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Legal Study of Trademark Reverse Confusion Infringement under Chinese Law Perspective

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Abstract

With the development of China's social economy, cases of reverse trademark confusion have been surfacing in judicial practice. This paper firstly analyzes and explains the basic theory of reverse trademark confusion by introducing the source of the theory of reverse trademark confusion and the difference between forward trademark confusion and reverse trademark confusion. After that, the necessity of reverse confusion infringement in China is argued from the lack of legislation and the real danger of reverse confusion infringement in China. Finally, it is clear that both forward confusion and reverse confusion are connotations of likelihood of confusion. The existence of likelihood of confusion is the criterion for determining trademark infringement, and the multi-factor test is applied to determine the likelihood of confusion. Therefore, the determination of reverse confusion should be based on the multi-factor test, taking into account the various factors in the market environment that affect consumers' purchasing decisions, rather than making a categorical decision based on one aspect.

Keywords

Reverse Trademark Confusion; Infringement; Multi-Factor Test Method.

1. Introduction

Reverse confusion of trademarks is relative to the forward confusion of trademarks. However, the concept of "reverse confusion" is not explicitly stated in China's trademark law and is rarely discussed in academic circles. However, the economy is constantly evolving, and cases of reverse confusion have emerged in judicial practice. These cases are a bit far-fetched to determine whether they constitute trademark infringement by using the theory of positive trademark confusion. Therefore, this article will provide some humble opinions on the theory of reverse trademark confusion infringement, starting from an overview of reverse trademark confusion, the necessity of clarifying reverse trademark confusion infringement in China, and suggestions for applying reverse trademark confusion infringement in China, with a view to providing references for further regulation of the Chinese intellectual property market.

2. Overview of Reverse Trademark Confusion

2.1. The Origin of the Theory of Reverse Trademark Confusion

The doctrine of reverse trademark confusion has been developed in judicial practice and judicial decisions in the United States, more recently in the 1968 case of Westward Coach Mfg. Co. v. Ford Motor Co. . The plaintiff, Westward Coach Mfg. Co. was far less famous than the defendant, Ford Motor Co. but the plaintiff already owned the trademark "Mustang" and used it on its automobile products, and the defendant, Ford Motor Co. knew or should have known that Ford Motor Co. knew or should have known that "Mustang" was registered and in use, but still manufactured "Mustang" cars and used various forms of advertising to heavily promote its products. As a result, it was clear that consumers were likely to perceive the plaintiff's products as imitations of the defendant's products. Using the theory of positive confusion, the judge

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found that the plaintiff's mark was not nearly as strong as the defendant's and that the defendant did not have a need to "rub it in". Therefore, the defendant Ford Motor Co. did not infringe. In the wake of this case, the U.S. courts have been hearing more and more cases of reverse trademark confusion. The concept and theory of reverse trademark confusion has been developed and refined as a result of the string of cases.

2.2. Forward and Reverse Trademark Confusion

In Chinese law, trademark confusion generally refers to positive trademark confusion, i.e. to determine whether the later mark is confused with the earlier mark, and such confusion is sufficient to make consumers believe that the goods in the later mark are different from the goods in the earlier mark. Ltd. v. Hebei Chenhong Beverage Co., Ltd. , the plaintiff's "six walnuts" registered trademark is a famous trademark in Hebei Province, a "well-known trademark", and Hebei Chenhong Beverage Co. Ltd. has "Six Walnuts" products in the market, in which the word "Six Walnuts" stands out and is arranged vertically, and the word "nut" is added in small size font. The word "six" and "walnut" were arranged horizontally in the middle of the font, and the color of the font was lighter than that of the font of "six walnuts". Considering the popularity of the trademark in question and the relevant products of Yang Yuan, the court held that the defendant's products were likely to cause confusion among relevant consumers and therefore constituted trademark infringement.

For example, in Diageo Canada Inc. v. Heaven Hill Distilleries, Inc. the plaintiff sold a rum with "Captain Morgan" and a character on it, and it had been produced and manufactured over a long period of time and had become a household name in Canada. The plaintiff's rum, which featured "Captain Morgan" and the character, had been produced and manufactured for a long time and was a household name in Canada. The defendant had "ADMIRAL NELSON's" and a character similar to the plaintiff's on its rum products, and the bottles of the two rum products were very similar in appearance. The Federal Court of Canada held that the plaintiff's goods were distinctive and had generated a high level of awareness in Canada, and that the defendant's products could be confused with the plaintiff's products by the average consumer. The rum was commonplace to Canadian consumers, and therefore consumers did not take long to distinguish between the products . As a result, the court ruled that the defendant had infringed the plaintiff's registered trademark rights. This is the pattern of positive trademark infringement.

The reverse confusion of trademarks is the opposite, that is, to determine whether the earlier trademark is confused with the later trademark, and such confusion is sufficient to make consumers think that the goods of the earlier trademark are different from the goods of the later trademark, that is, consumers will think that the goods of the earlier trademark are derived from the goods of the later trademark. For example, in the case of "New Balance" , the plaintiff Zhou was registered with the Chinese Trademark Office and obtained the trademarks "Bailun" and "New Balance". The defendant was the Chinese distributor of NEW BALANCE - New Balance Trading (China) Co. In 1983, NEW BALANCE registered "N" trademark, "NB" trademark and "NEW BALANCE" trademark in the United States Patent and Trademark Office. The court of first and second instance both found that the defendant New Balance Trading (China) Co., Ltd. infringed the plaintiff Zhou's exclusive right to use the trademark. From the perspective of trademark infringement, this act is an infringement of the trademark rights of a small enterprise by a large enterprise, and this infringement has constituted a de facto reverse trademark confusion. It should be noted, however, that not all reverse trademark infringement confusion is a large enterprise infringing on the trademark rights of small enterprises. For example, in the case of Guangzhou Kugou Technology Co., Ltd. and Kingsoft Data Corporation and CombiTek Corporation , the infringers were Kingsoft Data Corporation and CombiTek Corporation. Some scholars believe that "well-known large enterprises use the prior trademarks of small enterprises by strong means afterwards, leading consumers to mistakenly believe that the

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goods (or services) of small enterprises come from well-known large enterprises or imitate the goods (or services) of large enterprises." This case proves that there is a certain correlation between the infringer and the infringer of a trademark reverse confusion and the degree of corporate fame and size of the enterprise, but there are often exceptions to this rule, so the focus should not be too much on the degree of corporate fame and size of the enterprise when determining the trademark reverse confusion.

3. The Need for Clear Trademark Reverse Confusion Infringement in China

3.1. The Lack of Legislation on the Theory of Reverse Confusion Infringement of Trademarks in China

Although the 2013 Trademark Law of the People's Republic of China has already introduced the significant legislative change of "likelihood of confusion", the term "likelihood of confusion" in the 2019 Trademark Law of the People's Republic of China still The term "likelihood of confusion" in the 2019 PRC Trademark Law still does not distinguish between forward confusion and reverse confusion of trademarks. In the judicial interpretation of the Supreme People's Court of China , although this issue has been noted, no clear distinction has been made either. Thus, it can be seen that there has never been an official, accepted and unified definition of reverse trademark confusion in China.

3.1.1. Trademark Reverse Confusion Infringement is not Reflected in the Law

In this paper, we apply the theory of trademark confusion to the definition of reverse trademark confusion, but it is worth noting that the theory of trademark confusion does not directly apply to reverse trademark confusion. In Chinese legal practice, there are often different judgments on cases of reverse trademark confusion infringement, and even in two courts in one region, there are "different judgments on the same case". For example, in Guangzhou Baochili Chemical Co., Ltd. v. Nippon Paint (China) Co., Ltd. , the plaintiff registered the trademarks "Medley" and "Yongdeli" by improper means, but the Nantong Intermediate Court of the first instance found that Nippon Paint (China) Co. Ltd. constituted reverse infringement. In the second instance, the Jiangsu High People's Court reversed the original civil judgment of the Nantong Intermediate Court and found that it did not constitute infringement. The reason for this is that China is a country with statutory law, but there is no clear legal provision on reverse trademark confusion infringement to guide judges in deciding cases. Therefore, it is necessary and urgent to clarify the doctrine of reverse trademark confusion infringement in the legislation.

3.1.2. The Lack of Criteria for Calculating the Amount of Compensation for Reverse Trademark Confusion Infringement

The lack of legislation on the doctrine of reverse trademark confusion in China is also reflected in the lack of calculation of the amount of compensation. Article 63 of the Trademark Law of the People's Republic of China of 2019, which deals with the calculation and presumption of the amount of compensation for infringement of exclusive trademark rights , is obviously a regulation of the traditional sense of forward trademark confusion, and it is difficult to reflect the principle of "fairness" by directly applying this provision to reverse trademark confusion. "It is difficult to reflect the principle of "fairness. For example, in the case of "New Balance" , the court ruled in the first instance that New Balance Trade (China) Co., Ltd. should compensate the plaintiff RMB 98 million, and the court ruled in the second instance that New Balance Trade (China) Co., Ltd. should compensate the plaintiff RMB 5 million, which is a huge difference in the amount of compensation. Meanwhile, according to Article 63 of the Trademark Law of the People's Republic of China in 2019, "if the actual loss is difficult to be determined, it may be determined in accordance with the benefit gained by the infringer as a result of the

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infringement", the infringer in a trademark reverse confusion infringement case may have been awarded damages because "the trademark fits well with the business concept of its goods or services. The infringer of a trademark confusion infringement case may be because "the trademark is in line with the business concept of its goods or services, and it is difficult to find a comparable trademark in terms of appearance, call, and meaning to promote its goods or services. The plaintiff did not intend to take advantage of the goodwill of the plaintiff's trademark for its own benefit. Thus, there is no "free-riding" behavior. It can be argued that the infringer in a reverse trademark confusion infringement case benefits from its own goodwill for the mark, and therefore "the infringer's benefit from the infringement is determined" is an impossible proposition to decipher. In Ameritech, Inc. v. Am. Info. Techs. Corp. , the trial judge also stated that the impairment of goodwill suffered by the loss of control of a trademark by its owner is also a form of damage, and that the determination of such damage is left to the discretion of the judge. Therefore, the issue of damages in cases of reverse trademark confusion is also an important issue worth discussing.

3.2. Reverse Trademark Confusion Infringement has Real Harm

A good, fair and just market competition environment is a prerequisite for the development of market economy. According to the State Intellectual Property Office, in 2018, the number of trademark registration applications in China was 7.371 million and the number of trademark registrations was 5.007 million . Such a large number of trademark registrations undoubtedly reflects that enterprises can go to great lengths to find their own trademarks that impress consumers.

3.2.1. Disrupt the Market Order and Infringe the Legitimate Rights and Interests of Trademark Owners

The phenomenon of trademark snatching and the phenomenon of "hoarding registration" for the purpose of transferring registered trademarks for profit in the current Chinese trademark registration market is becoming more and more intense, which also further breeds the phenomenon of reverse trademark confusion and infringement, which is not conducive to the healthy development of China's intellectual property market. For example, in the case of Zhejiang Lanno Wine Co. v. PepsiCo China Ltd. , Zhejiang Lanno Wine Co. is a not very well-known company, which owns the registered trademark of "Blue Storm", a combination of words, pinyin and graphics. PepsiCo China Ltd. is a well-known global company in the food and beverage industry, and uses "Blue Storm" as a promotional theme, which is prominently displayed on posters and shelf price tags in China. Although the court of second instance found that PepsiCo China Ltd. had infringed, consumers had already drawn a parallel between "Blue Storm" and PepsiCo, and even thought that Zhejiang Lanno Wine Co. China Ltd. trademark. "The functions of traditional trademarks include identification of origin, quality assurance and advertising." Ltd. has seriously affected the functions of "identifying the source" and "advertising" of the "Blue Storm" trademark, severing the relationship between the trademark and the trademark owner. The damage caused to the trademark owner is incalculable, and the impact on the commercial market is more negative than positive.

3.2.2. Violation of the Legitimate Rights and Interests of Consumers

There is a general consensus in jurisprudence that the basic function of a trademark is to "distinguish between goods or signs of origin" and that when consumers are informed of the origin of a trademark, they will indicate the corresponding goods in their minds. The consumers' right to know, the right to choose and the healthy competition between producers are reflected in the process of indicating the goods . In most cases of reverse trademark confusion, large companies infringe the trademark rights of small companies (but not absolutely), and the trademark infringers use their financial and publicity advantages to turn the goods originally indicated by the trademark in the consumers' impressions into the goods

ISSN: 2688-8653

of the trademark infringers or directly link their own products with the infringed trademark, which substantially increases the difficulty for consumers to identify the trademark and confuses them about the origin of products and services. In other words, it violates consumers' right to know. Once the consumer's right to know is compromised, his or her choice of goods is also affected, and it may even result in the trademark owner not being the source of the products and services, but the counterfeit of the trademark infringer. Needless to say, this also infringes on the consumer's right of independent choice.

4. Suggestions for Applying Reverse Trademark Confusion Infringement in China

4.1. Improve and Refine the Legislation on the Theory of Reverse Confusion Infringement of Chinese Trademarks

Reverse trademark confusion infringement has never received an official, accepted, and uniform definition in China. Therefore, it is necessary to "culturize" the doctrine of reverse trademark confusion infringement in China's trademark law or other laws. In addition, it is necessary to clarify the criteria for calculating the amount of compensation for reverse trademark confusion infringement and to improve the legislation on the theory of reverse trademark confusion infringement in China.

4.1.1. Reflecting Reverse Trademark Confusion Infringement in the Legislation

The doctrine of reverse trademark confusion is not the same as the doctrine of forward trademark confusion. In judicial practice, judges have mostly applied the doctrine of reverse trademark confusion to the infringement of trademarks either directly or vaguely or in the spirit of reform and innovation. The last of these approaches has generated controversy among critics and praisers. The critics argue that it is a judicial progress to boldly apply the doctrine of reverse trademark confusion, while the critics argue that "there is no explicit law" and that the direct application of the doctrine of reverse trademark confusion would result in excessive discretion of judges. Therefore, this article argues that the best way to resolve the dispute is to "culturally" incorporate the doctrine of reverse trademark confusion in Chinese trademark law or other laws.

4.1.2. Clarify the Standard for Calculating the Amount of Compensation for Reverse Trademark Confusion Infringement

(1) The intangible value of a trademark is the basis for the amount of compensation for reverse trademark confusion infringement.

The intangible value of a trademark is the basis for determining the amount of damages for reverse trademark confusion. Therefore, the first step in calculating the amount of damages for reverse trademark infringement is to analyze the intangible value of the trademark . The loss of market share and the loss of control of the trademark is a matter of case-by-case analysis. It is the valuation of the trademark that can provide the reference for the intangible value of the trademark. In the context of Chinese law, people's courts and arbitration bodies or independent third parties can assess the intangible value of a trademark, and the legislation of other countries also allows IP agents or experts in the relevant field to assess the intangible value of a trademark . These assessments can provide some reference for judges to determine the amount of damages for reverse trademark confusion.

(2) Establishment of the principle of comprehensive compensation

The principle of comprehensive compensation is the most severe principle in infringement damages. This article argues that in trademark reverse confusion infringement, regardless of the subjective intent of the trademark infringer, establishing the principle of full compensation can protect the legitimate rights and interests of the trademark owner to the greatest extent.

ISSN: 2688-8653

Therefore, the direct and indirect damages caused by the trademark infringer to the trademark owner, the intangible losses caused by the loss of control of the trademark, and the litigation costs incurred by the trademark owner to defend the trademark rights should be taken into account by the court . This article argues that the principle of comprehensive compensation can be established by adopting the method of reasonable multiples of license fees to determine the amount of compensation for reverse trademark confusion infringement. Due to the unique nature of reverse trademark confusion infringement, the "loss to the right holder" and "profit to the infringer" methods of calculating damages have obvious shortcomings (the difficulties of proof for the trademark right holder and the reluctance of the trademark infringer to provide real sales data make it impossible to calculate actual damages). It is no longer applicable to the calculation of damages in cases of reverse trademark confusion infringement. In the 2013 Trademark Law of the People's Republic of China, the method of calculating damages for infringement of trademark rights by reference to the multiplier of trademark license fee was added for the first time, and the calculation of damages for infringement of trademark rights by reference to the multiplier of trademark license fee is applicable when the amount of damages cannot be calculated by the conventional method, which significantly reduces the difficulty of proof for the trademark right holder and is an alternative to the "loss of the right holder" and "damage to the right holder". It is a shortcut to replace the "loss of the right holder" and "profit of the infringer" in the calculation of damages. Ltd. v. Huang Weidong infringement of trademark rights , the plaintiff proposed to the court to calculate the amount of compensation with reference to the trademark Xu Mou use fee, although the court found that the defendant's infringement to the plaintiff's goodwill, drug sales, turnover loss is not identified. And the defendant's infringement of the benefits obtained is also difficult to determine under the existing evidence to support, but still did not refer to the trademark XuMou use fee to calculate the amount of compensation, have to say is a regret. However, this also reflects that more and more trademark rights holders call for the will of the people's court to calculate the damages for infringement of trademark rights by referring to the multiples of trademark license fees, and hope that the judges will not stick to the traditional thinking and boldly adopt the method of calculating damages for infringement of trademark rights by referring to the multiples of trademark license fees, in order to promote the better application of the principle of comprehensive compensation. In the United States, where the doctrine of reverse trademark confusion was first developed, the influential case of Big O Tire Dealers, Inc. v. Goodyear Tire & Rubber Co. , in which Big O was a small company and Goodyear was a super multinational company, Big O owned the trademark "Big Foot" and Goodyear owned the trademark "Big Foot". Big O owned the "Big Foot" trademark and Goodyear advertised and used the "Big Foot" trademark without permission, although consumers mistook products made by Big O for those made by Goodyear, and even Big O's sales increased significantly as a result. But Big O still filed a lawsuit to defend its trademark rights. Before entering the courtroom, Big O requested Goodyear to settle the case by multiplying the license fee; at the trial, Big O still proposed to compensate for the damage to its rights by multiplying the license fee, and the court mostly supported Big O's claim by using the license fee as the standard for determining the plaintiff's damages. After all, this method is more fair and objective than calculating the damages caused by the plaintiff's infringement or the benefits gained by the defendant's infringement in this case.

4.2. Clearly, The Determination of Reverse Confusion Should Apply a Multi-Cause Test, Taking into Account the Various Factors in the Market Environment that Affect Consumers' Purchasing Decisions

The difficulty of determining likelihood of confusion can be effectively addressed by applying a multi-factor test to the determination of likelihood of confusion . The multi-factor approach to

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determining likelihood of confusion first appeared in the U.S. Restatement of Torts of 1938, section 729, which consolidated previous precedents to determine likelihood of confusion in four areas . Since then, the U.S. Circuit Courts of Appeals have proposed different lists of multi-factor tests for likelihood of confusion, such as the Polaroid Factor summarized by the U.S. Court of Appeals for the Second Circuit in 1961 , the Sleekcraft Factor summarized by the U.S. Court of Appeals for the Ninth Circuit in 1979 , and the "Du Pleakcraft Factor" summarized by the U.S. Court of Appeals for the Federal Circuit in 1973 . The "Du Pont" factor . These multi-factor tests, although slightly different in content, are all extensions of the four aspects of the Restatement of Torts of 1938. Although China is a codified country and the discretion of judges is greatly restricted, it is still possible to refer to the U.S. multi-factor test and create a multi-factor case-by-case test for the likelihood of reverse trademark confusion that is suitable for China's economic development, as discussed in detail below.

4.2.1. Pay Attention to the Degree of External Similarity of the Trademark and the Degree of Similarity of the Goods or Services Corresponding to the Trademark

In general, consumers do not pay too much attention to whether the trademark is the same as the one they usually buy, but only compare the trademark with the one they remember, and if it is roughly the same, they will decide that the goods are the ones they want to buy. Therefore, the first step in determining reverse trademark confusion is to focus on the degree of external similarity of the trademark, and to pay attention to whether there is a greater likelihood of consumer confusion, and the greater the degree of similarity, the greater the likelihood of confusion. The next step is to pay attention to the degree of similarity of the goods or services corresponding to the trademark. For example, the case of Tianjin Unity Engineering Design Co., Ltd. v. Tianjin Tu You Education Technology Co., Ltd. . Tianjin Unity Engineering Design Company mainly provides professional design consulting services and graphic design services, and has formed a certain influence in various colleges and universities in Tianjin that offer decoration, design and other specialties. The defendant, a new company, published a post titled "Tu You You Focus on Art and Design Examinations" in the Baidu posting of the Unity Hand-drawing Bar (the court found that there was no owner of the Unity Hand-drawing Bar since its establishment). The plaintiff believed that the defendant was a "free-riding" infringement. Finally, the court found that hand-painting and engineering design are not the same field, and there is a significant difference between the two, and that Tianjin Unity Engineering Design Company used Unity Hand-painting as its corporate name on occasions other than the company's website, which failed to establish a stable connection between Unity Hand-painting and Unity Hand-painting, so the available evidence cannot confirm that Unity Hand-painting is the corporate name of Unity Engineering Design Company. The defendant's behavior also did not lead to the possibility of confusion, so the plaintiff's claim was rejected. Thus, even if there is a degree of similarity in the external form of the trademark, if the two trademarks do not exist at the same time in the same field, they will not cause confusion to consumers.

4.2.2. Focus on the Familiarity of Consumers

Reverse trademark confusion is the determination of whether the earlier mark is confusing with the later mark, and such confusion is sufficient to cause consumers to believe that the goods of the earlier mark are identical to the goods of the later mark, i.e., consumers will believe that the goods of the earlier mark are derived from the goods of the later mark. The main consideration in forward confusion is whether the influence and popularity of the trademark will cause the infringer to "piggyback" on the trademark, because the influence of the trademark determines the degree of consumer familiarity, which in turn plays an important role in the sale of goods (or services). However, this approach loses its vitality in reverse trademark confusion because the directions of forward and reverse confusion are different, and in reverse trademark confusion, most of them are infringement of trademark rights of small companies by large

companies (but not absolutely). Therefore, we should change our thinking to determine whether a trademark constitutes reverse confusion: we should examine the influence of the trademark and the familiarity of consumers after the trademark has been infringed. The greater the influence of the trademark and the greater the degree of consumer familiarity with the trademark, the greater the likelihood of reverse trademark confusion. For example, in the above-mentioned case of Zhejiang Lanno Wine Co. v. PepsiCo China Ltd. , after the trademark "Blue Storm" was infringed by PepsiCo China Ltd. the influence of the trademark has been significantly enhanced, and consumers have already equated "Blue Storm" with The case of PepsiCo China Co.

5. Conclusion

Reverse trademark confusion infringement is a special type of trademark infringement, which should determine whether the earlier trademark is confused with the later trademark, and such confusion is sufficient to make consumers think that the goods of the earlier trademark are different from the goods of the later trademark, i.e. consumers will think that the goods of the earlier trademark are derived from the goods of the later trademark. Because of the lack of legislation, in Chinese legal practice, there are often different rulings on cases of reverse trademark confusion, and even "different rulings on the same case" in two courts in one region. This has a negative impact on the development of the market economy and the effectiveness of judicial credibility. Therefore, it is necessary to "culturize" the theory of reverse trademark confusion infringement in China's trademark law or other laws, and create a multi-factor test for reverse trademark confusion with reference to the multi-factor test for positive trademark confusion, so as to better protect the legitimate rights and interests of trademark owners and promote judicial justice with the continuous improvement of the law. The law will be improved to better protect the legitimate rights and interests of trademark owners and promote judicial justice.

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