

Study on the Application of "Adverse Effect Clause" in Trademark Law

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Abstract: With the economic development, the country pays more attention to the intellectual property, People's understanding of the trademark law is more and more, the provisions on the adverse effects in the trademark law are also more discussed. The "adverse effects clause" is the "Trademark Law" Article 10, paragraph 1(8). Because there is no clear understanding and positioning of the meaning of the "adverse effects clause" in the academic circle at present, in some cases of suspected "adverse effects" of trademarks, there is a great dispute about whether the "bad effect clause" or the "prior right clause" should be applied to the "large-scale malicious pre-registration" act, it leads to some problems in judicial practice, such as different scales, unclear standards and extended application of the clause. It is necessary for us to further define the connotation and extension of "adverse effects", and to make clear the restrictions on its application. For example, the consideration of "adverse effects" in the "adverse effects" clause should be limited to the scope of the trademark mark itself and its constituent elements, and in the practical application should also consider the types of goods and services and the use of the main, at the same time this article can only be applied to social welfare. In addition, we can also judge the trademark examination day as the "adverse effects" of the time node to make further restrictions.

Keywords: "Adverse Effects" Clause; Limitation of Application; Determination Rule

1. Introduction

Since the outbreak of the new crown, the authorities through a rapid review process to reject hundreds of epidemic "abnormal trademark applications". For "Li Wenliang" and "Huoshenshan", the Trademark Law Article 10, paragraph 1, Item 8, "easy to cause adverse social effects" is rejected. The Article 10, paragraph 1, Item 8 of the Trademark Law of our country, which is called the "adverse effect" clause, is one of the most applicable clauses, and has once again played the role of "bottom-covering" regulation.

2. Raising of questions

2.1 The Da Kai Sha Jie in Nanjing was ordered to rectify the incident

A netizen posted on Weibo that a salad shop near the Nanjing Massacre Memorial Hall had a sign that read "Da Kai Sha Jie," raising questions from netizens. Because it's near the National Memorial Day, and then it's in such a sensitive location. Through the investigation of relevant departments, "Da Kai Sha Jie" is registered in 2016 through the examination of the legal trademark.

However, taking into account the expectations and feelings of the masses, the trademark did have a negative impact at that time, and there were irregularities in the use of the trademark by the merchants. Finally, with the persuasion of the relevant responsible person, merchants quickly covered up the Chinese signs and took down outdoor billboards.

2.2 Li Wenliang's trademark application was rejected

On February 7, 2020, Wuhan's anti-epidemic hero Dr. Li Wenliang died of new pneumonia, the country mourned. But since that day, companies have continued to apply for registration of "Li Wenliang" this trademark. In response, the trademark office responded on February 28 that the registration or use of "Li Wenliang" as a trademark during the outbreak of the new crown could easily have a significant adverse social impact, and therefore all applications for trademark registration were

rejected. The adverse effect clause is the most widely used clause in the application of trademark registration related to epidemic disease, which plays the role of bottom-covering clause.

3. Comment on "adverse effects clause" in trademark law

3.1 The meaning of "other adverse effects" in trademark law

In the interpretation of the "bad effects" clause in the "People's Republic of China Trademark Law (1993)", it refers to the negative and negative influence of the words, graphics or other elements of the trademark on the political, economic, cultural, religious, national and other social public interests and public order in our country. In the "standards for examination and adjudication of trademarks", it makes more detailed and specific provisions on the interpretation and application of the "bad effects" clause, mainly including political, racial, religious, party, national name, socialist moral and fashion, public interest and public order, etc. In addition, the use of Chinese characters and idioms is required to standardize, so as to better and more accurately apply the "adverse effects clause", and make the application for trademark registration more standardized.

3.2 The nature and adjustment object of "adverse effects clause" in trademark law

The first paragraph of Article 10 of the Trademark Law contains a total of eight items, all of which are "prohibition clauses". The first seven items clearly stipulate the specific circumstances of the Prohibition of trademark use, but they can not completely summarize and protect a wide range of public interests, therefore, most of the academic community recognized this article as a bottom-covering article. But at present, there are two main views on the subjects of the "adverse effects clause": one is to regard the subjects of the "adverse effects clause" as "harmful to the socialist morality", it was felt that the provision covered only part of subparagraph 8. The second view was that the "adverse effects clause" was an exhaustive exercise of the first seven paragraphs of the paragraph. The first view is more plausible by comparison. There are two main reasons for this. First, in terms of the articles, the "adverse effects" clause should be the bottom-covering clause in Item 8, after the "harmful effects to the socialist morality" clause in Item 8 in terms of its form, when the circumstances harmful to the socialist morals and customs occur, it is a general supplement to the circumstances which can not be included in the first seven items. Second, in the second view, it is generally believed that the eighth item is the bottom-covering clause of the first seven items, so the "adverse effects" clause is the bottom-covering clause of the paragraph. But in terms of the content of the articles, the first five items can not be included in the harmful socialist moral conduct, and the eighth item does not meet the formal requirements of the bottomless clause in terms of the legislative technical norms. Therefore, the "adverse effects clause" can not be regarded as the bottom-up clause of the entire first paragraph.

To sum up, the "bad influence clause" in the trademark law should be an exemplary provision with bottom-covering nature, and the "other bad influence" refers to the situation which can not be contained in the "harmful to socialist morality" and which is similar to the harm degree of "harmful to socialist morality".

3.3 Problems existing in the application of "adverse effects clause" in trademark law

First of all, the scope of application of the "adverse effects" clause has been controversial, because of the generality of the clause itself, resulting in its scope of application and conditions are not clear, easy to expand in practice. Some scholars think that the "adverse impact" clause should be limited to the "Trademark Law" Article 10, paragraph 1(8), such as Kong Xiangjun; some scholars think that the clause can regulate all similar situations, like Li Yang. Secondly, there is no agreement on whether the judgment of the "adverse effect" should only consider the pure trademark or the use of trademark should be considered. Some scholars think that "bad influence" should only focus on the trademark itself, and should not extend to the use behavior, such as Zhang Taolue and Zhang Weijun; but others think that although some trademarks have no bad influence of their own, but the trademark should not be allowed to be registered if its use would cause adverse effects. Finally, the "adverse effects" of the discretion of different standards, there are disputes. There is no clear conclusion as to whether "adverse effects" should be judged on the basis of the principle of popularity or on a case-by-case basis on the types of goods and services.

3.4 Restrictions on the application of the adverse effects clause

Because the "adverse effects clause" is not clear, it is often extended in application, so we should further define the meaning of "adverse effects", clear its applicable restrictions. In the relevant cases, there are a large proportion of cases where the application of the provisions in dispute, the most typical of which should be the "prior right clause" and "large-scale malicious pre-registration" required to apply the provisions.

3.4.1 Disputes on the application of "adverse effects" and "prior right".

According to the term interpretation of Intellectual Property Law, the prior right in trademark law can be defined as a kind of civil right that may arise prior to the trademark right in a particular trademark. There are also different views on the category of "prior right", which can be divided into two categories.

The first view holds that the rights and interests which have not been typified as rights are not "prior rights", and the category of "Prior Rights" only includes legal rights. The second point of view expands the scope of "prior right", which includes not only the legal right, but also the interests other than the legal right. The latter view is more plausible. In China's civil legislation, "lawful civil rights and interests" is the combination of rights and interests, and not strictly distinguish between them, so China's "prior rights" should also include interests other than legal rights. In China, "prior right", in addition to the legal right of name, which has been recognized by law, the right of commercialization (that is, the name of the virtual role and the commercial image), the name of the dead natural person, the name of the sports event and the name of the club also belong to the protection scope of the "prior right". But when faced with the act of applying for these logos as trademarks, in the judicial practice, there are still great differences on whether the "prior right" clause of Article thirty-two of trademark law or the "adverse effects" clause of Article 10 of Trademark Law should be applied.

In this regard, we should start from the procedural stage of the case and the significance of the tort. Only the trademark applicant and the trademark examination organ are involved in the trademark rejection procedure and the trademark rejection reexamination procedure. While examining the trademark application, the right holder or interested party who enjoys the "prior right" may defend his own legal rights and interests through the procedure of objection or invalidation. In Judicial Practice, the review organ will apply the "adverse effects" clause to reject the trademark application and avoid the waste of judicial resources.

3.4.2 Disputes on the application of legal provisions to the act of "malicious pre-registration".

The act of "malicious pre-registration" is worse and more anti-social than the act of infringing on the "prior right" of others. On the "large-scale Malicious Registration Act", the academic community of its applicable legal provisions are very controversial. There are several main points of view: The first is that the conduct should be subject to the "adverse effects" clause, since when an applicant makes a large-scale application without the actual intent to use the trademark, the conduct itself is inconsistent with the fair competition principle of the market, disturbed the order of trademark registration, and the subjective intention is not proper, easy to have a negative impact on society. The second view is that Article forty-four, paragraph 1, of the Trademark Law should apply to such conduct, even though the regulation targets registered trademarks, however, if the Trademark Office and the Trademark Examination Authority have discovered the malicious act of the applicant at the stage of trademark application and registration, this provision should also be applied, without waiting for the registration of the trademark to apply. The third view that the large-scale act of malicious pre-registration can be based on its procedural stage, respectively, the "Trademark Law" Article 4 and Article forty-four paragraph 1. The former regulates the trademark which has not been registered, and the reason for its application is that the applicant's behavior does not meet the conditions for obtaining the exclusive right to use the trademark, so it can not be registered. The latter applies to a registered trademark mark on the ground that the applicant has obtained registration by other improper means. By contrast, the third view is more plausible. However, Article 4 of the Trademark Law still has some shortcomings, because the trademark law of our country does not require the trademark applicant to submit relevant evidence of the actual intention of use when applying for trademark registration, the lack of this link leads to the acts of malicious trademark registration frequently.

4. On the assumption of standardizing the registration and use of trademarks on the "adverse effects clause"

4.1 The rule of judging "bad influence" in trademark law

Due to its semantic ambiguity, the meaning and extension of the "adverse effect" clause are not clear, which leads to the lack of standard rules in judicial application, and in actual judicial practice, there are also differences in the understanding of the provision among the relevant judicial staff. In the course of application, many people will expand its scope of application and confuse the legal interests protected by this article. Therefore, it is necessary to make clear the rules of judging this clause:

First, the application of the "adverse effects" clause should only consider the trademark itself and its constituent elements. We should limit the consideration of "adverse effect" to the trademark mark itself and its constituent elements, but not to the use process, so as to further promote the accurate application of the "adverse effect" clause. Second, the "adverse effects" clause should only be applied to public welfare, not to claim private interests. The "adverse effects" clause protects public order and public interest. The law does not arbitrarily prohibit the registration and use of trademarks. If the interested party objects to the trademark being applied for, the "Prior Right" clause shall also apply. Third, the identification of "adverse effects" should take into account the categories of goods or services designated for use and the subject of the application. The trademark should not only be its literal meaning, but also should combine its goods or service category to judge as a whole. And in real life, some trademarks themselves do not have a negative meaning in the literal, but linked to its designated application of goods or services will lead to adverse effects.

4.2 The necessity of perfecting the trademark procedure and strengthening the supervision of trademark registration

At present, there are still many problems in the application of China's trademark law, such as the lack of law in certain areas of the use of trademark registration, and the ambiguity in the connotation of some legal provisions, which leads to the fact that in judicial practice, in many cases, the applicable provisions are unclear, and different adjudicative organs and judicial personnel may lead to the phenomenon of different cases. In the Wechat trademark case, for example, the Beijing Higher People's Court applied a different clause to the disputed trademark than the one applied by the trademark review and Adjudication Board and the Beijing Intellectual Property Law. Therefore, it is necessary for us to further perfect the trademark law, and gradually clarify the connotation of the articles that are not clear at present, so as to make them more accurate, definite and correct in practical application. In addition, in the trademark application approval stage, the examination of trademarks should be more cautious. Such as the "Da Kai Sha Jie" event in Nanjing, "Da Kai Sha Jie" this trademark itself has problems, and "Da Kai Sha Jie" homophonic, has a bad impact, but it still passed the trademark bureau's approval for registration. In addition, it is necessary to limit the time limit for the trademark office to delay the publication of a trademark application. Because there is no provision in the Trademark Law for the Trademark Office to delay publication, and this period often reaches three to six months in actual work, for example, in the Wechat trademark case, precisely because the delay in publication is too long, as a result, tencent unknowingly used the trademark, and during this period, its wechat software users have been greatly increased, forming a greater social influence.

5. Conclusion

By improving the trademark registration process, deepening understanding and even clarifying the current connotation and extension of the law is still more ambiguous, can more accurately apply the relevant legal provisions, it can also, to a certain extent, resolve disputes over the application of the provisions on "malicious pre-registration", "prior right" and "adverse effects", and at the same time prevent and crack down on malicious pre-registration, curb unfair competition. Therefore, it is necessary for us to clarify the connotation of the "bad influence" clause and limit its scope of application so as to make it better applied in the real society, which can promote the common development and progress of our country's judicial theory and practice.

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