中国优秀博士论文
DOCTOR
法学

商标显著性研究

张慧春 著

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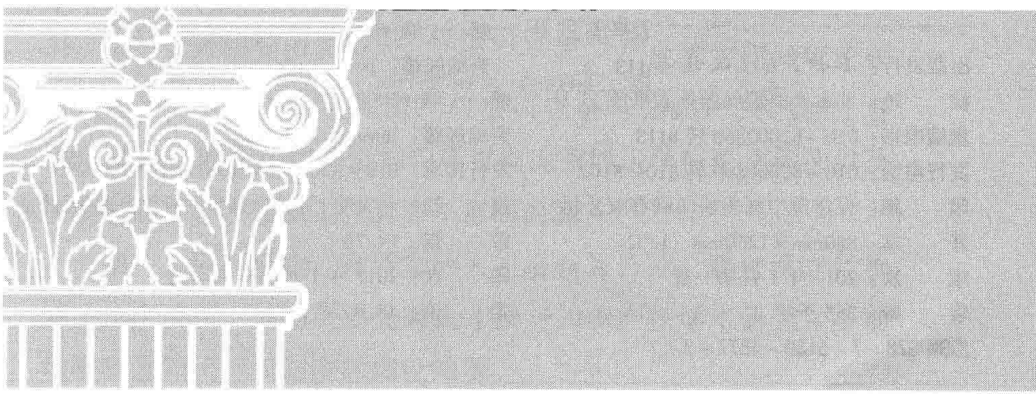

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总　序

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。

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是为序。

2010 年 5 月

摘　要

商标显著性理论贯穿于整个商标法律制度，可以说是商标法律制度有效运行的基础。申请注册的商标应当具有显著性，不具有显著性的标识不能注册为商标，除非具有第二含义。在法律实践中形成的判定商标显著性的经典方法，将显著性分为固有显著性与获得显著性。具体来说，将商标依其强度分为臆造商标、随意商标、暗示商标、描述性商标与通用名称。前三类商标由于识别力强，被认为具有固有显著性；而描述性标识则需要证明第二含义才能成为商标，这被称为获得显著性。通用名称依其性质而言不具有显著性不能作为商标。商标确权制度的核心问题就是对显著性的认定，在商标侵权制度中显著性的概念也尤为重要，在证明混淆可能时需要对商标的显著性进行判定，特别是商标的获得显著性成为混淆可能多因素检测法的构成因素之一。商标淡化理论与显著性的概念联系更为紧密，只有驰名商标才能受到淡化保护而对驰名商标的认定亦涉及显著性的判定。

商标显著性的强度是不断变化的，这种变化体现在商标的使用之中。法律实践中，人们越来越关注商标的使用，获得显著性随之成为研究的重点内容。所谓固有显著性和获得显著性的划分，并不是判断商标显著性的唯一准则。事实上，这种划分也造成在商标保护中对固有显著性商标的过分偏爱，所以有必要对显

著性理论进行系统研究，纠正在理论和实践中出现的问题。商标显著性的根本作用在于发挥商标的来源识别功能，降低消费者的搜寻成本。商标是信息来源，这些信息是企业在市场竞争中形成的。消费者信息的采集有一个搜寻成本，商标所包含的信息使得商标权人市场进入成本变低，因为可以方便消费者将商标从相关市场中识别出来。也可以说，商标显著性越强，越有利于商业主体在市场竞争中脱颖而出，所以商标权人致力于品牌建设，增进并维护商标的显著性。商标显著性的本质特征在于来源识别，但是如果仅仅将对商标显著性的理解限定在来源识别领域内未免片面。商标的强度、商标名声这些概念都已经以各种方式归结到显著性这一核心概念之上，商标已经不仅仅是指示来源的符号，商标所具有的多重功能和角色也影响着对商标显著性的解读。

商标只有经过使用才具备其他方面的显著性特征。不妨采用更多元的研究视角来讨论商标显著性的强度变化。法律层面的研究往往将品牌与商标作同义词解释，但品牌与商标存在区别，品牌具有象征意义。经过使用，商标具有了影响消费者选择的情感内容，所谓商标的声望，事实上反映了消费者对商标的观感，所以商标成为品牌，意味着商标显著性增强了。商标显著性的强度也会影响商标法的保护范围，商标法保护商标权人对维护和扩大商标显著性所进行的投资，初始兴趣混淆、售后混淆、商标淡化理论的出现都是为了保护那些具有很强显著性的商标。品牌战略发展的终极目标在于创造品牌文化，来自品牌学和法律文化学的研究表明消费者会受到品牌所传递的信息的影响，同时消费者也利用这些信息表达对品牌的看法。可以说通过使用，消费者也成为商标显著性的缔造者，所以在保护商标权的利益衡量中，消费者的利益也不容忽视。一些商标本来就是文化符号，商标权人意

图使用这些文化符号中的美好意蕴描述其产品。那些臆造商标经过使用也会具有文化内涵，可以说商标显著性也代表着商标的文化内涵，防止商标淡化就被认为是防止对商标文化内涵的伤害。商标具有了文化内涵进而与公共利益产生冲突。因为商标作为文化符号是一种共有资源，对其使用应当是自由的，所以还应进一步完善商标侵权制度中的具体判定规则，平衡商标使用中的各方利益。

商标显著性四分法将商标显著性的强度按照递增的顺序来划分以确定商标可受到保护的程度，但是这一划分界限并不总是清晰的，因为在实践中总会出现各种类别的复合。商标显著性四分法的界限并不是泾渭分明的，这也是该方法的先天不足，随着商标类型的不断发展，四分法越来越受到质疑，特别是在判断新型商标的显著性时，使用该规则进行解释显得牵强。商标法分类理论的缺陷在于，结论的提出是法律对消费者认知的假设，这种片面的认知导致结论的失真。来自认知心理学的实证分析表明，消费者主要依赖非语言的视觉线索对商标显著性进行判断，例如标识的位置或者标识被展示在产品包装中的尺寸，而并非仅依靠商标的语义含义。通过实证分析发现描述性商标的识别作用比暗示性商标、臆造商标或者随意商标毫不逊色。可以说，所有非通用名称的文字商标只要满足“商标使用”的要求都应当受到法律保护。商标显著性的发展使得消费者对商标的使用具有更高的利益诉求，所以需要面对市场，结合消费者的动机判断标识的识别来源功能，识别来源的判断就是消费者区分产品来源的认知过程。理论中和司法实践中对固有显著性过分偏爱，认为商标具有固有显著性对其提供的保护应该更强，这样的观点是经不起推敲的。事实上，在商标理论中获得显著性的重要性日益突出，商标显著

性的判断成为关键问题。固有显著性的概念有利于提高显著性判断的效率，但很多商标属于描述性的，需要证明第二含义。在证明第二含义时，权利人需要证明对于消费者来说商标是区分产品的单一来源或者匿名来源而不是描述产品本身。我国的商标法司法实践并不重视实证调查证据的运用，而证明商标显著性的关键在于证明消费者意识到商标具有来源识别功能，这需要对消费者的认知进行实证分析。实证调查证据的效力应当在未来司法实践中得到认可和推广。问卷调查是用来证明商标第二含义的常见形式，在调查中需要注意一些方法，这会影响法院对调查结果的采纳。

商标显著性理论影响了商标取得制度和商标侵权制度的构建。商标显著性理论对商标取得制度最重要的影响在于商标公共领域的划分。商标是文化符号，一些驰名商标甚至成为流行文化的组成部分，这给商标法中“公共领域”的界定提出了新的要求，不仅要从竞争需要的角度分析商标注册是否要考虑竞争对手的使用需求，还要结合我国独特的文化背景分析这种使用是否会造成对文化资源的不正当垄断。商标不仅限于文字、图案、颜色、声音、气味等要素；只要具备显著性，都可以注册为商标。对于这些特殊标识的注册，需要借助商标显著性理论对其可注册性进行分析。通过显著性理论分析，单一颜色商标的注册是可能的，颜色商标要获得注册，最关键要证明颜色具有非功能性。有关颜色商标是否具有固有显著性以及如何证明固有显著性存在争议。目前来看，如果颜色没有特殊性，注册为商标还需要结合具体使用情况证明获得显著性为宜。声音商标成为我国商标法中规定的一个新类型，有关声音商标显著性的判断还缺乏具体的操作依据，非功能性也是声音商标获得注册的关键因素，对于声音商

标显著性的判断还应坚持非功能性的规则，根据具体案例对显著性进行分类判定。商业外观获得商标保护的因素之一在于其是非功能性的，商业外观的显著性分类不能适用商标显著性的传统四分法，而需要通过考察商业外观在市场中的具体使用情况来确定。对上述特殊标识显著性判断的基本原则仍然是判断这些标识是否具备来源识别显著性。

侵害商标显著性的两种形式是商标混淆和商标淡化。商标混淆是通过将不同标识指向同一个来源出处，降低商标的区别能力，从而使商标权人遭受损害；商标淡化则是将同一个或近似标识指向不同的来源出处，从而降低商标的标识来源的能力。一言以蔽之，商标侵权的实质就是侵害了商标的显著性。在交易范围越来越广、交易频度越来越快的背景下，在确保商标来源识别功能有效发挥的情况下，商标所具有的有关商誉和文化内涵的连续性和期待性的意义更加重要。而商标侵权行为则潜移默化地破坏了商标传达这种信息的方式，使消费者获取有关商品或者服务的认知成本增加。在商标混淆可能侵权的判定中仍然表现了对固有显著性的偏爱，认为商标的固有显著性越强，被使用在相同或者相似的产品或者服务中越易混淆，这种观点是不严谨的，消费者是否实际将商标作为来源识别符号是一个第二含义判断的问题，所以判断商标使用是否造成消费者混淆主要应考虑商标的获得显著性。淡化理论也受到显著性分类理论的影响，有关驰名商标显著性的判定存在一个长期争议的观点，即“驰名商标应当是具有固有显著性的商标”，但并非所有的商标都具有固有显著性，很多驰名商标之所以驰名，是依赖于商标具有的极强的获得显著性。商标的固有显著性特征可以使其更容易获得保护，所以在注册商标时，尤其在意向发展驰名商标之初，选择固有显著性强的

商标更为有利，但具有固有显著性的商标并不比那些具有获得显著性的商标更优越。此外，在判定商标混淆和商标淡化的成立时，法院对侵权行为是否成立的分析日趋谨慎，一般要全面衡量商标权人、消费者、其他相关使用者的利益，其中对显著性的分析成为解决问题的关键。

我国商标法经过修订，进一步强调商标使用、完善商标注册制度、丰富商标类型，并加强商标专用权保护。商标具有固有显著性意味着商标具备获得注册的前提条件，但这不是获得全面的商标权保护的决定因素。使商标焕发生命力的决定因素在于商标的实际使用，这也是商标获得全面保护的具有正当性的因素，没有实际使用就没有商标保护意义上的显著性可言。强调商标使用意味着认识到了获得显著性的重要性，在商标法的司法和执法过程中还需要进一步落实和完善商标显著性判断规则，纠正在理论和实践中形成的重视商标的固有显著性忽视商标的获得显著性的观点，强调实证分析证据的证明力。对商标显著性的判断要以证明商标具有来源识别功能为根本准则，而对于那些具有特殊文化含义的符号注册为商标要考虑公众利益，防止不当注册的产生。

Abstract

Trademark distinctiveness theory is throughout the whole trademark law system, and it, so to speak, is the basis for the effective operation of trademark law system. A registered trademark should have distinctiveness, and a logo, which has no distinctiveness, can't be used as a registered trademark, unless it has a second meaning. A classical method is formed in legal practice to judge trademark distinctiveness, dividing distinctiveness into inherent distinctiveness and acquired distinctiveness. To be specific, trademark, according to its strength, falls into fanciful mark, arbitrary mark, suggestive mark, descriptive mark and generic. The first three marks, due to their strong discernment, are considered to have inherent distinctiveness, while descriptive mark can't become a trademark unless its second meaning is proved, and this is called acquired distinctiveness. Generic, as far as its nature is concerned, doesn't have distinctiveness, so it can't be used as a trademark. The core problem of trademark right verification system is the cognizance of distinctiveness, and the concept of distinctiveness in trademark infringement system is particularly important as well. When likelihood of confusion is demonstrated, trademark distinctiveness needs to be judged; especially that trademark's acquired dis-

tinctiveness is one of the component factors of the multifactor detecting method for likelihood of confusion. Trademark dilution theory is linked more closely to the concept of distinctiveness, and only well-known trademarks can enjoy antidilution protection. However, the recognition of well-known trademarks is also involved with the judgment on distinctiveness.

The strength of trademark distinctiveness is everchanging, and this change is reflected in the use of trademark. As more and more attention is paid to the use of trademark in legal practice, acquired distinctiveness has become a research emphasis. The division between inherent distinctiveness and acquired distinctiveness is not the only criterion for judgment on trademark distinctiveness. As a matter of fact, this division has also led to excessive preference for trademark with inherent distinctiveness in trademark protection, so it's necessary to make a systematic study on distinctiveness theory, to correct theoretical and practical problems. The fundamental role of trademark distinctiveness is to play a part in identifying trademark's source so as to reduce consumers' search costs. Trademark is information source, and the information is formed by enterprises in market competition. There are search costs for the acquisition of consumer information, and the information contained in trademark has lowered trademark owners' expenditures for market access, because consumers have less difficulties in identifying trademark in relevant market. It can also be said that the stronger trademark distinctiveness is, the more conductive it is for business subjects to stand out from market competition, so trademark owners hammer at brand building, to enhance and maintain trademark dis-

tinctiveness. The substantive characteristics of trademark distinctiveness lie in source identification, but it's partial to just understand trademark distinctiveness within the field of source identification. Such concepts as strength of trademark and brand reputation have already narrowed down to such a core concept of distinctiveness, so trademark is no longer a symbol for source instruction, and the multiple functions and roles of trademark also have impacts on interpretation of trademark distinctiveness.

The advent of a trademark's saliency characteristics in other aspects depends on its use. We might as well make discussions on the intensity change of trademark distinctiveness from more diversified research perspectives. A study in legal dimension usually interprets brand as a synonym of trademark, but there are differences between brand and trademark, for brand has symbolic significance. After used, trademark gets an affective content which affects consumer choice. Brand reputation actually reflects consumers' impressions on trademark, so when trademark becomes brand, it means that trademark distinctiveness is enhanced. The intensity of trademark distinctiveness will also influence the protective range of Trademark Act. Trademark Act protects trademark owners' investment in maintaining and enlarging trademark distinctiveness, and the advent of initial interest confusion, post-sale confusion and trademark dilution theory is for the purpose of protecting the trademarks with strong distinctiveness. The ultimate goal of brand strategic development is to create brand culture. The researches from brand science and legal culturology indicate that consumers are affected by the information conveyed by brand, and at the same time,

consumers also use the information to show their views on brand. In a manner of speaking, consumers are a founder of trademark distinctiveness, so consumers' benefits can't be ignored in the interest measurement of trademark right protection. Some trademarks are cultural symbols, and trademark holders have the intention to use the good implications in the cultural symbols to describe their products. And those fanciful marks will also get cultural connotations after used, so it can be said that trademark distinctiveness also represents a trademark's cultural connotations, and preventing trademark from being diluted is considered to be preventing trademark's cultural connotations from being damaged. Trademark gets a cultural connotation and then conflicts with public interests. Because trademark is a shared resource as a cultural symbol and the use of it should be free, it's necessary to further improve the concrete criterion rules in trademark infringement system, to balance the interest of all parties in use of trademark.

Trademark distinctiveness quartering divides the strength of trademark distinctiveness in ascending order to determine the protective range of trademark. But this division is not always clear, because there are always various categories of compounds in practice. The boundaries of trademark quartering are not always quite distinct from each other, which is the inherent shortage of trademark quartering. Along with the continuous development of trademark types, quartering has been increasingly oppugned. Especially, it is far-fetched to make an explanation by using this rule to judge the distinctiveness of a new-type trademark. The disadvantage of the classification theory of trademark law is that the proposal of conclusion is law's assumption of consumer cogni-

tion, and the one-sided cognition leads to the distortion of conclusion. Empirical analysis from cognitive psychology indicates that consumers rely largely on non-verbal visual cues to judge trademark distinctiveness, such as the location of logo or the size of logo on product packaging rather than relying solely on trademark's semantic meaning. Empirical analysis shows that the recognition function of descriptive mark is not inferior in any respect to that of suggestive mark, fanciful mark or haphazard mark. In a manner of speaking, all the word trade marks, which are not a common name, should be protected by law as long as they meet the requirements of "use of trademark". The excessive preference for inherent distinctiveness in theory and juridical practice thinks that a trademark's inherent distinctiveness should be more protective to it, and such a view does not stand up to scrutiny. As a matter of fact, the importance of acquired distinctiveness in trademark theory is increasingly prominent, so that the judgment on trademark distinctiveness has become a key issue. The concept of inherent distinctiveness is beneficial to improving the efficiency of distinctiveness judgment, yet many trademarks are descriptive, their second meaning needs to be proved. When proving the second meaning, right holders should demonstrate that for consumers, trademark is used to distinguish products' single source or anonymous source rather than describe products themselves. In the juridical practice of China's Trademark Law, the application of empirical evidence is not valued, yet the key to proving trademark distinctiveness is that consumers become aware of trademark's function in source identification, and it's necessary to make an empirical analysis in consumer cognition. The effectiveness of empirical evi-

dence should be recognized and promoted in future juridical practice. Questionnaire survey is a common form used to prove trademark's second meaning. It should be noted that some methods will affect courts from adopting survey results in investigation.

Trademark distinctiveness theory affects the construction of trademark acquisition system and trademark infringement system. The most important impact of trademark distinctiveness theory on trademark acquisition system lies in the division of the public domain of trademark. Trademark is a culture symbol. Some famous trademarks have even become part of pop culture. This puts forward new demands for the definition of the "public domain" in Trademark Law, so that not only should an analysis be made on whether or not the usage requirements of competitors be considered for trademark registration from the perspective of competition, but an analysis should be made on whether or not this usage will cause unjustifiable monopoly on cultural resources. Trademark is not limited just to such elements as character, pattern, color, voice and odor, etc., and anything that has distinctiveness can be registered as a trademark. For the registration of those special marks, trademark distinctiveness theory should be used to analyze their possibility of registration. Distinctiveness theory analysis indicates that the registration of single color mark is possible, and the key to registering a color mark is to prove the color has non-functionality. There are controversies as to whether or not color mark has inherent distinctiveness and how to prove inherent distinctiveness. At present, if color has no particularity, it's necessary to prove the acquired distinctiveness in the combination of specific service conditions when it is registered as a trademark. Sound