

Determination of Infringement of Trademark Confusion

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Abstract: Trademarks are attached to goods and are marks for identifying the source of similar goods or services. Real social life is complicated and various trademark infringements emerge in an endless stream. In order to safeguard the legitimate rights and interests of producers and operators who provide goods or services and relevant consumers, it is necessary to clarify what the identification standards for trademark infringement are. After years of research and development, the trademark law in China has developed from the traditional single similarity standard to a dual-standard model in which similarity and possibility of confusion coexist. This paper first briefly explains the relationship between trademark confusion theory and trademark infringement, and further demonstrates the theoretical basis for the existence of possibility of confusion. Secondly, by studying various more mature trademark infringement determination standards abroad, and realistically combining the current development status of China's trademark law, further clarify the status and value of China's possibility of confusion standard in judging trademark infringement. Thirdly, by comparing and studying trademark infringement cases that occurred in China's practice, the problems existing in China's current trademark infringement determination are analyzed. Finally, suggestions for improving the possibility of confusion theory in China's trademark infringement determination are put forward to further clarify the relationship between the trademark similarity standard and the possibility of confusion standard.

Keywords: Trademark Infringement; Likelihood of Confusion; Trademark Similarity; Goods Are Similar; Relevant Public

1. Introduction

Trademarks are the product of the development of commodity economy. In today's world, under the background of economic and trade globalization, commodity information of various countries is in a stage of continuous updating and dissemination. Trademarks have become the symbol of commodity producers and operators selling their commodities to the outside world. The essence of trademark right is a kind of identification right. With the development of society, the function of trademarks has been continuously expanded from the initial indication of the source of goods or services to the three functions of indicating the source, quality assurance, and advertising. The scope of protection of trademark rights has also tended to expand. However, there are endless trademark infringements in modern social life. It is impossible for the Trademark Law to stipulate them one by one when listing trademark infringements. These infringements have destroyed the trading rules of the commodity market, violated the legislative purpose of the Trademark Law, and infringed upon the legitimate rights and interests of trademark registrants and relevant social masses. Therefore, in order to effectively regulate the adverse effects brought about by trademark infringement, it is necessary to further explore and study the standards and basis for identifying trademark infringement.

2. Overview of Trademark Confusion Theory

2.1 The Relationship between Trademark Confusion and Trademark Infringement

A trademark is a carrier of commodity information, carrying the material attributes and morphological characteristics of the commodity itself. After years of development, the concept of trademark has become an intangible asset, playing its unique role in all aspects of social life. It

can be seen from Article 8 of my country's Trademark Law that a trademark is a mark composed of various elements or combinations with distinctive features and capable of identifying the source of similar goods or services. It can be seen that a mark that cannot be distinguished from the goods and services provided by others cannot be called a trademark, let alone be registered as a trademark. If others violate the provisions of the Trademark Law, cause consumers to be confused about the source of goods or services, and damage the legitimate interests of the trademark owner, it constitutes trademark infringement.

Trademarks are attached to commodities and are closely connected with our daily lives. On the one hand, we can use trademarks to identify which products and services are truly worthy of consumers' trust. For example, the snack "Oreo" that everyone often comes into contact with in life is well known to consumers for its pure taste and good advertising. Even if they encounter counterfeit products such as "Yue Li Yue" when shopping in supermarkets, ordinary consumers will not be confused and can make choices that suit them. On the other hand, legal means should be taken to effectively crack down on acts that infringe on the legitimate rights and interests of trademark owners, and legal liability for infringement of the vital interests of the relevant public should be pursued in accordance with the law. Therefore, the trademark confusion theory contributes particularly outstanding value in the process of determining whether a trademark constitutes infringement and whether legal liability needs to be borne.

2.2 The Necessity of Likelihood of Confusion

Trademark infringement and its legal liability are the top priorities of the entire trademark legal system. The social relationship between trademark registrants, prior bona fide users of related trademarks and general consumers is similar to that between sellers and buyers in the commodity economy. In order to ensure the stable and harmonious development of the commodity economy, my country's Trademark Law takes the protection of the legitimate rights and interests of trademark owners and

consumers as its legislative purpose. my country's traditional trademark law applies the "similarity" standard when resolving trademark infringement cases. However, with the progress of society and the continuous strengthening of the internationalization trend, judging whether a trademark constitutes infringement based solely on whether the plaintiff's and defendant's trademarks are similar can no longer meet the needs of today's society, let alone fairly and impartially safeguard the interests of trademark owners and consumers. The logos of Hyundai and Honda cars, which are common in life, are both composed of the capital letter "H". The difference is that one is tilted and the other is forward. General consumers can fulfill their higher duty of care and will not be mistaken for this. It can be seen that there are already cases in the real object where even if the trademarks of the prosecution and the defense are similar, they have not been judged as trademark infringement.

As long as the use of a trademark is sufficient to cause relevant consumers to be "likely" confused about the source of the goods or services, direct infringement can be determined based on this, and the trademark owner does not need to provide evidence to prove how many relevant consumers are actually confused.^[1] The trademark laws of many countries in the world believe that the scope of protection of a registered trademark is not limited to the scope of rights of the registered trademark. From this perspective, whether it is a country that adopts trademark registration or a country that adopts trademark use to confirm rights, the basis of trademark protection is to prevent confusion. The traditional "similarity" standard violates the purpose of China's trademark legislation, so China formally introduced the likelihood of confusion judgment standard in Article 57 of the Trademark Law revised in 2013.

3. Criteria for Determining Trademark Infringement

3.1 Criteria for Determining Overseas Trademark Infringement

3.1.1 Likelihood of confusion standard under U.S. trademark law

The US trademark law started early, and can be traced back to the Lamb Act of 1946. The

current standard for determining trademark infringement is the likelihood of confusion standard. The development of the theory of confusion in US trademark law can almost represent the development of the theory of confusion in trademark law. Looking back at US trademark law in the 19th and early 20th centuries, it can be found that "traditional" US trademark law mainly protects the interests of producers by protecting property rights. The current US trademark law has achieved a shift from "producer-centered" protection to "consumer-centered" protection, and from "property-right-based" protection to "confusion-based" protection.^[2]

However, likelihood of confusion is not a specific concept. Its existence will lead to many possibilities. Even if the plaintiff and defendant's trademarks are exactly the same, it does not necessarily constitute infringement. In trademark infringement cases, the US courts give judges a great deal of discretion. In the long-term process of hearing trademark infringement cases, the US courts have sorted out a large number of trademark infringement cases and studied the reference factors for determining the likelihood of confusion standard, namely the "multi-factor test method". It mainly involves the following aspects: the use time and influence of the prior trademark; the degree of similarity of the trademarks; the degree of similarity of the goods or services; the geographical connection between the plaintiff and defendant's product markets; the subjective attitude of the accused trademark user; the specific evidence that causes confusion; the quality of the accused goods or services; and the degree of consumer identification.^[3] In the judicial practice, the above reference factors are not applied in every case. Different courts will apply different reference factors according to their needs when hearing different trademark infringement cases. The principle of case-by-case determination is adopted for this.

Although the United States applies the "multi-factor test" in practice, it does not require that all the above factors be considered in a case. During the trial, the court should consider various reference factors according to the different circumstances of the case, select the factors related to the case, determine whether there is a possibility of confusion, and then determine whether it constitutes trademark

infringement.

3.1.2 Similarity and likelihood of confusion determination standards under EU trademark law

The EU applies a completely different standard to the US when judging trademark infringement. The EU Trademark Law adopts the similarity standard + likelihood of confusion standard. The EU Trademark Regulation emphasizes in its introduction: "Likelihood of confusion constitutes a special condition for trademark protection." The EU Trademark Law takes the existence of similarity as a prerequisite when resolving trademark infringement cases, and regards the likelihood of confusion as a post-condition. That is, the plaintiff and defendant's trademarks must first be determined to be similar, and then further explore the possibility of confusion.^[4] After long-term trial practice, the EU Court has also formed factors that can be referred to when judging trademark infringement, including the following: the market popularity of the plaintiff's trademark; the length of use of the plaintiff's trademark; the degree of similarity between the plaintiff's and defendant's goods or services; the similarity of the trademarks in appearance; the main parts of the trademarks, etc.

Compared with the United States, the EU's standards for determining trademark infringement leave less room for judges to exercise discretion. The United States uses the likelihood of confusion as the only standard for determining trademark infringement, while the EU court needs to further explore whether the likelihood of confusion is met on the basis of determining that the trademarks are similar, and then determine whether trademark infringement has occurred. Therefore, in the judicial practice of the EU, the determination of similarity, likelihood of confusion and trademark infringement is consistent. Although the United States and the European Union use different methods of determination in trademark infringement, they both essentially use the likelihood of confusion as a limiting factor in determining whether a trademark constitutes infringement.

3.2 My Country's Standards for Determining Trademark Infringement

3.2.1 Criteria for determining similarity and likelihood of confusion under my country's

trademark law

After years of historical inheritance and practice, my country's Trademark Law is in a critical period of gradual improvement. In the revisions in 1993 and 2001, the outstanding value of the likelihood of confusion standard in my country's trademark law was not highlighted. In the past, the "similarity" standard was followed, which led to inconsistent understanding of the judgment standard and inconsistent judgments by judges when hearing cases. The Trademark Law revised in 2013 established the criteria for determining trademark infringement, namely the legislative model of "similarity and likelihood of confusion" coexisting, and introduced the likelihood of confusion commonly used by the international community. The 2014 "Regulations for the Implementation of the Trademark Law" retained Article 50 of the 2002 "Regulations for the Implementation of the Trademark Law" regarding the independent status of likelihood of confusion in trademark infringement judgments. However, the 2020 revised "Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Trademark Civil Dispute Cases" continues the provisions of Articles 9 and 11 of the 2002 "Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Trademark Civil Dispute Cases", and still takes the possibility of confusion as a consideration factor in determining whether trademarks are similar or goods are similar, denying the independent status of the possibility of confusion in trademark infringement judgments, and failing to reach consistency with the 2013 amendment to the Trademark Law.^[5]

It should be noted that my country's Trademark Law does not use likelihood of confusion as a criterion for determining infringement when the trademarks claimed by the prosecution and the defense are exactly the same. This is because when the legislators formulated the law, they took into account that if there are two exactly the same trademarks, the legal effect of the possibility of confusion is obvious, and the legislators believed that there was no need to regulate through legislation.

The likelihood of confusion standard refers to the possibility that, due to the existence of the

later trademark, ordinary consumers and even the general public with a general degree of caution may mistakenly believe that the goods attached to the later trademark originate from or are related to the owner of the earlier trademark, that is, under objective conditions, confusion is caused by the trademarks being too similar.^[6] Although China has established the likelihood of confusion standard through legislation, it has not solved the problem of how to apply the traditional similarity standard and the likelihood of confusion in judicial practice. At the same time, the principles and factors for determining the likelihood of confusion of trademarks have not been improved through legislation. In judicial practice, there are still cases where judges do not know how to correctly handle the relationship between "similarity", likelihood of confusion and "trademark infringement", resulting in logical contradictions in the determination of trademark infringement in China in practice, which is obviously contrary to the original intention of the legislator.

3.2.2 The implications of overseas trademark infringement determination standards for my country

Through the comparative analysis of the trademark infringement determination standards of the United States and the European Union in the previous article, it can be seen that foreign countries have long established the core position of the likelihood of confusion standard in the determination of trademark infringement, and have formed factors for judging the likelihood of trademark confusion in trial practice. This provides a reference direction for future legislation and judicial practice in my country's trademark infringement determination.

China's current trademark infringement determination standards are similar to those of the EU. From the comparison above, it can be seen that the EU trademark determination standards are clearer and more specific than those of China. In judicial practice, China still often encounters logical confusion when applying trademark infringement determination standards. I believe that the United States uses likelihood of confusion as the only standard for determining trademark infringement,^[7] which can effectively avoid the phenomenon of inconsistent judgments when courts hear similar cases. With only one

standard for determination, judges will no longer fall into the quagmire of double standards in choosing and applying.

However, my country cannot completely copy the US trademark infringement identification standards at present, because the US has formed a relatively complete "multi-factor test method" that matches its identification standards in long-term trial practice. If my country wants to further clarify the status of likelihood of confusion in trademark infringement identification in future trademark legislation, it should reasonably consider the purpose of my country's trademark legislation and the function of trademarks, and establish the determination factors for the possibility of confusion through legislation.

4. Analyzing the Existing Problems in the Identification of Trademark Confusion Infringement in My Country Based on Cases

4.1 Wang Xingji Trademark Dispute Case

4.1.1 Brief introduction of the case

The plaintiff Hangzhou Wang Xingji Fan Industry Co., Ltd. (hereinafter referred to as Hangzhou Wang Xingji) was formerly known as "Wang Xingji Fan Shop" which was founded by Wang Xingji in 1875 (the first year of the reign of Emperor Guangxu of the Qing Dynasty). After being managed by successive generations of inheritors, Hangzhou Wang Xingji is a time-honored Chinese enterprise recognized by the Ministry of Commerce of China and a national and provincial intangible cultural heritage protection unit. It legally enjoys the exclusive right to the trademark No. 549924. The trademark was registered in 1991 and was later recognized as a well-known Chinese trademark. However, the defendant Shaoxing Wang Xingji Fan Factory (hereinafter referred to as Shaoxing Wang Xingji) used a trademark identical or similar to the registered trademark in question on the same product, which is likely to cause confusion and misunderstanding among relevant consumers about the source of the product. It has infringed the exclusive right to the registered trademark in question and does not have the prior use defense and other exemptions. Therefore, the court ruled that

it should bear the tort liability of stopping infringement and compensating for losses.^[8] Shaoxing Wang Xingji later appealed against the first-instance judgment. The Hangzhou Intermediate People's Court rejected the appeal and upheld the original judgment.

4.1.2 Analysis and summary

This case is a typical example of a trademark infringement case in which a similar mark to another person's previously registered trademark is used on similar goods and constitutes trademark infringement. For such cases, the historical background of the trademark in question, the historical relationship between the two parties, the popularity of the trademark in question, the actual use of the mark in question by both parties, the use of the alleged infringing mark, the subjective intention, and whether it will cause confusion among consumers should be considered and comprehensively judged. In the trial of this case, the judgment of whether trademark infringement has occurred should be based on the actual situation of the parties and social development, and the scope of protection of registered trademark rights cannot be simply and mechanically limited.

4.2 If You Are the One Trademark Dispute Case

4.2.1 Brief introduction of the case

The plaintiff, Jin Ahuan, sued the defendant, Jiangsu Radio and Television's "If You Are the One" program, for infringing his legal rights on the grounds that he had first obtained the registered trademark "If You Are the One". Since its launch, "If You Are the One" has been loved by audiences of all ages and has a high social reputation. After trial, the court held that even though the two programs are identical in name, the relevant public could exercise a high degree of care and would not confuse the TV program with the real-life marriage agency, let alone cause confusion. Therefore, the court ruled that Jiangsu Radio and Television's "If You Are the One" program did not constitute infringement.^[9]

4.2.2 Analysis and summary

This case is a typical example of a disputed trademark that uses the same mark as another person's previously registered trademark on

similar services but does not constitute trademark infringement. If the traditional similarity standard is applied to such cases, it will inevitably lead to unfair results. Therefore, the key to determining whether trademark infringement is established lies in whether there is a situation that will cause confusion and misunderstanding among the relevant public.

4.3 Problems in Determining Trademark Confusion Infringement in My Country

In the trademark dispute case mentioned above, it can be seen through comparison that if the trademarks used by the plaintiff and the defendant are identical from the perspective of the general public but will not cause people to be mistaken, the defendant cannot be found to have infringed. Therefore, whether the trademarks used by the plaintiff and the defendant are confusing is an important criterion for determining whether the trademarks constitute infringement.

In the above cases, there are still many issues that need to be discussed. In this section, the author believes that the following issues are more important in the determination of trademark infringement and will be discussed in detail.

4.3.1 The law does not specify the reference factors for likelihood of confusion

The determination of the likelihood of confusion requires reference to a variety of considerations and compliance with certain applicable principles. However, my country's Trademark Law does not make detailed provisions on the specific factors for determining the likelihood of confusion. Since the traditional "similarity" standard has a long history in my country, courts often fall into the deviation of the logical choice and application of "similarity" and likelihood of confusion when hearing cases. In terms of the identification factors of the likelihood of confusion in trademark infringement, since there are no legal provisions to regulate and constrain it, judges need to give full play to their subjective initiative when hearing cases and weigh the contradictions and disputes between the plaintiff and the defendant. As a result, when different judges hear similar cases, the handling results of the cases are

often different, which will affect the fairness and justice of the cases to a certain extent.

4.3.2 The relationship between the similarity standard and the likelihood of confusion standard is confusing

Before 2013, my country used "similarity" as the standard for determining trademark infringement. At that time, likelihood of confusion was not an independent judgment standard. Likelihood of confusion served to prove the existence of "similarity". At this time, the order of priority for determining whether a trademark constitutes infringement is likelihood of confusion, "similarity" and "trademark infringement".

In 2013, China revised the criteria for determining trademark infringement in the third revision of the Trademark Law. As a result, the current Trademark Law of China presents a situation where "similarity" and likelihood of confusion coexist. However, the newly revised Trademark Law does not clearly define the relationship between the two. ^[10] Articles 9 and 11 of the judicial interpretation of the Trademark Law of China still focus on "likely to cause confusion among the relevant public" when interpreting trademark similarity and product similarity. This is to prove the "similarity" between the plaintiff and defendant's trademarks through likelihood of confusion. If this judicial interpretation remains unchanged, it means that the possibility of confusion will be applied twice in the process of trademark infringement determination. The coexistence model of "similarity + possibility of confusion" cannot be correctly applied in judicial practice. That is, the order of application in determining whether a trademark constitutes infringement is likelihood of confusion, "similarity", likelihood of confusion and "trademark infringement".

Against the backdrop of economic globalization and international development, it is crucial to clarify the relationship between trademark "similarity" and likelihood of confusion if we want to integrate into the international intellectual property market and resolve the growing number of trademark disputes.

5. Suggestions on the Existing Standards for Identifying Trademark Infringement in My Country

5.1 Suggestions on Factors for Judging Trademark Infringement in My Country

In trademark infringement, a variety of factors should be considered, whether it is the "Polaroid Factor" in the United States ^[11] or the reference factors for judging the likelihood of trademark confusion formed in the long-term trial process of the European Union. The court will consider them comprehensively according to the needs in different cases. The author suggests that China can add specific legal provisions as "factors for determining the likelihood of trademark confusion" in the "Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Trademark Civil Dispute Cases" so that the court can have reference factors for consideration when hearing trademark infringement disputes.

5.1.1 Trademark similarity

By comparing the disputed trademark with the trademark previously registered by the trademark owner, the degree of similarity in terms of font, color combination, marking orientation, complexity, external form, etc., it is determined whether the trademarks provided by the prosecution and the defense are likely to cause consumers to misunderstand. Unifying the determination of trademark similarity is of great practical significance in guiding trial practice.

5.1.2 Similarity of goods or services

When determining whether there is a possibility of confusion between a trademark, it is inevitable to consider the differences between the goods and services provided by the defendant's trademark and the registered trademark. If the plaintiff's and defendant's trademarks are identical or similar, but because they are used on different categories of goods or services, such as the "If You Are the One" trademark dispute case mentioned above, then it will not cause general consumers to be mistaken. Of course, it cannot be required that all people in society will not be mistaken for this. Although the times are progressing, there are still some people who have not come into contact with the trademark in question for various reasons. The judgments of such people cannot be attributed to the understanding of

general consumers. Judges should consider the facts of the case when hearing trademark infringement cases.

5.1.3 Distinctiveness and popularity of the trademark

It is not difficult to see from the cases introduced above that the courts have taken into account the social popularity of "Beijing Qingfeng Baozi Shop" and the "If You Are the One" column when hearing trademark infringement cases. It can be seen that, under the same conditions, the higher the popularity of the trademark, the higher the possibility of confusion, and it is easier to define the behavior of others free riding. Using legal provisions as a reference factor for determining the possibility of confusion of trademarks is very consistent with the current development of my country's trademark law.

5.1.4 The sales channels of the plaintiff and defendant's products and the defendant's intentions

In the 2019 amendment to China's Trademark Law, new clauses were added that emphasize subjective intent, such as "malicious trademark registration applications that are not intended for use shall be rejected." If the producer and seller are third parties in good faith, do not have the subjective intention to infringe, and take positive actions to help combat infringement and avoid more serious losses to the trademark owner, they are considered not to have committed trademark infringement. In judicial practice, judges can use the principle of good faith to comprehensively consider the degree of correlation between the sales markets of the plaintiff and the defendant, whether the defendant's subjective intention and objective behavior constitute trademark infringement, and whether there is no defense, so as to determine whether confusion has occurred and whether the defendant needs to bear infringement liability. ^[12]

5.1.5 Other factors that may easily cause trademark confusion

Likelihood of confusion is an uncertain concept, and the factors for determining likelihood of confusion cannot be exhaustively listed. When hearing trademark infringement cases, the court should follow the principle of case-by-case identification and appropriately consider other auxiliary reference factors in different cases. The author suggests that subsequent trademark legislation can clarify

the reference factors of likelihood of confusion in the form of legal provisions, so that my country's trademark law can be in line with international standards in resolving trademark disputes.

5.2 Clarifying the Relationship between the Criteria for Judging Trademark Similarity and the Criteria for Judging the Likelihood of Confusion

For a long time, my country's Trademark Law did not include likelihood of confusion in formal legal provisions, and my country's traditional "similarity" standard has been the main body in the identification of trademark infringement for many years. The 2013 Trademark Law established likelihood of confusion through legislation, and separated likelihood of confusion from "similarity", but did not clearly explain the relationship between the two. In fact, although my country's current legislation still uses "similarity + likelihood of confusion" as the standard for identifying trademark infringement, in judicial practice, there are often cases where even if the plaintiff and defendant's trademarks are identical or similar, they still do not constitute trademark infringement. This further shows that the legal status of the "similarity" standard should not be set too high at this stage. Most judges have already used the "similarity" standard as a consideration factor in determining the likelihood of confusion standard when hearing cases.

The author suggests that the corresponding provisions of Articles 9, 10 and 11 of the "Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Trademark Civil Dispute Cases" adopted by China in 2020, which use likelihood of confusion to prove the existence of similarity of trademarks and similarity of goods, can be amended. If the legal effect of these provisions is maintained, it will lead to the courts mentioned above applying the possibility of confusion requirement twice when hearing trademark infringement cases, which obviously violates the original intention of the legislation. In practice, the possibility of confusion and similarity judgment are cross-cutting and complementary to each other, but because the causal logical relationship is not obvious, the possibility of confusion and similarity

judgment may be circularly recognized in the recognition process.^[13] Specifically, likelihood of confusion is no longer a consideration factor serving the traditional "similarity" standard recognition. "Similarity" should be used as a consideration factor for determining likelihood of confusion rather than an inevitable factor.

6. Conclusion

As a carrier of commodity economy, trademark is closely connected with our life. For a long time, the identification standard of trademark infringement in my country has been constantly improved and improved in the process of social development until the current similarity and possibility of confusion standard was formed. This article focuses on the problems existing in the determination of trademark infringement in my country, and puts forward several suggestions based on the reference of foreign countries and the current legislative situation in my country.

In summary, my country should formulate a series of relatively complete legal provisions on the criteria, identification principles, and considerations for the determination of likelihood of confusion as soon as possible in the future, and clarify the core position of likelihood of confusion in the determination of trademark infringement. With more detailed legal provisions, Chinese courts can reduce logical and application errors when hearing trademark infringement cases, and save judicial resources.

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