

## Original Paper

# Research on the Content of Similarity Comparison in Trademark Infringement Judgment

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### Abstract

*As for trademark infringement, in judicial judgment, the focus is on the scope and criteria of the similarity comparison. The comparison will be carried out based on the plaintiff's registered trademark (legal right basis), and the defendant's trademark used in practice (factual behavior object). Comparison should be conducted in terms of the mark as a whole, its visual and conceptual appearance, and its stand-alone source-identifying elements for the issued mark. In the constituent element analysis, one must take into account the actual usage situation of the trademark, since different situations may lead to different identification results of similar elements. In essence, trademark similarity infringement is a negation of the basic function of the registered trademark, which is source identification. The main standard for judging infringement is whether defendant's trademark possesses the capability of guiding customers to the source of plaintiff's goods and services. Fact that the defendant's trademark itself indicates it is the source as well does not preclude infringement established. This study systematically sort out logical framework of similarity comparison in trademark infringement judging, and combine theory with typical cases in order to clarify the core problems like subject of similarity, object of similarity, dimension and standard of similarity, providing theoretical support and operational references for the unified application of law in judiciary process.*

### Keywords

*trademark infringement, trademark similarity, similarity comparison, source-identification function*

## 1. THE PROBLEM

Article 57(2) of China's Trademark Law clearly stipulates that "without the permission of the trademark registrant, using a trademark similar to its registered trademark on the same kind of goods, or using a trademark identical or similar to its registered trademark on similar goods, which is likely to cause confusion" shall constitute trademark infringement. This legal provision directly establishes the core

position of "trademark similarity" in determining infringement liability in trademark infringement cases. In fact, in the practice of trademark protection both in China and internationally, "trademark similarity" has become a crucial factor for judicial and administrative authorities to evaluate the likelihood of consumer confusion and ultimately determine whether infringement has occurred.

With the rapid development of market economy and the increasing intensification of market competition, trademark has become an important intangible asset for enterprises to gain competitive advantage, and the number of trademark infringement disputes has shown a year-on-year growth trend. Among these disputes, cases involving similarity comparison account for an absolute majority. However, due to the diversity of trademark forms (including text trademarks, graphic trademarks, composite trademarks, etc.), the complexity of usage scenarios, and the subjectivity of similarity judgment, there are often differences in the understanding and application of similarity comparison standards in theoretical and practical circles (Judgment on the Conflict Between Trademark Right and Trade Name Right—Taking a Trademark Infringement Dispute of an Eyewear Company as an Example, 2025). Admittedly, determining whether trademarks are similar—and to what degree such similarity constitutes infringement—involves a value judgement which lacks a unified criteria and relies heavily on intuitive reasoning. However, identifying the specific thing to be compared is a factual matter that must strictly adhere to the principle of trademark law. In fact, correctly defining the subjects of the similarity comparison forms the essential foundation for conducting an accurate assessment, which helps ensure, to a considerable extent, the correctness of both the similarity comparison and the ultimate infringement determination. To clarify the objects of similarity analysis, a lot of questions should be answered. For example, how to define the scope of the plaintiff's registered trademark and the defendant's used trademark in the comparison? Should we prioritize the overall impression of the trademark or focus on the analysis of constituent elements in the comparison process? Whether the defendant's addition of its own source identification information can negate the finding of similarity? These issues have a direct impact on the fairness and authority of case handling results, and also relate to the effective protection of trademark registrants' legitimate rights and the maintenance of a fair competition market order.

The theoretical research on issues above and the content of similarity comparison in trademark infringement judgment is not only conducive to improving the theoretical system of trademark law, but also has important practical significance for unifying the criteria for handling similar cases, reducing the inconsistency of judgment results, and enhancing the predictability of legal practice. Therefore, based on the existing legal provisions and academic research results, this paper conducts in-depth exploration on the key issues of similarity comparison, and strives to construct a scientific and reasonable similarity comparison framework to meet the needs of theoretical research and practical application.

## 2. Distinguishing between "Registered" Trademarks and "Used" Trademarks

### 2.1 *The Basis of Comparison Is the Trademark Registered by the Plaintiff*

With the exception of well-known trademarks that may acquire rights through use, China's Trademark Law exclusively protects registered trademarks. In other words, under this legislation, exclusive trademark rights are established through registration, meaning registrants can only obtain specific legal entitlements by completing the registration process (Judgment on the Conflict Between Trademark Right and Trade Name Right—Taking a Trademark Infringement Dispute of an Eyewear Company as an Example, 2025). The rationale behind this provision is twofold: granting trademark owners exclusive rights inherently imposes a duty of care regarding trademark usage on others. If the owner subjectively neglects registration and the trademark objectively fails to achieve the status of a well-known mark—where even potential confusion would not cause significant harm—there is no need to impose such obligations on unspecified third parties. This mechanism also incentivizes trademark owners to actively pursue registration, thereby fostering a business environment governed by legal principles. Furthermore, since the purpose of trademark similarity comparison is to determine infringement, and the essence of trademark infringement lies in the violation of exclusive rights, the basis for such comparisons must naturally be the registered trademark—the plaintiff's trademark—that holds such rights. Therefore, if the plaintiff's non-compliant use of his registered trademark results in a discrepancy between the mark actually used and the one registered, the altered mark actually used by the plaintiff, which is unregistered, cannot receive protection under the trademark law unless it is recognized as a well-known mark.

In the situation discussed above, the plaintiff's original registered trademark, which has not been genuinely used by the plaintiff, can be canceled because of "non-use without justifiable reason for three consecutive years". However, it is worth noting that whether a mark is a registered trademark shall be determined according to the records of the China National Intellectual Property Administration (CNIPA). This means even if the plaintiff has engaged in improper use of its registered trademark or other grounds for cancellation of the trademark exist, as long as the CNIPA has not yet issued a final and effective decision to cancel the registration, the plaintiff's registered trademark remains valid and should still serve as the basis for assessing trademark similarity.

### 2.2 *The Object of Comparison Is the Trademark Used by the Defendant*

Unlike trademark opposition procedures where the registered trademark of the objector serves as the comparison benchmark, trademark infringement determinations focus on the trademark actually used by the defendant. This distinction arises because trademark infringement disputes address not "whether a trademark meets registration requirements," but rather "whether its use causes confusion and infringes the trademark owner's exclusive rights." In other words, infringement cases target actual trademark usage that directly harms the owner's interests and requires immediate cessation. Whether the defendant's trademark is registered or not is irrelevant to infringement determination. Therefore, regardless of whether the defendant holds a registered trademark or whether their registered trademark

matches the actual one used, the defendant must bear legal liability if they use a trademark similar to another party's registered trademark without legitimate justification.

In practice, registered trademarks generally do not constitute trademark infringement. Compared to infringement determinations, trademark registration oppositions apply more lenient standards for assessing similarity, making similarity claims more likely to succeed in opposition proceedings. Specifically, to protect prior trademarks, oppositions consider broader abstract scenarios, rejecting any trademark that might potentially harm existing rights. The similarity comparison criteria are therefore more flexible. In contrast, infringement cases require consideration of actual usage patterns or contexts, leading to stricter similarity evaluation standards. However, numerous instances of improper trademark use exist in practice, where registered trademark holders may still be liable for infringement. In such cases, the trademark actually used by the defendant may differ from the defendant's registered trademark, and the trademark causing damage to others' rights is the improperly used trademark. The similarity comparison and infringement determination should naturally focus on this specific trademark. In other words, judicial determinations of trademark infringement are independent of administrative proceedings concerning trademark registration oppositions. While assessing trademark infringement, the similarity comparison focuses solely on the trademark actually used by the defendant regardless of the defendant's registered mark.

### **3. Distinguishing between the "Overall Impression" and "Component Elements" of a Trademark**

#### *3.1 The Change of "Overall Impression" Does not Affect the Determination of Trademark similarity*

The primary function of a trademark is to distinguish the source of goods or services, a role known as the source identification function. Accordingly, the fundamental objective of trademark law is to ensure the proper fulfillment of this source identification function. When two trademarks exhibit identical or substantially similar overall visual effects, this clearly undermines the source identification function of the registered trademark, and such cases should be classified as trademark similarity. However, the impairment of the source identification function does not solely occur when trademarks visually resemble each other. Even if the accused trademark contains elements identical or similar to the plaintiff's registered trademark, and these elements can serve as identifiers, the source identification function of the plaintiff's trademark may still be compromised. Therefore, trademark similarity comparisons should not be limited to visual similarities but must also consider the constituent elements of the accused trademark. Even if the accused trademark creates a distinct impression from the plaintiff's registered trademark in its entirety, it may still be deemed similar to the plaintiff's registered trademark.

The issue was clarified in the "Thomson Life" case adjudicated by the European Court of Justice. In this case, the defendant's trademark "Thomson Life" included the plaintiff's registered trademark "Life", but the dominant element was the defendant's business name "Thomson", resulting in a distinct overall impression from the plaintiff's registered trademark. If the "impression theory" were strictly applied,

the defendant's "Thomson Life" would not be considered similar to the plaintiff's "Life", and the defendant would not be deemed to have infringed the plaintiff's trademark rights. However, while the European Court of Justice acknowledged that identical or similar overall impressions could lead to trademark similarity and that the overall impression might be influenced by the dominant role of individual elements, it further noted that if a prior trademark is incorporated into a subsequent trademark as an element—even if that element lacks dominance and the two trademarks' overall impressions differ—if the element can independently serve as a source identifier, confusion may still exist. Therefore, to protect the source-identifying function of the prior trademark, "Thomson Life" should be deemed similar to "Life". Otherwise, the source-identifying function of the earlier registered trademark would gradually be eroded as it is absorbed by the later trademark including additional elements. In this case, since the "Life" component of the accused infringing trademark is similar to the plaintiff's registered trademark, the two trademarks are considered similar. Consequently, the court used the "Life" component of the accused infringing trademark as the similarity comparison object, concluding that "Thomson Life" is similar to the plaintiff's registered trademark "Life". This method of determining the content of comparison is conducive to preventing the prior registered trademark from gradually losing its function of identification source when the later trademark absorbs the prior trademark. In judicial practice in China, courts are generally able to make accurate judgement when comparing text marks for similarity. However, when comparing figurative marks, courts are highly susceptible to the influence of the "impression theory".

### *3.2 The Disassembly of "Constituent Elements" Is the Key to the Comparison of Trademark Similarity*

Trademark similarity comparison may involve analyzing specific components of the accused trademark, necessitating structural breakdown in such evaluations. What constitutes trademark elements, and how should they be analyzed? For text trademarks, key components include specific words, font styles, sizes, and color schemes. When dissecting textual elements, particular attention should be paid to generic terms and conventional expressions<sup>[3]</sup>. For example, in the phrase "sakura butterfly," the generic term "sakura" should be separated as a distinct component from the character "butterfly." In addition, while fonts, sizes, and colors are typically attached to specific words, variations in these elements may create visual prominence that complicates analysis. In the case of "Xin'an Seahorse," the enlarged "seahorse" character should be recognized as a separate component from "Xin'an." For graphic trademarks, the primary elements are patterns and colors. If the plaintiff's registered trademark features a black-and-white design, and the defendant applies color to it for commercial use, the black-and-white pattern and the colored design are two distinct components in the defendant's trademark. Given that the "black-and-white pattern" element in the accused trademark is identical to the plaintiff's registered trademark, the two trademark should be considered visually similar for infringement purpose. As for Composite trademarks, the constituent elements of them are simply the sum of the elements of both textual trademark and graphic trademark, encompassing patterns, colors and characters with their font styles.

Different ways of decomposing the constituent elements of trademark might lead to different outcomes of the similarity comparison. Taking the allegedly infringing mark “Yelang Gujiu” as an example: if it is decomposed into “Yelanggu” and “jiu” (liquor), or alternatively into “Yelang” and “Gujiu” (ancient liquor), then both “Yelanggu” and “Yelang” are clearly different from the plaintiff’s registered trademark “Lang” for alcoholic beverages. However, if, in the mark “Yelang Gujiu”, the characters “Ye” and “Gu” are displayed in significantly larger fonts—thereby visually separating them from “Lang” and “Jiu”—the mark may be perceived by consumers as comprising three distinct elements: “Ye” “Gu” and “Lang Jiu”. In this case, the character “Lang” remains its independent prominence and could be recognized as referring to the plaintiff’s registered trademark “Lang”. Consequently, the defendant’s use of “Lang” in this context may constitute trademark infringement due to the likelihood of consumer confusion.

#### **4. Distinguishing between "Retention" and "Addition" of Identifiable Sources**

##### *4.1 "Reservations of Identifiable Sources" Are the Key to Trademark Infringement*

“Reservations of identifiable sources” refers to the situation where the plaintiff’s registered trademark, as a component of the allegedly infringing mark, still serves to identify the source of the goods or services. On one hand, the requirement for source identification preservation mandates that the plaintiff’s registered trademark must constitute an integral part of the accused infringing trademark. In other words, the plaintiff’s registered trademark must be incorporated into the accused trademark as a component. Otherwise, there would be no possibility of source misidentification, and no need to determine similarity or infringement. For instance, if the plaintiff’s registered trademark is a circular graphic design while the accused trademark, though circular, features unique patterns and text, the plaintiff’s circular trademark cannot be considered an element of the accused trademark. This is because the circle merely represents the shape of the accused trademark, whereas the distinctive patterns and text serve as the source-identifying components. In such cases, the comparison of trademark similarity can only focus on the unique patterns and text of both trademarks. Obviously, these elements do not constitute similarity, and trademark infringement cannot be established.

On the other hand, the retention of identifiable source requirements also necessitate that the plaintiff’s registered trademark maintains its independent source-identification function within the accused infringing trademark (Wang, 2020). If the plaintiff’s registered trademark, though included in the accused infringing trademark, has formed a new entity distinct from the plaintiff’s original trademark, the plaintiff’s registered trademark loses its independent source-identification function, and the newly formed entity no longer serves to direct the source of goods or services to the plaintiff. In such cases, the claim of trademark similarity infringement based on the accused infringing trademark containing the plaintiff’s registered trademark becomes untenable. For instance, while the accused infringing trademark “Shengda Fowen” includes the plaintiff’s registered trademark “Dafowen”, the established reputation of the business name “Shengda” means “Dafowen” has already formed a new entity

combining "Shengda" and "Fowen", thereby losing its independent source-identification function. Consequently, "Shengda Fowen" and "Dafowen" are not considered similar. Notably, whether a plaintiff's registered trademark retains its independent source-identification function within the accused infringing trademark requires linguistic context analysis. For example, when the head and tail of a text trademark can form a generic term, the middle word or modifier may be overlooked. Consider cases where the plaintiff's registered trademark "Meisheng" is contained in the accused infringing trademark "Meikesheng," and "Six Walnuts" is contained in "Six Stone Mill Walnuts"—in these instances, the plaintiff's registered trademarks still function independently as source identifiers, which constitutes trademark similarity.

#### *4.2 "The Increase of Identifiable Sources" Has nothing to do with Trademark Infringement*

The concept of "increased identifiability of source" refers to a trademark used by the defendant not only indicating the plaintiff's origin but also explicitly pointing to the defendant's own identity. In legal practice, some scholars argue that while the accused trademark resembles the plaintiff's registered trademark in line composition and design elements, constituting trademark similarity, the accused trademark's central position displaying the defendant's name along with business address, phone number, and mobile contact clearly indicates the product's origin (Li, 2025). Therefore, it should not be deemed trademark infringement, as the accused trademark has clearly points to the defendant as the source of the goods or services. Under this view, the determination of trademark infringement is influenced by the "increased identifiability of source". However, if this judicial perspective holds, there will be no trademark infringement anymore. To avoid trademark infringement, anyone attempting to exploit the trademark owner's rights and associated goodwill could simply mark their company name in the center of the target registered trademark. This would render all trademark infringement acts legally permissible through such labeling, thereby nullifying the purpose of trademark registration and trademark law (Feng & Mao, 2024). The crux of trademark similarity infringement lies in the continuation of the plaintiff's registered trademark's source-identifying function within the accused trademark. While the accused trademark may still indicate the defendant's origin, as long as it retains the potential to point to the plaintiff's source, it should still be recognized as trademark similarity infringement.

## **5. CONCLUSION**

The determination of trademark similarity in trademark infringement cases is a complex process involving legal provisions, theoretical analysis and practical judgment. Although it has a certain subjective color, the factual judgment of the content of similarity comparison must adhere to the fundamental principle of trademark law, that is, protecting the source identification function of trademarks. Only by taking this principle as the guide can we ensure the objectivity, fairness and rationality of the similarity comparison results.

When defining the content of similarity comparison in trademark infringement judgment, two core

points should be grasped. Firstly, in terms of the scope of comparison objects, the basis of comparison is the plaintiff's registered trademark, and the object of comparison is the defendant's actually used trademark. The registered trademark determines the scope of rights protected by law, and the actually used trademark is the specific behavior that may cause infringement. Only by clarifying the relationship between the two can we accurately define the scope of similarity comparison. Secondly, in terms of the comparison perspective, it is not only necessary to compare the overall impression of the defendant's trademark with the plaintiff's registered trademark, but also to focus on the analysis of the constituent elements of the defendant's trademark. Even if the overall impression of the two trademarks is different, if the defendant's trademark contains the constituent elements of the plaintiff's registered trademark that can independently identify the source, it may still be deemed similar.

In addition, the key to determining trademark similarity infringement lies in whether the accused trademark retains the source identification function of the plaintiff's registered trademark, that is, whether it is likely to cause consumer confusion about the source of goods or services. The fact that the defendant's trademark adds its own source identification information has no bearing on the infringement determination. This conclusion is not only in line with the legislative purpose of trademark law, but also conducive to safeguarding the legitimate rights and interests of trademark owners, maintaining the order of fair competition in the market, and promoting the healthy development of the market economy.

For academic research, it is necessary to further strengthen the research on the content of similarity comparison in trademark infringement judgment, combine the new problems and new situations emerging in the development of the market economy, such as the similarity comparison of new types of trademarks such as sound trademarks and three-dimensional trademarks, and continuously enrich and improve the theoretical system of trademark similarity comparison, so as to provide more solid theoretical support for the practice of trademark protection.

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