

Research on the Issue of "Trademark Use" in Trademark Infringement

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Abstract: "Trademark use" is the core thread running through trademark law and the cornerstone of the trademark legal system. However, there are still disputes over whether "trademark use" is a prerequisite and independent element for trademark infringement and the criteria for determining "trademark use". Therefore, it is necessary to further review the "trademark use" rule in combination with the principles of trademark law. In 2013, the Trademark Law was revised, and Article 48 of the Trademark Law added a specific definition of the use of trademarks. The view that "trademark use" is a prerequisite for trademark infringement has become the mainstream view in China's academic circle. However, "trademark use" faces problems such as unclear independent status and differences in determination standards in practice. Based on this, China can adopt the method of stipulating "trademark use" in the Trademark Law, clarifying its relationship with the "possibility of consumer confusion", and unifying the determination standards to improve "trademark use".

Keywords: Trademark Use; Possibility of Confusion; Specific Determination Criteria.

1. Introduction

The concept of "trademark use" as a condition for determining trademark infringement originated in 2009. Before that, there was little discussion or controversy over "trademark use" in China. In recent years, with the continuous emergence of foreign OEM processing cases and search engine keyword advertising cases, disputes over "trademark use" have become increasingly intense. Since the addition of the definition of "trademark use" in Article 48 of the Trademark Law in 2013, the view supporting "trademark use" has gradually been recognized by the majority of scholars. "Trademark use" is a prerequisite condition in the trademark infringement judgment process that precedes the determination of the possibility of confusion. If it does not constitute "trademark use", it is impossible to constitute trademark infringement. Treating "trademark use" as a prerequisite for trademark infringement has many benefits, such as exempting non-infringing non-"trademark use", distinguishing unfair competition from trademark infringement, and differentiating direct infringement from indirect infringement.

2. Basic Theory of "Trademark Use"

2.1. Conceptual Analysis of "Trademark Use"

"Trademark use" refers to the act of using a trademark to fulfill its function of source identification. It was first discussed and reflected upon by cases of using trademarks as keywords in American search engines. When China revised the Trademark Law in 2013, Article 48 added a definition of trademark use, which also sparked discussions in China on the independent status of "trademark use". If an act constitutes "trademark use", it needs to meet two aspects: one is commercial use, that is, the application of the trademark in commercial activities; On the other hand, the trademark used needs to serve as a source and identifier for the goods and services. [1]The significance of the independent status of "trademark use" is mainly reflected in the aspect of trademark

infringement. Acknowledging its independent status means acknowledging that it becomes a prerequisite for judging trademark infringement, that is, before judging trademark infringement, the act must be "trademark use". "Trademark use" and the possibility of consumer confusion are two criteria for determining trademark infringement. Therefore, these two standards are often combined to trigger discussions. Since the position of consumer confusion in trademark infringement is beyond doubt, the discussions mainly focus on the independent status of "trademark use".

2.2. Disagreements on "Trademark Use"

There are mainly three viewpoints in the academic circle regarding the position of "trademark use" in trademark infringement: The first one does not recognize that "trademark use" is a necessary condition for judging trademark infringement, arguing that the issue of "trademark use" does not need to be considered when determining trademark infringement, and Article 48 of the Trademark Law does not refer to "trademark use" but merely the use of trademarks. The second viewpoint also does not recognize "trademark use" as one of the elements for determining trademark infringement, nor does it recognize its independent status. It holds that "trademark use" will become an excuse to overcome all difficulties and a universal defense reason. It believes that the judgment of "trademark use" overly relies on the possibility of consumer confusion. Therefore, it can be integrated into the element of the possibility of consumer confusion without the need for independent analysis. There is another viewpoint that is a branch of the second one, which also does not recognize the status of the independent element of "trademark use". This viewpoint holds that when discussing trademark infringement issues[2], it can be used as a reference element to play an auxiliary consideration role. The main viewpoint of this article is the third one that currently dominates in China: namely, recognizing the independent status of "trademark use" in trademark infringement.

From the perspective of legalism, although Article 48 stipulates that it falls under the maintenance use of trademarks and the definition of trademark use does not appear in the general provisions, the legal provision clearly defines the scope of use as "this Law". Therefore, this definition can be fully regarded as the definition of "trademark use" and can also be fully applied to trademark infringement. The second viewpoint mentioned above is concerned that "trademark use" will serve as an excuse to overcome all difficulties. Its main concern lies in the belief that "trademark use" acts as a "gatekeeper" against trademark infringement. Once it does not meet the requirements of "trademark use", it will eliminate the possibility of trademark infringement and lead to the expansion of trademark rights. However, the recognition of the independent status of "trademark use" in this article does not imply that it plays an absolute leading role or a primary role in trademark infringement. This article holds that both "trademark use" and the possibility of confusion are important elements in trademark infringement and there is no sequence. Therefore, if the standard for determining fair use is used, there will be no situation in practice where all difficulties can be overcome simply by using it as a defense. Furthermore, although the author acknowledges the independent status of "trademark use", some problems have emerged due to the fact that there is no fixed standard for this requirement in practice at present. The following will illustrate them one by one with examples. Therefore, a reasonable determination criterion needs to be proposed, and this criterion should not blindly rely on the possibility of confusion among consumers. That would be contrary to the idea of recognizing the independent status of "trademark use".

3. The Current judicial Situation of "Trademark Use" in Trademark Infringement

3.1. There is a Lack of Understanding of the Essential Relationship Between "Trademark Use" and "the Possibility of Confusion"

Both "trademark use" and the possibility of consumer confusion are elements in determining trademark infringement. When judging trademark infringement, it is necessary to consider not only whether the act is "trademark use", but also whether the act has the possibility of causing consumer confusion. The relationship between the two should be independent and complementary. However, as there is no fixed standard for determining "trademark use" at present, in the practical process, when judicial personnel judge whether an act is "trademark use", sometimes the boundary of the standard of possibility of confusion with consumers is unclear. It may even regard consumer confusion as one of the criteria for determining "trademark use".

In the trademark rights dispute case between Wumart and Yangrui, The retrial court overturned the conclusion of the second instance court that the use of the involved trademark did not constitute trademark use. [3]One of the misunderstandings that the second-instance court fell into was that it took the possibility of confusion recognized by the relevant public as one of the criteria for determining "trademark use", and mixed the possibility of confusion and "trademark use" for judgment without independent analysis. As a result, the conclusion reached was not comprehensive

enough and was re-determined by the retrial court. From this, it can be seen that in practice, some judicial personnel do not have a specific positioning of the relationship between "trademark use" and the possibility of confusion among consumers.

The practice of incorporating the possibility of consumer confusion into the judgment criteria of "trademark use" in judicial practice can lead to a misunderstanding in thinking, and thus may result in a wrong assessment of the determination result of "trademark use". Therefore, it is extremely necessary to correctly clarify the relationship between the two, which is conducive to judicial personnel reaching correct conclusions in the practical process. This also indirectly confirms the independent status of "trademark use" in the determination of trademark infringement. Judging merely based on the possibility of confusion will lead to errors and repetitions in the results.

Furthermore, in practice, there exists a ambiguity regarding the relationship between the two, that is, only one party is considered while the other is ignored, and only the possibility of "trademark use" or consumer confusion is taken into account without considering both sides. Specifically, when judicial personnel determine trademark infringement, they only judge whether a certain act constitutes "trademark use". If the act is determined not to constitute "trademark use", it will be directly blocked from constituting trademark infringement. This avoids and neglects the further discussion on the possibility of consumer confusion. In contrast, only the possibility of consumer confusion is analyzed without determining whether the behavior constitutes "trademark use". This situation occurs more frequently in practice.

Combining with most cases, in the process of handling trademark infringement cases in China, the judgment on both "trademark use" and the possibility of consumer confusion is not comprehensive enough. There exists a situation where only one element is considered while the other is ignored. In practice, the neglect of "trademark use" cannot be ruled out. Although it is not ruled out that in some cases, the use behavior is obviously "trademark use" and thus has not been specifically determined, there are still problems that were not taken into account when further analyzing "trademark use" in specific cases. In practice, the neglect of the possibility of confusion mainly stems from the misunderstanding that as long as an act constitutes "trademark use"[4], it is directly determined that it does not constitute trademark infringement. Therefore, it is very necessary to clearly distinguish the independent status of the two and analyze the specific relationship between them, which is helpful to reduce many wrong judgments made due to incomplete consideration in judicial practice.

3.2. The Independent Status of "Trademark Use" is Unclear

If the consumer likelihood of confusion considers the determination of trademark infringement from the perspective of consumers, then "trademark use" should define trademark infringement from the perspective of trademark users. The two complement each other to form the integrity of the judgment framework. Some views hold that "trademark use" is a prerequisite for trademark infringement, meaning that an act must constitute "trademark use" before the consumer likelihood of confusion can be considered, and thus whether the act constitutes trademark infringement can be determined. If the act does not constitute "trademark use," it

is directly ruled out as non-infringement.

Thus, "trademark use" has become a defense pretext for some infringers—if "trademark use" is not established, there is definitely no trademark infringement. This statement is absolute. While the author acknowledges the independent status of "trademark use," it does not mean recognizing it as an absolute prerequisite. It is not the case that the determination of "trademark use" must precede the assessment of likelihood of confusion; the establishment of likelihood of confusion does not depend on "trademark use," and non-"trademark use" may also give rise to likelihood of confusion. The relationship between "trademark use" and consumer likelihood of confusion is more akin to the relationship between conduct and impact: the actor performs the act of "trademark use," which causes the impact of consumer confusion. [5]Therefore, it is more reasonable to determine trademark infringement by comprehensively considering both factors. Consequently, we can either start from the perspective of conduct or from the perspective of impact. When it is vague or difficult to first determine "trademark use" in some cases, we can first judge based on the impact of causing consumer confusion, and then examine the conditions that gave rise to this impact.

3.3. Divergence in the Identification Standards of "Trademark Use" in Practice

3.3.1. Difficulty in Distinguishing Designative Use from Descriptive Use

"Trademark use" needs to meet two aspects: "use in commerce" and "use to identify the source of goods". Among them, the element of use in commerce is relatively easy to determine and thus does not require much discussion. There is no disagreement or difficulty in the determination criteria. However, when it comes to the aspect of "used to identify the source of goods", the judgment criteria vary greatly and there are many differences. This has led to an unclear distinction between the descriptive use and the identifying use of trademarks in practice, resulting in different judgments in the same case. For the function of identifying the source of goods and services, the sources include two types. One is the physical source; The other one is the source in the related relationship. The physical source refers to the production relationship source directly corresponding to the trademark. The scope of the source in the associated relationship is relatively broader, including the authorizer of the processing of goods, the quality controller of the product, the sponsor, etc., all of which fall within the category of the associated source, that is, the "second source". Therefore, when determining whether this behavior can be used to identify the source of the goods, The process is rather complicated and the judgment criteria are difficult to clarify.

Since trademarks, as symbols, do not merely serve the function of identification, for instance, when used in some advertisements and products, they play a descriptive role, that is, by leveraging others' trademarks to introduce one's own products and services. When a trademark is used descriptive, the user's subjective intention is not to cause confusion among consumers or induce them to be confused with others' products and services, but merely to use others' trademarks in good faith to introduce and describe their own products or services. Descriptive use should not be classified as "trademark use" in trademark infringement. It falls within the scope of fair use of trademarks. Restricting descriptive use is not conducive to the development of trademarks and a free

market environment. However, in practice, there is no unified criterion for distinguishing between descriptive use and indicative use. Therefore, the boundary between the two is rather ambiguous. Sometimes, cases with similar circumstances may even lead to different judgment results. For example

In the trademark dispute case of "Crossing the Line", regarding the issue of whether Xueling Company's use of the involved trademark was an identifying use or a descriptive use, different courts reached completely different conclusions based on different standards. The first instance court mainly took the specific usage mode of the trademark user as the judgment criterion and concluded that the behavior was descriptive use. [6]The second instance court, however, analyzed from the criterion of whether the behavior had the possibility of causing confusion among consumers and concluded that the behavior was identifying use. The same contradiction is not uncommon in trademark rights disputes over TV programs. The main point of contention in such cases lies in distinguishing whether the use of a trademark is an identifying use or a descriptive use. As courts do not have a unified standard for "description" and "identification", the conclusions drawn from similar cases are not the same.

3.3.2. Divergence in Search Engine Advertising Keyword Cases

In addition to the above-mentioned issues, there are also differences in practice regarding whether the trademarks mentioned in search engine advertisements constitute "trademark use". The controversy over the "trademark use" issue in search engine advertising originated in the United States. The controversy over this issue has also indirectly promoted the discussion on the "trademark use" issue. That is, if it is determined whether the keywords used in search engine advertising fall under "trademark use" or not, if they do, it would be an infringement of trademark rights. There is a view that if this behavior is identified as "trademark use", it will restrict healthy business competition and be detrimental to business development. Moreover, an affirmative view holds that although there have been no cases in past practice that require specific exploration of whether a behavior is an identifying use, the trademark use behaviors in traditional cases, when analyzed, are almost all identified as identifying uses. Opponents, however, argue that if these acts of citing key words are not regarded as trademark infringement and do not constitute trademark use, they will cause disorder and lead to the expansion of trademark rights. In China, there are still numerous differences regarding cases involving trademark keywords mentioned in advertisements on search engines. The specific analysis of different types of cases varies, and the results obtained from the cases are also not the same.

The use of trademarks as keywords in search engines mainly falls into two categories: implicit use and explicit use. Implicit use mainly refers to the situation where users set others' trademarks as keywords in the links of search engines, but the advertisements on the search result pages that the public enters do not include others' trademarks. Most courts hold that implicit use does not fall under "trademark use". In contrast, explicit use is the opposite. When a user uses another person's trademark, it is not only included in the keywords of search links but also in their own advertising interface. This method of use is recognized by most courts as "trademark use". Although the use of trademarks as keywords can be divided into explicit and implicit uses, there are still two problems in practice. One is that not all implicit uses do not

constitute "trademark use". [7] Another issue is that when courts determine explicit use, the standards for identifying "trademark use" are not uniform.

By understanding some domestic cases, it can be seen that in practice, there is still no fixed standard for determining whether using a trademark as a keyword in search engines constitutes "trademark use". Although the use within most computer systems is not regarded as "trademark use", there are still cases where implicit use also constitutes "trademark use". Furthermore, even for the explicit use of keywords in promotional links, there is still a problem of inconsistent determination standards. Some analyze from the perspective of the intention of the trademark user, while others start from the specific usage methods of the trademark. Moreover, some scholars in the academic circle have also raised objections to the view that implicit use does not constitute "trademark use", arguing that some usage behaviors within computer search engines should also constitute "trademark use". However, when the author was sorting out relevant cases of implicit use, it was found that most courts have evaded the analysis of the issue of "trademark use". However, directly applying the case to the Anti-Unfair Competition Law is undoubtedly not comprehensive enough. The issue of whether implicit use constitutes "trademark use" should be worth exploring.

3.3.3. Disputes in Foreign-related OEM Processing Cases

In practice, disputes over whether foreign-related OEM processing cases infringe upon the exclusive rights of trademarks have frequently emerged before 2009. At that time, the determination results of infringement and non-infringement by courts in various regions were different, among which the result of not constituting infringement was the mainstream. Since 2009, the Supreme People's Court has retried three related similar cases respectively, but the results of the retrial judgments have been different. Therefore, the controversy over whether foreign-related OEM processing activities constitute "trademark use" has never subsided among all sectors. The academic community also has different standards for determining whether the OEM processing activities of trademark users constitute "trademark use". For instance, although scholars who also hold the view that export OEM processing does not constitute "trademark use", their focuses on the specific "trademark use" vary. Some scholars, based on the position of legalism, believe that by focusing on determining whether a trademark can perform its identification function; Some scholars, however, believe that the determination should be made from the perspective of whether there is a possibility of causing relevant confusion. However, some scholars deny focusing on public confusion and should mainly focus on trademark rights themselves, analyzing the independence and territoriality of trademarks.

Apart from the disputes in the academic circle over the criteria for determining "trademark use" in such cases, there is no unified specific judgment standard in the practical field either. Among the three types of foreign-related OEM cases handled by the Supreme People's Court, the retrial of two cases held that the use of the involved trademarks did not fall under "trademark use", while the retrial of the other case held that the use behavior constituted "trademark use", and emphasized that not all foreign-related OEM cases do not constitute an infringement of trademark exclusive rights. Against this backdrop, in practice, when the cases are similar, the judgment results may vary, and the specific criteria for determination also differ. For instance, when some courts determine whether an act constitutes "trademark use", they

need to consider two aspects: whether it is sold within China and whether the overseas client has the exclusive right to use the trademark in their country. However, in cases where the circumstances are similar, some courts' criteria for determining "trademark use" only take into account the circulation within the territory without considering the issue of authorization. From the above cases, it can be seen that the reference standards for the "trademark use" standards of foreign-related OEM processing courts are not the same. Therefore, when judging cases, one cannot directly judge based on the fixed thinking that if an act constitutes foreign-related OEM processing,[8] it is "trademark use" and thus does not constitute an infringement of the exclusive right to use a registered trademark. And a further analysis of "trademark use" is needed.

4. Suggestions for Improving the Application of "Trademark Use" in Trademark Infringement in China

4.1. Clearly Define "Trademark Use" in the Trademark Law

"Trademark use" is a core concept in trademark law. Although China adopts a registration system, it determines the maintenance of trademark rights and the formation of trademark infringement. It has a significant impact on the overall setting of the trademark law system. Therefore, the definition of the "trademark use" concept and its position in the trademark law articles are related to the improvement of the overall system and substantive system of the trademark law.

At present, the term "trademark use" does not appear in China's Trademark Law. In theory and judicial practice, the provisions of Article 48 of the Trademark Law are usually interpreted as "trademark use". This situation reflects the recognition of "trademark use" in theory and practice, but due to the lack of legal provisions, "trademark use" has no legal basis. Therefore, improving trademark legislation and clearly defining the term and connotation of "trademark use" has positive significance for the recognition and protection of trademarks.

4.2. Clarify the Relationship between "Trademark Use" and "Confusion Likelihood"

What is the relationship between "trademark use" and "confusion likelihood"? Different answers to this question determine different standards for judging trademark infringement, and naturally, there will be differences in specific judgments. Sometimes, in specific cases, different judgment subjects and other factors may also be involved. In short, the answer to this question often becomes a factor affecting whether "trademark use" is a prerequisite for trademark infringement. [9] This article believes that in judicial practice, the boundaries between the two should be clearly defined.

First, clarify the different logical positions of the two. "Trademark use" behavior may lead to the result of confusion likelihood, or it may not. In short, all kinds of results are possible. Whether the use behavior causes confusion among the relevant public requires a comprehensive judgment based on multiple factors. However, if it is not "trademark use", it will not lead to confusion.

Second, clarify the different scope of consideration factors between the two. The judgment factors of "trademark use" mainly focus on the behavior mode, while "confusion likelihood" has a greater subjective dependence on individuals. Because "trademark use" behavior is a use behavior that plays the identification function of the trademark[10], it is more considered from the aspect of behavior attributes, such as behavior mode, behavior purpose, and pre-use cognition, etc.

Third, clarify the different roles of the two. Clarifying the relationship between the two is conducive to the efficient resolution of disputes and also makes it easier for judges to explain their reasoning. It not only improves litigation efficiency but also enhances judicial credibility. "Trademark use" is a behavior that runs through the entire Trademark Law and is the boundary behavior of trademark rights. It has a significant impact on filtering out the use behaviors that are not evaluated by the Trademark Law in advance. The judgment of "confusion likelihood" is completely based on the subjective perspective and is not suitable for early resolution in litigation, which also reduces the predictability of the judiciary.

In practice, in the aspect of trademark identification confusion, "trademark use" is not the only way to cause consumer confusion. For example, some merchants may use the trademarks of original cars when manufacturing car models. This use of trademarks may cause confusion among consumers, making them mistakenly believe that the model is from the original car company. However, this behavior does not necessarily constitute "trademark use". When it is difficult to directly determine whether the behavior constitutes "trademark use", we can first analyze from the perspective of the confusion likelihood caused by the behavior. After clearly analyzing the impact, it will be much clearer to determine "trademark use". It should be noted that this approach does not imply that the determination of "trademark use" must rely on the possibility of confusion. These are two distinct concepts. The possibility of confusion is not the criterion for determining "trademark use", but rather an independent element parallel to "trademark use" and separate from trademark infringement. When it is difficult to determine either one, one can first determine the other and then clarify the other through logical thinking. Moreover, since neither has a prior or prerequisite nature, there is no sequence in their determination, but both should be taken into account.

The status of "trademark use" and consumer confusion are both independent, rather than one being dependent on the other, or one negating the other. In practice, both the implementation behavior and the impact result should be taken into account to reach a more reasonable conclusion on whether trademark infringement has occurred. The author believes that the independent status of "trademark use" should be recognized, but its role should not be exaggerated to the extent that it becomes the "gatekeeper" of trademark infringement. This would limit the property value brought by trademark use and to some extent restrict the development of trademark rights, leading to the abuse of "trademark use" in judicial practice.

4.3. Unifying the Criteria for Determining "Trademark Use"

Through the analysis of various cases in practice mentioned above, it can be seen that China still does not have a fixed standard for determining whether an act constitutes

"trademark use", which is one of the reasons for the controversy over whether "trademark use" should be recognized as an independent element in the determination of trademark infringement. In China's judicial practice, the "consumer recognition standard" is mostly adopted when determining "trademark use". This standard mainly examines whether the use of a trademark by consumers will associate it with the source of goods or services when determining whether an act has the function of identifying the source of goods or services. In addition, whether the trademark is applied in the domestic market is also reflected in this standard. If the trademark or service attached to the trademark is not applied in the domestic market, it will not affect consumers' perception and thus will not be "trademark use". These two points can be seen in cases involving foreign OEM processing. For example, in the trademark dispute case between Xinba Company and Xinyu Industrial Company, Xinba Company and Xinyu Company had a dispute over whether Xinyu Company's use of the COBY trademark for OEM processing constituted infringement. After the first and second instance trials, the court ruled that since the goods were not distributed in China, they would not play the function of identifying the source in China, and thus would not cause consumers to be confused about the source of the goods. Therefore, Xinyu Company's use of the trademark in question did not constitute "trademark use". From this case, we can see that this is a method of first analyzing the impact of the reference result and then determining the behavior of the actor.

In addition, the "consumer recognition standard" for determining "trademark use" has certain drawbacks. First, consumers' consciousness is subjective, and their perception of the source identification function may change over time, and different people's perceptions may also vary. Relying solely on consumers' perception may make the judgment standard unpredictable and lead to inconsistent judgments in similar cases. Moreover, this perception may also provide an excuse for some unscrupulous individuals. For example, if someone's OEM goods are piled up in the warehouse and have not been distributed, but there is a malicious intention to distribute them, they may claim that they have no intention to distribute them and that this is not enough to cause consumers to be confused about the source of the goods. In practical cases[11], would this lead to a determination that it does not constitute "trademark use" and is not an infringement? Finally, although China's practice adopts the "consumer recognition standard" for "trademark use", which seems to solve some cases, when analyzing cases, it inevitably leans towards the condition of consumer confusion possibility, which inadvertently makes "trademark use" lose its independent status in trademark infringement. Some scholars have questioned the independent status of "trademark use" based on this point and believe that "trademark use" should be considered as one of the reference conditions for consumer confusion possibility rather than as an independent element.

In contrast to the "consumer recognition standard" is the "actor recognition standard", which determines whether an act constitutes "trademark use" from the perspective of the actor. Since the subjective intention of the actor is difficult to grasp, we need to analyze their subjective thoughts through their objective actions, which is similar to the determination of the actor's fault in civil law. Analyzing the actor's objective actions mainly involves the following aspects. First, since determining whether an act constitutes "trademark use"

mainly involves determining whether it is used in business and whether it plays the role of identifying the source, we need to consider whether the actor has the intention to use the trademark in the business field. This is equivalent to an exclusionary matter. If the trademark is not used in business activities, there is no need to consider whether it can play the role of identifying the source. Secondly, we need to analyze the subjective intent of the actor from the perspective of source identification.[12] We can determine this by observing whether the actor's use of the trademark can perform its source identification function. For instance, if the actor places the trademark inside the product or makes the mark very small, this behavior clearly shows that they do not deliberately intend to utilize the source identification function of the trademark. Finally, in contrast to judging whether consumers have been misled about the product or its source, we can determine whether the actor has caused confusion among consumers by observing the way the trademark is used. Specifically, we can judge from the appearance of the product and the use of the trademark, especially the size and distinctiveness of the trademark. This can also help us infer the actor's subjective intent from objective behavior. [13]Of course, the actor's malicious intent to cause confusion among consumers is not a necessary condition for determining "trademark use", but it can be used as a reference factor for determining whether the trademark has performed its source identification function.

When applying the actor identification standard, we can analyze a case from two perspectives: from the perspective of the trademark user when determining "trademark use", and from the perspective of the consumer when considering the possibility of consumer confusion. Take the case of Qipeng Company v. Qianyao Company for trademark infringement as an example. Qipeng Company sued Qianyao Company for using a commercial mark on a batch of goods exported abroad, which infringed upon its registered trademark rights. According to the actor identification standard, we need to infer the actor's subjective intent from their objective behavior to determine whether the behavior constitutes "trademark use". When determining whether Qianyao Company only used the goods for export, we can first judge based on whether the goods have all been exported or if there are still remaining stocks in the warehouse. Because if the goods are completely exported, there is no possibility of causing damage to the trademark owner's rights, and if they have been completely exported and sold, it will not cause confusion among domestic consumers. Thus, we can infer whether the behavior is "trademark use". Additionally, we can infer the actor's intent based on the distinctiveness of the trademark on the goods and the differences from the original trademark use. From the court's judgment, it can be seen that the difference between Qianyao Company's use of the trademark and Qipeng Company's is merely that Qipeng Company added a string of English characters meaning "high quality" above the trademark. Therefore, there is no significant difference between the two.

Through the above case analysis, we can see the feasibility of the actor identification standard in specific cases and the comprehensiveness of the judgment from the perspective of the trademark user. This standard takes the trademark user as the subject and is reasonable from the perspective of legalism. From the definition of "trademark use" in Article 48 of the Trademark Law, it can be seen that the subject of trademark use is the trademark user, that is, the actor. Therefore, it is

particularly necessary to analyze and judge from the perspective of the actor. Compared with the consumer identification standard, this standard reflects a different focus. When analyzing the issue of "trademark use", it takes the actor's intent as the main factor and the possibility of causing consumer confusion as a secondary factor, rather than first judging based on the result of whether it can cause consumer confusion. This can prevent us from relying solely on the possibility of consumer confusion when determining "trademark use" behavior and losing its independent status. In contrast to the initial part of this article that mentioned the debate over the independent status of "trademark use", the view that questions the independent status of "trademark use" in trademark infringement believes that the determination standard of "trademark use" is prone to be directed towards the possibility of confusion. If the actor identification standard is adopted, this problem can be well avoided, which is consistent with the position of this article in supporting the independent status of "trademark use". Trademark rights, in essence, are a kind of right that emerges from the interaction and influence between the users and consumers of trademarks, rather than a solo act of consumers. The behavioral standard for identifying the actor is also a manifestation of recognizing the independent status of merchants.

5. Conclusion

Although there are still some issues regarding the determination standards of "trademark use" in practice, such as the different standards for the use of keywords in search engines and the processing of foreign trademarks, as well as the lack of fixed standards when determining whether the use of a trademark is expressive or descriptive in cases, all these problems can be solved by finding a more universal standard and accumulating practical case experience. The actor identification standard mentioned in this article, compared with the consumer identification standard, maintains the position of the merchant, that is, the trademark user, in trademark infringement. After all, the victim of trademark infringement is the trademark registrant and also the user of the trademark. Moreover, due to the existence of the possibility of consumer confusion in trademark infringement, the actor identification standard will not weaken the role of consumers in trademark protection. Applying a reasonable "trademark use" determination standard is conducive to the establishment of the independent status of "trademark use" and the reasonable protection of trademark rights. For the protection of trademarks, its core is mainly the protection of the property value of trademarks. Only when a trademark is used in a "trademark use" manner can it bring property value. Therefore, taking "trademark use" as an element of trademark infringement can better protect the core value of trademark rights.

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