

一、复制、摹仿或者翻译他人驰名商标审理标准

I. Standards for Trial of Reproduction, Imitation or Translation of Others' Well-Known Trademarks

《商标法》第十三条 为相关公众所熟知的商标，持有人认为其权利受到侵害时，可以依照本法规定请求驰名商标保护。

Article 13 of the Trademark Law: A holder of a trademark that is well known to the relevant public may request for protection of the trademark as a well-known trademark in accordance with this Law if the holder is of the opinion that its rights have been infringed upon.

就相同或者类似商品申请注册的商标是复制、摹仿或者翻译他人未在中国注册的驰名商标，容易导致混淆的，不予注册并禁止使用。

In the case of an application for registration of a trademark that is a reproduction, imitation, or translation of another's well-known trademark not registered in China on the same or similar goods, and consequentially is likely to create confusion, such application shall be rejected and the trademark shall be prohibited from use.

就不相同或者不相类似商品申请注册的商标是复制、摹仿或者翻译他人已经在中国注册的驰名商标，误导公众，致使该驰名商标注册人的利益可能受到损害的，不予注册并禁止使用。

In the case of an application for registration of a trademark that is a reproduction, limitation, or translation of another's well-known trademark registered in China on different or dissimilar goods, thus misleading the public and causing damage to the interests of the registrant for the well-known trademark, the application shall be rejected and the trademark shall be prohibited from use.

第十四条 驰名商标应当根据当事人的请求，作为处理涉及商标案件需要认定的事实进行认定。认定驰名商标应当考虑下列因素：

Article 14 Upon request by the party concerned, a well-known trademark shall be recognized as a fact that needs to be ascertained in the handling of a trademark-related case. The following factors shall be taken into consideration in the recognition of a well-known trademark:



(一) 相关公众对该商标的知晓程度;

(1) The degree of awareness of the trademark among the relevant public;

(二) 该商标使用的持续时间;

(2) The duration of the use of the trademark;

(三) 该商标的任何宣传工作的持续时间、程度和地理范围;

(3) The duration, extent and geographical scope of all publicity operations carried out for the trademark;

(四) 该商标作为驰名商标受保护的记录;

(4) Records of protection provided for the trademark as a well-known trademark; and

(五) 该商标驰名的其他因素。

(5) Other factors related to the trademark's well-known status.

在商标注册审查、工商行政管理部门查处商标违法案件过程中，当事人依照本法第十三条规定主张权利的，商标局根据审查、处理案件的需要，可以对商标驰名情况作出认定。

Where a party concerned claims rights pursuant to Article 13 of this Law during trademark registration examination or during the process whereby an administration for industry and commerce investigates and punishes a case of trademark-related illegalities, the Trademark Office may recognize the well-known status of the relevant trademark as may be necessary for case examination and handling.

在商标争议处理过程中，当事人依照本法第十三条规定主张权利的，商标评审委员会根据处理案件的需要，可以对商标驰名情况作出认定。

Where the party concerned claims rights pursuant to Article 13 of this Law during the handling of a trademark dispute, the Trademark Review and Adjudication Board may recognize the well-known status of the relevant trademark as may be necessary for case handling.

在商标民事、行政案件审理过程中，当事人依照本法第十三条规定主张权利的，最高人民法院指定的人民法院根据审理案件的需要，可以对商标驰名情况作出认定。

Where the party concerned claims rights pursuant to Article 13 of this Law during the hearing of a trademark-related civil or administration case, the People's Court designated by

the Supreme People's Court may recognize the well-known status of the relevant trademark as may be necessary for case hearing.

生产、经营者不得将“驰名商标”字样用于商品、商品包装或者容器上，或者用于广告宣传、展览以及其他商业活动中。

Manufacturers and business operators shall neither indicate the words “well-known trademark” on goods and the packaging or containers of goods, nor use the same for advertising, exhibition and other commercial activities.

第四十五条第一款 已经注册的商标，违反本法第十三条第二款和第三款、第十五条、第十六条第一款、第三十条、第三十一条、第三十二条规定的，自商标注册之日起五年内，在先权利人或者利害关系人可以请求商标评审委员会宣告该注册商标无效。对恶意注册的，驰名商标所有人不受五年的时间限制。

Paragraph 1 of Article 45: Where a registered trademark is in violation of Paragraph 2 and Paragraph 3 of Article 13, Article 15, Paragraph 1 of Article 16, Article 30, Article 31, or Article 32 of this Law, the holder of prior rights or an interested party may request the Trademark Review and Adjudication Board to declare the registered trademark invalid within five years upon the registration of the trademark. Where registration is obtained in a mala fide manner, the owner of a well-known trademark is not bound by the five-year restriction.

《商标法实施条例》第三条 商标持有人依照商标法第十三条规定请求驰名商标保护的，应当提交其商标构成驰名商标的证据材料。商标局、商标评审委员会应当依照商标法第十四条规定，根据审查、处理案件的需要以及当事人提交的证据材料，对其商标驰名情况作出认定。

Article 3 of the Implementation Regulations for the Trademark: Where a trademark holder applies for protection of a well-known trademark pursuant to Article 13 of Trademark Law, it shall submit evidence materials proving that its trademark constitutes a well-known trademark. The Trademark Office and the Trademark Review and Adjudication Board shall, pursuant to Article 14 of the Trademark Law, recognize the well-known status of its trademark based on the demand of examining and treating cases and the evidence materials submitted by the party concerned.

1. 引言

1. Introduction

上述规定体现了对驰名商标的保护，即从保护驰名商标持有人利益和维护公平竞争及消费者权益出发，对可能利用驰名商标的知名度和声誉，造成市场混淆或者公众

误认，致使驰名商标持有人的利益可能受到损害的商标注册行为予以禁止，弥补严格实行注册原则可能造成不公平后果的不足。

The abovementioned provisions embody the protection for well-known trademarks, namely they prohibit the trademark registration behaviors which will, by using the popularity and reputation of well-known trademarks, probably cause market confusion or public's misunderstanding, and damage the benefits of well-known trademark holders so as to make up the deficiency that strict execution of registration principles will probably cause unfair consequences, with a view to protecting the benefits of well-known trademark holders and maintaining fair competition and consumers' rights and interests.

在商标异议、不予注册复审及无效宣告案件审理中，涉及复制、摹仿或者翻译他人驰名商标问题，持有人认为其权利受到侵害的，以本标准为原则进行个案判定。

Where in the trial of the cases of trademark objection, non-approved registration review and invalidity declaration, the problem of reproduction, imitation or translation of another's well-known trademark is involved, and the holder considers that its right is infringed, individual cases shall be judged with the Standards as principle.

2. 驰名商标认定的原则

2. Principles for Recognition of Well-known Trademarks

2.1. 个案认定。首先，当事人必须在具体的商标案件中，认为系争商标构成对其已为相关公众所熟知商标的复制、摹仿、翻译并且容易导致混淆或者误导公众，致使该驰名商标持有人的利益可能受到损害时才可以提起驰名商标认定，并形成适当的请求；其次，在具有适当请求的案件中，驰名商标的认定结果只对本案有效。曾被认定为驰名商标的，在本案中仅能作为驰名商标保护记录予以考虑。

2.1 Case-by-case recognition: Firstly, the party concerned must not initiate the recognition of a well-known trademark and form an appropriate request until it considers in a concrete trademark case that, the disputed trademark constitutes the reproduction, imitation and translation of its trademark already well-known to relevant public, will easily induce confusion or misguide the public, thus causing damage to the benefits of the holder of this well-known trademark; secondly, in a case with appropriate request, the recognition result of a well-known trademark is only effective to this case. A trademark having ever been recognized to be well-known trademark can only be considered as well-known trademark protection record in this case.

2.2. 被动保护。商标局、商标评审委员会只能在具体的商标案件中应当事人的请求就其商标是否驰名进行认定，并在事实认定的基础上做出裁决。当事人未主张驰名商标保护的，商标局、商标评审委员会不予主动保护。

2.2 Passive protection: The Trademark Office and the Trademark Review and Adjudication Board can only, upon the request of the party concerned in a concrete trademark case, recognize whether its trademark is well-known, and make a ruling based on fact finding. Where the party concerned does not claim for protection of a well-known trademark, the Trademark Office and the Trademark Review and Adjudication Board will not provide active protection.

2.3. 按需认定。商标局、商标评审委员会只有在具体的案件中，根据审查、处理和审理案件的需要以及当事人提交的证据材料，为保护商标持有人的权利时才对商标驰名的事实做出认定。

2.3 Recognition upon demand: The Trademark Office and the Trademark Review and Adjudication Board only recognize in a concrete case the fact of a trademark's being well-known for protecting the rights of the trademark holder upon the demand of case examination, handling and trial and according to the evidence materials submitted by the party concerned.

按需认定原则下，在案件审理过程中，如果适用商标法第三十条、第三十一条及第三十二条“以不正当手段抢先注册他人已经使用并有一定影响的商标”即可以充分保护申请人请求的，则无需再适用《商标法》第十三条规定进行审理。

Under the principle of recognition upon demand, where it's available to sufficiently protect the applicant's request in accordance with Article 30, Article 31, and Article 32 “preemptively register by improper means a trademark which has been used and had certain influences” of the Trademark Law during case trial, it will be unnecessary to try the case in accordance with the provisions of Article 13 of the Trademark Law.

【方案二：增加一款 按需认定原则下，如果系争商标与他人商标区别较大，或者系争商标指定使用的商品/服务与他人商标指定使用的商品/服务相差较大，系争商标的申请注册不会导致混淆，或者误导公众，致使该驰名商标注册人的利益可能受到损害的，商标局、商标评审委员会不需对他人商标是否驰名进行审理。】

[Scheme 2: Add one clause “Upon the principle of recognition upon demand, where the disputed trademark has relatively great difference from another's trademark, or the goods/ services designed by the disputed trademark have relatively great differences from the goods/ services designed by another's trademark, and the application for registration of the disputed trademark won't induce confusion or mislead the public and probably damage the

benefits of the registrant of this well-known trademark, the Trademark Office and the Trademark Review and Adjudication Board will not need to try whether another's trademark is well-known.]

3.适用要件

3. Applicable Elements

3.1 适用《商标法》第十三条第二款须符合下列要件:

3.1 The following elements shall be satisfied for being applicable to the Paragraph 2, Article 13 of the Trademark Law:

(1) 他人商标在系争商标申请日前已经驰名但尚未在中国注册;

(1) Another's trademark has been well-known, but not been registered in China yet before the date of application for the disputed trademark;

(2) 系争商标构成对他人驰名商标的复制、摹仿或者翻译;

(2) The disputed trademark constitutes the reproduction, imitation or translation of another's well-known trademark;

(3) 系争商标所使用的商品/服务与他人驰名商标所使用的商品/服务相同或者类似;

(3) The goods/ services designated by the disputed trademark are identical with or similar to the goods/ services designated by another's well-known trademark;

(4) 系争商标的注册或者使用，容易导致混淆。

(4) The registration or use of the disputed trademark will easily induce confusion.

3.2 适用《商标法》第十三条第三款须符合下列要件:

3.2 The following elements shall be satisfied for being applicable to the Paragraph 3, Article 13 of the Trademark Law:

(1) 他人商标在系争商标申请日前已经驰名且已经在中国注册;

(1) Another's trademark has been well-known and registered in China before the date of application for the disputed trademark;

(2) 系争商标构成对他人驰名商标的复制、摹仿或者翻译;

(2) The disputed trademark constitutes the reproduction, imitation or translation of another's well-known trademark;

(3) 系争商标所使用的商品/服务与他人驰名商标所使用的商品/服务不相同或者不相类似;

(3) The goods/ services designated by the disputed trademark are not identical with or similar to the goods/ services designated by another's well-known trademark;

(4) 系争商标的注册或者使用，误导公众，致使该驰名商标注册人的利益可能受到损害。

(4) The registration or use of the disputed trademark will mislead the public, and probably damage the benefits of the registrant of this well-known trademark.

4.驰名商标的判定

4. Judgment of Well-known Trademarks

4.1 驰名商标是指在中国为相关公众所熟知的商标。

4.1 A well-known trademark refers to a trademark well-known to relevant public in China.

4.1.1 驰名发生地应为中国大陆。

4.1.1 The place where a trademark becomes well-known shall be Chinese Mainland.

4.1.2 相关公众包括但不限于下列情形为限：

4.1.2 Relevant public shall include, but not is limited to the following circumstances:

(1) 商标所标识的商品的生产者或者服务的提供者；

(1) The producer or provider of the goods or services marked with the trademark;

(2) 商标所标识的商品/服务的消费者；

(2) The consumer of goods/ services marked with the trademark;

(3) 商标所标识的商品/服务在经销渠道中所涉及的经营者和相关人员等。

(3) The operators and relevant personnel, etc. involved in the distribution channels of the goods/ services marked with the trademark.

4.2 认定他人商标是否构成驰名商标，应当视个案情况综合考虑下列各项因素：

4.2 The following factors shall be comprehensively considered according to the situation of an individual case when recognizing whether another's trademark constitutes a well-known trademark:

(一) 相关公众对该商标的知晓程度；

(1) The degree of awareness of the trademark among the relevant public;

(二) 该商标使用的持续时间;

(2) The duration of the use of the trademark;

(三) 该商标的任何宣传工作的持续时间、程度和地理范围;

(3) The duration, extent and geographical scope of all publicity operations carried out for the trademark;

(四) 该商标作为驰名商标受保护的记录;

(4) Records of protection provided for the trademark as a well-known trademark; and

(五) 该商标驰名的其他因素。

(5) Other factors related to the trademark's well-known status.

4.3 认定驰名商标应根据下列证据予以综合判定:

4.3 Comprehensive judgment shall be made according to the following evidence for recognizing a well-known trademark:

(1) 引证商标所使用的商品/服务的合同、发票、提货单、银行进帐单、进出口凭据等;

(1) The contract, invoice, bill of lading, bank deposit receipt, import and export vouchers, etc. of the goods/ services designated by the cited trademark;

(2) 引证商标所使用的商品/服务的销售区域范围、销售网点分布及销售渠道、方式的相关材料;

(2) Related materials about the sales region scope, sales outlet distribution, sales channels and methods of the goods/ services designated by the cited trademark;

(3) 涉及引证商标的广播、电影、电视、报纸、期刊、网络、户外等媒体广告、媒体评论及其他宣传活动材料;

(3) The media advertising, media comments and other propaganda activity materials via the media like radio, film, TV, newspaper, periodicals, network, outdoor, etc. and involving the cited trademark;

(4) 引证商标所使用的商品/服务参加的展览会、博览会的相关材料;

(4) Related materials of the exhibitions and expos participated by the goods/ services designated by the cited trademark;

(5) 引证商标的最早使用时间和持续使用情况的相关材料;

(5) Related materials about the earliest use time and continuous use of the cited trademark;

(6) 引证商标在中国及其他国家、地区的注册证明;

(6) The certificates of registration of the cited trademark in China and other countries and regions;

(7) 引证商标被认定为驰名商标并给予保护的相关法律文件, 以及引证商标被侵权或者假冒的情况;

(7) Related legal documents providing that the cited trademark is recognized as a well-known trademark and provided protection, and the information on that the cited trademark is infringed or counterfeited;

(8) 具有资质的会计师事务所出具的、具有公信力的权威机构公布的涉及引证商标所使用的商品/服务的销售额、利税额、产值的统计及市场占有率、广告额统计等;

(8) The statistics about the sales amount, profit-tax amount and output value, as well as market share and advertising amount, etc. of the goods/ services designated by the cited trademark, provided by a qualified Certified Public Accountants, and issued by an authoritative institution with public trust;

(9) 引证商标获奖情况;

(9) Awards obtained by the cited trademark;

(10) 其他可以证明引证商标知名度的材料。

(10) The other materials which are able to prove the popularity of the cited trademark.

4.4 引证商标使用商品/服务的销售、经营情况应当有销售合同、发票等有效证据支持。

4.4 The sales and operation of the goods/ services designated by the cited trademark shall be supported by effective evidence such as sales contract, invoice, etc.

证明申请人经济指标的企业年度报告或者上市公司的上市年报应提交原件或经公证的复印件。纳税额应当有税务机关证明的原件或经公证的复印件支持。

The original or notarized hard copy of enterprise's annual report or listed company's annual listing report proving the applicant's economic indexes shall be provided. The amount of tax

payment shall be supported by the original or notarized hard copy of the certification of tax authority.

4.5 申请人、引证商标及其使用商品获得的奖项应当是省部级以上的奖励。省级奖励限于省级人民政府颁布的奖励和省级工商行政管理局认定的著名商标；部级以上奖励的颁奖单位限于中央部、委、局等政府机构。获奖证书应提交原件或经公证的复印件。

4.5 The awards obtained by the applicant, the cited trademark and the goods designated by the cited trademark shall be of provincial, ministerial and higher level. Provincial awards shall be limited to the awards issued by the provincial people's government and the famous trademarks recognized by the provincial administration for industry and commerce; and awards of ministerial and higher levels shall be limited to the awards issued by the governmental authorities such as ministries, commissions and bureaus, etc. under the Central Government. Certificates of awards shall be submitted in the form of original or notarized hard copy.

4.6 当事人应提交引证商标的广告合同、发票、广告载体、广告费专项审计报告等证据，用以证明引证商标宣传的广告费用、形式载体、持续时间、覆盖范围等情况。广告费专项审计报告应提交原件或经公证的复印件。

4.6 The party concerned shall submit the evidence such as advertising contract, invoice, advertising carrier, special advertising fee audit report, etc. of the cited trademark, which prove the advertising fee, form carrier, duration, coverage scope, etc. of the propaganda about the cited trademark. The special advertising fee audit report shall be submitted in the form of original or notarized hard copy.

4.8 申请人应提供销售合同或销售发票等证据证明引证商标使用商品/服务已在十一个以上省（自治区、直辖市）销售/经营，并在省内具有一定影响。

4.8 The applicant shall provide the evidence such as sales contract or sales invoice, etc. to prove that the goods/ services designated by the cited trademark have been sold/ operated in more than ten provinces (autonomous regions, municipalities directly under the Central Government), and had certain influences in the province.

4.9 对请求认定引证商标为驰名商标的，不能满足上述全部条件，但申请人已提交的在案证据能够证明引证商标在市场上确实享有较高声誉，足以认定为驰名商标的，也可以认定。

4.9 A cited trademark may also be recognized as a well-known trademark where the applicant requests the recognition of the cited trademark as a well-known trademark, and

does not meet all the above mentioned conditions, but the documented evidence already submitted by the applicant could prove that the cited trademark really has relatively high prestige in the market and could be recognized as a well-known trademark.

4.10 上述证据原则上以系争商标申请日之前的证据为限，系争商标为未注册商标的，应当提供证明其使用持续时间不少于五年的材料；系争商标为注册商标的，应当提供证明其注册时间不少于三年或者持续使用时间不少于五年的材料。

4.10 The abovementioned evidence principle is limited to the evidence before the date of application for the disputed trademark. Where the disputed trademark is a non-registered trademark, the materials proving its continuous use for at least five years shall be provided; where the disputed trademark is a registered trademark, the materials providing its registration for at least three years or its continuous use for at least five years shall be provided.

4.11 为证明商标驰名所提供的证据材料不以中国为限，但当事人提交的国外证据材料，应当能够据以证明该商标为中国相关公众所知晓。

4.11 The evidence materials provided for proving the well-known state of a trademark are not limited to China, but the foreign evidence materials submitted by the party concerned shall be able to prove that this trademark is well-known to Chinese relevant public.

驰名商标的认定，不以该商标在中国注册、申请注册或者该商标所使用的商品/服务在中国实际生产、销售或者提供为前提，该商标所使用的商品/服务的宣传活动，亦为该商标的使用，与之有关的资料可以作为判断该商标是否驰名的证据。

The recognition of a well-known trademark shall not be in the precondition of the registration or application for registration in China of this trademark, or the actual production, sale or supply in China of the goods/ services designated by this trademark. The propaganda activities about the goods/ services designated by this trademark are also the use of this trademark, and related materials may be used as evidence for judging whether this trademark is well-known.

4.12 用以证明引证商标持续使用的时间和情况的证据材料，按照商业惯例，应当能够显示所使用的商标标识、商品/服务、使用日期和使用人。

4.12 The evidence materials used to prove the continuous use time and situation of the cited trademark shall be able to, according to commercial convention, display the used trademark sign, goods/ services, use date and user.

4.13 在审理案件时，涉及已被商标行政主管机关或者司法机关认定的驰名商标的，如果对方当事人对商标驰名不持异议的，可以予以认可。如果对方当事人对该商

标驰名持有异议的，应当依照《商标法》第十四条规定，综合考虑引证商标的显著性、知名度，引证商标和系争商标的近似程度及使用商品的关联程度，对符合《商标法》第十三条第二款、第三款适用要件的，予以认定。引证商标确实广为公众知晓并享有较高声誉的，可以适当减轻当事人举证责任，予以认定。

4.13 Where a well-known trademark already recognized by trademark administration authority or judicial authority is involved in the trial of a case, and the other party concerned does not object against the well-known status of the trademark, then this well-known trademark may be approved. Where the other party concerned objects against the well-known status of this trademark, then this trademark meeting the applicable elements in Paragraph 2 and Paragraph 3 of Article 13 of the Trademark Law shall be recognized in accordance with the provisions of Article 14 of the Trademark Law, and by comprehensively considering the distinctiveness and popularity of the cited trademark, the degree of similarity between the cited trademark and disputed trademark, and the degree of relevance of goods designated. Where the cited trademark is actually well-known to the public and has relatively high reputation, the burden of proof of the party concerned may be properly relieved, and this trademark may be recognized.

5. 复制、摹仿或者翻译他人驰名商标的判定

5. Judgment on the Reproduction, Imitation or Translation of Another's Well-known Trademark

5.1 复制是指系争商标与他人驰名商标相同。

5.1 Reproduction means that the disputed trademark is the same as another's well-known trademark.

5.2 摹仿是指系争商标抄袭他人驰名商标，沿袭他人驰名商标的显著部分或者显著特征。

5.2 Imitation means that the disputed trademark plagiarizes another's well-known trademark, and follows the distinctive parts or distinctive characteristics of another's well-known trademark.

驰名商标的显著部分或者显著特征是指驰名商标赖以起主要识别作用的部分或者特征，包括特定的文字或者其组合方式及字体表现形式、特定图形构成方式及表现形式、特定的颜色组合等。

Distinctive parts or distinctive characteristics of a well-known trademark means the parts or characteristics playing the main role in distinguishing the well-known trademark, including certain characters or their combination method and font expression form, certain pattern

composition method and expression form, certain color combination, etc..

5.3 翻译是指系争商标将他人驰名商标以不同的语言文字予以表达，且该语言文字已与他人驰名商标建立对应关系，并为相关公众广为知晓或者习惯使用。

5.3 Translation means that the disputed trademark expresses another's well-known trademark in a different language, which has established corresponding relationship with another's well-known trademark, and is known or habitually used by relevant public.

6.混淆、误导可能性的判定

6. Judgment on the Possibility of Confusion and Misleading

6.1、混淆、误导包括以下情形:

6.1 Confusion and misleading include the following circumstances:

(1) 消费者对商品/服务的来源产生误认，认为标识系争商标的商品/服务系由驰名商标所有人生产或者提供；

(1) Consumers misunderstand the source of goods/ services, and consider that the goods/ services marked with the disputed trademark are produced or provided by the owner of the well-known trademark;

(2) 使消费者联想到标识系争商标的商品的生产者或者服务的提供者与驰名商标所有人存在某种联系，如投资关系、许可关系或者合作关系；

(2) Consumers are made to imagine that the producer or provider of the goods or services marked with the disputed trademark has certain connection with the owner of the well-known trademark, such as investment relationship, license relationship or cooperation relationship;

(3) 足以使相关公众认为系争商标与他人驰名商标具有相当程度的联系，而减弱驰名商标的显著性、贬损驰名商标的市场声誉，或者不正当利用驰名商标的市场声誉的。

(3) It's sufficient to make relevant public consider that, the disputed trademark has quite a degree of connection with another's well-known trademark, so that the disputed trademark weakens the distinctiveness of the well-known trademark, or dispraises or improperly uses the market reputation of the well-known trademark.

6.2 混淆、误导的判定不以实际发生混淆、误导为要件，只须判定有无混淆、误导的可能性即可。

6.2 The judgment on confusion and misleading does not take actual occurrence of confusion and misleading as elements, and it's only necessary to judge that there is the possibility of confusion and misleading.

6.3 混淆、误导可能性的判定，应当综合考虑下列各项因素：

6.3 The following factors shall be considered comprehensively in judging the possibility of confusion and misleading:

(1) 系争商标与他人驰名商标的近似程度；

(1) The degree of similarity between the disputed trademark and another's well-known trademark;

(2) 他人驰名商标的独创性；

(2) The originality of another's well-known trademark;

(3) 他人驰名商标的知名度；

(3) The popularity of another's well-known trademark;

(4) 系争商标与他人驰名商标各自使用的商品/服务的关联程度；

(4) The relevance degree of the goods/ services designated by the disputed trademark and another's well-known trademark respectively;

(5) 其他可能导致混淆、误导的因素。

(5) Other factors which will probably induce confusion and misleading.

7. 驰名商标保护范围的判定

7. Judgment on the Protection Scope of a Well-known Trademark

7.1 对未在中国注册的驰名商标，依据《商标法》第十三条第二款规定，保护范围及于相同或者类似的商品/服务。

7.1 For a well-known trademark not registered in China, the protection scope shall cover the same or similar goods/ services, as regulated in Paragraph 2 of Article 13 of the Trademark Law.

7.2 对已经在中国注册的驰名商标，依据《商标法》第十三条第三款规定，保护范围及于不相同或者不相类似的商品/服务。

7.2 For a well-known trademark already registered in China, the protection scope shall cover the goods/ services which are not the same or similar, as regulated in Paragraph 3, Article 13 of the Trademark Law.

在不相同或者不相类似的商品/服务上扩大对已注册驰名商标的保护范围，应当以容易误导公众，致使该驰名商标注册人的利益可能受到损害为前提。在个案中保护的具体范围，应当综合考虑本标准 6.3 所列因素予以判定。

Enlarging the protection scope of a registered well-known trademark on the goods/ services which are not the same or similar shall take “easily misguiding the public and probably damaging the benefits of the registrant of this well-known trademark” as the precondition. The concrete scope of protection in an individual case shall be judged by comprehensively considering the factors listed in 6.3 of this Standard.

8. 恶意注册的判定

8. Judgment on Malicious Registration

复制、摹仿或者翻译他人驰名商标申请注册的，自该商标注册之日起五年内，驰名商标所有人或者利害关系人可请求商标评审委员会宣告该系争商标无效，但对属于恶意注册的，驰名商标所有人请求宣告系争商标无效不受五年的时间限制。

Where a trademark is applied for registration by reproducing, imitating or translating another's well-known trademark, the holder or an interested party of the well-known trademark may request the Trademark Review and Adjudication Board to declare the disputed trademark invalid within five years upon the registration of the trademark. Where registration is obtained in a mala fide manner, the owner of the well-known trademark is not bound by the five-year restriction for requesting declaring the disputed trademark invalid.

判定系争商标申请人是否具有恶意可考虑下列因素：

The following factors may be considered when judging whether the applicant of the disputed trademark has evil intentions:

(1) 系争商标申请人与驰名商标所有人曾有贸易往来或者合作关系；

(1) The applicant of the disputed trademark has ever had trade contacts or partnership with the owner of the well-known trademark;

(2) 系争商标申请人与驰名商标所有人共处相同地域或者双方的商品/服务有相同的销售渠道和地域范围；

(2) The applicant of the disputed trademark and the owner of the well-known trademark are located in the same territory or both parties have the same sales channels and territorial scope for their goods/ services;

(3) 系争商标申请人与驰名商标所有人曾发生其他纠纷，可知晓该驰名商标；

(3) The applicant of the disputed trademark has ever had other disputes with the owner of the well-known trademark, and may know this well-known trademark;

(4) 系争商标申请人与驰名商标所有人曾有内部人员往来关系；

(4) The applicant of the disputed trademark has ever had the internal personnel intercourse relationship with the owner of the well-known trademark;

(5) 系争商标申请人注册后具有以牟取不当利益为目的，利用驰名商标的声誉和影响力进行误导宣传，胁迫驰名商标所有人与其进行贸易合作，向驰名商标所有人或者他人索要高额转让费、许可使用费或者侵权赔偿金等行为；

(5) The applicant of the disputed trademark, aiming to make improper profits after registration, uses the reputation and influences of the well-known trademark to carry out misleading propaganda, forces the owner of the well-known trademark to cooperate with it in trading, and asks for high-amount transfer fee, license fee or infringement compensation from the owner of the well-known trademark or others;

(6) 驰名商标具有较强独创性；【方案二：驰名商标具有较强独创性，系争商标与之高度近似；】

(6) The well-known trademark has relatively strong originality; [Scheme 2: The well-known trademark has relatively strong originality, and the disputed trademark is highly similar to it;]

(7) 其他可以认定为恶意的情形。

(7) Other circumstances which could be recognized as malicious intention.

二、擅自注册被代理人或者被代表人商标的审理标准

II. Standards for Trial of Non-authorized Registration of Trademarks of Principals or Represented Persons

《商标法》第十五条第一款 未经授权，代理人或者代表人以自己的名义将被代理人或被代表人的商标进行注册，被代理人或被代表人提出异议的，不予注册并禁止使用。

Paragraph 1 of Article 15 of the Trademark Law: Where an agent or representative registers, in its own name, a trademark of one of its principal or represented party without authorization, and the principal or the represented party opposes the registration, the trademark shall not be registered and shall be prohibited from use.

1. 引言

1. Introduction

代理人或者代表人未经授权，擅自注册被代理人或者被代表人商标，违反了诚实信用原则，侵害了被代理人、被代表人或者利害关系人的合法权益，上述规定旨在禁止代理人、代表人的恶意抢注的行为。（方案二）上述规定旨在禁止代理人、代表人的恶意抢注行为，同时亦禁止代理人、代表人在同一种或类似商品上注册与被代理人、被代表人已经注册、初步审定或申请在先的商标相同、近似的商标。

Where an agent or representative registers the trademark of a principal or a represented person without authorization, the agent or representative shall be deemed to violate the principle of good faith and infringe the lawful rights and interests of the principal, represented person or interested party. The abovementioned provision aims to prohibit the malicious preemptive registration behavior of agents and representatives. (Scheme 2) The abovementioned provision aims to prohibit the malicious preemptive registration behavior of an agent and representative, and meanwhile, aims to prohibit the agent and representative from registering on identical or similar goods a trademark which is identical or similar to a prior trademark already registered, preliminarily approved or prior applied for by the principal and represented person.

在商标异议、不予注册复审及无效宣告案件审理中涉及代理人或代表人擅自注册被代理人或被代表人商标的，以本标准为原则进行个案判定。

Where in the trial of the cases of trademark objection, non-approved registration review and invalidity declaration, an agent or representative's non-authorized registration of a principal or represented person's trademark is involved, individual cases shall be judged with this Standard as principle.

2. 适用要件

2. Applicable Elements

认定代理人或者代表人未经授权，擅自注册被代理人或者被代表人商标的行为，须符合下列要件：

The following elements shall be satisfied for recognizing an agent or representative's behavior of registering the principal or represented person's trademark without authorization:

(1) 系争商标注册申请人是商标所有人的代理人或者代表人；

(1) The applicant for registration of the disputed trademark is the agent or representative of the trademark owner;

(2) 系争商标指定使用在与被代理人、被代表人的商标相同或者类似的商品/服务上；

(2) The disputed trademark is designated to use on the goods/ services which are identical or similar to those designated by the trademark of the principal or represented party;

(3) 系争商标与被代理人、被代表人的商标相同或者近似；

(3) The disputed trademark is identical or similar to the trademark of the principal or the represented person;

(4) 代理人或者代表人不能证明其申请注册行为已取得被代理人或者被代表人的授权。

(4) The agent or representative cannot prove that it has obtained the authorization of the principal or represented person for its behavior of applying for registration.

在注册商标无效宣告案件中，被代理人、被代表人或者利害关系人应当自系争商标注册之日起 5 年内提出无效宣告申请。

In a case of declaring a registered trademark invalid, the principal, represented person or interested party shall file the application for invalidity declaration within five (5) years since the registration date of the disputed trademark.

3.代理关系、代表关系的判定

3. Judgment on Agency Relationship and Representative Relationship

3.1 代理人不仅包括《中华人民共和国民法通则》、《中华人民共和国合同法》中规定的代理人，也包括基于商事业务往来而可以知悉被代理人商标的经销商。

3.1 Agents include not only the agents regulated in the *General Principles of the Civil Law of the People's Republic of China* and the *Contract Law of the People's Republic of China*, but also the dealers who could be familiar with the trademark of a principal based on commercial business contact.

代表人系指具有从属于被代表人的特定身份，执行职务行为而可以知悉被代表人商标的个人，包括法定代表人、董事、监事、经理、合伙事务执行人等人员。

Representatives means individuals who have a certain identity subject to a represented person and may know the trademark of this represented person for duty performance behavior, including legal representative, director, supervisor, manager, executor of partnership affairs, etc.

3.2 代理、代表关系尚在磋商阶段，代理人、代表人知悉被代理人、被代表人商标后进行注册，致使被代理人、被代表人利益可能受到损害的，属于《商标法》第十五条第一款所指代理人、代表人的擅自注册行为。

3.2 Where the agency or representative relationship is still at negotiation stage, the agent or representative registers after knowing the trademark of the principal or the represented person, so that the benefits of the principal or the represented person will probably be damaged, this shall belong to the non-authorized registration behavior of the agent or representative as stated in Paragraph 1 of Article 15 of the Trademark Law.

代理、代表关系结束后，代理人、代表人将被代理人、被代表人商标申请注册，致使被代理人、被代表人利益可能受到损害的，属于《商标法》第十五条第一款所指代理人、代表人的擅自注册行为。

Where after completion of agency or representative relationship, the agent or representative applies for registration of the trademark of the principal or the represented person, so that the benefits of the principal or the represented person will probably be

damaged, this shall belong to the non-authorized registration behavior of the agent or representative as stated in Paragraph 1 of Article 15 of the Trademark Law.

虽非以代理人或代表人名义申请注册被代理人或被代表人的商标，但有证据证明，注册申请人与代理人或者代表人具有串通合谋行为或者具有特定身份关系或者其他特定联系的，属于《商标法》第十五条第一款所指代理人、代表人的擅自注册行为。

Where it is not in the name of the agent or representative that the trademark of the principal or the represented person is applied for registration, but some evidence proves that, the registration applicant colludes or has certain identity relationship or other certain connection with the agent or representative, this shall belong to the non-authorized registration behavior of the agent or representative as stated in Paragraph 1 of Article 15 of the Trademark Law.

3.3 下列证据可以证明代理关系的存在:

3.3 The following evidence may prove the existence of an agency relation:

(1) 代理、经销合同;

(1) Agency and distribution contract;

(2) 可以证明代理、经销关系的交易凭证、采购资料等;

(2) The transaction vouchers, purchasing materials, etc. which could prove agency and distribution relationship;

(3) 其他可以证明代理、经销关系存在的证据。

(3) Other evidence which could prove the existence of agency and distribution relationship.

下列证据可以证明代表关系的存在:

The following evidence may prove the existence of representative relationship:

(1) 企业注册登记资料;

(1) Enterprise registration materials;

(2) 企业的工资表、劳动合同、任职文件、社会保险、医疗保险材料;

(2) Enterprise's payroll sheet, labor contract, appointment documents, social insurance and medical insurance materials;

(3) 其他可以证明一方当事人具有从属于被代表人的特定身份，执行职务行为而可以知悉被代表人商标的证据材料。

(3) Other evidence materials which could prove that one party concerned has certain identity subject to the represented person and may know the trademark of the represented person for duty performance behavior.

4.被代理人、被代表人的商标

4. Trademarks of Principals and Represented Persons

4.1 被代理人的商标包括:

4.1 Principal's trademarks include:

(1) 在合同或者授权委托文件中载明的被代理人商标;

(1) The principal's trademark stated in contract, authorization or entrustment document;

(2) 如当事人无约定，在代理关系已经确定时，被代理人在其被代理经销的商品/服务上，已经在先使用的商标视为被代理人商标；

(2) Where not stipulated by the party concerned, the trademark already used prior by the principal on the goods/ services distributed by the agent when the agency relationship is determined shall be deemed as the trademark of the principal;

(3) 如当事人无约定，代理人在其所代理经销的商品/服务上所使用的商标，若因代理人自己的广告宣传等使用行为，已足以导致相关公众认为该商标是表示被代理人的商品/服务与他人商品/服务相区别的标志，则在被代理人的商品/服务上视为被代理人的商标。

(3) Where not stipulated by the party concerned, the trademark used by the agent on the goods/ services distributed by it on commission basis is sufficient to make relevant public misunderstand that this trademark is a mark distinguishing the goods/ principal of the principal from another's goods/ services due to the use behavior such as advertising propaganda, etc. of the agent itself, then this trademark on the goods/ services of the principal shall be deemed as the trademark of the principal.

4.2 被代表人的商标包括:

4.2 Trademarks of represented persons:

(1) 被代表人已经在先使用的商标；

(1) The trademark already used prior of the represented person;

(2) 其他依法属于被代表人的商标。

(2) Other trademarks which belong to the represented person according to law.

5.对被代理人或者被代表人商标的保护范围不限于与该商标所使用的商品/服务相同的商品/服务，也及于类似的商品/服务。

5. The scope of protection for the trademark of a principal or represented person is not limited to the goods/ services identical to the goods/ services designated by this trademark, but also covers similar goods/ services.

6.代理人、代表人不得申请注册的商标，不限于与被代理人或者被代表人商标相同的商标，也包括与被代理人或者被代表人商标近似的商标。

6. The trademarks that an agent or representative shall not apply for registration are not limited to the trademarks identical to the trademark of the principal or represented person, but also includes the trademarks similar to the trademark of the principal or represented person.

7.代理人、代表人取得商标注册授权的判定

7. Judgment on the authorization obtained by an agent or representative for trademark registration

7.1 被代理人、被代表人所做出授权的内容应当包括代理人、代表人可以注册的商品/服务及商标标志，且授权意思表示应当清楚明确。

7.1 The contents of authorization made by a principal or represented person shall include the goods/ service and trademark sign that the agent or representative could register, and the expression of authorization intention shall be clear and definite.

7.2 代理人或者代表人应当提交以下证据材料证明授权事实的存在：

7.2 The agent or representative shall submit the following evidence materials to prove the existence of authorization fact:

(1) 被代理人、被代表人对代理人、代表人所做出的书面授权文件；

(1) The written document of authorization made by a principal or represented person to an agent or representative;

(2) 其他可以认定被代理人、被代表人对代理人、代表人做出过清楚明确的授权意思表示的证据。

(2) Other evidence which may be used to recognize that the principal or represented person has ever expressed clear and definite authorization to the agent or representative.

7.3 代理人、代表人虽然在申请注册时未取得被代理人、被代表人的明确授权，但被代理人、被代表人对该申请注册行为进行了事后追认的，视为代理人、代表人取得了被代理人、被代表人的授权。

7.3 Where an agent or representative does not obtain the definite authorization of a principal or represented person when applying for registration, but the principal or represented person recognizes retroactively this behavior of application for registration afterwards, the agent or representative shall be deemed to have obtained the authorization of the principal or represented person.

三、特定关系人抢注他人在先使用商标的审理标准

III. Standards for Trial of Specific related person's Preemptive Registration of Another's Prior Use Trademarks

《商标法》第十五条第二款 就同一种商品或者类似商品申请注册的商标与他人在先使用的未注册商标相同或者近似，申请人与该他人具有前款规定以外的合同、业务往来关系或者其他关系而明知该他人商标存在，该他人提出异议的，不予注册。

Paragraph 2 of Article 15 of the Trademark Law: An application for registering a trademark on the same or similar goods shall not be approved if: the trademark under application is identical with or similar to an unregistered trademark already used by another party, the applicant clearly knows the existence of the trademark of such another party due to contractual, business or other relationships with the latter other than those prescribed in the preceding Paragraph; and such another party raises objections to the applicant's trademark registration application.

1.引言

1. Introduction

特定关系人因合同、业务往来或者其他关系明知他人商标而抢注的行为违反了诚实信用原则，侵害了在先商标使用人或者利害关系人的合法权益。上述规定旨在禁止利用特定关系明知他人商标而恶意抢注的行为，维护公平有序的市场竞争秩序。

A **specific related person**'s behavior of preemptively registering a trademark under the circumstances that it knows this trademark belongs to another person for reason of contract, business contact or other relations is in violation of good faith principle, and infringes the lawful rights and interests of the prior trademark user or interested party. The abovementioned provisions aim to prohibit the behavior of preemptive registration of a trademark which is clearly known belonging to another person by using specific relationship, and to maintain fair and orderly market competition.

在商标异议、不予注册复审及无效宣告案件审理中涉及特定关系人抢注他人在先使用商标的，以本标准为原则进行个案判定。

Where in the trial of the cases of trademark objection, non-approved registration review and invalidity declaration, a specific related person's preemptive registration of another's prior trademark is involved, individual cases shall be judged with this Standards as principle.

2.适用要件

2. Applicable Elements

认定特定关系人抢注他人在先使用商标须符合下列要件：

The following elements shall be satisfied for recognizing a specific related person's preemptive registration of another's prior trademark:

(1) 他人商标在系争商标申请之前已经使用。

(1) Another's trademark has been used before application for the disputed trademark.

(2) 系争商标注册申请人与商标在先使用人存在合同、业务往来关系或者其他关系，因该特定关系注册申请人明知他人商标的存在。

(2) The applicant for registration of the disputed trademark has contract, business contact or other relationship with the prior user of the trademark, since the registration applicant as specific related person clearly knows the existence of another's trademark.

(3) 系争商标指定使用在与他人在先使用商标相同或者类似的商品/服务上；

(3) The disputed trademark is designated to use on the goods/ services which are identical or similar to those designated by another's prior trademark;

(4) 系争商标与他人在先使用商标相同或者近似；

(4) The disputed trademark is identical or similar to another's prior trademark;

在注册商标无效宣告案件中，商标在先使用人或者利害关系人应当自系争商标注册之日起 5 年内提出无效宣告申请。

In a case of declaring a registered trademark invalid, the prior user or interested party of the trademark shall file the application for invalidity declaration within five years since the registration date of the disputed trademark.

3.合同、业务往来关系及其他关系的判定

3. Judgment on Contract, Business contact and Other Relationship

合同、业务往来关系是指双方存在代表、代理关系以外的其他商业合作、贸易往来关系；其他关系是指双方商业往来之外的其他关系，如特定身份、曾发生争议纠纷、营业场所接近等。对合同、业务往来或者其他关系范围的界定应当从维护诚实信用原则立法宗旨出发，以保护在先权利，制止不公平竞争为落脚点，只要因合同、业务往来关系或者其他关系而明知他人在先使用商标存在进行抢注的，均应纳入本款规定予以规制。

Contract and business contact relationship means other business cooperation and trading contact relationship, except for representative and agency relationship, existing between both parties; other relationship indicates the relationship other than business contact between both parties, such as certain identity, having ever had controversies and disputes, close business places, etc. The definition of contract, business contact or other relationship shall start out from the legislation tenet of maintaining good faith principle, take “protecting prior rights and restraining unfair competition” as foothold. The preemptive registration of a trademark which is known belonging to another person for reason of contract, business contact or other relationship shall be under the regulation of this clause.

常见的合同、业务往来关系包括：

Common contract and business contact relationships include:

- (1) 买卖关系；
(1) Purchase and sales relationship;
- (2) 委托加工关系；
(2) Entrusted processing relationship;
- (3) 加盟关系（商标使用许可）；
(3) Alliance relationship (trademark use license);
- (4) 投资关系；
(4) Investment relationship;
- (5) 赞助、联合举办活动；
(5) Sponsoring or jointly holding an activity;
- (6) 业务考察、磋商关系。
(6) Business survey and negotiation relationship.

常见的其他关系包括：

Common other relationships include:

- (1) 亲属关系;
- (1) Domestic relation;
- (2) 隶属关系（除第十五条第一款规定的代表人以外的其他普通员工）；
(2) Membership function (other common employees except for representatives regulated in Paragraph 1 of Article 15);
- (3) 商标申请人与在先使用人曾发生经济纠纷；
(3) The applicant of a trademark has ever had economic disputes with the prior user;
- (4) 商标申请人申请注册在先使用人多个商标；
(4) The applicant of a trademark applies for registration of the prior user's several trademarks;
- (5) 商标申请人与在先使用人地理位置相邻。
(5) The applicant of a trademarks is neighboring to the prior user in terms of geographical location.

下列证据可以证明合同、业务往来及其他关系的存在:

The following evidence is able to prove the existence of contract, business contact and other relationships:

- (1) 合同;
(1) Contracts;
- (2) 可以证明合同、业务往来的来往信函、交易凭证、采购资料等;
(2) Correspondence letters, transaction vouchers, purchasing materials, etc. which could prove contract and business contact;
- (3) 企业的工资表、劳动合同、社会保险、医疗保险材料、户口登记证明等;
(3) Enterprise's payroll sheet, labor contract, social insurance and medical insurance materials, certificate of registered permanent residence, etc.;
- (4) 法院判决书, 行政处罚决定书, 有关商标争议的决定书、裁定书等;
(4) Judgment of the Court, written decision of administrative penalty, decision and ruling on trademark dispute, etc.;

(5) 在先使用人与申请人营业地位于同一街道或相邻之地理位置的证明；

(5) Certificate proving that the prior user and the applicant's business places are at the same street or of neighboring geographic location;

(6) 其他证明特定关系存在的证据。

(6) Other evidence proving the existence of specific relationship.

4. “在先使用”的判定

4. Judgment on “Prior Use”

在先使用应当是在系争商标提出注册申请前，已经在中国市场使用的商标。在先使用既包括在实际销售的商品、提供的服务上使用商标，也包括已在所涉商品/服务上对商标进行推广宣传。

Prior use means that a trademark has been used in Chinese market before application for registration of the disputed trademark. Prior use includes not only that a trademark is used on actually sold goods and provided services, but also that the trademark is promoted and propagandized on the goods/ services involved.

用以证明商标在先使用的证据不以中国为限，但当事人提交的国外证据材料，应当能够据以证明该商标为中国相关公众所知晓。

The evidence used to prove the prior use of a trademark is not limited to China, but the foreign evidence materials submitted by the party concerned shall be able to prove that this trademark is known to relevant public of China.

在先使用人只需证明商标已经使用，无需证明商标通过使用具有了一定影响。

Prior user only needs to prove that the trademark is already used, and does not need to prove that this trademark has had certain influences after use.

5. 虽非以特定关系人名义申请注册，但有证据证明，注册申请人与代理人或者代表人具有串通合谋行为或者具有特定身份关系或者其他特定联系的，属于《商标法》第十五条第二款所指特定关系人的抢注行为。

5. Where it's not in the name of specific related person that a trademark is applied for registration, but some evidence proves that, the registration applicant and the agent or representative collude with each other, or have specific identity relationship or other

specific relationship, it shall belong to the preemptive registration of specific related person, as stated in Paragraph 2 of Article 15 of the Trademark Law.

6.他人已就标有系争商标的商品/服务投入中国市场进行了实际准备，有证据证明特定关系人参与上述准备活动，且他人有证据证明事后确已将标有系争商标的商品/服务投入使用的，亦属于《商标法》第十五条第二款所指的抢注行为。

6. Where another person has made actual preparations for launching the goods/ services marked with the disputed trademark into Chinese market, some evidence proves that a specific related person has participated in the abovementioned preparatory activities, and another person has evidence proving that it has put into use the goods/ services marked with the disputed trademark afterwards, it shall also belong to the preemptive registration, as stated in Paragraph 2 of Article 15 of the Trademark Law.

7.对他人在先使用商标的保护范围不限于与该商标所使用的商品/服务相同的商品/服务，也及于类似的商品/服务。

7. The scope of protection for another's prior trademark is not limited to the goods/ services identical to those goods/ services designated by this trademark, but also covers similar goods/ services.

8.特定关系人不得申请注册的商标，不限于与他人商标相同，也包括与他人商标近似。

8. The trademarks that a specific related person shall not apply for registration are not limited to the trademarks identical to another's trademark, but also include the trademarks similar to another's trademark.

四、损害他人在先权利审理标准

IV. Standards for Trial of Damaging Another's Prior Rights

《商标法》第三十二条 申请商标注册不得损害他人现有的在先权利.....。

Article 32 of the Trademark Law: The application for trademark registration shall not damage another's existing prior rights ...

(一) 引言

(I) Introduction

申请注册的商标应当具有在先性，这种在先性是指申请注册的商标既不得与他人在先申请或者注册的商标相冲突，也不得与他人在先取得的其他合法权利相冲突。由于《商标法》的其他条款对于在先商标权利保护问题已经做了相应的规定，所以本条规定的在先权利是指在系争商标申请注册日之前已经取得的，除商标权以外的其他权利，包括字号权、著作权、外观设计专利权、姓名权、肖像权以及应予保护的其他合法在先权益（方案二无其他合法在先权益）。

A trademark applied for registration shall have priority, and such priority means that the trademark applied for registration does not conflict with a prior trademark applied for registered by another person, or conflict with the other prior legal rights obtained by another person. The other clauses of the Trademark Law give corresponding provisions on the protection of prior trademark rights, so the prior right regulated herein indicates the other rights except for trademark right and already obtained before the date of application for the disputed trademark, including the right to shop name, copyright, appearance design patent right, right of personal name, right to portrait, and other lawful prior rights and interests to be protected (scheme 2: No other lawful prior rights and interests).

在商标异议、不予注册复审及无效宣告案件审理中，涉及在先权利保护问题的，以本标准为原则进行个案判定。

Where in the trial of the cases of trademark objection, non-approved registration review and invalidity declaration, the problem of prior right protection is involved, individual cases shall be judged with this standard as principle.

本条所指的“现有”一般应当以系争商标申请注册日为时间点，确定在先权利是否形成，是否仍处于合法状态，但如果在先权利在案件审理时已不存在的，则一般不影响系争商标的注册。

For the purpose of Article 32 of the **Trademark Law**, the “existing” stated shall generally take the date of application for registration of a disputed trademark as time point to ascertain whether a prior right is formed and still in legal state. However, whether a prior right does not exist when a case is tried, the registration of the disputed trademark shall generally not be affected.

（二）在先权利

（II）Prior Rights

1、字号权

1. Right to shop name

1.1 将与他人在先登记、使用并具有一定知名度的字号相同或者近似的文字申请注册为商标，容易导致中国相关公众混淆，致使在先字号权人的利益可能受到损害的，应当认定为对他人在先字号权的损害，系争商标应当不予核准注册或者予以无效宣告。

1.1 Where the application for registration as a trademark of a character which is identical or similar to a prior shop name registered and used by another person and having had certain popularity will easily induce the confusion of Chinese relevant public, and probably damage the benefits of the holder of right to a prior shop name, this behavior shall be recognized as damage to another's right to a prior shop name, and the disputed trademark shall not be approved to register or shall be declared invalid.

1.2 适用要件

1.2 Applicable elements

（1）在系争商标申请注册之前他人已在先登记或使用其字号；

(1) Another person has registered or used its shop name before application for registration of a disputed trademark;

（2）该字号在中国相关公众中具有一定的知名度；

(2) This shop name has had certain popularity among Chinese relevant public;

（3）系争商标的注册与使用容易导致相关公众产生混淆，致使在先字号权人的利益可能受到损害。

(3) The registration and use of a disputed trademark will easily induce the confusion of relevant public and probably damage the benefits of the holder of prior right to the shop name.

1.3 关于在先字号权的界定

1.3 The definition of right to a prior shop name

以字号权对抗系争商标的，字号的登记、使用日应当早于系争商标的申请注册日。

Where a right to shop name is used to fight against the disputed trademark, the date of registration or use of the shop name shall be earlier than the date of application for registration of the disputed trademark.

在先享有字号权的事实可以用企业登记资料、使用该字号的商品交易文书、广告宣传材料等加以证明。

The fact of prior enjoyment of the right to a shop name may be proved with enterprise registration materials, transaction documents of the goods marked with this shop name, advertising propaganda materials, etc.

1.4 关于混淆可能性的判定

1.4 Judgment on the possibility of confusion

混淆的可能性是指，系争商标的注册与使用将会导致相关公众误以为该商标所标识的商品/服务来自于字号权人，或者与字号权人有某种特定联系。

The possibility of confusion indicates that the registration and use of a disputed trademark will make relevant public misunderstand that the goods/ services marked with this trademark are sourced from the holder of right to a shop name, or have some specific connection with the holder of right to this shop name.

认定系争商标容易与在先字号发生混淆，可能损害在先字号权人的利益，应当综合考虑下列各项因素：

The following factors shall be comprehensively considered when recognizing that the disputed trademark will easily induce confusion with the prior shop name and probably damage the benefits of holder of prior shop name:

(1) 系争商标与字号的近似程度

(1) Degree of similarity between disputed trademark and shop name

原则上系争商标与在先字号相同或基本相同时可能容易产生混淆，但在个案中应根据在先字号的独创性、知名度对系争商标与字号是否构成近似进行判断。

In principle, it will be easy to arouse confusion when a disputed trademark and a prior shop name are the same or basically the same, but in individual cases, it shall be judged whether a disputed trademark and a shop name constitute similar trademarks according to the originality and popularity of the prior shop name.

(2) 系争商标指定使用的商品/服务与字号权人提供的商品/服务的关联程度

(2) The degree of relevance between the goods/ services designated by a disputed trademark and the goods/ services provided by the holder of right to shop name

对在先字号权的保护原则上应当以相同或者类似商品/服务为限,但在个案中应根据在先字号的独创性、知名度,以及双方商品/服务的关联程度,具体确定该在先字号的保护范围。

The protection for right to a prior shop name shall be limited to identical or similar goods/ services in principle, but in individual cases, the protection scope of this prior shop name shall be determined according to the originality and popularity of the prior shop name, as well as the degree of relevance of the goods/ services of both parties.

1.5 对于企业名称的简称及事业单位、其他组织、个人合伙、个体工商户的名称及简称参照适用本标准。

1.5 This standard shall be referred to for the abbreviation of enterprise name, as well as the name and abbreviation of public institutions, other organizations, individual partnership, privately or individually-owned businesses.

方案二：将字号权改为名称权

Scheme 2: Change the “right to shop name” to the “right of name”.

2、著作权

2. Copyrights

2.1 未经著作权人的许可,将他人享有著作权的作品申请注册商标,应认定为对他人在先著作权的损害,系争商标应当不予核准注册或者予以无效宣告。

2.1 Where a work of which the copyright is enjoyed by another person is applied for registration as a trademark without the permission of the copyright holder, this behavior shall be recognized as damage to another's prior copyright, and the disputed trademark shall not be approved to register or shall be declared invalid.

2.2 适用要件

2.2 Applicable elements

- (1) 在系争商标申请注册之前他人已在先享有著作权;
(1) Another person has enjoyed prior copyright before the application for registration of the disputed trademark;
- (2) 系争商标与他人在先享有著作权的作品相同或者实质性相似;
(2) The disputed trademark is identical or substantially similar to the work of which the prior copyright is enjoyed by another person;
- (3) 系争商标注册申请人接触过或者有可能接触到他人享有著作权的作品;
(3) The applicant for registration of the disputed trademark has ever contacted or has the possibility to contact the work of which the prior copyright is enjoyed by another person;
- (4) 系争商标注册申请人未经著作权人的许可。
(4) The applicant for registration of the disputed trademark does not obtain the permission of the copyright holder.

2.3 关于在先著作权的界定

2.3 Definition of prior copyright

在先享有著作权是指，在系争商标申请注册日之前，他人已经通过创作完成作品或者继承、转让等方式取得著作权。

Prior enjoyment of a copyright means that another person has obtained the copyright by means of creating and completing a work or inheritance or transfer, etc.

在先享有著作权的事实可以下列证据材料加以证明：著作权登记证书，在先公开发表该作品的证据材料，在先创作完成该作品的证据材料，在先通过继承、转让等方式取得著作权的证据材料等。商标注册证或晚于系争商标申请注册日进行登记的著作权登记证书不能单独作为认定著作权成立的定案证据。

The fact of prior enjoyment of copyright may be proved with the following evidence materials: copyright registration certificate, evidence material proving prior public issuance of this work, evidence materials proving prior creation and completion of this work, evidence materials proving the prior obtaining of copyright by means of inheritance, transfer, etc. Trademark registration certificate or the certificate of copyright registration conducted later than the date of application for registration of the disputed trademark cannot be separately used as evidence to recognize that the copyright is tenable.

对生效裁判文书中确认的当事人在先享有著作权的事实，在没有充分相反证据的情况下，可以予以认可。

The fact of the prior enjoyment of copyright of the party concerned, as confirmed in an effective judgment document, may be approved where there is no sufficient reserve evidence.

2.4 “作品”是指受到《中华人民共和国著作权法》保护的客体。

2.4 “Work” means an object protected by the Copyright Law of the People’s Republic of China.

2.5 如果系争商标注册申请人能够证明系争商标是独立创作完成的，则不构成对他人在先著作权的损害。

2.5 Where the applicant for registration of a disputed trademark could prove that the disputed trademark is independently created and completed, the disputed trademark shall not constitute damages to another’s prior copyright.

2.6 系争商标注册申请人应就其主张的取得著作权人许可的事实承担举证责任。

2.6 The applicant for registration of a disputed trademark shall assume the burden of proof for the fact claimed by it that it has obtained the permission of copyright holder.

根据《中华人民共和国著作权法》及其《实施条例》的有关规定，系争商标注册申请人应当就著作权人做出过直接的、明确的许可其使用作品申请注册商标的意思表示举证证明。

In accordance with related provisions of the Copyright Law of the People’s Republic of China and its Implementation Regulations, the applicant for registration of a disputed trademark shall produce evidence to prove that the copyright holder has ever made direct and definite expression of its intention to license the applicant to use its work.

3、外观设计专利权

3. Appearance Design Patent Right

3.1 未经授权，将他人享有专利权的外观设计申请注册商标，容易导致中国相关公众混淆，致使在先外观设计专利权人的利益可能受到损害的，应当认定为对他人在先外观设计专利权的损害，系争商标应当不予核准注册或者予以无效宣告。

3.1 Where applying for the registration without authorization as a trademark of an appearance design of which the patent right is owned by another person will easily induce

the confusion of Chinese relevant public and probably damage the benefits of the holder of prior appearance design patent right, this shall be recognized as damage to another's prior appearance design patent right, and the disputed trademark shall not be approved to register or shall be declared invalid.

3.2 适用要件

3.2 Applicable elements

(1) 在系争商标申请注册之前他人已在先享有外观设计专利权；

(1) Another person has enjoyed the appearance design patent right before the application for registration of the disputed trademark;

(2) 系争商标的注册与使用容易导致相关公众产生混淆，致使在先专利权人的利益可能受到损害。

(2) The registration and use of a disputed trademark will easily induce the confusion of relevant public and probably damage the benefits of the holder of prior patent right.

3.3 关于他人在先外观设计专利权的界定

3.3 Definition of another's prior appearance design patent right

外观设计专利的授权公告日应当早于系争商标注册申请日及使用日。

The date of authorization announcement of an appearance design patent shall be earlier than the date of application for registration and the date of use of a disputed trademark.

当事人主张在先享有外观设计专利权的，应当提交外观设计专利证书、年费缴纳凭据等证据材料加以证明。

Where the party concerned claims prior enjoyment of appearance design patent right, it shall provide evidence materials to prove the right, such as appearance design patent certificate, annual fee payment voucher, etc.

3.4 关于混淆可能性的判定

3.4 Judgment on possibility of confusion

混淆的可能性是指，系争商标的注册与使用将会导致相关公众误认为该商标所标识的商品/服务来自于外观设计专利权人，或者与外观设计专利权人有某种特定联系。

The possibility of confusion indicates that, the registration and use of a disputed trademark will make relevant public misunderstand that the goods/ services marked with this

trademark are sourced from the holder of appearance design patent right, or have a specific connection with the holder of appearance design patent right.

认定系争商标容易与在先外观设计发生混淆，可能损害在先外观设计专利权人的利益，应当综合考虑下列各项因素：

The following factors shall be comprehensively considered when recognizing that a disputed trademark is easy to confuse with a prior appearance design and will probably damage the benefits of the holder of this prior appearance design patent right:

(1) 系争商标与在先外观设计所使用商品的关联程度

(1) The degree of relevance between the goods designated by a disputed trademark and those designated by a prior appearance design;

系争商标与外观设计使用于相同或者类似商品一般认定为容易导致混淆，但在先外观设计使用产品为包装或容器类的应结合在先外观设计的实际使用情况进行判定。

Using a disputed trademark and an appearance design on identical or similar goods is generally recognized as easily inducing confusion, but where the prior appearance design is used on packages or containers, the judgment shall be made in combination with the actual use of the prior appearance design.

(2) 系争商标与外观设计的近似程度

(2) The degree of similarity between a disputed trademark and an appearance design

关于系争商标与外观设计相同或者近似的判断，既可以就系争商标与外观设计的整体进行比对，也可以就系争商标的主体显著部分与外观设计的要部进行比对。

The identicalness or similarity of a disputed trademark and an appearance design may be judged by comparing this disputed trademark and appearance design on the whole, or comparing the principal distinctive part of the disputed trademark and the important parts of the appearance design.

有关系争商标与外观设计相同或者近似的认定，原则上适用商标相同、近似的审查标准。外观设计专利中的文字仅保护其特殊表现形式，含义并不在专利权保护范围内。

The recognition about the identical or similarity of a disputed trademark and an appearance design is applicable to the standard for examining the identical or similarity of trademarks in principle. The scope of protection for the characters in an appearance design patent only covers their particular expression form, and excludes their meaning.

3.5 系争商标注册申请人应当就其主张的取得外观设计专利权人授权的事实承担举证责任。

3.5 The applicant for registration of a disputed trademark shall assume the burden of proof for the fact claimed by it that it has obtained the authorization of the holder of an appearance design patent right.

4、姓名权

4. Right of Personal Name

4.1 未经许可，将他人的姓名申请注册商标，给他人姓名权可能造成损害的，系争商标应当不予核准注册或者予以无效宣告。

4.2 Where applying for registration without permission as a trademark of another's name will probably damage another's right of personal name, the disputed trademark shall not be approved to register or shall be declared invalid.

4.2 适用要件

4.2 Applicable elements

(1) 在相关公众的认知中，系争商标文字指向该姓名权人；

(1) In the cognition of relevant public, the character of a disputed trademark is directed at the holder of the right of personal name;

(2) 系争商标的注册给他人姓名权可能造成损害。

(2) The registration of the disputed trademark will probably damage another's right of personal name.

4.3 他人的姓名包括本名、笔名、艺名、别名等。

4.3 Another's name includes autonym, nom de plume, stage name, byname, etc.

“他人”是指提出异议、不予注册复审或者无效宣告申请时在世的自然人。

“Another” indicates a natural person living in the world when filing an application for objection, non-approved registration review or invalidity declaration.

4.4 认定系争商标是否损害他人姓名权，应当以相关公众容易将系争商标在其注册使用的商品上指向姓名权人或者与姓名权人建立对应联系为前提，既包括系争商标与

他人姓名完全相同，也包括虽然系争商标与他人姓名在文字构成上有所不同，但反映了他人的主要姓名特征，在社会公众的认知中指向该姓名权人。

4.4 When recognizing whether a disputed trademark damages another's right of personal name, we shall meet the precondition that, relevant public will easily direct the goods on which the disputed trademark is registered and used at the holder of the right of personal name, or establish a corresponding connection between such goods and the holder of the right of personal name, and this includes not only that the disputed trademark is completely the same as another's name, but also that the disputed trademark is somewhat different from another's name in terms of character composition, but reflects another's major name characteristics, and directs the holder of right of this personal name in the cognition of social public.

未经许可使用公众人物的姓名申请注册商标的，或者明知为他人的姓名，却基于损害他人利益的目的申请注册商标的，应当认定为对他人姓名权的损害。

Where a trademark is applied for registration by using the name of a public character without permission, or a trademark is applied for registration based on knowing that this trademark is another's name and for purpose of damaging another's benefits, this shall be recognized as damage to another's right of personal name.

4.5 系争商标注册申请人应当就其主张的取得姓名权人许可的事实承担举证责任。

4.5 The applicant for registration of a disputed trademark shall assume the burden of proof for the fact claimed by it that it has obtained the permission of the holder of the right of personal name.

在系争商标申请注册日之前姓名权人撤回许可的，超出姓名权人许可使用的商品/服务之外申请注册商标的，在姓名权人未明确许可的使用商品/服务上申请注册商标的，视为未经许可。

Where a holder of right of personal name withdraws permission before the date of application for registration of the disputed trademark, or a trademark is applied for registration outside the goods/ services permitted by the holder of right of personal name, or a trademark is applied for registration on the goods/ services not clearly permitted by the holder of right of personal name, it shall be deemed as not obtaining permission.

4.6 使用姓名申请注册商标，误导公众、妨害公序良俗或者有其他不良影响的，依据《商标法》第十条第一款第（七）项、第（八）项的规定进行审查。

4.6 Where applying for registration of a trademark with a name will mislead the public, hinder the good public order, or produce other negative influences, it shall be examined in

accordance with the provisions of Subparagraphs (7) and (8) of Paragraph 1, Article 10 of the Trademark Law.

5、肖像权

5. Right to Portrait

5.1 未经许可，将他人的肖像申请注册商标，给他人肖像权可能造成损害的，系争商标应当不予核准注册或者予以无效宣告。

5.1 Where applying for registration without permission as a trademark of another's portrait will probably damage another's right to portrait, the disputed trademark shall not be approved to register or shall be declared invalid.

5.2 适用要件

5.2 Applicable elements

(1) 在相关公众的认知中，系争商标图像指向该肖像权人；

(1) In the cognition of relevant public, the portrait of a disputed trademark is directed at the holder of the right to this portrait;

(2) 系争商标的注册给他人肖像权可能造成损害。

(2) The registration of the disputed trademark will probably damage another's right to portrait.

5.3 他人的肖像包括肖像照片、肖像画等。

5.3 Another's portrait includes portrait photo, portraiture, etc.

“他人”是指提出异议、不予注册复审或者无效宣告申请时在世的自然人。

“Another” means a natural person living in the world when filing an application for objection, non-approved registration review or invalidity declaration.

5.4 认定系争商标是否损害他人肖像权，应当以相关公众容易将系争商标在其注册使用的商品上指向肖像权人或者与肖像权人建立对应联系为前提，既包括系争商标与他人肖像完全相同，也包括虽然系争商标与他人肖像在构图上有所不同，但反映了他人的主要形象特征，在社会公众的认知中指向该肖像权人。

5.4 When recognizing whether a disputed trademark damages another's right to portrait, we shall meet the precondition that, relevant public will easily direct the goods on which the

disputed trademark is registered and used at the holder of the right to portrait, or establish a corresponding connection between such goods and the holder of the right to portrait, and this includes not only that the disputed trademark is completely the same as another's portrait, but also that the disputed trademark is somewhat different from another's portrait in terms of picture composition, but reflects another's major image characteristics, and directs the holder of right to this portrait in the cognition of social public.

未经许可使用公众人物的肖像申请注册商标的，或者明知为他人的肖像，却基于损害他人利益的目的申请注册商标的，应当认定为对他人肖像权的损害。

Where a trademark is applied for registration by using the portrait of a public character without permission, or a trademark is applied for registration based on knowing that this trademark is another's portrait and for purpose of damaging another's benefits, this shall be recognized as damage to another's right to portrait.

5.5 系争商标注册申请人应当就其主张的取得肖像权人许可的事实承担举证责任。

5.5 The applicant for registration of a disputed trademark shall assume the burden of proof for the fact claimed by it that it has obtained the permission of the holder of the right to portrait.

在系争商标申请注册日之前肖像权人撤回许可的，超出肖像权人许可使用的商品/服务之外申请注册商标的，在肖像权人未明确许可的使用商品/服务上申请注册商标的，视为未经许可。

Where a holder of right to portrait withdraws permission before the date of application for registration of the disputed trademark, or a trademark is applied for registration outside the goods/ services permitted by the holder of right to portrait, or a trademark is applied for registration on the goods/ services not clearly permitted by the holder of right to portrait, it shall be deemed as not obtaining permission.

5.6 使用他人的肖像申请注册商标，误导公众、妨害公序良俗或者有其他不良影响的，依据《商标法》第十条第一款第（七）、第十条第一款第（八）项的规定进行审查。

5.6 Where the application for registration of a trademark with another's portrait misleads the public, hinders the good public order, or produces other negative influences, it shall be examined in accordance with the provisions of Subparagraphs (7) and (8) of Paragraph 1, Article 10 of the Trademark Law.

（三）在先权益

(III) Prior Rights and Interests

6、知名商品特有名称、包装、装潢（方案二将知名商品特有名称、包装、装潢作为未注册商标适用第三十二条后半句审理标准）

6. Specific name, packaging and decoration of famous goods (scheme 2: The second half sentence of Article 32 may be taken as standard for trial where the specific name, packaging and decoration of famous goods are taken as non-registered trademarks)

6.1 将与他人知名商品特有名称、包装、装潢相同或者近似的文字、图形等申请注册为商标，容易导致中国相关公众混淆，致使该合法权益人的利益可能受到损害的，应当认定为对他人知名商品特有名称、包装、装潢的损害，系争商标应当不予核准注册或者予以无效宣告。

6.1 Where applying for registration as a trademark of a word or pattern, etc. which is identical or similar to the specific name, packaging or decoration of another's famous goods will easily induce the confusion of Chinese relevant public and probably damage the benefits of this holder of lawful rights and interests, it shall be recognized as damages to the specific name, packaging and decoration of another's famous goods, and the disputed trademark shall not be approved to register or shall be declared invalid.

6.2 适用要件

6.2 Applicable elements

- (1) 在系争商标申请注册之前他人已在先使用知名商品特有名称、包装、装潢；
(1) Another person has used the specific name, packaging and decoration of famous goods before the application for registration of the disputed trademark;
- (2) 他人知名商品特有名称、包装、装潢未获准注册为商标；
(2) The specific name, packaging and decoration of famous goods are not approved to register as trademarks;
- (3) 系争商标与他人知名商品特有名称、包装、装潢相同或者近似；
(3) The disputed trademark is identical or similar to the specific name, packaging and decoration of famous goods;
- (4) 系争商标的注册与使用容易导致相关公众产生混淆或误认，致使在先知名商品特有名称、包装、装潢权益人的利益可能受到损害。

(4) The registration and use of the disputed trademark will induce the confusion or misunderstanding of relevant public, and probably damage the benefits of the holder of rights and interests on the specific name, packaging and decoration of prior famous goods.

6.3 知名商品特有名称、包装、装潢的认定

6.3 Recognition with the specific name, packaging and decoration of famous goods

根据个案的具体情况及《关于禁止仿冒知名商品特有的名称、包装、装潢的不正当竞争行为的若干规定》对是否构成知名商品特有名称、包装、装潢进行认定：

It shall be recognized whether constituting the specific name, packaging and decoration of famous goods according to the concrete situations of individual cases and the Provisions on Prohibiting Unfair Competition Behavior of Counterfeiting the Specific Name, Packaging and Decoration of Famous Goods:

知名商品是指在市场上具有一定知名度，为相关公众所知悉的商品。

Famous goods indicate the goods which have certain popularity in the market and are known by relevant public.

特有是指知名商品独有的与通用名称有显著区别的商品名称。

“Uniqueness” means the unique name of famous goods, which has distinctive differences from a generic name.

包装是指为识别商品以及方便携带、储运而使用在商品上的辅助物和容器。

Packaging means auxiliary and containers used on goods for identifying goods and facilitating carrying, storage and transportation.

装潢是指为识别与美化商品而在商品或者包装上附加的文字、图案、色彩及其排列组合。

Decoration indicates the characters, patterns, colors and their permutation and combination attached to goods or package for identifying and beautifying goods.

6.4 关于混淆可能性的判定

6.4 Judgment on possibility of confusion

参照字号权 1.4 的考虑因素

Refer to the consideration factors in 1.4 of the right to shop name.

7、作品名称及作品中虚拟角色名称（方案二无该部分）

7. Name of a work and name of a virtual character in the work (scheme 2: Cancel this part)

7.1 将与他人具有较高知名度的作品名称、虚拟角色名称相同或者高度近似的文字申请注册为商标，容易导致中国相关公众认为系争商标使用的商品与该合法权益人存在特定联系，致使该合法权益人的利益可能受到损害的，应当认定为对他人商品化权益的损害，系争商标应当不予核准注册或者予以无效宣告。

7.1 Where applying for registration as a trademark of a word which is identical or highly similar to the name of another's highly popular work or virtual character will easily make Chinese relevant public consider that the goods designated by the disputed trademark has specific connection with this holder of lawful rights and interests, and probably damage the benefits of this holder of lawful rights and interests, it shall be recognized as damages to another's commercialized rights and interests, and the disputed trademark shall not be approved to register or shall be declared invalid.

7.2 适用要件

7.2 Applicable elements

(1) 他人的作品具有较高知名度，从而该作品名称或作品中的虚拟角色名称也具有较高知名度；

(1) Another's work is highly popular, so the name of this work or the name of a virtual character in this work is also highly popular;

(2) 系争商标与他人作品名称或作品中的虚拟角色名称相同或者高度近似，以相关公众是否容易将系争商标唯一指向作品名称或角色名称为标准进行判断；

(2) The disputed trademark is identical or highly similar to the name of another's work or the name of a virtual character in this work, and the judgment is made based on the standard that whether it's easy for relevant public to only direct the disputed trademark to the name of this work or the name of this character;

(3) 系争商标注册使用的商品与在先权益人作品通常可能延伸至的关联产品属于类似商品，容易导致相关公众产生误认，致使在先权益人的利益可能受到损害；

(3) The goods registered for use of the disputed trademark are similar to the associated products which the work of the holder of prior rights and interests will probably and

generally extend to, and this will easily induce the misunderstanding of relevant public and probably damage the benefits of the holder of prior rights and interests;

(4) 对作品名称、虚拟角色名称应在该作品著作权保护期内给予保护。

(4) The name of the work and the name of virtual character shall be protected in the period of protection for the copyright of this work.

五、抢注他人已经使用并有一定影响商标审理标准

V. Standards for Trial of Preemptive Registration of Another's Trademark Already Used and Having Certain Influences

《商标法》第三十二条 申请商标注册……，也不得以不正当手段抢先注册他人已经使用并有一定影响的商标。

Article 32 of the Trademark Law: The application for trademark registration ... and it's not allowed to preemptively register by improper means a trademark which has been used and had certain influences.

1.引言

1. Introduction

上述规定是基于诚实信用原则，对已经使用并有一定影响商标予以保护，制止以不正当手段抢注行为，弥补严格实行注册原则可能造成不公平后果的不足。

The abovementioned provision is to protect a trademark which has been used and had certain influences based on the principle of good faith and credibility, to restrain the behavior of preemptive registration by improper means, and to make up the deficiency that strictly executing the registration principle will probably cause unfair consequences.

在商标异议、不予注册复审及无效宣告案件审理中，涉及抢注他人已经使用并有一定影响商标问题的，以本标准为原则进行个案判定。

Where in the trial of the cases of trademark objection, non-approved registration review and invalidity declaration, the problem of preemptive registration of another's trademark already used and having certain influences is involved, and the holder considers that its right is infringed, individual cases shall be judged with this Standards as principle.

2.适用要件

2. Applicable Elements

- (1) 他人商标在系争商标申请日之前已经在先使用并有一定影响；

(1) Another's trademark has been used and had certain influences before the date of application for the disputed trademark;

(2) 系争商标与他人商标相同或者近似;

(2) The disputed trademark is identical or similar to another's trademark;

(3) 系争商标所指定的商品/服务与他人商标所使用的商品/服务原则上相同或者类似;

(3) The goods/ services designated by the disputed trademark are identical or similar to the goods/ services designated by another's trademark in principle;

(4) 系争商标申请人采取了不正当手段。

(4) The applicant of the disputed trademark adopts improper means.

在先使用并有一定影响商标的所在先使用并有一定影响商标的所有人或者利害关系人依据《商标法》第三十二条的规定对系争商标提出无效宣告的，应自系争商标核准注册之日起五年内提出。

Where the owner or interested party of a prior trademark having been used and had certain influences requests invalidity declaration of the disputed trademark in accordance with the provisions of Article 32 of the Trademark Law, the request shall be brought forward within five years since the date when the disputed trademark is approved to register.

3、已经使用并有一定影响商标的判定

3. Judgment on a trademark having been used and certain influences

3.1 已经使用并有一定影响商标是指在中国已经使用并为一定范围内相关公众所知晓的未注册商标。

3.1 A trademark having been used and had certain influences indicates a non-registered trademark which has been used and known to relevant public within a certain scope in China.

相关公众的判定适用《复制、摹仿或者翻译他人驰名商标审理标准》的相关规定。

The judgment on relevant public is applicable to relevant provisions of the Standard for Trial of Reproduction, Imitation or Translation of Others' Well-Known Trademark.

未注册商标，应包括在系争商标申请注册前从未提出注册申请的商标，或者曾获准注册但后因未续展等原因失效的商标，以及曾提出注册申请但未获核准的商标等情况。

Non-registered trademark shall include a trademark never applied for registration before the application for registration of the disputed trademark, or a trademark approved to register and later going invalid for reason of non-renewal, etc., and a trademark applied for registration but not approved to register, etc.

3.2 认定商标是否有一定影响，应当就个案情况综合考虑下列各项因素，但不以该商标必须满足下列全部因素为前提：

3.2 For recognizing whether a trademark has certain influences, we shall comprehensively consider the following factors aiming at the circumstances of individual cases, but shall not take that “this trademark must satisfy all the following factors” as precondition:

（1）相关公众对该商标的知晓情况；

(1) The awareness of relevant public about this trademark;

（2）该商标所标示的商品实际销售的持续时间和地理范围；

(2) The duration and geographical scope of the actual sale of the goods marked with this trademark;

（3）该商标的广告宣传、展览以及其他商业活动的持续时间、方式、程度、地理范围；

(3) The duration, method, extent and geographical scope of the advertising propaganda, exhibition and other commercial activities of this trademark;

（4）其他使该商标产生一定影响的因素。

(4) Other factors making this trademark produce certain influences.

3.3 上述参考因素可由下列证据材料加以证明：

3.3 The abovementioned reference factors may be proved by the following evidence materials:

（1）该商标的最早使用时间和持续使用情况等相关资料；

(1) Related materials about the earliest use time and continuous use, etc. of this trademark;

（2）该商标所标示的商品/服务的合同、发票、提货单、银行进帐单、进出口凭据等；

(2) The contract, invoice, bill of lading, bank deposit receipt, import and export vouchers, etc. of the goods/ services marked with this trademark;

(3) 该商标所标示的商品/服务的销售区域范围、销售量、销售渠道、方式、市场份额等相关资料；

(3) Related materials about the sales region scope, sales volume, sales channel, method, market share, etc. of the goods/ services marked with this trademark;

(4) 该商标所有人在广播、电影、电视、报纸、期刊、网络、户外等媒体发布的商业广告、宣传资料及上述媒体中所有涉及到该商标的评论、报道、宣传等资料；

(4) The commercial advertising and propaganda materials issued by the owner of this trademark via the media like radio, film, TV, newspaper, periodicals, network, outdoor, etc., as well as the comments, reports, propaganda materials, etc. involving this trademark in the abovementioned media;

(5) 该商标所标示的商品/服务参加展览会、博览会、拍卖等商业活动的相关资料；

(5) Related materials about the commercial activities such as exhibitions, expos, auctions, etc. participated by the goods/ services marked with this trademark;

(6) 该商标的获奖等商誉资料；

(6) Goodwill materials about awards granted to this trademark;

(7) 其他可以证明该商标有一定影响的资料。

(7) Other materials which can prove that this trademark has certain influences.

以上关于在先商标的使用证据不以形成于中国境内为前提，如能证明其使用能使该商标的影响力及于中国大陆地区，相关证据可以作为判断该商标是否具有一定影响的证据。

The above evidence about the use of prior trademark does not take “formation in China” as precondition. Where being able to prove that the use makes the influences of this trademark cover Chinese Mainland, relevant evidence may be used as evidence for judging whether this trademark has certain influences.

3.4 用以证明商标使用情况的证据材料，应当能够显示所使用的商标标识、商品/服务、使用日期和使用人。

3.4 The evidence materials used to prove the use of a trademark shall be able to display the used trademark sign, goods/ services, use date and user.

3.5 商标是否具有一定影响原则上以系争商标申请日为准予以判定。

3.5 Whether a trademark has certain influences shall be judged based on the date of application for the disputed trademark in principle.

在系争商标申请日前虽曾使用并具有一定影响，但未持续使用的，还应对该商标的影响力是否持续至系争商标申请注册日予以判定。

Where a disputed trademark has been used and had certain influences before the date of application, but it is not used continuously, then it will be necessary to judge whether the influences of this trademark last till the date of application for registration of the disputed trademark.

4、“不正当手段”的判定

4. Judgment on “improper means”

判定系争商标申请是否采取不正当手段，可综合考虑下列因素：

The following factors may be considered comprehensively for judging whether improper means are adopted to apply for a disputed trademark:

(1) 系争商标申请人与在先使用人曾有贸易往来或合作关系；

(1) The applicant of the disputed trademark has ever had trade contacts or partnership with the prior user;

(2) 系争商标申请人与在先商标使用人共处相同地域或者双方商品/服务有相同的销售渠道和地域范围；

(2) The applicant of the disputed trademark and the prior trademark user are located in the same territory or both parties have the same sales channels and territorial scope for their goods/ services;

(3) 系争商标申请人与在先使用人曾发生过其他纠纷，可知晓在先使用人商标；

(3) The applicant of the disputed trademark has ever had other disputes with the prior user, and may know this prior user's trademark;

(4) 系争商标申请人与在先使用人曾有内部人员往来关系；

(4) The applicant of the disputed trademark has ever had the internal personnel intercourse relationship with the prior user;

(5) 系争商标申请人具有以牟取不正当利益为目的，利用在先使用人有一定影响商标的声誉和影响力进行误导宣传、胁迫在先使用人与其进行贸易合作，向在先使用人或者他人索要高额转让费、许可使用费或者侵权赔偿金等行为；

(5) The applicant of the disputed trademark, aiming to make improper profits, uses the reputation and influences of the prior user's trademark having had certain influences to carry out misleading propaganda, forces the prior user to cooperate with it in trading, and asks for high-amount transfer fee, license fee or infringement compensation from the prior user or others;

(6) 他人商标具有较强独创性，系争商标与之高度近似；

(6) Another's trademark has relatively strong originality, and the disputed trademark is highly similar to it;

【方案二：(6) 他人商标具有较强独创性；】

[Scheme 2: (6) Another's trademark has relatively strong originality;]

(7) 其他可以认定为不正当手段的情形。

(7) Other circumstances which could be recognized as improper means.

5、是否构成本条款所指情形应对“一定影响”的大小和“不正当手段”的情形予以综合考虑。

5. Whether constituting the circumstances stated herein shall be considered comprehensively in combination with the degree of “certain influences” and the situation of “improper means”.

六、以欺骗手段或者其他不正当手段取得商标注册审理标准

VI. Standards for Trial of Trademark Registration Obtained by Deceptive or Other Improper Means

《商标法》第四十四条第一款 已经注册的商标，……是以欺骗手段或者其他不正当手段取得注册的，由商标局宣告该注册商标无效；其他单位或者个人可以请求商标评审委员会宣告该注册商标无效。

Paragraph 1, Article 44 of the Trademark Law: A registered trademark shall be declared invalid by the Trademark Office if ... its registration is obtained by deceptive or other improper means. Other entities or individuals may request the Trademark Review and Adjudication Board to declare such registered trademark invalid.

1、引言

1. Introduction

申请商标注册应当遵守诚实信用原则，不得以弄虚作假的手段欺骗商标行政主管机关取得注册，也不得基于进行不正当竞争、牟取非法利益的目的，恶意进行注册。

The application for trademark registration shall persist with the principle of good faith. It is not allowed to obtain registration from administrative authority of trademark by deceptive means, or to execute malicious registration aiming to make illegal profits based on improper competition.

涉及以欺骗手段或者其他不正当手段取得商标注册问题的，以本标准为原则进行个案判定。

Where the registration of a trademark is objective by deceptive or other improper means, individual cases shall be judged with this Standard as principle.

2、适用要件

2. Applicable elements

2.1 以弄虚作假的手段欺骗商标行政主管机关取得商标注册的行为。

2.1 The behavior of obtaining the registration of a trademark from administrative authority of trademark by deceptive means

此种情形是指系争商标注册人在申请注册商标的时候,采取了向商标行政主管机关虚构或者隐瞒事实真相、提交伪造的申请书件或者其他证明文件,以骗取商标注册的行为。包括但不限于下列情形:

Such circumstance indicates that, when applying for registration of a trademark, this disputed trademark registrant commits the behavior of fabricating or concealing the truth, submitting counterfeited application documents or other documentary evidence to the administrative authority of trademark in order to obtain trademark registration, including but not limited to the following circumstances:

(1) 伪造申请书件签章的行为;

(1) The behavior of fabricating signature and seal on application documents;

(2) 伪造、涂改申请人的身份证明文件的行为,包括使用虚假的身份证、营业执照等身份证明文件,或者涂改身份证、营业执照等身份证明文件上重要登记事项等行为;

(2) The behavior of fabricating and altering applicant's identity certification documents, including using false identity certification documents such as ID card, business license, etc., or altering important registration items on identity registration documents such as ID card, business license, etc.;

(3) 伪造其他证明文件的行为。

(3) The behavior of fabricating other certification documents.

2.2 基于进行不正当竞争、牟取非法利益的目的,恶意进行注册的行为。

2.2 The behavior of malicious registration aiming to make illegal profits based on improper competition.

此种情形是指确有充分证据证明系争商标注册人采用欺骗手段以外的扰乱商标注册秩序、损害公共利益、不正当占用公共资源或者以其他方式谋取不正当利益等其他不正当手段取得注册,其行为违反了诚实信用原则,损害了公平竞争的市场秩序。对于只是损害特定民事权益的情形,则应适用商标法第四十五条及商标法的其他相应规定进行审查判断。

Such circumstance indicates that there is sufficient evidence proving that disputed trademark registrant obtains registration by other improper means except for deceptive

means, such as disturbing trademark registration order, damaging public interest, taking up public resources improperly or seeking illegitimate interests by other means, etc., and its behavior violates the principle of good faith and damages the market order of fair competition. The circumstance of only damaging certain civil rights and interests shall be examined and judged in accordance with Article 54 and other corresponding provisions of the Trademark Law.

2.2.1 下列情形属于本条所指的“以其他不正当手段取得注册”：

2.2.1 The following circumstances belong to “obtaining registration by other improper means” stipulated in Article 44 of the Trademark Law:

(1) 系争商标申请人申请注册较大量商标，且与他人具有较强显著性的商标构成相同或者近似；

(1) A disputed trademark applicant applies for registration of a relatively big quantity of trademarks, which are identical or similar to another's trademark with relatively strong distinctiveness;

(2) 系争商标申请人申请注册较大量商标，且与地名、景点、建筑物等公共资源名称构成相同或者近似；

(2) A disputed trademark applicant applies for registration of a relatively big quantity of trademarks, which are identical or similar to place name or the name of public resources, such as scenic spots, buildings, etc.;

(3) 系争商标申请人申请注册较大量商标，且与他人字号、企业名称、社会组织及其他机构名称、域名、作品、姓名、药品名称、植物品种名称等构成相同或者近似；

(3) A disputed trademark applicant applies for registration of a relatively big quantity of trademarks, which are identical or similar to another's shop name, enterprise name, social organization and other institution name, domain name, work, name, drug name, plant variety name, etc.;

(4) 系争商标申请人申请注册大量商标，明显缺乏真实使用意图；

(4) A disputed trademark applicant applies for registration of a relatively big quantity of trademarks, and is obviously lack of true intention to use;

(5) 其他可以认定为以不正当手段取得注册的情形。

(5) Other circumstances which may be recognized as obtaining registration by improper means.

2.2.2 明显缺乏真实使用意图的判定，可综合考虑以下因素：

2.2.2 The following factors may be considered comprehensively for judging obvious lack of true intention to use:

(1) 明显超出系争商标申请人的经营范围，或者系争商标申请人不具有相关经营

资质；

(1) It is obviously outside the business scope of the disputed trademark applicant, or the disputed trademark applicant does not have related operation qualifications;

(2) 明显超出系争商标申请人的合理使用需求；

(2) It is obviously outside the reasonable use demand of the disputed trademark applicant;

(3) 系争商标注册后，系争商标注册人出于牟取不正当利益的目的，进行兜售，或者胁迫他人与其进行贸易合作，以及向他人索要高额转让费、许可使用费、侵权赔偿金；

(3) After registration of the disputed trademark, the disputed trademark registrant makes a sale of this disputed trademark aiming to make improper profits, or forces others to cooperate with it in trading, and asks for high-amount transfer fee, license fee or infringement compensation from others;

2.2.3 系争商标申请人以不正当手段取得注册的商标，不限于系争商标申请人本人申请注册的商标，也包括与系争商标申请人具有串通合谋行为或者具有特定身份关系或者其他特定联系的自然人、法人或其他组织。

2.2.3 The trademarks of which the registration is obtained by a disputed trademark applicant by improper means are not limited to the trademarks applied for registration by the disputed trademark applicant itself, but also include those trademarks applied for registration by the natural persons, corporations or other organizations which collude, or have specific identity relationship or other specific relationship with the disputed trademark applicant.

七、利害关系人的认定

VII. Recognition of Interested Parties

《商标法》第三十三条 对初步审定公告的商标，自公告之日起三个月内，在先权利人、利害关系人认为违反本法第十三条第二款和第三款、第十五条、第十六条第一款、第三十条、第三十一条、第三十二条规定的，或者任何人认为违反本法第十条、第十一条、第十二条规定的，可以向商标局提出异议。公告期满无异议的，予以核准注册，发给商标注册证，并予公告。

Article 33 of the Trademark Law: A holder of prior rights or an interested party may, within three months from the date of the preliminary examination announcement of a trademark, raise objections to the Trademark Office if it is of the opinion that the trademark is in violation of Paragraph 2 and Paragraph 3 of Article 13, Article 15, Paragraph 1 of Article 16, Article 30, Article 31 or Article 32 of this Law. Any party that is of the opinion that the trademark is in violation of Article 10, Article 11 or Article 12 of this Law may raise expiry of the announcement period, the Trademark Office shall approve the registration application, issue the certificate of trademark registration, and make an announcement thereon.

《商标法》第四十五条 已经注册的商标，违反本法第十三条第二款和第三款、第十五条、第十六条第一款、第三十条、第三十一条、第三十二条规定的，自商标注册之日起五年内，在先权利人或者利害关系人可以请求商标评审委员会宣告该注册商标无效。对恶意注册的，驰名商标所有人不受五年的时间限制。

Article 45 of the Trademark Law: Where a registered trademark is in violation of Paragraph 2 and Paragraph 3 of Article 13, Article 15, Paragraph 1 of Article 16, Article 30, Article 31 or Article 32 of this Law, the holder of prior rights or an interested party may request the Trademark Review and Adjudication Board to declare the registered trademark invalid within five years upon the registration of the trademark. Where registration is obtained mala fide, the owner of a well-known trademark is not bound by the five-year registration.

下列主体为利害关系人：

The following subjects are interested parties:

- (1) 商标权及其他在先权利的被许可使用人；
- (1) The licensed users of trademark right and other prior rights;
- (2) 商标权及其他在先权利的合法继承人；

(2) The lawful successors of trademark right and other prior rights;

(3) 商标权的质权人;

(3) The mortgagee of trademark right;

(4) 其他有证据证明与商标权及其他在先权利有利害关系的主体。

(4) Other subjects proved by some evidence to have interested relationship with trademark right and other prior rights.

是否为利害关系人应当以提出异议和无效宣告申请时为准。在案件审理时已不具备利害关系的，商标局、商标评审委员会可以发主体资格承继告知书，通知有利害关系的主体参与到案件审理中，后者未参与案件审理的，商标局、商标评审委员会将以主体不合格为由驳回其异议/评审请求；在案件审理时已具备利害关系的，应当认定为利害关系人。

Whether being an interested party shall give priority to the state when the application for objection and invalidity declaration is brought forward. When the interested relationship does not exist when a case is tried, the Trademark Office and the Trademark Review and Adjudication Board may send out a Notification on Inheritance of Subject Qualification, and notify a subject with interested relationship to participate in the trial of this case. Where the latter does not participate in the trial of this case, the Trademark Office and the Trademark Review and Adjudication Board may reject its request for objection/ review by the reason of improper statue of subject; where interested relationship exists during trial of the case, the interested party shall be recognized.

八、撤销注册商标案件审理标准

VIII. Standards for Trial of Registered Trademark Cancellation Cases

《商标法》第四十九条 商标注册人在使用注册商标的过程中，自行改变注册商标、注册人名义、地址或者其他注册事项的，由地方工商行政管理部门责令限期改正；期满不改正的，由商标局撤销其注册商标。

Article 49 of the Trademark Law: A trademark registrant that changes, without authorization, the registered trademark, the name or address of the registrant or other registration items during the use of the registered trademark shall be ordered to make correction within the prescribed time period by the relevant local administration for industry and commerce, and shall have its registered trademark cancelled by the Trademark Office if it fails to make correction by the prescribed deadline.

注册商标成为其核定使用的商品的通用名称或者没有正当理由连续三年不使用的，任何单位或者个人可以向商标局申请撤销该注册商标。商标局应当在收到申请之日起九个月内做出决定，有特殊情况需要延长的，经国务院工商行政管理部门批准，可以延长三个月。

Where a registered trademark has become the generic name of the goods for which its use is approved or has not been in use for three consecutive years without justification, any entity or individual may apply to the Trademark Office for cancellation of the registered trademark, and the Trademark Office shall make a decision within nine months upon receipt of the application. Where necessary, the time period may be extended for three months under special circumstances upon approval by the administration for industry and commerce of the State Council.

《商标法》第五十四条 对商标局撤销或者不予撤销注册商标的决定，当事人不服的，可以自收到通知之日起十五日内向商标评审委员会申请复审。商标评审委员会应当自收到申请之日起九个月内做出决定，并书面通知申请人。有特殊情况需要延长的，经国务院工商行政管理部门批准，可以延长三个月。当事人对商标评审委员会的决定不服的，可以自收到通知之日起三十日内向人民法院起诉。

Article 54 of the Trademark Law: A party concerned who has objections to the decision made by the Trademark Office on cancellation or non-cancellation of a registered trademark may apply for review to the Trademark Review and Adjudication Board within 15 days upon receipt of the relevant notice. The Trademark Review and Adjudication Board shall make a

decision, and notify the party concerned in writing within nine months upon receipt of the application. Where necessary, the time period may be extended for three months under special circumstances upon approval by the administration for industry and commerce of the State Council. The party concerned who has objections to the people's court within 30 days upon receipt of the relevant notice.

《商标法实施条例》第六十五条 有商标法第四十九条规定的注册商标成为其核定使用的商品通用名称情形的，任何单位或者个人可以向商标局申请撤销该注册商标，提交申请时应当附送证据材料。商标局受理后应当通知商标注册人，限其自收到通知之日起 2 个月内答辩；期满未答辩的，不影响商标局做出决定。

Article 65 of the Implementation Regulations for the Trademark Law: Where the circumstance exists that a registered trademark becomes a generic name of the goods designated by it, as regulated in Article 49 of the Trademark Law, any unit or individual may apply to the Trademark Office for cancelling this registered trademark, and shall attach evidence materials to the application filed. After accepting the application, the Trademark Office shall notify the trademark registrant to make an open reply in 2 months since the date when the notification is served; where the trademark registrant does not make an open reply after expiration of the said period, it shall not affect the decision making of the Trademark Office.

《商标法实施条例》第六十六条 有商标法第四十九条规定的注册商标无正当理由连续 3 年不使用情形的，任何单位或者个人可以向商标局申请撤销该注册商标，提交申请时应当说明有关情况。商标局受理后应当通知商标注册人，限其自收到通知之日起 2 个月内提交该商标在撤销申请提出前使用的证据材料或者说明不使用的正当理由；期满未提供使用的证据材料或者证据材料无效并没有正当理由的，由商标局撤销其注册商标。

Article 66 of the Implementation Regulations for the Trademark Law: Where the circumstance exists that a registered trademark is not used for 3 years successively without just reasons, as regulated in Article 49 of the Trademark Law, any unit or individual may apply to the Trademark Office for cancelling this registered trademark, and shall explain related situations when filing the application. After accepting the application, the Trademark Office shall notify the trademark registrant to submit the evidence materials proving the use of this trademark before filing of the application for cancellation or to explain the just reasons for not using this trademark in 2 months since the date when the notification is served; where the evidence materials proving the use are not provided at expiration of said period, or the evidence materials are invalid and there is no just reasons, the Trademark Office shall cancel its registered trademark.

前款所称使用的证据材料，包括商标注册人使用注册商标的证据材料和商标注册人许可他人使用注册商标的证据材料。

The evidence materials mentioned in the preceding paragraph include the evidence materials proving the trademark registrant's use of the registered trademark and the evidence materials proving that the trademark registrant permits others to use the registered trademark.

以无正当理由连续3年不使用为由申请撤销注册商标的，应当自该注册商标公告之日起满3年后提出申请。

Where a registered trademark is applied for cancellation for reason of not being used for 3 years successively without just reasons, the application shall be filed after 3 years since the date of announcement on the registration of this registered trademark.

《商标法实施条例》第六十七条 下列情形属于商标法第四十九条规定的正当理由：

Article 67 of the Implementation Regulations for the Trademark Law: The following circumstances belong to the just reasons regulated in Article 49 of the Trademark Law:

(一) 不可抗力；

(1) Force majeure;

(二) 政府政策性限制；

(2) Governmental policy restrictions;

(三) 破产清算；

(3) Bankruptcy liquidation;

(四) 其他不可归责于商标注册人的正当事由。

(4) Other just reasons which cannot be attributed to the trademark registrant.

1、引言

1、Introduction

商标注册人负有规范使用和连续使用注册商标并积极维护注册商标显著性的法定义务。《商标法》禁止自行改变注册商标、自行改变注册商标的注册人名义、地址或者其他注册事项等行为。

A trademark registrant has the statutory obligation to use its registered trademark in a normative and continuous way and maintain the distinctiveness of this registered trademark actively. The Trademark Law prohibits the behaviors of changing a registered trademark, its registrant's name, address or other registration items, etc. independently.

2、是否存在自行改变注册商标情形的判定

2. Judgment on whether the circumstance of changing a registered trademark independently exists

自行改变注册商标，是指商标注册人或者被许可使用人在实际使用注册商标时，擅自改变该商标的文字、图形、字母、数字、立体形状、颜色组合等，导致原注册商标的主要部分和显著特征发生变化。改变后的标志同原注册商标相比，易被认为不具有同一性。

Changing a registered trademark independently indicates that, during actual use of a registered trademark, the trademark registrant or licensed user changes the words, patterns, letters, digits, solid shape, color combination, etc. of this trademark at random, so that the main parts and distinctive characteristics of original registered trademark change. Compared with original registered trademark, the mark after change will easily be considered inconsistent.

存在上述行为，且经地方工商行政管理部门责令商标注册人限期改正，但拒不改正的，依法予以撤销。

Where the abovementioned behavior exists, and the trademark registrant is ordered by local administration for industry and commerce to make correction in a limited period, but it refuses to make corrections, then this trademark may be cancelled according to law.

3、是否存在自行改变注册商标的注册人名义、地址或者其他注册事项情形的判定

3. Judgment on whether the circumstance of changing the registrant's name, address or other registration items of a registered trademark independently exists

3.1 自行改变注册商标的注册人名义，是指商标注册人名义（姓名或者名称）发生变化后，未依法向商标局提出变更申请，或者实际使用注册商标的注册人名义与《商标注册簿》上记载的注册人名义不一致。

3.1 Changing the registrant's name of a registered trademark independently indicates that, the trademark registrant does not apply to the Trademark Office for alteration according to law after change of the name (name or designation), or the name of the registrant actually using the registered trademark is inconsistent with the name of the registrant recorded in the Trademark Register.

3.2 自行改变注册商标的注册人地址，是指商标注册人地址发生变化后，未依法向商标局提出变更申请，或者商标注册人实际地址与《商标注册簿》上记载的地址不一致。

3.2 Changing the registrant's address of a registered trademark independently indicates that, the trademark registrant does not apply to the Trademark Office for alteration according to law after change of address, or the actual address of the trademark registrant is inconsistent with the address recorded in the Trademark Register.

3.3 自行改变注册商标的其他注册事项，是指除商标注册人名义、地址之外的其他注册事项发生变化后，注册人未依法向商标局提出变更申请，致使与《商标注册簿》上登记的有关事项不一致。

3.3 Changing the other registration items of a registered trademark independently indicates that, the trademark registrant does not apply to the Trademark Office for alteration according to law after change of other registration items except for the name and address of trademark registrant, so that such other registration items are inconsistent with related items registered in the Trademark Register.

存在上述行为之一的，且经地方工商行政管理部门责令商标注册人限期改正，但拒不改正的，依法予以撤销。

Where one of the abovementioned behaviors exists, and the trademark registrant is ordered by local administration for industry and commerce to make correction in a limited period, but it refuses to make corrections, then this trademark may be cancelled according to law.

4、是否存在注册商标成为其核定使用商品的通用名称情形的判定

4. Judgment on whether the circumstance exists that a registered trademark becomes the generic name of the goods designated by it

4.1 注册商标成为其核定使用商品的通用名称，是指原本具有商标显著特征的注册商标，在市场实际使用过程中，退化为其核定使用商品的通用名称。

4.1 A registered trademark's becoming the generic name of the goods designated by it indicates that, the registered trademark originally having a trademark's distinctive characteristics is retrogrades to a generic name of the goods designated by it during the actual use in the market.

4.2 判定系争商标是否属于商品的通用名称，适用《商标审查标准》第二部分“商标显著特征的审查”之三“仅有本商品的通用名称、图形、型号的”。

4.2 The judgment on whether a disputed trademark is a generic name of goods is applicable to “Those only having the generic name, pattern and model of the goods” in section 3 of the “Examination on Distinctive Characteristics of Trademarks” in the Second Part of Trademark Examination Standard.

4.3 判断注册商标成为其核定使用商品的通用名称的时间点，一般应以提出撤销申请时的事实状态为准，案件审理时的事实状态可以作为参考。

4.3 The time point for judging whether a registered trademark becomes a generic name of the goods designated by it generally gives priority to the state of facts when the application for cancellation is filed, and the state of facts during trial of a case may be used as reference.

（注：此处与通用名称无效宣告案件的审理不同，通用名称无效宣告案件的时间点，一般应以该注册商标提出申请时的事实状态为准，该商标获得注册时的事实状态可以作为参考。）

(Note: Here, different from the trial of a case of declaring a generic name invalid, the time point of the case of declaring a generic name invalid generally gives priority to the state of facts when the application for this registered trademark is filed, and the state of facts when the registration of this trademark is obtained may be used as reference.)

4.4 适用要件：

4.4 Applicable elements

（1）注册商标在其申请注册之时尚不构成其核定使用商品的通用名称；

(1) A registered trademark does not constitute a general name of the goods designated by it when the application for its registration is filed;

（2）注册商标在被提出撤销申请时已构成其核定使用商品的通用名称；

(2) A registered trademark has constituted a generic name of the goods designated by it when the application for its cancellation is filed.

4.5 注册商标成为其核定使用商品通用名称的具体情形：

4.5 The concrete circumstances that a registered trademark becomes a generic name of the goods designated by it:

(1) 商标注册人在使用注册商标过程中使用不当，导致注册商标成为其核定使用商品的通用名称；

(1) A registered trademark is used improperly by the trademark registrant, and so becomes a generic name of the goods designated by it;

(2) 商标注册后，其他市场主体长期广泛使用该注册商标作为商品通用名称，商标注册人怠于行使商标专用权导致注册商标成为其核定使用商品的通用名称；

(2) A registered trademark becomes a generic name of the goods designated by it for that, after being registered, this trademark is used as a generic name of goods by other market subjects widely for a long term, and the trademark registrant is idle in exercising the right to use the trademark exclusively;

(3) 商标申请注册时显著性不强，且其他市场主体长期广泛使用该注册商标作为商品通用名称，导致市场上已经形成相关公众将该文字作为商品通用名称的客观事实。

(3) A trademark does not have strong distinctiveness when being applied for registration, and other market subjects use this registered trademark as a generic name of goods widely for a long term, so an objective fact has formed in the market that relevant public take the word as generic name of goods.

(方案二：去掉（3）)

(Scheme 2: Cancel (3))

4.6 任何单位或者个人认为某一注册商标成为其核定使用商品的通用名称，但其提供的证据材料能够证明该标志在其申请注册之时即为商品通用名称的，不适用本条规定审理，该单位或者个人可以依据《商标法》第四十四条第一款规定提起无效宣告请求。

4.6 Where any unit or individual considers that a registered trademark has become a generic name of the goods designated by it, but the evidence materials provided by such unit or individual can prove that this trademark has been a generic name of goods when the application for its registration is filed, the case shall not be tried according to the provisions of this clause, and the said unit or individual may appeal for invalidity declaration in accordance with the provisions of Paragraph 1 of Article 44 of the Trademark Law.

4.7 注册商标成为其核定使用商品的通用图形、型号，参照本条规定审理。

4.7 Where a registered trademark becomes a generic pattern or model of the goods designated, the case shall be tried according to the provisions of this clause.

5、是否存在连续三年停止使用注册商标情形的判定

5. Judgment on whether the circumstance exists that a registered trademark is stopped using for three years successively

5.1 连续三年停止使用注册商标，是指一个注册商标在其有效期内停止使用，且该行为不间断地持续三年以上。

5.1 Stopping the use of a registered trademark for three years successively indicates that, a registered trademark is stopped using in its effective period, and this behavior lasts for more than three years continuously.

5.2 连续三年停止使用注册商标的时间起算，应当自申请人向商标局申请撤销该注册商标之日起，向前推算三年。

5.3 The time for stopping the use of a registered trademark for three years successively shall be calculated from the date when the applicant applies to the Trademark Office for cancelling this registered trademark, and be reckoned forward by three years.

5.3 商标使用的判定

5.3 Judgment on the use of a trademark

5.3.1 商标的使用，是指商标的商业使用。包括将商标用于商品、商品包装或者容器以及商品交易文书上，或者将商标用于广告宣传、展览以及其他商业活动中，用于识别商品来源的行为。

5.3.1 The use of a trademark indicates the commercial use of a trademark, including the behavior of applying the trademark to goods, goods package or container and goods transaction documents, or to advertising propaganda, exhibitions and other commercial activities, in order to distinguish the source of goods.

5.3.2 商标使用在指定商品上的具体表现形式有：

5.3.2 The concrete expression forms of using a trademark on designated goods include:

（1）采取直接贴附、刻印、烙印或者编织等方式将商标附着在商品、商品包装、容器、标签等上，或者使用在商品附加标牌、产品说明书、介绍手册、价目表等上；

(1) Attaching the trademark to goods, goods packages, containers, labels, etc. by means of direct sticking, engraving, printing or weaving, etc., or using the trademark in attached label of goods, product specification, instruction manual, price list, etc.;

（2）商标使用在与商品销售有联系的交易文书上，包括使用在商品销售合同、发票、票据、收据、商品进出口检验检疫证明、报关单据等上；

(2) Using the trademark in the transaction documents related to the sale of goods, including using the trademark in goods sales contract, invoices, bills, receipts, goods import and export inspection and quarantine certificate, customs declaration documents, etc.;

（3）商标使用在广播、电视等媒体上，或者在公开发行的出版物中发布，以及以广告牌、邮寄广告或者其他广告方式为商标或者使用商标的商品进行的广告宣传；

(3) Using the trademark through the media such as broadcasting, TV, etc., or issuing the trademark in public publications, advertising and propagandizing the trademark or the goods designated by the trademark by means of bill board, posting advertisement or other advertising means;

（4）商标在展览会、博览会上使用，包括在展览会、博览会上提供的使用该商标的印刷品以及其他资料；

(4) Using the trademark at exhibitions and expos, including providing the presswork and other materials using this trademark at exhibitions and expos;

（5）其他符合法律规定的商标使用形式。

(5) Other trademark use forms meeting the provisions of laws.

5.3.3 商标使用在指定服务上的具体表现形式有：

5.3.3 The concrete expression forms of using a trademark on specified services include:

（1）商标直接使用于服务场所,包括使用于服务的介绍手册、服务场所招牌、店堂装饰、工作人员服饰、招贴、菜单、价目表、奖券、办公文具、信笺以及其他与指定服务相关的用品上；

(1) Applying the trademark directly at service places, including applying it to the service instruction manual, signboard at service place, in-hall decoration, working personnel's clothes, poster, menu, price list, gift coupon, office stationary, letter paper, and other articles related to the specified services;

（2）商标使用于和服务有联系的文件资料上，如发票、汇款单据、提供服务协议、维修维护证明等；

(2) Applying the trademark to the documents and materials related to the services, such as invoices, remittance receipts, service supply agreements, repair and maintenance certificate, etc.;

(3) 商标使用在广播、电视等媒体上，或者在公开发行的出版物中发布，以及以广告牌、邮寄广告或者其他广告方式为商标或者使用商标的服务进行的广告宣传；

(3) Using the trademark through the media such as broadcasting, TV, etc., or issuing the trademark in public publications, advertising and propagandizing the trademark or the goods designated by the trademark by means of bill board, posting advertisement or other advertising means;

(4) 商标在展览会、博览会上使用，包括在展览会、博览会上提供的使用该商标的印刷品及其他资料；

(4) Using the trademark at exhibitions and expos, including providing the presswork and other materials using this trademark at exhibitions and expos;

(5) 其他符合法律规定的商标使用形式。

(5) Other trademark use forms meeting the provisions of laws.

5.3.4 商标注册信息的公布或者商标注册人关于对其注册商标享有专用权的声明，不被视为商标法意义上的商标使用。

5.3.4 The publication of trademark registration information or the statement of a trademark registrant on its exclusive use right to the registered trademark shall not be deemed as trademark use in the sense of the Trademark Law.

5.3.5 系争商标不存在连续三年停止使用情形的举证责任由系争商标注册人承担。

5.3.5 A trademark registrant shall assume the burden of proof to prove that a disputed trademark is free of the circumstance of being stopped using for three years successively.

用以证明系争商标不存在连续三年停止使用的情形的证据材料，应当符合以下要求：

The evidence materials used to prove that a disputed trademark is free of the circumstance of being stopped using for three years successively shall meet the following requirements:

(1) 能够显示出使用的系争商标标识；

(1) Being able to display the sign of the disputed trademark used;

(2) 能够显示出系争商标使用在指定使用的商品/服务上；

(2) Being able to display that the disputed trademark is used on the goods/ services designated by it;

(3) 能够显示出系争商标的使用人，既包括商标注册人自己,也包括商标注册人许可的他人。如许可他人使用的，应当能够证明许可使用关系的存在;

(3) Being able to display the user of the disputed trademark, including the trademark registrant itself, and the others licensed by the trademark registrant. If the disputed trademark is licensed to use by others, the existence of licensed use relationship shall be proved;

(4) 能够显示出系争商标的使用日期，且应当在自撤销申请之日起向前推算三年内;

(4) Being able to display the use date of the disputed trademark, and being within three years reckoned forward since the date of application for cancellation;

(5) 能够证明系争商标在《商标法》效力所及地域范围内的使用;

(5) Being able to prove the use of the disputed trademark within the territorial scope which is effective according to the Trademark Law;

(6) 能够证明系争商标在商业活动中公开、真实、合法地使用。

(6) Being able to prove the open, authentic and lawful use of the disputed trademark in commercial activities.

5.3.6 商标注册人在相同商品上有多件注册商标的，其中某一商标的使用证据可以视为与该商标主要部分和显著特征相同的注册商标的使用证据。

5.3.6 Where a trademark registrant has several registered trademarks on the same goods, then the evidence proving the use of one trademark therein may be deemed as the evidence proving the use of the other registered trademarks which are identical to this trademark in terms of major parts and distinctive characteristics.

5.3.7 商标注册人应当在核定使用的商品上使用注册商标。商标注册人在核定使用的一项商品上使用注册商标的，在与该商品相类似的商品上的注册可予以维持。商标注册人在核定使用商品之外的类似商品上使用其注册商标，不能视为对其注册商标的使用。

5.3.7 A trademark registrant shall use a registered trademark on the goods designated by it. Where a trademark registrant uses a registered trademark on one of the goods designated by it, then the registration on the other goods similar to the said goods shall be maintained. The trademark registrant's use of its registered trademark on similar goods other than the goods designated by this registered trademark shall not be deemed as the use of its registered trademark.

九、类似商品或者服务审理标准

IX. Standards for Trial of Similar Goods or Services

1、引言

1、Introduction

商标按商品/服务类别进行注册、使用、管理和保护，商标法律中设置商品/服务类似关系用来确立商标权利及保护范围的大小。类似商品/服务的判定是商标确权案件审理的重要内容。

Trademarks are registered, used, managed and protected by the type of goods/ services, and similar relationship of goods/ services is set up in trademark laws to establish trademark rights and protection scope. The judgment on similar goods/ services is an important content of trial of trademark right determination cases.

《类似商品和服务区分表》是我国商标主管部门以《商标注册用商品和服务国际分类表》为基础，总结多年的类似商品或者服务划分的实践经验制定并对外公布的。

The Similar Goods and Services Distinguishing Form is formulated and publicized by Chinese trademark administration authority based on the International Classification Form of Goods and Services for Trademark Registration, and by summarizing many years of practical experiences in the division of similar goods or services.

为稳定商标注册秩序、提高审理效率、统一审理标准，商标局、商标评审委员会在审理案件时原则上应当参照《类似商品和服务区分表》。但由于商品和服务项目在不断更新、发展，市场交易的状况也不断变化以及商标案件的个案差异，类似商品或者服务的判定也会随之调整。

In order to stabilize trademark registration order, raise trial efficiency, and unify trial standard, the Trademark Office and the Trademark Review and Adjudication Board shall, when trying a case, refer to the Similar Goods and Services Distinguishing Form in principle. However, for reason of the constant updating and development of goods and service items, the constant change of market transaction status, and differences in individual trademark cases, the judgment on similar goods or services will also be adjusted accordingly.

在商标驳回复审、异议、不予注册复审、无效宣告、无效宣告复审、撤销、撤销复审案件审理中，涉及商品或者服务类似与否的判定问题的，以本标准为原则进行个案判定。

Where in the trial of the cases about review of rejected trademark, objection, review of non-approved registration, invalidity declaration, review of invalidity declaration, cancellation, review of cancellation review, the problem of judgment on whether goods or services are similar is involved, individual cases shall be judged with this standard as principle.

2、类似商品的判定

2. Judgment on Similar Goods

2.1 类似商品，是指在功能、用途、主要原料、生产部门、销售渠道、销售场所、消费群体等方面相同或者具有较大关联性的商品。

2.1 Similar goods indicate the goods which are identical or have relatively great relevance in terms of function, purpose, main raw materials, production department, sales channel, sales place, consumer group, etc.

2.2 类似商品的判定应当综合考虑下列各项因素：

2.2 The following factors shall be considered comprehensively when judging similar goods:

(1) 商品的功能、用途

(1) Function and use of goods

商品的功能、用途直接体现消费者的购买目的，两项商品的功能、用途相同或者相近，能够满足消费者同类需求的，则被判定为类似商品的可能性较大。

Functions and use of goods directly embody consumers' purchasing objective. Where two goods are identical or similar in terms of function and use, and could meet consumers' similar demands, there will be a big probability for the two goods to be judged as similar goods.

两项商品在功能、用途上具有互补性或者需要一并使用才能满足消费者的需求的，则被判定为类似商品的可能性较大。

Where two goods are complementary in terms of function and use, or need to be used together for meeting consumers' demand, there will be a big probability for them to be judged as similar goods.

(2) 商品的销售渠道、销售场所

(2) Sales channel and sales place of goods

两项商品的销售渠道、销售场所相同或者相近，消费者同时接触的机会较大，容易使消费者认为其属于同一市场领域，则被判定为类似商品的可能性较大。

Where two goods are identical or similar in terms of sales channel and sales place, there is a big opportunity for consumers to contact them simultaneously, and it's easy to make consumers misunderstand that they belong to the same market field, then there will be a big possibility for the two goods to be judged as similar goods.

（3）商品的生产者、消费者

(3) Producers and consumers of goods

两项商品由相同行业或者领域的生产者生产、制造、加工的可能性越大，则被判定为类似商品的可能性越大。

The bigger the possibility is that two goods are produced, manufactured or processed by producers of the same industry or field, the bigger the possibility will be that the two goods will be judged to be similar goods.

两项商品以从事同一行业的人为消费群体，或者其消费群体具有共同的特点，被判定为类似商品的可能性较大。

Where two goods take personnel engaged in the same industry as consumer group, or their consumer groups have common characteristics, there will be a big possibility for the two goods to be judged as similar goods.

（4）商品的原材料、成分

(4) Raw materials and ingredients of goods

商品的原材料或者成分，是决定商品功能、用途的重要因素。两项商品的原材料或者成分相同或者相近，或相互具有可替代性，被判定为类似商品的可能性较大。

Raw materials or ingredients of goods are important factors determining the functions and use of goods. Where the raw materials or ingredients of two goods are identical or similar, or are mutually replaceable, there will be a big possibility for the two goods to be judged as similar goods.

（5）商品与零部件

(5) Goods and parts & components

许多商品是由各个零部件组成的，但不能当然认为该商品与各零部件或者各零部件之间都属于类似商品，仍应当根据消费者对两者之间联系的密切程度的通常认知进行判断。

Many goods consist of each part and component, but it shall not be certainly considered that the goods and each part & component, or all the parts and components belong to similar goods, and still, the judgment shall be made according to consumers' common cognition with the degree of connection between two factors.

如果特定零部件的用途是为了配合特定商品的使用功能，而该商品欠缺该特定零部件，就无法实现其功能或者严重减损其经济上的使用目的，则被判定为类似商品的可能性较大。

Where the use of a certain part & component is to cooperate with the use function of a certain goods and lack of the certain part & component will make it impossible for the goods to realize its functions or will severely deteriorate its economic service purpose, then there will be a big possibility for them to be judged as similar goods.

（6）消费习惯

（6）Consumption habit

类似商品的判定，还应当考虑中国消费者在特定的社会文化背景下所形成的消费习惯。如果消费者在习惯上可将两项商品相互替代，则该两商品被判定为类似商品的可能性较大。

The judgment on similar goods shall also consider Chinese consumers' consumption habit formed in certain social and cultural background. Where consumers could mutually replace two goods habitually, there will be a big possibility for the two goods to be judged as similar goods.

（7）其他影响类似商品判定的相关因素。

（7）Other key factors affecting the judgment on similar goods.

3、类似服务的判定

3. Judgment on Similar Services

3.1 类似服务，是指在服务的目的、内容、方式、对象等方面相同或者具有较大关联性的服务。

3.1 Similar service means the services which are identical or have relatively great relevance in terms of service purpose, content, method, object, etc.

3.2 类似服务的判定应当综合考虑下列各项因素：

3.2 The following factors shall be considered comprehensively when judging similar services:

（1）服务的目的

(1) Purpose of service

两项服务具有相同或者相近的目的，有可能相互替代，或为互补性关系，可满足一般服务接受者的相同或者相近的需求的，被判定为类似服务的可能性较大。

Where two services have identical or similar purposes, are possibly mutually replaced, or have complementary relationship, and may satisfy the identical or similar demands of common service receivers, there will be a big possibility for them to be judged as similar services.

（2）服务的内容

(2) Service content

两项服务的内容越相近，被判定为类似服务的可能性越大。

The closer the contents of two services are, the bigger the possibility for them to be judged as similar services will be.

（3）服务方式与服务场所

(3) Service method and service place

两项服务的服务方式或者服务场所相同，一般服务接受者同时接触的机会较大，则被判定为类似服务的可能性较大。

Where the service method or service place of two services is the same, there will be a relatively big opportunity for common service receivers to contact the two services simultaneously, and so there will be a relatively big possibility for them to be judged as similar services.

（4）服务的对象范围

(4) Service object scope

两项服务的接受者来自相同或者相近的消费群体，则被判定为类似服务的可能性较大。

Where the receivers of two services are from identical or similar consumer groups, there will be a relatively big possibility for them to be judged as similar services.

（5）服务的提供者

(5) Service provider

两项服务的提供者来自相同的行业或者领域，则被判定为类似服务的可能性较大。

Where the providers of two services is from the same industry or field, there will be a relatively big possibility for them to be judged as similar services.

（6）其他影响类似服务判定的相关因素

(6) Other relevant factors affecting the judgment on similar services.

4、商品与服务是否类似的判定

4. Judgment on Whether Goods and Services are Similar

4.1 商品与服务类似，是指商品和服务之间具有较大关联性，易使相关公众认为商品和服务由同一市场主体提供或者存在特定联系，容易使相关公众混淆。

4.1 Similarity of goods and services indicates that there is a relatively great relevancy between goods and services, and it's easy to make relevant public confused and misunderstand that the goods and services are provided by a same market subject or have specific connection.

4.2 判定商品与服务是否类似，应当综合考虑下列各项因素：

4.2 The following factors shall be considered comprehensively when judging whether goods and services are similar:

商品与服务之间联系的密切程度，在用途、用户、通常效用、销售渠道、销售习惯等方面的一致性。

The degree of connection between goods and services, and the consistency in terms of use, user, general effect, sales channel, sales habit, etc.

十、经使用取得显著特征的标志审理标准

X. Standards for Trial of Trademarks Obtaining Distinctive Characteristics after Use

《商标法》第十一条 下列标志不得作为商标注册：

Article 11 of the Trademark Law: The following signs shall not be registered as trademarks:

(一) 仅有本商品的通用名称、图形、型号的；

(1) Those consisting only of generic names, devices, or model numbers of the goods concerned;

(二) 仅直接表示商品的质量、主要原料、功能、用途、重量、数量及其他特点的；

(2) Those consisting only of a direct representation of the quality, primary raw materials, functions, intended purposes, weight, quantity, or other characteristics of the goods concerned;

(三) 其他缺乏显著特征的。

(3) Those otherwise lacking distinctive features.

前款所列标志经过使用取得显著特征，并便于识别的，可以作为商标注册。

The signs mentioned in the preceding paragraph may be registered as trademarks after they have acquired distinctiveness and become easily distinguishable through use.

1、如《商标法》第十一条第一款所指的标志经使用，已成为相关公众识别该使用者提供的商品/服务的标志的，应当依据《商标法》第十一条第二款的规定，判定其可以作为商标注册。

1. Where as stated in Paragraph 1 of Article 11 of the Trademark Law, a mark has been used and become a mark for relevant public to distinguish the goods/ services provided by the user, this mark shall be judged available to register as a trademark in accordance with the provisions of Paragraph 2 of Article 11 of the Trademark Law.

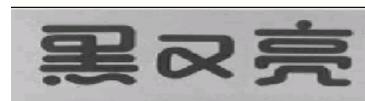
例 1: 牙膏

Example 1: Toothpaste



例 2: 鞋油

Example 2: Shoe polish



2、依照《商标法》第十一条第二款的规定，审查经过使用取得显著特征的标志，应当综合考虑下列因素：

2. In accordance with the provisions of Paragraph 2 of Article 11 of the Trademark Law, the following factors shall be considered comprehensively when examining a trademark which has obtained distinctive characteristics after use:

(1) 相关公众对该标志的认知情况；

(1) The cognition of relevant public with this trademark;

(2) 该标志在指定商品/服务上实际使用的时间、使用方式及同行业使用情况；

(2) The actual use time, use method and use in the same industry of this trademark on designated goods/ services;

(3) 使用该标志的商品/服务的销售量、营业额及市场占有率；

(3) The sales volume, sales amount and market share of the goods/ services using this trademark;

(4) 使用该标志的商品/服务的广告宣传情况及覆盖范围；

(4) The advertising propaganda and coverage scope of the goods/ services using this trademark;

(5) 该标志在其他国家或者地区获得注册的情况；

(5) The registration obtained in other countries or regions of this trademark;

(6) 使该标志取得显著特征的其他因素。

(6) Other factors making this trademark obtain distinctive characteristics.

3、判断该标志是否为经使用取得显著特征的标志，应以中国大陆相关公众的认知为准。如当事人主张该标志经使用取得显著特征，应当提交相应的证据材料加以证

明。用以证明该标志使用情况的证据材料，应当能够显示所使用的商标标志、商品/服务、使用日期及该标志的使用人。该标志的使用人包括商标注册申请人及商标许可使用人。

3. The judgment on whether this trademark has obtained distinctive characteristics after use shall give priority to the cognition of relevant public in Chinese Mainland. Where the party concerned claims that this trademark has obtained distinctive characteristics after use, it shall submit corresponding evidence materials to prove its claim. The evidence materials used to prove the use of this trademark shall be able to display the used trademark sign, goods/ services, use date and the user of this trademark. The user of this trademark includes the registration applicant and licensed user of this trademark.

4、申请注册经使用取得显著特征的标志，应当与实际使用的标志基本一致，不得改变该标志的显著特征；且应限定在实际使用的商品或服务上。上述所指的使用原则上应为独立使用，如与其他标志共同使用的情况下，还应酌情判断该标志在独立使用状态下是否取得显著特征。

4. The trademark applied for registration and having obtained distinctive characteristics after use shall be basically consistent with the trademark actually used, and shall not change the distinctive characteristics of this trademark; moreover, this trademark shall be limited to actually used goods/ services. The abovementioned use principle shall be independent use, and in condition of using together with other trademarks, it shall still be judged whether this trademark has obtained distinctive characteristics in condition of being used independently.

5、判定某个标志是否属于经使用取得显著性的标志，驳回复审案件、不予注册复审案件应当以审理时的事实状态为准，无效宣告案件原则上以系争商标申请注册时的事实状态为准，以审理时的事实状态作为参考。

5. The judgment on whether a trademark has become distinctive after use shall give priority to the state of facts during trial for the cases about review of the rejected and review of non-approved registration, or shall give priority to the state of facts when a disputed trademark is applied for registration and refer to the state of facts during trial for the cases about invalidity declaration.

Disclaimer: This translation is provided by a third party service, and IP Key does not guarantee the accuracy of the translated pages. In case of a discrepancy, the original Chinese document shall prevail.

免责声明：本译文由外部服务商提供，IP Key 对于译文内容的准确性不负任何责任，具体内容请以中文原文为准。

IP Key is co-financed by the European Union and the European Union Intellectual Property Office (EUIPO) under the framework of the new EU-China Cooperation. It is implemented by the European Union Intellectual Property Office (EUIPO) in cooperation with the European Patent Office (EPO). The contents of this document are the sole responsibility of the project implementation team and can in no way be taken to reflect the views of the European Union. Content may be reproduced and disseminated as long as it is attributed to the original source.

IP Key 项目由欧洲联盟与欧盟知识产权局（EUIPO）在新的中欧合作框架下共同资助。该项目由欧盟知识产权局与欧洲专利局（EPO）合作实施。本出版物是在欧盟的支持下制作，但本出版物的内容是项目实施小组的单独职责，决不反映欧盟的观点。内容可转载，但须注明原出处。

