

Feasibility Study on the Protection of Odor Trademark in China

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Abstract: A scent trademark is a type of non-traditional trademark in China and an important component of trademark composition. Given the unique characteristics of trademark development in China, relevant laws do not explicitly permit the registration of scent trademarks, leading to a series of discussions on scent trademarks in academic circles. This paper primarily employs literature review analysis and comparative research methods to analyze and summarize works and papers both domestically and internationally. It clarifies global trends in the development of scent trademarks. By comparing the practices of scent trademark protection in countries such as the United States, Australia, New Zealand, Hong Kong (China), and Singapore, it focuses on exploring the feasibility and necessity of registering scent trademarks under China's Trademark Law, taking into account China's specific circumstances. Additionally, it analyzes and summarizes the challenges faced in applying for scent trademark registration in China, proposing suggestions for revising laws and regulations related to scent trademark protection and Trademark Law from the perspectives of China's legal system, citizens, and enterprises.

1. Introduction

The term "odor trademark" first appeared in the United States. An odor trademark is a type of non-traditional trademark that has gradually spread to various regions. With the continuous development of science and technology, more and more companies are seeking innovation while constantly aiming to change traditional business models. Trademarks have become part of corporate strategy. Using odor trademarks as a non-traditional symbol for product marketing is a competitive approach for many companies. Although currently in China, the commonly recognized trademark law is generally considered to include only two-dimensional, three-dimensional, and reasonable trademarks.^[1] While odor trademarks have not yet been officially recognized, it cannot be denied that due to their ability to distinguish the source of goods, they should also be an indispensable component of a company's innovative trademark strategy.

The third amendment to the Trademark Law has sparked discussions among many scholars about scent trademarks. Many scholars in our country advocate that if scent trademarks are to be protected, there may be numerous issues. Ji Jichang from Southwest University argues, "It is too hasty to protect scent trademarks now; it would be more practical to seek protection for scent trademarks

outside of trademark law." However, I believe that since the trend towards protecting scent trademarks is widely recognized, it would be wise for our country to start practicing the protection of scent trademarks as early as possible, continuously identifying problems in practice. Moreover, we can learn from these experiences; although scent trademarks are not explicitly defined in our trademark law, there are already judicial precedents and legislative practices abroad regarding scent trademarks. This article compares the experiences of other countries and regions in protecting scent trademarks, combining them with the legislative experience and judicial protection practices of our country's trademark legal system. It carefully analyzes the feasibility of protecting scent trademarks in our country and the potential legal effects, and on this basis, offers corresponding suggestions for the application of scent trademarks, hoping to better promote the development of scent trademark protection in our country.

2. Overview of Odor Trademarks

Odor trademarks are also known as olfactory trademarks. Like trademark labels such as sound labels and color labels, odor labels are also non-traditional trademarks.^[2] Odor trademarks are a new type of non-traditional trademark in which an applicant applies to register an odor that can identify the source of goods as a trademark.

3. Second, the legislative practice of odor trademark

This paper mainly introduces the current situation of odor trademark protection in the United States, Australia, New Zealand, Hong Kong (China), Singapore and other countries.

3.1. United States

In 1990, the first odor trademark case in the United States was filed. The United States Patent Office granted Clark the license to register the odor trademark, thus setting the standard for odor trademark registration in the United States. It was a landmark practice and had guiding significance for odor trademark registration in the later years.

Applicant Clark applied to the U.S. Patent Office in 1988 for a trademark registration of a strong floral scent, which was used on short fiber yarns as an odor label. She argued that the use of scented yarns gave her products a distinctiveness that set them apart from others, and thus applied to register this scent as a trademark. Initially, her application was rejected because the U.S. Patent Office deemed the scent unimportant. Later, she appealed, arguing that her scented yarns helped consumers identify the source of the product, and ultimately, it was recognized that the scent could indeed be identified. As a result, her application was eventually approved for registration.

Although this case has aroused great controversy, we can see from this case that the United States has made a great progress in the registration of non-traditional trademarks such as odor trademarks, and also let later practitioners see more possibilities.

The "Lanham Act" of 1946 in the United States clearly stipulates: "A trademark, including any trademark name or any combination of trademarks used by a manufacturer or trader, is used only to identify a product or a unique product that others can create or sell to distinguish and indicate the source of the product, regardless of whether the source is known." Although U.S. trademark law does not explicitly state protection for scent trademarks, due to its broad scope of protection, as long as a product has the function to distinguish itself from other products, it can be registered. The U.S. trademark law does not limit the specific forms in which trademarks can be marked, providing a legal basis for the registrability of scent trademarks.

3.2. Australia

Australian Trademark Law Section 17 defines a trademark as follows: "A trademark is used solely to distinguish goods or services provided in the course of trade or commerce and clearly indicates that the trademark includes the following: names of letters and phrases, signatures, numbers, graphic symbols, headings, labels, draft regulations, packaging appearance, shape, color, sound, or smell." Australia explicitly states that it protects scent trademarks. The uniqueness of scent trademarks is a prerequisite for their registration.^[3] At the same time, when applying for early registration of a trademark in Australia, applicants are required to identify the scent trademark with a design and provide an accurate description, and may submit samples if necessary. This requirement is intended to help applicants better demonstrate the distinctiveness of scent trademarks during the application process. Australia explicitly lists scent as one of the specific forms of trademark expression, and like other types of trademarks, distinctiveness is a prerequisite for registration.

3.3. New Zealand

Similar to Australia's legislative model, New Zealand has revised its "Trademark Law" and specified the elements of a trademark in the new amendments. These include brand names, colors, logos, designs, labels, letters, names, numbers, shapes, signatures, scents, sounds, tastes, and any combination of these types of logos. New Zealand also explicitly recognizes the registrability of scent trademarks.

3.4. Hong Kong

The Trademark Ordinance of Hong Kong (China) stipulates that "a trademark may be designed by a name (personal name), style, letter, number, graphic element, color, sound, smell, shape of the goods and its packaging, and any combination of such marks". It can be seen that Hong Kong (China) clearly protects the trademark of smell.

3.5. Singapore

Singapore's "Trademark Law Implementation Rules" stipulate that not only visual logo combinations, but also color stereoscopic holographic movements, location logos, and even sound and smell logos are used. Because China has also joined the "Singapore Treaty", it should also expand the scope of trademark registration.

4. Third, the rationality of protecting odor trademarks

4.1. The purpose of trademark legislation

The purpose of trademark legislation is to protect the exclusive rights of trademarks, safeguard the legitimate rights and interests of trademark owners, ensure the quality of goods and services, thereby protecting the interests of consumers and operators. ^[4]Protecting scent trademarks can standardize the management of the trademark market, maintain consumers' reasonable methods of identifying product sources through scent during the selection process, protect the earnings of producers and operators from their creative labor, and also maintain market order by preventing unfair competitive practices that disrupt the market. This meets the requirements of economic development and forms a positive and orderly economic environment. Therefore, on this basis, the current Trademark Law can regulate the protection of scent trademarks.

4.2. Labor value theory

The owners of odor trademarks have invested labor in the creation and promotion of odor trademarks, so they should enjoy rights according to this theory. Odor trademarks can bring benefits to producers. If some market entities can enjoy benefits without paying any cost or price, it will not conform to the standard of social justice for the division of benefits.

4.3. International trends

In the context of global economic integration, many legal systems and practices around the world will gradually align, with odor trademark laws first being discovered in Western industrialized countries. With the rapid development of the global economy, international coordination of trademark law has become inevitable. ^[5]Under the premise that many countries protect odor trademarks globally, it is an inevitable trend for China to do so as well. According to the TRIPS Agreement, any unique mark can be used as a trademark. This means that as long as an odor trademark is distinctive, it can be registered. This is the most unified and simplest summary of trademark registration standards. Therefore, after China joined the TRIPS Agreement, its protection of odor trademarks not only aligns with the agreement's content but also conforms to the common understanding worldwide. We should follow this principle.

5. Obstacles to the protection of odor trademarks

5.1. The uniqueness of the smell trademark

5.1.1. The non-fixity of smell

Because odors are intangible and easily dispersed, they are difficult to preserve and fix for long periods. How to secure and maintain the uniqueness of an odor so that it does not mix with other substances in the air or change is the primary concern in protecting odor trademarks. This raises the bar for human cognitive and practical abilities. If science and technology cannot fix, preserve, and identify odors, it will be impossible to protect odor trademarks. Therefore, this poses a significant challenge to the protection of odor trademarks.

If the scent trademark wants to be approved for registration, the first thing to solve is the stability of the scent, so that the public can have a fixed standard for the perception of the scent trademark, so that the scent trademark can be used for a long time, which is a necessary prerequisite.

5.1.2. Confusion of odors

First, from our current understanding of perception, odors can easily be confused with other components in the air. Once confusion occurs, how to define an odor trademark becomes a significant issue. Moreover, once an odor is confused, its composition may change or undergo chemical reactions, making it even harder to accurately define. Additionally, odors can lead to misunderstandings in perception. For example, even when describing the same smell using different languages or methods, many people have varying experiences, which can result in verbal misunderstandings.

5.1.3. The exhaustion of the smell

Because our current cognitive abilities as humans are limited, if merchants were allowed to register scent trademarks, and once the number of registered scent trademarks exceeds a certain threshold, would this lead to the depletion or exhaustion of scents? Would this be beneficial for

other merchants entering the market later? If scents were exhausted, it would limit the opportunities for merchants who wish to apply for scent trademarks in the future, which is very unfair and could discourage their enthusiasm and creativity. It's hard to predict whether the deregulation of scent trademark registration would trigger a surge in registrations. Moreover, if the rate of increase in registered scent trademarks outpaces the breakthroughs in scent detection and recognition capabilities, many unforeseen consequences could arise, potentially leading to unfair competition, increased promotion, and disruptions to market rules.

5.1.4. Representation of smell

Under current conditions, accurately describing odors is also a significant challenge. Moreover, the methods for describing odors have been diverse so far. While verbal descriptions are the most common, they indeed have issues with accurate differentiation. Even when learning from Western countries' experience and using molecular formulas, which have limited numbers of molecules and chemical formulas, there can still be problems with incomplete expression. Therefore, representing odors remains a difficult task. There has not even been a systematic approach to solving this problem within existing experience. Thus, it is currently necessary to establish an official and unified standard.

5.2. Promotion of odor trademarks

A scent trademark, as a type of trademark, is inevitably a tool for companies to enhance their image and expand their promotional efforts. Due to its unique nature, scent trademarks can only be promoted in close proximity, and there are specific requirements for the promotional environment. Companies cannot use certain media for promotion, making it difficult for consumers to intuitively perceive the value of the product from a distance unless they have actually experienced it. This is highly detrimental to the company's promotion and publicity efforts and may also pose challenges in promoting scent trademarks. Moreover, this significantly restricts the application of the company's trademark strategy. Companies must, based on the special nature of scent trademarks, develop new strategies suitable for promoting them, which will present a new and unknown challenge for the company.

5.3. Analysis of the national conditions of trademark management in China

In China, the registration of odor trademark must meet the requirements of formal and substantive requirements before it can be approved.

5.3.1. Substantive requirements

First, the special scent intended for trademark registration must be very distinct, recognizable by consumers, and capable of effectively distinguishing and identifying the source of the product. In most cases, if we take an ordinary consumer with normal sense of smell as the standard, the same person can recognize the same scent and respond to the same object, so a scent trademark can serve its purpose of differentiation.

In addition, an odor trademark must have a second meaning. The significance of an odor trademark can be divided into intrinsic meaning and the "second meaning" acquired through use. Odors possess inherent distinctiveness and can be registered as trademarks. However, generally speaking, consumers can only use odors as decorations for certain products without directly identifying the source of the product or service. Therefore, most odor trademarks distinguish themselves over time and have a fixed connection with specific products or services. However,

proving the second meaning of an odor trademark is difficult. For example, in the case of Clark's odor trademark registration in the United States, the applicant sought to register a floral scent used on cutting lines and embroidery threads. However, the examiner believed that the trademark could not differentiate the applicant's products from those of others and deemed the application invalid, rejecting the trademark registration. Thus, how to prove that an odor trademark has a second meaning has become a challenge for various trademark applicants. To address this issue, market research can be used. Through surveys, it can be determined whether consumers normally associate specific odors with specific products or services, thereby proving whether the specific odor has a secondary meaning.

Secondly, the non-functional nature of the scent trademark applied for. If the scent is indispensable for the use or application of the product, or if it affects the cost or quality of the product, then the scent has functional characteristics. Functional scents are essential to the product's function and cannot be separated from it, such as the fragrance in perfumes, the aroma in wood products, spices in cooking, the rubbery smell in tires, and the sweetness in cakes. Additionally, although some scents may not serve a practical purpose, they are widely used in specific industries and have functional value, like the lemon scent added to dishwashing liquids in restaurants. These scents lack distinctiveness due to their functional nature and thus cannot be registered for protection.

5.3.2. Formal requirements for the registration of odor trademarks

According to the provisions of our country's Trademark Law, when registering a trademark, a written design must be submitted. This design represents the shape of the trademark and distinguishes it from other trademarks. For traditional trademark registration in our country, this is quite easy to meet. However, for scent trademarks, which cannot be expressed through designs, this is undoubtedly very challenging. Our country has been continuously trying to overcome this issue.

From the perspective of countries that have already established existing scent trademarks, the United States, the European Union, and Australia do not rule out registering and protecting scent trademarks. There are successful cases of registering scent trademarks in each country. One of the challenges in registering scent trademarks is accurately describing the scent to be registered. Generally, there are three methods: first, using chemical formulas to describe scent labels through various molecular structures, atomic structures, scale models, and stick figures; second, describing it in plain text; third, submitting scent samples.

The EU adopted *Skerman's* case to analyze the feasibility of expressing chemical formulas through scent labels. *Skerman* submitted a scent trademark application to the German Patent Office. The applicant also attached a textual description—"a fruit fragrance with cassia bark." However, the European Court found that few people were familiar with the scent chemical formula used by the applicant, and it was difficult to simply use chemical formulas to provide a deep understanding of the scent being registered. Therefore, the application was not approved. Moreover, since scents are influenced by different individuals' thoughts and personal experiences, the chemical formula cannot truly and clearly represent the scent of the registered application, making it impossible to define.

Regarding the description of text, the attitudes of the EU and the US differ. The EU believes that the key to textual descriptions lies in providing sufficient information so that third parties can immediately and clearly understand the content of the trademark. The European Court holds that textual descriptions cannot accurately convey scents and can sometimes be confusing. In contrast, the US team has not set up many registration barriers for scent labels and adopts an open attitude towards the way text is described. Scent trademark applications in the US do not require submission of drawings.

Regarding the submission method for odor samples, the United States has clearly stipulated that

samples should be submitted when applying for an odor label. It can be seen that there are significant differences in the formal requirements for odor trademark registration across different countries. China's Trademark Law has a series of management systems for traditional trademarks. If a company's trademark does not meet the requirements, it can be invalidated or revoked, thereby standardizing trademark management and restricting the abuse of trademark rights by trademark owners. However, odor trademarks have a special nature; their invalidation or revocation does not truly render them unusable, as odor trademarks are attached to the product itself. Unless the product is prohibited from entering the market, the invalidation or revocation of odor trademarks cannot be enforced, meaning that effective management and restriction of odor trademarks are not possible. This is detrimental to guiding the healthy development of companies owning odor trademarks.

6. Feasibility Suggestions

6.1. National level

6.1.1. Define the scope

A scent trademark, as a special type of trademark, is relatively uncommon due to its inherent characteristics and not all products are suitable for registering a scent trademark. A scent trademark does not necessarily add value to all trademark holders. When our country approves the registration of scent trademarks, it should first consider defining a range of products suitable for scent trademark registration to pilot the process. This can both reduce the misuse of scent trademarks and continuously enrich the product categories of scent trademarks in practice. If a product functions through its scent, it should not be approved for registration. If such products are approved for registration, and if the scent itself is a common attribute of similar products, then it should not be approved for registration. For example, the natural fragrance of fruits or the natural scent of perfumes are common attributes of these products and cannot be registered as trademarks. Therefore, when considering the registration of scent trademarks in our country, it is important to recognize that some products should not be eligible for scent trademark applications.

6.1.2. Develop standards

When formulating audit standards, we should fully draw on the experience of Western countries and, while retaining our country's existing trademark system, add requirements for registering non-traditional trademarks, such as scent trademarks. The registration process and specific requirements should be clearly defined, with practical considerations guiding the formulation of detailed audit standards. At the same time, in trademark examination, emphasis should be placed on reviewing the function of trademarks. Scent trademarks must play a role in identifying the source of goods and must have secondary meanings, which is a core principle that must be adhered to. Additionally, scent trademarks must maintain a certain level of stability to facilitate consumer recognition and differentiation. Only then will our country's protection of scent trademarks not waste administrative resources but better leverage the effectiveness of the system.

6.1.3. Simplify procedures

Currently, the trademark registration process in our country is complex and inefficient, which largely leads to a waste of resources and costs. For unique trademarks like scent trademarks, it is even more important to simplify procedures to truly bring convenience to applicants. We can continue to adhere to the principle of multiple categories for a single application as stipulated by our Trademark Law, while paying greater attention to protecting the rights of scent trademark owners.

The application process for scent trademarks can be enhanced by adding some pre-application or pre-registration systems, which can be applied from the preparatory stage of scent trademark preparation, better safeguarding the interests of existing scent trademark owners.

In the application method for scent trademarks, the written registration can include textual expressions and molecular formulas, which facilitates the registration of scent trademarks. Additionally, to ensure greater precision in describing scent trademarks, samples of the scent trademarks can be provided as references for review.

6.1.4. Better management

Once an odor trademark is approved for registration, we must manage and regulate it uniformly. If the owner of an odor trademark uses it improperly, restricting or affecting the legitimate rights of other trademark owners, our country's trademark administration must promptly intervene. However, since odor trademarks cannot be revoked or declared invalid like traditional trademarks, when managing them, we need to consider their uniqueness. They can be declared invalid or revoked without affecting the product's functionality. The samples provided by the applicant for registration can be destroyed, or the product packaging or decoration can be marked with "No Attached Odor Trademark" to distinguish it.

Because the odor trademark is not like the traditional trademark, if the original odor is reused, in many cases, the trademark administration department may not find it in time, but at this time, we can only rely on the timely feedback of consumers. We can establish a consumer reporting and feedback platform, hotline phone, etc., and carry out rewards to strengthen the supervision and management of the odor trademark.

6.2. At the citizen level

Every application and popularization of a trademark requires widespread recognition and support from all sectors of society. If our country wants to open up new horizons for the application of scent trademarks, it must promote scent trademarks and gain public recognition. This requires citizens to have a deep understanding of scent trademarks, approach this new form of trademark with an open mind, and form their own perceptions and understanding. However, it is important to advocate for the correct form during this process, such as educating citizens about the proper knowledge and common sense regarding scent trademarks, enabling them to actively identify, recognize, and distinguish them. As the main players in market operations, citizens should have their own criteria for evaluating scent trademarks, which will facilitate their healthy development. Citizens can actively exercise their right to free speech, express opinions, suggestions, and supervision on corporate scent trademarks, and leverage their innovative thinking to propose better methods for the application and registration processes of scent trademarks, overcoming practical challenges. Moreover, citizens can guide the development of scent trademark products in ways that benefit consumers through public opinion and media, respecting market rules.

6.3. Enterprise level

To make good use of the unique scent trademark and allow it to realize its value, companies need to develop a detailed scent trademark strategy. First, there must be an awareness of trademark protection. From the initial preparation for registration, every step should focus on protecting the scent trademark. Not only should the composition of the scent trademark be kept strictly confidential, but also advance registration with relevant departments to take the initiative. When a company obtains exclusive rights to the scent trademark, it is important to maintain its distinctiveness and avoid confusion with other companies' scent trademarks. At the same time,

effective promotion is essential to educate consumers about the product, converting the scent trademark into a greater intangible asset. This will help consumers deeply associate the scent trademark with their preference for the product, thereby enhancing the value of the scent trademark in the company's overall trademark strategy and continuously promoting recognition and protection awareness across society.

7. Conclusion

The protection of olfactory trademarks is a significant issue faced by China's Trademark Law. I believe that China should align with international trends and consider protecting olfactory trademarks. At the same time, the methods for protecting olfactory trademarks and their types need to be clearly defined in China's Trademark Law, providing guidance and suggestions for the future standardization of olfactory trademarks. Moreover, various contradictions and challenges encountered during the process of protecting olfactory trademarks require more laws and regulations to resolve and address. As a non-traditional trademark, olfactory trademarks have their own advantages. In today's China, which is increasingly integrating with the world, protecting olfactory trademarks is an inevitable necessity. Because olfactory trademarks may be very important, we must consider protecting them. However, due to the limitations of our country's development, the protection of olfactory trademarks should not be rushed. We need to explore a system suitable for protecting olfactory trademarks through the continuous establishment and improvement of intellectual property laws and related laws, maximizing the benefits for trademark owners. Therefore, the final part of the paper analyzes cases of olfactory trademark applications in other countries around the world and offers several suggestions for the registration and protection of olfactory trademarks in China. These suggestions mainly include how to define the scope of olfactory trademark applications, how to solve application difficulties, how to review the registration of olfactory trademarks, and how national enterprises and the public can promote the healthy development of olfactory trademarks. However, due to the significant challenges involved in protecting olfactory trademarks in China, as well as the extensive content involved, and limited by my own knowledge level, I have not been able to provide a comprehensive and detailed analysis of the feasibility of olfactory trademark protection in China. Therefore, in the future study, we should explore more knowledge in different fields, improve our knowledge level and enhance our ability in all aspects, so as to provide more diverse perspectives and more solid theoretical support for our research.

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