

Allocation of New Goodwill After Termination of the Trademark Licensing Contract

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doi:10.56397/SLJ.2024.12.03

Abstract

The allocation of new goodwill between licensor and licensee after termination of the trademark licensing contract is an increasingly important and highly controversial issue in theory and practice in trademark licensing. The new goodwill is a special intangible property, which is a prerequisite for allocating the new goodwill. Based on Locke's Labor Theory of Property and the principle of balance of interests, the allocation of new goodwill can be theoretically justified. Considering the separability of goodwill from trademarks and the valuability of goodwill, it is feasible to allocate new goodwill in practice. How do we allocate the newly generated goodwill? There are no express stipulations in-laws. Firstly, this article suggests that the allocation of new goodwill shall only be considered when the following three conditions are met: (1) there is no agreement between the parties on the ownership of the new goodwill or such agreement is unclear; (2) the licensee has contributed to the new goodwill; and (3) the new goodwill is significantly value-added. Secondly, based on contribution, we should consider various factors such as the degree of quality control, type of license and duration of license as the allocation standard of new goodwill. Finally, in actual operations, we need to make corresponding judgments based on different situations.

Keywords: new goodwill, termination of trademark licensing contract, allocation of new goodwill, licensee

1. Introduction

With the rapid development of the economy and trade, intellectual property licensing has become more prevalent, especially trademark licensing which is closely related to trade. According to statistics, a total of 39,906 trademark licensing contracts were registered in China in the first

three quarters of 2022. ¹During the entire term of the trademark licensing, the use of trademarks and the gain and loss of goodwill continue, and the disputes and academic discussions caused thereby continue.

¹ See Trademark Search Software, IPRdaily. (2022). China Trademark Big Data Report for the First Three Quarters of 2022! published in WeChat Public "IPRdaily", <https://mp.weixin.qq.com/s/E1fzA1EWWuUXFGmcNVF6TA>, last accessed on January 5, 2024.

Goodwill is the object of trademark rights¹, while the trademark sign is the carrier of goodwill. The two are not the same thing. In the absence of a license, the trademark owner puts the self-registered trademark into use, and the owner of the trademark and the contributor of goodwill are the same entity. In this case, goodwill is attached to the trademark signs. Hence, protecting the trademark right amounts to protecting goodwill. There is no need to consider the issue of protecting trademark rights and goodwill separately. However, with the emergence and popularity of trademark licensing, trademark owners and operators are separated, which means that trademark owners are not the contributors of goodwill. Under such circumstances, mere protection of the trademark rights will not protect the contributors of goodwill, which leads to disputes between the two parties among trademark licensing over the distribution of the new goodwill generated during the licensing period after the termination of the trademark licensing contract. Wanglaoji v. Jiaduobao for Dispute over Packaging or Decoration Peculiar to Famous Goods case is a typical example of such disputes. In such cases, the trademark licensors don't make any prior agreement regarding the creation of additional goodwill in the use of the trademarks during the license term with the licensees. In addition, China's current trademark legal system lacks provisions on the legal attributes of goodwill and the distribution of new goodwill created during the trademark licensing period. As a result, the courts have no legal basis to follow when resolving the aforementioned dispute. Even though the case has been resolved, the dispute continues. Scholars also have different views on such issues.

With the opening-up of China's economic market, the scope of trademark licensing will become wider and wider, and more trademark licensors and licensees will be involved in the allocation of new goodwill after the termination of the trademark licensing contract. Therefore, whether it is reasonable to allocate new goodwill and how to allocate it are issues that need to be resolved urgently.

2. Reasonable Basis for Allocation of New Goodwill

2.1 The Legal Attributes of New Goodwill

¹ Wang Qian. (2021). *Intellectual Property Textbook (7th Edition)*. China Renmin University Press, 5.

The discussion on the legal attributes of new goodwill is the premise for solving the allocation of new goodwill. If the new goodwill is not legally protectable, then the allocation of new goodwill is a pseudo-proposition.

There is no concept of new goodwill in Chinese law. This concept is merely a temporal division of goodwill, as opposed to the goodwill before granting others a license to use the trademark. Therefore, the discussion on the legal attributes of new goodwill is still a discussion on the legal attributes of goodwill. There is no unified definition of the concept of goodwill in domestic and foreign academic and theoretical circles.

Common law jurisprudence defines "goodwill" as "the expectancy of continued patronage" by consumers². Chinese academic circles define it as a positive social evaluation — "the positive evaluation made by consumers on a certain trademark, product or service",³ "the positive evaluation obtained by the civil subject in the society due to its economic ability in production and operation activities".⁴

China's trademark law system also lacks provisions on the legal attributes of goodwill, so there are different views on this issue. Some people believe that goodwill is a personality right. This is divided into (1) the single personality right theory, which holds that goodwill is part of reputation and is inseparable from the subject⁵; (2) the special personality right theory, which holds that the object of goodwill includes spiritual interests and property interests, but property interests are included in commercial interests⁶. Some scholars argue that goodwill is both a personality right and an intellectual property right. Other scholars believe that goodwill is an intellectual property right like patent, trademark and copyright. In this paper, goodwill is a kind of intangible special property, which is different from patent, trademark and copyright, and is an independent civil right with personality rights and property rights.

First, goodwill is a special intangible property.

² Newark Morning Ledger Co. v. United States, 507 U.S. 546(1993).

³ Li Mingde. (2007). *Intellectual Property Law*. Social Science Academic Press, 313.

⁴ Wu Handong. (2013). *Research on Basic Issues of Intangible Property Rights*. China Renmin University Press, 450.

⁵ See Sha Jin. (2010). On the Protection of Goodwill Rights under Tort Law. Jilin University, 25.

⁶ *Id.*, para 26.

Both the single personality right theory and the special personality right theory ignore the property characteristics of goodwill. A foreign lawyer compares goodwill to the momentum of a car. If the car (enterprise) is turned off (tangible assets are lost), the car can still move forward a certain distance with momentum, and this distance is the real value of goodwill.¹ This metaphor can be understood as goodwill is an intangible property that can be separated from the tangible property of the enterprise. In domestic practice, goodwill has been recognized as an intangible property.²

Secondly, goodwill is continuous and cumulative. Goodwill, as a kind of consumer cognition and evaluation, is not formed overnight. It requires long-term business activities, such as advertising, sales, etc., and gradually evolves and accumulates in this process. Once formed, goodwill exists with the business entity. If it hopes to develop continuously in the market where the strong survive, the business entity needs to continuously invest manpower, energy, and financial resources. Through improving the quality of products or services, advertising, and other activities, goodwill can vary with the changes in business results.

Finally, goodwill has a certain objectivity. Goodwill is the specific information that consumers use to evaluate commercial entities and is a product of comprehensive evaluation. On one hand, goodwill is not subject to the subjective will of commercial entities. Enterprises cannot control the formation and change of goodwill through commercial activities and advertising. They can only influence consumers' mental state and cognition through these activities. Hence, consumers' evaluation of commercial entities is not controlled by the subjective will of commercial entities. On the other hand, although goodwill is not controlled by commercial entities, it should still follow certain standards.

2.2 Legitimacy of Allocation of New Goodwill

As mentioned above, the new goodwill is an intangible property with economic benefits worthy of legal protection, which is the premise and basis for discussing the issue of the

distribution of new goodwill. After solving the issue of the protectability of new goodwill, we can discuss whether the valuable new goodwill should be allocated between the two parties involved in the trademark licensing contract in some way or according to some rules.

2.2.1 Locke's Labor Theory of Property

The first basis for the allocation of new goodwill is Locke's Labor Theory of Property. The classic statement of Locke's Labor Theory of Property is: "Land and all lower animals are common to all men, but everyone has a kind of ownership of his own person, which no one else has. The labor of his body and the work of his hands, we can say, belong to him properly, so as long as he takes anything out of the state that nature provides and that thing is in, he has mixed his labor into it, and added something of his own to it, thus making it his property. Since it is he who takes this thing out of the general state that nature has arranged for it, then his labor has added something to it, thereby excluding the common rights of others."³ In short, everyone is the owner of himself and his own labor, and the things that participate in his labor can legitimately become his private property, but it needs to be under two premises: one is that there are enough equally good things left for others to share in common⁴; the other is that the amount of private property should not exceed the scope required for human labor and life.⁵

Although Locke's Labor Theory of Property solves the legitimacy of tangible property such as land and all lower animals, the formation of this characteristic is based on the context in which the theory is formed. With the emergence of intangible property, the connotation and extension of things obtained through one's own labor have been greatly expanded. In the later period when intangible property rights represented by intellectual property rights are gradually improved, linking the concept of property with intellectual products can provide a basis for the legitimacy of intellectual property

¹ See Zheng Chengsi. (2003). *On Intellectual Property*. Law Press China, 394.

² See Liang Shangshang. (1993). On Goodwill and Goodwill Rights. *Chinese Journal of Law*, (5), 38-44.

³ [British] John Locke. (1964). *Two Treatises of Civil Government*, translated by Ye Qifang and Qu Junong, the Commercial Press, 19.

⁴ [British] John Locke. (1964). *Two Treatises of Civil Government*, translated by Ye Qifang and Qu Junong, the Commercial Press, 19.

⁵ [British] John Locke. (1964). *Two Treatises of Civil Government*, translated by Ye Qifang and Qu Junong, the Commercial Press, 23.

rights.¹ It can be seen that the scope of property covered by Locke's Labor Theory of Property has expanded from tangible property to intangible property, and will further expand with the changes of the times.

In trademark licensing, the licensee pays the licensor a license fee, which is a consideration for the labor that the licensor has put in attaching goodwill to the trademark before the license is granted. After the licensee has paid the license fee, the licensor and the licensee have theoretically reached a state of balance of interests. If, under normal circumstances, after the termination of the trademark licensing contract, the goodwill belongs to the trademark right holder along with the trademark, according to Locke's labor property theory, the premise must be that the goodwill before the termination of the licensing contract is entirely the result of the labor of the trademark right holder. However, in fact, before the termination of the licensing contract, the new goodwill is usually created by the licensee alone or by both the licensee and the licensor through commercial activities and advertising and other labor. According to Locke's Labor Theory of Property, the new goodwill should be distributed according to the actual labor added.

2.2.2 Principle of Balance of Interests

The second basis for allocating new goodwill is the theory of balance of interests. Balance of interests is the essential connotation of the value structure of the intellectual property system. A country's intellectual property system, from its legislative purpose to specific regulatory arrangements, maintains the necessary tension between monopoly interests and public interests. Specifically, it is an institutional arrangement for the state to balance the monopoly interests of intellectual property holders and the interest of the public's access to knowledge and information for the purpose of broadly promoting the rapid development of science and technology, culture and economy.

As an important part of intellectual property law, the Trademark Law also needs to be governed by the principle of balance of interests, from the legislative purpose to the specific institutional arrangements. In the field of trademark licensing, the balance of interests

mainly involves the coordination of interests between the two parties to the license. Specifically, the trademark licensor obtains license fees by conditionally transferring the right to use the trademark, and the licensee pays the license fee and takes advantage of the prior goodwill of the licensed trademark to quickly open up the market and make profits. In this case, both parties have achieved a state of interest balance.

In trademark licensing, it is reasonable for the relevant interests to fluctuate within a reasonable range to a certain extent, which can be tolerated by the trademark licensing system. However, once the relevant interests in trademark licensing exceed the tolerance contained in the system itself, the balance of interests between the two parties involved in the trademark license will also be broken. For example, in the trademark case between Provview Technology (Shenzhen) Co., Ltd. and Apple Inc., although the "iPad" trademark is under the name of Provview Technology (Shenzhen) in the mainland, its trademark value comes from the use of Apple, and it is Apple that created the added goodwill of the "iPad" trademark. For another example, in the trademark case between Guangzhou Pharmaceuticals Holdings, Ltd. (hereinafter referred to as "GP Holdings") and Guangdong Jiaduobao Drink & Food Co., Ltd. (hereinafter referred to as "JDB Company"), GP Holdings and its predecessor signed a series of trademark license agreements with the Hung To holdings, Ltd (hereinafter referred to as "HT holdings"), permitting the HT holdings to use the "王老吉" trademark, and JDB Company, a company invested and established by HT holdings, was granted a license to produce and sell Wanglaoji Red Can Herbal Tea accordingly. JDB Company has cultivated its brand and increased its market visibility through years of huge marketing expenses.² In both cases, the licensee has made a significant contribution to the increase of goodwill through long-term use of the trademark. In this event, if the new goodwill is not allocated, it will cause an imbalance of interests. In addition, the two parties to the trademark license are usually competitors within the scope of the dispute, and the imbalance of interests is further amplified. In order to correct the imbalance of interests, such

¹ Feng Xiaoqing. (2003). Research on the Theory of Labour in Intellectual Property. *Journal of Xiangtan University (Philosophy and Social Sciences)*, (27), 24-29.

² Civil Judgment of the Supreme People's Court (2015) Civil III Final No. 3.

gains and losses should be reasonably distributed according to certain rules, so as to achieve appropriate adjustments to the imbalance of interests.

2.3 Feasibility of Allocating New Goodwill

The legitimacy of the allocation of new goodwill is to solve the problem of whether the new goodwill should be allocated. And whether it can actually be reasonably allocated with certain theoretical support depends on the feasibility of the allocation of new goodwill. Since that the new goodwill can be separable from the trademark, and that the new goodwill has a certain degree of valuation, there is no obstacle to the allocation of new goodwill in reality.

2.3.1 Separability of Trademarks from Goodwill

As mentioned above, goodwill is a subjective evaluation of the consumer public on the operator and its products or services, which is sustainable and cumulative. When an enterprise continues to use a trademark in commercial activities and advertising, the positive evaluation of consumers will be attached to the trademark. As for the relationship between the trademark and goodwill, since goodwill is usually attached to the trademark, goodwill will appear with the trademark, and the two are closely related. However, it must be recognized that the trademark is only a carrier of goodwill, and the two are not inseparable.

First, trademarks that are not put into use do not have goodwill. Goodwill is the public evaluation of consumers, which is not formed overnight. It requires that during the use of the trademark, consumers form a certain cognitive network of relevant information about the goods or services. If it is not used for a sufficient period of time, it will not be enough to leave a perceptual impression in the minds of consumers, and consumers will not be able to accumulate sufficient consumption experience to establish effective cognition and expand this cognition to a wider range of consumers over time, sublimating from individual experience to public evaluation as goodwill. Therefore, unused trademarks do not have goodwill, which means that there is no natural connection between trademark signs and goodwill, and they are not naturally inseparable.

Secondly, goodwill is not only a carrier of trademarks, but can also be expressed in many other ways, such as product names, trade appearance, the form of the product itself or the

style of packaging, etc. Just like bottled water, the bottle is a common carrier that carries the content of water, but the bottle is not the only carrier. The water in the bottle can be poured into various other containers, such as teacups, bowls, etc. Professor McCarthy believes that goodwill and its trademark symbol are as inseparable as Siamese Twins who cannot be separated without death to both.¹ This view obviously ignores the relationship between trademarks and goodwill, which are carriers and contents. The two can be separated logically and can actually be controlled and used separately.

Finally, the goodwill carried by a trademark can be separated from a specific trademark and transferred to other commercial identifiers. Didi Global Inc. changed its own trademark from the original concrete taxi to a letter “D” with a missing corner, as shown in Figure 1. Logitech, a world-renowned mouse supplier, changed its trademark in July 2015, as shown in Figure 2, removing the original eyeball pattern and making the font more rounded. Yunda changed its visual design including the trademark, from the original transliteration Yunda to a graphic symbol of the word “Da”, and the original red to black, as shown in Figure 3.

To sum up, trademarks and goodwill are closely related, but the two can be relatively separated. Goodwill and the carrier to which it is attached are not naturally inseparable and can be transferred between the carrier media. Goodwill has independent value relative to trademarks.



Figure 1. Comparison of Didi's trademark changes

¹ J Thomas McCarthy. (2008). *McCarthy on Trademarks And Unfair Competition* (4th edition). Clark Boardman Callaghan, §18, 2.



Figure 2. Comparison of Logitech's trademark changes



Figure 3. Comparison of Yunda's trademark changes

2.3.2 Valuability of New Goodwill

As for the evaluation of goodwill, a relatively mature evaluation system has been formed internationally, with well-known evaluation companies. Although the evaluation of goodwill in China started late, it has received much attention over the years, and many specialized goodwill evaluation institutions have been formed in the market. In order to guide the evaluation of goodwill in China, the China Appraisal Society formulated the "Guiding Opinions on Trademark Asset Evaluation" in 2011 and revised it in 2017. Article 23 of the opinion stipulates that the evaluation methods of trademark value mainly include the specific evaluation of goodwill appreciation, and the traditional valuation methods such as market price method, cost method, income method and its derivative methods. The valuation of trademark appreciation can provide a value reference for the formulation of a reasonable distribution plan for the added value of trademark licensing. In short, the evaluation of trademark goodwill is increasingly valued by enterprises and the market, and there are many goodwill evaluation methods at present.

3. An Analysis of the Path of Allocating New Goodwill

China's laws do not clearly stipulate the rules for the distribution of new goodwill created during

the trademark licensing process. This article intends to draw on some existing ideas to a certain extent and try to establish China's new goodwill allocation system.

3.1 Conditions for Allocating New Goodwill

3.1.1 No Agreement Between Licensors and Licensees

Article 5 of the Civil Code stipulates that the parties to civil legal relations shall conduct civil activities under the principle of free will, and create, modify, or terminate civil legal relations according to their own wills. The issue of new goodwill arises with trademark licensing contracts. Contracts are based on the principle of autonomy of will. And the ownership of goodwill only involves the private interests of the two parties. Therefore, without violating legal norms and principles, the ownership of new goodwill should fully rely on the autonomy of the two parties and the freedom to dispose of their own rights and interests. Specifically, if the two parties have provisions on the ownership of new goodwill after the termination of the trademark licensing contract, whether it is clarified in the licensing contract in advance or stipulated in the form of a supplementary agreement during the process, the disposal of their own interests should be respected. Only when the parties have no agreement or the agreement is unclear on the ownership of new goodwill, the allocation of interests between the parties will be adjusted fairly and reasonably according to the rules for the allocation of the benefits of new goodwill.

At present, the parties have a weak awareness of the pre-allocation of the new goodwill in trademark licensing and lack the foresight of the huge goodwill appreciation in the trademark licensing contract. This is also the main reason for the dispute between the two parties over the division of the new goodwill after the termination of the trademark licensing contract. In the context of the increasing prevalence of trademark licensing in the future, the ownership of the new goodwill after the termination of the trademark licensing contract is also a major issue that cannot be ignored. Especially in the absence of clear regulations on this issue in China, enterprises should be aware of it and clarify the ownership of the new benefits, so as to avoid huge disputes after the termination of the licensing contract and embark on a decades-long litigation, which is an

uneconomical behavior for both parties.

3.1.2 The Licensee Is a Contributor to the Creation of New Goodwill

According to the aforementioned Locke's Labor Theory of Property, one of the conditions for the allocation of new goodwill should be the licensee's "labor" or contribution to the new goodwill. In other words, all or part of the new goodwill is the result of the licensee's use of the trademark through commercial activities and advertising activities that affect the consumer public's perception of business activities and its products and services. Therefore, it is in whole or in part, that the licensee has a legitimate claim. If the licensee does not contribute to the increase in goodwill, there is no basis for the right to request allocation of new goodwill. Therefore, if a dispute arises over the attribution of new goodwill, according to the principle of who advocates who presents evidence, the licensee should provide evidence of the increase in goodwill due to its long-term investment during the period of licensed use of the trademark, in order to claim the allocation of the new goodwill.

3.1.3 New Goodwill Is Significantly Accretive

As mentioned above, another legitimate basis for the allocation of new goodwill is that the new goodwill is a significant increase in value and is an increase in interests that exceeds the reasonable limits tolerated by the trademark licensing system, thus leading to a huge imbalance of interests. Goodwill will increase or decrease to a certain extent during the licensing process, which is a general commercial risk. Both parties should be able to foresee it when entering into the licensing contract, so the issue of allocation of new goodwill will not naturally arise. Only when the new goodwill is a significant increase in value and exceeds the reasonable limit tolerated by the trademark licensing system, the issue of the allocation of the new goodwill will arise. The reason is that under the circumstance that the goodwill floats within the reasonable range of the trademark licensing system, when the licensor takes back the use of the trademark, it will not break the balance of interests of paying the license fee as consideration for borrowing the licensor's original goodwill. However, in the context where the goodwill clearly exceeds the tolerance range of the trademark licensing system itself, when the goodwill is transferred back to the

licensor along with the trademark right after the termination of the licensing contract, the long-term investment of the licensee is not proportional to the final results of the income, which gives rise to the imbalance of interests. Therefore, according to the balance of interests theory, the allocation of new goodwill will only occur when the new goodwill is a significant increase in value.

In a nutshell, the allocation of new goodwill shall only be considered when the following three elements are satisfied: (1) there is no agreement between the parties on the ownership of the new goodwill or such agreement is unclear; (2) the licensee has contributed to the new goodwill, and (3) the new goodwill is significantly value-added. First, the attribution of the increased value of goodwill generated by trademark licensing shall be subject to an agreement between the two parties. Second, if the parties have not agreed upon the attribution of the increased goodwill in the trademark license agreement or the agreement is unclear as to the attribution of the increased goodwill, and the goodwill increases significantly during the trademark licensing period, which is substantially contributed by the licensee, it shall be allocated according to certain standards in accordance with the principle of fairness.

3.2 Criteria for New Goodwill Allocation

There are two ways to allocate new goodwill overseas. First, Japanese judicial practice has established the "contribution principle" through the GOLD Glitter car wax case¹, the gummed paper case² and the Azare case³. In the Azare case, due to business philosophy and conflicting interests, the Azalea Group split into plaintiff and defendant. Both parties used the original "AZARE" trademark to sell their products in different fields, and thus filed a lawsuit. The Tokyo High Court held that both the plaintiff and the defendant, as core enterprises of the group, had contributed to the fame of the mark in question and were the subjects of the goodwill embodied in the well-known mark. Even if the group splits, the goodwill attributed to each entity on these marks still exists, and each entity can be the subject of the commercial

¹ See Osaka District Judgement, 平 19 (ワ) 11489.

² See Tokyo District Court, 平 21 (ワ) 16809, 樹液シート事件.

³ See Tokyo High Court, 平 16 (ネ) 2000, アザレ事件・控訴審.

mark. The second is the quality control standard in the United States. In *the Distillerie Flli Ramazzotti, SPA v. Banfi Products Corp.* case¹, the judge held that during the performance of the contract, the trademark licensor conducted quality control of the goods in accordance with the law and the contract agreement, which was the prerequisite for the licensor to obtain the product design, even if it did not participate in the sales behavior. In the case of *Pilot Corp. of America v. Fisher-Price, Inc.*², since there was no evidence to prove that the plaintiff conducted “quality control” on the trademark during the license period, it was ultimately determined that the licensee enjoyed the rights to the product appearance.

The quality control principle in the United States urges the licensor to participate in the minimum substantive control, which can avoid the situation where the licensor is worried that the licensee will lose the right to create significant goodwill appreciation and eventually not license. However, it ignores the problem of the distribution of excess profits of the licensee who has made great contributions to the new goodwill, which is obviously unfair to the licensee. Japan’s “contribution principle” uses the contribution degree as the distribution standard for the new goodwill, which is in line with the aforementioned Locke’s Labor Theory of Property and reasonably distributes the excess profits between the two parties. When exploring its own new goodwill distributing standards, my country can also use the contribution degree as the standard for allocating new goodwill. However, since the factors included in goodwill are complex and the “contribution degree” is difficult to accurately grasp, the “contribution degree” cannot be used as the only allocation standard but can be taken into account simultaneously with other factors, such as the degree of quality control and the type of licensed use.

The degree of quality control is an important consideration because the evaluation of the quality of goods or services by consumers is an important part of goodwill. The licensor, through its control of the quality of goods or services, affects the corresponding evaluation of the goods or services by consumers to a certain

extent, which also affects the new goodwill. When calculating the “contribution” of the licensee to the newly added goodwill, the part of the goodwill appreciation caused by the licensor through quality control during the period of trademark license should be excluded.

The type of license is also a consideration, because it is difficult for the licensee to make a difference in the degree of contribution and the evidence for different types of licenses. In an exclusive license, only the trademark licensee uses the trademark, so the new goodwill during the license period is of course attributed to the licensee’s contribution. In a sole license, the licensee is not the only trademark user, and the new goodwill of the trademark during the license period is not entirely attributed to the licensee alone. In a simple license, there are more trademark users, and it is more difficult to distinguish who contributed to the new goodwill during the trademark use period, and it is more difficult to prove it.

In addition to the above factors, there are other factors that can be used for reference, such as the length of the license. Since goodwill is continuous and cumulative, the longer the license is used, the higher the contribution of the licensee. There are also factors such as market share, popularity and so on.

3.3 New Goodwill Allocation Operation

The above has discussed the standard for allocating new goodwill, taking “contribution” as the basic standard and comprehensively considering factors such as the degree of quality control and the type of licensed use. How to reasonably operate in different situations is what needs to be demonstrated next.

3.3.1 The Contribution of the Licensee Is Much Greater than that of the Licensor

When the contribution of the licensee is far greater than that of the licensor, the licensee should be allowed to transfer the newly added portion of goodwill with significant value when he requests it. However, it should be noted that the way and amount of goodwill transfer also need to be carried out under the principle of interest balance and fairness. The way of transfer should be in line with objective facts and should not be confused with the original trademark. And the amount of transfer should be limited to the contribution to the new goodwill. The transfer of goodwill after the termination of the license contract is a

¹ See *Distillerie Flli Ramazzotti, SPA v. Banfi Products Corp.* 52 Misc.2d 593, 276 NYS2d 413(1966).

² See *Pilot Corp. of America v. Fisher-Price, Inc.* 501 F.Supp.2d 292, 83 USPQ2d 1784(2007).

post-contractual obligation. It is binding on both parties. For the licensee, after the termination of the licensing contract, the trademark licensee needs to create a new carrier within a reasonable period of time and transfer the goodwill to the new carrier in a way that does not confuse or mislead consumers. And for the licensor, the licensee should tolerate the licensee's transfer of goodwill in an appropriate manner within a reasonable period of time for the transfer of goodwill. The licensor should provide assistance to the licensee's transfer of goodwill when necessary.

3.3.2 The Contribution of the Licensee Is Similar or Indistinguishable from that of the Licensee

When the contribution of the licensee is similar to or indistinguishable from that of the licensee, the contribution of the licensee and the licensor shall be deemed to be the same. In this case, the licensee and the licensor may choose to share the new goodwill, or one party may own it entirely and the other party shall provide corresponding compensation based on the contribution. If the licensor claims all rights and interests in the new goodwill, it does not involve the transfer of goodwill, which can be transferred back to the licensor along with the trademark after the termination of contract. Under this circumstance, it only involves giving the licensee financial compensation for his contribution. If the licensee claims all rights and interests in the new goodwill, it involves the transfer of goodwill. The licensee needs to transfer the goodwill in a reasonable manner within a reasonable period of time, and the licensor needs to tolerate and provide certain assistance when necessary.

3.3.3 The Contribution of the Licensee Is Much Less than that of the Licensor

When the contribution of the licensee is far less than that of the licensor, the licensor shall enjoy all the new goodwill but shall make appropriate compensation for the licensee according to his contribution. The reasons for this operation are as follows. First of all, the contribution of the licensee is too small and difficult to transfer. Secondly, the balance of interests can be achieved through corresponding economic compensation. Thirdly, new goodwill is mainly obtained by the licensor through business activities, and the licensor enjoying all the new goodwill can avoid the time-consuming, labor-intensive and costly transfer of goodwill,

maintain the stability of the relationship between the existing trademark and goodwill, and reduce the burden of consumers needing to form a new cognitive network.

4. Conclusion

With the globalization of economic trade, the allocation of new goodwill in trademark licensing needs to be taken seriously. The allocation of new goodwill has a reasonable basis. When exploring China's new goodwill allocation system, we should first try to clarify the conditions for the allocation of new goodwill and stipulate the prerequisites for the allocation of new goodwill. Secondly, based on the contribution degree, comprehensively consider various factors such as the degree of quality control, the type of licensed use, and the length of licensed use, and formulate new goodwill allocation standards that are in line with China's national conditions. Finally, in actual operation, we need to make corresponding judgments based on different situations. There is still a long way to go in the exploration of the allocation of new goodwill. We need to continuously formulate and improve relevant laws and regulations based on the experience of foreign countries and in combination with China's actual situation to promote the healthy development of China's trademark licensing market. At the same time, the study of the issue of new goodwill allocation will also help protect the legitimate rights and interests of both parties to the trademark license, maintain market order, and promote the sustained prosperity of China's economy.

In future research, we can further explore other factors that affect goodwill allocation. In addition, we can also conduct empirical analysis on different industries and different types of trademark licenses, in order to provide more targeted suggestions for the formulation of China's new goodwill allocation system.

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