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China's Response to the Protection of Odor Trademarks under the Threshold of Economic Globalization-Taking Comprehensive and Progressive Agreement for Trans-Pacific Partnership18.18 as an Entry Point

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Abstract. In the modern society of rapid economic development and globalization, as well as close international commercial communication, the demand for protecting non-traditional trademarks such as scent trademarks is becoming increasingly prominent. However, China's Trademark Law has not yet explicitly included odor trademarks in the scope of protection, resulting in a disconnect between domestic law and international practice. Taking Article 18.18 of Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) as the entry point, this paper systematically analyzes its institutional connotation and the experience of member states to reveal the theoretical and practical dilemmas faced by China in the protection of odor trademarks. It is found that although countries around the world have explicitly included odor trademark into the scope of legislation and different protection modes in their domestic legal practice, and scholars from various countries have carried out legal research on the legal concept of odor trademark from different perspectives, China has not carried out the corresponding legal work on this new concept of trademark, which to a certain extent impedes the discourse power of China in the global trade system. In this regard, this paper intends to take Article 18.18 of CPTPP as the entry point, systematically analyze its system connotation and experience of member states, synthesize the dilemma of China's legislative practice, and explore the future of China's connection to the rules of the CPTPP, and the construction of the odor trademark protection system of the due diligence.

Keywords: odor trademark, CPTPP, non-traditional trademark, comparative law

1. Introduction

Under the background of economic globalization, the pattern of international trade and competitive winds have made significant changes compared to the past, and all kinds of new commercial products have also appeared in the public's field of vision, and companies around the world have begun to invest heavily in scent marking and innovative digital scent technology, which will disseminate their iconic scent to the public through the Internet and television [1]. Trademarks, as an

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important legal tool for the protection of goods and trade, have also been given unprecedented importance by countries around the world as the variety of goods continues to grow. In order to meet the diverse types of goods nowadays, the concept of trademark is also expanding, and there is an increasing demand for the protection of new types of non-traditional trademarks, which are as crucial and important as traditional trademarks and should be given the same legal protection as traditional trademarks because of the sound, color, and specific shape of the goods that can be easily noticed and recognized from a group of similar goods [2].

In Article 18.18 of the CPTPP, which will enter into force in 2021, it is proposed for the first time that "the visual perceptibility of a trademark" shall not be a restriction on trademark registration by the parties, and for the emerging concept of scent trademark, the treaty also requires the parties to make their best efforts to register it. The treaty also requires the parties to make their best efforts to register and protect the odor mark, which is a new trademark concept. The emergence of this provision undoubtedly sends a signal to the world that the visual restriction in the traditional trademark theory is explicitly excluded from the registration requirements, and the concept of non-traditional trademarks has been included in the scope of legal protection. This not only breaks through the traditional trademark law theory on the form of trademark registration restrictions, and the "distinctiveness" of the substantive characteristics of the trademark as the core judgment standard.

Although including the United States, the European Union, including the legal provisions of a number of countries, has clear provisions on the odor trademark protection and the existence of precedent in odor trademark legal protection practice, China's odor trademark legal protection system is still clear. Even in the third amendment of the Trademark Law of the People's Republic of China, China has deleted the restriction of "visibility" but still has not explicitly included the odor trademark in the scope of the legal provisions. To a certain extent, this not only restricts the competitiveness of China's goods in the international community in the globalization of the economy and the right to speak, but also leads to China's trademark legal system with the CPTPP and other international agreements there is an obvious disconnect between China's relevant provisions of the CPTPP, the participation of international trade activities under the agreement there is a certain impediment.

Based on this, this paper adopts legal analysis, case study, literature review and other methods, based on the CPTPP Article 18.18 of the relevant content and the core of the ideology of the analysis and as a guide to the world's countries of the smell of the trademark protection practice, the legal provisions of the relevant content of the detailed and profound analysis and reference, on this basis on the protection of China's smell of the trademark protection of the relevant work of the reality of the practical proposals On the basis of this, this study proposes practical and feasible suggestions on the practical response to the protection of odor trademark in China, which will help the internationalization of China's trademark law, and provide assistance to China's accession to the CPTPP, docking with the world's new economy and trade, and improvement of domestic legal system.

2. The theoretical basis of odor trademark and research status quo

Odor trademark is to identify the source of goods or services with a specific odor as a sign, is a "non-traditional visual trademark", with the perceptible combination of odor molecules as the core constituent elements, through the sense of smell to allow consumers to establish the cognitive association of "odor - source", with the function of identification of the trademark law protection.

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When it has a recognizable function, it can be protected by trademark law and is even considered as part of the ethical capital of investment [3].

The world's first trademark registration for an odor occurred in 1990: Celia Clarke, a US manufacturer, applied to register the "strong, fresh, blooming floral scent of plum blossoms" as a distinctive plum blossom scent for her embroidery threads, and the Patent and Trademark Office rejected the application, but the Board of Review overturned the decision, claiming that the scent had been specifically recognized by consumers through long-term use. In 2017, Hasbro filed an application to register the "sweet, slightly musky and vanilla, cherry and salted wheat dough scent" for "Pelletizer Colorful Clay", which was granted in 2018 by the U.S. Patent and Trademark Office (PTO) [4]. centers on the decision to register or not to register by defining the necessary association of odors with specific goods and is one of the signs of maturity of odor trademark protection [5].

Research on odor trademarks continues to advance in the academic community. Among overseas scholars, some scholars point out that the difficulty in registering odor trademarks lies in the difficulty of expressing and proving distinctiveness in a "graphic manner" [6]. Other scholars believe that odors need to be distinctive and able to be associated with the product by consumers, and advocate making abstract odors explicit through visual drawings or chemical formulas [7]. Among the domestic scholars, some scholars focus on "odor trademark distinctiveness" and put forward "secondary distinctiveness" as the core of the determination [8]. There are also scholars who analyze analyzing the practice of various countries, clearly identifying trademark distinctiveness in China's determination of the rank, advocating the Trademark Law and the Unfair Competition Law to protect [9].

Existing research mostly focusses on universal issues, without combining China's legal system, practice and the institutional significance of CPTPP18.18. Based on this, this paper intends to analyze the CPTPP and other countries' legal provisions by disassembling them, draw on the protection practice, combine China's trademark legal system with the reality of the challenges, and explore the path of odor trademark protection with Chinese characteristics, in order to adapt to the new requirements of trademark protection under the economic globalization, and to promote the domestic reform of China's trademark legal system and the international standardization.

3. Research on scent trademark legislation under the threshold of internationalization

3.1. CPTPP18.18-the starting point of odor trademark exploration in international treaties

Chapter 18 of CPTPP mainly stipulates the relevant legal content of intellectual property rights, especially in Article 18 of the chapter, the non-traditional trademarks represented by odor trademarks and sound trademarks have been explicitly written into the text of the agreement and become the object of legal regulation.

This article mainly requires the parties to change the focus of trademark registration examination by setting prohibitive obligations, marking that the formal restriction of "visual perceptibility" on trademark registration has been explicitly excluded from the conditions of trademark registration, and emphasizes more on the functionalism of trademark registration, which provides the possibility for invisible signs such as sound and smell to become trademarks. This has made it possible for invisible signs such as sounds and odors to become trademarks. While "each Contracting Party shall use its best efforts to register the odor mark" reflects that the obligation of the Agreement to protect the odor mark is a non-compulsory obligation to advocate, and "use its best efforts" also expresses the hope of the Agreement for the parties to protect the odor mark as far as possible. The term "best efforts" also expresses the desire of the Agreement for the parties to protect odor marks to the extent

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possible. Finally, the provision that "a Contracting Party may require a brief and precise description or pictorial representation of the mark or, if applicable, both" also provides countermeasures and suggestions for the protection of non-traditional trademarks such as the smell mark, i.e., the description and definition of invisible signs in visual form.

3.2. A gathering of heroes-legislative spirit in the laws of various countries in the world

As the pioneer of the "open standard model", the United States, the Lanham Act is undoubtedly the most representative legal document of this model. According to Article 1052 of the Lanham Act, "The registration of a trademark shall focus on the nature of the trademark itself, and as long as the trademark can distinguish the applicant's goods from the goods of others, the trademark shall be registered in its own right, and as long as the trademark is able to distinguish the applicant's goods from the goods of others, it shall be registered in its own right. As long as the trademark can distinguish the applicant's goods from the goods of others, its registration on the principal register shall not be refused, except for violation of legal prohibitions." Thus, it can be seen that the U.S. trademark protection mainly adopts the "general+ exceptions" to maximize the scope of the signs that can be registered as trademarks, and holds an open attitude to trademark registration, i.e., as long as the signs can be registered as trademarks, it is not necessary for the applicant to register the trademarks. An Open attitude towards trademark registration, that is, as long as the logo can identify and distinguish the goods and does not violate the provisions of the law can be allowed to register, for the odor trademark registration in the United States has laid a legal foundation.

The European Union (EU) countries respect the registration of all kinds of trademarks with the greatest freedom, but at the same time put forward corresponding restrictions on this freedom. Article 4 of the European Union Trademark Rules (EUTMR) stipulates that as long as the relevant sign is capable of distinguishing specific goods and services from other goods or services, the sign is capable of becoming a trademark and being registered for protection, and this open-ended approach to regulation makes it possible to ensure that EU trademarks are not subject to strict limitations in terms of type. And the provisions of Article 3 of the regulation, the odor trademark can be expressed in any appropriate form, as long as the odor trademark can be accurate, clear, accessible form in the register, to facilitate the trademark authorities and the public to determine the subject of trademark protection, at the same time, the regulation also provides that the applicant can be described through the relevant description of the registered scent for additional description.

According to the requirements of the EU legal system, trademarks themselves should have two characteristics: first, they should reflect a unique theme; second, the content they display, and the scope of protection should be identifiable and distinguishable by relevant entities. Under these two trademark characteristics, the EU has imposed specific accuracy restrictions on trademarks to ensure that relevant authorities can easily identify any illegal use of trademarks [10].

The Japanese trademark system is like a solid fortress with strict restrictions on the registration of all types of trademarks. Article 2 of the Trademark Law of Japan adopts an explicit enumeration model to specify various types of signs that can be registered as trademarks but has not yet included odors within the scope of legal regulation. The Trademark Examination Guidelines of the Japan Patent Office also provide clear and specific requirements for the description of trademarks when they are registered in Chapter 3, Section 2. Thus, it can be seen that the legal protection of trademarks in Japan is strictly limited, and the possibility of registering trademarks for odors is excluded by specifying the types of signs that can be registered as trademarks. In addition, Japan also requires detailed and unambiguous descriptions when registering a trademark, further

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deepening its control over trademark registration and laying down the general pattern and institutional tone for the protection of odor marks in the future.

In summary, from the analysis of U.S. and EU laws and regulations, it can be seen that at least one condition needs to be fulfilled in order to obtain odor trademark protection, i.e., the ability to distinguish [11]. This is considered to be the most difficult condition for scents that want to be protected by a trademark. As for the countries represented by Japan, there is no system exploration and legal practice of legal protection of odor trademark yet.

4. Practical exploration: typical models of odor trademark protection from the perspective of international practice

4.1. Open description mode: represented by the United States

The United States, as the country with the largest number of odor trademark registrations, adopts the absolute open mode and lowers the registration threshold to ensure that more marks are protected, "Pohl - Boskamp GmbH & Co. KG v. United States Patent and Trademark Office exemplifies the practical logic of this model. In this case, the applicant applied for registration of "mint flavor" as a sensory mark for nitroglycerin, but the United States Patent and Trademark Office (USPTO) refused on the ground that it did not have the function of distinguishing the source of the goods, and the applicant's appeal failed.

The USPTO rejected the registration on the grounds that it did not distinguish the source of the goods, and the applicant's appeal was unsuccessful. Although the US is open to registration, there are clear restrictions on the nature of odors: odors do not naturally have a link to the goods but need to be used to obtain "secondary meaning" (acquired distinctiveness) before they can be registered. State that the applicant needs to prove that the odor has acquired a distinguishing function in the exchange of goods so that the public recognizes its reasonableness as a trademark [12]. Meanwhile, the Trademark Examination Manual states that odors need to be used in a non-functional manner in order to be registrable, and in this case, the Trademark Trial and Appeal Board held that the "peppermint scent" was perceived by consumers as a functional attribute of the product, and therefore not non-functional enough to be protected.

In summary, the US "open description model" does not restrict the type of trademark and encourages registration but requires the applicant to prove the "acquired distinctiveness" and "non-functionality" of the odor by proof.

4.2. Mixed description model: represented by the EU

A typical case of EU odor trademark is the Sieckmann Appeal case in Germany, in which the applicant Sieckmann applied for an odor trademark to the German Patent and Trademark Office, which is represented by the chemical formula "C6H5-CH=CHCOOCH3", and is described as "a fruity balsamic smell with a light cinnamon aroma". The application was rejected on appeal to the European Court of Justice (ECJ) after Sieckmann applied for a trademark for an odor, expressed by the chemical formula "C6H5-CH=CHOCH3" and described as a "fruity balsamic smell with a hint of cinnamon", and submitted a sample of the odor.

The ECJ held that a non-visual sign can constitute a trademark provided it can be graphically represented by a visual representation. In this case, the chemical equation was raw and difficult for the public to understand the odor it represented; the textual description was subjective and lacked

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broad recognition, so neither was sufficient to fully represent the odor trademark and the application was not granted.

In summary, the EU adopts the "mixed description model", which is based on clear, accurate and objective graphic descriptions, supplemented by chemical formulas, text and other auxiliary forms, and requires scientific precision on the molecular structure of odors [13]. Although the revised EUTMR in 2017 abolished the requirement of graphical representation, the model laid down in the case is still followed, and challenges still exist in practice.

4.3. Strictly limited model: represented by Japan

In the domestic legislation of countries represented by Japan, most of them adopt the "explicit enumeration" mode of legislation, i.e., the types of registrable marks are explicitly enumerated in detail in the domestic trademark legislation, which excludes the possibility of registering the odor mark as a trademark, and most of the protections of odors in Japan are carried out by laws of other sectors, such as the Anti-Unfair Competition Law and other laws. The protection of odors in Japan is mostly based on the laws of other sectors, such as the Unfair Competition Law. At the same time, Japan's trademark law requires applicants to provide a "clear, unambiguous" description, further reflecting the direction of the future protection of odor trademarks in Japan and other countries, that is, strict, clear, professional means of describing the odor samples.

5. The difficulties of China's odor trademarks and the path of development

5.1. The development status of China's odor trademark

First of all, China's legal system is not yet perfect, and the basis of protection is temporarily missing. China in 2013 has deleted the restriction of "visible signs" and the enumeration method is used to limit the types of trademarks that can be registered in a limited enumeration mode. However, odor marks are not explicitly included and their registrability remains ambiguous. Although the word "etc." offers the possibility of non-traditional trademarks, some scholars believe that the word "etc." should be strictly limited, adopting the rules of "reverse enumeration" and typological interpretation, and the standard only Stuck in the academic level, not confirmed by legislation or judicial interpretation, odor trademark registration lack of legal normative basis [14].

Secondly, China's practical exploration has not yet broken the ice, registration activities face challenges. Legislation alone is not enough to complete the task of protection; there are also challenges in our practice. The Regulations for the Implementation of the Trademark Law and the Guidelines for Trademark Examination and Trial do not provide guidance on odor trademarks, and if analogous to ordinary trademark standards, distinctiveness is the key. China can refer to the U.S. dichotomous standard of "inherent distinctiveness" and "acquired distinctiveness", but there is no visual appearance of odor, and inherent distinctiveness is difficult to be identified through drawings, etc.; acquisition of distinctiveness requires a lot of market research, and the process is complicated and costly, and the differences and difficulties in the determination of distinctiveness between the two categories constitute an obstacle to registration practice. Difference and difficulty, constituting an obstacle to registration practice [15].

Again, the relevant departments of China's adjudication standards of the law is not yet unified, the judicial issues need to be resolved. After the odor trademark is protected, the similar judgment in the infringement case is the key, and the core is to confirm the "confusing similarity" [16]. Traditional trademarks can be compared by visual analysis, but the smell relies on the judge's

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olfactory perception, individual sensory differences lead to the judgment of the existence of limitations and uncertainty, it is difficult to form a unified standard, contrary to the judicial objectivity, is the judicial protection of the challenges that need to be addressed.

Finally, the odor trademark rights face difficulties and high-cost problem. Trademark infringement evidence is often held by the infringer, the right to evidence [17]. And the smell cannot be visualized and fixed, evidence collection needs professional technology, the rights of the lack of technical support, easy to save untimely or improper loss of evidence, facing huge time and economic pressure, the cost of defending the rights remains high [18].

5.2. The development path of China's odor trademark

China should amend the Trademark Law to "do its best" to protect odor trademarks. In the context of China's desire to join the CPTPP, it is necessary to promote the alignment of domestic law with the provisions of the CPTPP, and to put odor trademark protection on the reform agenda. It is suggested to add "odor mark" as an independent object in the amendment of the Trademark Law, break through the restriction of "visually perceptible", and converge with the rules of CPTPP on "non-visible marks", so as to incorporate "best efforts" into the Trademark Law. "Best efforts" to be incorporated into the legal system.

In the context of improving the law in the future, the relevant departments can actively explore review modes and introduce emerging technologies. Some scholars have pointed out that written descriptions and samples alone are not enough to analyze the likelihood of confusion, and reliable technology is needed to assist odor identification in the future [19]. China can refer to the EU "mixed description mode", requiring the applicant to provide text, chemical formula and other visual materials, supplemented by spectral diagrams, odor molecular diagrams and other new technology materials, focusing on solving the odor trademark "distinctiveness" determination of the problem , in the form of visualization, scientific Overcome its natural defects of invisible and difficult to define [20].

In judicial practice, China should also clarify the adjudication standards and bridge the individual differences. In order to solve the judge's sensory differences caused by the adjudication of differences, it is necessary to clarify the focus of the judicial determination, through the chemical formula comparison, odor description distinction, consumer surveys and other visual test mode, to determine whether the trademarks involved in the case of the existence of "substantial similarity", in order to bridge individual differences with a unified standard, to protect the consistency of the judiciary.

At the same time, in terms of the protection of the parties' rights, China should also help to reduce the cost of testing and establish specialized institutions. The ultimate goal is to establish a sustainable protection mechanism and set up a specialized trademark examination agency to implement the rules for odor trademark protection; the agency should undertake odor sample testing to help right holders collect relevant data and information in a low-cost and convenient manner, so as to guarantee the smooth implementation of registration and rights defense activities.

6. Conclusion

CPTPP Article 18.18 of the non-traditional trademark system innovation, to a certain extent, reflects the background of today's world trade in the development of international intellectual property protection wind direction, but also for the imminent accession to the agreement in China to improve the odor trademark system, docking the process of the international legal system provides an

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important mirror. At present, China urgently needs to clarify the legal status of the odor trademark at the legislative level, fill the gaps in the system, promote the localization of the international rules, and accelerate the improvement of the corresponding judicial system innovation at the judicial level, so as to bridge the gap between law and practice. At the same time, further attention should be paid to the impact of consumer awareness and market dynamics on the determination of the distinctiveness of the odor trademark and explore the application of digital assistive technology in the examination of related cases and the defense of rights. Focusing on legal system innovation and scientific and technological support complement each other, in order to empower the internationalization of China's intellectual property system and the development of its characteristics, and to enhance China's core competitiveness in the context of economic globalization, in the face of the ever-changing concept of new trademarks.

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