



**POLITECNICO
DI TORINO**

Research on the criteria of the similarity of goods in Trademark Law

Master Degree

Liu Qing

Supervisors

Prof. Mantelero Alessandro

Prof. Shan Xiaoguang

Politecnico di Torino
September 22, 2018

Summary

In the area of trademark, the judgement of the similar product is involved to trademark licensing、 conforming、 infringement and so on, but it is still uncertain how to identify similar product in laws and practice.

Although there are lots of scholars made researches about the topic, almost all of them separately considered the same or similar good and did not get the same part of them. In author's opinion, The same product is a special case of similar goods No matter in the words or in the judicial interpretation or in the foreigners' laws, and the standard of the same and proximity good have same general parts. Therefore, the thesis do the analysis based on the general rules not only in the similar goods but also in the same goods.

The thesis consists of 5 parts. The first part give an overview of current rules and analyze the necessary to integrate study of the proximity goods; Based on cases and foreign legislation and practice, the second、 the third and the forth part separately do the further research on determination subject judging standards、 the way to judge. According to the research above, the last part do the rational analysis of relative Chinese current legal rules and provide suggestions of laws and practice of the proximity goods.

Key Words: similar goods, same goods, relative public, relative products.

Content

1.1 BACKGROUND AND SIGNIFICANCE OF THE TOPIC	4
1.2 LITERATURE REVIEW	5
1.3 RESEARCH IDEAS AND METHODS	7
1.4 THESIS INNOVATION	7
2.1 LAWS AND REGULATIONS, JUDICIAL INTERPRETATION OF SIMILAR GOODS IN PRC	8
2.2 APPLICATION OF THE RULES FOR SIMILAR GOODS.....	9
2.2.1 Case overview.....	9
2.2.2 Main problems in practice	11
3.1 SPECIFIC CASE ANALYSIS	13
3.2 FOREIGN LEGISLATION AND JUDICIAL PRACTICE	15
3.3 ANALYSIS OF CRITERIA FOR RELEVANT PUBLIC	17
3.3.1 Reasons based on the relevant public and the relevant public objects.....	17
3.3.2 Scope of the relevant public.....	18
3.3.3 Degree of attention.....	19
3.4 SUMMARY.....	20
4.1 SPECIFIC CASE ANALYSIS	22
4.2 FOREIGN LEGISLATION AND JUDICIAL PRACTICE	24
4.3 DISCUSSION ON SUBJECTIVE OR OBJECTIVE STANDARDS OF SIMILAR COMMODITIES IN CHINA.....	27
4.4 SUMMARY.....	28
5.1 SPECIFIC CASE ANALYSIS	30
5.2 FOREIGN LEGISLATION AND JUDICIAL PRACTICE	33
5.3 REASONS FOR SIMILAR GOODS COMPRISING RELATED GOODS	34
5.4 INTERPRETATION OF THE RELEVANCE OF GOODS IN TRADEMARK LAW	36
5.5 SUMMARY.....	37
6.1 ANALYSIS OF THE RATIONALITY OF EXISTING RULES IN PRC	39
6.1.1 Historical Development of PRC's Trademark Law.....	39
6.1.2 Rationality of the same and similar commodities as a premise of confusion.....	40
6.1.3 Reasonableness of the same commodity without relevant judicial interpretation	42
6.2 SHORTAGE OF EXISTING RULES IN CHINA	43
6.3 IMPROVEMENT OF THE CURRENT RULES FOR SIMILAR COMMODITIES IN CHINA	44
6.3.1 objective criteria.....	44
6.3.2 Theoretical analysis of the identification criteria for similar commodities.....	47
6.3.3 Improvement of legal provisions and judicial interpretations of similar commodities	50
6.3.4 Improvement of the identification of similar commodities in practice.....	51

Chapter

1 Introduction

1.1 Background and significance of the topic

A trademark is a symbol used to distinguish goods or services for enterprises¹. A symbol has no meanings itself otherwise the symbol is combined with goods or service so that it can distinguish from relevant goods or services². Article 3 of PRC Trademark law stipulates that trademark registrants enjoy the exclusive right to use trademarks. The exclusive right is specifically reflected in the trademark category applied for by the trademark owner. Articles 30 and 57 of the PRC Trademark Law respectively stipulate conditions of authorization and infringement³, and the same or similarity of commodities and trademarks are prerequisites for judging whether trademarks can coexist. Therefore, most trademark-related cases involve how to judge similar goods.

same or similar goods are used as juxtapositions for judging confusion as what said before. Different from the absolute identity of the same commodity, the judgment of similar commodities has a certain degree range, so it is more likely to cause controversy than the same commodity. Although there are a large number of administrative and judicial interpretations of similar goods (Appendix 1), there are some conflicts: such as the inconsistent standards (subjective or objective), vagueness of the relationship between related goods and similar good, and poor practical operation, etc. At the same time, the conflicts of the rules and regulations has caused a great differences in judging similar goods.

1 <http://www.wipo.int/trademarks/en/>, access time 2018/4/20

2 Cheng Yongshun, Wu Lijuan. Major Measures to Solve the Trouble of Trademarks and Comment on Several Hot Issues in the Third Revision of the Trademark Law[J]. Electronic Intellectual Property, 2013(10).

3 See Article 30 of the Trademark Law of the People's Republic of China: Any trademark that is applied for registration, if it does not comply with the relevant provisions of this Law or is the same or similar to a trademark already registered or preliminarily verified by another person on the same commodity or similar commodity, The Trademark Office rejects the application and does not announce it. And Article 57: Article 57: Any of the following acts shall be infringement of the exclusive right to use the registered trademark:

(1) using the same trademark as the registered trademark on the same commodity without the permission of the trademark registrant;

(2) Using a trademark similar to its registered trademark on the same commodity without the permission of the trademark registrant, or using a trademark identical or similar to its registered trademark on similar commodities, may cause confusion;

1.2 Literature review

After summarizing a large amount of literature, I summarized the following three main conflict points for judging similar goods.

1. the subject

The relevant public is the basis for judging similar goods, whether it is an authorization or infringement case, judges and China trade mark review and adjudication board need to stand on the position of the relevant public to make judgments. Wang Xin believes that the relevant public includes not only consumers, but also agents, wholesalers, and retailers⁴. Peng Yu believes that the scope of relevant public includes consumers, operators and some producers⁵. The EU Trademark Handling Guidelines consider that the relevant public includes both real consumers and potential consumers. The US trademark law has a wider public scope, including buyers, users, investors, employees, third-party companies, and so on⁶. In general, according to the theoretical point of view, the relevant public includes consumers (including potential consumers) and other operators (including natural persons) who influence consumers to make decisions. Although both theory and practice recognize that the relevant public is a concept that is larger than the consumer, in practice, it is more likely to stand on the perspective of customers or just simply apply the rules but not do detail analysis.

Regarding how to analyze the relevant public in practice, some academics believe that China should establish a survey system for the relevant public⁷. Some academics think that it is necessary to take into account the education level⁸, price, and time and place of shopping⁹ of the relevant public. If each case is to consider different related subjects one by one, it is too complicated to deal with a large amount of cases in China. In practice, how to judge the relevant public, what factors need to be considered, and is

4 Wang Wei. Research on the identification of similar commodities in trademark infringement disputes [D]. Anhui University, 2016.

5 Peng Yu. Research on similar commodity standards in trademark infringement disputes [D]. Ningbo University, 2012.

6 U. S. P. Q. 2d 1865 (S. D. N. Y. 1990). Transferred from Zhang Aiguo. “Consumer” and “Professional Public” in the Trademark Law[J]. China Trademark, 2011(5):32-34.

7 Li Zhenlin. Identification of “One Kind of Commodity” for the Crime of Counterfeiting Registered Trademarks[J]. Law Application, 2015(7):65-70..

8 Xu Wei. On the Regulation of Trademark Confusion[D]. Southwest University of Political Science and Law, 2013.

9 Cheng Xiaopeng. Identification of “same commodity” and “same trademark” in the act of counterfeiting registered trademarks [D]. Nanchang University, 2016.

it necessary to establish a relevant public investigation system? These issues need to be further explored.

2. The relationship between certain related products and similar products.

The judicial interpretation of PRC trademark law interprets similar goods as the same or related objective aspects such as function and use, or a certain degree of connected goods. But for what and how to understand this kind of connection, the judicial interpretation does not give a more detailed explanation. Most academics generalize this association as a kind of economic connection between the two enterprises; some scholars interpret this connection as the existence of sponsorship, licensing¹⁰, etc. In addition, somebody believes that this connection refers to the existing guaranty relation that consumers believe that the trademark owner is responsible for the infringer¹¹.

And there are three different opinions on the relationship between this kind of relevance and similar goods: Most scholars believe that the relevance of goods and the objective factors of goods are the same level of parallel relationship, which are separate different ways of judgments of similar goods; the second opinion is represented by most judicial precedents, and its logical judge path is: the similar of the objective factors -> connection between goods -> confusion; the last opinion directly equates the related commodity with similar goods. these three different opinions are reflected in different cases.

3. The criteria for similar goods.

There are three main criteria for similar commodities: objective criteria, subjective criteria, and mainly objectiveness, exceptionally subjectivity. The objective criteria, represented by Yao Hehui, Liu Kongzhong, and JOHN WOLFF and the English courts, believes that it is only necessary to consider the attributes of the goods such as the Classification Table, the function of the goods, the use, the production department, the sales channels, etc. The subjectivists, represented by Zhang Tirui, Shi Bisheng, Cui Yingqi and the Ruby Ho Court, believe that not only the attributes of the goods themselves, but also the reputation of trademarks, distinctiveness, and post-trademark holder of bad faith; another opinion, represented by Cai Chongshan, believes that it is an objective principle to determine whether a commodity is similar or not, subjective factors are an exception.

10 Zhang Aiguo. Unrelated goods should not be confused with related relationships [N]. Securities Times, 2013-05-25 (A04).

11 Yao Hehui. Reflection and Definition of the Scope of Application of Trademark Association Relationship Confusion Rules[J]. Western Legal Review, 2015(4):86-95.

1.3 Research ideas and methods

This paper is divided into five chapters. The first chapter starts with the current laws and interpretations of the similar goods in China, and analyzes the main problems encountered by these rules in the practice. The second chapter, the third chapter and the fourth chapter respectively discuss the judgment methods of the similar commodities from the subject, the subjective and objective criteria, the means of identification, combined with specific cases and foreign practices. on the basis of the first four chapters, The fifth chapter reflects on the existing rules of China and makes suggestions in laws and practice.

This paper mainly uses theoretical analysis (based on a large number of documents), empirical analysis (based on 100 cases), comparative analysis (comparing domestic and foreign laws and judicial practice) and historical analysis (analysis of the development of PRC trademark law and historical background) Four research methods.

1.4 Thesis innovation

1. Innovations in research perspectives. Although there are a large number of research literatures on similar commodities, they almost all split the same and similar commodities and analyze them separately. However, this paper considers that the same commodity is a special case of similar commodities and unifies it into similar commodities for analysis.

2. Innovation in the interpretation of related commodities. Through the comparative study of China's legal framework, practical cases, foreign laws, and jurisprudence, this thesis creatively provide that it is not a binary proposition to identify similar commodities but a degree of concept, and the correlation between commodities is some kind of reflection of the degree.

3. The innovation of the method for identification. According to the status quo of China's legal framework and judicial precedents, this paper concludes that the same product should be forward-trace and similar products can be judged by two methods: back-trace and forward-trace.

Chapter 2

The present rules of Similar goods

2.1 laws and regulations, judicial interpretation of similar goods in PRC

According to the relevant provisions of Trademark Law in PRC, the similarity of goods is considered as a prerequisite for judging trademark authorization, confirmation, and infringement. In the case of disputes concerning trademarks, it is inevitable to involve judgments on whether the goods are the same or similar.

As the same goods is in the special case of similar goods, PRC's law stipulates that when the disputed goods and the trademarks and commodities of the cited commodities are double identical, they are directly recognized as infringement without judging whether confusion will occur. However, there are no specific provisions and rules on how to judge same goods in Trade mark law and interpretations in PRC. However, there is a relevant judicial interpretation of the same goods in the field of criminal law in PRC. It is emphasized¹², In the "Agreement of the Second Trial of the Criminal Trial of the Higher People's Court of Zhejiang Province on Several Issues Concerning the Trial of Criminal Cases of Infringing Intellectual Property Rights", that in the determination of "counterfeit trademark crimes", it is necessary to avoid "similar goods" in the judgment of trademark infringement to extend to The standard of recognition of the "service" in the criminal case field. This shows that, at least in criminal cases, the judgement of the same goods is more strict than similar goods. Some scholars believe that because there is no relevant judicial interpretation for same goods", the judgement of the same goods should be based on the "The form of Classification of

12 "Two Highs, the Ministry of Public Security's Opinions on Several Issues Concerning the Application of Laws in Handling Criminal Cases of Infringement of Intellectual Property Rights" V. The goods with the same name and the same name in the identification of the "same commodity" as stipulated in Article 213 of the Criminal Law Goods of the same thing can be identified as "the same kind of goods." "Name" refers to the name used by the Trademark Office of the State Administration for Industry and Commerce in the registration of goods, usually the name of the goods specified in the International Classification of Goods and Services for the Purposes of Registration of Trademarks. "Commodities with different names but referring to the same thing" refer to the same or basically the same in terms of functions, uses, main raw materials, consumption objects, sales channels, etc., and the relevant public generally considers the same thing.

goods"¹³. In response to similar goods, since 1999, China has successively make some regulations and judicial interpretations, and I summarizes them in Appendix A.

It can be seen from the above-mentioned identification rules. No matter it is the interpretation of the same goods or similar goods, the basis of judgment is the relevant public, in other words, judges should stand on the position of the relevant public to judge whether the two commodities are the same or similar; secondly, The objective factors for judging the same and similar goods include function, use, sales channels, and sales targets (consumer groups), although the provisions of the same goods in the Criminal Law have one more element, main materials, than The Trademark Review and Trial Standards, Opinions of the Supreme People's Court on Several Issues Concerning the Trial of Trademark Authorization to Confirm Administrative Cases which have one more object factor, production departments, than the other two, The Trademark Review and Trial Standards has sales place which the others do not have, but considering that the lists of objective factors is non-end, there is no essential difference in their objective factors; in addition, in the seven judicial interpretations related to similar goods, six thereon interpret the goods as products with certain relevance. In practice, The same and similar goods have cases in which the judge interprets the goods as having a certain connection. Therefore, the relevance of goods has a very large impact on the identification of similar goods.

2.2 Application of the rules for similar goods

2.2.1 Case overview

I collected 100 controversial cases related to the similar products from 2015 to 2017 (see Appendix B). From the trial level, including 18 retrial cases, 74 second-instance cases and 8 first-instance cases. From the type of case, including 8 civil cases, 92 administrative cases comprising 15 in registration review, 31 in invalidation, 38 in objection review, 8 cases from no use for withdrawal in three years. By analyzing these cases, I observed that although the cases have different categories, in practice, the methods for judging similar goods are basically the same. The rules applied is almost Articles 30 to 32 in 2013 Trademark Law or Articles 28 to 31 of the 2002 Trademark Law (related provisions of trademark registration) and Article 57 of the Trademark Law of 2013 or the Article 52 of the Trademark Law of 2002 (trademark infringement

¹³ Wang Qian. On the Identification of "Same or Similar Goods (Services)"——Comment on the Case of "If You Are the One"[J]. Intellectual Property, 2016(1):22-2

clauses), so I believe that it is not necessary to separately analyze the judgment methods of the similar commodities according to different types of cases.

Although the standard of confusing has been identified in the trademark law in 2013 by the form of a law, the clauses of authorization was not amended accordingly, but in the course of practice, whether it is infringement, confirmation or authorization, the final standards are all confusing. On the whole, the reasons given by the TRAB in all kinds of cases are relatively simple, and most of them directly identify the goods as the same or similar, or just copy the law. Relatively speaking, the court is more detailed than the Chamber of Commerce for their grounds of decision, especially the high-level courts. However, most courts still have plain statements about the law but no further explanation. I believe that if the case is not controversial, the rough explanation can be understood. Because there are too many good cases in China, if each one is explained in detail too much waste of judicial resources, there is no need to go too detailed for uncontroversial cases. However, for controversial cases, The decision is not such reasonable. For example, in the case of Jiangmen City Pengjiang Red Chemical Co., Ltd¹⁴, the Trademark Review and Adjudication Board considered that the disputed goods-stickers are not similar to the cited industrial adhesives. The reason of the TRAB is that the two products are highly different in function, use, sales channels, etc. The court of first instance held that the above two goods are similar. The reason is that the functions, uses, sales channels, consumer groups and other aspects are closely related and they are similar commodities. The court of second instance only agreed with the judgment of the court of first instance, but does not gave detail. In the same way, when the opinions of the lower and upper courts are different, the same situation occurs. For example, in the case of the National Chamber of Commerce and the Moulin Rouge¹⁵, the court of first instance considered swimming trunks, swimwear, etc. similar to cloth, fabrics, etc., on the grounds that The functions of the goods are related to the use; the sales objects are the same or overlap, which makes the consumers confused and misunderstood the source of the goods, while the court of second instance considers that they are not similar. The reason is that the functions and uses of the products are large different, There is also a big difference in sales channels, consumer groups, sales places. On the basis of the same precondition, the decision of the First instance and the Second instance are inconsistent.

14 Beijing administration of Final Appeal 5687

15 Beijing administration of Final Appeal 5109

2.2.2 Main problems in practice

Firstly, It is very important to judge the subject who determine the scope of the products to some extent, But the character do not be gotten too much attention. The law stipulates that the subject for deciding similar goods and services is the person proposed by the law-related public, which has also been recognized in practice. The cases in practice basically take into account the relevant public, but most of them are based on the law, in other words, the way was taken over without an in-depth analysis and detailed explanation but only directly cite what the law expressed. Although the judicial interpretation stipulates that the relevant public includes not only consumers but also other people who are closely related to commodity activities, in practice, the relevant public is often mixed with consumers¹⁶. This undoubtedly narrows the scope of the relevant public. Therefore, in the course of practice, reasoning still needs to be further strengthened, especially in the relevant public part, which needs to be relatively valued.

Secondly, the criteria, subjective or objective, are vague. In the identification of the same goods, some judges regard the "similar goods and services distinction table" as the sole criterion, and some judges are not limited to this table, mainly for the comprehensive judgment of the objective attributes of goods; for the identification criteria of similar goods, although After the revision of the commercial law, the call for objective standards is increasing, but in practice it is still divided into two different opinions. Some judges believe that when analyzing whether goods or services are similar, subjective factors such as trademark and trademark salience cannot be considered; another part The judge believes that in some cases subjective factors can be incorporated into the judgment process of similar commodities. Since there are two very different views in China's judicial interpretation, it is necessary to further analyze it.

Third, It is unclear that the relation between relevant goods and similar goods.

Judicial interpretation interprets similar goods as commodities with the same objective aspects such as function and purpose, or relevant public will think that there is a certain relationship between the goods, and interprets the same goods as the above objective aspects are the same or basically the same, the relevant public will think they are the basically same. Judicial interpretation divides the judgment method of similar commodities. It can be similarly identified by objective factors, or similarly by the correlation between commodities, but only one way is allowed for the same commodity. However, in practice, objective factors are usually used to explain the correlation between commodities, and when the degree of association between commodities is

16 Beijing administration of Final Appeal 3152 and Pu original civil Appeal No. 127

extremely close, there is also the possibility of being identified as the same commodity. But can related products be used to explain the same goods? What is the relationship between related products and the same and similar products? How to judge related products and how to explain them further? These issues need to be further explored.

Therefore, this article focuses on three major issues in the identification process of the similar commodities.

Chapter 3

Analysis of the subject of similar commodity.

3.1 Specific case analysis

(1) The relevant public is an expert

In the case of the Commercial Appraisal Committee and other second-instance administrative disputes of Dassault Systèmes Software Co., Ltd., Dassault Systèmes proposed to the Trademark Office the "computer software for data management and evaluation of mineral data and other software products in the 9th group." for Trademark registration, but both the Trademark Office and the Trademark Review and Adjudication Board believe that it is similar to the "Cash Collector, Electric Fax Equipment, Signal Lights, etc." and products that belong to the same category therefore will not be registered. The first-instance judge held that the relevant public, including consumers and users, stated in the judgment that the consumers who appealed to the trademarks were usually related to the mining industry, and the users were usually technicians or related researchers of the mining enterprise. It also has higher attention when purchasing and using related products, so it is not easy to be confused. Although the direct consumers of the case are related to the mining industry, the actual users are the relevant technical personnel of the mining enterprise. The unit purchases the goods for the use of these technicians. These technicians also directly influence the making of purchasing decisions. Technicians have professional technical knowledge in the mining industry. Therefore, in the related fields, there are obvious differences between the goods that the average person thinks are close to them, and their understanding and awareness of related products are much higher than the general public. Therefore, the court held that commodities such as computer software for evaluating mineral data” and “commodities such as signal lights” were similar in the perception of the relevant public, and thus obtained more reasonable results.

(2) Relevant public is a specific industry personnel

In the case of China Dongfang Electric Group Co., Ltd. and Guizhou Dongrui Electric Power Technology Co., Ltd infringement of trademark rights disputes¹⁷, the court of first instance compared the plaintiff’s use of the goods “boiler for power station and its auxiliary equipment” and the goods produced and sold by the defendant “box-

17 Qian civil final review No. 462

type substation”, transformers, etc., taking into account the relevant public in a particular industry, the understanding of the goods involved, so the relevant public is defined as “the relevant public of power development, operation”, such public attention to disputed goods and awareness will be significantly higher. For the public, based on this perspective, the court of first instance judged these two types of goods as similar goods. Although the relevant public in this case has a weak professional background compared to the previous case, due to its long-term operation and development in related fields, and long-term exposure to relevant professional knowledge, its knowledge of relevant background is higher than that of the general public. Deeper, the court officially judged that the original defendant's goods were similar because it considered the higher level of concern and awareness of the public in the power station industry than the general public.

(3) The relevant public is a special group

In the case of trademark about Ejiao, a traditional Chinese medicine nourishing yin and tonifying blood for women, dispute between Dong'e Ejiao Co., Ltd. and Jiangsu Xi'a Biotechnology Co., Ltd.¹⁸, the court of second instance found that the goods involved in the case had obtained the registration of the drug, and the Ejiao Glue that was accused of infringement belonged to the food, and the two did not belong to the same commodity. However, the products actually produced by the trademark owner should not be compared with the products allegedly infringed, nor should they be simply classified according to the Similar Category of Goods and Services, but should consider whether the relevant public considers the two commodities to be connected to each other, which is easy to cause confusion. Later, the court analyzed that the medicinal properties of Ejiao products are reflected in the effects of nourishing yin and blood on special people, thus forming a specific market consumer group. Although food manufacturers do not clearly define the proportion of gelatin in gelatin cream, because gelatin has medicinal functions, gelatin gum contains gelatin, which will inevitably make the above special groups pay more attention to gelatin products when choosing foods. So choose to buy gelatin cream and thus confuse.

Unlike the previous case, the general public does not think that the drug and food are similar. Although the trademark owner's trademark is registered in the drug category but the infringer's trademark is used in the food, it is necessary to take the customers who want to be nourished yin and tonified blood. Such groups will have a high degree of attention to Ejiao products. This level of attention is limited by the lack of relevant public background knowledge, so it is limited to whether the same product contains Ejiao, but does not meet whether it is food or medicine, so the relevant public

18 Su civil final review no.172

It is easy to confuse “drug Ejiao” with “food Ejiao”. In other words, this higher level of attention makes this group more likely to confuse related goods, so the court judges it as a similar commodity. The author believes that there is no essential difference between this kind of relevant public and the general public, only that they have more preference for a certain product or they are more demanding for a certain kind of goods, but their mastery of related products is far less than An expert or a professional in a particular industry. Therefore, the author below analyzes experts and professionals in a certain industry as a whole, and the general public and special groups as another.

It can be seen from the above cases that experts and industry-specific practitioners are less likely to confuse goods in related fields, and special group publics are more likely to confuse goods in related fields. But in the end, how to judge the relevant public, we also need to give different analysis based on different cases. The breadth of the relevant public, the scope and the average attention of the relevant public have an important impact on the judgment for similar commodities.

3.2 Foreign legislation and judicial practice

After reconciling the national trademark laws, the European Court of Justice defined the relevant public in the Lloyd case as: “The average consumer of such products, which has reasonably informed information, has reasonable observation and caution.”¹⁹ The European Court of Justice explained that the relevant consumer “usually treats the mark as a whole and does not analyze its various details” and “has few opportunities to directly compare different trademarks, but must believe in the imperfect photos he remembers. "In any case, the definition of the relevant public must be given different results in different cases depending on the specific commodity and the specific service. Therefore, the relevant public must not only be cautious, but also pay attention to the fact that many commodities have changed from professional markets to ordinary markets for fast consumption (such as mobile phones and computers). This is in stark contrast to the trial practice in the United States, where there is no unified concept for the relevant public. According to Professor McCarthy, the court's definition of the relevant public ranges from “reasonable and discerning consumers” to “hurried, unscrupulous and easily deceived consumers”. US courts have expanded the categories to include "ignorance, no thought, credulity, lack of experience and credulous buyers," but not including "negligence and indifference" consumers. The United States is a case law country with different certification standards in different continents. Among them, the closest to the European standards is the US Third Circuit

19 Mejias A. THE MULTIFACTOR TEST FOR TRADEMARK INFRINGEMENT FROM A EUROPEAN PERSPECTIVE: A PATH TO REFORM[J]. *Idea the Intellectual Property Law Review*, 2014.

Court. The court held that: "Ordinary people are neither professionals nor smart people. Lack of special abilities, but the ability to exercise normal common sense and judgment of ordinary people."²⁰

In terms of relevant public objects, the European Court's approach focuses on consumers or end users. The Luxembourg courts commented that the level of consumer attention depends on the goods and services to be purchased (the more expensive the product, the more concerned). Therefore, the European Court of Justice believes that the relevant public includes the public that is more easily confused, the specialized public, and the public who are less likely to be confused. In addition, if the relevant public is composed of professional consumers and the general public, the possibility of confusion will be analyzed from those who are less focused. With one exception, if the trademark is only for a professional consumer to specify a product or service, then the possibility of confusion will be analyzed from professional consumers, such as prescription drugs. In prescription drugs, the relevant public is composed of doctors and the public. A similar approach has been proposed by American academics.

In addition, the degree of attention to goods or services, although the relevant public is composed of ordinary consumers, does not necessarily mean that the degree of attention is low. Again, this does not mean that the relevant consumer is an expert who is highly concerned about the purchase behavior. According to US trademark law, the degree of purchase participation is critical to determining the average level of attention. For example, buying expensive, infrequent, and potentially dangerous goods or services often requires higher consumer attention, while habitual, cheaper goods require less consumer involvement. However, even if consumers are highly concerned, the possibility of confusion cannot be absolutely ruled out. For example, the EU Trademark Office Appeals Board believes that although consumers generally pay great attention, the possibility of confusion of tobacco products is not ruled out.²¹

20 Bone R G. Taking the Confusion Out of 'Likelihood of Confusion': Toward a More Sensible Approach to Trademark Infringement[J]. *Northwestern University Law Review*, 2012, 106(3):243-255.

21 Bone R G. Taking the Confusion Out of 'Likelihood of Confusion': Toward a More Sensible Approach to Trademark Infringement[J]. *Northwestern University Law Review*, 2012, 106(3):243-255.

3.3 Analysis of criteria for relevant public

3.3.1 Reasons based on the relevant public and the relevant public objects

Trademark law protects not just a symbol, but the goodwill behind²². Judging whether a trademark can be registered, or whether a trademark is infringing, is ultimately determining whether the disputed trademark has caused damage to the goodwill of the predecessor. The specific manifestation is that the consumer has misunderstood the choice of the same goods or services based on the trust of the trademark owner, so that the goodwill of the original trademark owner is divisively separated from its trademark. And this kind of injury is directly borne by the person who buys such goods or enjoys the service. Therefore, direct consumers are inextricably linked to this specific purchase behavior. But consumers are not a static concept, but a dynamic concept. Consumers of the same commodity are not static. If the goods have certain advantages in the market compared with similar products, the consumers will gradually accumulate, and the reputation of the merchants will increase accordingly. However, if a commodity is in an inferior position in the free market, the consumers will become less and less, and the final merchant will be out of the market by the natural competition. Therefore, consumers include not only consumers who are now real consumers, but also potential consumers in the future. Potential consumers are those who may purchase this product in the future. They may be affected by the consumers who have bought the goods, or they may be affected by the marketing strategy of the merchants. In the future, they are likely to consume the same goods. So first, the concept of consumers here should be extended to explain both current consumers and potential consumers in the future.

The Trademark Law in PRC stipulates that the relevant public, in addition to consumers, also includes other operators who are closely linked to commodity activities. The theoretical community has subdivided these operators into agents, wholesalers, retailers and some producers. I believes that agents, wholesalers, retailers or other operators are part of the distribution channel from the production of goods to the hands of consumers. Distribution channels refer to the path between goods from production to consumption²³. China's distribution channels are divided into direct distribution and indirect distribution. Direct distribution refers to the direct production of products to

22 Li Chunfang, Zhu Chunhao. Judging the Model of Trademark Infringement from the Case of "If You Are the One" [J]. Journal of South China University of Technology (Social Science Edition), 2018(1).

23 Type Selection and Management of Enterprise Commodity Distribution Channels [J]. Frontier Economy and Culture, 2016(01): 7-8.

consumers. Indirect channels refer to the need to pass through distributors, wholesalers, retailers, etc., and ultimately to consumers. These middlemen are divided into two types: one possesses the ownership of goods, such as dealers, wholesalers, etc., they earn the difference through resale behavior, although the ultimate purpose of this type of people is not consumption, but they have happened real consumption behavior, if they confuse the goods, take the wrong products, and ultimately consumers do not buy them, they will suffer huge losses. Therefore, the relevant public contains one type of person; the other type does not have the ownership of goods, such as agents, who earn commissions by agent goods, although there is no real or formal sale or purchase in the agent Behavior, but they play an important role in facilitating transactions. They need to consider which products are selling well in the market. They need to stand on the perspective of consumers or retailers to identify goods to avoid misunderstanding, so agents are also part of the relevant public.

In addition, in the case of Dassault Canada mentioned above, the judge held that the relevant public included users in addition to consumers. For the controversial goods "language data management and evaluation of mineral data such as computer software and other commodities" consumers are usually mining industry-related firms, users are usually mining enterprise related technical personnel or related researchers, the judge believes that they are purchasing and using Related products will also have higher attention, so it is not easy to be confused. Although users do not directly buy the goods here, but they are closely related to these mining-related commodities, an indispensable tool in their work. Mining firms (consumers) purchase these goods in order to give their employees, relevant technical personnel in mining largely influenced the decision-making of mining firms. Therefore, under certain conditions, the user is also a part of the relevant public.

For employees and investors included in the US Trademark Law, I believe that it should not be included because it does not directly or indirectly participate in consumer activities, nor does it have a large impact on consumer activities.

For the specific target of the relevant public, specific case analysis is needed. In general, it includes consumers (including potential consumers), agents, dealers and other operators closely related to production activities and Important users who largely influent customers.

3.3.2 Scope of the relevant public

The relevant public refers to people who are closely related to consumer activities, including the general public and professionals with certain knowledge. For the general mass consumer goods: clothes, daily food, etc., the relevant public is the general public,

and for other commodities, such as the "boiler for power station and its auxiliary equipment" in the above case and " computer software for data management and evaluation of mineral deposits." the relevant public of goods is a person or enterprise with certain professional knowledge in a specific field.

If the person who is closely related to the goods or services includes both the general public and professionals with certain knowledge, in this case, the author believes that it is necessary to classify and discuss. (1) If the relevant public for the controversial commodity and of the cited commodity includes the general public and professionals with certain knowledge, the judge should analyze it from the perspective of the general public, because if the general public does not confuse the source of the commodity, then the professionals will not be confused; (2) If the relevant public of the cited goods includes the general public and professionals, the relevant public of the opposition trademark is only a professional or a group of people with certain professional knowledge (or vice versa). It is more reasonable to analyze from the perspective of a professional with certain knowledge, because professionals may purchase controversial goods or purchase dissident goods, but the general public may only buy one of them. In the case of the EU Trademark Review Guidelines, consumers of ordinary painting materials include both profit-oriented professionals and the general public motivated by hobbies. Therefore, when the reference trademark and the disputed trademark include the general public and professionals, only professionals with certain knowledge need to be considered, because only such people have the possibility of involving two types of goods at the same time. (3) If the cited commodity and the disputed commodity are respectively professionals with certain knowledge and the general public, there will be no confusion. Because the relevant public does not cross, each will not involve the other's field.

Finally, for some goods or services with strong regional characteristics, it is necessary to consider regional factors. For example, some local restaurants and supermarkets have their markets limited to a certain geographical space, so it is difficult to confuse other publics in a certain geographical space. Therefore, geographical factors should also be considered in the context of the relevant public.

3.3.3 Degree of attention

Generally speaking, the relevant public does not means smart people who reach the expert level, nor can they include ignorant and unthinking buyers like the US courts. It is a duty for the general public with reasonable care and reasonable sense.²⁴ Therefore, in general, the relevant public has a generally reasonable and prudent duty of care. In

²⁴ Same as note 5

reality, there is a case in which a consumer mistakenly buys shampoo as a drink and drinks it in a cleaning store, which obviously does not fulfill the obligation of reasonable care. But for some specific commodities, consumer attention is different. In general, consumers have a relatively high level of attention to the following items.

1, expensive goods

These expensive items include luxury goods, jewellery and diamonds, cars, real estate, financial products and more. In general, compared to ordinary goods, consumers spend a long time thinking and comparing before buying expensive goods. Consumers with no experience or relevant knowledge will also consult with people with relevant knowledge or relevant experience, so consumers will pay more attention to these products.

2. Goods with a certain risk factor

Such as fireworks and firecrackers which have certain safety management standards and commodities, to which customer has to pay attention. if the consumer fails to fulfill the obligation of reasonable check, it may cause irreparable harm to his personal injury. Therefore, consumers will pay more attention to such goods than ordinary products.

3. Pharmaceutical products and baby products

Pharmaceutical products are divided into prescription and non-prescription drugs. For prescription drugs, although the end user is the relevant consumer, the consumer cannot purchase it privately, and can only purchase it if the hospital permit it and gets the doctor's prescription. Therefore, in essence, the relevant public of prescription drugs should be regarded as professionals, and their awareness of goods will be higher than that of ordinary consumers. For non-prescription drugs, although the doctors do not need special prescriptions, the relevant public will still pay close attention to them. Because these medical products directly affect people's physical condition. In addition, because the development of various organs of infants and young children is incomplete, their physical quality is significantly worse than that of adults. Therefore, for infants and young children, parents pay more attention to them than ordinary commodities.

3.4 Summary

In practice, for the judgment of the relevant public, most judges only copy the law, but do not really do analysis based on the position of the relevant public, such as "baby food and medical nutrition food²⁵", "medical nutrition purifying agent and pharmaceutical preparations²⁶", "Experimental distiller and audio-visual teaching

²⁵ Beijing administration of Final Appeal 1925

²⁶ Beijing administration of Final Appeal 2525

equipment²⁷", etc., and in reality, the relevant public's attention or understanding of the above-mentioned goods is greater than the general public. Therefore, whether or not such attention is taken into account when determining the same and similar goods may have a direct impact on the judgment of the final outcome of the case.

As far as the objects of relevant public concerned, the relevant public includes not only ordinary consumers, users, but also dealers, agents and other people closely related to commodity activities, because the behavior of these people or enterprises is not only concerned about their own interests, To a large extent, it will also affect consumers' decisions. But employees and investors should not be included.

As far as the scope of relevant public concerned, it includes the general public and those who possess certain knowledge and skills. When the relevant public of the goods covers both types of people at the same time, the general public shall prevail; when the disputed goods and citation goods One of them covers both types of people at the same time, and the other covers only one of these types of people, which should be based on the type of person who crosses; when the controversial goods and the cited public are separately the general public and have certain knowledge Professionals, they will do not confuse.

Finally, there is a different level of attention to the public about different commodities. For expensive goods such as luxury goods, goods with a certain risk factor, medical products and baby products, the relevant public will pay more attention.

Chapter 4

the criteria for similar commodity

The objective judgment criteria for the identification of similar goods refers to whether the two commodities are similar only from the commodity factors such as function, use, sales channels, and sales place, and whether they are unique in the similar goods and services classification table. The standard is divided into absolute objective criteria and relative objective criteria; subjective criteria is that not only the above-mentioned commodity factors but also factors other than the commodity itself such as popularity and trademark distinctiveness are considered. The objective criteria here do not refer to the judgment of the natural physical properties of a single bundle of commodities, but to the objective needs of the relevant public to put the commodities into the consumer market.

4.1 Specific case analysis

(1) Related cases

Case 1: In the “Haoduo trademark infringement”²⁸ case, Shanghai Haoduo Company registered the trademark into the classification table of “selling and selling for others since there is no category of “supermarket” in the table. At that time, many companies have registered their supermarket services in the 35th category, Selling and selling for others, and the defendant Liu and Zhangjiagang are engaged in wholesale and retail-oriented supermarket services. The defendant used the “Haoduo” trademarks similar to the plaintiff, but considered the plaintiff’s registration. The commodity category is neither the same nor similar to the supermarket in which the defendant actually operates. The court of first instance held that the defendant had no infringement. However, the court of second instance held that although the 35 categories did not include services such as supermarkets, except for the promotion category for them, there was no other registration category for supermarkets in the Similar category of Goods and Services at the time, so it was a long period of time. Many supermarkets have registered trademarks in 35 categories. In fact, supermarkets and “selling for others” constitute the same service, and the court of second instance pointed out that it is necessary to judge the similarity of goods or services with the general knowledge of the relevant public. A similar table of goods and services can be used as a reference.

28 Guangdong Supreme China three Final No. 123

Case 2: In the case of the “Inter-continental grand dissent review”²⁹, the court of first instance explained that “complaining goods, cream, milk, etc., and citation goods, mineral water, soda, etc., are similar in function production department, sales channels, consumer objects, etc. and the relevant public generally thinks that there is a specific connection between them, and the cited trademark has a high reputation in a specific industry, so it is more confusing, so it constitutes a similar commodity. However, in the analysis of the court of second instance, it did not take the visibility into consideration in the judgment of similar commodities.

Case 3: In the case of “the objection review of Baobo Co., Ltd.”³⁰, the court of second instance clearly stated that when the cited trademark has a high degree of distinctiveness and popularity, and the trademark applicant has obvious intention to attach, it should moderately widen the similar scope of the commodity.

Case 4: In the case of “the invalidation of Daimler Co., Ltd.”³¹, the second-instance court considered that the “vehicles and their parts and components” approved by the cited trademarks and the “cable car; baggage stroller, etc.” approved for use in the disputed trademark were vehicles and related accessories, there is a greater correlation between the two similar products. However, the court went on to point out that the honor obtained by the cited trademark is not the basis for judging whether the trademark and the referenced trademark are similar. In other words, the popularity of the cited trademark does not constitute a consideration for judging similar commodities.

(2) Specific analysis

The Classification of Similar Goods and Services is a classification of commodities that the State Administration has established in accordance with the Nice Agreement on the International Classification of Goods and Services for the Registration of Trademarks, which meets the actual market needs of China. The classification itself referring to Objective factors such as the function, use and sales of the goods is a scientific table. Since the trademark of our country is registered according to this form, the judicial interpretation has not given the same commodity a more detailed explanation. It is inevitable that some scholars believe that the legal default of the similar goods and services in China is the standard for judging the same commodity. The court of first instance in the first case of appeal will only consider that the defendant engaged in supermarket operations does not infringed on Shanghai Haoduo supermarkets that are formally registered in the “sales” category (in fact, supermarket services). However, like all laws and regulations, the "similar goods and services

29 Beijing administration of Final Appeal 3712

30 Supreme Court Administrative Retrial No.10

31 Beijing administration of Final Appeal No. 5054

distinction table" is inevitably characterized by lag. The court of second instance also considered this factor and then changed the defendant's infringement, thus making a more just judgment. Although in practice, there are still very few judges who stand in the judgment of the said classification, most judges use the list only as a reference.

In the above case, the court of first instance in the second case considered the subjective factors of the parties into the judgment of similar commodities, while the fourth case suggested that the popularity did not constitute a factor for judging similar commodities. The third case is in the middle of a transitional nature. In practice, only a small number of cases take into account factors such as popularity, trademark distinctiveness, and purpose of parties when directly analyzing similar commodities. The judgment of more cases is the following two ways: The first mode of judgment logic is, firstly on the perspective of objective factors, judges judge the two commodities are same or similar, and then consider with the subjective factors and identify if they constitutes confusion; the other method is that firstly judges judge whether there is a certain correlation between the two commodities, and if so, combines with other factors to analyze whether it will cause confusion, if it is confusing, it is considered that the two commodities are similar. The first method is to judge whether the two commodities are the same or similar from the objective factors, and the second method first bypasses the judgment of the preconditions. If the two commodities constitute a confusion, the two commodities are reversed to form similar goods.

4.2 Foreign legislation and judicial practice

The EU Trademark Law, as a result of reconciling the trademark laws of each member states, the same and similarity of goods or services becomes a prerequisite for infringement judgment based on the possibility of confusion. Prior to the Canon case, there was a lack of guidance on assessing the approximation of goods under the Trademark Directive and related regulations. Courts usually judge based on the classification of goods and services established in the Nice Agreement. However, as the controversy increased in practice, the court gradually realized that the Nice classification is a pure administrative classification, in which it is possible that less similar goods are classified into the same category and very similar goods are classified into different categories.

The EU Trademark Guidelines clearly stipulate that when comparing goods or services, the trademark factors or the distinctiveness of the trademarks cannot be considered, and the trademark factors can only be considered when the final evaluation is carried out. It can be seen that the EU adopts relatively objective criteria for the similar commodities.

According to an objective method, goods must be placed in a vacuum to judge, independent of comparing trademarks and assessing the associated confusion possibility analysis. Although the Nice Classification is the starting point for analyzing the similarities of goods and services. However, the European Court of Justice moderately warned that the Nice Classification is only administratively effective. Therefore, even if two trademarks are designated in the same category of goods or services on the Nice Classification, they cannot be presumed to be the same or similar. The United States has the same principle regarding the Nice Agreement.

In the Canon case, the EU Trademark Office established relevant numerical factors for the determination of similar commodities. (1) the nature of the goods; (2) the end user or intended use; (3) the method of use; (4) whether the goods are complementary; (5) whether the goods are in a competitive state; (6) the distribution channels of the goods; (7) The public; (8) the usual origin.³² By explanation, the EU Trademark Office ranks the influencing factors from strong to weak—usually source, purpose, nature, complementarity and competition, and less important factors—how to use, distribution channels, and the relevant public. The specific method of judging is generally to find two strong factors (or one strong factor and two weak factors), and then judge whether the goods are the same or similar according to the intensity of the similarity presented by these factors.

Although the EU countries do not consider subjective factors when judging similarity,, it is necessary to combine the comprehensive factors such as commodities, relevant public attention, and the distinctiveness of the trademarks for judging whether there will be confusion. The EU's judgment of similar goods is not a non-binary proposition, but a degree problem. According to the objective attributes of the goods, the similarity degree of the goods is divided into five levels: same, highly similar, similar, lowly similar, non-similar. It has a tool for testing similarity³³. For example, the toothpaste and the toothbrush are separately input under this tool, and the result is that the toothpaste of the third category is similar to the toothbrush of the 21st category,

32 Canon Kabushiki Kaisha vMetro-Goldwyn-Mayer Inc [1998] All ER (EC) 934; [1999] RPC 177...

33 See <http://euipo.europa.eu/sim/search>, visit time, 2011.5.30

the reason is that they are complementary goods, and they are in the distribution channel, The relevant public overlaps. As shown in Figure 1.

0007708-0059130	EUIPO (EM)	28	Electronic games	Identical	28	Slot machines [gaming machines]			
Electronic games in Class 28 is/are identical to a Slot machines [gaming machines] in Class 28.									
0058705-0019576	EUIPO (EM)	28	Christmas crackers	Similar	28	Decorations for Christmas trees	2,6,7		
Christmas crackers in Class 28 is/are similar to a Decorations for Christmas trees in Class 28 as they have the same purpose. They usually coincide in relevant public and distribution channels.									

Figure 1

For example, if you enter fitness bike and fitness bike, the results are the same under some subcategories, similar to some subcategories, as shown in Figure 2.

0007708-0059130	EUIPO (EM)	28	Electronic games	Identical	28	Slot machines [gaming machines]			
Electronic games in Class 28 is/are identical to a Slot machines [gaming machines] in Class 28.									
0058705-0019576	EUIPO (EM)	28	Christmas crackers	Similar	28	Decorations for Christmas trees	2,6,7		
Christmas crackers in Class 28 is/are similar to a Decorations for Christmas trees in Class 28 as they have the same purpose. They usually coincide in relevant public and distribution channels.									

Figure 2

However, it also has the drawback of hysteresis. I tries to search the similarity between the printer and the 3d printer, but the tool still does not include the 3d printer in the relevant category.

In the United States, there is no distinction between the same and similar, and it is unified as a judging factor in the multi-factor judging method, that is, the degree of similarity of goods. The degree of similarity of goods is not a precondition for confusing judgment, but only one of the constituent factors. The similar commodities here refer not only to competitive commodities, but to commodities that consumers consider to be related.³⁴ Some of the other factors in the Eight-Factor Test Method for Confusion Judgment in the US Second Circuit Court are also easily incorporated into the analysis of whether goods and services are similar, as they are merely some aspect of assessing the proximity of a commodity. For example, similarity factors for distribution channels can be included in the general associated categories of goods and services. In addition, Professor McCarthy pointed out that similar goods are not just goods that have the same attributes or the same physical properties. Because similar goods are judged based on relevant consumers, the diversified operation mode of the enterprise will judge the confusion of consumers, because he will make consumers

³⁴ Halmen K E. The Effects of the Corporate Diversification Trend on Trademarks[J]. Marquette Intellectual Property Law Review, 2006(3).

expect various goods to come from the same enterprise, especially when the enterprise has certain When it is known. In addition, the relationship between similar goods and services is very important, they will affect each other, and this relationship is sometimes difficult to distinguish. In addition, the United States attaches importance to the role of market research, which requires 11% to 46% of confusion under market surveys, and no emphasis on the judgment of the same or similar goods.

In summary, the European Court of Justice attaches great importance to the judgment of the same and similar goods and regards it as a precondition for confusing judgments. The United States does not attach importance to the judgment of the same and similar goods, but pays more attention to the comprehensive judgment to determine whether goods will occur between commodities. European recognition of the same and similar goods is based on relatively objective criteria, while the United States adopts subjective criteria.

4.3 Discussion on Subjective or Objective Standards of Similar Commodities in China

The reason why China has two main different arguments for similar commodities is that the 2001 Trademark Law does not specify the final confusion standard for trademark infringement³⁵. Before the introduction of the new trademark law, the main application of similar commodities was the judicial interpretation of 2002, in which similar commodities were interpreted as commodities that the public considered to be specific and confusing. This judicial interpretation internalizes the confusion criteria into the judgment process of similar commodities.

The hazard of confusion is that the relevant public believes that the goods have the same source, and this misunderstanding does not occur only from a single trademark or a commodity that is not linked to the trademark. Only when the two factors of trademark and commodity are combined, Confusion can happen. Therefore, based on the limitations of the text of the trademark law in 2001, it is inevitable to consider similar factors such as trademark popularity and significance.

However, after the revision of the Trademark Law in 2013, the 52 articles of the original trademark were divided into two. When the goods and the trademarks were the same, they were directly recognized as infringement. When the goods and the

35 Article 52 of the 2001 Trademark Law: Any of the following acts shall be infringement of the exclusive right to use a registered trademark:

(1) using the same or similar trademark as the registered trademark on the same commodity or similar commodity without the permission of the trademark registrant;

trademarks were not identical, the standard was finally confused. Although there is no need to judge confusion when the goods and trademarks are the same, the final criteria are also confusing. However, when the two are the same, there is no need to make further judgments, but they are presumed to be confusing³⁶. There are similar provisions in the Trips agreement. Therefore, whether the goods are the same or similar, the 2013 trademark law clearly confuses whether the final standard of infringement occurs, and the same or similar products are only a prerequisite for the judgment of confusion. Whether it is the subjective judgment standard or objective judgment standard of the same or similar goods, the ultimate purpose is to judge whether the two products will be confused, but the two things of goods and trademarks are not a separate concept, and it is inevitable in the process of identification. Will learn from each other and influence each other. In response to this, some scholars believe that in practice there is no need to entangle whether similar commodities are subjective or objective³⁷.

However, due to the uniqueness of China's current legal framework, i believe that it is not appropriate to add subjective factors to the judgment of the similar commodities. This issue will be further discussed in the last chapter. Here are two simple points. The first point is as described above. The new trademark law has clearly defined the final judgment criteria as confusing, such as discussing these subjective factors when analyzing similar commodities. Inevitably, the judgment process is confusing, and the rules are too complicated. Secondly, only considering objective factors contributes to the stability and efficiency of judicial judgment in China's practice. In practice, when judging similar products, it is not necessary to consider the factors such as trademark popularity and distinctiveness, but simply consider the natural characteristics of the goods and the sales channels, which will help to form a stable judicial judgment system and limit the excessive discretion of the judges. .

4.4 Summary

In the practice of the EU Trademark Law, the judgment of the same and similar goods is taken as an objective standard, and the subjective standard adopted by the United States. Before the amendment of the Trademark Law, since the Trademark Law of 2001 did not stipulate the confusion standard, PRC incorporated the confounding factors into the interpretation of similar commodities in the judicial interpretation, which led to the controversy of the subjective and objective judgment methods in the

36 Yan Lin. Research on the identification of trademark infringement under the “double identical” [D]. East China University of Political Science and Law, 2009.

37 See reference 2

academic circle. After the revision of the Trademark Law, it is not necessary to participate in subjective factors when judging the same or similar goods.

Although the "similar table of goods and services" has certain scientific nature, it cannot avoid the defects of stand and lag. Therefore, when identifying the same and similar commodities, it should not be too rigid, and should be combined with the actual situation, specific circumstances, and specific analysis. .

To sum up, PRC's Trademark Law is more appropriate for the identification of similar goods with relatively objective criteria.

Chapter 5

The channels on Analysis of Similar goods

The judicial interpretation of the Trademark Law interprets similar goods as: goods whose functions, uses, etc. are related or identical, or have a certain connection. The judicial interpretation of the criminal law interprets the same commodity as: the objective aspect is the same or basically same, and the relevant public will consider it to be the same thing. From the perspective of legal provisions, there are two similar ways to identify similar goods. The first way is to judge from the objective factors of the commodity, and the second way is to judge whether there is some correlation between the two commodities. The identification of the same commodity is only a way, that is, at least when the objective factors are basically the same at the same time the relevant public will also think that the two commodities are the same. It can also be seen that the judicial interpretation does not use related goods to explain the same goods. PRC's "Trademark Review and Trial Standards" gives specific trial criteria for each objective factor. Therefore, there is less controversy about the judgment of objective factors in practice, but what is the certain connection in judicial interpretation? If this kind of connection can be used to identify the same commodity, which are still a controversial problem in theory and practice. Therefore, this chapter mainly analyzes the ways for judging similar commodities.

5.1 Specific case analysis

(1) The same goods and closely related goods

In the case of Dama Co., Ltd. v. National Trademark Administration General Trademark Review and Adjudication Board³⁸, Dama Company expressed dissatisfaction with the decision to continue the maintenance of the ninth category of "glasses" products that YiJiuliang Company registered to be revoked for three years without using. To file an administrative lawsuit. Dama Company believes that YiJiuliang's trademark is approved for registration on "glasses" products, and the actual use of glasses frames, the two are not in the same category in the "Differentiation Form", so the trademark of YiJiuliang Company should be revoked. However, the court of first instance held different opinions on this. The court of first instance held that although in the "Differentiation Table", the glasses and frames were located in the 21st

³⁸ See reference 12

group of the 9th category, so that the two belong to similar commodities. However, as the frame of glasses, the relevant public in the real life in the glasses shop to buy glasses, for most of the glasses products, because each consumer needs to be considered The degree of demand is different. Optical shops rarely sell glasses with lenses. The relevant public first needs to determine the degree of glasses and then pick up the glasses frames. Therefore, the manufacturers of glasses rarely make glasses with lenses. There are inseparable relationships between glasses frames and glasses, especially in the field of eyewear services. Therefore, the court held that Dama Company had used the products approved for use, in other words, it was used on the same product).

In this case, the two items “glasses” and “glasses frames” literally look like similar products, but considering that in real life, due to the different degrees of myopia glasses, manufacturers rarely produce directly. Glasses with lenses are measured by consumers first, then with lenses, and then with glasses frames, so glasses and frames are inextricably linked, so the court believes that glasses and frames constitute the same product. In this case, the judge did not mechanically identify the same goods based on objective factors, but based on the general public's general opinion under real-life conditions, the judges determined that the links between the two goods were inseparable because of the relevant public opinion. Identify it as the same product. In addition, there are some commodities in daily life. Although there is no big difference in the name, the essence is completely different. For example, vegetarian beef is not real beef, but a dried bean product. There are also some things, although different in name, but they are the same goods, such as Digua and Hongshu, which are both potatoes. Therefore, when we judge whether two commodities are the same commodity, we cannot judge it based solely on its literal meaning. Instead, we must go to the relevant market to see whether the relevant public will think that there is an inseparable connection between the two commodities.

(2) Similar goods and certain related products

In the case of Swarovski's second-instance invalidation of administrative disputes³⁹, the trademark "Royal Swarovski" was registered by Xu Shihua in the 11th category "Exhaust fans, heaters, solar water heaters, etc.", cited by the trademark "Royal Luo Shiqi Company is registered on "Lights, Lighting Equipment, etc.". Swarovski has proposed that Xu Shihua's trademark registration is invalid based on the similarity of commodities to the Commercial Appraisal Committee. However, the Trademark Review and Adjudication Board believes that the disputed goods and the cited “lights and other commodities” have large differences in functional use and do not belong to similar commodities, so they will not be related. The public has confused and misunderstood the source of the goods. The court of first instance also considered that

39 Beijing administration of Final Appeal No. 3727

the two commodities differed greatly in terms of functions, uses, sales channels, and consumption objects, so they did not constitute similar commodities, but the court of second instance considered the lamps used for the certification of the trademarks. "Lighting equipment" and the "exhaust fan light products" approved by the trademarks are used in different categories in the "Differentiation Table", but both are daily household items, although there are certain differences in functional use. However, there is a certain overlap in the sales channels and there is a certain crossover between the consumer groups. Therefore, the two products are highly related products, plus the approximation of the trademark and the degree of the trademark, so they constitute similar trademarks on similar commodities; Victoria's Secret Store Brand Management Company and the Commercial Review Board's second instance administrative case⁴⁰, The court of trial held that although the "cleansing tissue" designated by the opposition trademark was related to the "perfume and cosmetics" products approved by the cited trademark, the evidence provided by Victoria Company was insufficient to prove that the cited trademark was in China. The high popularity, so the use of the objection trademark on the "cleansing tissue" does not make the public think that the product has a specific connection with the "perfume and other products" used by the cited trademark, which leads to confusion and misunderstanding.

In the case of Swarovski, the court of second instance identified two commodities as highly related commodities based on the same objective factors of the commodity, and did not directly say whether they constituted similar commodities. In practice, in most cases, the courts adopt this approach. Therefore, it can be seen that although the judicial interpretation puts objective factors and relevance in the same rank to judge similar commodities in two different ways, in practice, In the case of Victoria's secret case, the judge believes that even if there is a certain correlation between the two commodities, the relevant public will not think that the two commodities are specific. Contact does not constitute a similar. Therefore, similar products can only be formed when this correlation reaches a certain level.

In addition, there are very few judges who replace similar commodities with related commodities in the process of judging cases. Therefore, some scholars believe that the emergence of related commodities is the some reconstruction of the legal framework of China's trademark law based on the provisions of judicial interpretation on related commodities. When the confusion is determined, the goods can satisfy the preconditions of relevance. However, as early as the 2014 Supreme Court's case--the Woodpecker case, the retrial court pointed out that the second-instance court directly identified the two commodities as related goods without mentioning similar goods, and the related goods generally referred to The tables belong to different categories, but

40 Beijing administration of Final Appeal No. 1942

there is a great correlation in practice. This kind of relevance will lead to confusion among the relevant public. It still needs to be judged in a similar commodity framework, and should not be created outside the similar commodity framework.⁴¹

In general, in China, whether in law or in practice, similar products can be formed only when the degree of association is relatively large, and when the degree is inseparable, it constitutes the same commodity.

5.2 Foreign Legislation and Judicial Practice

According to Article 10, paragraph 2, of the EU Trademark Directive, a registered trademark owner can prevent others from using the trademark on the following related goods: when the two trademarks are the same or similar and the goods are the same or similar and there is a possibility of public confusion. This confusion includes relevance confusion.

In the United States, the same or similar goods are not used as a precondition for confusing judgment. Instead, multi-factor analysis is used. The same or similar goods are only one of the requirements, and finally the confusion is the criterion. Moreover, there is no direct regulation of related goods in the US trademark law. Before 1938, infringement could only be determined when the two commodities were in a competitive relationship. However, since the promulgation of the Tort Law Restatement in 1938, the United States began to adopt the standard of dichotomy, that is, to adopt confusion standards for directly competing commodities. Associated standards are used for non-direct competitors. However, in the Polaroid case⁴², the judge judged that the microwave oven used by the defendant and the television used by the plaintiff would be confused with the two non-direct competitors, which were further recognized as infringement, and in this case, the first multi-factor test method was developed. . It is also from this case that the United States does not distinguish between competitive or non-competitive goods, and the criteria for judging are unified as confusing standards. In fact, as far as the scope of its goods is concerned, the non-competitive goods and competitive goods of the "Restatement of Tort Law" are unified into "related goods".

From the perspective of legal provisions, whether the United States or the European Union, the concept of related goods is not in a hierarchy with the concept of related goods in China. However, in practice, the EU Trademark Review Guidelines clearly state that possibility confusion and possibility association are not a replacement concept, and the possibility association can only determine the scope of protection. It can be

41 Beijing administration of Final Appeal No. 3612

42 Polaroid Corp. v. Polarad Electronics Corp

seen that the degree of association in the EU trademark law is not a decisive factor in judging whether a trademark is infringing, but only defines the scope of protection⁴³. From here, the EU and China's regulations are most similar.

5.3 Reasons for similar goods comprising related goods

(1) Suppressing the phenomenon of "near brand"

From the historical development process of trademark law, the protection of trademarks by law is not a short-term formation, but a gradual process based on social and economic development, changes in people's perceptions, and institutional changes. As early as 1904, under the invasion of the powers, China was forced to sign the Treaty of Renewing the Treaty of Trade and Industry and the Treaty of Trademark Protection. At the time, Article 3 of the Treaty stipulated that the same or similar trademarks were prohibited from being used on the same kind of goods, but the concept of well-known trademarks was not recognized at the time. It was not until 1993 that China established the prototype of well-known trademark protection, extending the scope of trademark law protection to trademarks that were already well known to the public⁴⁴. Three years later, the State Administration for Industry and Commerce officially promulgated the Interim Provisions on the Recognition and Management of Well-known Trademarks, and extended the protection of well-known trademarks to non-similar goods. The reason is partly to adapt to the special protection of well-known trademarks in international treaties and to fulfill the obligations of member states. China joined the Paris Convention and the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter referred to as the Trips Agreement) in 1985 and 1994 respectively. The Paris Convention only provides for the protection of well-known trademarks on the same and similar commodities⁴⁵. In the Trips agreement, the protection of well-known trademarks for different products that are not similar is specified⁴⁶.

China's current trademark law prohibits the use of trademarks on goods that are different or similar to well-known trademark already registered by others. The prohibition of non-famous trademarks is limited to the same or similar goods. For the middle zone, there is no relevant regulation for a famous trademark that has a certain reputation but has not yet a well-known symbol. However, with the development of the

43 GUIDELINES FOR EXAMINATION OF EUROPEAN UNION TRADE MARKS
EUROPEAN UNION INTELLECTUAL PROPERTY OFFICE (EUIPO) PART C

44 See "Rules for the Implementation of the Trademark Law of the People's Republic of China 1993" (already abolished) Article 25, paragraph 2

45 See the second paragraph of Article 6, "the Paris Convention"

46 See Article 16, paragraph 3 of the TRIPS

market economy, the variety of market commodities is increasing, and the phenomenon of brand name has occurred from time to time. In the judicial interpretation in 2009⁴⁷, the Supreme People's Court pointed out that in order to curb free-riding behavior, encourage market benign competition, awareness and significance Higher goods give higher protection. Therefore, the introduction of related products can fill the gap in legal protection of famous trademarks to a certain extent.

(2) Reducing the threshold of “similar” judgments on famous commodities

As some scholars have said: the introduction of related products is to achieve cross-class protection of famous trademarks, but the author believes that it is not appropriate. First of all, even the cross-class protection of famous trademarks is not a true cross-class. Even a famous trademark cannot achieve full protection, and the goods it protects must meet a certain degree of connection, such as in the case of Monach's objection review⁴⁸, although Monach is in the film instrument, Trademarks registered on commodities such as newspapers and magazines have formed well-known trademarks, but the court believes that they are in conflict with the trademarked shoes, and other goods, regardless of function, use, or sales channels of goods, consumer groups, etc. It has a large difference, so even if it is well-known, its market popularity is not enough to radiate to the range of goods or similar goods or related products that are designated for use by the object. Therefore the objection is invalid. In another case⁴⁹, the courts of the first and second courts all considered that the original defendant's goods were far apart in terms of objective elements such as function and use, and the relevant public would not be confused. However, the retrial court held that when considering the relationship between the "vehicle decorations" designated by the opposition trademark and the "zipper" used by the cited trademark, although the two commodities are difficult to identify as the same or similar goods, the evidence of the defendant may It can be proved that the zipper can be used in the interior decoration of the vehicle, and it is related to the object-oriented product "vehicle decoration", and it is considered that the "zipper" has a high degree of popularity. Well-known trademarks can be protected on "vehicle decorations" on "zippers". It can be seen from the above two cases that even a well-known trademark needs to be protected under the premise that there are certain links between objective elements such as function and use; in addition, the similarity of goods is not a non-binary proposition, but a degree. Judging the size, if the degree of association between the two commodities is high, the probability of confusion among consumers will increase, and at the same time, the possibility that the judge will be

47 See "Opinions on Several Issues Concerning the Overall Situation of Intellectual Property Trial Services under the Current Economic Situation"

48 The Supreme Court administrative appeal No.2682

49 Supreme Court Administrative Retrial No.67

identified as a similar commodity will be greater, so the requirement for the judgment threshold of similar commodities will also be Lower. Even if the Trips protocol stipulates cross-class protection, there are certain restrictions, that is, when it is used for dissimilar products, it will make people feel that there is a certain connection with the goods between the trademark owners⁵⁰.

Therefore, whether it is a well-known trademark or a famous trademark or a common trademark, when it is judged whether or not it is infringing, there must be a certain relationship between the commodities. Therefore, the “cross-class” in the provisions of the trademark law is not a cross-class in the true sense, but When the relationship between the goods is not so strong, but it will cause confusion to the relevant public, the threshold for similar goods is lowered.

5.4 Interpretation of the relevance of goods in trademark

law

China's trademark law review guidelines and judicial interpretations all interpret similar goods as the relevant public and believe that there is a certain association or connection between the two commodities. There is no further explanation for this association or connection. From the case, I summarize the terms used by the judge when they identify the similar goods, “have strong relevance⁵¹”, “the general public thinks they have a specific connection⁵²”, “there are some association or some special connection⁵³”, “There are close associations belonging to larger related products⁵⁴”, “very close contact⁵⁵”, “strong correlation⁵⁶”, “inseparable⁵⁷” (same), “highly

50 The original Article is that Article 6bis of the Paris Convention (1967) shall apply, *mutatis mutandis*, to goods or services which are not similar to those in respect of which a trademark is registered, provided that use of that trademark in relation to those goods or services would indicate a connection between those goods or services and the owner of the registered trademark and provided that the interests of the owner of the registered trademark are likely to be damaged by such use.

51 The Supreme Court administrative appeal No. 3543

52 The Supreme Court administrative appeal No. 5043

53 Beijing administration of Final Appeal No. 3705

54 Beijing administration of Final Appeal No. 3048

55 Beijing administration of Final Appeal No. 2878

56 Beijing administration of Final Appeal No. 4403

57 Beijing administrative preliminary examination No. 3774

correlated⁵⁸ ", and the dissimilar terms are "only certain relevance⁵⁹ " or "The relationship is weak⁶⁰". In general, the TRAB or the court considers that when the relationship between the contending commodity and the cited commodity is stronger than the greater correlation, it is a similar commodity. When it considers that the two commodities are "inseparable", they consider it to be the same commodity.

The reason why the relevant public believes that the two commodities have a certain degree of relevance, and the confusion based on this correlation is because consumers believe that the quality, brand culture, and after-sales service of the products they purchase are superior to other commodities. Even if the consumer knows that the product he purchased does not belong to the same manufacturer as the product he trusts, the consumer will make the purchase behavior as long as he believes that the product he purchases can be guaranteed by the product he trusts. Some scholars have previously proposed the above-mentioned "guarantee theory", which points out that this kind of relevance refers to the guarantor that makes the relevant public think that the infringer is the quality of the infringer. In this regard, the author believes that it should not be limited to this, as long as the relevant public believes that the infringer's goods can be protected by the merchants he trusts. This kind of protection can be based on the trust of the infringer person, and can also be established on The parent company of the infringed company or the company authorized to the infringed company. Specifically, there are the following cases: two goods belong to the same enterprise, one enterprise is authorized by another enterprise, two enterprises belong to the parent company relationship, or two enterprises belong to the same company under the same institution, or the goods are only different distribution channels, etc. . A scholar believes that sponsorship is also a category with certain connections⁶¹, but the author believes that this is not true, because sponsorship usually refers only to economic supply, and there is no quality guarantee. Consumers will not be sponsored by companies. Choose to buy goods.

5.5 Summary

The development of China's trademark law is a gradual process. In order to adapt to the international treaties and China's economic development to a certain extent, the concept of well-known trademarks is introduced in China's trademark law, but even

58 Beijing administration of Final Appeal No.3727

59 Beijing administration of Final Appeal No.3727

60 Beijing administration of Final Appeal No.5037

61 Sun Liping. Research on Judging Standards of Similar Commodities in China [D]. East China University of Political Science and Law, 2015.

well-known trademarks cannot be protected in all categories, and they also need to have a certain degree of connection between commodities. Cross "class" protection.

Judging whether a commodity is the same or similar, not a non-dual proposition, but a degree problem, and the introduction of relevance is to make those similarities not so high, but in combination with other factors, will make consumers The concept of a strong connection between two commodities. When the degree of association is high, the two commodities will be similar. When the degree of association is inseparable, the two commodities are identical.

In addition, the contact here refers to the relationship that can be guaranteed to a certain extent, which is manifested by the relationship between the two enterprises, such as licensing, cooperation, parent company, or affiliated company under the control of the same enterprise, but the sponsorship relationship cannot guarantee this economic connection.

Chapter 6

Reflection and Improvement of PRC's Existing Rules

6.1 Analysis of the rationality of existing rules in PRC

6.1.1 Historical Development of PRC's Trademark Law

In 2001, the Trademark Law's provisions on the determination of trademark infringement were consistent with the 1982 Trademark Law, and did not take into account the confounding factors. The Trademark Act of 1982 was derived from the Interim Regulations on Trademark Registration in 1950⁶². Some scholars call it the "symbol protection mode." That is to emphasize the protection of trademark marks, regardless of the brand's visibility and other factors⁶³. But symbolic protection is a product of the planned economy era, when people saw the law as a national coercive force⁶⁴. At that time, China's economic and social development was imperfect, and the gap with the world was large. The role of trademark law was more to facilitate state management than to protect the interests of consumers. The state acts as a manager and intervener. However, with the development of the economy and society and the joining of some international conventions, China's economic model has gradually changed from a planned economy to a market economy. The state has also relegated from the role of managers to the second line and has become a service provider of the socialist market economy. Thus, the fundamental purpose of the trademark law has also changed, and it has turned to protecting the interests of consumers and operators. As a result, the final judgment criteria also become confused with the relevant public.

After the Third Plenary Session of the Eleventh Central Committee, China gradually realized the reform of the market economic system. The first trademark law in the true sense also became part of this reform. However, the new China in the transitional period is inevitably not deeply understood by the theory of the "imported goods" trademark law. Trademarks are the direct object of trademark rights, and goods are the direct carriers of trademarks. The relationship between the two is not inseparable.

62 Deng Hongguang. The Entity Issues Needed to Be Solved by the Trademark Law: From "Symbol Protection" to "Preventing Confusion" [J]. Academic Forum, 2007, 30(11): 147-151..

63 Peng Xuelong. Semiotic Analysis of Trademark Law [M]. Law Press, 2007.

64 See reference 11

The two are closely related to trademark rights. It is inevitable that if people have similar trademarks and similar products, they will be misunderstood without considering them. To the confusion is the fundamental criterion.

Although PRC's trademark law in 2013 officially "turned the confusion" to the standard of confusion, as early as 1988, China's gradual discovery of whether the relevant public was confused was fundamental, so it was only in the relevant judicial interpretations – the "Rules for the Implementation of the Trademark Law". There is a confusing predecessor - the "mistaken" rule⁶⁵. Although the current judgments on similar commodities in the 2002 judicial interpretation still provide for confounding factors. However, the reason was a compromise on the unsound legal provisions at the time. Some scholars define it as the pursuit of the fairness of the essence of the law and sacrifice the logic of the law⁶⁶.

6.1.2 Rationality of the same and similar commodities as a premise of confusion

Both the EU and the US regard confusion as the final standard for trademark registration and trademark infringement. Article 57 of PRC's Trademark Law regards confusion as the decisive factor for the judgment of infringement of the same and similar goods. Although there is no explicit standard for confusion in the trademark law at the time of trademark registration, in practice, the standard recognized by the judge is confusing.

Confusion is such a big hazard because it separates the trademark of the legal trademark owner from its commodity. Consumers purchase their goods based on their trust in legal trademark owners, but then find that the quality of the goods is far lower than they expected, so consumers will switch to other merchants' products on their next choice. Under this circumstance, not only the interests of consumers are not guaranteed, but also the goodwill of the business that is painstakingly operated by the merchants is damaged. Even if the quality of goods bought by consumers is far greater than the goods held by legal trademarks, it seems that The consumer's interests and the interests of the merchants are not harmed, but the goods are far from being controlled by legal

65 Article 41 of the Regulations for the Implementation of the Trademark Law of the People's Republic of China (1988) (Repealed) (2) On the same or similar goods, the words or figures that are identical or similar to the registered trademarks of others shall be used as the trade name or commodity. The decoration is used and is enough to cause misunderstanding;

66 Li Chunfang, Zhu Chunhao. Judging the Model of Trademark Infringement from the Case of "If You Are the One" [J]. Journal of South China University of Technology (Social Science Edition), 2018(1)

trademark owners. If consumers buy the right goods in the next purchase, they find that the quality is reversed. It is better to buy goods that are wrong, he will think that the quality of the legitimate trademark holders is not as good as before, so the trust established by the hearts of the trademark owners will be greatly reduced. Therefore, confusion can cause irreparable harm to both consumers and merchants.

Since the final criterion is to prevent confusion among the relevant public, why does China not learn from the United States, and the similarity of goods as a factor of judgment confusion rather than a premise? On the surface, the multi-factor analysis method in the United States is more scientific and reasonable, but the multi-factor detection method in the United States is gradually developed in practice jurisprudence. After half a century of controversy, the United States developed the first multi-factor detection method in the 1960s, and with the development of the times, the judgment criteria of this method are constantly improving. The earliest trademark law in our country was enacted under the imperialist powers, and it was not the will of our people. In 1982, China had its first trademark law, and it has only been more than 30 years. Therefore, the theoretical basis of our practice is very different from that of the United States.

In addition, every court in every continent in the United States has its own different judgment factors. For example, the Third Circuit Court adopts the ten-factor test method, which includes 1. the degree of similarity of trademarks, the intensity of trademarks, the degree of consumer attention, the time of use of trademarks by defendants, the malicious degree of defendants, the sales channel, and the real confusion. Evidence 8. Whether the sales purposes of the two parties are similar. 9. Product function 10. Other factors that will make consumers think that the plaintiff's goods will be in the defendant's commodity market. ⁶⁷The Eighth Circuit Court adopts the eight-factor test method, which includes 1, trademark intensity, trademark similarity degree 3, commodity competition level 4, the degree of maliciousness of the infringer, evidence of true confusion, and the type of commodity. It can also be seen from the United States that the understanding of the same and similar products is different from that in China. For example, the Third Circuit Court splits the sales channels and commodity functions in the commodity factors into multiple factors judgments that are juxtaposed with the same and similar products but China's two factors are caused by the judgment of similar commodities. Therefore, from the perspective of the relationship between the same and similar commodities and confusion, it is not appropriate for China to directly learn from the United States.

In summary, if the multi-factor detection method is directly applied to China, it is inevitable that there will be "acclimatism". China's judging criteria based on the same

67 ANNE GILSON LALONDE, GILSON ON TRADEMARKS § 5.02 (2013).

and similar commodities and the cross-class protection model of well-known trademarks are models that have gradually developed in practice and are more in line with reality and more suitable for China's current situation.

6.1.3 Reasonableness of the same commodity without relevant judicial interpretation

First of all, from the literal point of view, "the same" is different from "similar", "Word Ocean" interprets "the same" as consistent with each other, no difference. It is a clear and absolute concept. The interpretation of "similar" is roughly similar, which is a vague and lingering concept. Therefore, similar products are more likely to cause controversy than the same goods.

Secondly, judging from the provisions of the law, Article 56 of the Trademark Law of China sets the exclusive authority of the registered trademark on the approved registered classification of goods. This makes people think that the legal default "Differentiation Table" is the only basis for judging the same goods, that is, In the Distinction Table, the same is true if the two items are classified as the same category. Some scholars have adopted a positive attitude based on the distinction table. They believe that because the commodity belongs to the classification table, which category has objectivity, the court does not give the same commodity for explanation. In practice, it is necessary to use the distinction table as the basis for identification⁶⁸. In addition, the Trademark Law of 2001 does not stipulate that when goods and trademarks are the same, they are directly recognized as infringement, but in the Trademark Law, the same and similar goods are unified into one regulation. Even though the Trademark Law of 2013 refines the original fifty-two items into two identical rules, which are double identical and non-double identical, the previous provisions are still continued in the legal provisions of Article 13 trademark authorization. Therefore, this view does not consider it necessary to make further judgments on the same goods.

Furthermore, whether the goods are the same or not is not a completely separate concept, but a closely related concept, even as the most severe legal criminal law, it is not radically different to judge the same and similarity for the objective factors of the trademark law. The only difference is that the final standard for the same goods in the criminal law is "the goods that the public generally thinks the same thing", and the final standard of the trademark law for similar goods is "the relevant public believes that there is a specific connection.". On the other hand, the first paragraph of Article 67 of the "Trademark Law" of China may constitute a crime if it is the same. Therefore, the

68 See reference 17

law-makers in China do not think it necessary to explain the same goods in detail, but by default they can refer to similar commodities or the standards of criminal law.

6.2 shortage of existing rules in China

Although based on the above reasons, China's legal framework and regulations have certain rationality, but there are still some shortcomings. Specifically, the author summarizes it in the following four aspects:

Firstly, similar goods and confusion. In the existing regulations, the judicial interpretation stipulates that confusion is the criterion of judging similar goods, and confusion is also the standard for judge whether the trademark is infringed or not. Therefore, from the perspective of the existing legal provisions, there is a contradiction between the similar commodities and the logic of confusion.

Secondly, it is confused to rank the similar goods and relevant goods. The judicial interpretation of China's trademark law interprets similar commodities as commodities with the same objective factors or certain connection. However, in practice, each objective factor is usually used to explain goods with connection, and the goods with certain connection are also replaced to similar goods by judges. In the relevant cases, the following logic exists: 1. Some objective factors are the same or there are related items that have certain relevance → there are certain related products, certain related products + popularity + trademark significance, etc. → Similar trademarks on the same or similar goods. 2, the objective factors are the same or there are related + goods have a certain relevance + popularity and other factors → confusion (constituting the same or similar goods on the trademark) 3, the objective factors are the same or have a certain relevance → there are certain related goods (equivalent For the same or similar goods). In the first case, there are certain related commodities located on each objective factor, similar to the commodity level; in the second case, there are certain related commodities and the objective factors of the commodity belong to the same rank; in the third case, there are Certain related products belong to the same rank as similar products.

Thirdly, subjective and objective standards for identical and similar commodities are still controversial. Subjective and objective standards have always been disputes in the theoretical circle. Especially after the regulation of confusion in 2013 trademark law, the objective standards of trademarks has gradually increased. But most scholars are still standing in the subjective standard camp. In particular, the current trademark law regards provisions of confusion as the terminal decision of infringement, but the trademark authorization clause is still consistent with the old law. It is believed that the legislator still wants to consider the subjective factors into the judgment process of

similar commodities. In addition, there are also inconsistencies in the subjective and objective criteria given by different judicial interpretations.

Fourthly, the same goods have not received the corresponding attention. Although according to the above analysis, there is a certain rationality in the interpretation of the same commodity in the current legal framework of China, generally, if all kinds of commodities are uniformly identified as the same or similar, there will be very few unfairness. However, in a case where the trademark has not been revoked for three years, the same product and similar products will result in completely different judgments. In addition, Article 67 of the Trademark Law stipulates that if it double same, under serious circumstances, the action of infringement could constitute crime. Therefore, it is still necessary to further explain the identification of the same goods.

6.3 Improvement of the current rules for similar commodities in China

6.3.1 objective criteria

6.3.1.1 The similar commodities should be judged in substance, and the "Differentiation Table" can be used as a reference.

The "Differentiation Table" is a classification of commodities that is based on the international classification of the Nice Agreement and based on the actual conditions of China's commodity market. The table itself has certain scientific nature and is formulated based on comprehensive analysis of the use, function, sales channels and sources of the goods. Therefore, it is reasonable to judge whether two products are the same or similar according to the table.

However, the commodities in the economic market are not static. With the development of the social economy, new products are emerging. Thirty years ago, the BB machine was still a new thing. Now the BB machine has already withdrawn from the market, and the mobile phone has become a daily communication instead of the BB machine. Therefore, if you simply judge based on the distinction table, it is not enough to make a correct decision. On the other hand, in trademark infringement cases, most infringing goods have no valid registered trademarks, so it is even less likely to compare them with their registered trademarks and reference trademarks. Therefore, the identification of the same and similar goods, the "differentiation table" is not sufficient as the standard of recognition. Moreover, under certain special circumstances, the "Differentiation Table" itself has certain errors. For example, the EU Trademark

Guidelines have pointed out that the "Classification Table" separately stipulates pharmaceutical preparations under two different categories, but these two medical preparations have nothing difference, which is caused by the error in the classification table itself.

Therefore, the author believes that the identification of the similar goods can be referred to but not limited to the "Differentiation Table". On the basis of the "Differentiation Table", compare the characteristics of the two commodities in terms of function, use, consumption objects, sales channels, etc. If the relationship between the two commodities is inseparable, it is considered to be the same commodity, if the two commodities are basically the same or have Larger associations (do not compare every point, but detailly analyze according to specific cases), then directly judged to be similar, if there is no connection, then judged to be dissimilar, if the objective factors have a certain degree of relevance, but the degree of relevance If it is not so strong, it should not be overly concerned with the judgment of similar commodities. Instead, it should be combined with factors such as trademark factors, commodity popularity, and the purpose of subject to determine whether the final confusion will occur. If it is confusing, the judgment of the premise on similar goods is satisfied.

In summary, the role of the "Differentiation Table" here is only a reference. The basic criteria for similar commodities should still be analyzed from the objective factors of the functions and uses, and then comprehensive judgments should be made.

6.3.1.2 The criteria for the same commodity shall be stricter than similar commodities.

From the literal meaning of the same and similar goods, similar goods are a concept with a certain scope. As mentioned above, the United States does not directly stipulate whether the goods constitute a similarity, but stipulates the degree of similarity between the goods, and, like the EU, In the trademark review guide, similar products are divided into three different levels: highly similar, similar, and low similar. The same product is a relatively absolute concept. If the two commodities are only identical in some respects, they will not be considered to constitute the same commodity, but merely constitute similar commodities. For example, the fruit drink and the milk are basically the same in the object of consumption, the sales channel, and the use, the judge does not recognize it as the same product, but merely refers to it as a similar product⁶⁹.

In addition, according to the provisions of Article 67 of the Trademark Law, when the composition of goods is the same, it may also violate the crime of "counterfeiting registered trademarks" in the Criminal Law. Therefore, the identification of the same

goods cannot be given a relatively broad interpretation like similar goods. A relatively strict explanation should be given.

According to the relevant judicial provisions of the Criminal Law, the provisions of the same commodity⁷⁰ in the “crime of counterfeiting registered commodities”⁷¹. Relevant scholars believe that in the case of the same commodity factors such as function and use, the Criminal Law will identify two commodities as the same commodity, while the trademark law only identifies it as a similar commodity, which leads to the identification of similar commodities in the civil law. More stringent than the same commodity in the criminal law⁷². The author believes that this understanding is not appropriate. First of all, although there is no clear stipulation in the law, in the cases related to trademark law, judges do not need to consider all objective factors when determining similar goods. Usually only three to four factors are considered, and even individual cases only consider one objective factor. However, the criminal law has different requirements for the identification of the same commodity, and all of its objective requirements must be basically the same to be recognized as the same commodity. In addition, as a scholar puts it⁷³, the interpretation clause in the criminal law has a suffix, that is, “the commodity that the public generally thinks is the same thing.” Unlike the criminal law, the suffix of the similar provisions in the civil law is “the relevant public believes that there is a specific connection. ”. The requirement that the relevant public considers the goods same is far higher than the goods relevant.

Although some scholars believe that criminal law is the most stringent law, the rules and standards for the identification of "the same commodity" must be stricter than civil law. For this view, the author believes that the strictness of criminal law is not reflected in the definition of "same commodity", but in the control of the degree of infringement. According to Article 213 of the Criminal Law, the use of the same

70 According to Article 5 of the Opinions on Several Issues Concerning the Application of Laws in Handling Criminal Cases of Infringement of Intellectual Property Rights, goods with the same name and goods with different names but referring to the same thing may be regarded as “the same commodity”. Commodities with different names but referring to the same thing refer to goods that are the same or substantially the same in terms of functions, uses, main raw materials, consumption objects, sales channels, etc., and the relevant public generally considers the goods of the same kind.

71 According to Article 213 of the Criminal Law of the People’s Republic of China, the crime of counterfeiting a registered trademark refers to a violation of the national trademark management regulations. Without the permission of the registered trademark owner, the same trademark as the registered trademark is used on the same commodity. Serious behavior.

72 See reference 18

73 Chen Shenglan, Zhou Linbin. Judicial Determination of “One Goods or Services” in Trademark Law[J]. Southeast Academic, 2016(6): 153-159.

trademark on the same commodity alone is not sufficient to constitute a crime, and only in the case of such a serious act can it constitute a crime. Moreover, according to the severity of the infringement, different sentencing standards are given. Therefore, the author believes that criminal law is no different from civil law or administrative law in determining the "same commodity."

In summary, the requirements for the identification of the same product are stricter than similar products, and the strictness is reflected in the fact that the objective factors such as function, use, etc. are all the same or substantially the same, and can be recognized as the same product.

6.3.2 Theoretical analysis of the identification criteria for similar commodities

6.3.2.1 Analysis of the subject on similar commodities

The relevant public is a fictional concept set to achieve the relative objectivity of judicial judgment. Due to the effectiveness of the buying and selling behavior, groups such as the relevant public do not actually exist in the judge judgment process. In order to avoid the judge's arbitrariness, such a group is legally fabricated to promote the fair judgment of the case.

The relevant public is different from the judicial workers. Most of them are in a basic and vague state of knowledge. When they buy the same goods, they will not know the existence of the "similar goods and services distinction table", and it is impossible. Two items are placed in this table to compare them to the same or similar. They are more likely to rely on their buying experience to complete the purchase behavior with a subjective perceptual knowledge. For example, pineapple (Boluo) and pineapple (Fengli), Tangyuan and Yuanxiao were once mistaken for different kinds of commodities. However, the relevant public is not a completely emotional group. They have logical thinking ability. If they slightly discriminate and strengthen their purchasing obligations during the purchase process, the above goods will not be judged wrong.

In the case of the above-mentioned glasses and glasses frames, from the perceptual point of view, the relevant public believes that there is an inseparable relationship between the glasses and the glasses frames based on their experience in life practice. The use of the trademark by the trademark owner on the glasses frame is equivalent to that on the glasses. Through rational analysis, glasses frames are an important part of glasses, without glasses frames, glasses could not be called glasses, so from an objective point of view, the two have a certain degree of overlap in all aspects. Therefore, in this case, the judge held that the relevant public would consider the two to be inextricably

linked, and thus identified them as basically the same goods. On the surface, the relevant public is judged by their perceptual cognition, but in reality there is a certain degree of objective judgment in the subconscious, and only when the two goods are inextricably linked, they will identify them as the same goods. If the items in the above case are glasses cases and glasses, they will not think that there is a close relationship between the two, nor will they consider the two to be the same or basically the same. The process of understanding similar products is more lenient than the same goods, and it is a flexible space for the relevant public. Therefore, in practice, when similar goods are identified with certain difficulty, judicial workers tend to concentrate on Confusing judgments, when the relevant public believes that the two commodities will be confused, the preconditions for similar commodities are met. Therefore, for the relevant public with the duty of care, the criteria for the identification of similar goods are lower than the same goods.

6.3.2.2 Analysis of the relationship between similar goods and confusion

Prior to the revision of the Trademark Law in 13 years, no matter the Trademark Law of 1984 or the Trademark Law of 2001, the legal provisions of trademark infringement and trademark authorization were the same or similar to those of others on the same commodity or similar goods. But at that time, the law-making authorities had realized that confusion was the ultimate criterion for judgment. However, based on the maintenance of the stability of the Trademark Law, the legislature cannot add additional elements of confusion in the established legal provisions. Therefore, as a compromise, in the judicial interpretation of 2002, confusion was used to explain similar commodities. This interpretation is a last resort. Therefore, before the revision of the Trademark Law in 2013, similar goods carried many responsibilities that should not be borne by them. In addition, in Taiwan Province of China and the EU Trademark Law, the identification of similar goods is an objective standard.

After the 2013 revision of the Trademark Law, although the trademark authorization clause is consistent with the 2001 Trademark Law, the trademark infringement clause splits the original legal provisions into two. Under the condition that the commodity trademarks are the same, it is not necessary to judge whether it will be confused or not. If the commodity trademarks are not completely consistent, the similarity of the commodities and the approximation of the trademarks are changed from the final criteria of the original judgment to the preconditions, and the confusion becomes a new criterion. Therefore, under this condition, the subjectively strong factors such as the popularity of the trademark and the distinctiveness of the trademark should not be considered in the premise judgment. Instead, after analyzing the same or similar commodities, they should be combined with other factors to determine whether they will confuse.

In addition, although the trademark licensing terms have not changed accordingly, in practice, the final criteria for judges in handling trademark registration, trademark opposition, and trademark invalidation cases are confusing. As for why the trademark licensing terms have not changed? The author understands that since the judicial interpretation in 2002 has not been abolished, the judgment of similar commodities in judicial interpretation is still a standard of confusion. Therefore, if the terms of the license and the infringement clause add the final confounding factor, it will inevitably lead to a circular argument. Therefore, it is a compromise to the corresponding judicial interpretation and belongs to a transitional policy of legal change. However, the actual judgment is no different from the infringement clause. All are based on confusion as the final criterion.

In summary, the basic logic for the judgment of confusion is: firstly, according to objective factors, it is determined to be the same or similar commodities, and then combined with other factors to determine whether the relevant public will be confused.

6.3.2.2 Analysis of the relationship between similar commodities and related commodities

The "Trademark Review and Trial Standards" interprets similar commodities as "products with the same objective or similar relevance, such as function and purpose." The Interpretation of Certain Issues Concerning the Application of Law in the Trial of Trademarks in Civil Dispute Cases interprets similar commodities as "commodities that are generally considered to be in a particular connection by the public and are prone to confusion". The Opinions of the State Administration for Industry and Commerce on Certain Issues in the Administrative Law Enforcement of Trademarks interprets similar commodities as "products, uses, etc., or products with specific links". Only from judicial interpretation, it is difficult to see the hierarchical relationship between goods and similar commodities that have a certain connection.

In practice, there are three types of products with certain related products and similar products: Firstly, there are certain related products located on various objective factors, similar to the commodity level; Secondly, a certain relationship goods and objective factors belong to the same rank; thirdly, certain related commodities and similar commodities belong to the same rank. The author recognizes the first point of view. The inadequacy of the second view is whether the product has a certain degree of relevance. It is not made out of innocence, It is a comprehensive judgment that requires objective elements and other factors to be combined. Therefore, it is inappropriate that the objective elements and relevance are in the same order. In addition, in the case of the Supreme Court's Guided Case Woodpecker, the judge stated in the judgment that there should be no additional criteria for judging under the current judicial system, that is, related goods cannot be equated with similar commodities, therefore, the third viewpoint Not appropriate.

In practice, if there is an inseparable correlation between the two commodities, the two goods are same; if there is a strong correlation between the two commodities, it will be considered similar; if the two commodities are completely unrelated, it is not similar. The same and similar identification of goods is not a non-binary proposition, but a degree problem. The related goods here are used to explain the degree of similarity of goods to a certain extent. When the similarity of the two commodities is not so high, However, when it is not completely different, in order to avoid the occurrence of wrongful cases, the logic of the judge usually firstly identifies the goods with less similar degree as commodities with a certain degree of relevance, and then judges whether it will be confused when they are combined with trademark factors and product popularity. If confusion occurs, it is reversed, and the products are similar.

In summary, the use of objective criteria to identify the same and similar commodities not only avoids the problem of circular argumentation, but also makes the judges clearer in practice and more convenient in judging methods. In addition, to a certain extent, it avoids the discretion of judges for Any expansion.

6.3.3 Improvement of legal provisions and judicial interpretations of similar commodities

In summary, the author suggests to make the following adjustments to laws and regulations and judicial interpretation:

1. Delete the confusion in the "Interpretation of Several Issues Concerning the Application of Laws in the Trial of Trademarks in Civil Disputes" and change it into "similar goods as stipulated in the Trademark Law refers to functions, uses, production departments, sales channels, and consumption objects, etc. are same , or the relevant public generally believes that there is a specific connection to the goods."

2. Increase the interpretation of the same goods:

"The same commodity refers to the same or substantially same in terms of functions, uses, consumption objects, sales channels, sales places, consumer groups, etc., and the relevant public generally considers the same thing.

The same commodity includes items with the same name and items with different names but the actual same. ”

The identification of the same goods shall be judged according to the actual market conditions. "

3. Adding confusion to the trademark authorization clause of Article 30 of the Trademark Law in PRC:

"A trademark applied for registration shall be rejected by the Trademark Office if it does not comply with the relevant provisions of this Law or is the same as the

registered trademark of another person on the same commodity, or is the same as or similar to the registered trademark on the same or similar goods. No announcement will be made."

4. Add an explanation of certain connected goods in the judicial interpretation:

"A commodity with a certain connection in judicial interpretation means that the relevant public will misidentify the existence of licenses, cooperation, parent-subsidary companies, or affiliated companies under the control of the same enterprise. The above relationship will make the relevant public think that The goods of the infringed person are protected by the subject trusted by the customers"

6.3.4 Improvement of the identification of similar commodities in practice

6.3.4.1 Pay attention to the analysis of the relevant public

Although the trademark law emphasizes the analysis based on the position of the relevant public, whether it is on the same commodity or similar commodities, there are very few judges who can truly analyze the relevant public positions in the face of specific cases. Therefore, in practice, judges need to pay more attention to the relevant public.

In addition, judges need to recognize that the relevant public is not only consumers (including potential consumers), but also users and other operators who are closely related to goods or services. Secondly, the relevant public is not a blind and ignorant person, but a public with reasonable care obligations; finally, it must also pay attention to the level of public attention and cognitive ability of the relevant industry.

6.3.4.2 The positive method is adopted for the identification of the same goods, and the positive and negative push methods can be used for the identification of similar goods.

As already analyzed above, the same commodity cannot be given a broad interpretation. Therefore, only when the objective factors such as functions and uses are all considered to be the same or substantially the same, can they be judged to be the same product.

However, for similar commodities, if the objective factors are similar to each other, they can be directly identified as similar. If the degree of similarity between commodities is not so high from the perspective of objective factors, then there is no need to entangle in the judgment on the preconditions. However, it should be combined with other factors such as trademark factors and popularity to judge whether confusion will occur. If confusion occurs, then the similar preconditions for the goods are reversed.

6.3.4.3 The court needs to strengthen the reasoning in the judgment process

When the court makes a statement, it usually does not specifically analyze each objective factors, but simply lists the law. This is a bad practice, especially when the court disagrees with the TRAB, or when the opinions of the lower and lower courts are inconsistent, If it is simply to deny the previous judgment or ruling without specific reasoning, it is inevitable that it is difficult to convince the public, so in practice the court still needs to strengthen reasoning.

