

The Determination of Sound Trademark Distinctiveness in Online Live Streaming Audio Effects

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Abstract. With the continuous development of online live streaming, broadcasters have gradually developed exclusive live streaming audio effects to enhance the viewing experience. However, the issue of whether online live streaming audio effects have sound trademark distinctiveness still needs to be explored. Sound trademarks have characteristics such as invisibility, communicability, dynamism, and stability, which determine the basic conditions for the determination of sound trademark distinctiveness. Sound trademark distinctiveness is divided into inherent distinctiveness and acquired distinctiveness, both of which can be used as the basis for trademark distinctiveness determination. Based on the consideration of sound trademark distinctiveness, functional sounds and generic sounds should be excluded. The combination of sound with goods and services, the perspective of the general attention of the relevant public, the principle of starting from the whole, and the actual use of the sound should be used as the criteria for determining the distinctiveness of sound trademarks.

Keywords: Sound Trademarks; Distinctiveness Determination; Online Live Streaming Audio Effects.

1. Problems Raised

With the rise of online live streaming, various broadcasters have emerged, and live streaming has become a way of goods or services. In order to enhance the viewing experience and increase the audience's interest, many broadcasters have created their own exclusive live streaming catchphrases, such as "Wuhu take off", "Tu Yang Tu Sen Po", "oh my god", etc., to make the live streaming more representative and original. These exclusive audio effects identify the source of the live streaming, have distinct features and high recognition, and are distinctive features of the broadcaster's live streaming process. Can it also be used as a sound trademark and obtain exclusive audio effect trademark rights through application registration? However, based on the case of Li Jiaqi, the "sales king", whose "OMG, buy it, buy it" sound trademark registration failed, and as of June 2023, only 41 sound trademarks have been successfully registered, with a registration success rate of only 5%, the issue of sound trademark registration still needs to be closely followed, and it is urgent to discuss the conditions for determining the distinctiveness of sound trademarks for broadcasters' exclusive audio effects.[1]

2. The Special Nature of Sound Trademarks

Sound trademarks are a non-traditional type of trademark, which has special properties such as invisibility, strong communicability, dynamism, and stability compared with traditional trademarks. When discussing whether online live streaming audio effects have the special properties of sound trademarks, these properties need to be taken into account.

2.1. Sound Trademarks have Invisibility

The composition elements of traditional trademarks are basically text, patterns, colors, etc., which are perceived by consumers through visual observation. Sound trademarks are different, as they are composed of sounds. Sound itself is a melody and a tone composed of notes, which is intangible. Sound trademarks are a kind of trademark that depends on the auditory system of consumers to



perceive, and it stimulates human auditory nerves through the subtle way of sound transmission, so that consumers will associate this sound with a certain kind of goods and services once they hear a certain sound.[2] For example, the unique lion roar sound trademark of MGM Company, which will emit a lion roar at the beginning of the film, even if the audience does not see the opening, they will know that this is a film produced by MGM Company when they hear the lion roar. In addition, the invisibility of sound trademarks can make the trademark obtain a certain degree of distinctiveness in long-term use, so the invisibility of sound trademarks is closely related to the judgment standard of distinctiveness.

2.2. Sound Trademarks Have Strong Communicability

The communication method of traditional trademarks is extremely limited, because most traditional trademarks need to rely on the text, graphics, and services in the service place to appear. Only when consumers come into contact with goods and accept services can they receive the trademarks of goods. With the continuous development of electronic media technology, it has brought space for the existence of sound trademarks. The communication methods and communication ranges of sound trademarks are more diverse and extensive. Nowadays, sound trademarks can be dynamically transmitted through computers, radio, television, mobile phones, and other electronic media. In addition, there are language barriers and cultural barriers between different countries, but people's perception of sound is generally similar, so sound trademarks have a natural advantage in internationalization, can cross national borders and freely spread, and consumers in different countries can easily identify them, so sound trademarks have strong communicability.

2.3. Sound Trademarks Have Dynamism

Sound trademarks are perceived by the human auditory system through the discrimination and perception of sound, and finally form a cognition of sound in the brain. Unlike static flat trademarks, sound trademarks are presented in a dynamic and continuous state, such as the roar of a lion or the performance of a piano, and its state changes constantly with the change of sound. This series of processes makes the time that sound stays in the human ear far exceed the time that the image stays in the human eye. Usually, sound is transmitted through wireless electronic media, and this dynamic communication form makes the sound trademark not fixed, unlike flat trademarks that are static and motionless, but presented in a dynamic and intangible way.

2.4. The Stability of Sound Trademarks

Traditional trademarks, whether composed of text, graphics, numbers, or their combinations, need to be based on visibility as a prerequisite, but non-traditional trademarks go beyond the limitation of visibility and include auditory, taste, smell, and odor elements into the composition of trademarks. Sound trademarks use sound as a characteristic to distinguish goods and services, making it different from other trademarks in non-traditional trademarks, such as the instability of odor due to temperature, concentration, and other conditions, while sound trademarks can be expressed through methods such as sheet music and recording samples, which are objective and stable.

From the above content, it can be inferred that if online live streaming audio effects have the above four characteristics, they can be considered to have the basic characteristics of sound trademarks.

First, sound trademarks are trademarks composed of sound elements, without physical form, and need to be perceived through the auditory system. Online live streaming audio effects are also composed of sound elements, and there are no pictures or text to assist in their explanation when they are used. They are a kind of sound effect that enhances the atmosphere and viewing experience of live streaming, so they also have the characteristic of invisibility; second, sound trademarks have strong communicability and can be dynamically transmitted through various channels, with a wide range of communication. Online live streaming audio effects can also be transmitted through the Internet, mobile phones, and other electronic media, and have a wide audience, so they also have strong communicability; third, sound trademarks are presented in a dynamic state in a continuous state.

Online live streaming audio effects are also produced in a dynamic state, and the audience perceives them through the auditory system by playing them by the host; finally, sound trademarks have stability. Sound trademarks can be expressed through methods such as sheet music and recording samples, which are objective and stable. Online live streaming audio effects can also be expressed through the above methods, so they also have the characteristic of stability.

In summary, online live streaming audio effects have invisibility, strong communicability, dynamism, and stability, and are considered to have the characteristics of sound trademarks.

3. Types of Sound Trademark Distinctiveness

Sound trademark distinctiveness is divided into two types: inherent distinctiveness and acquired distinctiveness.[3] This article will specifically analyze the distinctiveness of sound and make a judgment on whether online live streaming audio effects have distinctiveness.

3.1. Inherent Distinctiveness of Sound Trademarks

The inherent distinctiveness of sound trademarks refers to the ability of sound marks to identify the source of goods or services and play a distinguishing role. In order to facilitate the distinction of the appropriate degree of trademark registration protection, trademark law classifies trademarks into arbitrary or arbitrary marks, suggestive marks, descriptive marks, and generic marks according to the degree of inherent distinctiveness. Suggestive marks are trademarks that hint at the characteristics and inherent attributes of goods or services through metaphorical techniques; if the sound mark itself is commonly used and has no connection with goods or services, it constitutes an arbitrary mark; if the sound is fabricated and given a certain specific meaning, it belongs to a fabricated mark; descriptive marks are trademarks that directly describe the quality or characteristics of the marked object; generic marks are generally owned by competitors in the same industry and do not have distinctiveness. When using sound trademarks, consumers cannot distinguish different goods or services based on the sound mark, so sound trademarks belong to arbitrary or suggestive marks. Therefore, the inherent distinctiveness of sound should be judged from whether the sound can distinguish goods, allow the public to distinguish different goods or services, and should have strong recognition.[4] In general, there are two conditions for meeting the inherent distinctiveness: first, the sound mark should have recognition, the duration should not be too long or too short, and the composition elements should not be too complex; second, it should have distinctiveness, be able to distinguish from other marks, and the relevant public can identify the source of goods or services based on the overall sound trademark in auditory perception.

3.2. Acquired Distinctiveness of Sound Trademarks

The acquired distinctiveness of sound trademarks refers to the recognition and distinction of sound marks that lack inherent distinctiveness through use. The acquired distinctiveness of sound trademarks enables consumers to use this sound as a sign of goods or services, which is a factual judgment. For example, when hearing the "HELLO KUGOU" software entry sound of Kugou Music software or the notification sound of Tencent QQ messages, the relevant public can clearly distinguish the brand source of the sound. These sounds are widely used in daily life, have a long history of use, and are used by a wide range of public groups, which have been integrated into the daily lives of the public, constantly reinforcing the public's cognitive habits and having a very obvious distinctiveness. The public can naturally associate the sound with the merchant.[5] For identifiers that have not been used for a long time, consumers find it difficult to associate the sound with the merchant and cannot be regarded as the merchant's trademark. Therefore, for non-traditional trademarks like sound trademarks, it is necessary to provide very strong evidence to prove that the sound identifier has acquired distinctiveness through use, which can clearly confirm that the sound trademark identifier's services or products are directed at the applicant in the eyes of relevant consumers. Therefore, sound trademarks have more distinctiveness in use in fields with strong professionalism or fewer goods and services.

In summary, sound trademarks have inherent and acquired distinctiveness, can represent goods and services, and meet the primary function of trademarks that consumers can distinguish between the providers of the same or similar goods or services through trademarks.[6] Therefore, it can be concluded that online live streaming sound effects also have distinctiveness. From the perspective of inherent distinctiveness, first of all, online live streaming sound effects have high recognition, strong personal characteristics of the host, including unique timbre, rhythm, or pitch, and the sound effect duration is moderate, with simple and clear elements, high differentiation and emotionalization, and distinctive features that occupy a place in the consumer's memory, and are usually associated with specific host live streaming services or products; secondly, online live streaming sound effects can be distinguished from other identifiers, allowing the relevant public to identify the source of the sound effect based on the overall sound perception, which is not easily confused with other sounds and has a high degree of distinction. From the perspective of acquired distinctiveness, online live streaming platforms have been used frequently and repeatedly over a long period of time, which strengthens consumers' cognition and memory of the sound and forms a specific association with the host, to a certain extent, representing the host's image and live streaming behavior, making it easy for live streaming viewers to naturally associate the sound with a specific host, thus having acquired distinctiveness.

4. Exclusion of Sound Trademark Distinctiveness

Universal sounds and functional sounds are excluded due to their lack of distinctiveness, and the same criteria should be applied when discussing the distinctiveness of online live streaming sound effects.

4.1. Universal Sounds

Universal sounds are a public resource shared by the general public and are widely used and well-known by market operators of the same type, making it difficult to distinguish between different products of the same type.[7] If universal sounds are protected by trademark in an exclusive manner, it can be reasonably inferred that the right holder can monopolize and possess this public resource for a long time through continuous renewal, which will seriously affect the interests of other brands and merchants of the same product and hinder the healthy development of the market, thus failing to maintain social fairness.[8] Moreover, the widespread use of universal sounds by producers and operators in the same industry also determines that it is difficult for them to gain distinctiveness. For example, the sound of a pig cannot be registered as a sound trademark, as it can easily blur the distinction between various merchants and brands selling pork, reducing their recognition and failing to represent a specific merchant. Therefore, it is generally stipulated that universal sounds shall not be registered as trademarks.

4.2. Functional Sounds

If a product feature is essential for the use or purpose of the product, or if it affects the cost or quality of the product, then the feature is considered functional.[9] Typically, sounds that represent product functions cannot be registered as sound trademarks because such sounds are inevitable in the use of goods or services. Once registered, companies will gain a monopoly over the market for products and services with this function, which is not conducive to creating a fair and just market environment. If functional sounds are allowed to be registered as trademarks, on the one hand, this would indirectly protect the technical solutions corresponding to the function, which already falls under the scope of patent law rather than trademark law; on the other hand, to avoid infringement, providers of similar goods or services would have to adopt technical means to change the sound, which would disrupt the order of fair competition in the market.[10] For example, the sound of a motorcycle engine is the sound produced when starting the motorcycle engine, which is an inevitable sound due to its internal structure and does not have the ability to distinguish the source of goods or services. Based on considerations of public interest and recognition, it is not registered. For online live streaming sound effects, they are not functional or essential features of live streaming, nor do they affect the quality

of live streaming. Therefore, they do not belong to functional sounds. In addition, online live streaming sound effects are not widely used and well-known in the live streaming industry, and they are unique to a particular host, able to clearly distinguish between different hosts. Therefore, they also do not belong to universal sounds. In summary, online live streaming sound effects are not types of sound trademarks that are not allowed to be registered.

5. Criteria for Determining the Distinctiveness of Sound Trademarks

Based on the above discussion, the criteria for determining the distinctiveness of sound trademarks can be derived from four aspects: the combination of goods and services, the overall perspective, the general attention of the public, and the actual use of the trademark. These criteria can be used to determine the distinctiveness of online live streaming sound effects.

5.1. Combination of Goods and Services

Combination of Goods and Services The distinctiveness of a trademark is closely related to the degree of connection between the trademark and its goods or services. The features carried by the trademark and the goods or services it represents mutually influence each other, forming a relationship of mutual reinforcement and weakening. If the trademark features are too similar to the corresponding goods or services, the distinctiveness of the trademark will be reduced accordingly; conversely, it will be more prominent. In trademark registration practice, the same trademark can be applied for registration in different product fields, and the scope of the trademark can be determined according to the applicant's wishes. Therefore, it is necessary to closely combine the trademark with specific goods or services to distinguish its category, show the unique distinctive features of the brand, and increase market competitiveness. For example, Intel's "dun, etc., etc." sound trademark: the sound itself cannot represent any information, but when combined with Intel's blue handwritten logo, it forms a unique corresponding relationship, allowing consumers to identify Intel's advertisement just by hearing this sound.

5.2. Overall Perspective and Combination of Facts

The review of inherent distinctiveness should adopt a holistic approach, that is, to judge whether the trademark has the function of identifying the source of goods or services from the overall application of the trademark. A trademark can be composed of multiple elements, but it does not require each constituent element to have distinctiveness, as long as the overall application of the trademark has distinctiveness.[11] Since sound trademarks are usually composed of multiple elements, one element may not have distinctiveness, but when combined with other elements, it may have distinctiveness. Therefore, the distinctiveness of sound trademarks should be considered from the overall principle and the combination of constituent elements. MGM's lion roar is an example. Hearing the lion roar alone cannot immediately associate it with the company, but when you can see the image of "a lion roaring in a golden circle," people will immediately think of MGM's unique lion roar. Therefore, when evaluating the distinctiveness of sound trademarks, the overall nature and interaction between sound trademarks and other elements should be considered.

5.3. General Attention Principle of the Relevant Public

The distinctiveness of a trademark is the possibility of consumers associating a certain trademark with specific goods or services. Therefore, the determination of the distinctiveness of a trademark should take the cognition of the relevant public as the starting point.[12] This principle is the primary principle of trademark distinctiveness judgment, which involves the scope of "relevant public," including producers, sellers, and major consumers. For consumers, paying attention to the distinctiveness of trademarks can help them select suitable products from a large number of products; for producers and sellers, they need to avoid using others' registered trademarks to reduce infringement and use trademarks more reasonably. As mentioned earlier, sound trademarks have inherent distinctiveness and thus have a natural advantage. However, due to their inherent limitations,

sound trademarks must be used for a long time to be accepted by the public and have the qualification to obtain distinctiveness. In this case, the trademark can form a strong connection with the product or service, which is called true distinctiveness.

5.4. Judging the Distinctiveness of Sound Trademarks Based on Actual Use

For the judgment of the distinctiveness of sound trademarks, the actual use of goods should be fully considered. The distinctiveness of sound trademarks is gradually formed and deeply rooted in the long-term use, and the distinctiveness of trademarks varies with factors such as the degree of use, reputation, and publicity. These factors are necessary conditions for the judgment of distinctiveness. Active and effective use of sound trademarks helps to enhance their distinctiveness, while the opposite will gradually weaken their distinctiveness. Therefore, in the actual use of trademarks, it is necessary to strengthen the management and protection of trademarks to prevent passive use of trademarks. This fully demonstrates the importance of the actual use of goods to the distinctiveness of sound trademarks. In the case of Tencent QQ's application for a sound trademark, Tencent submitted a large amount of materials, including three notarial certificates, survey reports from multiple companies, 152 library documents, and QQ's well-known trademark certification. The court conducted a very detailed review of these pieces of evidence from the three dimensions of "degree of use," "time of use," and "scope of use" to determine its distinctiveness.

6. Summary

In summary, judging whether an online live streaming sound effect has the registrability of a sound trademark should be judged from four aspects. First, the sound effect should be combined with the specific behavior of live streaming services to obtain strong distinctiveness; second, the live streaming sound effect should be combined with other sound elements to obtain distinctiveness from an overall perspective, such as a host's exclusive live streaming sound effect, which can not only include the host's unique quote recordings but also add other memorable sound effects to enhance the distinctiveness of the sound; third, the online live streaming sound effect should have inherent distinctiveness and acquired distinctiveness, constantly strengthening the connection between the sound and live streaming services in long-term use, and enhancing the recognition and differentiation from the perspective of the relevant public; fourth, the online live streaming sound effect should actively use network publicity to enhance recognition and the host should continuously accumulate reputation and goodwill in the live streaming process to make the online live streaming sound effect be actively used and obtain the distinctiveness of sound trademarks.

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