



中国优秀博士论文  
DOCTOR  
法学

# 商标混淆可能性研究

姚鹤徽 著



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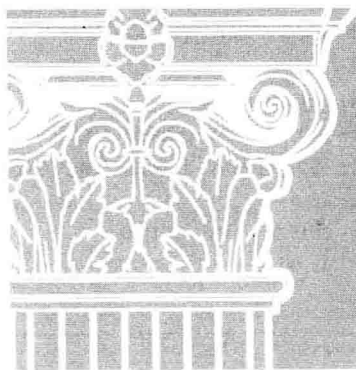
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## 图书在版编目 (CIP) 数据

商标混淆可能性研究 / 姚鹤徽著. —北京: 知识产权出版社, 2015. 4  
(中国优秀博士论文)

ISBN 978 - 7 - 5130 - 3410 - 4

I. ①商… II. ①姚… III. ①商标法 - 研究 - 中国 IV. ①D923. 434

中国版本图书馆 CIP 数据核字 (2015) 第 064072 号



责任编辑: 刘睿 刘江

文字编辑: 李红

责任校对: 韩秀天

责任出版: 刘译文

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姚鹤徽 著

出版发行: 知识产权出版社 有限责任公司

社 址: 北京市海淀区马甸南村 1 号

责编电话: 010 - 82000860 转 8113

发行电话: 010 - 82000860 转 8101/8102

印 刷: 保定市中国画美凯印刷有限公司

开 本: 880mm × 1230mm 1/32

版 次: 2015 年 4 月第一版

字 数: 407 千字

ISBN 978 - 7 - 5130 - 3410 - 4

网 址: <http://www.ipph.cn>

邮 编: 100088

责编邮箱: [liurui@cnipr.com](mailto:liurui@cnipr.com)

发行传真: 010 - 82000893/82005070/82000270

经 销: 各大网上书店、新华书店及相关专业书店

印 张: 16.5

印 次: 2015 年 4 月第一次印刷

定 价: 48.00 元

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如有印装质量问题, 本社负责调换。

谨以此书献给我的父亲母亲

本书受湖南省重点学科建设项目资助，系湖南师范大学博士启动项目（2014BQ16）和湖南师范大学青年基金项目（14XQN11）阶段性成果

# 总 序

改革开放以来，我国经济社会发展的水平日益提高，科学技术和文化创作日益进步，知识经济的特征日益凸显，知识产权制度对科技和经济发展的支撑作用日益加强。

经过多年发展，我国知识产权事业取得了巨大成就，符合社会主义市场经济发展要求的知识产权制度基本建立。以 2008 年《国家知识产权战略纲要》的颁布为标志，我国知识产权制度从“调整性适用”阶段进入“主动性安排”阶段，知识产权制度的发展进入了一个新的历史时期，知识产权事业正在揭开一个新的篇章。

中国知识产权制度的建构、知识产权事业的发展与进步，离不开知识产权人才的培养、知识产权教育水平的提高和知识产权学术研究的进步。中国知识产权事业的发展需要全社会的共同努力。为提高我国知识产权学术研究水平，培育优秀青年知识产权研究人才，中国法学会知识产权法研究会与知识产权出版社自 2008 年始，联合组织开展知识产权类优秀博士学位论文评选以及资助出版工作。该项工作具有丰富的内涵：

第一，以高层次、高质量的人才培养为目标。通过设立优秀博士论文奖项，鼓励更多优秀人才参与知识产权学术研究，不断增强我国知识产权制度的理论储备。

第二，以提高知识产权学术水平为导向。评选优秀博士论文，促使更多青年学人创作高质量学术著作，不断提高我国知识

产权学术研究水平。

第三，以我国知识产权事业的发展为宗旨。通过优秀博士论文的评选以及资助出版工作，鼓励青年学人关注现实，关注新兴发展需要，以优秀思想成果推动我国知识产权事业向着更快更好的方向发展。

第四，以科学公正、注重创新、严格筛选、宁缺毋滥为原则。在知识产权优秀博士论文的评选过程中，知识产权法研究会组织评审专家，本着公开、公平、公正的原则，严格按照评审标准，对申报人员的博士论文进行遴选。

第五，以选题新颖、研究创新、逻辑严密、表达规范为标准。优秀博士论文的选题应当具有理论意义和现实意义，在研究内容上应当有所创新，材料应当翔实，推理应当严密，表达应当准确。

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是为序。



2010年5月



## 摘 要

目前，世界上一些国家实行的商标侵权判定标准是混淆可能性（likelihood of confusion）。一旦在后商标的使用极有可能导致消费者对相关商品或服务的来源发生混淆，使消费者存在混淆可能性，就构成商标混淆侵权，商标权人就有权予以禁止。在我国，2013年商标法已明确将混淆可能性规定为商标侵权判定的要件。因此，混淆可能性是商标审查的重要尺度，是商标侵权的关键问题，是保护商标权和制止不正当竞争的重要法律基础。尽管如此，混淆可能性还存在着模糊性与不确定性，主要表现为：商标法需要以混淆可能性作为商标侵权判定标准的正当性和理论基础不明确、混淆可能性本身的范畴较为模糊、混淆可能性与商标的相似性、商品的类似性之间的关系定位不准、混淆可能性的具体判定较为混乱。

从历史上看，中世纪之后到19世纪中叶之前，英、美两国的普通法和衡平法对商标一般是通过欺诈之诉来保护，混淆可能性在商标侵权判定中的地位还未确立。随着商标财产权观念的确立和消费者地位的提高，19世纪中期之后，主观欺诈的要件不再重要，法院开始将商标视为财产，侵权判定的标准不再围绕被告主观上是否具有欺诈的意图，而是关注于被告的行为所造成的影响，亦即，被告的行为是否极有可能造成消费者混淆。混淆可能





性成为商标侵权判定的标准，主观欺诈的意图在历经漫长的历史演化之后退出了历史舞台。

商标侵权判定之混淆可能性标准的设立，有其正当性和理论依据。商标的形成、结构、本质和功能是混淆可能性的设立基础和理论依据之一。商标的形成、结构和本质表明商标是由人类感觉器官能够感知的外在刺激形式，即商标标识和可被激活的消费者大脑记忆中存储的该商标标识代表的相关信息组成。商标的基本功能在于标示来源，使消费者能够正常地识别商标，依据商标所代表的信息进行购物决策。在消费者混淆的状态下，商标标示来源的功能就会丧失。这是将混淆可能性作为商标侵权判定标准的重要基础。商标混淆的机制和危害是混淆可能性的设立原因和理论依据之二。商标混淆的本质特征在于，由他人的侵权行为所导致的，消费者无法正常地识别商标和依据商标所代表的相关信息进行购物决策的状态。在混淆的状态下，商标权人和消费者的利益都会受到损害。这是将混淆可能性作为商标侵权判定标准的主要原因。商标法的价值和规范意旨是混淆可能性的设立原则和理论依据之三。商标法的价值是公平之下的竞争自由。商标法的规范意旨是通过设立混淆可能性标准，规制市场中极有可能造成消费者混淆的行为，激励商标权人投资于商标、降低消费者购物的搜寻成本。同时，将混淆可能性界定在一定的范围之内，防止商标权损害自由竞争。这是设立混淆可能性标准的基本原则。根据上述理论，商标法之所以要设立混淆可能性标准，就是为了确保商标标示来源功能的正常发挥，确保消费者能够正常地识别商标和依据商标所代表的信息进行购物决策。商标混淆可能性标准所指的混淆，也正是这种由于侵权人的行为所造成的相关消费者无法正常地识别商标和依据商标所代表的相关信息进行购物决策



的状态。只有他人的行为造成了相关消费者发生这种状态的混淆，才属于混淆可能性所针对的混淆，他人的行为才构成商标侵权。

根据混淆可能性的理论依据，混淆可能性这一范畴是指，他人未经许可，将与商标权人商标相同或近似的标识使用在商品或服务之上，致使相关消费者中的相当一部分，虽然施加了合理谨慎的注意力，仍然极有可能将不同的商品或服务误认为来自于同一来源，或误认为两种商品的来源之间存在着赞助、许可、附属等关联关系，并可能基于该错误的认识作出错误的购物决策的状态。由此定义可见，商标混淆可能性的范畴具有指向上的特定性，仅仅针对那些损害商标标示来源功能的发挥，危害消费者和商标权人利益，危及商标法价值和规范意旨实现的混淆形态。只有他人的行为极有可能造成消费者发生这种形态的混淆，才构成商标侵权。

根据混淆可能性的理论依据，混淆可能性在关联关系混淆、初始兴趣混淆、售后混淆方面的扩张并不合理。关联关系混淆中所谓赞助、附属、许可、联系等描述关联关系的词语，语义含混笼统，指向不明，法律并未明确其含义，可能导致司法扩大化地解释混淆中的关联关系。实际上，关联关系混淆侵权成立的关键在于，消费者是否会在关联关系的判断中，认为商标权人是侵权人商品背后赞助、许可或进行某种控制的主体。换言之，消费者是否会认为商标权人是侵权人商品质量的保证方，会对侵权人的商品进行质量方面的监督和管控。只有消费者发生这种混淆，才属于关联关系混淆，他人的行为才构成关联关系混淆侵权。商标初始兴趣混淆在消费者购买之时不存在混淆的情况下，笼统地以消费者购买之前因混淆而发生的“购买兴趣转移”替代“混淆可

能性”作为侵权判定的标准，可能会造成初始兴趣混淆规则适用范围的扩大。实际上，在发生初始兴趣混淆之后，如果消费者后续购买到商标权人商品的搜寻成本较高，他人造成消费者发生初始兴趣混淆的行为应当受到商标法的规制。而当消费者搜寻成本不高时，消费者拥有充分的自主选择权，无论其购买商标权人的商品或者搭便车者的商品，都出自其自愿，商标法自无干涉的必要。售后混淆是一种旁观者混淆，但售后混淆规则中旁观者的范围过于宽泛。在适用售后混淆规则时，应当对售后混淆所针对的旁观者进行进一步界定，归纳出那些确实极有可能造成相关消费者混淆，并对商标权人权益构成损害的行为，将之纳入售后混淆规则的调整范围。此外，对于因售后混淆而发生的商标权人商品稀缺、高贵或上层的形象受到损害，属于商标淡化的问题，不属于商标混淆的问题，与售后混淆毫无关系。

根据混淆可能性的理论依据，消费者是否极有可能对系争商标发生混淆，是商标侵权判定的关键要素。因此，混淆可能性应是商标侵权的判定标准，商标的相似性、商品的类似性仅是混淆可能性判定中需要考量的因素。在实践中，适用混淆可能性标准，判定系争使用是否构成商标侵权的方法主要是多因素检测法和消费者调查。无论是多因素检测法还是消费者调查，其适用的关键都在于考察消费者在市场中对商标的心理认知状态。在多因素检测法中，有六项主要的用以考量消费者是否极有可能发生混淆的因素，包括商标的相似性、商品的类似性、商标的显著性、消费者注意程度、实际混淆、被告的主观意图。这些因素与消费者的心理认知之间存在着不同的关系，在混淆可能性判定中的地位 and 具体适用各不相同。

根据上述研究内容，我国《商标法》需要在以下方面予以完



善。第一，在混淆可能性的理论依据方面，修改《商标法》的立法目的，对商标的概念、商标法的保护对象进行重新界定。第二，在混淆可能性的地位方面，肯定《商标法》第57条第2款的规定，明确将混淆可能性确定为商标侵权的判定标准。第三，在混淆可能性的范畴方面，对混淆可能性的内涵和外延作出具体界定。第四，在混淆可能性的类型方面，将关联关系混淆、初始兴趣混淆、售后混淆三种新型商标混淆相关规则规定在《商标法》相关条例或司法解释中，明确其适用范围。第五，在混淆可能性的判定方面，将多因素检测法和消费者调查规定在《商标法》中，并通过《商标法实施条例》或司法解释对多因素检测法和消费者调查的具体适用作出规定。

## Abstract

At present, the trademark infringement determination standard is likelihood of confusion passing around some countries in the world. Once the use of the trademark is likely to leading the consumer confusing about the source of the related goods or services, making consumer has the likelihood of confusion, they constitute trademark confusion infringement, trademark owner shall have the right to banning it. In China, the new trademark law specifically providing that the likelihood of confusion is the trademark infringement determination element. Therefore, likelihood of confusion is an important measure of the trademark examination, it is the key problem of trademark infringement, it is the important legal basis to protect the trademark right and stop unfair competition. Even so, likelihood of confusion has fuzziness and uncertainty, the main performance are: the unknown legitimacy and theoretical foundation of trademark law using likelihood of confusion as the trademark infringement determination standard, the relatively fuzzy category of likelihood of confusion itself, the inaccurate relation orientation between likelihood of confusion and the similarity of trademark, the similarity of the goods, the relatively chaos determination of likelihood of confusion.



From a historical point of view, after the Middle Ages to the middle of the 19th century before, the American and British common law and equity law are through the fraud lawsuit to protect the trademark generally, likelihood of confusion is not established in the trademark infringement determination. With the establishment of the concept of trademark property rights and the improvement of the status of consumers, after the middle of the 19th century, the subjective element of fraud is no longer important. The court began to treat trademark as property, and the infringement determination standard no longer around the defendant's subjective intention of fraud, but focus on the defendant's act impact, that is, whether the defendant's act would cause the consumer confusion. Likelihood of confusion became trademark infringement determination standard, and subjective intention of fraud out of the stage of history after a long historical evolution.

The establishment of likelihood of confusion trademark infringement determination standard has its legitimacy and theoretical basis. The formation, structure, nature and function of the trademark are the setting up foundation and first theory basis of likelihood of confusion. The formation, structure, nature of the trademark shows that the trademark is external stimulus form that the human sense organs can perceive and the stored trademarks of representative information that can be activated in consumer brain memory. The basic function of trademark is identifying source, make consumer normally identify trademark and making shopping decisions according to information which the trademark represents. In the state of consumer confusion, the function of trademark identifying source would be lost. It is the important basis



of using likelihood of confusion as the trademark infringement determination standard. Trademark confusion mechanism and harm damage is the setting up reason and second theory basis of likelihood of confusion. The essential characteristics of trademark confusion is the other people's tort that causing the state of consumers that can't normally identifying trademark and making shopping decision according to the information which the trademark represent. In the state of confusion, the interests of trademark rights holders and consumers will be damaged. It is the main reason of using likelihood of confusion as the trademark infringement determination standard. The value and purpose of the trademark law are the setting up principle and third theory basis of likelihood of confusion. The value of the trademark law is free competition under fair. The purpose of the trademark law is regulating the acts that may cause consumer confusion in the market through the establishment of likelihood of confusion standard, encouraging trademark right holder invest in trademark and reduce the consumer's shopping search cost. At the same time, defining the likelihood of confusion in a certain range, preventing trademark damage free competition. It is the main principle of set up likelihood of confusion. According to the above theories, the reason of why the trademark law set up likelihood of confusion standard is to ensuring trademark identify source function can normally play, ensuring that consumers can normally identifying trademark and making shopping decision according to the information which the trademark represents. The confusion which the trademark likelihood of confusion standard referring to is this state due to the behavior of the infringer that the relevant consumers cannot normally identifying trademark and



making shopping decision according to the information which the trademark represents. Only relevant consumer happen this state of confusion caused by the behavior of others, just belongs to the confusion that the likelihood of confusion referring to, the behavior of others also constitute trademark infringement.

According to the theoretical basis of the likelihood of confusion, the category of likelihood of confusion is, others without permission, use the same or similar mark to the trademark of trademark owner in the goods or services, causing the quite part in the relevant consumers the state that although put reasonable careful attention, still making the mistake that the different goods or services may from the same source, or the source of the two goods has the sponsorship, permission, affiliated relationship, and may making the wrong shopping decision based on the wrong understanding. From this definition, the concept of trademark likelihood of confusion have the specificity that only referring to those confusion state that damage trademark identifying source function, harm consumers and trademark right holder's interest, endanger the realization of trademark law value and purpose. Only this behavior of others that may cause consumer happen this form of confusion will constitute trademark infringement.

According to the theory basis of likelihood of confusion, the expansion of likelihood of confusion in relationship confusion, initial interest confusion, post-sale confusion is not reasonable. In the relationship confusion, the description words such as sponsorship, subsidiary, licensing, contact, are all of semantic ambiguity, general to unknown, and the law does not define its meaning, these may lead





judicial to explain relationship of confusion extendly. In fact, the key of relationship confusion infringement established lies in whether consumers, in the judgement of the relationship, thinking that a trademark owner is behind the infringer to sponsoring, licensing or controlling the quality of goods. In other words, whether consumer will think that trademark owner are the guarantee party of the infringer in the quality of the goods, that supervising and controlling the infringer's goods quality. Only consumer happen this confusion, it just belongs to relationship confusion. This behavior of others will constitute relationship confusion infringement. When consumer do not exist confusion, trademark initial interest confusion generally use the "buying interest transfer" before the consumer to buy and before the confusion happen substitute for "likelihood of confusion" as infringement determination standard, this may cause the widening scope of application of initial interest confusion rules. In fact, in case of initial interest confusion happening, if consumer continue to buy the trademark owner of goods's search cost is higher, others cause consumer produce initial interest confusion should be punished by the regulation of the trademark law. When consumer search cost is not high, consumers have fully independent option, regardless of its purchase of trademark owner of goods or free rider of goods, its all from their voluntary, trademark law has no need to interfering. Post-sale confusion is observer confusion, but the scope of the observer in post-sale confusion rules is too general. In the application of the rules of post-sale confusion, we should further define the observer in the post-sale confusion, summarizing the behavior that really may cause confusion in related consumer and