

Trademarks

商标

I. INTERNATIONAL

I. 国际性的保护

The international accord governing trademarks is the Protocol Relating to the Madrid Agreement (Madrid System), which is comprised of the Agreement treaty and the Protocol treaty.¹ The Madrid system was created to facilitate protection for trademarks internationally, by streamlining the administrative process.² China and the United States have both ratified the Protocol treaty.

规定商标的国际条约是《关于马德里协定的议定书》（马德里体系），该体系包括马德里协定及其议定书。马德里体系是为了促进商标的国际保护，简化行政程序而设立的。中国和美国都是马德里议定书的缔约国。

To apply for an international trademark, a trademark owner must first have a trademark application in their country of origin.³ Afterwards, the owner can apply to the their respective trademark office for an international trademark, with the exact same mark, under the Madrid Protocol.⁴ The international registration is equivalent to filing a group of national applications

to all members of the Madrid Protocol. Therefore, member countries can refuse or limit the trademark protection in their respective country.⁵

为申请一个国际商标，商标所有人应当先在其所在的成员国申请国内注册。然后，按照马德里议定书，所有人可就同一商标向所在国的注册机构申请国际注册。该国际注册相当于向所有的马德里议定书成员国申请注册。因此，成员国可以在其国内拒绝或者限制商标权保护。

In order to assert a claim of priority for an international application, the application must specify that a claim is wanted and must be made within six months after filing the initial trademark in the country of origin.⁶ The priority claim allows the international trademarks to be considered filed when the original trademark was registered. Once received, the international trademark protection lasts for 10 years and can be renewed by paying a renewal fee.⁷

为了主张国际注册申请的优先权，申请人必须明确其想主张优先权并且必须是在申请国内注册的六个月之内主张。优先权主张可将国际商标注册视为和最初国内注册同一时间提起。一旦核准注册，国际商标注册有效期为 10 年并可以在到期后支付一定费用续展。

II. TRADEMARK LAW IN CHINA

II. 中国的商标法

To register a mark in China, the owner must apply to the Trademark and Patent Office (TPO) and follow the rules of the *Trademark Law of the People's Republic of China*. An owner

can register trademarks, service marks, certification marks, and collective marks.⁸ Chinese law requires a trademark to be distinctive so that it can be distinguished from other marks already in force in order for the mark to be registered.⁹

为在中国注册商标，所有人必须向中国工商行政管理总局的商标局提出申请并遵照《中华人民共和国商标法》。所有人可以注册商品商标，服务商标，证明商标和集体商标。中国法律要求申请注册的商标，有显著特征，便于与他人先取得的商标相区别。

China has a first to file system, which allows the first person to file for a trademark to be the true owner, despite previous usage by another party who had not registered.¹⁰ Because of the first to file system, there is no common law protection for trademarks. Therefore a trademark must be registered for it to be protected, and Chinese law requires the mark to be registered in order to be marketed and sold.¹¹ Chinese trademark law also lists out marks that cannot be registered as trademarks. These include marks that are similar to the Chinese flag or emblem,¹² generic names,¹² or names that directly reference a quality of a good.¹³ Finally, any trademark that would cause customer confusion cannot be trademarked.¹⁴

中国实行先注册体系，其允许第一个申请注册的人成为商标的所有人，不管未注册的第三人是否已在先使用。由于这个先注册体系，中国不实行对商标的事实保护。因此注册是给予法律保护的必要条件，而且用于市场推广和销售的商标，中国法律要求其必须注册。中国的商标法也列明了什么样的标记不可注册为商标。这些标记包括同中国国旗、国徽相同或者近似的标记，商品的通用名称，或者直接表示商品的质量的名称。最后，任何易引起消费者混淆的标记也不可给予商标专有权保护。

The validity of a trademark lasts for 10 years upon approval of registration.¹⁵ There is a six month grace period after the deadline to renew the trademark.¹⁶

注册商标的有效期为十年，自核准注册之日起计算。注册商标有效期满后有六个月的宽展期可申请续展。

III. TRADEMARK LAW IN THE UNITED STATES

III. 美国的商标法

In the United States, trademark law is a self-policing set of rules that covers any device such as a word, design, slogan, sound or symbol.¹⁷ All of these can be trademarks to the extent that they can distinguish and identify a good (trademark) or service (service mark).¹⁸

Trademarks can include logos, packaging, colors for specific companies.

在美国，商标法是一套自我约束的规则，涵盖任何图案如一个词，设计，标语，声音或符号。所有的这些都可以成为商标只要它们可以用来区分和辨别商品（商品商标）或者服务（服务商标）。

Certification and collective marks are also protected under federal trademark law.

Certification marks are used to show that a product or service has a certain standard or quality associated with it,¹⁹ while a collective mark shows membership to a specific organization.²⁰

证明商标和集体商标也受联邦商标法律的保护。证明商标是用以证明该商品或者服务具有一定的标准或质量的标记，而集体商标表明商标所有人在某组织中的成员资格。

A. Basics

A. 概况

Some basic principles are necessary to understand trademark law. Most importantly, the first person to use a trademark will own it.²¹ This allows for so called “common law” trademarks. Common law trademarks are protected in the area that they are used, even if they are not registered with the federal government.²² However, in order to receive nationwide protection, a trademark must be registered. Moreover, the mark must have some sort of customer recognition to qualify as a trademark; if customers do not associate the trademark with a specific good or service then it cannot be protected.²³

为理解美国的商标法，了解一些基本的原理是必要的。首先，第一个使用某商标的人是所有人。这个原则允许所谓的“事实”商标。事实商标在其使用的范围内受保护，尽管它们未在联邦政府注册。然而，要享有全国范围的保护，该商标必须进行注册。另外，这个事实商标必须在消费者中有一定的知名度，如果消费者不会把该商标和特定的商品或者服务联系起来的话，就不能得到保护。

A court will determine the “strength” of mark to decide the proper level of protection. If a trademark is distinctive, it will most likely be considered strong and therefore the mark will have comprehensive protection.²⁴ Arbitrary terms and coined words that suggest their owner, but do not actually describe them, are held to be “inherently distinctive.”²⁵ Inherently distinctive trademarks can always be registered. On the other hand, a trademark that merely describes some characteristic of a good or service is known as a weak trademark.²⁶ Weak trademarks are less protected, but occasionally more informative. Therefore, some companies decide to use those weak marks to better inform their consumers rather than using an arbitrary

mark. There is also the possibility that a weak mark can turn into a strong mark once there is a large enough public association with that particular trademark.²⁷

法院决定一个标识的“强度”从而确定相应的保护程度。如果一个标识是特征显著的，那么该标识就会被认定为有很强的商标性，因而受到综合的保护。任意性的词组和编造的词语显示它们的所有人，而不描述所有人，具有内在的特征显著性。相反，仅描述商品或者服务的某些特点的商标会被认为是商标性比较弱的商标。这种商标受到的保护相对较少，但有时能传递较多的信息。因此，有些企业采用商标性比较弱的商标来更好地向消费者传递一些信息而不采用任意性标识。另外，一个比较弱的商标可能成为强有力的商标一旦有很多的公众知晓该特定的商标。

The biggest question that is asked by the courts on trademark disputes is whether “simultaneous use of the marks (is) likely to cause customer confusion.”²⁸ If one trademark is similar to another “only in sound, appearance or meaning,” it could still cause confusion and the courts could intervene and stop the use of a trademark.²⁹

在商标纠纷中法院会问的最大的问题是标识的同时使用是否会引起消费者的混淆。如果一个商标和另外一个商标仅仅在声音，外表或者含义上相似，但还是有可能引起混淆，法院就会介入并禁止该商标的使用。

But it is possible for a trademark to be owned by two or more businesses. If the services/products of two businesses are different, or do not compete, then there would be no customer confusion.³⁰ Also, if the marked products/services are marketed through different channels, there is again little chance of confusion and two companies could separately own the

same trademark.³¹ However, major difficulties can arise if one company attempts to encroach on the trademark rights of another company.

商标有可能为两个或两个以上企业所有。如果这两个企业的商品或者服务不同，或者不互相竞争，那么消费者就不会混淆。同样，如果标注的商品或者服务通过不同的渠道销售，那么混淆的几率就比较小，两个企业就可以分别拥有相同的商标。然而，当一个企业试图侵蚀另外一个企业的商标权的时候问题就会引发问题。

Finally, some owners of famous marks can stop other similar marks from being used under the Dilution Doctrine. This applies only to famous marks when the reputation of that mark is seriously damaged by the use of a similar mark.³² There is no requirement of confusion for this doctrine, only that the trademark is being “diluted” by other usages of it.³³

最后，有些驰名商标的所有人可以根据商标淡化原则阻止其他类似标识的使用。这一原则仅适用于驰名商标，当驰名商标的声誉受到另一类似标识的严重损害的时候。这个原则不要求混淆这一要件，只要求商标因被用于其它用途而被淡化。

B. Ownership

B. 商标所有权

In the United States the first person to actually use a trademark is the true owner.³⁴ There are two possible ways that a person or company can “use” a trademark to show ownership. First is actual use, where a product or service is distributed or advertised with the trademark/service mark.³⁵ But a person could also “intend to use” a trademark by completing

an intent to use application with the U.S. Patent and Trademark Office and then later actually utilizing the mark.³⁶ Both processes give protection for the trademark.

在美国第一个实际使用商标的人是商标的真正所有人。个人或者企业通过使用来表明其所有权有两个可能的途径。第一个是实际使用，即当一个商品或者服务带着该商品商标或者服务商标进行发行或者广告。但一个人也可以通过向美国专利和商标局提交意图使用某商标申请来显示其意图使用某标识，然后实际使用该标识。两个途径均可获得商标权保护。

C. Trademark Law and Registration

C. 商标法和注册登记

Trademarks are registered with the U.S. Patent and Trademark Office (PTO) under the guidance of the Lanham Act.³⁷ Registration increases the trademarks owner's ability to win lawsuits based on infringement of the trademark. However, a business can still stop another company from using a similar trademark if it is shown that the business used the mark earlier and has acquired the common law trademark protection.

商标根据 Lanham 法案向美国专利和商标局进行登记。注册登记可提升商标所有人赢得商标侵权诉讼的几率。然而，一个企业仍然可以阻止其他企业使用类似的商标如果它能证明自己较早使用该标识并获得事实商标保护。

If a mark is distinctive enough, it will be placed in the Principal Register. The PTO requires that the trademark must involve commerce across state lines, be distinctive, and a few other criteria.³⁸ Being on the Principal Register gives the trademark all of the legal protection

from the PTO including nationwide ownership.³⁹ If a mark does not meet the requirements for the Principal Register then it will be placed on the Supplemental Register. This does not give as much legal protection as the Principal Register, but does allow the trademark to be found in a standard trademark search, giving notice that the trademark is already on the market and using it could create a legal action.⁴⁰

如果一个标识具有特征显著性，它可以在商标主目录中登记注册。美国专利和商标局要求进入主目录的商标涉及州际贸易，有显著性和符合其他一些标准。进入商标主目录可以给予商标美国专利和商标局的所有法律保护，包括全国范围的所有权。如果一商标不符合进入主目录的标准，那么它会被登记在补充目录中。登记在补充目录中不能给予该商标像主目录那么全面的保护，但是该商标可以在标准检索中找到，告知公众该商标已存在于市场上，如果使用会引发法律问题。

A federal trademark lasts for 10 years and can be renewed indefinitely as long as the mark is still in use.⁴¹

一个联邦注册的商标有效期为 10 年，并且可以无效续展只要该商标仍处于使用中。

D. Trade Names

D. 商号

Trade names are the formal names used for billing, banking, and taxes, whereas trademarks are used to identify a company in the marketplace.⁴² Many times trade names and marketplace trademarks are exactly the same. However, a business name may be properly

recognized as a trade name but at the same time unusable as a trademark due to another business' use. Therefore, a business may need to create a new trademark name if its current trade name infringes on an existing trademark.

商号是用于收账，在银行开户和缴税的正式名称，而商标则用于在市场上区分一个企业。很多时候，商号和商标是相同的。然而，一个公司的名称可以被认为是商号但是由于其他企业的使用而不能作为商标。因此，一个企业需要新的商标名称如果直接以他们的商号为商标会侵害他人现有的商标权。

E. Trade Dress

E. 商业外观

A trade dress is the “total image” of a product/service, consisting of a combination of features such as color, shape, texture, etc. and can receive protection from the PTO.⁴³ Décor and packaging are two examples of trade dresses that can be registered. In order protect a trade dress the product first must be distinctive.⁴⁴ This can be given automatically if the dress is inherently distinctive or if it is proven that the public consumer associates the dress with a certain company through advertising, promotion, and sales. Also, there needs to be a likelihood of consumer confusion that would make registering the trade dress necessary.⁴⁵ Finally, the trade dress must be non-functional, that is cannot have a purpose other than to distinguish the product.⁴⁶

商业外观是产品或者服务总的形象，是色彩，形状，质地等特征的总和，可受美国专利与版权局的保护。装饰和包装是能注册登记的商业外观的两个典型例子。要使一商业

外观受到保护，首先该外观必须具有特征显著性。保护是自动的如果一外观具有内在的特征显著性或者会被认为具有显著性如果可以证明因广告，推广或销售的原因大众消费者会把该外观和某特定企业联系起来。同时，消费者有混淆的可能使注册登记该外观很有必要。最后，商业外观必须是非功能性的，就是说不能有除了区别产品外的其他功用。

IV. DIFFERENCES

IV. 中美商标法的差异

Listed below is a table of some differences in Chinese and United States trademark law.

以下表格所列的是美国和中国商标法律的一些差异。

	China 中国	US 美国
Legal system 法律体系	Civil Law 大陆法系	Common Law 普通法系
Basis of protection 保护基础	Registration (Principle) and Use (Exception) 登记（主要的）和使用（例外）	Use 使用
Filing Basis 申请基础	Without requirement of use 不要求使用	Intention to use; Use in commerce 意图使用或者实际在商业中使用
Type of registration 登记类型	Unified Registration 统一登记	Principle & Supplementary Register 主目录和补充目录登记
Subject matter 权利标的	Word, design, letters of an alphabet, numerals, 3-D symbol, combinations of colors, and their combination 文字，图形，字母，数字，三维标志，颜色组合，以及这些要素的组合	Wider (including smell, color, etc.) 更广泛（包括气味，颜色，等等）
Enforcement 执行	Administrative and judicial 行政的和司法的	Judicial 司法的
Filing type 申请类型	Per-mark, per-class 每个标识，每一类标识	Multi-class 多种类型可同时申请
Madrid system 马德里体系	Madrid Agreement, Madrid Protocol 马德里协定，马德里议定书	Madrid Protocol 马德里议定书

In the United States, trademark law is based on use, which includes either actual use or the intent to use. Use is a required precondition to actual registration but a trademark can still be protected without registration. However, in China trademark rights are based on registration and only registered marks have government protection, with limited exceptions for famous marks. This comes into play as the first to file an application in China gains the protection whereas in the United States previous use can stop a similar trademark.

在美国，商标法的保护基于使用，包括实际使用或意图使用。使用是注册登记的前提条件，但未登记的商标还是可以获得保护。然而，在中国，商标专用权的取得取决于登记，而且只有登记了的标识可以获得政府的保护，驰名商标有部分例外。这样就造成在中国先申请的人获得一商标的专用权而在美国先使用可以阻止他人注册类似商标。

V. CONCLUSION

V. 结论

Trademark law in the United States is broader than that of China. Chinese trademark law is still undergoing expansion and change in order to best suit the needs of its people. The ability to have common law trademarks as well as “first to use” doctrine allow for a greater availability of trademarks in the United States. However, ambiguity in who was the first to use a trademark could lead to litigation.

美国商标法比中国的更为广泛。中国商标法还处于不断发展中以适应社会需求。事实商标的存在和先使用原则使美国拥有更多商标。然而，关于谁是最先使用者的不确定性

可导致诉讼的常发性。

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