



The Enlightenment of the Modern Function Analysis of Trademarks by EU to the Judgment of Trademark Use in China

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Abstract: The research on the functions of the trademark varies from country to country. The EU has recognized three modern functions in judicial cases, namely, the functions of communicating, advertising, and investment, and then applied them to the legal issue of judging the use of the trademark. In China's judicial practice, the use of the trademark is a precondition for trademark infringement judgment, and the judgment of trademark use depends on the judgment of whether the origin function is damaged. This paper first analyzes the modern function of the trademark recognized by EU, and then discusses its impact on the judgment of trade use. Finally, this paper tries to put forward some enlightenment to the judgment of trade use.

Keywords: modern function, trademark infringement, trademark use

1. Introduction

According to Article 57 of China's newly revised "Trademark Law", the use of the identical trademark on identical goods or the use of similar trademarks on similar goods, which are likely to cause confusion, constitutes trademark infringement. Therefore, for trademark infringement cases, it is very important to determine whether it constitutes a "trademark use". In China's judicial practice, only the source identification function of trademarks is often discussed, and the possibility of "confusion" is discussed on this basis. The EU uses the trademark function to recognize the use of trademarks, which is of reference significance for China's judicial practice. 1. A concrete analysis of the modern functions of trademarks under the EU system

1.1 Communicating function

In layman's terms, communicating function specifically refers to the ability of a trademark to provide consumers with information related to goods. It includes not only specific information related to the product itself, but also personal experience and experience of consumption-related products that have occurred to consumers. Utilitarian theorists have used trademarks to reduce the cost of product search to demonstrate the rationality of the communicating function. For consumers, the total cost of a product is the price of the product plus the economic cost and emotional cost of the customer to understand the product [1]. When consumers are consuming, they are often unwilling to spend too much time and experience to check the relevant tag content on the product, or browse the characters on the outer packaging of the product in order to find their favorite products. All relevant product information sneaks into consumers' minds through trademarks, greatly reducing the search time consumers spend on shopping. Otherwise, the additional search cost will only cause the lack of customers' willingness to consume the goods. In fact, the identification of this function is controversial. Opponents believe that information transmission is merely a natural result of the implementation of commercial strategies such as advertising and should not be protected as an independent trademark function. However, in the modern market, the recognition of the communicating function helps to understand the role of trademarks in modern advertising and trademark investment. For understanding how trademarks play a role of information communicators, the following points need to be paid special attention to.

First of all, only when a trademark is understood in a broad sense can a trademark be equivalent to a brand. In practice, the trademark has always served only as an intermediary between the brand and consumers. The use of trademarks endows the brand with visual characteristics, conveys the brand information required by the market, highlights the brand value, and highlights the distinctive characteristics of the brand. Secondly, in the field of fashion and luxury goods, the communicating function of related trademarks is the most prominent. The subject of trademark rights implies that its products have the ability to demonstrate the social status and lead the trend of life through trademarks. In addition to the consideration of product quality, and product appearance, consumers endow the trademark with additional value, and the demand for products is also based on the pursuit of status, personality and other factors. Therefore, the trademark acts as a medium, transferring

all kinds of information at the cultural, group and individual levels.

1.2 Advertising function

In the case of *Google France v Louis Vuitton*, the European Court of Justice held that the function of trademark advertising is embodied in the trademark rights subject's right to use the trademark as a tool for market promotion in commercial activities. In fact, it is equivalent to treating the trademark as the subject of product sales. To a certain extent, it helps consumers identify the source of goods and prevent the occurrence of product confusion. This point of view essentially believes that advertising behavior reflects the consciousness of the subject of trademark rights, and successfully transforms the trademark into an advertising tool, which influences consumers' consumption choices by playing the role of product identification or persuasion.

From another perspective, the advertising function means that trademarks are used as one of the most effective sales methods. The use of trademarks is not only a mechanical expression, but more importantly, it can be mixed with special human emotions and leave a mark in the minds of consumers [2]. Based on this, the subject of trademark rights often has more incentives to increase investment in their trademarks, increase the value of their trademarks, and obtain the "secondary meaning" of trademarks through continuous investment in advertising, thereby enhancing the distinctiveness of their trademarks. This can greatly reduce the probability of consumers being confused about the source of the goods. The subject of trademark rights integrates the brand image into the consumer's living environment as much as possible to achieve the goal of maximizing the interests of the subject of trademark rights.

There has been a debate about whether the advertising function of trademarks should be protected. Opponents believe that advertising can be divided into persuasive and informative. At present, many advertisements in the market can only bring a lot of inductive information to the public, and only a small part of the information is about the product itself. Therefore, some economists believe that only the part of the advertisement that can provide the exact information of the product can be recognized as exercising the advertising function and thus be protected by law [3]. In fact, most advertisements are designed to persuade consumers to buy goods they do not need, rather than to promote the source and quality of the goods. The opinion of scholars who question the function of advertising is based on purely economic considerations and believe that the content of advertisements other than the exact relevant information of the product is worthless. However, in practice, the role of advertising has long been beyond the dissemination of product information. The development of the modern advertising industry has prompted some scholars to regard advertisers as commercial engineers, who have the ability to grasp the thoughts and feelings of consumers. Therefore, the psychological impact of irrelevant product content in advertisements on consumers is still worthy of legal protection.

1.3 Investment function

In the case of *Interflora v Spencer*, the investment function is defined as the subject of trademark rights using its trademark to obtain goodwill, thereby attracting consumers and maintaining consumer loyalty to their trademark. The court emphasized that there is overlap between the trademark advertising function and the investment function. The investment function is a natural extension of the advertising function, and the scope of the investment function is wider in comparison. The uniqueness of the investment function is mainly reflected when the trademark is used to obtain or maintain the reputation of the trademark. For example, when the subject of a well-known trademark is infringed, its trademark reputation will also be challenging to maintain, and the investment function will also suffer as a result.

According to the European Court of Justice, when discussing the function of trademark investment, the issue of trademark awareness needs to be taken into consideration. If the accused behavior has a negative impact on the ability of the trademark holder to attract consumers and maintain consumers' loyalty to their trademark, it can be deemed that the investment function has been compromised. According to market surveys, in addition to advertising, many companies often use a series of complex marketing strategies and brand strategies to enhance their brand image. This image has an independent place in the minds of consumers. It has independent value on its own, has nothing to do with the product itself, and is worthy of legal protection. Protecting the investment function of a trademark from damage is the protection of the distinctive features of the trademark. The identification of this function actually strengthens the protection of well-known trademarks.

In essence, the trademark is an important weight to solve the problem of product promotion. However, for the investment behind the trademark and to ensure that the subject of trademark rights can get a return from its investment, the legal protection of trademark goodwill appears extremely severe. The European Court's protection of the investment function of trademarks can in fact reflect its reflection on the facts, that is, the improper use of third-party subjects, even if it does not cause confusion, may still interfere with the company's business strategy, thereby damaging the significance of the trademark.

2. The impact of recognition of the modern function of trademarks by EU on the judgment of "trademark use"

The preliminary exploration of the modern functions of trademarks needs to be traced back to the Arsenal v Reed case. The EU legal adviser proposed that the scope of trademark functions should be expanded. The trademark use behavior involved in this case is suspected of causing damage to other trademark functions. With the continuous development of the trademark system, trademark holders continue to increase their investment in their trademarks, and trademarks begin to have a "secondary meaning". The European Court of Justice began to question whether the function of trademarks is limited to referring to the source of goods. In the case of Google France, the European Court of Justice held that when a third party's trademark usage affects the trademark owner's use of its trademark as a business method in product promotion or other commercial activities, the trademark owner has the right to prohibit it. Although the statement is too broad and may cause instability in the application of the law, the statement is a recognition of the trademark advertising function and a bold attempt to use this function in the field of judicial practice. In the Interflora case, the European Court of Justice affirmed and applied the trademark investment function. It believes that when a third party's illegal use of a trademark damages the ability of the trademark owner to use its trademark to gain reputation, attract consumers, and maintain consumers' loyalty to their products, it is a damage to the investment function of the trademark and should be judged. The use of this trademark constitutes trademark infringement. Through the above classic cases, it is not difficult to analyze that the EU's judgment on the use of trademarks is not limited to the function of identifying the source of trademarks. Regarding the understanding of EU trademark infringement clauses, Article 5 of the EU Trademark Regulations should be interpreted as the scope of protection for the subject of trademark rights should not be limited to its traditional functions such as source identification, and its communicating function, advertising function, and investment function are infringing Factors should also be taken into consideration when determining behavior.

3. The enlightenment of the judgment of trademark use by the modern functions of trademarks to China's judicial practice

3.1 The nature of trademark use

The determination of "factual issues" and "legal issues" is regarded as a prerequisite for legal research. Under normal circumstances, the judgment of facts does not involve the subjective psychological judgment of the perpetrator, but only needs to rely on objective conditions to make judgments; legal issues involve the evaluation of existing facts by the law. Specific to the two concepts of "trademark use" and "use trademark", "trademark use" reflects objective facts, that is, whether a third-party subject uses a trademark, in judicial procedures, only the claimant bears the burden of proof to objective facts. The "trademark use" belongs to a legal concept. In China's judicial practice, its essence is to judge whether the third party's behavior "affects the trademark to perform its source identification function". It requires the judge to combine the third party's use of the trademark, subjective purpose, and The objective results of the use of subjective judgments, and the defendant can rely on the use of its behavior is not the use of source identification significance to defend.

3.2 The status of trademark use in trademark infringement cases in China

Whether "trademark use" should be a prerequisite for the determination of trademark infringement is controversial in theoretical circles. The opposing point of view is that it should start from the entire behavior of the accused trademark, that is, the entire specific business scenario in which the accused trademark is used, rather than the trademark itself, and the use of "trademark" should not be used as a preconceived condition. Supporting the view that "trademark use" itself has the "function of source identification" and must focus on the specific commercial prospects rather than the trademark identity itself. This view denies that "trademark use" is a prerequisite for trademark infringement judgments, which is difficult to establish [4]. In addition, for non-trademark use behaviors, such as descriptive or explanatory use behavior, it is impossible to share the trademark owner's dominant interest in goodwill, and it is impossible to cause the relevant public to confuse and misunderstand the source of goods or services[5]. Therefore, in China's theoretical and practical circles, it is generally believed that the use of a trademark in the legal sense is a necessary condition for trademark infringement.

The main clause concerning trademark infringement in China's "Trademark Law" is Article 57, which lists various trademark infringements, and requires that in the infringement, the object of the infringement is a trademark, and the alleged infringement is a legal concept. Use of trademarks. As a precondition for trademark infringement judgment, the purpose of "trademark use" is to exclude acts that do not belong to "trademark use" from trademark infringement. There are subjective standards and objective standards for the judgment of the results of "trademark use". If judged by subjective standards, it

often produces disadvantages that are difficult to prove subjectively, and may cause the infringer to not have the subjective intention of infringement, but objectively cause the result of trademark confusion. However, no matter what standard is adopted, it is determined that the judgment of "trademark use" in China's judicial practice is entirely based on whether the trademark use behavior affects the function of identifying the source of the trademark.

3.3 The enlightenment of the analysis based on the modern functions of trademarks by EU to China

In China's current judicial practice, the relationship between the use of a trademark and the confusion between consumers is the relationship between cause and effect, and the process of judging whether the confusion actually occurs is the process of judging whether the trademark source identification function has been adversely affected. According to the Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Administrative Cases for the Authorization and Confirmation of Trademarks (2017), the five major factors of trademark confusion are: the degree of similarity of trademark, the degree of similarity of goods, the distinctiveness and popularity of trademarks requested for protection, The degree of attention of the relevant public, and other relevant factors. It can be seen from this that the method adopted in judicial practice in China is to use the trademark source identification function as the basic point, and constantly stipulate various factors to assist in judging whether the source identification function has been damaged.

It is usually believed that the trademark source identification function is the cornerstone of the trademark function system, and other trademark functions are built around the source identification function. The communicating function, advertising function, and investment function discussed in the EU are all further evolutions of the source identification function. In a nutshell, the approach adopted by the European Union is based on the function of identifying the source of trademarks, continuously exploring other functions of trademarks and using them as the basis for judging whether the infringement constitutes the use of trademarks in infringement judgments. The author believes that there are two lessons to be learned from the EU's approach.

First, as far as the modern functions of trademarks recognized by the European Union are concerned, the three types of functions reflect the hierarchy. Communicating function and advertising function are functions that all trademarks have. The author believes that these two functions are a further evolution of the source identification function, and these two functions have a broader scope. Whether it affects the communicating ability of a trademark or its advertising ability, it may cause confusion about the source of product identification, but at the same time, it is not limited to the function of identifying the source of the trademark, which can provide a deeper level of protection for the subject of trademark rights. Regarding the investment function of trademarks, the author prefers to use it in the determination of well-known trademark infringement. The "Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Civil Dispute Cases Involving the Protection of Well-Known Trademarks" (hereinafter referred to as the "Interpretation") emphasizes that damage to well-known trademarks can reduce the distinctiveness of well-known trademarks and detract from the market for well-known trademarks. The reputation and the market reputation of improper use of well-known trademarks are considered from three perspectives. In fact, the trademark investment function discussed can be demonstrated from these three perspectives. The three actions stipulated in the "Interpretation" will actually cause a decline in the ability of trademark rights subjects to attract consumers and maintain consumer loyalty. Therefore, it is believed that the function of trademark investment can be used as a perspective for judging well-known trademark infringement in judicial practice.

Second, although the modern functions of the three types of trademarks recognized by the European Union are still controversial, it is worth learning to refine the trademark function and use it as a way to judge whether a trademark constitutes infringement. In view of the increasingly complex commodity market and the continuous increase of trademark rights and investment in their trademarks, many trademarks have gradually developed into signs with "secondary meaning". Only protecting its source identification function can no longer meet the needs of trademark owners. And in practice, it is too abstract to directly invoke the trademark source identification function to judge trademark use behavior. The author believes that China can learn from the research ideas of the European Union and combine the characteristics of China's market to conduct research on the evolution of the trademark source identification function, and further refine the trademarks' due functions. This is conducive to improving the efficiency of judicial trials. In the trial of difficult cases, it is not limited to the judgment of the source identification function, and the refined trademark function provides more legal guidance for judicial judgment.

Although the trademark functions discussed above are not reflected in the EU Trademark Regulations, most countries in the EU are case law countries, and their judgments can be used as the legal basis for future trials and provide accurate legal guidance. In addition to the source identification function in China, the research on other functions almost only exists

on the theoretical level. In judicial practice, some courts have explained other functions of trademarks. For example, in the "FUJIYA" (Hangzhou) case[6], the court held that: trademarks have the basic function of identifying the source of goods, as well as derivative functions such as quality assurance and credit-bearing. However, as a statutory country, the interpretation in this case cannot play any role in the determination of future cases. On the whole, China is vague about the category of trademark function and whether it can be used as a legal basis in a trial. Therefore, it is recommended that the functions of trademarks that are generally accepted in theory can be confirmed through judicial interpretations, etc., to provide more thinking angles and legal basis for the determination of trademark use.

4. Conclusion

By studying the EU's research process on trademark functions, it is not difficult to see that trademark functions have been changing with market changes. The identification of its functions cannot stop at the most traditional functions. It should keep pace with the times, take basic functions as the core, and explore trademark functions that are in line with today's market. And its research should not only stay at the theoretical level, and only when it is used flexibly in judicial practice can the value of research be demonstrated.

Although the European Union's research results on the modern functions of trademarks cannot be widely recognized, they still have reference significance, and its idea of using modern functions to judge the use of trademarks is of a considerable reference value. China can learn from its thinking and use our judicial practice as a benchmark to conduct in-depth research to improve the efficiency of China's legal judgment on trademark use.

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