

Research on the distinctiveness examination criteria of scent trademarks

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Abstract: With the vigorous development of the market economy, sensory marketing has gradually become popular, and smell has gradually become the main identification of the source of goods and services in many countries. On the basis of studying the concepts related to the distinctiveness of odor trademarks, through the analysis of the feasibility of the construction of odor trademarks in China, a standardized and orderly examination process for the distinctiveness of odor trademarks is obtained: firstly, a distinctiveness examination access system is set up for the judgment of the type of odor trademark, and then whether the trademark has a second meaning is determined on the basis that the odor trademark under examination has acquired distinctiveness. In this way, the distinctiveness standard system of odor trademarks can be effectively constructed, so as to enrich the scope of the subject matter of China's trademark system.

1. Introduction

Worldwide, there are precedents for successful registration of scent trademarks in many countries. In the Chinese consumer market, commercial manufacturers seek to break through the visual effect of the way of product display, so smell has gradually become one of the means of commercial marketing, competition and brand management. As early as 2007, Hengyuanxiang is committed to building the brand of "Hengyuanxiang 1927", looking forward to finding the olfactory memory point suitable for most consumers with the thinking of olfactory marketing, and establishing a solid olfactory association with consumers, and has successively carried out multi-sensory comprehensive cross-influence research on the relationship between smell and color, smell and human emotion with scientific research institutions such as Monell Chemical Sensory Center in the United States and Life Science and Technology Hearing Research Laboratory of University of Science and Technology of China, so as to establish a unique positioning for its brand. Strongly promoted the development of sensory brands. In 2019, the scent library achieved cross-border cooperation with White Rabbit toffee and launched a series of fragrance products flavored with White Rabbit toffee, which quickly enhanced brand awareness and achieved brand differentiation. The research office of the Hainan Provincial Party Committee is also calling for the boom in duty-free shopping on Hainan Island, which will promote the innovative protection of China's odor intellectual property rights.[1]Therefore, in order to cope with the increasing needs of odor marketing and economic development, it is extremely important to study the distinctiveness

and protection of odor trademarks.

2. Definition of the concept of scent trademarks

A smell trademark, also known as an olfactory trademark, is a commercial mark that uses the consumer's olfactory organs to identify the service and source of goods through taste. That is, a special smell is registered as a trademark, and this smell is used to distinguish different goods or different service industries.[2]Its essence is to affirm the legal protection of existing odors that can function as trademarks.

First of all, it does not have the visual characteristics of traditional trademarks, and belongs to a new type of non-traditional trademark. Secondly, it does not have the fixed characteristics of two-dimensional flat forms such as graphics, words, numbers, etc., and may change or volatilize in the process of using relevant goods or services, with low stability and high frequency of change.

The distinctiveness of a scent mark depends mainly on the degree to which consumers assign a secondary meaning to it, so the analysis of its type is also part of the study of its distinctiveness. In terms of the degree to which consumers consider smell when purchasing goods, smell trademarks are generally divided into three categories, namely primary smell trademarks, secondary smell trademarks and distinctive smell trademarks. The main smell trademark refers to the smell is the primary factor considered by consumers when making a purchase, and some scholars believe that such smell trademarks cannot be registered for use in fact, because they lose their distinctiveness due to their functionality. A trademark of secondary smell means that when consumers purchase goods or services, the smell is a secondary factor that consumers consider and has weak distinctiveness; A distinctive smell trademark means that the smell is not a component of the goods or services, or the smell is not the general smell of the goods or services, and the smell is not associated with the goods or services or the smell is not related to the goods or services, and the smell is the most distinctive.

3. Feasibility analysis of scent trademarks

China implements the principle of voluntary trademark registration, and the trademark applied for registration must be distinctive and expressive (i.e., descriptive). With regard to the distinctiveness of smell trademarks, most of the current academic research on odor trademarks is based on the study of non-traditional trademarks, and in the literature specializing in odor trademarks, most scholars are discussing the necessity of odor trademarks, and they do not find that the essence of the non-necessity problem lies in "whether the odor trademark is distinctive". Therefore, the study on the distinctiveness examination of scent marks is innovative. In terms of the representation and description of scent trademarks, the new form of non-visual trademarks has jumped out of the traditional two-dimensional flat form, which obviously poses a serious challenge to the image judgment method that has long relied on the visibility benchmark (Chen Yuzhen). There may still be technical problems to be overcome in how the scope of the scent trademark can determine the scope of its rights in a clear, unambiguous, complete, objective, stable and understandable form, so that its competitors and consumers can recognize and understand its registered trademark.

Article 8 of the Trademark Law stipulates that "any sign that can distinguish the goods of a natural person, legal person or other organization from the goods of others, including words, graphics, letters, numerals, three-dimensional signs, color combinations and sounds, as well as a combination of the above elements, may be applied for registration as a trademark." It shows that as long as it is a sign that can distinguish one's own goods from the goods of others, it can apply for a registered trademark, and the word "etc." is used to cover its constituent elements, indicating that although China's law does not expressly indicate that the smell trademark can be applied for as a

registered trademark, there is no prohibitive express provision, that is, China's current trademark law does not exclude the registration of odor as a trademark.

As far as the requirements for the registration of odor trademarks are unclear, it is mainly divided into two problems: the difficulty in describing odor trademarks and the difficulty in determining the distinctiveness of odor trademarks, among which, for the description system, we can use chemical equations on the basis of ordinary representations such as graphic text to establish an electronic odor sample repository or odor database to store directional odors, and in the promotion of goods and trademarks, we can introduce corresponding technologies in addition to the introduction of words and graphics, so as to realize the leapfrog innovation of the brand.

As far as the protection dilemma caused by the smell itself is concerned, it is mainly divided into two aspects: the inherent instability of the smell itself, the instability of the representation method attached to the commodity caused by volatile, the difficulty of storage, and the difference in the subject's experience brought about by people as the subject. Among them, in terms of the attributes of the smell itself, the object of the smell trademark that we want to study and protect should be a smell that holds a generally stable form in a normal environment, and it is not reasonable to take a volatile, confusing, toxic and harmful gas as the object of the smell trademark as the research object, and only the smell that can give a unique value to the goods under normal conditions has the possibility of being registered as a trademark, so there is no need to consider too much the dilemma of studying such trademarks caused by the inherent properties of the smell itself. In terms of the difference of the subject's experience, most of them take into account the different sensing and reception of the same smell by different people, in fact, the result of its essence is the individual's acceptance of the smell carried by the goods or services, if the majority of people have a high degree of acceptance, its significance will be high, and if the acceptance is low, it will be low in terms of significance, and will not affect the composition and objective existence of the smell itself, so we can change our thinking in the study of the difference in the subject experience of the smell trademark.

4. Determination of the distinctiveness examination standard of odor trademarks

The so-called smell is composed of gas and taste, gas is a volatile substance composed of small molecules, and taste refers to the molecules acting on the sensory surface after producing a certain signal transmitted to the brain through the nerves, then the smell is the feeling caused by the volatile substances composed of some small molecules acting on the human olfactory system. It can be said that odor is a sensor between gas molecules and human senses, so in the study of the dilemma of odor trademark protection, we need to consider the protection dilemma brought by the gas molecule itself and the subject experience dilemma brought about by people as subjects.

The greater the distinctiveness, the greater the likelihood of being registered as an odor mark, and the less distinctiveness is obtained, the less likely it is to be registered as an odor mark. The degree of distinctiveness needs to be proved by the fact of previous long-term cumulative use, therefore, the applicant must submit a large amount of evidence to prove that the trademark has acquired a "second meaning" through prior market use, and the trademark examination board can judge the degree of distinctiveness obtained by analyzing the following factors.

Continuous use here mainly includes the duration of continuous use and the geographical scope of continuous use. The fact of continuous use is the premise, and the length of continuous use and the extent of the geographical scope of continuous use are important factors in judging whether it has a "second meaning". The longer the continuous use, the more stable the sales and market acceptance rate of the product in the market, and the wider the geographical scope of use, the greater the influence rate of the product in the market, which is a positive factor to prove whether

the smell trademark is distinctive.

It is very important to consider whether a certain trademark has been used on the goods, and if so, whether the trademark used is a well-known trademark and whether the influence is large, and the type of goods, whether the goods used are daily necessities, and the size of the use value of the goods, so as to judge the market share and market favorability of the goods.

The higher the value, the higher the value represents the production and sales chain of the goods, and whether the production and sales of the goods are invested in advertising, the intensity, method, frequency, content, time, etc., the greater the advertising investment, the greater the impact of the goods in the market, which is conducive to the distinctiveness evaluation of the trademark of the goods.

Trademarks are used to recognize the value of goods and services, and their value is not only given by commercial manufacturers, but also depends largely on the perception of consumer groups and the brand perception formed by the use of the goods or services. Therefore, the applicant for a smell trademark needs to prove that ordinary consumers can identify the product by smell, that is, when the smell is continuously used in a specific product so that consumers recognize the product when they come into contact with the smell, and must prove that consumers can regard the smell itself as a sign of the source of the goods, and that the source of the trademark can be known by relying on the smell alone in order to meet the distinctiveness requirements stipulated in the Trademark Law. It is one of the conditions that the smell has acquired distinctiveness and can be applied for as an odor trademark. Trademark applicants can do this by conducting market research, conducting research and analysis of consumer reactions, etc., and if this cannot be proven, the trademark application for the smell can be rejected during trademark examination.

5. Conclusion

Distinctiveness examination is the core element of trademarks and the pivot of the operation of trademark law, and the smell trademark system has been established throughout the world, and the research on the distinctiveness of odor trademarks has been effective, so in order to improve China's trademark law system and enrich the scope of protection of trademark objects, we should study the distinctiveness examination standards of odor trademarks. Whether it can distinguish the source of goods or services is the most important function of a trademark, so the distinctiveness of a trademark needs to be clearly defined by law.

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