

Exploration of Trademark Conflict of Use on the Internet

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Abstract

The Internet has changed the traditional business model and become the main channel for enterprises to promote their goods and build up their goodwill, which has led to an increase in the number of trademark right conflicts worldwide. The resolution of trademark right conflicts has put forward new requirements for trademark law, and it seems that the traditional trademark coexistence system can be regarded as an effective way to solve the conflicts of trademark rights on the Internet.

Keywords: Internet, trademark use, conflict of rights

1. Characteristics of Internet Trademarks Using

As a brand new information transmission channel, the Internet has revolutionized the traditional space-dependent industries, and continues to profoundly affect the socio-economic and cultural life forms. ¹Unlike the traditional space, the Internet has the core features of virtuality, openness and hyperlocality. Among them, virtualization changes the identities, environments and social relationships of the participants in trade activities, while openness overcomes the limitations of traditional communication methods by connecting to the global computer system through the TCP/IP protocol, enabling users to freely exchange ideas and culture and share resources and information in a virtual environment. ²In this environment, based on new business strategies, operators use Internet trade as the main channel for sales or advertisement, and Internet trade has developed and expanded at an astonishing speed. In the context of trademark law, the main feature of Internet trade is that trademarks are transferred from the traditional physical space to the virtual space of the Internet³, and at the same time, the behavior of Internet use of trademarks also closely depends on the core attributes of the Internet.⁴

Traditionally, the use of trademarks is usually limited to the region of the country in which the trademark is registered. The Internet has expanded the geographical boundaries of trademark rights, making it difficult to clearly delineate the use of trademarks on the Internet as in the actual geographical area, which has a significant impact on the exclusive rights of trademark right holders, and also aggravates the cross-domain trademark conflicts. The effect of trademark use has been greatly enhanced globally, and this expansion of the effect of trademark use has brought about a double effect: on the one hand, trademark right holders have fully utilized the functions of identification, promotion and reputation shaping of their trademarks through the Internet, and

¹ See Marian P Felder, (2003). 'The Internet Revolution and the Geographic Distribution of Innovation'. In *International Journal of Social Science*, (1).

² See Zhang Xinbao, (2003). *Research on Tort Issues on the Internet*, 2003 edition. People's University of China Press, p. 25.

³ See Paul Edward Geller, (1999). *From the Plate Model to the Internet Model: Responses to Changes in International Intellectual Property Rights*. China University of Political Science and Law Press, 1999 edition, pp. 281-282.

⁴ See Mei Lei, (2012). *Conducting business in China: an intellectual property perspective*. Oxford University Press.

realized the highest income with the lowest investment; on the other hand, a large number of Internet activists have repeatedly used existing trademarks through the Internet, which has led to the conflict between trademarks that used to be in peace and harmony to be unavoidable. On the other hand, the repeated use of existing trademarks by a large number of Internet activists through the Internet has caused conflicts between trademarks, which were originally peaceful, to become inevitable. Although the territoriality of trademark rights provides the basis for such conflicts legally, due to the excessive complexity of the Internet use of trademarks, the impracticality of delimiting the Internet space according to national boundaries, and the incompatibility between the delimitation of Internet boundaries and the nature and value of Internet freedom, the emergence of large-scale conflicts of trademark rights and interests in¹ inevitably affects the order and development of commercial activities.

Due to the super-territoriality of trademarks used through the Internet, which has triggered cross-jurisdictional trademark conflicts, it has become an urgent task for the existing trademark regulatory systems of various countries to respond effectively,² such as the difficulties in the application of laws and regulations, jurisdictional issues, and the establishment and handling of infringement acts.

2. Substance of Conflicts over the Use of Internet Trademarks in and Outside of the Territory

2.1 The Substance of Domestic Trademark Conflicts

From the perspective of the basic function of trademarks, the main duty of trademark law is to distinguish between different providers of goods or services, so as to facilitate consumers to identify and choose goods or services.³ Therefore, the essence of determining trademark conflict depends on whether the trademarks will cause confusion among consumers, which in turn will lead to trademark infringement. From the perspective of the constituent elements of the trademark itself, the basic elements that constitute the trademark itself are relatively limited, and the trademark registrant will often design a trademark with obvious directionality or certainty based on the type of goods or services, and the possibility of different registrants designing the same or similar trademarks (when unregistered) is very high, so the occurrence of a trademark conflict is inevitable, and will further increase with the development of time. Therefore, trademark conflicts are inevitable, and even with the development of the times, trademark conflicts will be further aggravated.⁴ From the point of view of the attributes of trademark law, the trademark law grants the exclusive right of trademark⁵. From the point of view of the legislative principle, the standard of recognizing trademark conflict is in essence the standard of likelihood of confusion, which is also considered as the standard of examining trademark registration and judging trademark infringement.⁶

2.2 Territorial Breakthrough: The Cross-Domain Internet Trademark Rights Challenge

Under the traditional trademark use environment, when a trademark right holder puts his trademark into the market for use, it is undoubtedly protected by the trademark law of the jurisdiction in which it is located. However, in the whole Internet which extends the application of a certain jurisdiction's trademark to the international arena, can it be protected in the same way?

Based on the fundamental criteria of trademark law, territoriality determines the boundaries of trademark rights, the essence of which comes from the recognition and enforcement of trademark rights within a jurisdiction⁷,

¹ Torsten Bettinger & Dorothee Thum, (2000). *Territorial Trademark Rights in the Global Village-International Jurisdiction, Choice of Law and Substantive Law for Trademark Disputes on the Internet-Part Two*, 31 IIC 285.

² See Wu Handong and Hu Kaizhong, (2002). *Intellectual Property Rights in the Age of Knowledge Economy*. Law Press, pp. 229-242.

³ Article 48 of the Trademark Law stipulates: "The use of a trademark referred to in this Law refers to the use of a trademark on commodities, commodity packages or containers, and instruments of commodity transactions, or the use of a trademark in advertising, publicity, exhibitions, and other commercial activities for the purpose of identifying the source of commodities. In other words, the new Trademark Law adds "the act of identifying the source of goods" to the attributes of trademark use.

⁴ See Xu Yinghan, (2021). "The Necessity of Non-Traditional Trademark Protection — A Legal Economics Explanation." *Zhonghua Shangbiao*, (1).

⁵ Article 1 of the Trademark Law: "This Law is hereby enacted for the purpose of strengthening the administration of trademarks, protecting the exclusive right to use trademarks, inducing producers and operators to ensure the quality of goods and services, and safeguarding the credibility of trademarks, so as to safeguard the interests of consumers as well as those of producers and operators, and to promote the development of the socialist market economy."

⁶ See Wang Taiping, (2018). "The Jurisprudential Logic and Institutional Construction of Trademark Coexistence." *Legal Science (Journal of Northwestern University of Political Science and Law)*, (36).

⁷ Yi Zaicheng and Gong Feifei, (2022). "Study on the Harmonization of Cross-jurisdictional Trademark Legal Systems in Guangdong, Hong Kong and Macao Greater Bay Area — Taking the EU Trademark System as a Reference". *Social Science Front*, 5(5).

delimiting the demarcation of trademark rights between different countries. Although the laws of China do not specifically provide for the scope of application of the trademark law and the territoriality of trademark rights, it is generally recognized by academics that intellectual property rights are still characterized by territoriality, and their validity is limited to the country. However, with the acceleration of international economic globalization, the territoriality of intellectual property rights is gradually fading¹, but whether this change is thorough or not still needs continuous observation and research. Some scholars have pointed out that even in today's globalization, the territoriality of trademark right is still the basis and starting point of national trademark legislation and justice.

It is because of the principle of territoriality that the same/similar trademarks can be independently owned and used by different entities in different countries. When these two different trademark right holders use the trademark on the Internet at the same time, an inevitable conflict will arise, which is known as the “collision phenomenon”.² This is known as the “collision phenomenon”. This kind of conflict mainly originates from the rivalry of trademark rights, rather than from the trademark law itself.³ Therefore, the nature of cross-domain trademark right conflicts does not only reflect the confusion of trademarks similar to intra-domain trademark right conflicts, or even the occurrence of trademark conflation, but these trademarks have their own legitimate sources of rights. This phenomenon may be interpreted as a fundamental opposition caused by the principle of sovereignty, but the author believes that in the era of globalization, global commercial and trade activities are frequently intertwined and integrated, and the territoriality of trademark rights is not a reason for avoiding the cross-domain infringement of trademark rights on the Internet. In this paper, the nature of cross-domain trademark conflicts is summarized as follows: trademark confusion and trademark conflation arising from legitimate (non-infringing) reasons.

2.3 Causes of Cross-Domain Trademark Rights Conflicts

2.3.1 Use of Internet Trademarks Leads to Expansion of Trademark Rights and Interests

If person A obtains the right to a certain trademark and owns the corresponding trademark right in jurisdiction A, due to the territoriality of the trademark, he cannot enjoy the trademark right directly in jurisdiction B. At that time, person B registers the same/similar trademark or obtains the corresponding trademark right through use in jurisdiction B. In this way, the two trademarks may exist in both jurisdictions, and the consumer groups in the two jurisdictions are independent of each other and do not intersect with each other, which usually does not lead to misunderstanding among consumers. In this way, these two trademarks may co-exist in jurisdiction A and jurisdiction B. The consumer groups in the two jurisdictions are relatively independent and do not intersect with each other, which usually does not lead to misunderstanding among consumers. However, once the markets of the two jurisdictions start to influence each other or both of them are involved in third-party geographies, then consumers will easily be confused. For example, if A's goods are introduced into B's jurisdiction or B's goods are introduced into A's jurisdiction, this may lead to a conflict of rights. If the goods of both A and B are sold in a third party market, there will also be a conflict of rights.

Under the Internet, trademark right holders are able to take advantage of their lawful acts of trademark use in their own jurisdictions to expand the influence of their trademarks on the Internet, resulting in their arbitrary use on the internet world, and making their trademarks appear on the front of every “display screen” around the globe. In that case, is such expansion fair to those trademarks that are recognized in China and have the same value? When should the expansion stop and the necessary controls be put in place? How can we realize the reasonable expansion and restriction of rights and interests on the internet environment to achieve the best balance of interests?

2.3.2 Differences in the Acquisition of Interests in Cross-Domain Trademarks

Regarding the main channels for the original acquisition of trademark rights and interests, we analyze their composition from the perspective of legislation. These include three basic categories: acquisition by registration, acquisition based on use and both. At present, the Paris Convention⁴, the TRIPS Agreement¹ and the European

¹ See Wang Qian, (2016). *Tutorial on Intellectual Property Law*. People's University of China Press, 2016 ed.

² See Wu Handong, (2014). *Intellectual Property Law*. Peking University Press, 2014 edition.

³ Cui Lihong, (2007). “Market Impact Planning — Substantive Law Countermeasures to the Conflict of Trademark Rights on the Internet”. *Electronic Intellectual Property Rights*.

⁴ See Article 6 of the Paris Convention for the Protection of Industrial Property: “Conditions for the Registration of Trademarks.”

Community Trademark Regulation² all explicitly stipulate that only registration can be a measure for acquiring trademark rights. Trademark laws and regulations in most countries or regions around the world also emphasize and rely on the important step of registration. Even in places where trademark rights are typically acquired through the use of trademarks, such as the United States, its typical act, the Lanham Act, introduced a federal registration system for trademarks in its 1988 amendment. It is not difficult to see that it considers a trademark as a kind of trademark carrying the reputation of an enterprise, and its pointing function and the goodwill generated by the use of the trademark (actual use or based on intentional use) and the impression on consumers constitute the basic reasonable basis for the protection of the trademark law.³

On the surface, the trademark laws of most jurisdictions rely on registration as a condition for the original acquisition of trademark rights, and are able to deduce that the completion of the trademark registration process will result in the acquisition of trademark rights. In practice, however, relying on trademark registration alone can only provide the right holder with confirmation of trademark ownership and the advantage of its use for a particular period of time. In addition, if the trademark is not actually used within the legal period, it is difficult for the right holder to construct the cornerstone necessary for the defense of the trademark right — the generation of actual goodwill. As stipulated in the trademark law of China, if the subsequent user uses the registered trademark of another person, the registrant cannot claim any compensation from the subsequent user.⁴ It can be seen that the shaping of a trademark and the functioning of a trademark do not depend on whether or not it has been registered, but is determined by the actual use of the trademark in the marketplace.

Due to the different modes of obtaining trademark rights, the conflict of cross-domain trademark rights is even more aggravated. Even though the Internet trademark user generates goodwill on the Internet through his/her use behavior, it does not mean that his/her use behavior can be legally protected in the area of goodwill influence, and even the Internet use behavior of a certain jurisdiction's confirmed trademark will bring troubles to the user himself/herself, especially when it comes to the jurisdiction of trademark registration. This is especially true in jurisdictions where trademark registration is involved.⁵

2.3.3 Technical Measures to Restrict Access to the Internet Have Limited Effect

The cross-domain nature of the use of trademarks on the Internet stems from the ultra-territorial nature of the Internet, so can the problem be dealt with by the Internet itself? In other words, whether it is possible or valuable to set access restrictions and categorize the use of trademarks on the Internet and online.

Under the current situation, it is problematic to rely on a country's establishment of territorial scope on the internet domain, although theoretically as well as practically, a country can block domestic users from accessing websites outside the country. In terms of distinguishing the participants in the use of Internet trademarks, the measure of blocking extraterritorial access does not prevent the entry of trademarks into the market of that country, that is to say, consumers in that country may not be able to actively search for certain websites, but it does not prevent consumers from passively accepting the appearance of certain cross-domain trademarks. Blocking extraterritorial access would require a database of information that accurately identifies the physical location of all users, which does not exist today and is unlikely to exist in the future. Most critically, the separation of the Internet from the rest of the world violates its fundamental attributes and undermines the value of the Internet at. Therefore, relying on the Internet itself to take technical measures to directly restrict certain accesses does not seem to be a reasonable choice. It is necessary to rely on the proactive countermeasures of

¹ TRIPS, Article 15: "Any mark or combination of marks which distinguishes the goods or services of one enterprise from those of other enterprises shall be capable of constituting a trademark. Such marks, in particular words, including personal names, letters, numerals, figures and combinations of colors, and any such marks shall be eligible for registration as trademarks. Where the marks are not inherently distinctive of the goods or services in question, Members may decide whether or not to register them on the basis of the distinctiveness acquired by the marks in question after use. Members may require, as a condition of registration, that the marks be visually perceptible."

² See Article 6 of the European Community Trademarks Ordinance: "Community trademarks shall be acquired by registration."

³ See Shi Xinzhang, (2009). "The Consent Agreement System in U.S. Trademark Review." *Zhonghua Shangbiao*, (12).

⁴ Article 64 of the Trademark Law of the People's Republic of China: "Where the owner of the exclusive right to use a registered trademark requests for compensation, and the alleged infringer raises a defense that the owner of the exclusive right to use the registered trademark has not used the registered trademark, the people's court may require the owner of the exclusive right to use the registered trademark to provide evidence of the actual use of the registered trademark within the preceding three years. If the owner of the exclusive right to use the registered trademark cannot prove that the registered trademark was actually used within the preceding three years, or that it has suffered other losses as a result of the infringement, the alleged infringer shall not be liable for compensation."

⁵ Annette Kur, (2012, Spring). Convergence after All — A Comparative View on the U.S. and EU Trademark Systems in the Light of the Trade Mark Study. *Journal of Intellectual Property Law*, 19(2), 305-324.

trademark laws and regulations, and to make corresponding changes to trademark laws and regulations, and to construct novel rules and criteria, so as to appropriately deal with the application of trademark Internet and its cross-territory problems of the Internet.

3. Ideas for Reconciling Conflicting Trademark Uses on the Internet

3.1 *The Internet Has Become a Major Way for Operators to Build Goodwill*

With the arrival of the Internet era, the rapid rise of the electronic business industry, such as Taobao (Ali baba), Jingdong Mall, Tmall, Pinduoduo, and even the current short video complex Jitterbug and other large-scale Internet shopping platforms have accounted for a significant portion of the market. At the same time, the immediacy of the Internet has brought about a direct consequence, namely, the dissemination of trademarks is instantaneous, often local brands will be targeted at the jurisdiction to develop activities to build goodwill, and most of the new brands are precisely to take advantage of the advantages of the Internet to quickly shine, which directly leads to the brand's cross-border goodwill building is inevitable. If the enterprise has built up a high level of goodwill in its own jurisdiction, but has not made any overseas trademark layout for a specific region, does it mean that the trademark does not have any influence in the potential market at all? For example, in the recent case of Ruixing China's unsuccessful lawsuit against Ruixing Thailand¹, the registered trademark protection system practiced in Thailand should allow the prior registration of identical/similar trademarks in the same class of goods/services in the country, so the prior Internet use of Ruixing China's trademark could not oppose the registration effect of Ruixing Thailand's trademark (which could not be recognized as a cybersquatting of Ruixing Thailand's trademark), and it directly led to Ruixing China's loss of business layout in the Thai market. Based on the local registration protection system, the trademark coexistence system should have a corrective and harmonizing effect, such as recognizing the validity of the Internet use of Ruixing China's trademark and allowing the later registration of the trademark. From the point of view of the timing of the registration of the trademark in Thailand, the unregistered Ruixing China's trademark caused the confusion with the first registered Thai Ruixing trademark, but from the point of view of the consumers, the confusion was caused by the fact that Thai Ruixing China was not able to register the trademark in Thailand. However, from the perspective of consumers, the confusion was caused by the fact that Ruixing Thailand was riding on the coattails of Ruixing China, and Ruixing Thailand became the beneficiary of the registration protection system. Allowing Ruixing China to co-exist protects the interests of prior users of Internet trademarks, but may be a compromise at this level.

Based on the behavior of trademark use on the Internet, it is necessary to consider how the territorial limitation of trademarks can be broken under the Internet environment. Some people advocate the use of various means to identify the so-called "fictitious" market, and most of them focus on the connection between the existing territorial boundaries and the Internet. In the current structure of the Internet (from a technological point of view), the link between geographic space and Internet space is the target audience sought by websites, which are aimed at the global public, and which are not able to actively choose to target consumers in a certain geographic area only. In other words, there is a clear difference between the difference between visitors and consumers and the correlation between trademarks and goodwill. As for when the holder of a trademark from a different place, when the Internet launches similar goods, it may infringe the rights and interests of the goods of the same name in the local area, and in the actual operation process, it has begun to regard this element as one of the important references to judge whether it constitutes an infringement behavior². It can be seen that there is a close relationship between the various elements of the Internet and their physical environment and that this relationship makes it impossible for judges to define exactly where the edge of the territory is covered by the popularity of a specific geographic location. As noted in Hanover star, since the law does not protect the trademark itself, but only the transaction itself that identifies the origin of the goods and triggers the consumer's perception.³

Evaluating the number of visitors to a particular Internet platform and targeting some of the promotional means on the Internet (such as keyword advertising, search engine enhancement, e-mail marketing and social media, etc.), since regardless of whether there is a subjective desire to shop or not, users will inevitably come across the trademark and the related goods and services every time they browse the website. Therefore, Internet-based promotional strategies are effective in expanding the visibility of a trademark, which helps to strengthen consumer awareness of the goods, and ultimately, the business, companies use advertisements to make their

¹ See "Thailand's Ruixing" Preempts Ruixing Coffee's Infringement Lawsuit." *China Trade News*, Dec. 8, 2023, <https://www.chinatradenews.com.cn/content/202312/08/c154060.html>.

² See *Thrifty Rent-A-Car Sys. v. Thrift Cars, Inc.*, 831 F.2d 1177 (1st Cir.1987).

³ See *HanoverStar Milling Co. v. Met calf*, 240 U.S. 403 (1916).

goods and services widely known to the public and to bring them some additional benefits.

However, this paper does not begin to discuss the relationship between goodwill and trademarks, only to explain the analysis of enterprises through the Internet to establish goodwill has become a major and even necessary means of implementation of specific measures may be Internet direct sales, Internet publicity, and even commissioned sales and publicity, etc., to carry these ways of carrying the carrier to a large extent, are originating from the goods of the trademark, in order to achieve the consumers to identify the goods and then the enterprise goodwill enhancement. The effect is that consumers can recognize the goods and thus enhance the goodwill of the enterprise. Therefore, when users continue to be interested in a certain content and click frequently, this behavior will leave a memory in their subconsciousness, and ultimately, this trademark can establish a long-term impression in their minds and then become their choice in consumption.

3.2 The Feasibility of Trademark Coexistence System in Reconciling Conflicts of Trademark Use on the Internet

Some scholars believe that through adjustment and optimization, the original theory of trademark coexistence can play a valuable role on the internet environment, so that the Internet users of trademarks have the right to adopt appropriate methods to distinguish their trademarks on the Internet, and avoid conflicts in each other's markets. ¹Similarly, it is believed that the improved trademark coexistence system is still applicable to the Internet environment, and that trademark coexistence on the internet environment is not impossible, as the Internet does not restrict the right of use of coexisting trademark owners, who are still free to utilize the relevant trademarks within their own territories. In order to prevent consumers from confusion and misunderstanding on the Internet, the court can minimize the possibility of misunderstanding by mandating necessary information dissemination, website announcement or optimization of search engines. ²This viewpoint emphasizes the importance of information transparency and search accuracy for trademark coexistence on the internet era, and at the same time provides new protection strategies for trademark right holders. Specifically, courts can require trademark right holders to post notices on their websites detailing the use of their trademarks so that consumers can more clearly understand the differences between different trademarks. In addition, the courts can optimize the algorithm of search engines so that consumers can find the right information more accurately when searching for related trademarks.

In the context of the Internet, which makes it impossible to have a clear and specific substantive law to guide the avoidance of confusion, the concept of coexistence protects the legal basis for the use of trademarks between trademark right holders or users of similar or identical trademarks or services, but based on the characteristics of the Internet trade, the reasonable and effective adjustment of the conflict of interests between trademark right holders and consumers is precisely the premise on which trademarks can be legally coexisted. However, due to the characteristics of Internet trade, reasonable and effective adjustment of the conflict of interests between trademark owners and consumers is also the premise for trademarks to legally coexist.

Therefore, explores and explains that it seems feasible for the trademark use coexistence system to reconcile the conflicts such as the impact of the Internet on the territoriality of trademarks and the conflict of trademark rights and interests, but the way of reconciliation of the system needs to be further discussed.

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¹ See Luo Li, (2019). "Trademark Coexistence Rules in the Information Age." In *Modern Law*, 4(4).

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