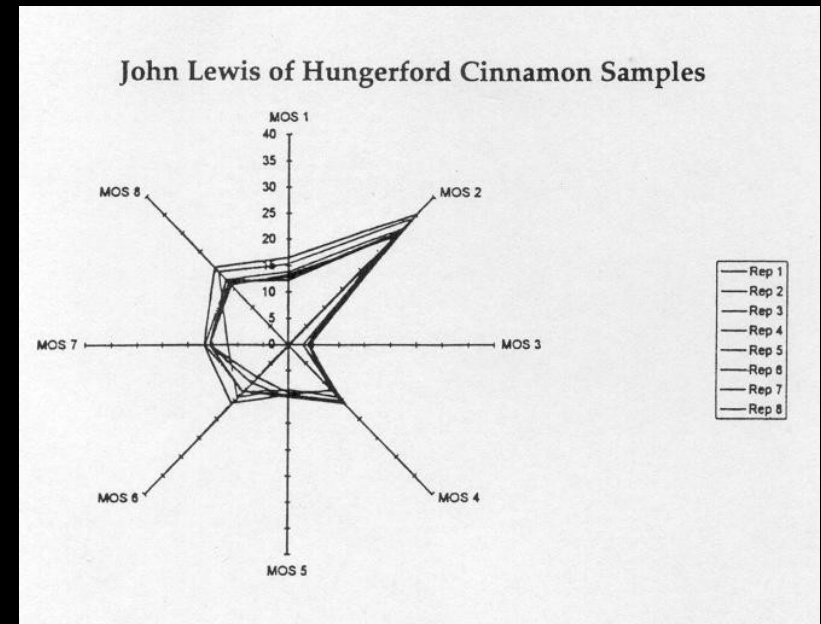


# Chromatogram



# ENose 'profile'

- Electronic nose designed to mimic human sense of smell
- Conducting polymers used as sensors
- Changes in resistance are plotted to give a graphical profile or fingerprint



# My Argument: Graphic Representation

- Current methods of graphic representation of scents and tastes have rightly been held inadequate, but so should that for auditory and colour marks, and;

# My Argument: Graphic Representation

- Current methods of graphic representation of scents and tastes have rightly been held inadequate, but so should that for auditory and colour marks, and;
- What if the Trade Marks Register was a second generation VRE?

# My Argument: Distinctiveness

*Cognitive jurisprudence* should be applied consistently in both trade mark registration and trade mark infringement, thus:

# My Argument: Distinctiveness

*Cognitive jurisprudence* should be applied consistently in both trade mark registration and trade mark infringement, thus:

- Increasing certainty for registrants and third parties, and;

# My Argument: Distinctiveness

*Cognitive jurisprudence* should be applied consistently in both trade mark registration and trade mark infringement, thus:

- Increasing certainty for registrants and third parties, and;
- Reducing the need for survey evidence.

# Conclusions

- Sensory trade marks are likely to be important for second and third generation VREs;

# Conclusions

- Sensory trade marks are likely to be important for second and third generation VREs;
- Current UK trade mark jurisprudence is partial, inconsistent and out of date;

# Conclusions

- Sensory trade marks are likely to be important for second and third generation VREs;
- Current UK trade mark jurisprudence is partial, inconsistent and out of date;
- Cognitive jurisprudence is a way forward – not only in protecting the VREs of tomorrow, but for trade mark law today, and;

# Conclusions

- Sensory trade marks are likely to be important for second and third generation VREs;
- Current UK trade mark jurisprudence is partial, inconsistent and out of date;
- Cognitive jurisprudence may be a way forward – not only in protecting the VREs of tomorrow, but for *current* trade mark law, and;
- Some difficulties could be resolved if the Trade Marks register was a second generation VRE.