

Practical Law Regulatory Thoughts on Cross-Domain Trademark Rights Conflict on the Internet

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Abstract

Based on the characteristics of the Internet and the rapid development of Internet trade, the use of Internet trademarks has aggravated the conflict of cross-domain trademark rights, and the adoption of the trademark coexistence system to solve the conflict of cross-domain trademark rights is appropriate, through the expansion of the explanation of the extension of trademark coexistence system, and the requirement of Internet trademark users to take corresponding technical measures, and the comprehensive generalization of the system of coexistence for the use of trademark, which reflects the value of the expansion of the system of coexistence of trademarks in order to regulate Internet trademark conflicts, and the value of substantive law regulation. This is to realize the value of expanding the trademark coexistence system to regulate cross-domain trademark conflicts on the Internet.

Keywords: Internet, trademark rights conflict, trademark coexistence system

1. The Reasonableness of Trademark Coexistence System in Response to the Conflict of Cross-Domain Trademark Rights on the Internet

1.1 Symptoms of Cross-Domain Trademark Rights Conflicts on the Internet

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

criteria of trademark law, territoriality determines the boundaries of trademark rights. Its essence comes from the recognition and enforcement of trademark rights within a jurisdiction¹, which demarcates the boundaries of trademark rights between different countries. Although the laws of China do not specifically provide for the scope of application of the trademark law and the territoriality of trademark rights, it is generally recognized by academics that intellectual property rights are

¹ Yi Zaicheng and Gong Feifei, (2022). Study on the Harmonization of Cross-jurisdictional Trademark Legal Systems in Guangdong, Hong Kong and Macao Greater Bay Area — Taking the EU Trademark System as a Reference. *Social Science Front*, 5(5).

still characterized by territoriality, and their validity is limited to the country. However, with the acceleration of international economic integration, the territoriality of intellectual property rights is gradually fading¹, but the territoriality of trademark rights in the context of globalization is still the basis and starting point of national trademark legislation and justice.

It is because of the principle of territoriality that the same/similar trademarks can be independently owned and used by different entities in different countries. When these two different trademark right holders use the trademark on the Internet at the same time, an inevitable conflict will arise, which is called the "collision phenomenon".² This is known as the "collision phenomenon". The conflict mainly originates from the rivalry of trademark rights, rather than from the trademark law itself.³ Therefore, the nature of cross-domain trademark right conflict is not only similar to the confusion of trademark right conflict in the domain, or even the emergence of trademark conflation, but these trademarks have their own legal right source, under this perspective, cross-domain trademark right conflict on the internet is expressed as: trademark confusion and trademark conflation due to legal (non-infringement) reasons.

1.2 The Regulatory Value of the Trademark Coexistence Regime in the Context of Substantive Law

In *SG 2 v. Brokat*⁴, the defendant, a German company, owned the German trademark "payline" and used it in an online payment system on its website. The plaintiff, a French company, owned the French trademark "payline". The plaintiff sued the defendant for infringement of the trademark by using it on the German website www.brokat.de. The French company applied for an injunction in court, arguing that the German company was promoting its trademark worldwide through the

Internet. In fact, even though the German company did not sell any goods on the French market, the court found that the nature of the Internet allowed the trademark to be accessed globally, which constituted a trademark infringement in France, and granted the injunction.

In the case of *Playboy v. Chuckleberry*⁵, the plaintiff was the publishing company of the famous Playboy magazine "Playboy" and the defendant was the publishing company of the Italian magazine "Playmen". The plaintiff, the publisher of the famous Playboy magazine "playboy", and the defendant, the publisher of the Italian magazine "Playmen", sued the defendant for violating a 1981 injunction prohibiting the defendant from distributing and selling the magazine "Playmen" in the United States by setting up a web site using the "Playmen" trademark. The plaintiff sued for violation of a 1981 injunction prohibiting the defendant from distributing and selling "Playmen" magazine in the United States, and although the latter created a web site for users to browse on the Internet through a server in Italy, the court ruled that the defendant had not thereby violated the 1981 injunction against the distribution of Playmen's magazine within the United States. The court emphasized the conflict between the geographic limitations imposed by the Internet and the Internet domain's ability to transcend those limitations, with implications for traditional trademark law standards of evaluation.

The above two cases reveal the conflict between geographical limitations and the transcendence of geographical limitations on the internet arena and how it has affected the assessment standards of traditional trademark law, which has shown itself to be weak in dealing with the problem of the expansion of trademark use on the Internet as it tends to be more applicable to the use of trademarks in a specific geographic location.³ The above two cases are also relevant to the issue of the use of trademarks in a specific geographic location, as they have been discussed in this paper. The value of the substantive law of the trademark coexistence regime lies in the fact that it can provide a relatively uniform legal concept for courts in a particular jurisdiction or even across jurisdictions to ensure more

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

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

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

⁴ See *SG 2 v. Brokat Informations system e GmbH*, Nanterre Court of Appeals, October 13, 1996.

⁵ See *Playboy Enterprises v. Chuckle berry Publishing Inc.*, 39 USPQ 2d 1746, S.D.N.Y. 1996.

consistent and clear definitions when dealing with cross-jurisdictional trademark conflicts. A common legal standard can be provided to different courts in dealing with trademark conflicts, which can provide clearer guidance to the courts in dealing with trademark disputes on the internet era, and reduce the uncertainty of the judgment results, thereby enhancing the operability of the entire legal system. With due consideration to the global and virtual nature of the Internet, it is ensured that the law can not only protect the rights and interests of trademark users, but also maintain the stability of the global business order.

1.3 “Market Impact Rule” Borrowing Value

In 2001, the member states of the World Intellectual Property Organization (WIPO) and the member states of the Paris Convention unanimously adopted a joint recommendation on “Industrial Property Protection of Trademarks and Other Marks on the Internet”, which aims to solve the problem of multinational trademark conflicts arising from the Internet and to propose standards of substantive law and uniform rules for the resolution of trademark conflicts on the Internet. The SCT is responsible for the interpretation of the WIPO Committee on Trademarks, Industrial Marks and Geographical Indications (SCT). The core point of the joint proposal is Article 2 of the market impact rule, which states: “If the application of a trademark on the Internet produces a commercial effect within the meaning of Article 3, it shall be deemed to apply in respect of a particular country...”. “In other words, no matter what kind of trademarks are used, they should be regarded as applicable to a specific country. In other words, no matter how a trademark is used or displayed on the Internet, as long as it has triggered a commercial effect, it will be regarded as an actual use targeting specific countries and regions. Section 3, on the other hand, elaborates on a series of criteria for assessing commercial utility in a particular country. It involves the following key points: whether there is evidence to show that the party is developing or planning to develop commercial activities in a member state; the relationship, level and characteristics of the party’s (the trademark user’s) business model with the member state, etc. Further, in respect of the assessment of the relationship between the use of trademarks on the Internet and the member state, the “Joint Proposal” puts forward

a number of factors for consideration. The “Joint Recommendation” proposes a number of factors to be considered in assessing the relationship between the use of a trademark on the Internet and a member state.¹ These factors cover: (1) the connection between the user’s goods or services on the Internet and the member state; (2) the relevance of the specific way in which the goods or services are used on the Internet to the member state; and (3) the impact of the use of the Internet trademark on the trademark rights of the member state. These assessment factors are not independent of each other, but should be analyzed comprehensively on the basis of considering the overall environment and specific circumstances. For example, in assessing the connection between the user of a trademark and a member state, it is necessary to consider various circumstances such as whether the user has provided specific services in the member state or whether it has provided after-sale services to consumers in the member state. This methodological synthesis helps to more accurately assess the legal connection between the use of a trademark on the Internet and a particular country.

Theoretically, as long as two legitimate users can take measures to minimize the problems caused by cross-border business, they should be allowed to co-exist on the internet world. This reflects a balanced approach of interests. Based on the consideration of the protection of Good Faith users, the author believes that the use of Internet trademarks should comply with the subjective-objective unity, and the corresponding measures taken by the Internet trademark users before the consumers are aware of the conflict will not be regarded as an infringement of the other’s trademark right. Article 9 of the WIPO Joint Recommendation and its subsequent provisions provide for the relevant steps in detail. For example, Article 10 provides for the demonstration of compliance with the use of a trademark, while Articles 11 and 12 specify how notice of rights is to be given and the criteria for acceptance of a disclaimer. More in-depth, Article 12 indicates that member states should generally regard disclaimers as an appropriate means of preventing conflicts and provides a detailed description of the requirements necessary for an effective

¹ See Wu, Handong, (2022). *Study on the Application of Intellectual Property Rights*. People’s University of China Press.

disclaimer. These programs should be consistent with the economics of the country in which they are located, while at the same time providing an opportunity for legitimate users to guard against possible conflicts.

2. The Applicability of Trademark Coexistence System to Cross-Domain Trademark Right Conflicts on the Internet

2.1 Trademark Coexistence System Does Not Change the Ownership of Legal Trademarks

The trademark coexistence system should be defined or limited in its scope of application to govern all legal and regulatory relationships arising from legitimate trademark coexistence situations.¹ Compared with the trademark registration system and the trademark priority system, the trademark coexistence system is an important component of the trademark law because of its irreplaceable role.² The core of the trademark coexistence system that can effectively resolve Internet trademark conflicts lies in the fact that it ensures that the ownership of the lawful users in cross-domain trademark conflicts will not be affected, and that the use of their Internet trademarks is legally grounded.

2.2 Reconciling the Expanding Interests in Internet Trademarks

In conjunction with WIPO's "Market Impact Rules", the mediation mechanism for trademark coexistence lies in the fact that when non-member country trademark users do not realize that their trademarks are already being used by member country trademark rights holders (who may also be the prior users of the trademarks), or when they are already aware of such a situation but have no subjective intention of profiting from the former's reputation, and have adopted similar or identical trademarks in new goods and services, thus creating a certain degree of market stability without causing misleading and confusing situations to consumers, then it is necessary for them to adopt similar or identical trademarks in new goods and services. Or if they are aware of the situation, but do not have the subjective intention to borrow the reputation of the former to gain benefits, and have adopted similar or

identical trademarks in new goods and services, thus creating a certain degree of market stability, and at the same time, not leading to consumer misinformation and confusion, then they can each own their own trademark rights in the original territory and the territory of their Internet expansion.

On the internet environment, from the perspective of safeguarding the interests and rights of consumers. Consumers are often faced with more complex and diversified choices of goods and services. Through the trademark coexistence system, Internet trademark users can often take "avoidance measures" to effectively protect the legitimate rights and interests of consumers in choosing goods and services, and avoid losses due to trademark confusion and misleading. In addition, although the phenomenon of coexistence of trademarks has become more obvious on the internet era, and collisions between trademarks, whether intentional or unintentional, have become more and more common, trademark rights are still an important issue. However, trademark rights are still a private right. Therefore, when facing the problem of trademark coexistence, we should give stakeholders the freedom of self-management to realize the applicability of the trademark coexistence system.

2.3 Trademark Coexistence Regime Reconciles Cross-Domain Trademark Conflicts in Accordance with the Value of Trademark Law

Under the trend of globalization, the position of trademark in business competition has become more important. The promotion and application of the concept of coexisting trademarks has restricted the exclusive rights of trademarks to a certain extent.³ The main objective of the trademark coexistence system is that trademark right holders in different geographical areas can peacefully coexist rather than conflict with each other in trademark registration, trademark use and trademark protection. Under the concept of coexisting trademarks, trademarks of different geographical regions can avoid the risk of traditional trademark conflict and upgrade on the Internet, and intentionally safeguard fair competition and protect consumer interests.

One of the duties of trademark law is to protect the normal operation of trademark holders and

¹ See Mei Juwen and Wang Chaozheng, (2010). An Analysis of the Theory of Trademark Coexistence. *Journal of Chongqing Polytechnic University*, (3).

² See Ni Zhuliang, (2016). Research on Trademark Coexistence System, doctoral dissertation, Southwest University of Politics and Law.

³ See Wu Handong and Hu Kaizhong, (2005). *Research on the System of Intangible Property Rights*. Law Press, pp. 100-105.

business and trade activities and to maintain an orderly state. Due to the differences in culture, customs and consumption habits in different countries and regions, the same trademark may be recognized and evaluated differently in different markets, which may also have an impact on the trademark image and marketing strategies of enterprises. One of the duties of trademark law is to protect the normal operation of trademark holders and commercial and trading activities and to maintain an orderly state. Under such circumstances, trademark coexistence can help enterprises to solve these problems. The establishment of trademark coexistence use system can help enterprises better adapt to the needs of different markets and cultural differences, and enterprises can maintain a consistent trademark image and marketing strategy in different countries and regions, improve consumer awareness and trust of trademarks, and avoid unnecessary trademark disputes and lawsuits, and reduce the legal risks and costs of enterprises. It can also avoid unnecessary trademark disputes and lawsuits and reduce the legal risks and costs of enterprises. Specific Regulatory Thoughts on the Applicability of Trademark Coexistence System to Cross-domain Trademark Right Conflicts on the Internet

3. Expanding the Extent of the Trademark Coexistence Regime

3.1 Trademarks Using Standards that Produce Commercial Effects

In the traditional physical market environment, the use of a trademark and the reputation it acquires is closely related to the geographical area in which it is located, and this reputation is a direct reflection of the popularity and influence of the trademark in a particular regional market¹. This rule no longer defines the jurisdiction of a trademark simply on the basis of its geographical location, but rather on the basis of whether or not the act of use has generated a market impact in a particular country to determine whether or not it is subject to that country's trademark law and anti-competitive law. ²Specifically, a trademark conflict arises when trademark owners from two different jurisdictions sell the same or similar

goods or services on the Internet. We can determine which party's behavior constitutes infringement or unfair competition by determining whether each party's behavior affects the other's market. The traditional territorial approach to evaluating the impact of a trademark should focus on the pattern of interaction between the website and the consumers: for example, the degree of participation of consumers on the website, the frequency of downloading information related to the goods or services, the activity of leaving comments and inquiries on the website, and the volume of sales of goods through the Internet channel. ³This change in evaluation method not only reflects the new characteristics of Internet trademark reputation, but also highlights the importance of evaluating trademark influence on a global scale. In the author's opinion, the trademark can be recognized as having commercial effect in the region through the judgment of the following points:

3.1.1 Consumer Awareness

On the internet space, the market power of a trademark can be defined by measuring the degree of consumer awareness of the trademark in a specific geographic area. Specifically, it involves the link between consumers' familiarity with the trademark and the trademark-related cognition and awareness. If a trademark is widely recognized in a certain geographic area and is closely related to the daily life or culture of consumers, then its market impact in that area is considered significant. However, it should be noted that the determination of the scope of recognition should be separated from well-known trademarks. The scope of recognition analyzed in this article is only one of the elements for assessing the market influence of a trademark, and the degree of recognition is related to the degree of influence of the trademark, so it is not possible to assume that a trademark has a higher scope of recognition, i.e., it is assumed that the trademark should be protected by the system of well-known trademarks.

For example, in the case of "nexus"⁴, the trademark term was used to describe a kind of calculator equipment specially designed for

¹ See Li Yufeng and Ni Zhuliang, (2012). Seeking Fairness and Order: A Study of the Coexistence System in Trademark Law. *Intellectual Property*, (6).

² See Liu Chuntian, (2015). *Intellectual Property Law*. Higher Education Press, 2015 ed.

³ See Chen Yong, (2011). Search Engine Trademark Infringement Typical Cases Briefly Evaluated. *Industry and Commerce Administration*, (19).

⁴ Supreme People's Court (2016) Supreme Court Ruling No. 103.

bicycles, in fact, the users of this kind of goods mainly target at those who are interested in professional bicycle sports or those who like cycling, these people usually have a higher level of knowledge about this kind of goods and when they buy this kind of goods, they tend to pay more attention to the information on the content of the goods rather than the shape or design of the trademark itself, therefore, the court finally recognized that similar trademarks are not too likely to cause misunderstanding among the general public. In fact, this type of users mainly focus on those who are interested in professional cycling or cycling enthusiasts, who usually have a higher level of knowledge about this particular kind of goods, and they tend to pay more attention to the content information of the goods rather than the styling or design of the trademarks, so the court eventually found that the similarity of the trademarks is not too easy to cause misunderstanding among the general public.

3.1.2 Sales Time and Market Share

A trademark's market power in a particular region can also be assessed by the history of sales and market share of its goods or services in that region. Long-term market presence and high market share are usually obvious indicators of a trademark's success in the region. It reflects the mark's solid position in the minds of consumers and its long-term market appeal.

3.1.3 Consumer Interaction and Purchase Behavior

Consumers' frequency of interaction with the trademark and their purchasing behavior are also important indicators for evaluating its market influence. This includes the frequency of visits to the trademark's website, the degree of participation in Internet activities, inquiries about the goods, and actual purchasing behavior. Positive consumer interaction and feedback usually indicates that the trademark has a high level of appeal and influence in a particular region.

3.1.4 Trademark Visibility and Reputation

A trademark that enjoys a high degree of popularity and good reputation in a particular region usually means that it has strong market influence in that region. Positive consumer evaluations and recommendations of a trademark spread rapidly on the internet space, further strengthening the trademark's market

position.¹In addition, consumer mobility is also a key indicator of a trademark's reputation. On the internet era, the mobility of consumers is even more obvious, as they can easily cross the geographical boundaries, and get in touch with and know different trademarks and trademarks from all over the world.

In summary, the evaluation of a trademark's reputation on the internet environment needs to take into account a number of factors, including the geographic positioning of website advertisements, consumers' interactive behavior and mobility, etc. These factors together affect the market influence and reputation of a trademark in a particular region. All these factors affect the market influence and reputation of a trademark in a specific region. Trademark management and promotion strategies need to flexibly adapt to these new challenges and opportunities in order to maintain its market competitiveness and trademark value.

3.2 Trademark Coexistence System Clarifies Conditions for Cross-Domain Trademark Coexistence

3.2.1 Subjective: "Good Faith Use" as a Prerequisite for Trademark Interconnection Coexistence

The concept of coexistence of trademark rights applies to both the traditional business environment and the Internet environment². First of all, it should be clear that the coexistence of trademark rights does not mean that anyone can use other people's trademarks without authorization. On the contrary, under the premise of protecting the legitimate rights and interests of trademark right holders, and taking into account the actual situation and demand, it gives other Good Faith users a certain amount of space for use. This concept reflects the law's respect for fairness, justice and commercial reality. Compared with the principle of absolute protection in traditional trademark law, the solution of trademark coexistence is more flexible and reasonable. Under the principle of absolute protection, either party may file a lawsuit against the other party for infringement, which may not only lead to serious losses for both parties, but also damage the business

¹ See Huang Wushuang, Liu Wei, et al. (2013). *Trademark Coexistence: Principles and Jurisprudence*. Law Press.

² See Yang Hongjun, (2008). Conflict and Coordination of Trademark Rights on the internet Environment. *Business Modernization*, (27).

platform of both parties on the Internet. The solution of trademark coexistence can maximize the protection of trademark rights of both parties and safeguard the goodwill of both parties accumulated on the Internet.

3.2.2 Objective: Requiring Internet Trademark Users to Take Avoidance Measures

(1) Clarify the way the website is declared

When consumers purchase goods or services on the Internet, the information they obtain through search engines may cover a wide range of different websites and trademarks without knowing with certainty whether these websites are associated with the particular trademark or trademarks they are looking for. As a result, consumers often need to browse through different pages repeatedly in order to identify and ascertain the goods or services they need. In implementing a trademark co-existence regime in the area of Internet trade, the following measures are recommended: to ensure that both parties clearly indicate their respective territorial limitations on goods sold on the Internet; to strictly follow the requirements of the agreement to avoid intentional cross-border operations; and to minimize consumers' concerns by clearly indicating the relationship between their respective businesses. These measures will help to rectify consumers' perception bias towards the source. If a company conducts its business in strict compliance with the stated geographic location, users can easily differentiate and select the goods or services that suit their needs by checking the description on the website.

(2) Providing web links to related trademarks

To ensure the effective implementation of the trademark co-existence regime on the internet environment, trademark right holders should clearly indicate on their official websites the location of links to other related trademarks and provide detailed information to help consumers understand the meaning and relationship of these links. For example, a company may set up a special menu item on its website, such as "Related Trademarks" or "Related Links", in which it lists all related trademark owners and their web links. ¹This practice not only enhances the transparency of information, but also helps

consumers to minimize confusion and understand more clearly the relationship between the various trademarks. Alternatively, creating a separate website or platform dedicated to displaying relationships and links between users of related coexisting trademarks can be an effective strategy. This platform can contain links and detailed descriptions of each trademark user, or even use visualization tools, such as maps or charts, to show the location and role of each trademark user in an intuitive manner. Such an approach not only helps to enhance the accuracy of the message, but also helps consumers to better understand the origin of the goods or services, thus effectively minimizing misunderstandings caused by trademark similarity.

Alternatively, creating a separate website or platform dedicated to displaying relationships and links between trademark users can be an effective strategy. This platform can contain links and detailed descriptions to each trademark user, or even use visualization tools such as maps or charts to show the location and role of each trademark user in an intuitive manner. Such an approach not only helps to enhance the accuracy of the message, but also helps consumers to better understand the origin of the goods or services, thus effectively minimizing misunderstandings caused by trademark similarity.²

On this basis, trademark users must abide by the principle of not maliciously intruding into others' protected areas to ensure that the use of trademarks on the Internet is lawful and fair. In the event of malicious infringement, trademark holders should take necessary measures to protect their trademarks, including defending their rights through legal means. At the same time, strengthening consumer education and enhancing their knowledge of trademarks is also key to ensuring the effective operation of the trademark coexistence system.

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² See Kevin Afghani, (2003). *Harrods Ltd. v. Sixty Internet Domain Names: A Non expansive Expansion of the Anti cybersquatting Consumer Protection Act*. Tul. J. Intell. Tech. & Intell. Prop., 5, 141.

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