

DEFINITION OF A TRADE MARK UNDER INDIAN LAW: AN ANALYSIS

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Abstract

This paper contains definitions and interpretations. While some new definitions have been added, some of the definitions existing in Trade and Merchandise Marks Act, 1958 have been made comprehensive and amplified. The provision for registration of “collective marks” is new and suitable definition has been included for the purpose. The expression “services” has been defined, as the Act envisages registration of trade mark not only for “goods” but also for “services” which include within its scope service relating to advertising and business, insurance and finance, construction and repair, transport and storage, material treatment, boarding and lodging, education and entertainment.

INTRODUCTION

Intellectual Property Rights allow people to assert ownership rights on the outcome of their creativity and innovative activity in the same way as they can own physical property.¹ Intellectual Property arises out of human labour hence it is bound by a number of changes.² The main types of Intellectual Property are Patents, Trade Marks, Designs, Copyrights and Geographical Indications. This paper will deal with Trade Marks which is an important aspect of Intellectual Property. In simple terms trade marks is for products and services to be identified with its maker and provider respectively. It becomes very valuable since it is connected with quality and consumer expectation.³ Trade marks can be name, number, logo, coined term, colours or combination of these and can be the texture or shape of the goods too. A trade mark protects both the interest of the consumer and the trader as well. The consumer is able to relate

¹ Anita Rao and V. Bhanoji Rao, *Intellectual Property -A Primer 2* (2003).

² P. Narayanan, *Intellectual Property Law* 120 (1999).

³ G.B. Raddy's, *Intellectual Property Rights and the Law* 256 (2012).

the product with the quality assured by its trader and the trader being able to block his competitors from using his mark and gain profits through imitation while making it distinct.⁴

DEFINITION OF A TRADE MARK

The dictionary meaning of a trade mark is that it is used as a symbol, word, or words chosen to represent a company or product.⁵

But the legal dictionary defines a trade mark as a name, symbol, figure, letter, form or device adopted and used by the manufacturer or merchant in order to designate the goods that he manufactures or sells, and to distinguish them from those manufactured or sold by another to the end that they may be known in the market as his, and thus enables him to secure such profits as result from a reputation for superior skill, industry or enterprise.⁶

As per Section 2(u) of the Bureau of Indian Standards Act, 1986:

“Trade Mark” means a mark used or proposed to be used in relation to goods for the purpose of indicating or so as to indicate a connection in course of trade between the goods and some person having the rights, either as proprietor or as registered user to use the mark, whether with or without any indication of the identity of that person.

ANALYSIS OF DEFINITION OF TRADE MARK UNDER INDIAN LAW

1999. Definition follows the pattern of 1958 Act⁷ and gives two definitions stated below. “Trade Mark” means:⁸

a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others and may include shape of goods, their packaging and combination of colours; and-

- i. In relation to Chapter XII (other than Section 107), a registration trade mark or a mark used in relation to goods or services for the purpose of indicating or so as to indicate a connection in the course of trade between the goods or services, as the case may be, and some person having the right as proprietor to use the mark; and
- ii. In relation to other provisions of this Act, a mark used or proposed to be used in relation to goods or services for the purpose of indicating or so to indicate a connection in the course of trade between the goods or services, as the case may be, and some person having the right, either as proprietor or by way of permitted user, to use the mark whether with or without any indication of the identity of that person, and includes a certification trade mark or collective mark.

There are listed two definitions of trade mark- one of Chapter XII (except Section 107) and the other for the purpose of the rest of the Act. Chapter XII (Sections 101-121) of the 1999 Act deals with Offences, Penalties and Procedure. Section 107 prescribes penalty for falsely representing a trade mark as registered. The essential features of both the definitions are the same. Section 2(1) (zb) imposes the positive requirement that a trade mark must possess distinctive character.⁹

⁴ Vinod V Sople, *Managing Intellectual Property* 107 (2006).

⁵ *Compact Oxford Reference Dictionary* 889 (2003).

⁶ P. Ramanatha Aiyar, *Concise Law Dictionary* 1152 (2008).

⁷ *Trade and Merchandise Marks Act, 1958.*

⁸ *The Trade Marks Act, 1999, Section 2 (1) (zb).*

⁹ Ashwani Kumar Bansal, *Law of Trade Marks In India* 64 (2014).

Moreover a trade mark covers a mark. The concept of mark “includes a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or combination of colours or any combination thereof”. This meaning becomes clear from Section 2(1) (m) of the Trade Marks Act, 1999.

Changes in Definition Brought About By the 1999 Act

In the new definition of trade mark there are inserted more substantive requirements for being a trade mark.¹⁰ This definition has enlarged the concept of being represented graphically and to include shape of goods, their packaging and combination of colours. The expression would apply to both goods and services.¹¹

“capable of being represented graphically”

“Graphical representation” means the representation of a trade mark for goods or services in paper form.¹² The purpose of graphic representation has been explained thus: “it is essential for traders to be able to identify with clarity what the registered trade mark is. The first question that arises when infringement is in issue is whether or not the alleged infringing mark is identical to the trade mark registered. If it is, and is used in relation to the same goods, the trade mark has an absolute monopoly. Where however, the mark is not identical but merely similar, the monopoly is restricted to uses, which create the necessary likelihood of confusion on the part of the public. This is the fundamental aspect of the law and it is for this reason that the graphical representation, being the means by which the trade mark is defined must be adequate to enable the public to determine precisely what the sign is that is the subject of registration.¹³

“capable of distinguishing the goods or services”

The trade mark must distinguish goods or services of the proprietor of trade mark from those of others, is now specifically stated for a mark to qualify as a trade mark and for being proprietor of a trade mark. The trade mark must possess capability to distinguish goods or services for the purpose of registration of trade mark in the register which now has only one part.¹⁴ The tribunal will consider whether the word is one which is so apt for normal description of the article that a monopoly in the use of it should not be acquired and will refuse registration if it will unduly fetter the freedom of action of other *bona fide* traders.¹⁵ Thus registration will be refused where the mark does not possess sufficient inherent capacity to distinguish and there is no evidence of factual capability to distinguish.¹⁶

¹⁰ *The Trade and Merchandise Marks Act, 1958*, Section 2(1) (v) listed two definitions of “Trade mark” one for chapter x (except section 81) and the other for the purposes of the rest of the Act. The essential features of both the definitions are same.

¹¹ K.C. Kailasam and Ramu Vedaraman, *Law of Trade Marks and Geographical Indications* 52 (2003).

¹² *The Trade Marks Rules, 2002*, Rule 2(1) (k).

¹³ *Surizzells Matlow Ltd. Appl.*, 58(1999) RPC 879.

¹⁴ Under *Trade and Merchandise Marks Act, 1958*, Register had two parts-Part A and B. In part A for registration adaptability of distinguishing was required, registration in Part B could take place with. Capability of distinguishing. The requirement of adaptability to distinguish is no more applicable.

¹⁵ *Liverpool Electric Cable Co.Ld.s Appl.*, (1929) 46 RPC 99.

¹⁶ *Phillips Phonographische Industries Apple.*, (1955) 72 RPC 183.

“for the purpose of indicating or so as to indicate”

When the Act requires that a mark to be qualified for registration as a trade mark must have been used for the purpose of indicating the origin of the goods in connection with which it is used, “I do not think that any deliberate resolution to that effect on the part of the user of the mark is contemplated. It is enough if in practice the mark has been so used as to denote the origin of the goods. I do not think it is essential to prove in addition that the market has accepted it is as a distinguishing mark, although such evidence may be valuable in fortification.”¹⁷

Shape, Packaging and Colour Combination of Goods as Trade Mark

Definition of trade mark now subsumes three more things (a) shape of goods, (b) packaging of the goods, and (c) combination of colours. The definition of ‘trade mark’ makes graphic presentation of the trade mark a necessity. If a mark consisting of a shape, or packaging or a combination of colours is put on goods or services in the course of trade or rendering of service it shall be a trade mark. It may be registered or may remain unregistered and would have rights accordingly. This new recognition of shape trade marks has brought about an overlap between rights in designs under the designs law and shape trade marks. There is likely to be enhanced activity for shape trade marks as they will enjoy exclusivity in perpetuity as trade marks against time limited protection of maximum of 15 years for designs.¹⁸ In addition, the assertion of *Gorbatschow Wodka Kg v. John Distilleries*¹⁹ the Bombay High Court delivered an interesting judgment pertaining to passing off trade mark law. The dispute was over the shape adopted by the defendant for its Vodka bottle. The Court held that the plaintiff *prima facie* established its trans border reputation as well as reputation in Indian market. The Court noted that the plaintiff adopted the instant shape capriciously, purely to give the article a distinctive appearance. It did not have a functional character. The shape of plaintiff’s bottle was based on the architecture of Russian Orthodox Church- a bulbous structure. The shape of defendant’s bottle relied primarily on the same bulbous structure. The defendant could not give a *bona fide* explanation for adopting the impugned shape for its bottle. If the defendant was allowed to dilute the distinctiveness and exclusivity of the mark of the plaintiff, it would embolden other infringers to invade upon the proprietary right of the plaintiff. The Court categorically blunted the argument of the defendant that the consumers of Vodka being affluent and educated were less likely to be deceived. The Court drew the fallacy of the assumption underlying that argument viz., while those who were educated or affluent had the ability to discern, consumers who did not belong to the aforesaid category were more likely to be deceived. It was held that the plaintiff made out a strong *prime facie* case for the grant of injunction. The balance of convenience weighed in favour of the plaintiff which had an established reputation. If the defendant was allowed to launch its product, it would cause irreparable injury to the established goodwill and reputation of the plaintiff. Accepting the arguments of the plaintiff, the Court restrained the defendant from using the objectionable bottle and any other shape identical/deceptively similar to the plaintiff’s mark in relation to its products in any manner whatsoever.

¹⁷ Lord Macmillian-Nicholson's Trade Mark (1931) 48 RPC 227.

¹⁸ *Supra* note 9 at 65.

¹⁹ 2011 (47) PTC 100 (Bom).

Prohibited shapes

Some types of shapes are prohibited under the Trade Marks Act, 1999 from being registered as a trade mark. The relevant provision in this regard is Section 9(3). Which reads:

A mark shall not be registered as a trade mark if it consists exclusively of –

- a) The shape of goods which result from the nature of goods themselves; or
- b) The shape of goods which is necessary to obtain a technical result; or
- c) The shape which gives substantial value to the goods.

Thus, all the shapes are not allowed registration as a trade mark; equally there is no requirement that all trade marks must be registered.

“Connection in the course of trade”

The expression “for the purpose of indicating or so as to indicate a connection in the course of trade” is wide enough to cover any person who handles the goods commercially in the course of trade; thus it will include an importer, manufacturer, selector, wholesaler or retailer.²⁰

“A connection in the course of trade in my opinion means, in the definition section, an association with the goods in the course of their production and preparation for the market. After the goods have reached the consumer, they are no longer in the course of trade. Trading in them has reached its objective and its conclusion in the acquisition by the consumer.”²¹ In the same case, it was further held that “in the course of trade” sufficiently, in my opinion, preserves the essential and characteristic function of the mark. The proprietor is required to be a trader who places the goods before the public as being his goods. That is the vital connection.²² It is to be noted that “connection in the course of trade” does not cover advertisement medias like gifts of goods wholly different from the goods of the proprietor of the mark.²³ There is no doubt that a person dealing with the goods of another may have good-will in business of dealing with them. An agent who is agent for the sale of goods of others may have a good-will in his agency business.²⁴ It is possible for an importer to get a valuable reputation for himself and his wares by his care and selection or his precaution as to transit or storage or because his local character is such that his genuineness; and if therefore goods, though of the same mark, are passed off by the competitors as being imported by him he will have a right of action.²⁵

Traditional Conditions in Definition Continued in the 1999 Act

All the traditional conditions which were there in relation to trade mark continue under the 1999 Act.²⁶ There are certain essentials which every trade mark must possess to be a trade mark. These essentials have been so, from a very long time. The Supreme Court had once said that “it is a settled principle of law relating to trade mark that there can be only one mark, one source and one proprietor. It cannot have two origins.”²⁷

²⁰ *Supra* note 11 at 54.

²¹ *Aristoc Ltd.v.Rysta Ltd.*, (1945) 62 RPC 65 per Lord Macmillan

²² *Id.* by Lord Wright.

²³ *Ferodo Ltd's Application*, (1945) 62 RPC 111 at 123.

²⁴ *Dental Manufacturing Co.Ltd.v.De Trey and Co.* (1912) 29 RPC 677 at 625.

²⁵ *Imperial Tobacco Company of India Ltd v. Bonnan*, AIR (1924) 187.

²⁶ *The Trade Mark Act*, 1999

²⁷ *Power Control Appliances and others v. Sumeet Machines Private Limited*, 1994 (1) MLJ 74.

Use by Proprietor or Permitted User

The definition of trade mark in Section 2(1) (zb) does not impose any condition as to use by a registered proprietor.²⁸ The definition requires that the connection displayed by the trade marked goods or services should either be with the proprietor or the permitted user.²⁹ If the proprietor, under his sponsorship or quality control allows use of the trade mark by any other person, it does not violate the definition of trade mark.

Any person who first introduces his goods or services into the market with a mark thereon in course of trade, is the proprietor of the trade mark for that description of goods or services according to the Common Law prevalent in India. This is recognized as such by the statutory law.³⁰

Trade Mark and Property Mark

A property mark indicates the ownership of property but not a trade mark. Under common law a trade mark meant a device and a word mark meant a trade name, but the trade mark and the trade names were treated as property marks in equity. A property mark is used by persons who do not deal in goods or services. A trade mark is used by traders in the course of their business. The English Public Stores Act of 1875 in terms gives a definition of “property marks”. On items owned by several wings of government, specific marks are affixed with a view to indicate the ownership of the goods. Though, the Trade Mark Acts in India do not define the word property mark, the Indian Penal Code (IPC) defines it. The definition under Section 479 of IPC reads thus: “A mark used for denoting that movable property belongs to a particular person is called a property mark.”

Sections 481 to 489 of IPC deal with various offences relating to property marks. It is significant to notice that these provisions do not refer in terms to trade mark. One reason for this could be that in 1860 when the Indian Penal Code was made the distinction between a property mark and trade mark was not that clear. Chapter XII of the Trade Marks Act, 1999 (substantially corresponding to Chapter X of the Trade and Merchandise Marks Act, 1958.) deals with the subject of offences, penalties and procedures pertaining to trade mark and trade description. In the case of *Sumat Prasad Jain v. Sheojanam Prasad*³¹ the Supreme Court held that the concept of trade mark under Section 2(1)(v) of the 1958 Act, is quite different from that of a property mark under Section 479 of the IPC, which means that the concept of trade mark has not nullified the concept of property mark. In that case the accused found that the scent (Pushpa Raj) could not capture the market. Copied the property marks from the carton of complainants popular scent (Basant Bahar) in toto and marketed Pushpa Raj scent under the same name. In a prosecution under Section 488 and 486 of IPC. Supreme Court confirming the conviction recorded by the

²⁸ The term “proprietor” is not defined in the Trade Marks Act, 1999, and is not governed by the Act, as it only defines the “registered proprietor” in Section 2 (1) (v). The registered proprietor is the person for the time being entered in the register as the proprietor of trade mark. Section (2) (1)(v) of *Trade Marks Act, 1999*.

²⁹ In *The Trade and Merchandise Marks Act, 1958*, ‘Registered User’ under Section 2(1)(s) was used.

³⁰ *Consolidated Food Corp. v. Brandon & Co.*, AIR 1965 Bom 35; *Lalwani v. Caltex*, AIR 1969 Bom 24, wherein the applicant was declared as proprietor of Caltex mark for watches, even though registration was refused.

³¹ AIR 1972 SC 2488.

trial magistrate held that the accused had committed the offence of both using a false property mark as well as of selling goods marked with a counterfeit property mark. The complainant in that case had used the word “trade mark” in the complaint. Supreme Court held that the allegations in the complaint were quit clear and reference to word “trade mark” was loosely made. The significant observations are reproduced below:

“The concept of trade mark is distinct from that of a property mark. A mark as defined by Section 2(1) (j) of Trade and Merchandise Marks Act, 1958, includes a device, brand, heading, label, ticket, name, signature, word, letter or numerical or any combination thereof. A trade mark means a mark used in relation to goods for the purpose of indicating or so as to indicate a connection in the course of trade between the goods and some person having the right as proprietor to use that mark. The function of trade mark is to give an indication to the purchaser or a possible purchaser as to the manufacture or quality of the goods, to give an indication to his eye of the trade source from which the goods come or the trade hand through which they pass on their way to the market.³² On the other hand, a property mark, as defined by Section 479 of the Penal Code means a mark used for denoting that a movable property belongs to a particular person. Thus, the distinction between a trade mark and a property mark is that where as the former denotes the manufacture or quality of goods to which it is attached, the latter denotes the ownership. In other words, a trade mark concerns the goods themselves, while a property mark concerns the proprietor. A property mark attached to the movable property of a person remains even if part of such property goes out of his hands and ceases to be his.³³ In *Emperor v. Dahyabhai Chakash*³⁴ the National Bank of India used to import bars of gold for sale in India. Each bar was of a uniform size, weight and purity and had the words “National Bank of India” inscribed on it as its property mark. The gold so imported was known in the market as ‘Nasrana Bak’, and acquired a special value in the market. The accused place in the market gold of their own market with work ‘Nasrana Bak’ inscribed on their bars. The High Court of Bombay held that the National Bank of India owned a property mark in the bars imported by it, and that accused was guilty of counterfeiting that property mark. It further held that though some of those bars had been sold by Bank and had thus passed out of its hands, that fact did not mean that its property mark did not remain, for the function of a property mark to denote ownership is not destroyed because any part of it on which it was impressed has ceased to be of that ownership.

TYPES OF TRADE MARKS

There are basically four types of trade marks which are:-

1. Service Mark.
2. Collective Mark.
3. Certification Mark.
4. Well- Known Trade Mark.

All these types of trade marks are equally important and promote activity as well as maintain the distinctiveness of the product.

³² Per Bowen, L.J., *In re Powell's Trade Mark* (1893) 10 RPC 200; *Ramdev Food Products Pvt. Ltd v. Arvindbhai Rambhai Patel*, AIR 2006 SC 3304.

³³ V.A. Mohta, *Trade Marks Passing off and Franchising* 72 (2004).

³⁴ (1904) 6 Bom LR 513.

Service Mark

The marks used as trade marks may not be only in respect of goods which become subject matter of trade or manufacture. However, there have been many instances where the marks are used for service also. The definition of 'service' or concept of 'service mark' was not provided under the Trade and Merchandise Marks Act, 1958. Therefore there was no provision for registration of service marks in India under the Act of 1958. These marks or names used by business rendering various kinds of services could be protected only by an action for passing off.³⁵

The Trade Marks Act, 1999 has changed this position and at present provides for registration of 'service mark'. As per Section 2(1)(z) of this Act. 'Service' has been defined as under:

'Service' means service of any description which is made available to potential users and includes the provision of services in connection with business of any industrial or commercial matters such as banking, communication, education, financing, insurance, chit funds, real estate, transport, storage, material treatment, processing, supply of electrical or other energy, boarding, lodging, entertainment, amusement, construction, repair, conveying of news or information and advertising.

It can be seen that a very comprehensive definition has been given to the 'service' under the Act. Service mark is a trade mark but it is used to identify and distinguish the services of one person from the services of others and to indicate the source of the services (e.g. Airtel and Hutch, LIC, DTC, UP Roadways, Punjab Roadways, Doordarshan India, AIR, Star TV, Welcome group hotels, Holiday inn, Air India, etc.) Titles, character names and other distinctive features of radio and television programs may be registered as service marks. The definition of trade mark is applicable to service mark, the only difference is that it is used or registered for a service and not goods.³⁶

Service Marks are used in number of day to day services, some examples of them are:-

- Management and investment services.
- Housing development services.
- Advertising Promotional services.
- Sponsorship.
- Speed reading instruction.
- Hotel and Motel services.
- Entertainment service rendered by individual group or theatre.³⁷

Collective Mark

A collective mark is one used by members of association, union or other collective group or other group or organization to identify source of the goods or services.³⁸ The Trade Marks Act, 1999 defines "collective mark" in Section 2(1)(g) as under:

"collective mark" means a trade mark distinguishing the goods or services of members of an association of persons [not being a partnership within the meaning of Indian Partnership Act, 1932 (9 of 1932)] which is the proprietor of the mark from those of others.

³⁵ *Supra* note 3 at 262.

³⁶ *Supra* note 9 at 48

³⁷ Dana Shilling, *Essentials of Trade Mark and Unfair Practices* 22 (2002).

³⁸ Marcia Rorkem Edward Asolfi, Berned Friedlach, *Licensing in the Federal Laboratory* 13 (1993).

There are two types of collective marks or legal entity for differentiation with other goods or services of same kind.³⁹ They are:

1. **Collective Membership Mark:** These marks are not used to indicate source of goods or services but they indicate that the seller is part of defined group.
2. **Collective Trade Mark and Collective Service Mark:** These are used to indicate the source. Such collective marks are used by group to indicate that the goods or services offered by each individual member of group are product or services of the collective.

A collective mark is for use by the individual members of an organization but is registered as a whole. The primary purpose or function of a collective mark is to indicate a trade connection of a member with the proprietor association or group. For example the well –known TATA house mark to be reserved for use by the members belonging to the House of TATAS. Similarly, the goods or services of a company or group of companies like Godrez or Hindusthan Lever may be the subject matter of a collective trade mark.⁴⁰

Examples of Collective trade marks include:

- The “CA”, device used by the Institute of Chartered Accountants.
- The mark “CPA”, used to indicate members of the Society of Certified Public Accountants, and
- The marks of various Confederated lobby groups.

Certification Mark

Corresponding provision in the Trade and Merchandise Marks Act, 1958 is Section 2(i)(c) and in Trade Marks Act, 1940 it is Section 2(i)(b). while Section 2(i)(c) of the 1958 Act, and Section 2(i)(b) of the 1940 Act are similarly worded there is a change in the language of definition under Section 2(1)(e) of the Trade Marks Act, 1999 which defines “certification trade mark” as under: “certification trade mark” means a mark capable of distinguishing the goods or services in connection with which it is used in the course of trade which are certified by the proprietor of the mark in respect of origin, material, mode of manufacture of goods or performance of services, quality, accuracy or other characteristics from goods or services not so certified and registrable as such under Chapter IX in respect of those goods or services in the name as proprietor of the certification trade mark, of that person.

The trade mark generally serves to distinguish the goods of one trader from those of others.⁴¹ The purpose of certification mark is to show that the goods or services on which the mark is used have been certified by some competent person in respect of certain characteristics of the goods or services such as origin, mode of manufacture, quality etc. Unlike in the case of an ordinary trade mark, the proprietor himself is not allowed to trade in such goods or services, which are under certification. Famous WOOLMARK and device in respect of Woolen goods and AGMARK used in relation to food products are instances of certification marks.⁴²

³⁹ Andrew Sriro, *Sriros Desk Reference of Indonesian Law* 367 (2006).

⁴⁰ *Supra* note 11 at 33.

⁴¹ *Supra* note 3 at 264.

⁴² *Supra* note 11 at 32.

Well –Known Trade Mark

The term well-known trade mark has been used for the first time in India under the Trade Mark Act, 1999, which came in force on 15 September, 2003 and has been defined under Section 2(1) (zg) which reads under:

“well –known trade mark”, in relation to any goods or services, means a mark which has become so to the substantial segment of the public which uses such goods or receives such services that the use of such mark in relation to other goods or services would be likely to be taken indicating a connection in course of trade or rendering of services between those goods or services and a person using the mark in relation to the first mentioned goods or services.

The definition clearly indicates that it is the ordinary trade mark which may acquire the character of well- known trade mark. When the consuming public on seeing a trade mark on some goods or services, relates it to a trade mark already used on some other goods or services, such a trade mark is considered to be a well known trade mark.⁴³ The definition of well- known trade mark is to be read with the provisions in Section 11(6) to 11(11) of the Trade Marks Act, 1999., which stipulate the facts and other things which are to be taken into account for determining a trade mark as a well- known trade mark.⁴⁴

The most important requirements in relation to well- known trade marks are:

- i. Knowledge or recognition of trade mark in the relevant section of public,
- ii. promotion of trade mark,
- iii. duration, extent and geographical area including registration and use,
- iv. Section 11(9) would show how no single factor is to be weighed in determining whether the trade mark is well –known or not.

The factors which the Registrar cannot require in relation to a well –known trade mark are stated in Section 11(9). The number of trade marks of Indian origin which may qualify as well known trade marks is very scant and thus it may safely be stated that the protection being extended to well –known marks is substantially to foreign trade marks.⁴⁵

A trade mark may be well-known trade mark even if:

- The trade mark has not been used in India⁴⁶
- The trade mark has not been registered in India⁴⁷
- The application for registration has not been filed in India⁴⁸
- Irrespective of the fact that whether trade mark is well- known or not, registered or not or has been applied for registration or not, in any other country⁴⁹
- The trade mark is not well- known in India to public at large.⁵⁰

⁴³ *Supra* note 9 at 53.

⁴⁴ *Supra* note 11 at 61.

⁴⁵ *Supra* note 9 at 53.

⁴⁶ *The Trade Marks Act, 1999*, Section 11(9) (i).

⁴⁷ *id.*, Section 11(9) (ii).

⁴⁸ *id.*, Section 11(9) (iii).

⁴⁹ *id.*, Section 11(9) (iv).

⁵⁰ *id.*, Section 11 (9) (v).

CONCLUSION

This paper contains definitions and interpretations. While some new definitions have been added, some of the definitions existing in Trade and Merchandise Marks Act, 1958 have been made comprehensive and amplified. The provision for registration of “collective marks” is new and suitable definition has been included for the purpose. The expression “services” has been defined, as the Act envisages registration of trade mark not only for “goods” but also for “services” which include within its scope service relating to advertising and business, insurance and finance, construction and repair, transport and storage, material treatment, boarding and lodging, education and entertainment. The existing definition of the expression “certification trade mark” has been modified to include services. The definition of “mark” has been enlarged to include the shape of goods, packaging and combination of colours. The definition of “trade mark” has also been enlarged to mean a mark capable of being represented graphically as well as to include shape of goods, their packaging and combination of colours and covers both goods and services.