

北京市高级人民法院  
商标授权确权行政案件审理指南

(中、英文版)

北京市高级人民法院  
知识产权庭

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# 《北京市高级人民法院商标授权确权行政案件审理指南》中文版

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# 第一部分 相关程序问题

## 1、主体资格的确定

### 1.1 【在先权利人的范围】

商标权人及其他应受法律保护的合法在先权利所有人属于商标法第三十三条、第四十五条第一款规定的“在先权利人”。

### 1.2 【利害关系人的范围】

在先权利的被许可使用人、在先权利的合法继受人或者在先权利人的控股股东属于商标法第三十三条、第四十五条第一款规定的“利害关系人”。

经纪人提交了模特、演员等就相关人身权出具的特别授权文件的，属于“利害关系人”。

仅因诉争商标的申请注册而受到影响，但与在先权利不具有直接利害关系的主体，不宜认定为“利害关系人”。

### 1.3 【利害关系人的认定时间】

利害关系人的认定一般以提出商标异议或者无效宣告请求时为准。

一审法院受理行政诉讼后，利害关系人发生变化的，一般不影响原利害关系人的诉讼主体地位，但可以依据现利害关系人的申请通知其参加行政诉讼。

一审法院作出裁判后，利害关系人发生变化的，二审法院可以依据现利害关系人的申请通知其作为第三人参加行政诉讼。

#### **1.4 【引证商标转让对当事人诉讼地位的影响】**

一审行政诉讼中，引证商标被核准转让的，可以依据受让人的申请通知其参加诉讼，但不影响转让人继续参加诉讼；转让人明确放弃继续参加诉讼的，受让人可以替代转让人的诉讼地位，转让人已经完成的诉讼行为对受让人具有拘束力。

二审行政诉讼中，引证商标被核准转让的，可以依据受让人的申请通知其参加诉讼，但不影响转让人继续参加诉讼。

#### **1.5 【未通知诉争商标受让人参加评审的法律后果】**

商标评审程序中，诉争商标已经发生转让，国家知识产权局商标评审部门（以下简称商标评审部门）未通知受让人参加评审程序，直接作出对其不利的行政裁决，受让人在诉讼中能够证明被诉行政裁决理由和结论违法的，对其提出撤销被诉行政裁决的主张，可以予以支持；但受让人在诉讼中不能证明被诉行政裁决理由和结论违法的，对其提出撤销被诉行政裁决的主张不予支持。

#### **1.6 【诉争商标转让对当事人诉讼地位的影响】**

商标评审程序中，诉争商标已经发生转让，且受让人参加后续评审程序的，转让人一般不再作为行政相对人。转让人提起行政诉讼的，可以裁定驳回起诉。

转让人在评审程序中已经完成的行为对受让人具有拘束力。

#### **1.7 【追加诉讼当事人的范围】**

商标申请驳回复审行政案件中，一般诉讼当事人应以被诉

行政行为的相对人以及其他与行政行为有利害关系的人为限，不宜主动追加未参与商标评审程序的引证商标权利人等主体参加诉讼。

### **1.8 【异议事由与主体资格的认定】**

异议人同时主张诉争商标违反商标法第十条、第十一条、第十二条规定和第十三条第二款、第三款、第十五条、第十六条第一款、第三十条、第三十一条、第三十二条规定的，应当对其是否具有依据第十三条第二款、第三款、第十五条、第十六条第一款、第三十条、第三十一条、第三十二条的规定提起申请的主体资格进行审查。若异议人不属于商标法第三十三条所规定的“在先权利人或者利害关系人”的，对其申请的除第十条、第十一条、第十二条规定以外的理由应当不予审查。

### **1.9 【涉外当事人主体资格的认定】**

涉外当事人主体资格的认定，应当适用涉外民事关系法律适用法第十四条的规定。

当事人依据其他国家或者地区的法律主张对方当事人的主体资格已经不存在的，应当提供该主体资格消灭登记的证据以及该国家或者地区关于主体资格消灭的法律规定。

依据其他国家或者地区法律，主体资格被剔除登记簿后仍可恢复的，可以给予当事人对主体存续状态进行补正及说明的机会。若当事人怠于举证，由其承担相应法律后果。

## 2、审查范围

### 2.1 【遗漏评审理由的法律后果】

商标评审范围一般以申请人在申请书、补充理由中明确列明的理由及其对应的法律条文为限，被申请人的答辩事实和理由与上述申请内容有直接关联的，可以一并予以审查，但超出商标法规定期限的除外。商标评审部门未按前述情形予以审查，且对当事人权利产生实际影响，当事人据此主张违反法定程序的，可以予以支持。

商标评审程序中，申请人或者被申请人的答辩事实和理由、后续质证意见等内容明显超出申请范围的，或者申请人仅在申请书和补充理由中罗列法律条文，在全文中没有相关事实及理由论述的，当事人据此主张商标评审部门遗漏评审理由的，不予支持。

### 2.2 【第十三条与第三十条的选择适用】

当事人依据商标法第十三条或者同时依据第十三条及第三十条提出申请，商标评审部门未依据商标法第十三条进行审查，且未支持当事人申请的，构成遗漏评审理由，若对当事人权利产生实际影响，当事人据此主张违反法定程序的，可以予以支持。

### 2.3 【超范围审查的法律后果】

当事人有证据证明被诉裁决的内容超出驳回商标注册申请决定、不予注册决定、撤销或者维持注册商标决定，和当事人复审请求、答辩的范围，且无法律依据，其主张超出部分违

法的，可以予以支持。

## **2.4 【补充评审证据】**

商标评审程序中，当事人依据商标法实施条例第五十九条的规定，声明需要补充提交证据，商标评审部门在法律规定的期限届满前径行作出被诉裁决的，当事人据此主张违反法定程序的，可以予以支持。

## **2.5 【商标驳回复审的审查范围】**

商标申请驳回复审行政案件中，商标评审部门在未听取申请人意见的情况下，超出驳回商标注册申请的决定，直接依据商标法第十条、第十一条、第十二条或者第十六条第一款的规定作出被诉裁决，当事人据此主张违反法定程序的，可以予以支持。

## **2.6 【商标不予注册复审的审查范围】**

商标不予注册复审行政案件中，被诉裁决内容超出不予核准注册的商品或者服务的范围，当事人据此主张违反法定程序的，可以予以支持。

商标评审部门审查不予注册复审的理由，一般应根据不予注册决定审查的范围、申请人申请复审的主张和原异议人在复审中所主张的并已在异议阶段申请的理由确定。

## **2.7 【商标权无效宣告的审查范围】**

商标权无效宣告请求行政案件中，商标评审部门一般应当针对当事人申请和答辩的事实、理由及请求进行审查，商标评

审部门超出前述范围进行评审，当事人据此主张违反法定程序的，可以予以支持。

## **2.8 【商标行政诉讼中审查范围的确定】**

商标行政诉讼中，一般应根据原告的诉讼请求及理由确定审查范围。原告虽未提出主张，但被诉裁决存在明显不当的，应当在各方当事人陈述意见后，对相关事由进行审查并作出裁判，但不能超出被诉裁决的审查范围。

当事人在商标评审程序中提出了多项理由，商标评审部门仅依据部分理由作出被诉裁决，且认定结论有误，当事人主张撤销被诉裁决的，可以予以支持，对商标评审部门未审查的事由不宜直接予以支持。

## **2.9 【“绝对理由”和“相对理由”的同时适用】**

商标评审部门依据商标法第十条、第十一条、第十二条的规定和第三十条、第三十一条的规定作出驳回诉争商标注册申请的决定，不能仅以商标评审部门同时适用商标法第十条、第十一条、第十二条的规定和第三十条、第三十一条的规定进行审查为由撤销被诉决定。

# **3、送达**

## **3.1 【送达地址的确认】**

当事人在商标评审程序中确认送达地址且同意适用于商标行政诉讼程序的，可以按照该地址进行送达。

### **3.2 【电子送达】**

采用传真、电子邮件方式送达的，应记录传真发送和接收号码、电子邮件发送和接收邮箱、发送时间、送达诉讼文书名称，并打印传真发送确认单、电子邮件发送成功网页，存卷备查。

采用短信、微信等方式送达的，应记录收发手机号码、发送时间、送达诉讼文书名称，并将短信、微信等送达内容拍摄照片，存卷备查。

### **3.3 【送达认定标准】**

商标评审程序中邮寄的商标评审案件受理通知书、举证通知书、答辩通知书、证据交换通知书和证据等案件相关材料均以当事人收到作为送达的标准。

### **3.4 【送达的举证责任】**

商标行政诉讼中，当事人以其未收到案件相关材料为由主张送达程序违法的，商标评审部门应当提供当事人收到案件相关材料的证据，邮政部门按批次打印的交寄清单可以作为初步证据。

发文清单等内部流程材料，以及未经当事人授权的物业公司或者门卫代收的凭证，不足以证明当事人收到案件相关材料。

### **3.5 【送达程序不当】**

商标评审部门无法提供当事人收到案件相关材料的直接证据，但其能够提供已经通知当事人参加评审程序的初步证据，

且被诉裁决理由和结论均无不当，存在下列情形之一的，当事人主张送达程序违法，可以不予支持：

（1）当事人除主张送达程序违法外，未提出实体理由的；

（2）当事人除主张送达程序违法外，同时主张实体理由，但该理由不成立或者不属于本案审理范围的。

## 4、“一事不再理”的认定

### 4.1 【“相同的事实”】

当事人依据在原行政行为之后新发现的证据，或者在原行政程序中因客观原因无法取得或在规定期限内不能提供的证据提出的申请，不属于以“相同的事实”再次提出申请。

下列情形属于以“相同的事实”再次提出申请：

（1）当事人依据在原行政程序中能够获得但无正当理由未予提交的图书馆查询资料等证据，再次提出申请的；

（2）当事人主张侵害在先著作权，在原行政程序中提交了相关作品，仅依据新取得的著作权登记证书，再次提出申请的。

### 4.2 【“相同的理由”】

下列情形不属于以“相同的理由”再次提出申请：

（1）原行政程序中仅对当事人主张的部分理由进行了审理，该当事人对未经审理的其他理由，再次提出申请的；

（2）当事人依据在原行政程序中未涉及的引证商标，再次提出申请的；

（3）当事人在原行政程序中，依据商标法第十三条提出申请，商标评审部门主动转换适用商标法第三十条，且未予支持，



当事人再次依据商标法第十三条提出申请的；

（4）商标异议复审程序中，当事人依据 2001 年商标法第十条第一款第（七）项提出申请，商标评审部门主动转换适用 2001 年商标法第十条第一款第（八）项并予以支持，经行政诉讼程序认为该申请不能成立，诉争商标被核准注册，当事人再次依据 2013 年商标法第十条第一款第（八）项提出无效宣告请求的。

#### **4.3 【以“相同事实和理由”再次提出评审申请】**

当事人以“相同事实和理由”再次提出评审申请的，商标评审部门不予受理或者依据商标法实施条例第五十七条规定予以驳回，当事人主张违反法定程序的，不予支持。

### **5、重新作出行政行为的处理**

#### **5.1 【证据的提交】**

审理被诉重审裁决的行政案件，当事人以商标评审部门未予采信其补充提交的证据为由，主张违反法定程序的，一般不予支持，但该证据所涉及内容并未经生效裁判认定且足以影响案件审查结果而商标评审部门未予采信的除外。

#### **5.2 【重审裁决的审查程序】**

商标评审部门按照生效裁判重新作出被诉裁决的，应当至少更换一名合议组成员，当事人因未予更换而主张违反法定程序的，可以予以支持。

生效裁判已经作出实体认定结论，商标评审部门未另行通

知当事人进行答辩、交换证据、质证等，径行作出被诉裁决，当事人据此主张违反法定程序的，不予支持。

### **5.3 【提起诉讼的处理】**

商标评审部门按照生效裁判重新作出被诉裁决，当事人据此提起行政诉讼的，裁定不予受理；已经受理的，裁定驳回起诉。但商标评审部门作出被诉裁决依据的事由不复存在的除外。

## **6、其他程序事项**

### **6.1 【商标注册事项的认定依据】**

商标注册证与商标注册簿记载的注册事项不一致的，以商标注册簿为认定依据，但有证据证明商标注册簿确有错误的除外。

### **6.2 【起诉日期的计算】**

原告不服行政行为提起诉讼的，起诉期限从其收到被诉裁决的第二日起算。

### **6.3 【商标评审部门的举证责任】**

商标行政诉讼中，商标评审部门无正当理由，逾期未予举证的，可以认定构成行政诉讼法第三十四条规定的情形。但是，被诉裁决涉及第三人合法权益，第三人提供证据的除外。

### **6.4 【逾期作出被诉裁决的处理】**

商标行政诉讼中，商标评审部门未按商标法第三十四条、

第三十五条、第四十四条、第四十五条、第四十九条规定的法定期限作出被诉裁决，但未对当事人权利产生实际影响的，当事人据此主张违反法定程序的，不予支持。

#### **6.5 【商标权撤销复审行政案件中证据的提交与采纳】**

商标权撤销复审行政案件中，当事人明确表示依据其在撤销决定作出前提交的证据原件主张诉争商标实际使用的，商标评审部门仅以当事人未提交证据为由撤销诉争商标注册，当事人据此请求撤销被诉决定的，可以予以支持。

#### **6.6 【未按规定预交案件受理费的法律后果】**

商标行政诉讼中，原告或者上诉人未按诉讼费用交纳办法第二十二条规定的期限预交案件受理费，又不提出缓交、减交、免交申请，或者提出申请未获批准的，可以依据《最高人民法院关于适用〈中华人民共和国民事诉讼法〉的解释》第六十一条的规定，按自动撤诉处理。

#### **6.7 【诉讼费用的负担】**

商标行政诉讼中，因采纳当事人诉讼阶段补充提交的证据撤销被诉裁决的，诉讼费用应当由提交补充证据的当事人负担。

#### **6.8 【未告知合议庭成员】**

商标评审部门未告知合议庭成员导致当事人无法行使申请回避的权利，当事人据此主张违反法定程序，但未提出实质性的回避理由，可以不予支持。

## 6.9 【双方代理】

同一代理机构或者代理人在同一案件中，分别在商标行政程序不同阶段代理双方当事人的，可以认定被诉行政行为违反法定程序，但当事人明确表示同意的除外。

## 6.10 【诉讼终结的适用】

商标权无效宣告请求行政案件中，诉争商标已经被撤销注册的，不属于《最高人民法院关于适用〈中华人民共和国行政诉讼法〉的解释》第八十八条规定“终结诉讼”的情形。

## 6.11 【当事人拒交“翻译文本”的处理】

商标行政诉讼中，若第三人为外国人，原告未提交具有翻译资质的机构出具的翻译文本，也未委托翻译并交纳相应费用，经释明后原告在合理期限内仍不提交，导致无法向该外国当事人送达的，可以裁定驳回起诉。

前款规定中需翻译的文本包括起诉状、开庭传票。

# 第二部分 相关实体问题

## 7、基本规则

### 7.1 【商标法第四条的适用】

商标申请人明显缺乏真实使用意图，且具有下列情形之一的，可以认定违反商标法第四条的规定：

(1) 申请注册与不同主体具有一定知名度或者较强显著

特征的商标相同或者近似的商标，且情节严重的；

（2）申请注册与同一主体具有一定知名度或者较强显著特征的商标相同或者近似的商标，且情节严重的；

（3）申请注册与他人除商标外的其他商业标识相同或者近似的商标，且情节严重的；

（4）申请注册与具有一定知名度的地名、景点名称、建筑物名称等相同或者近似的商标，且情节严重的；

（5）大量申请注册商标，且缺乏正当理由的。

前述商标申请人主张具有真实使用意图，但未提交证据证明的，不予支持。

## **7.2 【诚实信用原则的适用】**

商标行政案件中，诉争商标的申请注册不应违背商标法第七条第一款的规定。

## **7.3 【商标标志构成要素】**

诉争商标的构成要素应以商标注册公告、商标申请注册文件或者商标注册簿等文件中明确列明的内容为依据。

## **7.4 【商标受让不影响相关条款的认定】**

诉争商标的申请注册违反商标法相关规定的，诉争商标的申请人或者注册人仅以其受让该商标不存在过错为由主张诉争商标应予核准注册或者维持有效的，不予支持。

## **7.5 【注册人被吊销或者注销的处理】**

商标权撤销复审、商标权无效宣告请求行政案件中，诉争

商标注册人被吊销营业执照或者已经注销的，不宜仅据此对诉争商标撤销注册或宣告无效。

## 8、商标法第十条的适用

### 8.1 【商标法第十条第一款的认定标准】

诉争商标标志具有多种含义或者具有多种使用方式，其中某一含义或者使用方式容易使公众认为其属于商标法第十条第一款所规定情形的，可以认定诉争商标违反该款规定，诉争商标使用情况一般不予考虑。

### 8.2 【含有中国国家名称的标志】

诉争商标标志含有中华人民共和国国家名称，但整体上并不相同或者不近似，如果该标志作为商标注册可能损害国家尊严的，可以认定属于商标法第十条第一款第（八）项规定的情形。

### 8.3 【含有外国国家名称的标志】

外国国家名称包括外国国家名称的中、外文全称或者简称等，官方文献等可以作为认定外国国家名称的依据。

诉争商标标志中虽含有外国国家名称，但是整体上并不相同或者不近似，如果该标志作为商标注册可能损害该国尊严的，可以认定属于商标法第十条第一款第（八）项规定的情形。

具有下列情形之一的，可以推定属于商标法第十条第一款第（二）项规定的“经该国政府同意”，但有相反证据的除外：

（1）当事人提交了该国政府同意诉争商标申请注册的文

件的；

(2) 当事人提交了相同申请人就诉争商标在相同商品或者服务上，已经在该国获准注册的文件。

#### **8.4 【“欺骗性”的认定】**

公众基于日常生活经验等不会对诉争商标指定使用的商品或者服务的质量等特点或者产地产生误认的，不属于商标法第十条第一款第（七）项规定的情形。

#### **8.5 【使用企业名称注册商标】**

诉争商标中含有企业全称或者简称，而申请人与该企业全称或者简称存在实质性差异的，在易使公众对商品或者服务来源产生误认的情况下，可以认定属于商标法第十条第一款第（七）项规定的情形。

诉争商标标志仅由申请人的企业全称或者简称构成，或者显著识别部分仅是企业全称或简称的，在不属前款所指的情形下，可以认定属于商标法第十一条第一款第（三）项规定的情形，但是具有显著特征且符合商业惯例的除外。

前述企业全称或者简称以容易使公众将其作为指代企业主体身份的标识为认定要件。

#### **8.6 【“其他不良影响”的判断因素】**

根据公众日常生活经验，或者辞典、工具书等官方文献，或者宗教等领域人士的通常认知，能够确定诉争商标标志或者其构成要素可能对我国社会公共利益和公共秩序产生消极、负面影响的，可以认定具有商标法第十条第一款第（八）项规定

的“其他不良影响”。

当事人的主观意图、使用方式、损害结果等可以作为认定是否具有“其他不良影响”的参考因素。

### **8.7 【“其他不良影响”的判断时间】**

在审查判断诉争商标标志或者其构成要素是否具有“其他不良影响”时，一般以诉争商标申请注册时的事实状态为准。核准注册时事实状态发生变化的，以核准注册时的事实状态判断其是否具有“其他不良影响”。

### **8.8 【“已故知名人物”的保护】**

诉争商标标志或者其构成要素与特定行业、地域的已故知名人物姓名、肖像等相同或者近似，并由此导致公众对诉争商标指定使用的商品或者服务的质量、信誉、工艺等特点产生误认的，可以认定属于商标法第十条第一款第（七）项规定的情形。

诉争商标标志或者其构成要素与已故的政治、经济、文化、宗教、民族等公众人物的姓名、肖像等相同或者近似，可能对我国社会公共利益和公共秩序产生消极、负面影响的，可以认定属于商标法第十条第一款第（八）项规定的具有“其他不良影响”的情形。

### **8.9 【“规范使用文字”的认定】**

诉争商标标志或者其构成要素未规范使用汉字或者成语，可能对我国文化教育产生消极、负面影响的，可以认定属于商标法第十条第一款第（八）项规定的具有“其他不良影响”的



情形。

## 8.10 【地名商标的其他含义】

诉争商标标志或者其构成要素含有县级以上行政区划的地名或者公众知晓的外国地名，但是整体上具有其他含义的，可以认定其不属于商标法第十条第二款所规定的情形。

具有下列情形之一的，可以认定诉争商标整体上具有其他含义：

（1）诉争商标仅由地名构成，该地名具有其他含义的；

（2）诉争商标包含地名，但诉争商标整体上可以与该地名相区分的；

（3）诉争商标包含地名，整体上虽不能与该地名相区分，但经过使用足以使公众将其与之区分的。

## 8.11 【已经获准注册“地名”商标扩展注册的判断】

商标法未禁止地名作为商标注册和使用之前已经获准注册的地名商标，在原注册范围内有效，当事人主张在该地名商标基础上申请注册其他商标的，一般不予支持。

# 9、商标法第十一条的适用

## 9.1 【判断主体】

判断诉争商标是否具有显著特征时，应以与该商标指定使用商品或者服务有关的消费者和与前述商品或者服务的营销有密切关系的其他经营者等相关公众为判断主体。

## 9.2 【概括适用条款】

被诉裁决未明确指出诉争商标属于商标法第十一条第一款第（一）项、第（二）项、第（三）项的具体情形，仅概括表述为商标法第十一条第一款，当事人主张法律适用错误的，可以予以支持。

## 9.3 【具体条款的并列适用】

商标法第十一条第一款第（一）项、第（二）项和第（三）项分别规定了诉争商标标志不具有显著特征的情形，认定相同商标在同一商品上是否具有显著特征时，一般不宜并列适用。

## 9.4 【显著特征的认定范围】

若诉争商标标志不会被相关公众作为商标识别，则其指定使用在任何商品上均不具有显著特征。

若诉争商标标志仅对其指定使用商品的质量、数量等特点具有描述性，则其在该商品上不具有显著特征。

## 9.5 【新类型商标显著特征的认定】

颜色组合标志、声音标志、或者以商品自身形状、包装、装饰等形式体现的三维标志等，是否系当事人所独创或者最早使用，与认定该标志是否具有显著特征无关。

## 9.6 【“其他缺乏显著特征”的认定】

诉争商标仅由广告宣传用语等构成的，一般属于商标法第十一条第一款第（三）项规定的情形。

## 9.7 【“第二含义”的认定】

当事人主张诉争商标标志经过使用取得显著特征的，可以综合考量下列因素予以认定：

（1）诉争商标标志的使用足以使其发挥识别商品来源的作用；

（2）使用诉争商标标志的时间、地域、范围、规模、知名度程度等；

（3）其他经营者使用诉争商标标志的情况。

认定诉争商标标志经过使用取得显著特征的，仅限于使用诉争商标标志的商品，不包括与其类似的商品。

## 9.8 【三维标志显著特征的判断】

诉争商标含有三维标志的，应当从整体上判断其是否具有显著特征，一般情况下不能仅因该商标含有文字或者图形等其他因素，即认定其具有显著特征。

## 10、商标法第十二条的适用

### 10.1 【三维标志的功能性】

当事人申请注册商标的三维标志仅由商品自身性质产生的形状、实现自身技术效果所需有的形状或者使商品具有实质性价值的形状构成，可以认定属于商标法第十二条规定的情形，该三维标志的使用情况不予考虑。

### 10.2 【商品自身性质产生的形状】

实现商品固有的目的、功能、用途、效果等，必须采用的

或者通常采用的形状，属于商品自身性质产生的形状。

### **10.3 【实现商品技术效果所需的形状】**

为达到特定技术参数、指标等所需要采用的形状，属于实现自身技术效果所需有的商品形状。

### **10.4 【使商品具有实质性价值的形状】**

影响消费者购买意愿的商品外观、造型等，属于使商品具有实质性价值的形状。

## **11、商标法第十三条的适用**

### **11.1 【驰名商标的举证】**

当事人主张在先商标构成驰名商标的，一般应当提交该商标在诉争商标申请日前已处于驰名状态的证据。

当事人提交诉争商标申请日后形成的证据，足以证明在先商标在诉争商标申请日前已处于驰名状态的，可以予以采纳。

### **11.2 【驰名商标的保护】**

适用商标法第十三条第三款规定时，应考虑以下要件：

- (1) 引证商标在诉争商标申请日前已经达到驰名状态；
- (2) 诉争商标构成对驰名商标的复制、摹仿或者翻译；
- (3) 诉争商标的注册容易误导公众，致使驰名商标所有人的利益可能受到损害。

前款所列任一要件不成立时，无需对其他要件予以认定。

### 11.3 【驰名商标的保护范围】

认定驰名商标的保护范围，可以综合考虑商标的显著性、知名度、商标标志的近似程度、指定使用的商品情况、相关公众的重合程度及注意程度、诉争商标申请人的主观状态等因素。

### 11.4 【第十三条第三款适用的情形】

下列情形属于商标法第十三条第三款规定的情形：

（1）在不相同或者不类似的商品上申请注册的诉争商标是对引证商标的复制、摹仿或者翻译，足以使相关公众对使用引证商标和诉争商标的商品来源产生误认，或者足以使相关公众认为使用引证商标和诉争商标的经营者之间具有许可使用、关联企业关系等特定联系的；

（2）在不相同或者不类似的商品上申请注册的诉争商标是对引证商标的复制、摹仿或者翻译，足以使相关公众认为诉争商标与引证商标具有相当程度的联系，而减弱引证商标的显著性、贬损引证商标的市场声誉，或者不正当利用引证商标的市场声誉的。

### 11.5 【驰名状态】

下列情形不能认定在先商标已经达到驰名状态：

（1）当事人自身具有较长经营历史和较高知名度，但无法证明在先商标已为中国境内相关公众所熟知的；

（2）在先商标在其他国家、地区等具有较高知名度，但依据诉争商标申请日前的实际使用情况，不能为中国境内相关公众所熟知的。

## 11.6 【复制、摹仿和翻译的认定】

诉争商标标志与他人驰名商标标志相同或者视觉上基本无差异属于复制。

在诉争商标标志中使用他人驰名商标的显著部分或者显著特征等属于摹仿。

在诉争商标标志中将他人驰名商标以不同的语言文字予以表达，且该语言文字已与他人驰名商标建立对应关系，并为相关公众广为知晓或者习惯使用的，属于翻译。

## 11.7 【驰名商标的法条转换】

商标评审部门在符合下列条件的情况下，适用商标法第三十条或者第三十一条作出被诉裁决且支持当事人申请，对方当事人主张适用法律错误的，不予支持：

（1）当事人依据商标法第十三条第三款的规定对相同或者类似商品上申请注册的诉争商标申请不予核准注册或者宣告其无效的；

（2）当事人没有明确主张诉争商标的申请注册违反商标法第三十条或者第三十一条的；

（3）当事人申请诉争商标不予核准注册或者宣告无效的实质理由是相关公众容易对诉争商标与引证商标所标示的商品来源产生混淆的；

（4）当事人提出宣告诉争商标无效的申请没有超出商标法第四十五条第一款规定的五年期限的。

## 11.8 【已注册驰名商标在同类商品的保护】

诉争商标自注册之日起超过五年的，驰名商标所有人依据商标法第十三条第三款的规定请求对在相同或者类似商品上的诉争商标宣告无效的，可以予以支持。

## 12、商标法第十五条的适用

### 12.1 【未经授权的认定】

被代理人或者被代表人未明确作出同意代理人或者代表人申请注册诉争商标的意思表示属于商标法第十五条第一款规定的“未经授权”。

被代理人或者被代表人知道诉争商标的申请注册而未提出反对意见的，一般不能据此推定其同意代理人或者代表人申请注册诉争商标。

### 12.2 【“被代理人或者被代表人的商标”】

被代理人或者被代表人在诉争商标申请日前的已注册或者申请的商标，不属于商标法第十五条第一款规定的“被代理人或者被代表人的商标”。

被代理人或者被代表人是否实际使用该商标，不属于商标法第十五条第一款认定的要件。

### 12.3 【适用要件】

代理人或者代表人未经授权申请注册的商标，与被代理人或者被代表人的商标相同或者相近似，指定使用的商品与被代理人或者被代表人的商标指向的商品相同或者类似，属于商标

法第十五条第一款规定的情形。

#### **12.4 【适用主体】**

诉争商标申请人与商标法第十五条第一款规定的“代理人或者代表人”、第二款规定的“申请人”存在亲属关系，或者是“代理人或者代表人”或“申请人”公司法定代表人的，属于商标法第十五条适用的主体。

#### **12.5 【“在先使用”的判断】**

仅在其他国家、地区使用商标的，不属于商标法第十五条第二款规定的“在先使用”的情形。

商标使用的规模、时间、知名度等因素，不影响“在先使用”的判断。

#### **12.6 【“在先使用”证据的认定】**

当事人主张保护“在先使用”的商标，应当提交诉争商标申请日前在中国境内使用商标的证据，在其他国家、地区的使用证据或者准备投入中国境内使用的证据可以作为证明其商标在先使用情况的补充。

#### **12.7 【“其他关系”的认定】**

诉争商标申请人与在先使用人存在代理、代表关系以外的，能够知道他人商标且应予主动避让的关系，属于商标法第十五条第二款规定的“其他关系”的情形。



## 12.8 【商标法第十五条认定的例外】

诉争商标申请人能够举证证明其在形成代理、代表关系前，在先使用诉争商标的，可以认定不属于商标法第十五条第一款规定的情形。

诉争商标申请人能够举证证明其先于商标法第十五条第二款规定的“他人”使用诉争商标的，可以认定不属于商标法第十五条第二款规定的情形。

## 13、商标法第十六条的适用

### 13.1 【误导公众的认定】

诉争商标的申请注册容易使相关公众对使用该商标的商品真实产地发生误认的，属于商标法第十六条第一款规定的情形。

### 13.2 【“商标中有商品的地理标志”】

诉争商标完整包含地理标志，或者包含地理标志的主要识别部分，容易使相关公众对使用该商标的商品的真实产地发生误认的，属于“商标中有商品的地理标志”的情形。

### 13.3 【申请主体】

为保护地理标志而成立或者以保护地理标志为宗旨的团体、协会等，认为诉争商标违反商标法第十六条第一款规定的，可以提出申请。

使用该地理标志的产品的生产加工者、市场经营者，可以作为利害关系人提出申请。

#### **13.4 【原属国在先保护原则】**

外国人以诉争商标的申请注册违反商标法第十六条第一款规定申请该商标不应予以注册或者应予宣告无效的，应当提供其名下的该地理标志在原属国受法律保护的证明。

#### **13.5 【混淆判断】**

若地理标志集体商标或者证明商标申请注册在后，普通商标申请在前，应当结合地理标志客观存在情况及其知名度、显著性、相关公众的认知等因素，判断是否容易造成相关公众对商品或者服务来源产生混淆；若地理标志集体商标或者证明商标申请在前，普通商标申请在后，可以从不当攀附地理标志知名度的角度，判断是否容易造成相关公众对商品或者服务来源产生混淆。

#### **13.6 【驰名商标保护的适用】**

地理标志集体商标或者证明商标已经达到驰名状态的，可以适用商标法第十三条第三款予以保护。

当事人依据商标法第十三条第三款申请地理标志集体商标或者证明商标不予核准注册或者宣告无效的，应当结合地理标志客观存在情况及其知名度、显著性、相关公众的认知等因素，认定地理标志集体商标或者证明商标的注册是否会误导公众、致使普通商标注册人的利益可能受到损害。

#### **13.7 【将地理标志注册为普通商标】**

诉争商标申请人或者注册人将地理标志整体或者主要识

别部分作为证明商标或者集体商标之外的商标申请注册的，可以适用商标法第十六条第一款、第十条第二款或者第十一条第一款的规定等进行审理。

### **13.8 【地理范围确定错误】**

地理标志集体商标或者证明商标的申请人在申请文件中标示的地区范围与真实产地不一致的，可以适用商标法第十六条第一款的规定等进行审理。

### **13.9 【法律条款的适用】**

当事人以他人申请注册的地理标志证明商标或者集体商标违反商标法第十六条第二款的规定不应予以核准注册或者应予宣告无效的，适用商标法第三十条中“凡不符合本法有关规定”的内容进行审理。

## **14、商标法第十九条第四款的适用**

### **14.1 【商标代理机构的认定】**

已经备案的从事商标代理业务的主体、工商营业执照中记载从事商标代理业务的主体、以及虽未备案但实际从事商标代理业务的主体，属于商标法第十九条第四款规定的“商标代理机构”，一般工商营业执照记载的经营事项不能作为排除认定“商标代理机构”的依据。

### **14.2 【商标代理业务的认定】**

接受委托人的委托，以委托人的名义办理商标注册申请、

商标评审或者其他商标事宜，包括代理商标注册申请、变更、续展、转让、异议、撤销、评审、侵权投诉，提供商标法律咨询、担任商标法律顾问、代理其他有关商标事务等，属于商标代理业务。

### **14.3 【诉争商标的转让不影响主体的认定】**

商标评审程序中，诉争商标从商标代理机构转让至非商标代理机构名下的，可以适用商标法第十九条第四款的规定进行审理。

### **14.4 【诉争商标申请注册范围的确定】**

“代理服务”仅限于《类似商品和服务区分表》中第四十五类第 4506 类似群组的服务项目。

除商标代理服务之外，商标代理机构在其他商品或者服务类别上申请注册商标的，不予支持。

## **15、商标法第三十条、第三十一条的适用**

### **15.1 【商标延续注册的限制】**

诉争商标申请人的在先商标注册后、诉争商标申请前，他人在相同或者类似商品上注册与诉争商标相同或者近似的商标并持续使用且产生一定知名度，诉争商标申请人不能证明该在先商标已经使用或者经使用产生知名度、相关公众不易发生混淆的情况下，诉争商标申请人据此主张该商标应予核准注册的，可以不予支持。

## 15.2 【商标近似的判断规则】

适用商标法第三十条、第三十一条时，可以综合考虑商标标志的近似程度、商品的类似程度、引证商标的显著性和知名度、相关公众的注意程度以及诉争商标申请人的主观意图等因素，以及前述因素之间的相互影响，以是否容易造成相关公众混淆为标准。

商标标志相同且指定使用的商品相同，可以直接认定违反商标法第三十条、第三十一条的规定，无须考虑其他因素。

将引证商标的整体或者显著识别部分作为诉争商标构成要素的，可以认定构成商标标志近似。

## 15.3 【商标申请驳回复审行政案件中商标近似性的判断】

商标申请驳回复审行政案件中，诉争商标与引证商标是否近似，主要根据诉争商标标志与引证商标标志近似程度等因素进行认定。诉争商标的知名度可以不予考虑。

## 15.4 【商标不予注册复审和无效宣告请求行政案件中商标近似性的判断】

商标不予注册复审和商标权无效宣告请求行政案件中，若诉争商标的申请人主观并无恶意，且基于特定历史原因诉争商标与引证商标长期共存，形成既定市场格局，当事人主张不会导致相关公众发生混淆的，可以认定不构成近似商标。

认定诉争商标与引证商标是否近似，可以综合考虑诉争商标申请人和引证商标权利人提供的证据、诉争商标申请人的主观状态等。

### **15.5 【市场调查报告的认定】**

当事人可以提交市场调查报告用于证明诉争商标和引证商标不构成近似商标，但该报告结论缺乏真实性、科学性的，可以不予采纳。

### **15.6 【商标法第三十条、第三十一条的适用条件】**

商标行政案件中，应当依据诉争商标的申请日确定引证商标属于已被核准注册、已初步审定的商标或者在先申请的商标。

引证商标申请日早于诉争商标，但在诉争商标申请日前，引证商标尚未被核准注册或者初步审定，即使在商标评审部门作出被诉裁决时，引证商标已被核准注册或者初步审定的，应当适用商标法第三十一条的规定对引证商标与诉争商标是否构成近似商标进行认定。

### **15.7 【引证商标权利人被注销】**

商标行政案件中，引证商标权利人被注销且无证据证明存在权利义务承受主体的，可以认定引证商标与诉争商标不构成近似商标。

### **15.8 【中文商标与外文商标的近似性判断】**

中文商标与外文商标的近似性判断，可以综合考虑以下因素：

- (1) 相关公众对外文含义的认知程度；
- (2) 中文商标与外文商标在含义、呼叫等方面的关联性或者对应性；

- (3) 引证商标的显著性、知名度和使用方式;
- (4) 诉争商标实际使用的情况。

### **15.9 【三维标志商标的比对】**

涉及三维标志商标的近似性判断,一般应从整体上进行比对,不能仅就该商标中的文字、图形与在先注册的文字、图形商标进行比对。

### **15.10 【共存协议的属性】**

判断诉争商标与引证商标是否构成近似商标,共存协议可以作为排除混淆的初步证据。

### **15.11 【共存协议的形式要件】**

引证商标权利人应以书面形式同意诉争商标申请注册,明确载明诉争商标的具体信息,但附条件或者附期限的共存协议一般不予采信。

共存协议应当真实、合法、有效,且不存在损害国家利益、社会公共利益和第三人合法权益等情形,否则不应予以采纳。

### **15.12 【共存协议的法律效果】**

引证商标与诉争商标的商标标志相同或者基本相同,且使用在相同或者类似商品上的,不能仅以共存协议为依据,准予诉争商标的注册申请。

引证商标与诉争商标的商标标志近似,使用在相同或者类似商品上,引证商标权利人出具共存协议的,在无其他证据证明诉争商标与引证商标的共存足以导致相关公众对商品来源

发生混淆的情况下，可以认定诉争商标与引证商标不构成近似商标。

引证商标权利人出具共存协议后，以诉争商标与引证商标构成近似商标为由，提起不予注册异议或者请求无效宣告的，不予支持，但该协议依法无效或者被撤销的除外。

### **15.13 【类似商品的认定】**

商标申请驳回复审行政案件中，一般应以案件审理时的《类似商品和服务区分表》作为判断构成类似商品或者服务的依据。

商标不予注册复审、商标权无效宣告请求行政案件中，案件审理时的《类似商品和服务区分表》可以作为判断构成类似商品或者服务的参考。

### **15.14 【具有主观恶意的认定】**

判断诉争商标申请人是否具有主观恶意，可以综合考虑如下因素：

- (1) 引证商标具有较强显著性和知名度；
- (2) 诉争商标申请人与引证商标权利人营业地址临近；
- (3) 诉争商标申请人与引证商标权利人属于同行业；

(4) 诉争商标标志与引证商标标志基本相同且诉争商标申请人未作出合理解释。



## 16、商标法第三十二条的适用

### 16.1 【在先权利范围】

当事人依据反不正当竞争法第六条主张在先合法权益的，可以适用商标法第三十二条进行审理。

认定诉争商标的申请注册是否损害他人在先权利，一般以规定在先权利的法律为依据。

### 16.2 【在先权利时间的起算】

当事人主张诉争商标的申请注册损害“在先权利”的，应举证证明诉争商标申请日前该在先权利合法存在。

如果在先权利在诉争商标核准注册时已不存在的，则不影响诉争商标的注册。

### 16.3 【外国人在先著作权】

外国人主张诉争商标的申请注册损害其在先著作权的，按照著作权法第二条的规定进行处理。

### 16.4 【损害在先著作权的认定】

判断诉争商标的申请注册是否损害当事人在先著作权时，应考虑以下要件：

- (1) 涉案作品构成著作权法的保护客体；
- (2) 当事人为涉案作品的著作权人或者利害关系人；
- (3) 在诉争商标申请日前，诉争商标申请人有可能接触涉案作品；
- (4) 诉争商标标志与涉案作品构成实质性相似。

前款所列任一要件不成立时，无须对其他要件予以认定。

### **16.5 【作品的认定】**

缺乏独创性的，不应认定为作品。

简单的常见图形、字母等一般不认定为作品。

### **16.6 【超过保护期限的作品】**

诉争商标申请注册时，当事人以超过著作权法规定保护期限的作品主张著作权的，不予支持。

认定诉争商标标志和涉案作品是否构成实质性相似时，二者共同使用已进入公有领域的表达不作为考虑因素。

### **16.7 【在先著作权权属的认定】**

当事人提供的涉及著作权的底稿、原件、合法出版物、诉争商标申请日前著作权登记证书、取得权利的合同等可以作为认定在先著作权归属的初步证据，但是诉争商标申请人提供相反证据的除外。

### **16.8 【利害关系人资格的认定】**

当事人依据商标公告、商标注册证等主张其有权作为在先著作权的利害关系人提出申请的，可以予以支持。

### **16.9 【独创性高低对认定“实质性相似”的影响】**

对于独创性较低的作品，诉争商标标志与该作品在视觉上基本无差异的，可以认定构成实质性相似。

## 16.10 【不构成损害在先著作权的抗辩】

当事人主张诉争商标的申请注册不构成损害他人在先著作权，具有下列情形之一的，可以予以支持：

（1）诉争商标标志与涉案作品相同或者相近似的部分属于公有素材或者公有领域的信息的；

（2）诉争商标标志与涉案作品相同或者相近似的原因在于执行共同的标准或者表达形式有限的；

（3）诉争商标标志与涉案作品相同或者相近似的部分源于案外人的作品，且该作品的创作完成时间早于涉案作品的。

## 16.11 【在先著作权的保护范围】

当事人以损害其在先著作权为由主张诉争商标应当不予核准注册或者应予宣告无效的，对诉争商标指定使用的商品或者服务类别不予考虑。

## 16.12 【姓名权保护的具体利益】

当事人主张诉争商标的申请注册损害其在先姓名权的，一般应举证证明诉争商标申请人明知其姓名而采取盗用、冒用等手段申请注册商标。

相关公众容易认为标有诉争商标的商品与该自然人存在许可等特定联系的，可以认定属于商标法第三十二条规定的情形。

## 16.13 【姓名的范围】

姓名包括户籍登记中使用的姓名，也包括别名、笔名、艺

名、雅号、绰号等。

能够与特定的自然人建立起对应关系的主体识别符号可以视为该自然人的姓名。

#### **16.14 【自然人声誉对姓名权的影响】**

自然人的声誉不是保护其姓名权的前提，但可以作为认定相关公众是否将某一姓名与特定自然人建立起对应关系的考虑因素。

#### **16.15 【肖像权的保护】**

当事人主张诉争商标的申请注册损害其在先肖像权的，应当举证证明诉争商标标志具有足以使相关公众识别其所对应的特定自然人的个性特征，从而使该标志与该自然人之间形成了稳定的对应关系，相关公众容易认为标有诉争商标的商品与该自然人存在许可等特定联系。

人形剪影未包含可识别的特定自然人个性特征，当事人据此主张损害其在先肖像权的，不予支持。

#### **16.16 【在先企业名称权的认定】**

企业名称的简称或者字号等经使用具有一定知名度，已与当事人建立稳定对应关系，且该使用行为不违背当事人意愿的，当事人可以据此主张在先企业名称权。

#### **16.17 【外国企业名称的保护】**

外国公司的企业名称、字号或者其惯用音译等，在诉争商标申请日前已在中国境内进行商业使用、具有一定知名度且为

相关公众所知晓的，当事人可以据此主张在先企业名称权。

### **16.18 【“商品化权益”的表述】**

在法律尚未规定“商品化权益”的情况下，不宜直接在裁判文书中使用“商品化权益”等称谓。

### **16.19 【“商品化权益”认定的限制】**

当事人主张的“商品化权益”内容可作为姓名权、肖像权、著作权、一定影响商品（服务）名称等法律明确规定的权利或者利益予以保护的，不宜对当事人所主张的“商品化权益”进行认定。

若依据除商标法第三十二条“在先权利”之外的其他具体条款不足以对当事人提供救济，且无法依据前款所规定的情形予以保护的，在符合特定条件时，可以依据当事人的主张适用商标法第三十二条“在先权利”予以保护，但一般应依据反不正当竞争法第六条的规定进行认定。

### **16.20 【“特定条件”的认定】**

认定是否属于本审理指南 16.19 条所规定的“特定条件”时，应同时具备下列情形：

- （1）“保护对象”为作品名称、作品中的角色名称等；
- （2）在诉争商标申请日前，“保护对象”应具有一定知名度；
- （3）诉争商标的申请注册人主观上存在恶意；
- （4）诉争商标标志与“保护对象”相同或者相近似。
- （5）诉争商标指定使用的商品属于“保护对象”知名度

所及的范围，容易导致相关公众误认为其经过“保护对象”利益所有人的许可或者与利益所有人存在特定联系。

### **16.21 【恶意抢注适用仅限“未注册商标”】**

商标法第三十二条规定的“申请人不得以不正当手段抢先注册他人已经使用并有一定影响的商标”，其中所规定的“商标”是指“未注册商标”，包括在诉争商标申请日前未提出商标注册申请或者已失效的商标。

### **16.22 【恶意抢注的适用要件】**

认定诉争商标的申请注册是否属于“以不正当手段抢先注册他人先在先使用并具有一定影响的商标”时，应同时具备下列情形：

（1）未注册商标在诉争商标申请日之前已经使用并有一定影响；

（2）诉争商标与在先使用的未注册商标构成相同或近似商标；

（3）诉争商标指定使用的商品与在先使用的未注册商标所使用的商品构成相同或者类似商品；

（4）诉争商标申请人明知或者应知他人先在先使用商标。

商标申请人能够举证证明其没有利用在先使用商标商誉的恶意的，不构成前款所指情形。

### **16.23 【明知或者应知的认定】**

认定诉争商标申请人是否明知或者应知他人的未注册商标时，可以综合考虑以下因素：

- (1) 诉争商标申请人与在先商标使用人曾就商标许可、商标转让等进行联络；
- (2) 经相关机关认定，诉争商标申请人存在侵害商标权行为；
- (3) 诉争商标申请人与在先商标使用人属于同行业；
- (4) 在先商标显著性较强的，诉争商标与其高度近似。

#### **16.24 【“已经使用”的判断】**

当事人通过商业宣传和生产经营活动，能够使其主张的“未注册商标”发挥识别商品来源的作用属于商标法第三十二条规定的“已经使用”。

一般在相关公众已将该“未注册商标”与当事人产生联系的情况下，只要该行为不违背当事人主观意愿的，可以认定构成“已经使用”的情形。

#### **16.25 【“有一定影响”的判断】**

当事人举证证明其在先未注册商标的知名度足以使诉争商标申请人明知或者应知该商标存在的，可以认定构成“有一定影响”。

当事人提交在先未注册商标的持续使用时间、区域、销售量或者广告宣传等证据，足以证明该商标为一定范围的相关公众所知晓的，可以认定构成“有一定影响”。

#### **16.26 【单纯出口行为的认定】**

使用在先未注册商标的商品未在中国境内流通且直接出口的，当事人主张诉争商标的申请注册属于商标法第三十二条

规定的“以其他不正当手段抢先注册他人已经使用并有一定影响的商标”情形的，不予支持。

## **17、商标法第四十四条第一款的适用**

### **17.1 【“欺骗手段”的认定】**

同时具备下列情形的，可以认定属于商标法第四十四条第一款规定的“以欺骗手段取得注册”：

（1）诉争商标申请人存在使商标行政机关因受到欺骗而陷入错误认知的主观意愿；

（2）诉争商标申请人存在以弄虚作假的手段从商标行政机关取得商标注册的行为；

（3）商标行政机关陷入错误认识而作出的行政行为系基于诉争商标申请人的行为所产生，二者之间具有直接的因果关系。

### **17.2 【“其他不正当手段”的认定】**

“其他不正当手段”是指以欺骗手段以外的其他方式扰乱商标注册秩序、损害公共利益、不正当占用公共资源或者谋取不正当利益，以使诉争商标获准注册的行为，包括诉争商标申请人采取大批量、规模性抢注他人具有一定知名度的商标等手段的行为。

同时具备下列要件的，可以认定属于商标法第四十四条第一款规定的“以其他不正当手段取得注册”：

（1）适用主体是该商标的申请注册人，但有证据证明诉争商标现注册人与申请注册人之间具有特定关系，或对于申请



注册诉争商标的行为具有意思联络的除外；

(2) 适用对象既包括已经注册的商标，也包括申请注册的商标；

(3) 申请注册行为扰乱商标注册秩序、损害社会公共利益、或者属于不正当占用公共资源、以其他方式谋取不正当利益的；

(4) 申请注册行为未仅损害特定民事权益。

### **17.3 【“其他不正当手段”具体情形的认定】**

具有下列情形之一的，可以认定属于商标法第四十四条第一款规定的“以其他不正当手段取得注册”：

(1) 诉争商标申请人申请注册多件商标，且与他人具有较强显著性的商标或者较高知名度的商标构成相同或者近似，既包括对不同商标权利人的商标在相同或类似商品、服务上申请注册的，也包括针对同一商标权利人的商标在不相同或不类似商品或者服务上申请注册的；

(2) 诉争商标申请人申请注册多件商标，且与他人企业名称、社会组织名称、有一定影响商品的名称、包装、装潢等商业标识构成相同或者近似标志的；

(3) 诉争商标申请人具有兜售商标，或者高价转让未果即向在先商标使用人提起侵权诉讼等行为的。

### **17.4 【“其他不正当手段”具体情形的例外】**

诉争商标申请人具有本审理指南第 17.3 条规定的情形，但诉争商标申请注册的时间较早，且在案证据能够证明诉争商标申请人对该商标具有真实使用意图并实际投入商业使用的，

可以根据具体情况，认定诉争商标不构成“以其他不正当手段取得注册”的情形。

### **17.5 【“其他不正当手段”条款适用的限制】**

审理商标不予注册复审、商标权无效宣告请求等行政案件时，根据在案证据能够适用商标法其他条款对诉争商标不予注册或宣告无效的，不再适用商标法第四十四条第一款。

## **18、商标法第四十五条的适用**

### **18.1 【商标法第四十五条属性的确定】**

商标法第四十五条第一、二、三款均属于程序条款。

### **18.2 【“五年期间”的认定】**

商标法第四十五条第一款规定的“自商标注册之日起五年内”，是指自诉争商标注册公告之日的次日起五年内，该期间不适用中止、中断等情形。

自诉争商标注册公告之日的次日起，方可依据商标法第四十五条第一款的规定提起商标权无效宣告申请。

### **18.3 【超“五年期间”申请主体】**

商标法第四十五条第一款规定的“驰名商标所有人”，不包括驰名商标的利害关系人。

### **18.4 【“恶意注册”的认定】**

认定商标法第四十五条第一款规定的“恶意注册”，可以综

合下列因素：

- (1) 诉争商标与在先驰名商标近似程度较高；
- (2) 在先驰名商标具有较强显著性和知名度；
- (3) 诉争商标指定使用商品与在先驰名商标的商品关联程度较高；
- (4) 诉争商标申请人与在先驰名商标所有人曾有贸易往来或者合作关系；
- (5) 诉争商标申请人与在先驰名商标所有人营业地址临近；
- (6) 诉争商标申请人与在先驰名商标所有人曾发生其他纠纷，足以知晓该驰名商标；
- (7) 诉争商标申请人与在先驰名商标所有人曾有内部人员往来关系；
- (8) 诉争商标申请人申请注册该商标后，具有攀附在先驰名商标商誉的行为；
- (9) 诉争商标申请人大量注册他人具有较强显著性和知名度的商标。

## 19、商标法第四十九条第二款的适用

### 19.1 【注册商标通用化的判断】

认定诉争商标是否属于商品通用名称，应当从商标标志整体上进行审查，且应当认定通用名称指向的具体商品。对与该商品类似的商品不予考虑。

当事人主张诉争商标成为商品通用名称的，可以提交字典、工具书、国家或者行业标准、相关行业组织的证明、市场调查报告、市场上的宣传使用证据、其他主体在同种商品上使用该

商标标志的证据等予以证明。

## **19.2 【注册商标通用化判断的时间点】**

认定诉争商标是否属于通用名称，一般以当事人向商标撤销审查部门提出撤销申请时的事实状态进行判断，评审时的事实状态可以作为参考。

## **19.3 【新旧法的适用】**

商标权撤销复审行政案件中，对于指定的三年期间跨越2014年5月1日的，在实体法上适用2001年修正的商标法。

## **19.4 【使用的认定】**

具有下列情形之一的，当事人主张维持商标注册的，不予支持：

- (1) 仅在核定使用范围外的类似商品或者服务上使用诉争商标的；
- (2) 使用诉争商标但未发挥区分商品、服务来源作用的；
- (3) 为了维持诉争商标注册进行象征性使用的。

## **19.5 【“违法”使用的认定】**

商标使用行为明确违反商标法或者其他法律禁止性规定的，可以认定不构成商标使用。

## **19.6 【使用主体的认定】**

商标法第四十九条第二款规定的“连续三年不使用”中的“使用”主体，包括商标权人、被许可使用人以及其他不违背

商标权人意志使用商标的人。

商标权人已经对他人使用诉争商标的行为明确表示不予认可，在商标权撤销复审行政案件中又依据该他人的行为主张使用诉争商标的，不予支持。

### **19.7 【非规范商品的认定】**

实际使用的商品或者核定的商品不属于《类似商品和服务区分表》中的规范商品名称，在认定具体商品所属类别时，应当结合该商品功能、用途、生产部门、消费渠道、消费群体进行判断，并考虑因消费习惯、生产模式、行业经营需求等市场因素，对商品本质属性或名称的影响，作出综合认定。

### **19.8 【非规范实际使用商品构成核定商品使用的认定】**

实际使用的商品不属于《类似商品和服务区分表》中的规范商品名称，但其与诉争商标核定使用的商品仅名称不同，本质上属于同一商品的，或是实际使用的商品属于核定商品下位概念的，可以认定构成对核定商品的使用。

认定是否属于同一商品，可以综合考虑物理属性、商业特点以及《类似商品和服务区分表》关于商品分类的原则和标准等因素。

### **19.9 【维持注册范围】**

诉争商标在核定商品上构成使用的，可以维持与该商品类似的其他核定商品上的注册。

认定前款所指的类似商品，应当严格按照商品的功能、用途、生产部门、消费渠道和消费群体进行判断，一般依据《类

似商品和服务区分表》进行认定。

#### **19.10 【区分表的变化对商品类似的判断】**

诉争商标核准注册时，核定的未实际使用商品与已实际使用商品在《类似商品和服务区分表》中不属于类似商品，但因《类似商品和服务区分表》的变化，在案件审理时属于类似商品的，以案件审理时的事实状态为准，可以维持未实际使用商品的注册。

诉争商标核准注册时，核定的未实际使用商品与已实际使用商品在《类似商品和服务区分表》中属于类似商品，但因《类似商品和服务区分表》的变化，在案件审理时不属于类似商品的，以核准注册时的事实状态为准，可以维持未实际使用商品的注册。

#### **19.11 【在他人商标上贴附诉争商标的认定】**

在标注他人商标的商品上同时贴附诉争商标，若相关公众不易识别该商品来源于诉争商标注册人的，可以认定不构成商标使用。

#### **19.12 【一物多标行为的认定】**

诉争商标注册人在同一商品上，同时使用包括诉争商标在内的多个商标的，若相关公众能够将该商标作为识别商品来源的标志，可以认定构成商标使用。

#### **19.13 【一人多标行为的认定】**

诉争商标注册人拥有多个已注册商标，虽然其实际使用商

标与诉争商标仅存在细微差异,但若能够确定该使用系针对其已注册的其他商标的,对其维持诉争商标注册的主张,可以不予支持。

#### **19.14 【“替他人推销”商标使用的认定】**

诉争商标注册人为商场、超市等,其能够证明通过提供场地等形式与销售商等进行商业合作,足以认定其为推销商品提供建议、策划、宣传、咨询等服务,可以认定诉争商标在“替他人推销”服务上进行了商标使用。

#### **19.15 【指定期间后的使用】**

指定期间之后开始大量使用注册商标的,一般不构成在指定期间内的商标使用,但当事人在指定期间内使用商标的证据较少,在指定期间之后持续、大量使用诉争商标的,在判断是否构成商标使用时可以综合考虑。

#### **19.16 【单纯出口行为的认定】**

使用诉争商标的商品未在中国境内流通且直接出口的,诉争商标注册人主张维持注册的,可以予以支持。

### **附 则**

本指南自下发之日起执行,2014年1月22日发布的《北京市高级人民法院关于商标授权确权行政案件的审理指南》不再适用。

**Beijing High People's Court**  
**Guidelines for the Trial of Trademark Right**  
**Granting and Verification Cases**  
**(2019)**

**IP Division, Beijing High People's Court**

**April 4<sup>th</sup>, 2019**

This English translation of the Guidelines is for reference only. In case of any conflict, the Chinese version of the Guidelines shall prevail.



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## **Part I Relevant Procedural Issues**

### **1. Determination of subject eligibility**

#### **1.1 Scope of prior rights holders**

The trademark owner and other legitimate prior rights owners under the protection of law shall be the “prior rights holders” as provided in Articles 33 and 45.1 of the Trademark Law.

#### **1.2 Scope of interested parties**

The licensees of prior rights, the lawful successors of prior rights, or the controlling shareholders of the prior rights holders shall be the “interested parties” as provided in Articles 33 and 45.1 of the Trademark Law.

If a broker submits a special authorization document issued by a model, actor and so forth for relevant personal rights, he/she shall be deemed to be an “interested party”.

A subject that is affected by the application of registration of a trademark in dispute but does not have a direct interest in the prior rights shall not be considered an “interested party”.

#### **1.3 Time of determination of interested parties**

The determination of interested parties shall be generally based on the time of application for trademark opposition or invalidation.

If interested parties changed after the court of first instance accepts an administrative case, the litigation subject status of original interested parties shall not be affected in general, but the current interested parties may be notified to participate in the administrative lawsuit based on their application.

If interested parties changed after the court of first instance delivered a judgment, the court of second instance may notify them to participate in the administrative lawsuit in the capacity of third parties based on current interested parties’ application.

#### **1.4 Effect of transfer of a reference trademark on the litigation status of the parties**

If a reference trademark has been approved for transfer in a first-instance administrative lawsuit, a

transferee may be notified to participate in the lawsuit according to the transferee's application, which shall not affect the transferor to continue to participate in the lawsuit; in the event that the transferor explicitly waives the continued participation in the lawsuit, the transferee may substitute the litigation status of the transferor, and the litigation actions completed by the transferor are binding on the transferee.

If a reference trademark has been approved for transfer in the second-instance administrative lawsuit, a transferee may be notified to participate in the lawsuit according to the transferee's application, which shall not affect the transferor to continue to participate in the lawsuit.

### **1.5 Legal consequences of not notifying the transferee of the trademark in dispute to participate in the review**

If, in the trademark review process, a trademark in dispute has been transferred, the trademark review and adjudication department of National Intellectual Property Administration, PRC (hereinafter referred to as "TRAD") does not notify the transferee to participate in the review process and directly makes an administrative ruling against the transferee, and the transferee is able to prove that the reasons and conclusions of the administrative ruling in question are illegal, then the transferee's claim on revocation of the disputed administrative ruling may be supported; however, if the transferee is unable to prove that the reasons and conclusions of the disputed administrative ruling are illegal in the lawsuit, then the transferee's claim on revocation of the disputed administrative ruling may not be supported.

### **1.6 Effect of the trademark in dispute transfer on the litigation status of the parties**

If, in the trademark review process, the trademark in dispute has been transferred and the transferee participates in the forthcoming review process, the transferor shall generally no longer be an administrative counterpart. In the event that the transferor files an administrative lawsuit, such lawsuit may be rejected.

The litigation actions completed by the transferor are binding on the transferee.

### **1.7 Scope of adding litigants**

In an administrative case of review of rejected trademark application, generally, litigants shall be limited to the counterparties of the administrative act in question and other persons that are interested in the administrative act, it is inappropriate to proactively add the subjects that have not participated in the

trademark review process such as the owner of the reference trademark.

### **1.8 Opposition causes and determination of subject eligibility**

In the event that the opponent also alleges that the trademark in dispute violates the provisions of Articles 10, 11, 12, 13.2, 13.3, 15, 16.1, 30, 31 and 32, whether such opponent is eligible to file the application according to Articles 13.2, 13.3, 15, 16.1, 30, 31 and 32 shall be examined. If the opponent is not a “prior right holder” or an “interested party” under Article 33 of the Trademark Law, the application causes other than those provided in Articles 10, 11 and 12 shall be examined.

### **1.9 Determination of subject eligibility of foreign parties**

The determination of subject eligibility of foreign parties shall be governed by the provisions of Article 14 of the Law on the Application of Laws of Foreign-related Civil Relations.

If a party claims that the subject eligibility of the counterparty no longer exists according to the laws of another country or region, it shall provide evidence of the elimination of registration of such subject eligibility as well as the legal provisions on the elimination of registration of such subject eligibility in such country or region.

If the subject eligibility may be reinstated after being removed from the register based on the laws of another country or region, the party may be given an opportunity to correct and explain the status of the existence of the subject. In the event that the party is delinquent in proving, such party shall bear the corresponding legal consequences.

## **2. Scope of review**

### **2.1 Legal consequences of omitting review reasons**

The scope of trademark review is generally limited to the reasons and the corresponding legal provisions explicitly set out in the application and supplementary reasons by the applicant. If the facts and reasons for the defense of the respondent are directly related to the aforesaid application items, they can be reviewed conjunctly except for those exceeding the time limit specified by the Trademark Law. If TRAD fails to review under the foregoing circumstances accordingly, which poses a real impact on the party’s rights, the party’s claim that the above violates the legal procedures may be supported.



In the trademark review process, if the facts and reasons for defense, subsequent cross-examination opinions and so forth of the applicant or the respondent are obviously beyond the scope of application, or the applicant simply lists the legal provisions in the application and supplementary reasons without stating relevant facts and reasons throughout the text, the party's claim that TRAD omits reasons for the review shall not be supported.

## **2.2 Selecting application of Articles 13 and 30**

If a party makes an application based on Article 13 or both of Articles 13 and 30 of the Trademark Law, and TRAD fails to review according to Article 13 of the Trademark Law and does not support the application of the party, then TRAD constitutes omission of reasons for review; if the circumstance above poses a real impact on the party's rights, the party's claim that TRAD violates the legal procedure may be supported.

## **2.3 Legal consequences of review beyond the scope**

If a party has evidence to prove that the content of the disputed ruling is beyond the scope of refusal of the application for trademark registration, the non-registration decision, the decision to revoke or maintain the registered trademark, and the review application and defense of the party and there is no legal basis, the party's claim that the content exceeds the scope may be supported.

## **2.4 Supplementing review evidence**

In the trademark review process, if a party states that it needs to supplement the evidence based on Article 59 of the Implementing Measures of the Trademark Law, and TRAD directly makes the disputed ruling by the time limit prescribed by law, the party's claim that the above violates the legal procedure may be supported.

## **2.5 Scope of review of rejected trademark application**

In an administrative case of review of rejected trademark application, if TRAD directly makes the disputed ruling based on Article 10, 11, 12 or 16.1 of the Trademark Law beyond the decision of rejection of trademark registration application without hearing the applicant's opinions, the party's claim that the above violates the legal procedure may be supported.

## **2.6 Scope of review for unapproved trademark registration**

In an administrative case of review of unapproved trademark registration, if the content of the disputed ruling exceeds the scope of goods or services that are not approved for registration, the party's claim that the above violates the legal procedure may be supported.

TRAD's examination of unapproved registration review shall generally be determined by the scope of review of non-registration decision, the claim of the applicant for review, and the reasons claimed by the original opponent in the review and applied during the review process.

## **2.7 Scope of review of invalidation of trademark rights**

In an administrative case of the request for invalidation of trademark rights, TRAD shall generally examine the facts, reasons and requests in the application and defense of the parties. If TRAD reviews beyond the foregoing scope, the party's claim that the above violates the legal procedure may be supported.

## **2.8 Determination of the review scope in trademark administrative litigation**

In trademark administrative litigation, the scope of review shall generally be determined based on the plaintiff's claims and reasons. If the plaintiff fails to claim and yet the disputed ruling is obviously inappropriate, a ruling shall be made on relevant issues after each party states opinions and shall not exceed the review scope of the disputed ruling.

If a party has claimed a number of reasons in the trademark review process, and TRAD only makes the disputed ruling based on part of the reasons and the conclusion is erroneous, the party's claim to revoke the disputed ruling may be supported and the reasons that are not examined by TRAD shall not be supported directly.

## **2.9 Simultaneous application of “absolute reasons” and “relative reasons”**

If TRAD makes a ruling to reject the disputed application for trademark registration based on provisions of Articles 10, 11, 12, 30 and 31 of the Trademark Law, the disputed ruling shall not be revoked simply because TRAD applies provisions of Articles 10, 11, 12, 30 and 31 of the Trademark Law simultaneously in its review.

### **3. Service**

#### **3.1 Determination of service address**

If a party confirms the service address during the trademark review procedure and agrees to apply the same in the trademark administrative proceeding, it may be served at that address.

#### **3.2 Electronic service**

In the case of delivery by fax or e-mail, fax numbers for sending and receiving faxes, e-mail addresses for sending and receiving e-mails, time of sending, and the name of the litigation documents for delivery shall be recorded, and the confirmation forms of fax delivery and the web page indicating successful delivery of e-mails shall be printed for filing and future reference.

In the case of delivery by text, Wechat or otherwise, the number of the mobile phone of receiving and sending, time of sending, and the name of the litigation documents for delivery shall be recorded, the delivered content by text, Wechat or otherwise shall be photographed for filing and future reference.

#### **3.3 Determination standards of service**

The party's receipt of the notice for acceptance, proof, defense and evidence exchange, evidence and other materials relevant to the case in the trademark review case posted during the trademark review procedure shall be deemed to be proper service.

#### **3.4 Burden of proof for service**

If a party claims that the service procedure is illegal on the grounds that it has not received the relevant materials of the case in trademark administrative litigation, TRAD shall provide evidence proving that the party receives relevant materials and the mailing list printed by the postal department in batches may serve as prima facie evidence.

The materials of internal processes such as list of issues, as well as the documents evidencing collection by a property company or a doorman on behalf without authorization of the party, do not suffice to prove that the party has received the relevant materials.

### **3.5 Improper service procedure**

If TRAD fails to provide direct evidence proving that the party has received materials relevant to the case and yet is able to provide prima facie evidence that the party has been notified to participate in the review process, and the reasons and conclusions of the disputed ruling are not improper, the party's claim that the service procedure is illegal may not be supported if one of the following circumstances occurs:

(1) the party fails to claim a substantive reason other than the claim that the service procedure is illegal; or

(2) in addition to claiming that the service procedure is illegal, the party also claims a substantive reason, but such reason is false or does not fall within the scope of review in this case.

## **4. Determination of “double jeopardy”**

### **4.1 “Same facts”**

Where a party submits an application based on the evidence that is newly discovered after the original administrative act or that cannot be obtained due to objective reasons or cannot be provided within the prescribed time limit during the original administrative procedure, the foregoing does not constitute a reapplication based on the “same facts”.

The following circumstances constitute a reapplication based on the “same facts”:

(1) the party reapplies based on evidence such as library inquiries that are available in the original administrative procedure but are not submitted without justifiable reasons;

(2) the party claims infringement upon the prior copyright and has submitted relevant works in the original administrative procedure, and reapplies based on the copyright registration certificate newly obtained.

### **4.2 “Same reasons”**

The following circumstances do not constitute a reapplication based on the “same facts”:

(1) in the original administrative procedure, only part of the reasons claimed by the party are

adjudicated, such party reapplies based on the other reasons that have not been adjudicated;

(2) the party reapplies based on the reference trademarks that are not covered in the original administrative procedure;

(3) in the original administrative procedure, the party applies based on Article 13 of the Trademark Law, and TRAD takes the liberty to switch to apply Article 30 of the Trademark Law and does not support the same; and the party reapplies based on Article 13 of the Trademark Law;

(4) in the original trademark opposition review procedure, the party files an application based on Article 10.1.7 of the Trademark Law effective in 2001, and TRAD takes the liberty to switch to apply Article 10.1.8 of the Trademark Law effective in 2001 and supports the same. Such application is not supported after the administrative litigation proceeding and the trademark in dispute has been approved for registration. The party files a request for declaration of invalidation in accordance with Article 10.1.8 of the Trademark Law effective in 2013.

#### **4.3 Filing a review application based on the “same facts and reasons” again**

The party files a review application based on the “same facts and reasons” again and TRAD does not accept or reject the same based on the provision of Article 57 of the Implementing Measures of the Trademark Law. The party’s claim on violation of legal procedure shall not be supported.

### **5. Dealing with renew administrative acts**

#### **5.1 Submission of evidence**

In the case of an administrative case that hears the disputed review ruling, if a party claims that TRAD violates the legal procedure in rejecting the supplementary evidence provided by such party, such claim shall generally not be accepted, except that the content involved in the evidence is not determined by effective ruling and is sufficient to affect the review outcome and yet is not accepted by TRAD.

#### **5.2 Review procedure for reviewing a ruling**

If TRAD redelivers a disputed ruling based on the effective judgement, at least one member of the panel shall be replaced. If a party claims that TRAD violates the legal procedure for non replacement,

such claim may be supported.

If an effective judgement has been delivered to conclude the substantive determination, and TRAD has not notified the parties for defense, exchange of evidence, cross-examination and so forth and directly makes the disputed ruling, the party's claim that the above violates the legal procedure shall not be supported.

### **5.3 Dealing with filing a lawsuit**

If TRAD makes a new ruling according to an effective judgement and the party files an administrative lawsuit accordingly, such case shall not be accepted; if such case has been accepted, it shall be dismissed. However, the above shall not apply where the facts based on which TRAD makes the ruling no longer exist.

## **6. Other procedural matters**

### **6.1 Determination basis for trademark registration items**

If the registration items on the *Trademark Registration Certificate* are inconsistent with those set out in the *Trademark Register*, the *Trademark Register* shall be the determination basis unless there is evidence to prove that the *Trademark Register* is incorrect.

### **6.2 Calculation of the date of suing**

If the plaintiff refuses to accept an administrative act and brings a lawsuit, the statute of limitation runs from the second day from its receipt of the disputed ruling.

### **6.3 TRAD's burden of proof**

In trademark administrative litigation, if TRAD fails to provide evidence within the time limit without justifiable reasons, it may be deemed to constitute the circumstance provided in Article 34 of the Administrative Procedure Law. However, the above shall not apply where the disputed ruling involves a third party's legitimate rights and the third party provides evidence.

#### **6.4 Dealing with disputed overdue ruling**

In trademark administrative litigation, if TRAD fails to make the disputed ruling within the statutory time limits provided in Articles 34, 35, 44, 45 and 49 which has not actual influence on the parties' rights, the party's claim that the above violates the legal procedure shall not be supported.

#### **6.5 Submission and adoption of evidence in administrative cases of review of revoked trademark rights**

In an administrative case of review of the revoked trademark rights, if a party explicitly indicates that it claims the actual use of the trademark in dispute based on the original of evidence submitted before the decision of revocation is made, and TRAD revokes the registration of the trademark in dispute only in the absence of evidence submitted by the party, the party's request to revoke the disputed decision may be supported.

#### **6.6 Legal consequences of failure to prepay the case acceptance fee as required**

In trademark administrative litigation, if the plaintiff or the appellant fails to prepay the case acceptance fee within the time limit provided in Article 22 of Measures on Payment of Litigation Fees and does not file an application to delay, reduce, or exempt, or files an application which is not approved, such case may be treated as voluntary withdrawal of complaint based on the provision of Article 61 of Interpretation of the Supreme People's Court on the Application of the Administrative Procedure Law of the People's Republic of China.

#### **6.7 Responsibility of litigation costs**

In trademark administrative litigation, if the disputed ruling is revoked due to adoption of the evidence supplemented by a party during litigation, the litigation fee shall be borne by the party that submits the supplementary evidence.

#### **6.8 Failure to publish the members of the panel**

If TRAD does not publish the members of the panel such that the party is unable to exercise the right to apply for evasion, the party's claim that the above violates the legal procedure without substantive reasons for evasion may not be supported.

## **6.9 Agency of both parties**

If the same agency or agent acts for both parties in different stages of the trademark administrative procedure respectively in the same case, the disputed administrative act may be determined to violate the legal procedure unless the parties explicitly consent.

## **6.10 Application of termination of litigation**

In an administrative case of request for invalidation of trademark rights, if the registration of the trademark in dispute has been revoked, it does not constitute termination of litigation provided in Article 88 of Interpretation of the Supreme People's Court on the Application of the Administrative Procedure Law of the People's Republic of China.

## **6.11 Dealing with a party's rejection to submit the "translated text"**

In trademark administrative litigation, if the third party is a foreigner, the plaintiff fails to submit the translated text issued by an institution with translation qualifications and to commission the translation and pay the corresponding fees, and the plaintiff does still not submit the foregoing within a reasonable period of time after explanation, resulting in the failure of service to such foreign party, the complaint may be dismissed.

The translated text specified in the preceding paragraph includes the complaint and the court summons.

## **Part II Relevant Substantial Issues**

### **7. Basic Principles**

#### **7.1 Application of Article 4 of the Trademark Law**

If any trademark applicant obviously lacks the true intention of use and is under any of the following circumstances, this applicant may be determined to violate the provisions of Article 4 of the Trademark Law:

(1) applying for registration of the trademark identical with or similar to that of various subject with certain popularity or higher distinctiveness, which is regarded as a serious circumstance;



(2) applying for registration of the trademark identical with or similar to that of the same subject with certain popularity or higher distinctiveness, which is regarded as a serious circumstance;

(3) applying for registration of the trademark identical with or similar to any other commercial signs other than trademarks of others, which is regarded as a serious circumstance;

(4) applying for registration of the trademark identical with or similar to any name of place, scenic spot, building and others with certain popularity, which is regarded as a serious circumstance;

(5) applying for registration of a large number of trademarks without good reasons.

If the trademark applicant above claims that he has the true intention of use, but fails to present the relevant evidence, this claim shall not be supported.

## **7.2 Application of principle of honesty and trustworthiness**

In an administrative case of trademark rights, any application for registration of the trademark in dispute shall not violate the provisions of Article 7.1 of the Trademark Law.

## **7.3 Components of marks of the trademarks**

The components of the trademark in dispute shall be based on the contents as expressly set out in the trademark registration announcement, the document on application for registration of the trademark, the trademark register or others.

## **7.4 Acceptance of the transferred trademark not affecting determination of relevant clauses**

If an application for registration of the trademark in dispute violates the relevant provisions of the Trademark Law, and the applicant or registrant of the trademark in dispute claims that the trademark in dispute should be registered or remained valid only on the ground that the applicant or registrant has no fault when the trademark transferred, then this claim shall not be supported.

## **7.5 Processing of any registrant being revoked or canceled**

In an administrative case of review of revoked trademark rights and request for invalidation of trademark rights, if the business license of a registrant of the trademark in dispute is revoked or this registrant has been canceled, it is not appropriate to revoke the registration of, or declare the

invalidation of trademark in dispute only based on the reason above.

## **8. Application of Article 10 of the Trademark Law**

### **8.1 General standards of Article 10.1 of the Trademark Law**

If the mark of the trademark in dispute has several meanings or methods of use, and one meaning or method of use makes the public easily believe that this mark falls under the circumstances provided in Article 10.1 of the Trademark Law, this trademark in dispute may be determined to violate the provisions of Article 10.1, without considering the use conditions of the trademark in dispute in general.

### **8.2 Marks containing “the People’s Republic of China”**

The mark of the trademark in dispute contains, but as a whole is not identical with or similar to, the words of the People’s Republic of China and so on, if registration of this mark as a trademark would damage the dignity of China, then this mark may be determined to fall under the circumstances provided in Article 10.1.8.

### **8.3 Marks containing a foreign country name**

The name of a foreign country includes the full or abbreviated name in Chinese and foreign language of this country, and the official documents and others may be used as the basis for determining the foreign country name.

The mark of the trademark in dispute contains, but as a whole is non-identical with or dissimilar to a foreign country name, if registration of this mark as a trademark would harm the dignity of this country, then it may be determined to fall under the circumstances provided in Article 10.1.8.

The following circumstances may be presumed to be “with the consent of such country’s government”, except for evidence to the contrary:

(1) where the party concerned has submitted the documents that this country’s government consents to application for registration of the trademark in dispute;

(2) where the party concerned has submitted the documents that the same applicant has been approved in this country to register the trademark in dispute on the identical goods or services.

#### **8.4 Determination of “fraudulence”**

If the public does not misidentify the quality and other characteristics or origins of the goods or services designated by the trademark in dispute on the basis of their daily life experience and others, this trademark does not fall under the circumstances provided in Article 10.1.7 of the Trademark Law.

#### **8.5 Registration of trademarks using the corporate names**

If a trademark in dispute contains the full or abbreviated name of a company, and there is any substantial difference between the applicant’s entity and the full or abbreviated name, where it is easy for the public to misidentify the sources of goods or services, this trademark may be determined to fall under the circumstances provided in Article 10.1.7 of the Trademark Law.

If the mark of the trademark in dispute is composed only of the full or abbreviated corporate name of the applicant, or its distinctive identification part is only the full or abbreviated corporate name, where this trademark does not fall under the circumstance provided in the preceding paragraph, it may be determined to fall under the circumstances provided in Article 11.1.3, except for trademarks with distinctive characteristics and in line with the commercial practice.

The prerequisite of determination of the full or abbreviated corporate name above is that it is easy for the public to deem the name as the sign indicating the entity identification of a company.

#### **8.6 Judgment factors of “any other adverse effect”**

If the mark of the trademark in dispute or its components could be confirmed to have any negative or adverse effect on the public interests and order of China according to the daily life experience of the public, or the official documents such as dictionaries and reference books, or the common knowledge of the people in the field of religion and others, it may be determined to have “any other adverse effect” provided in Article 10.1.8 of the Trademark Law.

The subjective intention, methods of use, results of damage and others of the party concerned may be taken as the reference factors for determining whether there is “any other adverse effect”.

### **8.7 Time of judgment of “any other adverse effect”**

When examining and judging whether the mark of the trademark in dispute or any of its components has “any other adverse effect”, the examination and judgment shall be subject to the state of facts at the time of application for registration of the trademark in dispute in general. If the state of facts at the time of approval of registration changes, the examination and judgment are subject to the state of facts at the time of registration approval.

### **8.8 Protection of the deceased personalities**

If the mark of the trademark in dispute or any of its components is identical with or similar to the name, portrait or others of a deceased personality in a specific industry or region, as a result of which the public misidentifies the quality, reputation, craftsmanship and other characteristics of the goods or services designated by the trademark in dispute, then this trademark may be determined to fall under the circumstances provided in Article 10.1.7 of the Trademark Law.

If the mark of the trademark in dispute or any of its components is identical with or similar to the name, portrait and others of a deceased personality in the fields such as politics, economy, culture, religion and nation, then this trademark shall be determined to have “any other adverse effect” provided in Article 10.1.8 of the Trademark Law.

### **8.9 Determination of the “standard use of words”**

If the mark of the trademark in dispute or any of its components fails to use Chinese characters or idioms in a standardized manner, which would have any negative or adverse effect on China's cultural education, then this trademark may be determined to have “any other adverse effect”.

### **8.10 Other meanings of trademarks using geographical names**

If the mark of the trademark in dispute or any of its components contains the geographical names of administrative regions of county level or above or overseas geographical names well known by the public, but has other meanings as a whole, then this trademark may be determined to fall outside the circumstances provided in Article 10.2 of the Trademark Law.

The trademarks in dispute under the following circumstances may be determined to have other meanings:

(1) if the trademark in dispute is composed only of a geographical name with other meanings;

(2) if the trademark in dispute contains a geographical name, but can be distinguished from the geographical name as a whole; or

(3) if the trademark in dispute contains a geographical name, and cannot be distinguished from the geographical name as a whole, but it is enough for the public to distinguish it from the geographical name through use.

### **8.11 Judgment of extension registration of the approved trademarks using “geographical names”**

Any trademark using any geographical name that was registered prior to the prohibition by the Trademark Law on the registration or use of any geographical name as trademark shall remain in effect within its original scope of registration.. If the party concerned claims the application for other trademarks based on such trademark with the geographical names, this claim shall not be supported in general.

## **9. Application of Article 11 of the Trademark Law**

### **9.1 Subjects**

When judging whether a trademark in dispute has distinctive characteristics, the subjects shall be the customers in connection with the goods or services designated by this trademark and other business dealers closely related to the marketing of the goods or services above and other relevant public.

### **9.2 Application of clauses**

If a disputed ruling just summarily states that the trademark in dispute falls under the circumstances provided in Article 11.1 of the Trademark Law instead of the specific circumstances provided in first, second or third paragraph of Article 11.1 of the Trademark Law, and the party concerned claims that the applicable law is wrong, this claim may be supported.

### **9.3 Concurrent application of specific clauses**

The first, second or third paragraph of Articles 11.1 respectively provides the circumstances that

the mark of the trademark in dispute has no distinctive characteristics, in determining whether the identical trademark has distinctive characteristics on the identical goods, it is generally not appropriate for concurrent application of specific clauses.

#### **9.4 Determination scope of distinctive characteristics**

If the mark of the trademark in dispute cannot be recognized by the relevant public as the trademark, its designated use will have no distinctive characteristics on any goods.

If a trademark in dispute only describes the quality, quantity and other characteristics of the goods designed by this trademark, then it will have no distinctive characteristics on such goods.

#### **9.5 Determination of distinctiveness of new type trademarks**

When determining whether the mark for color combination or sound, or the three-dimensional mark embodied in the form of the goods' own shape, packaging and decoration has distinctive characteristics or not, there is no need to judge whether such mark is independently created or used at the earliest by the party concerned.

#### **9.6 Determination of other circumstances of lacking distinctive characteristics**

If a trademark in dispute is composed only of advertising slogans, it generally falls under the circumstances provided in Article 11.1.3 of the Trademark Law.

#### **9.7 Determination of “the second meaning”**

If a party concerned claims that the mark of the trademark in dispute obtains distinctive characteristics through use, this trademark may be determined by considering the following factors:

(1) the use of the mark of the trademark in dispute is sufficient to enable it to play a role in identifying the source of the relevant goods;

(2) the time, territory, scope, scale, popularity and others of the use of the mark of the trademark in dispute; and

(3) the conditions on the use of the mark of the trademark in dispute by other business dealers.

If the mark of the trademark in dispute is determined to obtain distinctive characteristics through use, this trademark shall only apply to the goods using such mark other than the similar goods.

### **9.8 Judgment of distinctive characteristics of three-dimensional marks**

If a trademark in dispute contains a three-dimensional mark, it shall be judged as a whole whether the trademark has distinctive characteristics or not. In general, this trademark may not be determined to have distinctive characteristics only because it contains any words, pictures and other factors.

## **10. Application of Article 12 of the Trademark Law**

### **10.1 Functions of three-dimensional marks**

If the three-dimensional mark which the party concerned applies for registering as the trademark is composed only of a shape arising from the characteristics of the goods or a shape of the goods required to obtain technical results or a shape which gives the goods substantial value, then this mark may be determined to fall under the circumstances provided in Article 12 of the Trademark Law, without considering the use of such three-dimensional mark.

### **10.2 A shape arising from the characteristics of the goods**

The shape which must be adopted or generally adopted in order to obtain the inherent purposes, functions, uses, effects and others of the goods shall be the shape arising from the characteristics of the goods.

### **10.3 A shape required to obtain technical results of the goods**

The shape necessary to achieve the specific technical parameters, indicators and others shall be the shape of goods required to obtain technical results.

### **10.4 A shape which gives the goods substantial value**

The appearance, shape and others of the goods which affect the consumers' willingness to purchase shall be the shape which gives the goods substantial value.

## **11. Application of Article 13 of the Trademark Law**

### **11.1 Proof of the well-known trademarks**

If a party concerned claims that a prior trademark constitutes the well-known trademark, it shall generally submit the evidence that this trademark has been in the well-known state prior to the date of application for the trademark in dispute.

If the evidence, formed after the date when a party concerned files an application for the trademark in dispute, is sufficient to prove that the prior trademark has been in the well-known state prior to the date of application for the trademark in dispute, this evidence may be accepted.

### **11.2 Protection of the well-known trademarks**

The application of the provisions of Article 13.3 of the Trademark Law shall take into account the following prerequisites:

(1) a reference trademark has been in the well-known state prior to the date of application for the trademark in dispute;

(2) a trademark in dispute constitutes a replication, imitation or translation of a well-known trademark; and

(3) the registration of a trademark in dispute easily misleads the public, as a result of which the interests of the owner of the well-known trademark are damaged.

If any of prerequisites as set out in the preceding paragraph is not met, it is not necessary to identify other prerequisites.

### **11.3 Protection scope of the well-known trademarks**

The determination of the protection scope of a well-known trademark may comprehensively take into account this trademark's distinctiveness, popularity, the similar degree of marks of the trademarks, the details of goods designed, the degree of overlap and attention of the relevant public, the subjective state of the applicants of the trademark in dispute and other factors.



#### **11.4 Applicable circumstances of Article 13.3 of the Trademark Law**

The following circumstances shall belong to those provided in Article 13.3 of the Trademark Law:

(1) an application for registration of a trademark in dispute on non-identical or dissimilar goods is a replication, imitation or translation of a reference trademark, which is sufficient for the relevant public to misidentify the source of the goods using the reference trademark and the trademark in dispute or believe that there are specific relations such as the licensed use and affiliates between the business dealers using the reference trademark and the trademark in dispute; and

(2) an application for registration of a trademark in dispute on non-identical or dissimilar goods is a replication, imitation or translation of a reference trademark, which is sufficient for the relevant public to believe that there is a considerable degree of relations between the trademark in dispute and the reference trademark to weaken the distinctiveness of, derogate or improperly use the market reputation of the reference trademark.

#### **11.5 Well-known state**

A prior trademark may not be determined to have been in the well-known state under any of the following circumstances:

(1) a party concerned has a long history of operations and high popularity, but fails to prove that the prior trademark has been well known by the relevant public in China; or

(2) the prior trademark has high popularity in other countries or territories, but fails to be well known by the relevant public in China pursuant to the actual use prior to the date of the application for the trademark in dispute.

#### **11.6 Determination of replications, imitations or translations**

If the mark of the trademark in dispute is identical with or has no visual difference basically with that of another person's well-known trademark, this trademark in dispute shall constitute a replication.

If the mark of the trademark in dispute uses any distinctive part or characteristics of another

person's well-known trademark, this trademark in dispute shall constitute an imitation.

If another person's well-known trademark is expressed in the mark of the trademark in dispute in a different language which has established a corresponding relation with another person's well-known trademark and is widely known or usually used by the relevant public, this trademark in dispute shall constitute a translation.

#### **11.7 Rule Conversion of the well-known trademarks**

Subject to the following conditions, if TRAD makes a disputed ruling by applying Article 30 or 31 of the Trademark Law and supports the application made by the party concerned, where the party concerned claims that TRAD wrongly applies legal provisions, then this claim shall not be supported:

(1) the application for registration of a trademark in dispute made by the party concerned on the identical or similar goods pursuant to the provisions of Article 13.3 of the Trademark Law is not approved or is declared invalid;

(2) the party concerned does not expressly claim that the application for registration of a trademark in dispute violates the provisions of Article 30 or 31 of the Trademark Law;

(3) the substantial reason why the application for registration of a trademark in dispute by the party concerned is not approved or is declared invalid is that the relevant public might well confuse the sources of goods designed by the trademark in dispute and the reference trademark;

(4) the party concerned claims that the application for invalidation of the trademark in dispute does not exceed the five-year period provided in Article 45.1 of the Trademark Law.

#### **11.8 Protection of the registered well-known trademarks on the identical category of goods**

If a trademark in dispute exceeds more than five years since its registration, and the owner of a well-known trademark claims that the trademark in dispute on the identical or similar goods should be declared invalid pursuant to the provisions of Article 13.3 of the Trademark Law, then this claim may be supported.

## **12. Application of Article 15 of the Trademark Law**

### **12.1 Determination of “without authorization”**

If a principal or an entrusting party does not explicitly express its intention to agree its agent or representative to apply for registration of the trademark in dispute, this circumstance shall be “without authorization” provided in Article 15.1 of the Trademark Law.

If a principal or an entrusting party is aware of the application for registration of the trademark in dispute, meanwhile does not raise any objection, then the principal or the entrusting party may not be generally presumed to agree its agent or representative to apply for the trademark in dispute.

### **12.2 “Trademarks of the principal or the entrusting party”**

The trademark already registered or applied for by the principal or the entrusting party prior to the date of application for the trademark in dispute is not “a trademark of the principal or the entrusting party” provided in Article 15.1.

Whether the principal or the entrusting party actually uses this trademark is not a prerequisite of determination by Article 15.1 of the Trademark Law.

### **12.3 Applicable prerequisites**

If the trademark which is applied for registration by the agent or the representative without authorization and its designated goods are identical with or similar to the trademark of its principal or entrusting party and the designated goods, then this is one of circumstances provided in Article 15.1 of the Trademark Law.

### **12.4 Applicable subjects**

If an applicant of the trademark in dispute has family ties with “the agent or the representative” provided in Article 15.1 and “the applicant” provided in Article 15.2, or is the legal representative of the company to which “the agent or the representative” or “applicant” belongs, this applicant constitute an applicable subject provided in Article 15 of the Trademark Law.

## **12.5 Judgment of “earlier used”**

If a trademark is used only in other countries or regions, this use does not fall under the “earlier used” circumstances provided in Article 15.2 of the Trademark Law.

The scale, time and the popularity of use of the trademark and other factors do not affect the judgment of the “earlier used”.

## **12.6 Judgment of the evidence of “earlier used”**

If a party concerned claims to protect the “earlier used” trademark, it shall submit the evidence of this trademark use in China prior to the date of application for the trademark in dispute, and the evidence of this trademark use in other countries or regions or of such trademark to be used in China may be in addition to the proof of “earlier used”.

## **12.7 Determination of “other relations”**

If an applicant of the trademark in dispute has with a prior user any relation (other than the agency or representative relation) that the applicant is able to be aware of existence of another person’s trademark and should actively avoid same, this relation falls under the circumstances of “other relations” provided in Article 15.2.

## **12.8 Exceptions to Article 15 of the Trademark Law**

If an applicant of the trademark in dispute can prove by evidence that it firstly uses the trademark in dispute before the formation of the agency or representative relation, it may be determined to fall outside the circumstances provided in Article 15.1 of the Trademark Law.

If an applicant of the trademark in dispute can prove by the evidence that it uses the trademark in dispute earlier than “another person” provided in Article 15.2, it may be determined to fall outside the circumstances provided in Article 15.2.

## **13. Application of Article 16 of the Trademark Law**

### **13.1 Determination of “misleading the public”**

If the application for a trademark in dispute is easy for the relevant public to misidentify the true

origin of goods using this trademark, this trademark falls under the circumstances provided in Article 16.1 of the Trademark Law.

### **13.2 “Trademarks containing geographical indications of the goods”**

If a trademark in dispute contains the whole of geographical indication or the main identification part of a geographical indication, as of result of which the relevant public easily misidentifies the true origin of the goods using this trademark, it shall constitute one of “trademarks containing geographical indications of the goods”.

### **13.3 Application subjects**

If any group or association established to protect geographical indications or aiming at protecting geographical indications believes that a trademark in dispute violates the provisions of Article 16.1 of the Trademark Law, it can file an application.

Any producer or business dealer of the goods using such geographical indications may file an application as an interested party.

### **13.4 Prior protection principles of the country of origin**

If a foreign person claims that an application for registration of the trademark in dispute violates the provisions of Article 16.1 of the Trademark Law and thus this trademark should not be registered or be invalid, then it shall provide the certificate proving that the relevant geographical indication in its name is protected by the laws of its country of origin.

### **13.5 Confusion**

If an application for registration of the original trademark is followed by the collective trademark or the certification trademark containing a geographical indication, then the factors such as the objective existence of this geographical indication or its popularity, distinctiveness and the perception of the relevant public may be comprehensively considered to judge whether the relevant public might well confuse the sources of the goods or services; if an application for registration of the collective trademark or the certification trademark containing a geographical indication is followed by the original trademark, we can, from the perspective of improperly adhering to the popularity of this geographical indication, judge whether the relevant public might well confuse the

sources of the goods or services.

### **13.6 Application of the well-known trademark protection**

If a collective trademark or certification trademark containing a geographical indication has been in the well-known state, Article 13.3 of the Trademark Law may apply for purpose of protecting this trademark.

If an application for registration of the collective trademark or the certification trademark containing the geographical indication filed by a party concerned pursuant to Article 13.3 of the Trademark Law is not approved or is declared invalid, then the factors such as the objective existence of this geographical indication or its popularity, distinctiveness and the perception of the relevant public may be comprehensively considered to determine whether the registration of the collective trademark or the certification trademark containing the geographical indication misleads the public and would harm the interests of the registrant of the ordinary trademark.

### **13.7 Geographical indication registered as ordinary trademarks**

If the applicant or registrant of a trademark in dispute applies for registration of the whole of a geographical indication or its main identification part as a trademark other than the collective trademark or the certification trademark, Article 16.1, 10.2 or 11.1 of the Trademark Law may apply when hearing this case.

### **13.8 Erroneous determination of geographical scope**

If the geographical scope indicated by the applicant of a collective trademark or certification trademark containing the geographical indication in the application document is inconsistent with the actual place of origin, Article 16.1 and other clauses of the Trademark Law may apply when hearing this case.

### **13.9 Application of legal provisions**

If a party concerned claims that another person's application for registration of a certification trademark or collective trademark containing the geographical indication violates the provisions of Article 16.2 of the Trademark Law and therefore this trademark should not be approved or be declared invalid, the contents ("any trademark to be registered which does not comply with the

relevant provisions of this Law”) of Article 30 of the Trademark Law shall apply when hearing this case.

## **14. Application of Article 19.4 of the Trademark Law**

### **14.1 Determination of trademark agents**

The subjects filed and engaging in the trademark agency business, and the subjects recorded in the business license and engaging in the trademark agency business, and the subjects not filed but actually engaging in the trademark agency belong to “the trademark agencies” provided in Article 19.4 of the Trademark Law, and the business items recorded in the business license may not be taken as the basis for exceptions to determination of “the trademark agents” in general.

### **14.2 Determination of trademark agency business**

As entrusted by the entrusting party, the agent handles the application for registration of trademarks, trademark review and other trademark matters in the name of the agent, including trademark registration application, change, renewal, transfer, objection, revocation, review and infringement complaint, offer of legal trademark consulting service, acting as the legal trademark consultant and agency of other trademark affairs, all of which belong to the trademark agency business.

### **14.3 Transfer of the trademarks in dispute not affecting the subject determination**

In procedures of trademark review, if a trademark in dispute is transferred from a trademark agent to a non-trademark agent, Article 19.4 of the Trademark Law may apply when hearing such case.

### **14.4 Scope determination of application for registration of the trademarks in dispute**

The “agency service” is limited to the service items in No. 4506 similar group of the Category 45 of the Similar Goods and Services Classification Table.

Except for the trademark agency service, the trademark agents apply for registration of the trademarks on other categories of goods and services, these applications shall not be supported.

## **15. Application of Articles 30 and 31 of the Trademark Law**

### **15.1 Restrictions on extension of trademark registration**

After the registration of the prior trademark of the applicant of the trademark in dispute and before application for the trademark in dispute, if another person registers for the identical category of goods or similar goods a trademark which is identical with or similar to the trademark in dispute, is continuously used and has certain popularity, but the applicant of the trademark in dispute is unable to prove that such prior trademark has been used or has certain popularity through use and does not easily create confusion for the public, where the applicant of the trademark in dispute claims that the registration for such trademark shall be approved, this claim may not be supported.

### **15.2 Principles of similar trademark judgment**

Articles 30 and 31 of the Trademark Law may apply by comprehensively considering the factors such as the similar degree of marks of the trademarks and the goods, the distinctiveness and popularity of the reference trademark, the degree of attention of the relevant public and the subjective intention of the applicant of the trademark in dispute, and the interaction between the factors above, and based on whether it is easy to create confusion for the relevant public.

If the marks of two trademarks and their designated goods are identical, the above may be directly determined to violate the provisions of Articles 30 and 31 of the Trademark Law, without considering other factors.

If the whole of reference trademark or its distinctive identification part is taken as a component of the trademark in dispute, these trademarks may be determined to have similar marks.

### **15.3 Similar trademark judgment in administrative cases of review of the rejected trademark application**

In an administrative case of review of the rejected trademark application, the similar degree between marks of the trademark in dispute and the reference trademark and other factors are mainly taken the basis for determining whether the trademark in dispute is similar to the reference trademark. The market popularity of the trademark in dispute may not be considered.



#### **15.4 Similar trademark judgment in the administrative cases of review of the unapproved trademark registration and request for invalidation**

In an administrative case of review of the unapproved trademark registration and request for invalidation, if the applicant for the trademark in dispute is not malicious subjectively, and the trademark in dispute and the reference trademark are coexisted for a long time based on specific historical reasons, and a party concerned claims that the relevant public do not confuse two trademarks, then these trademarks may be determined to be dissimilar with each other.

The factors such as the evidence provided by the applicant of the trademark in dispute and the owner of the reference trademark and the subjective state of the registrant of the application for the trademark in dispute may be comprehensively considered to determine whether the trademark in dispute is similar to the reference trademark.

#### **15.5 Market research reports**

A party concerned may submit the market research reports to prove that both the trademark in dispute and the reference trademark are dissimilar with each other, but these reports lacking the truthfulness and science basis may not be accepted.

#### **15.6 Conditions for application of Articles 30 and 31 of the Trademark Law**

In an administrative case of trademarks, the date of application for the trademark in dispute should be taken as the basis for determining that the registration of reference trademark has been approved, preliminarily validated or applied earlier.

If the date of application for the reference trademark is earlier than the trademark in dispute, but the registration of reference trademark has not been approved or preliminarily validated prior to the date of application for the trademark in dispute, even though the registration of reference trademark has been approved or preliminarily validated when TRAD makes a disputed ruling, then Article 31 of the Trademark Law shall apply when determining whether both the trademark in dispute and the reference trademark are similar with each other.

#### **15.7 Cancellation of owners of reference trademarks**

In an administrative case of trademarks, if the owner of a reference trademark is canceled and

there is no any evidence to prove that a successive subject exists, this trademark may be determined to be dissimilar to others.

### **15.8 Judgment of similarity between Chinese and foreign trademarks**

The similarity between Chinese and foreign trademarks can be judged by comprehensively taking into account the following factors:

- (1) the degree of cognition of the foreign language meaning by the relevant public;
- (2) the relevance or correspondence such as meanings, pronunciation and so on between Chinese and foreign trademarks;
- (3) the distinctiveness, popularity and methods of use of the reference trademark;
- (4) the actual use conditions of the trademark in dispute.

### **15.9 Comparison of three-dimensional trademarks**

When judging the similarity of a three-dimensional trademark, this judgment generally compare the three-dimensional trademark as a whole, rather than only comparing words and pictures in such trademark with those in the earlier registered trademark.

### **15.10 Attributes of coexistence agreements**

When judging whether the trademark in dispute is similar with the reference trademark, the coexistence agreements may be used as prima facie evidence to exclude confusion.

### **15.11 Formal prerequisites of coexistence agreements**

The owner of the reference trademark shall agree with application for registration of the trademark in dispute inwritten, and expressly states the specific information of the trademark in dispute, but the co-existence agreements with conditions or periods shall not be accepted in general.

The coexistence agreements shall be true, legal and valid, and not harm the interests of the state, the public and the third party, otherwise they shall not be accepted.

### **15.12 Legal effects of coexistence agreements**

If the marks of the reference trademark and the trademark in dispute are identical or substantially identical with each other, and used on the identical category of goods or similar goods, coexistence agreements shall not be only taken as the basis for approving the application for registration of the trademark in dispute.

If the marks of the reference trademark and the trademark in dispute are similar with each other and used on the identical category of goods or similar goods, and the owner of the reference trademark issues a coexistence agreement, in the event that there is no any other evidence to prove that the coexistence of two trademarks above is sufficient to make the relevant public confusing the sources of goods, then these two trademarks may be determined to be dissimilar with each other.

If after issuing a coexistence agreement, the owner of the reference trademark raises an objection on unapproved registration or request for invalidation on the ground that the trademark in dispute is similar to the reference trademark, then this objection or request shall not be supported, unless such coexistence agreement is invalid or canceled.

### **15.13 Determination of similar goods**

In an administrative case of review of rejected application for trademarks, the Similar Goods and Services Classification Table at the time of hearing this case shall be generally taken as the basis for judging whether to constitute similar goods or services.

In an administrative case of review of unapproved trademark registration and request for validation of trademark rights, the Similar Goods and Services Classification Table at the time of hearing this case may be taken as the reference for judging whether to constitute similar goods or services.

### **15.14 Determination of subjective malice**

When judging whether the applicant of the trademark in dispute has the subjective malice, the following factors shall be taken into account:

- (1) the reference trademark has distinctiveness and popularity;

(2) the business place of the applicant of the trademark in dispute is adjacent to that of the owner of the reference trademark;

(3) the applicant of the trademark in dispute and the owner of the reference trademark belong to the same industry; and;

(4) the mark of the trademark in dispute is substantially identical with that of the reference trademark and the applicant of the trademark in dispute does not give reasonable explanations.

## **16. Application of Article 32 of the Trademark Law**

### **16.1 Scope of the prior rights**

If a party concerned claims its legitimate prior rights and interests pursuant to Article 6 of the Anti-unfair Competition Law, then Article 32 of the Trademark Law may apply when hearing this case.

The law providing the prior rights shall be generally taken as the basis for determining whether the application for registration of the trademark in dispute violates the prior rights of others.

### **16.2 Start time of the prior rights**

If a party concerned claims that the application for registration of the trademark in dispute violates its “prior rights”, it shall prove by evidence that the prior rights have legally existed prior to the date of application for the trademark in dispute.

If the prior rights do not exist at the time of approval of registration of the trademark in dispute, the prior rights will not affect the registration of the trademark in dispute.

### **16.3 Prior copyright of foreigners**

If a foreigner claims that the application for registration of the trademark in dispute violates its prior copyright, Article 2 of the Copyright Law shall apply.

### **16.4 Determination of damage to prior copyright**

The determination of the damage of the application for registration of the trademark in dispute

to the prior copyright of the party concerned shall take into account the following prerequisites:

- (1) the work involved constitute the object protected by the Copyright Law;
- (2) the party concerned is the copyright owner or the interested party of the work involved;
- (3) the application for the trademark in dispute may have access to the work involved prior to the date of application for the trademark in dispute;
- (4) the mark of the trademark in dispute is substantially similar to the work involved.

If any of prerequisites as set out in the preceding paragraph is not met, it is not necessary to identify other prerequisites.

#### **16.5 Determination of works**

Any intellectual achievements which lack originality shall not be determined as works.

The simple common graphics, letters and others are not determined as works generally.

#### **16.6 Works exceeding the protection term**

If a party concerned claims its copyright in connection with the work exceeding the term of protection provided in the Copyright Law at the time of application for registration of the trademark in dispute, this claim shall not be supported.

In determining whether the mark of the trademark in dispute is substantially similar to the work in involved, the expression having entered the public domain and jointly used by both the mark and the work above will not be considered.

#### **16.7 Determination of prior copyright ownership**

The copyright-related manuscript, original, legal publication, copyright registration certificate prior to the date of application for the trademark in dispute, the certificate issued by the certification authority, the contract for obtaining the rights and others provided by the party concerned may be taken as the prima facie evidence for determining the ownership of prior copyright, unless the applicant of the trademark in dispute presents the evidence to the contrary.

### **16.8 Qualifications determination of the interested parties**

If a party concerned claims that it is entitled to file an application as an interested party of the prior copyright pursuant to the trademark announcement, trademark registration certificate and so on, this claim may be supported.

### **16.9 Effect of originality on determination of “substantial similarity”**

If there is no basically visual difference between the mark of the trademark in dispute and a work with the less originality, the mark may be determined to be substantially similar to the work.

### **16.10 Defense of no damage to prior copyright**

If a party concerned claims that the application for registration of the trademark in dispute does not harm the prior copyright of another person, this claim may be supported if:

(1) the identical or similar part between the trademark in dispute and the work involved belongs to the information of public material and domain;

(2) the reason why the trademark in dispute and the work involved are identical with or similar to each other is that they implement the common standard or the expression forms are limited; or

(3) the identical or similar part between the trademark in dispute and the work involved is sourced from the works of the persons unconcerned, and the completion time of creation of works is earlier than the work involved.

### **16.11 Scope of prior copyright protection**

If a party concerned claims that registration of the trademark in dispute shall not be approved or be declared invalid on the ground of damage to the prior copyright, the categories of the goods or services designated by the trademark in dispute shall not be considered.

### **16.12 Specific interests of protection of name rights**

If a party concerned claims that the application for registration of the trademark in dispute violates his/her prior name rights, it shall generally prove by evidence that the applicant of the trademark in dispute is aware of his/her name and applies for registration of the trademark by

misappropriation, fraudulent use or other means.

If the relevant public is inclined to believe that the goods using the trademark in dispute have the license or other specific relation with the natural person above, this trademark may be determined to fall under the circumstances provided in Article 32 of the Trademark Law.

### **16.13 Scope of the name**

The name includes the name used in the household registered, alias, pen name, stage name, poetic name, nickname and so on.

The subject identification expression which can establish a correspondence with a specific natural person may be deemed as the name of this natural person.

### **16.14 Effect of the reputation of a natural person on the name right**

A natural person's reputation is not a precondition for protecting his/her name right, but can be taken as a reference factor to determine whether the relevant public could establish a corresponding relation between a name and a specific natural person.

### **16.15 Protection of portraiture right**

If a party concerned claims that an application for registration of the trademark in dispute harms his/her portraiture right, he/she shall prove by evidence that the mark of the trademark in dispute has the sufficient personality features to enable the relevant public to believe that this trademark in dispute is corresponding to a specific natural person, as a result of which a stable correspondence is formed between this trademark and this natural person, and the relevant public thinks the goods with this trademark has the license and other specific relations with this natural person.

The silhouette of the human figure does not contain the identifiable personality features of a specific natural person, if a party concerned claims that a trademark harms its prior portraiture right based on the silhouette, this claim shall not be supported.

### **16.16 Determination of prior corporate name right**

If the short name or trade name of an enterprise has certain popularity and has established a stable correspondence with a party concerned, and the use does not violate the will of the party

concerned, the party concerned may claim its prior corporate name right based on the reasons above.

#### **16.17 Protection of foreign corporate names**

If a foreign company's corporate name, trade name or its usual transliteration has been used commercially in China, has had certain popularity and has been well known by the relevant public prior to the date of application for the trademark in dispute, then the party concerned may claim its prior corporate name right based on the reason above.

#### **16.18 Expression of “commercialized” rights and interests**

In the case that the law does not provide the “commercialized” rights and interests, it is not appropriate to directly use the “commercialized” rights and interests and other titles in the judgments.

#### **16.19 Restrictions on determination of “commercialized” rights and interests**

If the contents of “commercialized” rights and interests claimed by a party concerned can be protected as the name right, portraiture right, copyright, the product (service) name with certain impacts and other rights or interests expressly provided in laws, it is not appropriate to determine the “commercialized” rights and interests claimed by the party concerned.

If other specific clauses other than Article 32 (“Prior Rights”) of the Trademark Law are insufficient to provide relief to the party concerned, and the “commercialized” rights and interests cannot be protected on the basis of the circumstances provided in the preceding paragraph, when the specific conditions are met, the “commercialized” rights and interests may be protected according to Article 32 (“Prior Rights”) of the Trademark Law as claimed by the party concerned, but shall be determined generally pursuant to the provisions of Article 6 of the Anti-unfair Competition Law.

#### **16.20 Determination of “specific conditions”**

When determining a “protected object” falls under the “specific conditions” provided in Article 16.19 of these Trial Guidelines, the “protected object” shall fall under the following circumstances at the same time:

- (1) the “protected object” is the name of a work, the role name of a work, etc.;



(2) the “protected object” has certain popularity prior to the date of application for the trademark in dispute;

(3) the applicant registrant of the trademark in dispute is subjectively malicious;

(4) the mark of the trademark in dispute is identical with or similar to the “protected object”;  
and

(5) the goods designated by the trademark in dispute fall under the scope involved in the popularity of the “protected object”, as a result of which the relevant public might well wrongly believe that the trademark in dispute is permitted by the owner of the “protected object” or has specific relations with the owner.

#### **16.21 Application of malicious rush registration only to “unregistered trademarks”**

Article 32 of the Trademark Law provides that an applicant, by improper means, forestall the registration of a trademark that is already in use by another person and has certain influence, among which, the “trademark” means the “unregistered trademark”, including the trademarks whose registration application has not been filed or which has become invalid prior to the date of application for the trademark in dispute.

#### **16.22 Applicable prerequisites of malicious rush registration**

If an application for registration of the trademark in dispute is determined to fall under the circumstances of “use of improper means to forestall the registration of a trademark that is already in use by another person and has certain influence”, the trademark in dispute shall fall under the following circumstances at the same time:

(1) the unregistered trademark is already in use and has certain influence prior to the date of application for registration of trademark in dispute;

(2) the trademark in dispute is identical with or similar to the unregistered trademark in prior use;

(3) the goods designated by the trademark in dispute is the identical category with or similar to those designated by the unregistered trademark in prior use; and

(4) the applicant of the trademark in dispute knows or should have known the trademark which is in prior use by another person.

If the applicant of the trademark can prove by evidence that it does not maliciously use the good will of the trademark in prior use by another person, its application shall fall outside the circumstances set out in the preceding paragraph.

#### **16.23 Determination of “know or should have known”**

The following factors may be comprehensively considered to determine that whether the applicant of the trademark in dispute knows or should have known the unregistered trademark of another person:

(1) the applicant of the trademark in dispute and the prior trademark user contacted with each other with respect to the trademark license, transfer and otherwise;

(2) upon determination by the relevant organ, the applicant of the trademark in dispute has infringed upon trademark rights;

(3) the applicant of the trademark in dispute and the prior trademark user belong to the same industry; and

(4) the trademark in dispute is highly similar to the prior trademark with higher distinctiveness.

#### **16.24 Judgment of “already in use”**

If a party concerned makes the “unregistered” trademark claimed by it playing the role in identifying the sources of goods through commercial advertising, production and management activities, the “unregistered trademark” shall fall under the circumstance of “already in use” provided in Article 32 of the Trademark Law.

If the relevant publicity has established a connection between the “unregistered trademark” and the party concerned, which does not violate the subjective will of the party concerned, the “unregistered trademark” may be determined to fall under the circumstance of “already in use”.

## **16.25 Judgment of “certain influence”**

If a party concerned proves by evidence that the popularity of its prior unregistered trademark is sufficient to enable the applicant of the trademark in dispute to know or should have known existence of the prior unregistered trademark, the prior unregistered trademark may be determined to have “certain influence”.

If the evidence of the prior unregistered trademark provided by the party concerned, including the duration of use, region, sales or advertising, is sufficient to prove that the prior unregistered trademark is known by the relevant public within certain scope, then the prior unregistered trademark may be determined to have “certain influence”.

## **16.26 Determination of pure export behavior**

If the goods using the prior unregistered trademark are directly exported without being circulated in China, and a party concerned claims that the application for registration of the trademark in dispute should fall under the circumstances of “use of improper means to forestall registration of a trademark which is already in use by another person or have certain influence” provided in Article 32 of the Trademark Law, this claim shall not be supported.

## **17. Application of Article 44.1 of the Trademark Law**

### **17.1 Determination of “fraud”**

An application under the following circumstances may be determined to fall under the circumstances of “obtained by fraud” provided in Article 44.1 of the Trademark Law:

(1) the applicant of the trademark in dispute has the subjective willingness to make the administrative organ having misconceptions by fraud;

(2) the applicant of the trademark in dispute obtains the trademark registration from the competent trademark administrative organ by deceptive means; and

(3) the administrative acts taken by the administrative organ with misconceptions are based on the acts of the applicant of the trademark in dispute, and there is a direct causal relation between such two acts.

## **17.2 Determination of “other improper means”**

“Other improper means” mean the acts that disrupt the trademark registration order, harm public interests, improperly occupy public resources or seek illegitimate interests in ways other than the fraud for the purpose of obtaining the registration of the trademark in dispute, including the acts taken by the applicant of the trademark in dispute to forestall registration of others’ trademarks with certain market popularity in large-scale and extensive manners.

An application meeting the following prerequisites may be determined to fall under the circumstances of “obtained by other improper means” provided in Article 44.1 of the Trademark Law:

(1) the applicable subject is the application registrant of the trademark in dispute, unless there is evidence to prove that the registrant and the applicant of the trademark in dispute have a specific relation, or there is a meaning connection for the application of registration of the trademark in dispute;

(2) the applicable object includes the registered trademark and the trademark under application;

(3) the application disrupts the trademark registration order, harms the public interests, improperly occupies the public sources or otherwise seeks illegitimate interests;

(4) the trademark may not only violate certain civil law rights and interests.

## **17.3 Determination of specific circumstances of “other improper means”**

A trademark under any of the following circumstances may be determined to fall under the circumstances that “the registration is obtained by other improper means” provided in Article 44.1 of the Trademark Law:

(1) the applicant of the trademark in dispute applies for registration of multiple trademarks which are identical with or similar to others’ trademarks with the higher distinctiveness or popularity, including the application for registration of trademarks of the different owners on the identical or similar goods or services and also the application for registration of trademarks of the same owner on the non-identical or dissimilar goods or services;

(2) the applicant for the trademark in dispute applies for multiple trademarks which are identical with or similar to any other corporate names, names of social organization, the names, packaging, decoration and commercial signs of goods with certain influence; or

(3) the applicant of the trademark in dispute sells the trademark, or file a bring infringement lawsuit against the users of the prior trademark after failing to transfer at a high price.

#### **17.4 Exceptions to specific circumstances of “other improper means”**

If an applicant of the trademark in dispute is under the circumstances provided in Article 17.4 of these Trial Guidelines, but the trademark in dispute is earlier applied and there is evidence to prove that the applicant of the trademark in dispute has a true intention to use such trademark and actually puts it into commercial use, then the trademark in dispute may, according to the specific circumstances, be determined to fall outside the circumstances of “the registration is obtained by other improper means”.

#### **17.5 Restrictions on application of the “other improper means”**

When hearing an administrative case of review of unapproved registration and request for invalidation of trademark rights, if the application of the party concerned can be supported by applying other clauses of the Trademark Law according to the documented evidence, Article 44.1 of the Trademark Law shall not apply.

### **18. Application of Article 45 the Trademark Law**

#### **18.1 Attributes determination of Article 45 of the Trademark Law**

The first, second and third paragraphs of Article 45 of the Trademark Law are procedural clauses.

#### **18.2 Determination of “five-year period”**

The “within five years from the date of trademark registration” provided in Article 45.1 of the Trademark Law means the five-year period following the date when the registration of the trademark in dispute is announced, and this period shall not apply to the suspension, interruption and others.

From the next date of announcement of the registration of the trademark in dispute, the

applicant may file an application for invalidation pursuant to the provisions of Article 45.1 of the Trademark Law.

### **18.3 Applicants of beyond the “five-year” period**

The “owners of well-known trademarks” provided in Article 45.1 of the Trademark Law do not cover the interested parties of the well-known trademarks.

### **18.4 Determination of “malicious registration”**

The determination of “malicious registration” provided in Article 45.1 of the Trademark Law may take into account the following factors:

- (1) the trademark in dispute is highly similar to the prior well-known trademark;
- (2) the prior well-known trademark has higher distinctiveness and popularity;
- (3) the goods designated by the trademark in dispute are highly connected with the prior well-known trademark;
- (4) the applicant of the trademark in dispute has trade dealings or cooperation with the owner of the prior well-known trademark;
- (5) the applicant of the trademark in dispute and the owner of the prior well-known trademark are at the same territory;
- (6) other disputes occurred between the applicant of the trademark in dispute and the owner of the prior well-known trademark, which sufficiently enable the applicant to know this trademark in dispute;
- (7) the applicant of the trademark in dispute has internal personnel exchanges with the owner of the prior well-known trademark;
- (8) after the applicant of the trademark in dispute applies for registration of such trademark, the applicant attaches such trademark to the good will of the prior well-known trademark;
- (9) the applicant of the trademark in dispute applies for registration of a large number of trademarks of others with higher distinctiveness and popularity.

## **19. Application of Article 49.2 of the Trademark Law**

### **19.1 Judgment of generalization of registered trademarks**

When determining whether a trademark in dispute is the generic name of the goods, the mark of the trademark shall be examined as a whole, and the specific goods designated by the generic name shall be determined, without considering the commodities similar to such goods.

If a party concerned claims that the trademark in dispute becomes a generic name of the goods, it may prove its claim by submitting the evidence such as dictionaries, reference books, national or industrial standards, the certificates issued relevant industrial organizations, market research reports, publicity and use on the market and the use of the mark of such trademark by other manufacturers of the identical goods.

### **19.2 Time point judgment of generalization of registered trademarks**

When determining whether the trademark in dispute is a generic name, this determination shall be generally judged from the status of facts when the party concerned applies for revocation with the trademark cancellation review department, with the status of facts at the time of review as reference.

### **19.3 Application of new and old laws**

In an administrative case of review of revoked trademark rights, if the designated three-year period straddles May 1, 2014, the Trademark Law revised in 2001 shall apply in terms of substantive law.

### **19.4 Determination of the use**

If a party concerned claims to maintain the registration of the trademark under any of the following circumstances, this claim shall not be supported:

(1) where the party concerned only uses the trademark in dispute on the similar goods or services beyond the approved scope;

(2) where the party concerned uses the trademark in dispute, but fails to play a role in distinguishing the sources of goods or services; or

(3) where the party concerned symbolically and accidentally uses the trademark in dispute for maintaining registration of such trademark.

#### **19.5 Determination of “illegal” use**

If the trademark use clearly violates the provisions on prohibition use of the Trademark Law and other laws, this use may not be determined as the trademark use.

#### **19.6 Determination of use subjects**

For the “has not been used for three years consecutively” provided in Article 49.2 of the Trademark Law, the “use” subjects include the trademark owners, trademark licensees and any other persons whose use does not violate the use willingness of the trademark owner.

If a trademark owner has explicitly expressed that it does not recognize the use of the trademark in dispute by another person, but recognizes such use in an administrative case of review of revocation of trademark rights, this circumstance may not be determined as the “use”.

#### **19.7 Determination of nonstandard goods**

If the actually used or approved goods are not the titles of standard goods or services provided in the Similar Goods and Services Classification Table, the determination of the category of the specific goods shall comprehensively take into account those goods’ functions, use, production department, consumption channels and consumer groups as well as the effects of the market factors (including consumption habits, production patterns, industry management needs) on the nature or title of the goods.

#### **19.8 Determination of actually used nonstandard goods constituting the use of the approved goods**

If actually used goods are not the titles of standard goods or services provided in the Similar Goods and Services Classification Table, but such goods are the identical with those approved by the trademark in dispute, both categories of goods are different only in name, or the actually used goods belong to the subordinate concept of the approved goods, this use may be determined to the use of the approved goods.



The determination of the identical goods may comprehensively take into account the physical attributes, commercial features and the principles and standards of the Similar Goods and Services Classification Table on the goods classification and other factors.

### **19.9 Maintenance of trademark registration scope**

If a trademark in dispute on the approved goods constitutes the use, the registration of the trademark on other approved goods similar to such goods may be maintained.

The similar goods referred to in preceding paragraph shall be judged strictly in accordance with the functions, use, production department, consumption channels and consumer groups of goods, and generally determined according to the Similar Goods and Services Classification Table.

### **19.10 Effect of classification table changes on judgment of similar goods**

If the goods approved but not actually used are dissimilar to the actually used goods according to the Similar Goods and Services Classification Table when the registration of the trademark in dispute is approved, but two categories of goods are similar at the time of the case trial due to the changes in the Similar Goods and Services Classification Table, then the registration of the goods not actually used may be maintained by taking the status of the facts at the time of the case trial as the basis.

If the goods approved but not actually used are similar with the actually used goods according to the Similar Goods and Services Classification Table when the registration of the trademark in dispute is approved, but two categories of goods are dissimilar at the time of the case trial due to the changes in the Similar Goods and Services Classification Table, then the registration of the goods not actually used may be maintained by taking the status of the facts at the time of registration approval as the basis.

### **19.11 Determination of trademark in dispute attached to the others' trademarks**

If the goods using the trademark of another person is affixed with the trademark in dispute, and it is difficult for the relevant public to identify such goods from the registrant of the trademark in dispute, this circumstance may not be determined as the use of trademark.

#### **19.12 Determination of the identical goods with multiple trademarks**

If a registrant of the trademark in dispute uses more than one trademark including the trademark in dispute on the identical goods at the same time, and the relevant public can take such trademark as the mark distinguishing the sources of goods, this circumstance may be determined as the use of trademark.

#### **19.13 Determination of one registrant having multiple trademarks**

If a registrant of the trademark in dispute has more than one registered trademark, there are only minor differences between its actually used trademark and the trademark in dispute, but where this use can be determined to be the other registered trademarks of the registrant, the registration of the trademark in dispute may not be maintained.

#### **19.14 Determination of the use of trademarks on the services of “sales promotion for others”**

If a registrant of the trademark in dispute is a shopping mall, a supermarket or otherwise, can prove that it cooperates with the sellers by offer of the site or other means, and sufficiently confirms that it provides advice, planning, publicity, consultation and other services for selling the goods, then the trademark in dispute may be determined to be used on the services of “sales promotion for others”

#### **19.15 Use after the specified period**

If a registered trademark is used in a large-scale manner after the specified period, this use will not constitute the use of trademark within the specified period in general. However, if there is little evidence that the party concerned uses the trademark within the specified period, and the trademark in dispute is used continuously and extensively after the specified three year, the above factors may be comprehensively taken into account to judge whether to constitute the use of trademark.

#### **19.16 Determination of pure export behavior**

If the goods using the trademark in dispute are directly exported without being circulated in China, and the registrant of the trademark in dispute claims to maintain the registration of such trademark, this claim may be supported.

### **Supplementary Provisions**

These Guidelines shall be implemented from the date of their issuance, and the *Guidelines of Beijing High People's Court on Trial of Administrative Cases of Trademark Right Granting and Verification* issued on January 22, 2014 shall not apply.