

# Identification of Likelihood of Confusion in Trademark Infringement Cases

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**Abstract:** The identification function is the core function of trademark, and the essence of trademark infringement is that the source identification function of trademark is damaged, which leads to confusion, so the possibility of confusion is the core element in the judgment of trademark infringement. However, as the identification of trademark "possibility of confusion" is not yet in a mature stage in China, there are still some problems in judicial practice, such as how to analyze each consideration factor, whether there is a distinction of probative power and what kind of correlation exists between them. Therefore, on the basis of existing theories, combined with specific cases, this paper makes an in-depth discussion on the identification of "confusion possibility". It is hoped that the system of identifying the possibility of trademark confusion can be perfected by solving this problem.

**Keywords:** Likelihood of Confusion; Trademark Infringement; The Distinctiveness of Registered Trademarks; Multifactor Detection Method

## 1. Introduction

A trademark is essentially a symbol that serves as a carrier and intermediary for market entities to spread their brand. A trademark is not only an important channel for consumers to interact with a brand, but also carries certain economic value behind it. Therefore, in economic activities, there are often brands with relatively low economic value that use improper forms to cling to trademarks with relatively high economic value, borrow their influence to reduce their own promotional costs, and thus profit from it. Similar trademark infringement cases occur frequently, and the possibility of confusion is the core criterion for determining whether it constitutes trademark infringement. This article mainly discusses the factors that need to be considered when determining the

possibility of confusion in the trademark involved. A typical case is the "Puyi Glasses" v. "Yongzheng Glasses" trademark infringement case. In this case, when determining whether the disputed trademark constitutes trademark infringement, the court comprehensively considered factors such as the degree of similarity between the disputed trademark and the cited trademark's logo and goods, the distinctiveness and popularity of the cited trademark, the attention of the relevant public, and the relationship between the two trademarks. After that, the court believed that the use of "Yongzheng Glasses" has the possibility of confusion, which is sufficient to cause confusion and misidentification among consumers, and constitutes trademark infringement. At present, China's trademark and brand protection efforts are continuously increasing, and the country's efforts to crack down on malicious trademark registration have entered a good stage overall. However, compared with the trademark laws of the United Kingdom and the United States, China's theoretical development in this regard is relatively lagging behind.

It is precisely because the recognition of the "possibility of confusion" of trademarks in China is not yet mature. Therefore, based on the existing theoretical foundation and specific cases, the author further discusses how to recognize the "possibility of confusion" of trademarks, hoping to continuously improve the system of determining the possibility of confusion of trademarks, strengthen the legal awareness of trademark owners and users, provide good institutional guarantees for protecting their trademark rights, avoid getting involved in similar disputes and controversies, provide reference opinions for judicial practice, and improve judicial efficiency.

## 2. The Theory and Origin of Determining the Possibility of Trademark Confusion

## 2.1 Concept and Status of Confusion Possibility

The possibility of confusion refers to the possibility of consumers misidentifying the origin or relationship of two similar or identical trademarks in the market, based on consumer perception. The determination of confusion largely depends on the subjectivity of the determining party. In trademark infringement cases, it is very difficult for the parties to provide evidence to prove that actual confusion has occurred. Therefore, the law only requires the possibility of confusion, not actual confusion [1]. The Trademark Law mainly covers two levels of situations that are "likely to cause confusion": (1) situations that are sufficient to make the relevant public believe that the goods or services involved are produced or provided by the registered trademark owner; (2) It is sufficient to make the relevant public believe that the provider of the goods or services involved in the case has an investment, licensing, franchise, or cooperative relationship with the registered trademark owner [2].

Trademark use and public confusion are two key criteria when evaluating trademark infringement cases. The former checks whether the alleged infringement has conveyed information to consumers, while the latter focuses on the specific content of the information conveyed [3]. Trademark use focuses on the user's own behavior, while the possibility of confusion is targeted at the consumer's perception. By combining various evaluation factors, it can be determined whether the use of a trademark leads to consumer confusion and misidentification, based on the examination of the results of trademark use, rather than the use of the trademark itself [4]. In addition, some scholars have pointed out that trademark use is a "key threshold element" in trademark infringement litigation, which can exclude behaviors that are not within the control of trademark law and set normative restrictions to further identify the possibility of trademark confusion [5].

The theory of trademark confusion holds that the key to determining trademark infringement lies in whether consumers will confuse the source of goods due to their trademark use behavior [6]. Identifying the source is the most important function of a trademark. If the user of the trademark uses improper means to cause the relevant public to consume in a mistaken

manner, it is equivalent to the trademark user transferring some consumers in fact, which fundamentally damages the rights of the trademark owner [7]. For this reason, many countries in the world currently use the possibility of confusion as the core basis for trademark infringement determination.

## 2.2 Development Process of Criteria for Determining the Possibility of Confusion at Home and Abroad

### 2.2.1 Theoretical origins and development of the possibility of confusion in the Anglo-American legal system

In the long river of history, the determination of trademark infringement has not focused on the possibility of confusion for a long time. With the development of the social economy, the status of consumers has also improved, and preventing consumer confusion has gradually become a consensus. The standard for the possibility of confusion has only been established in trademark law. Moreover, with the development of business practices, the possibility of confusion has been established and continuously expanded under the promotion of merchants. The legal provisions on "possibility of confusion" in the Anglo-American legal system have roughly gone through the following development process. In the Middle Ages, before the emergence of the standard of likelihood of confusion, the standard for determining trademark infringement in common law and equity in England and America was whether there was fraudulent behavior. After the mid-19th century, the rise and rapid development of the Industrial Revolution led merchants to demand strengthened trademark protection, and the standard of confusion in trademark infringement determination was established in trademark law. At that time, some scholars believed that the law should protect buyers from confusion, rather than simply punishing malicious infringers who intended to deceive buyers [8]. In 1946, the United States' Lanham Act stipulated that if the defendant's use of the trademark owner's trademark may cause confusion, error, or mislead the buyer about the origin of the goods, it constitutes trademark infringement, and fraud is no longer a necessary factor in infringement. Since the early 20th century, with the further development of industry and commerce, the status of

consumers has been further elevated, and the possibility of confusion has been expanding. This is prominently reflected in: firstly, lowering the threshold for the possibility of confusion by reducing consumers' attention and expanding the consumer group in terms of confusing subjects. Secondly, various forms of consumer confusion are continuously included in the regulatory scope of trademark law in terms of confusion types [9]. At the same time, the possibility of confusion has also been clearly stipulated in major international conventions: the TRIPS Agreement stipulates that trademark infringement is judged based on the possibility of confusion [10].

### 2.2.2 Legislative evolution and current situation of the criteria for determining the possibility of confusion in China

Before 2013, China did not explicitly stipulate the possibility of confusion in legislation. However, in judicial practice, in order to further protect prior trademark rights and regulate malicious trademark registration behavior, judicial authorities have increasingly attached importance to the key factor of "confusion possibility" in handling trademark infringement cases, and gradually included it in the requirements of "trademark similarity" and "trademark similarity", so as to make legal judgments on it [11]. In the academic community, scholars such as Huang Hui and Wang Ze also believe that trademark law needs to consider the possibility of confusion, which is not only a requirement for unified interpretation, but also determined by the basic function of trademarks - the function of identifying the source.

Until 2013, legislators added the provision of "possibility of confusion" when amending Article 57 (2) of the Trademark Law, making it independent and on par with "trademark similarity" and "trademark similarity", both of which are constituent elements of trademark infringement determination.

At present, China's China National Intellectual Property Administration issued the Criteria for Judging Trademark Infringement in 2020, which lists multiple factors that should be comprehensively considered by relevant trademark enforcement departments when deciding whether confusion is likely to occur, and lists the interaction between various factors, such as the similarity between trademarks, goods or services, the significance and

popularity of registered trademarks, the characteristics of goods or services and the use of trademarks, the degree of public attention and recognition, and other factors. In addition, in the judicial field, Article 12 of the "Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Administrative Cases of Trademark Authorization and Confirmation" (revised in 2020) once again confirms the importance of using the above factors as a basis for the people's court to determine whether confusion is likely to occur. The determination based on the possibility of response confusion should follow the requirements of a unified standard. Although this rule is aimed at the background of trademark authorization and confirmation cases, it also has reference significance for handling trademark infringement cases.

### 2.3 Value Basis of Confusion Possibility

The content of the theory of confusion possibility reflects its underlying legal philosophical foundation, which has undergone a complex evolutionary process. Currently, the most popular theories include economic theory and social planning theory.

Firstly, the legal philosophy foundation of traditional trademark protection is economic theory. Bentham's utilitarianism is one of its theoretical origins. From a utilitarian perspective, trademark protection should be based on maximizing wealth. Granting the trademark owner a monopoly on the trademark precisely achieves the maximization of wealth. Economic theory also holds that if there is a conflict between private property protection and natural rights such as fairness and justice, fairness and justice should make concessions. By searching the content of trademark legislation in various countries, it can be found that the utilitarian economic theory viewpoint is adopted by most countries, especially developed Western countries. But the author believes that the goal of legislation should not be to maximize wealth, but rather to achieve fairness and justice.

Secondly, there is a new development in the philosophical foundation of trademark protection law - social planning theory. This theory adds expressions of concepts such as "consumer welfare" and "distributive justice" compared to economic theory. This theory places greater emphasis on the role of

consumers in the trademark protection system, believing that trademark owners and the consumer public jointly create trademark value. Therefore, the meaning of a trademark should be interpreted by the general consumer public, rather than the trademark owner [12]. But social planning theory has the content of planned economy, which will suppress free competition. Therefore, the philosophical foundation of China's trademark protection law adopts a combination of the above two theories, namely economic and social planning theory. It not only protects the interests of trademark owners, but also takes into account the level of consumer awareness and its impact in the trademark protection system.

### **3. The Problems of the Criteria for Determining the Possibility of Confusion in Judicial Practice**

#### **3.1 The Determination of Factors to Consider the Possibility of Confusion is not Yet Clear**

The above regulations have been widely applied in judicial rulings since their introduction, such as a typical case of "Puyi Glasses" v. "Yongzheng Glasses" trademark infringement. In June 2022, Zhongya Co., Ltd. (hereinafter referred to as "Zhongya Company"), which belongs to "Puyi Glasses", discovered two stores in Wuhan, with a straight-line distance of only 4 kilometers from the "Puyi Glasses" store it operates. The logo of the "Yongzheng Glasses" store is almost identical to that of the "Puyi Glasses" store except for the text part. In September of the same year, Zhongya Company filed a trademark civil infringement lawsuit with the Haidian District People's Court in Beijing. The court pointed out that based on the existing evidence, it can be confirmed that the two defendants used the accused trademark "Yongzheng Glasses", and the above-mentioned services are the same as those approved for use of the trademark in question. The accused logo and the involved trademark are highly similar in terms of text font, graphic composition, and overall structure, design style, visual effects, etc. after the combination of various elements, and there is a strong correlation between Yongzheng and Puyi, who were both emperors of the Qing Dynasty. Moreover, considering that the involved trademark has a certain level of popularity and market reputation in the eyewear industry, the two defendants, as operators in the

same industry, should be aware of the involved trademark and make reasonable concessions. However, the two defendants used the accused logo that is highly similar to the involved trademark in their business operations without permission, which is sufficient to cause confusion and misidentification among the public. According to Article 57 (2) of the Trademark Law, it is an act of using a logo that is similar to the involved trademark in the same service and is prone to confusion, which has a high possibility of infringing on Zhongya Company's trademark rights in the involved trademark.

It can be seen that although the relevant considerations mentioned in the revised regulations of the Supreme People's Court have been applied to this case as the standard for trademark infringement determination. However, in the legal documents of this case, not all considerations were analyzed, and since the standard is only a general provision, how the judicial authorities should analyze each consideration factor specifically when applying the standard, whether there is a distinction in the degree of proof between each consideration factor, and what kind of correlation exists between them are important issues that need to be discussed urgently in this article.

#### **3.2 The Improvement of Consumer Cognitive Level Makes the Application of Confusion Possibility Identification Standards Uncertain**

Secondly, how to consider the cognitive level of consumers in the process of trademark expansion is also a problem. On the one hand, determining the possibility of confusion should be based on the perspective of consumers. However, because trademark law carries the responsibility of preventing trademark counterfeiting and prohibiting trademark owners from pointing their trademarks towards the defendant's goods or services, using the possibility of consumer confusion as the standard for determining trademark infringement carries the risk of expanding the rights of trademark owners [13]. On the other hand, consumers' cognitive abilities will continue to improve with the development of the social economy. The consumer psychology of relevant consumers is becoming increasingly mature, and trademark use behavior is receiving more attention in legal policies. In this situation,

should the standard for determining the possibility of confusion be applied more strictly in judicial practice? And should there be clear rules for determining the possibility of confusion in trademark infringement cases? For example, the emphasis on the actual use of trademarks in reverse confusion may lead to more space for trademark coexistence. Consumers may be able to distinguish the source of goods by paying a little attention in the pattern of trademark coexistence, and the possibility of reverse confusion is also reduced. In addition, it is not enough to determine reverse confusion solely based on the existence of consumers mistaking goods with previously registered trademarks as originating from trademarks of later trademark users. Otherwise, it will increase the identification cost of relevant consumers and lead to market disorder.

### **3.3 The Position of the "Multifactor Detection Method" in Trademark Infringement Determination in China is not Clear**

Most countries adopt the "multiple factor testing method" as a consideration method when determining the possibility of confusion, and China also adopts this method in judicial practice. Each country has its own identification standards in judicial practice, which are generally the same but also have differences.

After summarizing the legislative examples related to the possibility of confusion, American scholars stipulated in Article 21 of the 1995 Restatement of the Tort Law that the determination of the possibility of confusion needs to consider eight elements, including the similarity of the involved identification, the market model similar to the sales channel, the characteristics of potential consumers, and their level of attention at the time of purchase. At the same time, it was mentioned that "all types of elements that constitute a market situation with the possibility of confusion cannot be predetermined by any mechanical formula or list. In EU legislation, trademark similarity and product similarity are the main factors in assessing the likelihood of confusion. The EU Trademark Directive states in the tenth part of the preamble that the determination of the possibility of confusion depends on various factors, particularly the market recognition of the trademark, the possible association between the use of the logo and the registered trademark,

the degree of similarity between competing trademarks, and the similarity between related products or services, which constitute specific conditions for trademark protection.

It can be seen that in principle, the factors considered in the "multi factor detection method" are variable and relative. Each factor is one of the influencing factors in determining the likelihood of confusion, rather than a necessary or sufficient condition. Moreover, there is no fixed order of consideration among various factors in the specific evaluation process. Generally speaking, there is no situation where a certain element itself serves as a decisive condition for determining the case, and the court's excessive emphasis and emphasis on a specific factor should not be tolerated. Therefore,

A comprehensive examination and analysis of all relevant factors must be conducted to weigh their "cumulative effects" in order to obtain reliable conclusions.

However, Professor Barton Biby conducted an empirical analysis of 331 confusion cases recorded by the US Federal District Court between 2000 and 2004, and found that shortcut analysis was more commonly used by courts in relying on multiple factor testing methods to argue for the possibility of confusion, rather than conducting comprehensive analysis. The contribution of different factors to proving the possibility of confusion varies. Empirical analysis data shows that trademark similarity, product similarity, and defendant intent play a significant role in determining the likelihood of confusion. However, the strength of trademarks, especially the inherent distinctiveness of trademarks, has low probative value in judicial practice. In addition, although many courts believe that investigative evidence is the best and most persuasive evidence to prove the possibility of confusion, empirical analysis data shows that investigative evidence is rarely presented by parties or adopted by courts. Although the empirical analysis data has certain limitations in terms of time and region, it can indeed reflect the different evidential powers of various factors in demonstrating the possibility of confusion. The openness of the "multi factor detection method" itself provides the possibility and necessity for judges' discretion [14]. The process and method of applying the law should or preferably should be tailored to the situation, and judges should ideally have no room for

discretion. However, in the complex legal landscape and social life, such a legal landscape is filled with an idealistic color and cannot truly be realized in social reality [15]. Therefore, judges should be allowed to give relatively strong evidentiary power to certain factors when adjudicating specific cases.

At present, China has stipulated that trademark infringement cases can refer to the relevant provisions of trademark confirmation administrative cases, that is, the "multiple factor detection method" can be applied in judicial practice. However, this provision is actually directly applicable to trademark confirmation cases. Therefore, whether it should be clearly stipulated to apply the "multiple factor detection method" in trademark infringement cases and how to apply this method is also a question.

#### **4. Improvement of Judicial Judgment Standards for Determining the Possibility of Confusion**

Based on the above issues, it is necessary to discuss the considerations listed in Article 12 of the "Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Trademark Authorization and Confirmation Administrative Cases" revised in 2020 in China. Discuss how each consideration factor should be specifically applied in judicial practice through specific cases, and propose suggestions on how to apply China's "multi factor detection method" through comparative research methods.

##### **4.1 Strengthen the Application of Multi Factor Detection Methods**

Although China has already stipulated that trademark infringement cases can refer to the relevant provisions in trademark confirmation administrative cases, the author believes that it is necessary to separately stipulate the judgment rules in trademark infringement cases.

The use of multi factor testing as an important condition for determining the likelihood of confusion and the comprehensive consideration of various factors that affect consumers' purchasing decisions in the market environment should be clearly defined; At the same time, the factor list in the multi factor testing method has a natural characteristic of not being exhaustive. In this case, the court should also pay attention to incorporating other considerations into the scope of judicial judgment based on specific

circumstances. Moreover, the degree of trademark confusion is only the result of comprehensive analysis of various factors in the factor testing method, and the judgment approach of considering trademark infringement based solely on individual factors has committed a logical error of generalization. This is conducive to implementing the principle of adapting measures to local conditions and keeping pace with the times in judicial activities that determine the possibility of confusion. It can also expand the analytical perspective of confusion possibility, fully consider changes in various aspects, and promote the objectivity of confusion possibility determination.

##### **4.2 Using the "Double Similarity" Standard as a Prerequisite for Determining the Possibility of Confusion**

The prerequisite for determining the possibility of confusion is that the defendant used a trademark like identifier on similar goods, used a trademark like identifier on the same goods, or used the same trademark on similar goods, rather than using the same trademark on the same goods designated for protection at the time of trademark application [16]. Therefore, the first factor to consider when determining whether there is a possibility of confusion is the degree to which the trademark is similar to the goods.

The determination of trademark similarity should be centered on the constituent elements of the trademark (such as form, sound, and meaning), compared with the specific situation of the trademark, and made on the basis of comprehensive consideration of various factors. The comparison includes the form, pronunciation, and meaning of the text in the trademark in question, the composition and color of the graphics, as well as the similarity of the overall structure, three-dimensional shape, color combination, etc. after element combination. Under normal circumstances, the court can draw a corresponding conclusion by comparing the constituent elements of the relevant trademarks to determine whether they are similar as a whole; But there are also exceptions. If the constituent elements of the relevant trademark are not similar as a whole, but the popularity of the rights trademark is much higher than that of the accused infringing trademark, the judgment can be made by comparing the main parts. In the "Songjiang

case", the court held that when determining the similarity of a trademark, both the main part and the whole should be compared. In this case, graphics and symbols should be the main parts, and the "Songjiang" text should be examined as a secondary part due to its low distinctiveness. Overall, after comparison, although the individual elements of the combination trademarks "Songjiang" and "Songjiang" and the "Songjiang" logo are the same or similar, there are significant differences in the overall and main parts of the trademarks and logos, and therefore do not constitute trademark similarity. The similarity of goods or services should be comprehensively recognized based on their specific relationships, such as licensing, sponsorship, sales channels, business models, cultural concepts, etc. For example, in the "Didi Taxi Case", the court believed that the division of goods and services should be based on a comprehensive judgment of the whole service. The services provided by applications based on Internet and mobile communication services are not telecommunications services, and do not constitute the same or similar services, so it is not easy to cause confusion. When considering the use of similar products, the main use should be taken into account, and consumers with lower levels of attention should be taken into account [17].

In addition, the similarity of trademark identification and the similarity of goods or services can complement each other, and it is not necessary for both to reach the possibility of confusion before they are recognized as confusion. They need to be considered together [18].

#### **4.3 Strengthen the Recognition of Distinctiveness and Fame Differentiation**

The strength of trademark protection should be commensurate with its expected distinctiveness and popularity. The higher the distinctiveness and popularity of the trademark being requested for protection, the wider its scope of protection, and the more inclined it is to provide protection when determining the possibility of confusion. Especially when the accused infringing commercial logo has been widely and long-term used in the market and has a high level of popularity, the higher the popularity, the more it indicates the degree of commercial success. In the case of Jiayu Great Wall, the court held that the "Great Wall" or "Great Wall Brand" text in

COFCO's registered trademark has sufficient fame and distinctiveness to cause confusion among the relevant public in the wine market, at least making it easy to believe that the two have a specific connection in terms of origin, thus establishing the possibility of confusion.

On the other hand, if a trademark has not yet been put on the market, or even if it has been put on the market, it has almost no popularity or distinctiveness, then the scope of legal protection for the trademark is small, and it is not inclined to be recognized as having the possibility of confusion. The greater its popularity, the more it indicates that the relevant consumers have the ability to identify the brand, and the lower the possibility of confusion with the trademark. As pointed out in the judgment of the "Opp II case", the purpose of trademark law is to protect the function of trademarks in identifying and distinguishing the source of goods and services, rather than just the trademark identification itself solidified by the registration act.

This factor is also clearly stipulated in judicial interpretations. People's courts may, when examining and judging the possibility of confusion of disputed trademarks that have not yet been widely used, strictly control the standards for trademark authorization and confirmation in accordance with the law, and focus on protecting prior trademarks, enterprise names, and other trademark rights with high visibility and distinctiveness, in order to minimize the possibility of confusion; For disputed trademarks that have a long history of use, have established a good reputation in the market, and have formed a certain loyal consumer group among the relevant public, we need to correctly understand the legislative spirit of protecting the rights of prior commercial signs and coordinating and maintaining market order in the Trademark Law. We must fully respect this market reality, that is, the relevant public has objectively distinguished the relevant commercial signs and paid attention to maintaining the established and stable market order.

#### **4.4 Consideration of the Characteristics of Goods or Services Included and the Use of Trademarks**

In China's legislation and judicial practice, relevant laws and regulations, as well as many courts, require that the use of behavior "has no

possibility of confusion". And it is believed that the actual usage situation can affect the judgment of the possibility of confusion. At the same time, the Trademark Law restricts the scope of confusing use behavior and excludes non confusing use behavior from the protection scope of the Trademark Law, avoiding excessive protection of trademarks.

Firstly, the use behavior in trademark confusion does not include the use behavior that triggers associations, and simply making consumers think of another trademark does not constitute confusion [19]. In other words, the "possibility of confusion" in the sense of trademark law excludes the "possibility of association". Secondly, based on the defendant's subjective mentality, if its purpose of use is to indicate the product brand, it does not have confusion and constitutes indicative use. Scholar Zhang Siwen believes in his article "Determination of the possibility of confusion in indicative use of trademarks" that this does not mean that the court has set a hard standard of "no possibility of confusion". Instead, after measuring specific cases, the court can determine that the relevant use behavior is within reasonable limits and usually will not cause consumer misidentification and confusion. In other words, the lower range of consumer confusion that may occur is no longer subject to legal regulation, which is a tolerance for objective confusion [20]. Beyond this tolerance range, there is a possibility of confusion, which is subject to the discretion of the judge in specific cases.

#### 4.5 Refining the Application of Relevant Public Attention Standards

China's judicial interpretation has made corresponding provisions for the definition of "relevant public", stating that the term "relevant public" in the Trademark Law refers to consumers related to a certain product or service identified by the trademark, as well as other operators closely related to the market promotion of the product or service. Therefore, the attention standards of the relevant public may vary in different fields. For example, in the real estate industry, consumers often compare and conduct on-site inspections when purchasing a house, and will not blindly choose based solely on brand awareness. So the requirement for consumers' attention level in this field is relatively high, and the possibility of product confusion is relatively small; In cases

involving ordinary daily consumer goods with relatively low value, the requirement for consumers' attention level is relatively low, and the possibility of product confusion is relatively high.

#### 4.6 Consideration of Other Relevant Factors

##### 4.6.1 Subjective intention of trademark applicant

The subjective state of the perpetrator is not a constituent element of trademark infringement, but if the defendant has subjective malice when using the trademark, then this subjective mentality is a positive condition for determining whether the possibility of confusion is established. On the other hand, a negative condition for determining the possibility of confusion is the defendant's subjective mentality of operating in good faith and using commercial logos in good faith.

After sorting through a large number of cases, practitioners in the United States have found that once the intention of attaching goodwill is determined, it can be inferred that there is a possibility of confusion; Seeking advice from a lawyer or trademark agent before choosing a trademark can usually reduce or even eliminate this risk. This has also become the main factor considered by Chinese courts when determining the subjective intention of the perpetrator. In the "One Generation Zongzi Master" case, the French court believed that the proportion of the "One Generation Zongzi Master" logo was small and not prominent, and there was no subjective malice to climb the brand awareness and commercial reputation of Pengdeli Company, which would not cause misidentification.

In addition, Professor McCarthy of the United States found after reviewing the cases of the Federal Circuit Court of Appeals that latecomers have an obligation to avoid confusion with prior well-known trademarks [21]. The Dongfeng case, which received considerable attention in China in 2016, also emerged. In this case, the Supreme Court emphasized in its judgment the reasonable duty of care of the processing contractor. The court pointed out that if evidence can be presented to prove that the OEM did not fulfill its reasonable duty of care and substantially damaged the interests of the domestic trademark owner, it may be judged as infringement; On the other hand, if there is evidence to prove that the



contractor has reviewed the relevant certificates and status of rights when accepting the commission, it can be deemed that they have fulfilled their corresponding duty of care.

#### 4.6.2 Evidence of actual confusion

The evidence of actual confusion is an important reflection of the real market situation and a reference factor for determining the possibility of confusion. The Beijing High People's Court has stipulated that in determining whether a disputed trademark is similar to a cited trademark, the evidence provided by the disputed trademark applicant and the cited trademark owner, as well as the subjective state of the disputed trademark applicant, can be comprehensively considered. The Supreme Court accepted the investigation report in the 2016 Jordan case: two investigation reports can be combined with other evidence to further prove that the relevant public is prone to mistakenly believe that there is a specific connection between Jordan and the applicant for retrial.

However, regarding the "investigation report" on proving confusion, China's judicial practice generally holds a cautious attitude towards it. Due to the inevitable shortcomings of the survey report, it lacks scientific validity and accuracy. Firstly, there is uncertainty as to whether the survey subjects belong to the relevant public in the field of commodity consumption; Second, during the survey, the respondents will receive souvenirs or other benefits after the visit, which makes it difficult to guarantee the objectivity and impartiality of the survey conclusions. Therefore, the Beijing High People's Court also stipulates that the parties may submit a market research report to prove that the disputed trademark and the cited trademark do not constitute similar trademarks, but if the report lacks authenticity and scientificity, it may not be adopted.

### 5. Conclusion

China's judiciary refers to the possibility of confusion as the core element for determining trademark infringement cases in common law countries. On the basis of referring to relevant laws and theoretical theories, this article introduces the concept, theory, and historical origins of confusion possibility. In addition, through comparative law research methods, it reflects on the recognition rules of confusion possibility theory and summarizes the problems

that exist in the specific application of confusion possibility recognition standards in China's judicial practice. It is believed that there are still ambiguous areas in China's regulations on confusion possibility, including how judicial authorities should analyze various factors when applying confusion possibility recognition standards, whether there is a distinction in the degree of proof between various factors, and what kind of correlation exists between them. These are important issues that need to be discussed urgently in this article. Based on the existing theoretical foundation and judicial practice, the author summarizes domestic and foreign experiences, specifically discusses the factors to consider in determining the possibility of confusion in judicial judgments, and summarizes the recognition standards of different countries. Specific suggestions are proposed for the application of China's "multi factor detection method". I hope to continuously improve the relevant system for identifying the possibility of trademark confusion, provide good institutional guarantees for trademark owners, avoid unnecessary disputes and controversies, and maintain a good and orderly economic and social order.

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