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# 摘 要

与物权相比，知识产权更容易受到侵害。于是，知识产权的脆弱性造成一个反弹现象：在法律制度上，包括商标在内的知识产权保护被空前强化。[1] 但是，法律对商标进行保护的目的从来都不是消灭竞争，商标法也从来不意味着仅仅授予商标权人以财产权，消费者和商标所有人的竞争者们在市场中同样享有合法的利益。法律要求平衡这些相互竞争的权利，商标保护因此需要在商标所有者的利益、竞争者的利益与公众利益之间实现精妙的平衡，从商业表达自由的角度探讨商标法律保护中商标权利与竞争者利益的平衡，正是这样一种尝试。

商标是商标法上最基本的概念。各国有关商标的法律界定无不着眼于商标的构成要素以及商标的功能，但立法对标志可注册性标准的降低，彰显了商标权利的扩张及其对自由竞争的抑制。商标天生是符号，但商标法所保护的并非单纯的符号，而是作为区分商品或服务的符号的商标。这种指代符号源自公共领域，被固定使用在商品和服务上，建立起其自身与商品及服务提供者的联系，同时也承载了不同于符号自身内容的有关商品和服务的信息。商标所具有的表彰商品来源和区分的功能、品质保障的功能、承载商誉和广告宣传的功能，构成商标保护制度的基础。而商标所具有的交流和传达信息的功能，则是竞争者在一定条件下享有正当、合理使用他人商标之自由的前提。

现有的用于证明商标权利正当性的理论主要有两类，其中，经济理论

[1] 李琛：《论知识产权法的体系化》，北京大学出版社 2005 年版，第 148 页。

可以为保护商标的前三项功能和反对混淆提供一定的正当性，却不足以支持商标法对商标承载商誉和广告宣传功能进行保护的正当性。此外，法律通常采用禁止不当利用和反对淡化的方式，通过保护商标的显著性和商标声誉，实现对商标承载商誉和广告宣传功能的保护，但经济原理无法充分证明这种权利赋予的正当性。从道德和公平层面看，诚信原则由于与商标权的结构不符，不能为商标权提供正当性；不当得利原则又缺乏财产权正当性所需要的规范标准，并且该原则的运用并不意味着任何以他人成果为基础的得利都当然是不正当的，因此，商标权的法律保护只能获得有限的正当性。洛克的劳动理论经延伸，可用于证明法律对商誉和商标广告功能提供保护的正当性，却依旧不够充分。简言之，经济原理、道德原理或者公平原理都不能为商标权利提供全部的正当性依据。商标权利及其相关理论也没有就商标权会对竞争者的商业表达自由构成限制这一事实给予足够的关注，因此需要转而求助表达自由这一理论基础。

商标的作用与使用方式随着经济和贸易的发展而发生了改变，当代的商标不仅是一个标识产品或服务来源的符号，更具备区分产品、保障品质、承载商誉和广告宣传等多项功能。此外，商标还是一种交流工具；在商业领域，竞争者在一定情况下需要借助他人商标传递相关信息，否则就无法与消费者进行交流。随着商标功能的演变，商标法不仅给予商标所有人以商标专用权，更赋予商标所有人以商标禁止权，通过反对混淆、反对搭便车、反对模糊和玷污，通过保护商标的显著性和商标的声誉来保护商标的功能。然而，这种保护可能与竞争者想要告知消费者相关信息的商业表达自由相冲突。这种类型的冲突具有纯粹的商业特征，即全部内容不过是提供信息和开通接近消息者的通道。商业表达自由的正当性，建立在商业表达对当代社会公民所具有的积极效用的基础上，它源自消费者获取有关商品或服务的不同信息的利益，而这种利益反射为经营者向消费者信息的权利，具体体现为竞争者对他人商标的描述性使用、指示性使用及比较广告中的合理与正当使用。当然，鉴于商业表达具有的负面效应，该正当性的可拓展范围要比非商业表达自由的范围小得多。目前，商业表达自由对商

标权利所具有的限制作用，已经得到欧洲国家及美国立法与司法机关的支持，主要问题已经不再拘泥于是否保护，而在于如何保护、如何减少商标法律保护对第三人的负面效应以及实现商标所有人与竞争者利益的平衡。

商标法对商标权利与竞争者权益的平衡始于商标权的取得。就商标权的取得而言，各国通常采用注册主义。注册制度有助于实现法律的确定性，具有明显的经济效益。但注册不以商标标志的实际使用为条件，因此可能带来标志或符号被锁定而导致其他经营者无权使用的情况，并影响竞争者的商业表达自由。为避免该不良效应，商标法规定了有关拒绝注册的理由。与商业表达自由相关的、可拒绝注册的标志主要包括：缺乏显著性的标志、描述性标志和通用名称。这三类标志在有关商品和服务的属性、特征的信息交流中具有重要的作用，但它们同时也缺乏作为商标所需要的区分和识别功能，如果就此类标志赋予某一经营者具有垄断性质的商标权，势必对公平竞争造成恶劣影响。为了保护建立在商业表达基础之上的竞争者与消费者的共同利益，立法需要拒绝这三类标志的注册诉求，将此类标志留下供所有的市场参与者免费使用。这些拒绝理由对商标注册申请构成限制，并为压缩商标权排斥第三人的成本提供了实质性帮助。但如果上述标志通过使用获得了显著性，可以注册为商标。因此需要考虑获得显著性的评估、获得显著性的证据、获得显著性的部分排除等问题。获得显著性构成上述商标注册拒绝理由的限制条件，有助于制止搭便车等商标侵权行为。

为了保护商标所有人的利益，商标法授予权利人使用其商标的排他性权利，商标权人有权禁止他人在相同的商品或服务上使用相同的标识，有权禁止他人在相似或不相似的商品或服务上使用其商标以避免混淆，有权禁止他人利用其商标的声誉及显著性进行不公平竞争。但法律对商标权利的行使亦实施了限制，在不会引起混淆和淡化的前提下，商标法允许其他竞争者对商标的正常合理及必要的使用。与商业表达自由有关的使用行为主要有：描述性使用、指示性使用及比较广告中的合理使用。从商业表达自由的角度看，商标法之所以保护这些使用行为，是因为缺乏足够信息会导致消费者“自由选择”在实质上落空，为此，商标法需要赋予其他经营

者在其商业交流中使用他人商标向消费者提供信息或进行交流的权利和自由。这类使用行为构成商标侵权的免责事由，使用他人商标的竞争者也往往以此进行抗辩。通常情况下，司法机关根据混淆理论判断有关使用行为是否构成商标侵权；但如果竞争者不正当地利用或者攀附、损害他人商标的显著性和声誉，即使不存在混淆，也应禁止。然而，对商标的显著性和声誉的保护很容易使责任范围过分扩张，因此在判断商标侵权责任是否成立时，应当权衡消费者的利益和公平的竞争秩序，避免增加其他交易者和消费者的成本支出。

我国目前的商标法律制度仍有不足，这种不足不仅存在于立法上，也存在于商标注册审查及商标侵权的司法救济中。对商标法律保护与商业表达自由之间冲突与平衡的研究，为我国相关制度建设提供了一个新视角。商标法律制度的完善应当是全方位的，商标法当然要保护商标权，但也需要限定商标权利的范围，在商标法律保护与商业表达自由之间取得平衡。因此，我国不仅要完善商标合理使用制度，对比较广告作出详细具体的规定，更需要在商标注册的审核及司法审判的实务中权衡各方利益，在保障商标权利的同时保证市场竞争的公平，在促进经济发展的同时维护消费者的权益，平衡私益与公益的冲突。

# Abstract

Comparing to right in rem, intellectual property is more likely suffering infringement. Therefore, the fragility of intellectual property right results in a rebounce situation: the protection on intellectual property including trademark is enforced unprecedentedly in legal system. However, the purpose of trademark legal protection does not eradicate competition at all times. Trademark Law has never meant granting only trademark owner with property, while consumers and the competitors against trademark owner enjoy the same degree legal protection in market. The aim of law is to balance various competing rights; therefore, trademark protection requires an intrinsic balance among the interests of trademark owner, competitors' interests and public interests. Here is the attempt to study the balance between commercial rights and competitors' interests from the aspects of commercial expression freedom.

Trademark is a basic concept of trademark law. No definition of trademark all over the world does not focus on its constituent and functions of trademark. However, legislation lowering down the standard on registration mark shows the right expansion of trademark and the restraint against free competition. Trademark is inborn a symbol. While the marks protected by trademark law are not merely trademark, but the mark as a symbol which can distinguish goods and services from others' firms. The referring symbol from public domain, is used on goods or services, and creates a connection between the symbol and goods or services, at

the same time, carry goods or services related information which is different from the symbol itself. The functions owned by trademark such as goods source demonstration and differentiation, quality guarantee function, goodwill undertaking function and advertizing function, constitutes the basis of trademark protection. While the communication and information convey functions owned by trademark, under certain competition circumstances, the competitors is entitled to use them reasonably.

There are two kinds of main existing theories which can be used to support the rationale of trademark rights. Among which, economic rationale can provide certain protection for the first three functions of trademark and against confusion, however it cannot provide sufficient rationale for trademark goodwill and advertising functions granted by trademark law. The laws protect trademark repute and advertising functions by protection of trademark distinctiveness and trademark reputation and by prohibition of taking unfair advantage and anti-dilution, while this kind rights and its rationale cannot be supported sufficiently by economic theory. From the aspects of ethic and fairness, principles of truth cannot provide rationale for trademark rights due to its different right structure. Unjust enrichment principle lacks the criteria and norm required by property rationale, and the application of this principle does not mean that any achievement based on others property is unfair. Therefore, the legal protection of trademark can just acquired limited rationale. The extension of Lockie's labor theory can be used to support the legal rationale of goodwill and advertising functions granted by law, however it is still not sufficient. In short, economic theory, ethical theory and fairness theory do not provide full rationale to trademark rights. Trademark right and its related theories do not provide sufficient attention to the limitation to competitor's commercial expression freedom by trademark right. In the end, it is necessary to turn to expression freedom theory.

With the development of economy and trade, the functions and usage of

trademarks are changing. Modern trademark is not only a symbol to demonstrate certain goods or service source, but with various functions such as product distinguish, quality guarantee, goodwill carrier and advertising functions. Furthermore, trademark is a kind of communication tool. In commercial and trade field, competitors are in virtue of under circumstances others' trademark to send related information; otherwise they cannot communicate with consumers. With the change of trademark functions, trademark law grant trademark owner not only the exclusive right, but also trademark blocking right by the way of anti-confusion, anti-free riding, anti-blurring or tarnishment to protect trademark's functions by protection of its distinctiveness and repute. However, this protection may conflict with commercial expression freedom which can be used to send information to consumer by competitors. This kind of conflict is of pure commercial character which means only sending information or providing access to consumers. The rationale of commercial expression freedom is based on the positive effect to publics. It comes from the interests gained by consumers from related goods or services. The interest reflects the right of traders sending information to consumers. Specifically speaking, it is reasonable and fair to use others' trademark in a descriptive way or indicative way or to use in comparative advertisement. Whereas the negative effect of commercial expression, its extendable rationales scope is much less than non-commercial expression. The limiting function to trademarks of commercial expression freedom has already been supported by European countries and American legislation and judicial authority. The main concerns are not to protect it or not, but how to protect, how to reduce the negative effect from trademark law protection to third party, and how to balance the interest between trademark owners and competitors.

Trademark law balance trademark rights and competitors' rights and interests at the acquisition time of trademark rights. As to the acquisition of trademark right, registration standard is adopted for most of the world. The registration re-

gime is helpful to reach the certainty of law, with clear economic efficiency. However the registration is not based on actual use of a mark. As a result, it may bring about the situation that the mark or symbol is confined and others have no right to use it, which may give impact on the commercial expression freedom. In order to avoid the negative effects, trademark law has regulations to deny the registration application when the mark is related to commercial expression freedom such as marks lack of distinctiveness, or descriptive mark, or common name. The above mentioned three kinds of marks have important roles when it is used to show the characters of related goods or services or used as communication tools. But they are lack of distinction role or identification role for a trademark. If these kinds of mark are owned as trademarks exclusively, that may lead to very bad effect to fair play competition. In order to protect the common interests shared by competitors and consumers which are based on commercial expression freedom, legislation denies the registration application of these three kinds of marks, and leave these mark free use for all market participations. These denials constitute a kind of limit to trademark registration application and provide material support to reduce the exclusion cost of trademarks. However, if the above-mentioned marks acquire distinctiveness by use, they can be trademark by registration. Therefore, it is necessary to consider the assessment of the acquired distinctiveness, and the proof of distinctiveness, and partial exclusion issues. Acquired distinctiveness constitutes a limit item to trademark application and it is to restrain free-riding trademark.

In order to protect the interests of trademark owner, Trademark law grants its owner exclusive right to use the mark. That means, the right owner has a right to block others using the same mark on same goods or services, or on similar or non-similar goods or services in order to avoid confusion, and has a right to prohibit others using the repute and or distinctiveness of the mark to compete in an unfair way. However, the law applies restriction to the usage of trademark rights. Under

the condition that there is no confusion and or dilution, trademark law allows other competitors use the trademark within the limit of normal or necessary way. The reasonable usages of trademark by others related to commercial expression freedom are descriptive use, referring use and comparative use in advertising. From the aspect of commercial expression freedom, trademark law protect these reasonable usages is the reason that information insufficient may result in "substantial falling" of "free choice" for consumers. Therefore, it is necessary for trademark law to grant the rights and freedom for other traders to use others' trademark and to provide information or communication to consumers. These kinds of usage constitute exemption of trademark infringement, and competitors who use others' trademark often use this reason to plea. Usually, judicial services judge the trademark infringement according to confusion theory. It should be prohibited even if there is no confusion when competitors take unfair advantages, or free-riding, or damage the repute or goodwill of others' trademarks. However, it is likely to expand the obligation scope of others at the time of protecting trademarks' distinctiveness and repute. Therefore, at the time of assessing infringement, it is necessary to balance the consumers' interests and fair competition ordinance to avoid extra cost expenditure of other traders and consumers.

Chinese trademark law system has achieved significantly, however, there are still shortages in not only legislation but trademark registration censoring and trademark infringement judicial relief. The study on the conflict and balance between trademark law protection and commercial expression freedom provide a new perspective for related system development. Trademark law system improvement exists in all-around perspectives. Trademark law of course is to protect trademark rights, also limit the right scope to achieve a balance between legal protection and commercial expression freedom. Therefore, it is necessary not only to improve trademark reasonable usage system, to regulate specifically the comparative advertising, but also to balance the interests of various parties at the time of trade-

mark registration verification and judicial judgment, to achieve the trademark right protection and to achieve market fair competition, to achieve economical development and to protect the consumers' rights, to balance the private and public interests.

# 目 录

# 导 言

商标权被惯常定义为商标所有人对其商标进行支配的权利，一经授予，便依法受到保护。较之其他知识产权，商标权的法律保护有一大特征，即法律为商标权提供的保护可以通过续展得以无限延续，这意味着商标权可以不像专利权、版权那样最终进入“公共领域”。如果可能，商标的权利人希望得到绝对并且永久的保护，然而，竞争对手则希望对方得到更少的保护，从而使自己能够得到更多传递信息和表达自己产品或服务特征的机会。

法律明确承认一种权利——它保护任何超出最低付出的劳动、技术、精力、对时间和金钱投资的成果，因此，商标法赋予商标所有人对商标使用的独占权和垄断权；但是，法律对权利的保护并不是漫无边际的。在商业领域，商标一直是提供产品来源和产品质量等重要和主要信息的标志符号，当其他经营者为了向消费者传递有关产品或服务的信息以帮助消费者理性决策，从而需要使用他人商标时，商标权保护与商业表达自由的冲突由此产生。

正如非商业表达自由对于民主政治所具有的意义与作用，商业表达自由构成市场经济和公平竞争不可或缺的必要内容。商标法作为规制市场经济秩序的重要法律机制，需要在至少三个利益不同的团体要求中取得平衡：（1）商标所有人的利益；（2）竞争者的利益；（3）商品或服务的消费者或使用者的利益。事实上，大部分（如果不是全部）知识产权纠纷是由竞争

者提出的，消费者的利益也存在，但与竞争者的利益属于不同类别。[1] 商业表达自由对当代社会公民具有积极的效用，其正当性源自消费者获取有关商品或服务的不同信息的利益，法律因此必须将这种自由和权利授予经营者，以便他们为消费者提供相关信息。

然而，长期以来，商标法律制度过于关注对商标权利的保护，太少关注与这种权利保护尾随而来的负面效应，因而带来了其他市场竞争者和消费者的利益面临着被忽视的危险。对商标权利的限制，如同对商标权利的保护一样，是知识产权制度中不可或缺的部分。对商标权利保护与商业表达自由之间冲突与平衡的研究，能够为限制商标权利的过度扩张、维持和促进公平竞争提供一个新视角。

## 第一节　选题的由来与意义

商标是生产者、经营者用以表彰其生产、销售的商品或所提供服务的标识，目的是与他人生产的商品或提供的服务相区别，以便在市场上发挥公平竞争的效用。作为经营者联结消费者的最重要、最直接的纽带，商标成为这个时代极为复杂的生产机制和商品分配的不可替代的服务工具。[2]

美国学者兰德斯和波斯纳在《商标法：经济分析的视角》一文中指出，对商标法的最好解释建立在法律总是试图促进效率这一基本假设之上。[3] 具体来说，商标对效率的促进主要表现在两个方面，即降低消费者搜寻成本和激励企业提高产品质量。在市场经济条件下，商品或服务的生产者和经营者必然需要借助商标在生产和流通领域展开竞争，商标法通过

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[1] Pendleton, Excising Consumer Protection—The Key To Reforming Trade Mark Law, *Intellecutal Property Journal* 110. 3 (1992).

[2] ［荷］维尔克曼著，许振中译：《商标——创造、心理、理解》，北京经济学院出版社 1992 年版，第 7 页。

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