

# TRADEMARK COSMOPOLITANISM - GLOBAL RECOGNITION TO WELL KNOWN TRADEMARKS

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## MEANING AND DEFINITION OF COSMOPOLITANISM

The word derives from the Greek *kosmopolites* formed from *kosmos* i.e., world, universe or cosmos and *polites* which means “citizen of a city”. Contemporary usage defines the term as “citizen of the world”.<sup>1</sup> Cosmopolitanism is the ideology that all human beings belong to a single community, based on a shared morality. A cosmopolitan community might be based on an inclusive morality, a shared economic relationship, or a political structure that encompasses different nations.<sup>2</sup> The term refers to a cluster of ideas and school of thought that sees a natural order in the universe reflected in human society, particularly in the polis or city state. It tends to present a political-moral philosophy which posits people as citizen of the world rather than of a particular nation-state. It emphasizes on social bonds rather than nation-states lays the foundation for its view of society ultimately evolving toward harmony and away from conflict.<sup>3</sup> Gustavo Lins Ribeiro says that Cosmopolitanism presupposes: “a positive attitude towards difference, a desire to construct broad allegiances and equal and peaceful communities of citizens who should be able to communicate across cultural and social boundaries forming a universal solidarity. It is unique in a way that it unites difference and equality, an apparent paradox of wishing to reconcile universal values with a diversity of culturally and historically constructed subject positions.”<sup>4</sup> It has always been considered as synonyms of the terms like mobility, migrancy, sensitivity and tolerance to otherness, independence from specific authorities, and transcultural and transnational realities and claims. Its opposing concepts are xenophobia, fixity, parochialism, restricted sovereignty, and allegiance to motherland or a nation-state.<sup>5</sup> Cosmopolitanism is often heralded as a cultural orientation ideally suited to the sociocultural and economic complexities emanating from the accelerating pace of globalization.<sup>6</sup> In general, “cosmopolitanism” can variously designate a style, an outlook, a description of certain global trends, or a normative program. In contemporary times, the thought of cosmopolitanism emerges from “post-modernism” and is the result of political shifts that have occurred at the end of cold war and of unipolarity after the second Gulf War and also the economic changes which we called as “globalization”. Contemporary cosmopolitanism has been said to have both an ethical or individualistic aspect and a political or institutionalist aspect.<sup>7</sup> Craig Calhoun writes that: “cosmopolitanism reflects an elite perspective of the world.”<sup>8</sup>

## I. MEANING OF TRADEMARKS

Trademark means a symbol, word or words legally registered or established by use as representing a company or product. It is a recognizable sign, design or unique expression related to products or services of a particular source from those of others. Essentially, a trademark is used to identify the commercial source or origin of products or services hence can properly be called as “badge of origin”.<sup>9</sup> Dictionary of Merriam Webster defines “trademark” as: “something that identifies a particular company’s product and cannot be used by another company without permission”; “a device pointing distinctively to the origin or ownership of merchandise to which it is applied and legally reserved to the exclusive use of the owner as maker or seller; or “a distinguishing feature or characteristic firmly associated with a person or thing”.<sup>10</sup> Section 2m of the Trademarks Act 1999 defines the trademark by saying that “it includes a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or combination of colours, or any combination of such expressions. Speaking generally, a trademark means a mark capable of being represented graphically and it should be capable of distinguishing the goods or services of one person from those of others. The court opined<sup>11</sup> that: “the inherent requirement is that the trademark should be descriptive enough so as to be indicative of the nexus between the goods and the mark owner.”<sup>12</sup> McCarthy on Trademarks says: “an individual or group of letters, not forming a recognisable word, can function as a mark. An arbitrary arrangement of letters can constitute a distinctive mark. When put in a

<sup>1</sup> Cosmopolitanism available at: <https://en.wikipedia.org/wiki/cosmopolitanism> (last accessed on March 7, 2016).

<sup>2</sup> *Ibid.*

<sup>3</sup> Joseph F. Benning, “cosmopolitanism” available at: [www.britannica.com/topic/cosmopolitanism-international-relations](http://www.britannica.com/topic/cosmopolitanism-international-relations) (last accessed on March 7, 2016).

<sup>4</sup> Gustavo Lins Ribeiro available at: [www.vibrant.org.br/downloads/v2nl\\_wc.pdf](http://www.vibrant.org.br/downloads/v2nl_wc.pdf) (last accessed on March 7, 2016).

<sup>5</sup> *Ibid.*

<sup>6</sup> Craig J. Thompson and Siok Kuan Tambyah, “Trying to be Cosmopolitanism” available at: [www.jstor.org/stable/pdf/10.1086/209560.pdf?](http://www.jstor.org/stable/pdf/10.1086/209560.pdf?) (last accessed on March 7, 2016).

<sup>7</sup> Robert J. Delahunty, “Nationalism, Statism and Cosmopolitanism” 5 *NWILR* 77 (2012).

<sup>8</sup> *Ibid.*

<sup>9</sup> Trademark available at: <https://en.wikipedia.org/wiki/trademark> (last accessed on March 7, 2016).

<sup>10</sup> Trademark available at [www.merriam-webster.com/dictionary/trademark](http://www.merriam-webster.com/dictionary/trademark) (last accessed on March 8, 2016).

<sup>11</sup> *Nirlex Spares (P) Ltd. v. CCE* (2008) 2 SCC 628.

<sup>12</sup> Avtar Singh, *Intellectual Property Law* 7 (Eastern Book Co., Lucknow, 1<sup>st</sup> edn., 2013).

content, it should be distinctive".<sup>13</sup> In USA, a trademark is any word, name, symbol, or design, or combination thereof, used in commerce to identify and distinguish the goods of one manufacturer or seller from those of another and to indicate the source of goods.<sup>14</sup>

## II. CONCEPT OF TRADEMARK COSMOPOLITANISM

Diogenes, the ancient Greek Cynic philosopher had once proclaimed himself as "citizen of the world", when asked a question about his geographic origin which was referred by **Martha Nussbaum** in his work "**Patriotism and cosmopolitanism**" where she underscored for the "moral universalism" and "need of educational cosmopolitanism" that recognized that "the central features of human personhood transcended national boundaries". Nussbaum explained that "Diogenes meant that his identity was defined by not only his local origins and memberships but by more universal aspirations". Stuart Hall and Craig Calhoun were also of the same opinion and embraced the notion of emergent "global citizenry". Traditionally the concept of "cosmopolitanism" has always been talked about the "politics and legal theory", but it can also be talked about in the context of transnational marks which are gaining popularity in the name of "well-known marks" and also the lagging of international milestone in the form of any delegated legislation beyond the notion of territoriality to protect the species of "well-known marks" of the genus "trademarks". In the era of this globalization, marks are getting renowned not only in the country of origin but also gaining popularity beyond the territorial limits of one nation or country. So, in this wake what could be the fate of the "well-known marks" which are becoming "transnational marks" with the increasing pace of globalization and international branding, and hence this way the concept of cosmopolitanism put before us a very prominent question pertaining to the International protection of Intellectual property in relation to the "trademark regime". With this background, it is pertinent to discuss the concept of "cosmopolitanism" in the light of "global recognition to well-known marks" and hence the concept of cosmopolitanism becomes the emerging concept "trademark cosmopolitanism".

## III. BACKGROUND OF THE CONCEPT OF TRADEMARKS

Trademarks have been considered as one of the most important components of the Intellectual Property regime in national as well as international level. Legally it can be said that trademarks aimed at the protection of the rights and benefits of the trademark owners and also the consumers' community. Trademark may be understood as any perceptible sign including words, names, letters, numerals, symbols, designs, devices, or any combination thereof, shapes of goods or of their packaging, used or intended to be used in commerce to identify and distinguish goods or services of one undertaking from those of other undertakings.<sup>15</sup> Jeremy Philips<sup>16</sup> has quoted following functions of trademarks:

- a) To identify the actual physical origin of goods and services;
- b) To guarantee the identity of the goods and services;
- c) To guarantee the quality of the goods and services;
- d) To serve as a badge of support or affiliation;
- e) To serve as an advertising symbol of goods and services of producers ; and
- f) To enable the consumer to make a lifestyle statement.

Now, the characteristics of the trademarks can be mentioned in the following enumeration:

- a) Distinctiveness
- b) Multiform
- c) Valueable
- d) Territorial limitation

But now it can very well be said that in this age of globalization and international harmonization, "trademark law" cannot be limited to territorial limits. There are various international conventions which provide for the protection of trademark in the "intellectual property regime". They can be named as follows:

- **The Paris Convention 1883:** The key requirements of the Paris Convention, includes trademarks, utility models and industrial designs. The Convention contains stronger substantive provision which guarantees for trademarks than it does for patents. The Convention provides that for trademarks, in order to preserve priority, the interval between the original filing and filing in another member country is limited to six months. The Convention also facilitates leveraging goodwill from one country to others through its "well-known marks" provisions.<sup>17</sup>
- **The Madrid Agreement and Protocol:** it is an international treaty which was adopted in 1989 in order to remove difficulties that were deterring some countries from acceding to the Madrid Agreement, the 1891 treaty that established the system for the international registration of trademarks. Hence protocol became a convenient and economical means of securing trademark registration in member countries in Asia, Africa, Europe, the Middle East, the pacific rim and the Western Hemisphere.<sup>18</sup>

<sup>13</sup> *Ibid.*

<sup>14</sup> 15 USC 1127 available at: <https://www.law.cornell.edu/wex/trademark>. (last accessed on March 8, 2016).

<sup>15</sup> Phan Ngoc Tam, "Well-known Trademark Protection: A Comparative study between the Laws of the European Union and Vietnam" (2011) (Hochiminh University of Law).

<sup>16</sup> Jeremy Philips, *Trade mark Law- a practical anatomy* 23-28 (Oxford University Press, 2003).

<sup>17</sup> Dr.M.K.Bhandari, *Law relating to Intellectual Property Rights* 162 (Central Law Publications, Allahabad, 3<sup>rd</sup> edn., 2012).

<sup>18</sup> Madrid Protocol available at: [www.inta.org](http://www.inta.org) (last accessed on March 16, 2016).

- **The TRIPS Agreement:** TRIPS explicitly incorporates the principal provisions of the Paris Convention, including its “national treatment principle”, “its priority rule”, and substantive protection. It adds a “most-favoured nation” requirement, elaborates on the requirements for trademark protection, and extends the substantive rights a member state must confer.<sup>19</sup>

#### IV. CONCEPT OF WELL-KNOWN TRADEMARKS

Article 6 *bis* of the Paris Convention for the protection of Intellectual Property which states, in part, that member countries agree refusing or cancelling the registration, and to prohibit the use, of a trademark which constitutes a reproduction, an imitation, or a translation, liable to create confusion, of a mark considered to be well-known in a country as being already the mark of a person entitled to the benefits of the Convention.<sup>20</sup> It has also been discussed earlier in the Washington Diplomatic Conference for the Revision of the Paris Convention in 1911. And hence the doctrine of well-known marks was adopted internationally. Accordingly, the TRIPs Agreement developed and improved upon Article 6*bis* of the Paris Convention by inserting language in Article 16 extending the protection of well-known trademarks to service marks and enlarging the scope of protection to the use of the mark with dissimilar goods. In 1999, the well-known trademark doctrine was further developed and extended by the WIPO General Assembly and the Paris Union through a nonbinding recommendation, which stipulates that a well-known mark will be protected in a specific country on the ground that it is well known even if the mark is not registered or used in that country. Member states are prohibited not only from requiring that a mark be used in that state as a condition for determining whether a mark is well-known, but also from requiring that the mark be registered in any other member state.<sup>21</sup>

In markets, there are various producers whose goods or services have become almost similar to their trademarks and list of examples of which is quite exhaustive and likewise, their marks have become quite famous and widely known throughout the world. This well-known reputation along with the success of the manufacturers has also increased the threat of infringement activities. Therefore, there arises a very important issue of the protection of legitimate rights and benefits of the well-known trademark owners. The term “well-known mark” in Article 6 *bis* of the Paris Convention can be translated into different languages as “marque notoirement connue”, “notorisch bekannte marke”, “marchio notoriamente conosciuto”, or “marca notoriamente conocida”.<sup>110</sup> Further, the ordinary dictionary meaning of “well-known” according to Webster’s Third New International Dictionary is “widely known”, but in the Oxford English Dictionary as “known to many”.

Provisions for the protection of well-known trademarks have also been featured under national laws: for example The Trademarks Act 1938 (replaced by the Trademarks Act 1994), of the United Kingdom, the Lanham Act of 1946 of the United States of America (amended by the Federal Trademark Dilution Act in 1995 and the 2006 Revisions), and the Trademark Act of 31 December 1964 and the Intellectual Property Code of France.<sup>22</sup>

According to the Indian Trademark Act 1999: [A] “well-known trademark 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 as indicating a connection in the 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.<sup>23</sup> Hence, it can be said that due to lack of any uniform definition of “well-known trademarks”, each country and nations have their own point of view on the question that what constitutes well-known trademarks?

Globalization opened the doors to nations which had long been closed by national boundaries and has created a single, global community, the so-called “global village”. This process provides many opportunities for the development of the world economy, especially in international trade, and for new types of transactions, including in the field of intellectual property rights.<sup>24</sup> Along with the increasing pace of globalization, specialization and new inventions and technologies are also becoming big challenges to protect the well-known marks. To some extent, the traditional legal framework of well-known trademark protection appears to be less productive. Therefore, there is a need to build a more effective legal regime to protect the rights and benefits of well-known trademark owners in the global economy. This is one of the main reasons why many recent international legal protection initiatives have been established or proposed.<sup>25</sup>

Globalization has been incrementally abolishing national boundaries to establish a universal world market that ignores differences in political, cultural and traditions and shortens geographical distances between people, markets, and producers to consumers. Such a process brings many advantages and interests to countries, people, and companies. Nevertheless, it also creates new and more complicated challenges for countries and companies. In that context, the protection of trademarks and well-known trademarks in particular need to be reconsidered and harmonized.

<sup>19</sup> *Supra* note 17 at 162-163.

<sup>20</sup> The Paris Convention 1883, Article 6*bis*.

<sup>21</sup> *Supra* note 15.

<sup>22</sup> *Supra* note 15.

<sup>23</sup> *Ibid*.

<sup>24</sup> The Trademarks Act 1999, section 2 (1)(zg).

<sup>25</sup> *Supra* note 15.

## V. INTERNATIONAL CONVENTIONS AND TREATIES CONCERNING WELL-KNOWN TRADEMARKS

**Paris Convention:** it makes the first international mention of protection of well-known trademarks.<sup>26</sup> Article 6bis of the Paris Convention deals with three legal issues:

- That the obligations of members to protect a well-known trademark by refusing or cancelling the registration of any mark which infringes the well-known mark,
- That determinations of well-known trademarks will be based upon (a) a decision of the competent authority of the registered country, or (b) a decision of the competent authority of the country where the mark is used; and
- Defining infringements of well-known trademarks to include the reproduction of the whole or the essential part of the mark, or an imitation, or a translation of such mark which can create confusion with the well-known marks.

The Paris Convention does not define when a mark has become well-known or how to define a well-known trademark. The Paris Convention does not define when a mark has become well-known or how to define a well-known trademark. Article 10bis of the Paris Convention addresses aspects of unfair competition protection for well-known trademarks that may not fall under Article 6bis. The Paris Convention provides only basic principles for the protection of well-known trademarks; the specifics of legal implementation are left to national legislation.

**TRIPS Agreement 1994:** article 16 stipulates the issues concerning the protection of well-known trademarks. It can be said that TRIPS has expanded the scope of protection provided to well-known trademarks under Paris Convention under article 6bis. The TRIPS Agreement may be seen as an important step in the protection of well-known trademarks on a global scale.

In summary, international efforts to create an international framework for the protection of well-known trademarks have resulted in significant achievements through international conventions and treaties. Even though they do not all provide specific definitions for well-known trademarks or direct provisions for their protection, they have built the basic foundations and established minimum standards for such protection. They have been utilized as a basis for advancing national systems for well-known trademark protection.

## VI. COSMOPOLITAN APPROACH TOWARDS TRADEMARK REGIME

Cosmopolitanism may mean a lot many things, but trademarks and global brands are the approaches which could be used to understand the concepts like globalization in context of intellectual property rights regime. And hence, the concept of trademark cosmopolitanism is inextricably linked to global flow of contents and brands. As brands now reflect a kind of global consciousness and design, globalization has also produced a generation of cosmopolitanist consumers.

**"Global brands make us feel like citizens of the world, and . . . they somehow give us an identity".<sup>27</sup>**

Hence, the concept of global branding comes into picture. Global brand leadership means using organizational structures, processes, and cultures to allocate brand-building resources globally, to create global synergies, and to develop a global brand strategy that coordinates and leverages country brand strategies. That is, of course, easier said than done. For example, companies tend to give the bulk of their brand-building attention to countries with large sales—at the expense of emerging markets that may represent big opportunities.<sup>28</sup>

While talking about global branding, "corporate social responsibility" is something which cannot be overlooked. Although the term "corporate social responsibility" was coined by economist Howard Bowen a decade after Nuremberg, its modern formation tends to emphasize the need for corporations to consider the social and ecological impact of their practices on humanity as a whole, and without ceasing to remain a profit generating entity. While the field of CSR traditionally refers to the protection of human rights, labour rights, the environment, and non-corrupt business practices, among other considerations, it also connects deeply to notions of trademark cosmopolitanism for a variety of reasons, which can be illustrated in the following discussed manner.

First, as the previous section suggested, the brand's visuality often becomes the central repository for all the ancillary conflicts that surround a corporation - social, political, economic, etc. As a result, in order to protect their brands from public reproach, most companies now engage in proactive strategies that infuse the brand's personality with information about a company's desirable business practices and its commitment to social responsibility.

Second, it also connects to consumers' own cosmopolitanism, reflected in their global buying practices. As consumers view themselves as global citizens, they increasingly offer concern for the manufacturing practices of the companies that they patronize. Third, and relatedly, the brand becomes the visual cue for the information that the consumer possesses about a company's labor practices. That is why the relationship between a company's brand managers and activist anti-branding movements can be so contentious for trademark lawyers.<sup>29</sup>

<sup>26</sup> *Supra* note 20.

<sup>27</sup> *Supra* note 15.

<sup>28</sup> David Aaker and Erich Joachimsthaler, "The Lure of Global Branding" available at: <https://hbr.org/1999/11/the-lure-of-global-branding> (last visited on March 17, 2016).

<sup>29</sup> Sonia A. Katyal, "Trademark Cosmopolitanism", 47 *U.C.D. L. Rev.* 875 (2013-2014).

**“Thus, just as global branding is now an integral part of any multinational marketing enterprise, global trademark registration is an essential part of the portfolio for any growing business”.**

## VII. WELL-KNOWN TRADEMARKS AND THE TRADEMARKS ACT 1999

The term "well-known trade mark" has been defined in the Trade Marks Act, 1999 and refers to 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 as indicating a connection in the 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.

A trade mark has considerable goodwill and reputation if it is limited to a specific geographical area whereas a well-known trade mark must have substantial reputation all over India. In other words it is the difference of degree and extent of territorial reputation. Any trade mark with the status of a "well-known" substantially improves the extent of protection available to it, as it provides the owner of the brand, the exclusive right to the trade mark against all unlawful users thereof, regardless of the differences in the field of business, goods or services. To make action successful, it is required to be established that the adoption of the brand by the unauthorized users is mala fide and without due cause. In short, the well-known marks are protected not only for goods and services related to those with which it is already associated, but for non-competing goods and services. A mark, if it has been decided as well-known in any legal proceedings including opposition, rectification or civil suit, is the influence which has to be taken into deliberation in favor of the said trade mark in all subsequent proceedings.

As per the Statute, the Registrar of Trade Marks shall not require as a condition, for determining whether a trade mark is a well-known trade mark, any of the following, namely:-

- (i) That the trade mark has been used in India,
- (ii) That the trade mark has been registered.
- (iii) That the application for registration of the trade mark has been filed in India.
- (iv) That the trade mark –
  - (a) Is well known in; or
  - (b) Has been registered in; or
  - (c) In respect of which an application for registration has been filed in, any jurisdiction other than India; or
  - (v) That the trade mark is well known to the public at large in India.

In view of the above, the trade mark owner is not required to carry on any business within India and neither is it required to possess any registrations, to be entitled to claim protection of its trade mark. However, with respect to foreign well known trade mark, there are various aspects that can establish that they are not entitled to protection in India if it is not well known here. The factors could be in the form if the foreign proprietor could not establish trans-border reputation and likelihood of confusion or deception among relevant sections of the public. In the cases where Indian Party has adopted the mark in good faith, the foreign trade mark owner would not be able to succeed.

In deciding the cases, the likelihood of confusion or deception has to be assessed only when the marks are used in the relation to the same or similar goods as seen in Section 11(1) of the Act. However, no such limitation is imposed under Section 11(2) (mentioned below):

### *11. Relative grounds for refusal of registration.-*

*(1) .....*

*(2) A trade mark which –*

*(a) is identical with or similar to an earlier trade mark, and*

*(b) is to be registered for goods or services which are not similar to those for which the earlier trade mark is registered in the name of a different proprietor.*

*Shall not be registered if or to the extent the earlier trade mark is a well-known trade mark in India and use of the later mark without due cause would take unfair advantage of or be detrimental to the distinctive character or repute of the earlier trade mark.*

The provision under Indian law which offers a well-known mark protection is Section 11(10) of the Trademark Act, 1999 mentioned below:

### Section 11

(10) While considering an application for registration of a trade mark and opposition filed in respect thereof, the Registrar shall—

(i) protect a well-known trade mark against the identical or similar trademarks ;

(ii) Take into consideration the bad faith involved either of the applicant or the opponent affecting the right relating to the trade mark.

Accordingly, not only well known marks are protected in India but the bad faith of the infringer is also taken into consideration. A significant element that also needs to be considered for a well-known mark to receive more protection than a lesser known mark is the degree of distinctiveness. If the mark is well known which is a coined or arbitrary mark or stylized device mark, then adoption of such a mark will be considered to be in bad faith. However if the mark is well known but generic in nature, then adoption of such a mark is seen to be in good faith with no intent to benefit from the registered mark.<sup>30</sup>

## VIII. CONCLUSION

Well-known trademarks are emerging as a completely new stream and hence needs the attention of international as well as national community. The era of globalization and technological development are threats to the well-known trademarks. In this era of “global branding”, trademarks are not just limited only within one’s nation rather it is expanding its tentacles throughout the world and hence the concept of “trademark cosmopolitanism” comes into picture. Thus the major legal issue is that of the “global recognition and international protection to well-known trademarks”. Though there are number of “international conventions” which provide for “provisions for the protection of well-known trademarks” but there seems an eminent need for the “international harmonization regarding the provisions for the protection of well-known trademarks” and that was all which has been discussed so far in the paper.

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<sup>30</sup> Omesh Puri, “An Insight on Well-known Trademarks in India” available at: [www.mondaq.com/india/x/304436/trademarks/an+insight+on+wellknown+trade+marks+in+india](http://www.mondaq.com/india/x/304436/trademarks/an+insight+on+wellknown+trade+marks+in+india) (last accessed on March 17, 2016).