商标行政诉讼新证据采信问题研究

Evolution of admission of new evidence in trademark lawsuits

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中国政府加入世界贸易组织(WTO)后，根据相关协议于 2001 年对商标法进行了相应的修改，规定商标行政行为应该接受司法审查。如果当事人对商标评审委员会做出的裁定书不服，可以在法定的期限内向北京市第一中级人民法院提起行政诉讼。从 2001 年开始，商标行政诉讼的案件数量急剧增加，2002 年的案件量是 19 件，2010 年的案件量升到 2002 件。从 2002 年到 2012 年，北京法院总共受理 7896 件商标行政诉讼案件，其中结案 6793 件。

在商标行政诉讼案件中，一个热点法律问题就是新证据的采信问题。当事人经常在诉讼程序中提交新证据，并要求法院采信上述证据的效力。法院有权根据案件的情况，行使自由裁量权决定是否采信新证据，而新证据是否被采信有时候直接关系到案件能否胜诉。根据笔者的经验，法院对于商标行政诉讼中能否接受新证据的态度有一个逐渐演变的过程，可以概括为如下的三个阶段。

卷宗主义

第一阶段：法院奉行严格的卷宗主义，审查商标行政行为的合法性，并不采信诉讼阶段中所提交的新证据。

一个典型的案例就是海尼根公司与泰中烟草国际贸易公司“喜力”商标行政案件(案号：[2004] 高行终字第 67 号行政判决书)。北京高院认定：商标评审委员会依据行政相对人（即海尼根）的请求及理由居间裁决商标异议复审案件，是符合法律规定及法定程序的。根据“谁主张，谁举证”的原则，海尼根作为商标异议复审申请人，对其商标为驰名商标等问题负有举证义务。海尼根在商标异议复审程序中未向商标评审委员提交足够证据证明其主张，未完成法律法规所要求的举证责任。

> “关于新证据的提交的时间点……当事人最好在一审诉讼阶段提交”

如果法院接受申请人在行政诉讼中提出的而在商标异议复审程序中没有提出的证据或理由，则有可能导致商标评审委员会的裁定被撤销，不符合诉讼当事人权利对等的原则。因此，海尼根在一审期间提供的新证据在本案中不应当被采纳。”

救济机会

第二阶段：法院主要从“当事人有没有救济机会”的角度来考虑该法律问题。如果法院不接受当事人所提供的新证据，当事人就会败诉并没有其它的救济手段。法院从行政诉讼的救济价值出发，逐步地接受一些新的证据。一个典型案例就是佳选企业服务公司诉商标评审委员会行政案件（案号：2011 行提字第 9 号）。

在案件的一审期间，佳选企业服务公司向法院提交了在中国大陆使用申请商标从事商业活动以及与之有关的报刊杂志等证据。一审法院认为这些证据均为诉讼中提交的新证据，且无正当理由，故不予采纳。经调查，佳选企业服务公司为世界 500 强企业。2007 年，佳选企业服务公司在中国的第一家门店在上海市开业经营，引发媒体的广泛报道和业界的关注。佳选企业服务公司在经营活动和广告宣传中使用申请商标。

最高人民法院认定：“商标驳回复审案件中，申请商标的注册程序尚未完成，评审时包括诉讼过程中的事实状态都是决定是否驳回商标注册需要考虑的。本案中，佳选企业服务公司在一审诉讼过程中提交了申请商标实际使用的大量证据，这些证据所反映的事实影响了申请商标显著性的判断，如果不予考虑，佳选公司将失去救济机会，因此在判断申请商标是否具有显著特征时，应当考虑这些证据。一审法院以这些证据为诉讼中提交的新证据，而无正当理由，对上述证据不予采信的做法不妥。”

开放态度

第三阶段：法院对于新证据持相对开放的态度，对新证据的接受程度越来越高。根据笔者的经验，目前法院基本上接受下面三种类型的新证据：

1. 补强性的新证据：当事人行政复审阶段已经提交了理由及相关证据，诉讼阶段补充提交新证据，用以补强自己的主张；
2. 有合理理由的新证据：例如，当事人复审阶段确实没有收到商标评审委员会的通知书，所以只能在诉讼阶段提交新证据；
3. 足以影响案件实体审理的新证据：例如，当事人在诉讼阶段提交了在先商标被撤销的生效的裁判书，证明阻挡申请商标获得注册的阻碍已经消除。

关于新证据的提交的时间点，笔者认为从公平的角度出发，当事人最好在一审诉讼阶段提交，不要拖延到二审诉讼阶段。■

After the central government acceded to the World Trade Organisation (WTO), it amended the trademark law accordingly, pursuant to the relevant agreement in 2001, by requiring trademark administrative actions to be subject to judicial review. If a party is not satisfied with a judgement made by the Trademark Review and Adjudication Board (TRAB), it may bring an administrative lawsuit at the Beijing First Intermediate People's Court within a statutory deadline.

Since 2001, caseload involving trademark administrative litigation has increased dramatically, from 19 cases in 2002 to just over 2,000 cases in 2010. From 2002 to 2012, the Beijing court accepted a total of 7,896 cases of trademark administrative litigation, of which 6,793 have been disposed of.

A hot legal issue in trademark administrative litigation is the admission of new evidence. The parties often submit new evidence in litigation proceedings and ask the court to admit such evidence as valid. Depending on the circumstances of a case, the court has the right to decide at its discretion whether new evidence is admissible, and whether the new evidence is admissible is sometimes directly related to whether the case can win. According to the author's experience, the court is gradually evolving in its attitude towards whether it can accept new evidence in trademark administrative proceedings. This evolution process can be summarised in three stages.

Review based on file

Stage one: the court reviewed the legality of a trademark administrative action strictly based on the details of a file, and did not admit the new evidence submitted during litigation proceedings. A typical case was the Heineken trademark administrative case between Heineken and Thai Chung Tobacco International Trading (2004).

Beijing High People's Court found that the intermediate decision by TRAB based on the request of the administrative counterpart, Heineken, over the review of a trademark opposition case was in compliance with the law and legal procedures. According to the principle that a party is required to provide evidence to substantiate the claim lodged by itself, Heineken as an applicant for the review of the trademark opposition had the burden of proof on its trademark as a well known trademark, and other issues. Since Heineken did not submit sufficient evidence to the TRAB during review procedures to substantiate its claim, it had not fulfilled the burden of proof required by legislation.

> *"The parties should submit new evidence during the proceedings at first instance"*

If the court accepted the evidence or reasons presented by the applicant in the litigation proceedings, which were not presented in the trademark review process, it would probably result in revoking the TRAB's judgment, which was not in compliance with the principle of equal rights for the litigants. Therefore, the new evidence provided by Heineken during the first trial was not adopted in this case.

Chance of relief

Stage two: the court considered legal issues mainly from the point of view of "whether a party has a chance of relief". If the court did not accept the new evidence provided by the party, the party would lose the case without any relief. Taking this into account, the court began to gradually accept some new evidence in administrative proceedings. A typical case is the administrative case of *Best Buy Enterprise Services v TRAB* (2011).

During the first trial of the case, Best Buy submitted to the court evidence on the use of the filed trademark in commercial activities in China, including promotional materials that appeared in newspapers and magazines related to its use. The court of first instance held that this evidence was new evidence submitted in the litigation proceedings without any justified reason, and that such evidence not be accepted. Subsequent investigations found that Best Buy was among the top 500 companies worldwide. It opened its first store in Shanghai in 2007, attracting extensive media coverage and industry attention. It used the trademark it applied for in its business and advertising activities.

The Supreme People's Court found that since the registration process for the trademark in dispute had not been completed, the facts included in the litigation during the review process needed to be considered to determine whether to dismiss the trademark registration. In this case, Best Buy submitted substantial evidence on the actual use of the trademark during the first-instance proceedings.

The facts reflected by this evidence could affect the judgment of the distinctiveness of the trademark. If this evidence was not taken into account, Best Buy would lose its chance for relief. Therefore, in determining whether the trademark had any distinctive feature, such evidence should be considered. It was not right for the court of first instance to deny the admission of new evidence on the ground that such evidence was submitted in the litigation proceedings without any justified reason.

Open attitude

Stage three: the court held a relatively open attitude towards new evidence, with increasing acceptance of new evidence. According to the author's experience, the court generally accepts three types of new evidence:

1. New evidence of a reinforcement nature. A party has submitted reasons and relevant evidence during review proceedings, and then submits supplementary new evidence during litigation proceedings to reinforce its claims;
2. New evidence with reasonable grounds. For example, if a party confirms during review stage that it did not receive notice from the TRAB, and so it can only submit new evidence in the litigation stage;
3. New evidence sufficient to affect the substantive hearing of a case. For example, a party submits in the litigation stage an effective judgment on the revocation of a prior trademark to substantiate that the obstacles blocking access to an application for trademark registration have been removed.

As to the point of time for submission of new evidence, the author believes that, based on the principle of fairness, the parties should submit new evidence during the proceedings at first instance instead of the proceedings at second instance. ■

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