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摘 要

近年来，与商业外观相关的国内外案例逐渐增多，我国企业对于商业外观相似也会侵权的现象产生了诸多疑惑并亟须理论研究对此问题予以厘清。尽管我国法院曾作出过保护饭店整体的店面装潢以及服务风格的商业外观的判例；尽管我国商标法、专利法、著作权法、反不正当竞争法等法律在不同的视角和立法目的的指引下可以为商业外观提供一定程度的法律保护；尽管知识产权客体不断扩张的发展趋势使知识产权保护呈现出渐进性扩张的趋势，从而加强了对商业外观的法律保护；尽管我国学者已从不同的角度，分别讨论过诸如实用艺术品著作权、外观设计专利、未注册商标以及知名商品特有的包装、装潢的法律保护等问题，但我国还是缺少对结合了艺术、包装、设计、标志、信誉等内容在内的商品或服务的整体形象的商业外观进行系统、完整和较为深入的研究，缺少对商业外观保护的基础理论问题的研究，缺少对保护商业外观权益的法律制度构建和实施等问题的研究。因此，商业外观保护的法律制度研究具有较好的理论意义和实践价值。

商业外观是直接 from “trade dress” 翻译过来的来源于美国判例和法学著作的术语。尽管目前各国对于商业外观还没有相对权威或统一的定义，但对于商业外观概念的基本共识认为，商业外观是指由特定元素（如外形、样式、包装、颜色及其组合等）构成的商品或者服务的整体形象。商业外观在市场经济生活中的作用越来越多地引起经营者的重视，从而产生法律对其进行保护的

迫切需要,商业外观作用的多样性也促成了多部法律对商业外观进行不同程度、不同视角保护的格局。需要注意的是,并非所有商业外观都能当然获得法律保护,只有具备了相应条件的商业外观才能形成商业外观权益。由于从知识产权的概念可以看出知识产权与商业外观权益的紧密关联性,从重要的知识产权国际公约的规定和商业外观权益具备知识产权的基本特征可以得知商业外观权益具有知识产权属性,从知识产权的对象可以看出商业外观权益属于知识产权的范畴,也由于商业外观权益还具有财产权属性,属于无形财产权的范畴,因此,笔者认为将商业外观权益的性质界定为具有知识产权属性的无形财产权似乎更妥当。

商业外观权益的产生,不仅是经济社会客观现实的需要和商业道德内在的需求,也具备了较为坚实的哲学基础、经济学基础和法学基础。首先,任何法律制度的构建和完善都要尽可能与民众常识相契合。笔者之所以认为商业外观权益的产生具备较为坚实的社会基础,是因为社会公众也认为,消费者有不受误导的权利,经营者有不被混淆的权利。为了减少某些经营者不正当的“搭便车”行为,为了保护良好的市场竞争秩序,亟须法律对商业外观进行比较全面的调整和保护。其次,所有的权利在产生之初,理论界都试图通过哲学分析来证明该权利产生或存在的合理性,而商业外观权益的产生从哲学角度来看,不仅具有合理性,也符合伦理道德中“公平”、“正义”的要求。再次,尽管经济激励或利益补偿理论、增强竞争理论、信息经济学、现代营销学、成本效益理论等经济学说观点各异,却从不同视角出发均认为商业外观应得到法律的保护,从而使商业外观权益的产生有了经济学理论的支撑。最后,与商业外观相关的市场中的经营者、消费者和社会公众是多元化的利益主体,其多元化的利益都具有法律保护的必要性;在很大程度上和范围中,并不存在一个简单化的、非此即彼的利益取舍,利益的协调不存在机械而僵化的“铁律”,而必须从衡平的角度进行有效的配置。当知识产权法律制

度本身就是利益平衡的产物时,国家通过法律对商业外观进行保护,并因此获得经营者对开发产品和拓展市场的信心和投入,从而最终提高社会的生活水平,给消费者带来实惠,也使商业外观权益的产生贯穿了利益平衡的理念并具有了法学的基础。

并非所有商业外观都能形成商业外观权益,商业外观在什么条件下能够形成权益并获得法律保护问题的研究,本质上是对商业外观法律制度调整范围的研究,也是对商业外观权益边界的研究。因此,商业外观权益形成条件的确定需要兼顾公正、效率的理念,贯彻利益平衡的原则。首先,商标法、专利法、著作权法等法律在维护知识产权的同时也会对具备相应法定条件的商业外观进行基础性的保护,此时商业外观权益的形成条件便是注册商标专用权、驰名商标权益、外观设计专利权和著作权的形成条件。其次,反不正当竞争法对商业外观的保护与传统知识产权法存在差异,因此受到反不正当竞争法保护的商业外观权益的形成条件会呈现一些个性化特征,目前我国获得反不正当竞争法保护的商业外观权益的形成条件是知名性、特有性和易受混淆性。美国获得法律保护的商业外观权益的形成条件是显著性、非功能性和使用性。由于每个国家的法律体系、立法模式以及影响法律制度构建的经济、社会、法律发展的状况均存在一定的差异性,因此,在借鉴有关国家成熟和先进的经验,对我国具体情况和已经积累的实践经验进行总结的基础上,笔者认为,我国获得反不正当竞争法保护的商业外观权益的形成条件应该为:知名性、显著性和非功能性。

商业外观权益的利用是商业外观价值实现的最为重要的途径,商业外观权益只有通过利用才能真正体现出它具有交换价值和使用价值的财产属性。商业外观权益利用制度是在利益平衡原则的引导下由商业外观权益的行使制度和商业外观权益行使的限制制度组成。商业外观权益主要是财产权利,权利的行使将围绕使用权能展开,商业外观所有人对于其享有的商业外观权益可以

通过转让、投资、设定质押、使用许可等方式来具体行使。同时，为了平衡商业外观权利人与国家、社会公众之间的利益分配，商业外观权益的行使也会受到限制，商业外观权益的行使不得消除、限制竞争，也不能损害相关当事人的合法权利。

商业外观权益的保护是商业外观法律制度的重要组成部分。由于理论和实务界对商标、专利、著作权领域的侵权行为已进行了较为广泛和深入的研究，因此反不正当竞争法在遵循利益平衡原则的基础上对商业外观权益的保护问题便成为本书研究的重点。商业外观具有的知名性、显著性和非功能性是商业外观权利人受到反不正当竞争法保护的实体权利基础；损害后果要件则是商业外观权利人实现胜诉权的基础，其本质是从消极角度对商业外观权益的范围进行进一步的界定，因此，损害后果要件的界定将是反不正当竞争法保护商业外观权益的一个非常关键的问题。损害后果要件是以混淆为标准来确定的，鉴于混淆的含义在不断变化，是发展的，是动态的；鉴于混淆最初局限在消费者购买商品或接受服务时产生的来源混淆和关联关系混淆，后来逐渐扩大到售前混淆、售后混淆、消费者以外的第三人发生的混淆等，所以“易受混淆性”便成为反不正当竞争法保护商业外观权益的比较合适的损害后果要件标准。“易受混淆性”指的是“混淆”和“混淆的可能性”，其中，“混淆的可能性”包括“已经产生联想”和“已经造成淡化”的情形；至于是否将“产生联想的可能性”和“产生淡化的可能性”纳入“易受混淆性”的界定范围，则需要仔细斟酌，暂不宜进行考虑。同时，法律保护商业外观权益也存在例外情形。

随着商业外观上负载的价值的增加，其初始的权利状态会逐渐被打破，权利设定的制度需要重新被安排，我国迫切需要确定保护商业外观权益的制度模式。目前各国保护商业外观权益制度模式主要有以商标法为中心的商业外观权益保护模式、以反不正当竞争法为中心的商业外观权益保护模式、以商业外观专门法为

中心的商业外观权益保护模式。由于我国专利法和著作权法保护商业外观权益的有限性,我国商标法和反不正当竞争法便成为保护商业外观权益的核心法律。而笔者在对商标法和反不正当竞争法保护商业外观权益的互补和并列关系进行详细分析后,认为我国应该构建以商标法和反不正当竞争法为核心的互补和并列模式的商业外观权益保护制度。司法实践中的典型案例也从一个侧面证明了这种制度模式选择在我国的可行性。

商业外观法律制度的构建会推动相关立法的修订,同时,商业外观法律制度的实施也会面临诸多具体问题。首先,在《中华人民共和国商标法》(以下简称《商标法》)和《中华人民共和国反不正当竞争法》(以下简称《反不正当竞争法》)的修订过程中,从保护商业外观权益的视角出发应对一些具体条文进行修订。《商标法》在修订中应扩大申请商标注册标志的外延范围,进一步明确商标注册条件,加强对未注册商标的保护,修订民事赔偿责任中法定赔偿额的条款。在《反不正当竞争法》的修订中,第5条应修改为:“经营者不得采用下列不正当手段从事市场交易,损害其他经营者:(一)擅自使用商品、营业或服务的知名的、可识别的、非功能性的名称、商标、包装、装潢、外形、外观等商业标识或商业形象,造成和他人商品、营业或服务相混淆或存在混淆的可能性的行为;(二)擅自使用他人知名的企业名称、企业简称、字号或者姓名,造成和他人商品、营业或服务相混淆或存在混淆的可能性的行为。下列行为通常不被视为不正当竞争行为:(一)使用的知名商业标识、商业形象是商品、营业或服务的通用名称或惯用商业标识、商业形象;(二)善意地使用自己的姓名;(三)他人的商业标识、商业形象在社会公众所普遍认知前的善意使用行为;(四)知名的商业标识、商业外观的非商业性合理使用行为;(五)其他根据利益平衡原则不被视为不正当竞争行为的行为。”同时,“不正当竞争行为”一章应增加一般条款的规定,即“禁止其他违反诚实信用原则和公认商

业道德的不正当竞争行为”；并在“法律责任”一章增加 1 条，即“经营者违反本法第×条规定从事其他不正当竞争行为的，监督检查部门应当责令停止违法行为，可以根据情节处以×万元以上×万元以下的罚款。”其次，为了解决保护商业外观权益在执法和司法实践中面临的具体问题，应遵循整体判断原则、利益平衡原则、借鉴商标法理论原则和个案分析原则来实施我国商业外观法律保护制度；而本书对于如何解决商业外观知名性、显著性和易受混淆性的认定等实践难题的论述，也从另一个侧面证明了整体判断原则、利益平衡原则、借鉴商标法理论原则和个案分析原则在我国商业外观法律制度实施中的可操作性。

关键词：商业外观；知识产权；商标法；反不正当竞争法

Abstract

Both international and domestic cases related to trade dress have been increasing these years. Enterprises in our country are confused by the phenomenon that even similar trade dress would violate others' legal rights. Therefore, theoretical study in this field is urgently needed to solve related problems. The court in our country used to set the legal precedent that the integral decoration and service style of a restaurant should be protected as the right of trade dress. Besides, Trademark Law, Patent Law, Copyright Law, Antitrust Law and other law of our country have provided a certain degree of protection towards the right of trade dress under the guidelines of different perspectives and legislative intents. Furthermore, the expanding objects of Intellectual Property Law gradually stimulate the developments of the legal protection of IP rights, thus strengthening the legal protection of trade dress. In addition, scholars in our country have respectively discussed topics of legal protection concerning copyright of practical art, design patent; unregistered trademark, unique packaging of well-known commodity and architecture decoration from different perspectives. Despite above facts, we still lack systematic and complete in-depth study of trade dress of overall commodity or service image including art, packaging, design, mark and reputation. We also lack

fundamental theoretical study of trade dress and construction and implement of legal protection scheme of trade dress rights and interests. Therefore, the study of protecting trade dress legal system is of great value both theoretically and practically.

The translation of trade dress originated from the legal term used in US judicial cases and legal publication. Though we don't have a unified or authoritative definition of trade dress in different countries, trade dress usually refers to the overall image of commodity or service consists of some certain characteristics like shape figure, style, packaging, color and related combinations. Trade dress has got more and more emphasis of business operators in today's market economy and daily life, thus creating the urgent need of related legal protection. The diversified functions of trade dress also stimulate the formation of legal protection pattern by different law and regulations. But we should know not all trade dress can be protected by laws. Only those trade dress satisfying corresponding conditions can form legal rights and interests of trade dress. We can learn the close relevance between IP rights and trade dress rights and interests from the definition of Intellectual Property. Also, we can learn trade dress rights and interests have the characteristics of IP rights from international IP treaties and trade dress rights and interests share some features with IP rights. Besides, we can learn from the objects of IP rights that trade dress rights and interests are within the category of IP rights. In the meanwhile, trade dress rights and interests also possess some characteristics of property rights which belong to invisible property rights. Therefore, it is better for us to define the trade dress rights and interests as the invisible property rights with some characteristics of intellectual property rights.

The trade dress rights and interests are generated not only by the needs of objective reality in economic society but also the internal needs of commerciality and they have solid philosophical, economic and legal foundations. First of all, the construction and perfection of any legal system should be matched with people's common sense. The reason why I think the generation of trade dress rights and interests has solid social foundation is that the public also think customers have rights of avoiding misleading while business operators have rights of avoiding confusions. In order to reduce illegal behaviors of some business operators and protect sound market competition order, complete legal adjustment and protection of trade dress rights and interests are in urgent need. Secondly, at the very beginning of the generation of each right, theoretical circles always try to prove the rationality of the generation and existence of this right through philosophical analysis. It is not only rational for trade dress rights and interests to originate from the perspective of philosophy, but also fair and justice as required in ethics. Thirdly, although there are different economic theories such as economic incentive theory or benefit compensation theory, competition strengthening theory, information economics, modern marketing and theory of cost-benefit, they share a common opinion that trade dress rights and interests should be protected legally from different perspectives, thus providing a economic theory support for the construction and perfection of legal system of trade dress protection. Last but not least, business operators, customers and social public in the market related to trade dress are diversified subjects of different interests. Each party's diversified interests are necessary to get

legal protections. It is more than a simple trade-off and there are no rigid rules for coordinating the conflicts of interests. When the IP law system itself is the result of balancing the interests, our government protects trade dress through law, thus obtaining the confidence and input efforts of business operators to develop products and expand markets and ultimately increasing the social living standard and bringing benefits to the customers so that the theory of interests balancing goes all the way through the legal protection system of trade dress.

Not all trade dress can constitute the rights and interests of trade dress. In essence, the study on how trade dress would fall within the meaning of a legitimate legal right and be qualified for legal protection is actually research about scope of the legal system of trade dress and borderline of the rights and interests of trade dress. Therefore, we should take into consideration both the philosophy of justice and efficiency and the principle of interest balancing. First of all, Trademark Law, Patent Law, Copyright Law all provide fundamental protection toward some trade dress which satisfies corresponding legal conditions while safeguarding the IP rights. At this time, the formation conditions of trade dress rights and interests are the same as those of exclusive right to use a registered trademark, design patent and copyright. Secondly, the legal protection provided by Anti Unfair Competition Law toward the trade dress is quite different from that by traditional IP law, therefore, the formation conditions also differ. Up till now, the formation conditions of trade dress to get legal protection by China's Anti Unfair Competition Law are being well-known, being unique and being confusing while the formation conditions of trade dress to get legal protection are distinctiveness, non-

functionality and being usable in U. S. A. Considering the differences of legal systems, legislative modes and economic, social and legal developments which influence the construction of the legal system in different countries, the formation conditions of trade dress rights and interests to get legal protection by Anti Unfair Competition Law in China should be being well-known, distinctiveness and non-functionality based on the summary of both mature and developed experience in other countries and China's specific circumstances and accumulated practice experience.

The usage of trade dress rights and interests is the most important method to realize the value of trade dress. The property characteristic of trade dress which has value in exchange and value in use can be genuinely reflected through utilization. The utilization system of trade dress rights and interests consists of utilization guidelines and limitation of utilization under the guidance of principle of benefit balancing. Rights and interests of trade dress mainly contain property rights, and the core of the execution of rights and interests of trade dress is right of use. The owner of trade dress can specifically execute the rights he enjoys through the ways of making transfer, making investment, setting pledge and permitting use. Meanwhile, in order to balance the benefits among the owner of trade dress, the country and the society, the execution of trade dress rights and interests limited. The execution of trade dress rights and interests can no longer eliminate or restrict competitions. Also, the legal rights of related parties cannot be damaged either.

The protection of trade dress rights and interests is a very important component of trade dress legal system. Since the theoretical circles and practice circles have conducted extensive

and in-depth studies of tort behaviors in the fields of trademark, patent and copyright, the legal protection of trade dress by Anti Unfair Competition Law is more worthy of being studied following the principle of benefit balancing. The characters of famous, distinctive and none-functional of trade dress are the substantial foundations for the holder of trade dress rights and interests to be protected by Anti Unfair Competition Law. And the conditions of damages resulting from infringement are the basis for the holder of trade dress rights and interests to win the litigation. Together they further define the parameter of trade dress rights and interests from a negative perspective. Therefore, it is crucial to define and determine the conditions of damages from infringement for the purpose of protecting trade dress rights and interests under Anti Unfair Competition Law. Confusion standard is the basis of determining the conditions of damages from infringement, however, the definition of confusion has been consistently developing and revolving. At first, the confusion comes from the place of production and the complex relationships involved when the consumers purchase the products. Later the confusions expanded to other fields, including the confusions with respect to pre-sale, the confusions with respect to after-sale and the confusions with respect to third parties. Therefore the likelihood of confusion is an appropriate test for determining the conditions of damages from infringement in applying trade dress rights and interests. The likelihood of confusion includes two layers of concepts, one is the confusion and the other is the possibility of confusion. The possibility of confusion applies to two scenarios, one is existed of association of ideas, and the other is existed dilutions. However, whether include the

concepts of likelihood of association of ideas and likelihood dilutions into the parameter of likelihood of confusion still requires further study. In the meanwhile, there are several exceptions in protecting trade dress rights and interests by law as well.

With the increase of value of trade dress, the original status of the trade dress rights and interests have been broken, a new system for defining rights and interests has to be in place, therefore China is required to employ a system to determine and protect trade dress rights and interests. Currently, there are mainly three types of legal systems for protecting trade dress rights and interests around the world, one is centered on Trademark Law, another is centered on Anti Unfair Competition Law, and the last is centered on Specialized Trade Dress Law. Since the Patent Law and Copyright Law in China are limited in protecting trade dress rights and interests, the Trademark Law and Anti Unfair Competition Law of China have become the core laws in protecting trade dress rights and interests. After a substantial and extensive study and comparison of Trademark Law and Anti Unfair Competition Law of China, we have concluded that we should construct a complementary and parallel legal system model that are centered on Trademark Law and Anti Unfair Competition Law in protecting trade dress rights and interests in China. The typical cases from judicial practice also prove the feasibility of such system in China.

The establishment of trade dress law system shall promote the amendments and modifications of relevant laws, meanwhile, the implementation of trade dress legal system will also face several obstacles as well. First, in amending the Trademark Law

and Anti Unfair Competition Law of China, several provisions and clauses shall be amended in light of protecting trade dress rights and interests. The Trademark Law shall be amended to expand the scope of the application of trademark, further specify the conditions in trademark application, strength the protection of unregistered trademark, change the statutory damage of civil liability. In amending the Anti Unfair Competition Law, Clause Five shall be amended as,

“Operators shall not adopt any of the following unfair means to carry on transactions in the market and cause damage to competitors:

(1) using, without authorization, the famous, distinctive and non-functional names, trademark, packaging, decoration, sign and image, as part of commercial signs or images, that cause confusion or the likelihood of confusion with the goods, operation or services of others;

(2) using, without authorization, the famous enterprise names, abbreviation of names, trade name or personal names of others on their own goods, that cause confusion or the likelihood of confusion with the goods, operation or services of others.

The following activities shall not deemed as unfair competition activities,

(1) The commercial signs and images used are the common names, signs and images of products and services;

(2) Bona fide use of own name;

(3) Bona fide use of other's commercial signs and images before the public became accustomed to them;

(4) The none-commercial fair use of famous commercial signs and trade dress;