

# *Determination of Relevant Public Confusion in Trademark Reverse Confusion*

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**Abstract:** As a new confusion model, reverse confusion has many differences from forward confusion. There are also a large number of cases involving the trademark reverse confusion in judicial practice, but China's Trademark Law has not introduced corresponding legislation on this, not to make corresponding provisions on the determination of relevant public confusion. Therefore, it is necessary to introduce the theory of reverse confusion. The determination of relevant public confusion is the key to the study of the theory of trademark reverse confusion. Clarifying the definition and scope of relevant public confusion are of particular significance to determine the infringement of trademark reverse confusion. This paper will briefly analyze the issue of determination of relevant public confusion in trademark reverse confusion, and propose the introduction of a questionnaire survey model and the construction of an analytical model to prove whether confusion actually occurred among the relevant public in individual case. It is hoped that the theory of reverse confusion can be promoted into the law, so as to provide a certain basis for the application of law in the specific trial of relevant cases.

## **1. Introduction**

Trademark confusion in traditional sense refers to forward confusion, that is, the trademark use behavior of the subsequent user makes the relevant public mistakenly believe that the goods or services of the subsequent user come from the trademark registrant or have a specific relationship with the trademark registrant. At this time, the conclusion can be drawn in accordance with the four elements of illegality of acts, the existence of the fact of damage, causality, and the subjective fault of the actor. However, reverse confusion means that the use of the trademark by the subsequent user has made it more famous, so that the relevant public mistakenly believe that the goods of the previous trademark registrant come from the later user or that there is a relationship between the two. Reverse confusion separates the connection between the trademark and the previous registrant, and blocks the source identification of the trademark pointing to its previous registrant. Forward confusion and reverse confusion have different emphases in the determination of infringement, and the traditional elements of infringement cannot be simply applied directly, but should be analyzed on the basis of traditional elements of infringement, and combined with the legislative purpose of protecting trademarks and the specific circumstances of individual cases.

Not only does forward confusion conceptually fail to cover reverse confusion, the reasons for the two are also different. The reason for forward confusion is that there is a relatively stable relationship between the previous trademark and the indicated goods, which is exploited by the subsequent infringing enterprises, making consumers mistakenly believe that the goods they purchase belong to the owner of the trademark. The reason for the reverse confusion is that the connection between the previous trademark and the indicated goods is relatively loose in consumers' mind, and the later use of the trademark separates the originally tight connection, so that the consumers mistakenly believe that the goods they purchased belong to the trademark infringer. Therefore, the difference in content that consumers misidentify can be used as the basis for the division of reverse confusion and forward confusion.

The relevant public confusion factors will be taken into account in both determinations of infringement, but the determination of relevant public confusion by reverse confusion is more complicated than forward confusion. As a new model of confusion, reverse obfuscation has many differences from forward confusion. There are also a large number of cases involving reverse confusion of trademarks in judicial practice, but China's Trademark Law has not issued corresponding legislation on this, let alone made corresponding provisions for the determination of relevant public confusion. Therefore, it is necessary to introduce the theory of reverse confusion. The determination of relevant public confusion is the key to the study of the theory of trademark reverse confusion. Clarifying the definition and scope of relevant public confusion are important to determine the infringement of trademark reverse confusion. This paper will briefly analyze the determination of relevant public confusion in trademark reverse confusion, and put forward corresponding suggestions for improvement.

## **2. Determination of "Relevant Public Confusion"**

### **2.1. Problems in the Determination of "Relevant Public Confusion"**

#### **2.1.1. Lack of Legislation on Trademark Reverse Confusion**

"Reverse confusion" refers to some large companies with strong economic strength deliberately use the registered trademark of a small company, make the relevant public mistakenly believe that the trademark is legally owned by the large company through a large number of advertisements, which separates the small company from its legality. The association of all trademarks has damaged the legal rights that small companies should have enjoyed. In trademark infringement cases, the relevant public is the subject of judging confusion. Therefore, the determination of confusion surrounding relevant public constitutes the key point of trademark infringement, and it is also one of the difficult issues in judicial practice when determining trademark infringement cases. Regarding the theoretical issue of "reverse confusion", there are various opinions in academia, and many cases related to reverse confusion have appeared in judicial practice, but China's Trademark Law has no clear legislative provisions on this, no mention of corresponding regulation on the identification of relevant public confusion. Due to the lack of legislation, the court's judgment on such cases can only invoke the existing forward confusion theory, resulting in many unreasonable judgments. The emergence of such cases has caused us to ponder: whether "reverse confusion" can be established in legislation as a new type of trademark infringement, whether the current trademark positive confusion can be extended to the "reverse confusion" theory, and how to restrain it. The court determines the relevant public when judging, etc. The root of these problems is the disconnection between legislation and social development, which urgently needs to be resolved through legislation related to trademark law.

## 2.1.2. Problems in Judicial Practice

Early Judicial Practice of Reverse Confusion - the Avoided Concept.

By sorting out the “reverse confusion” cases before 2010 on the China Judgement Online (see Table 1 below), it can be found that the court tried to avoid the concept of “reverse confusion” directly in the judgement. Moreover, when analyzing whether it constitutes infringement, it is still affected by the elements of the “forward confusion” case, and in practice, the problem of different judgments for the same case is prone to occur.

Table 1: Typical cases of "reverse confusion" before 2010

Case	The court attitude	Determination standards	Legal basis
“Freezing Point” case	Determining constituted infringement from the perspective of forward confusion.	The accused infringer used the trademark registered by others as the name of the product, and the word logo was larger than other words, which could easily cause the relevant public to misidentify the source of the goods between the two or mistakenly believe that there was a specific connection between the two; the behavior of the accused infringer does not constitute fair use.	Article 52(5) of the Trademark Law, Article 3 and Article 50(1) of the Regulations for the Implementation of the Trademark Law of the People's Republic of China
“G2000” case	The court of first and second instance determined that the infringement constituted infringement from the perspective of positive confusion.	The logo involved in the case is a trademark logo and is used on products and packaging.	Article 57(1)(2) of the Trademark Law (2013 Amended)
“Zhongkai” case	Determining constituted infringement from the perspective of forward confusion.	The registered trademark involved in the case is a fabricated phrase, which has a certain degree of distinctiveness, and the company name of the accused infringer is similar to the registered trademark, which may easily confuse the relevant public.	Article 52(5) of the Trademark Law; Article 1(1) of the Trademark Judicial Interpretation

Current stage: How to unify the reverse confusion determination standard.

At this stage, the discussion on reverse confusion cases is no longer about whether this type of infringement should exist, but how to improve the existing legal system, so as to unify the determination standards of reverse confusion cases and reduce the number of different judgments for reverse confusion cases. By comparing the New Balance case and the “MK” case, the court’s judgment ideas are drawn. (See Table 2 below).

Table 2: Comparison of Judgment Ideas in Two Cases

	New balance case (Constitutes reverse confusion)	“MK” case (Does not constitute reverse confusion)
The first trial	(1) The defendant's use of the “New Balance” trademark constituted a trademark use; (2) Both products are similar; (3) Trademarks are identical; (4) Consumers will actually be confused; (5) The defendant’s conduct was subjectively malicious.	(1) Does not take into account the popularity of the alleged infringing logo; (2) Subsequent users have stronger economic strength and higher market position; (3) Focus on the possibility of trademark coexistence; (4) Comprehensively consider the interests of the trademark owner, the accused infringer and consumers.
The second trial	(1) The conduct of the defendant would cause confusion among the relevant public; (2) (Under the premise of knowing that the trademark belongs to others) The defendant's use of the “New Balance” logo is not a fair use of its company name.	(1) The inherent distinctiveness of the prior trademark is weak; (2) Plaintiff did not enhance its distinctiveness and popularity through use of the trademark; (3) The accused infringer did not intentionally use the goodwill of the prior trademark subjectively and avoided to a certain extent when using it; (4) The the consumer groups are different and there is no confusion in the market.
Retrial	Retrial application was rejected.	Basically the same as the second trial: (1)Not only should the actual use of the accused infringing logo be considered, but also the distinctiveness and popularity of the two should be considered (the plaintiff has less distinctive, and the defendant gained popularity through use); (2) The defendant did not subjectively intend to borrow the plaintiff’ s trademark; (3) There are large differences in consumer groups, so there will be no misidentification.

Through comparison, it can be found that the New Balance case and the “MK” case are completely different in terms of judgment and consideration factors, which are mainly manifested in the following aspects:

Whether the factors that should be considered in determining reverse confusion should be exactly the same as forward confusion is one of the controversial points in the court's judgment. In the “New Balance” Case, the court did not put forward the concept of “reverse confusion”, and the judgment idea was consistent with the earlier reverse confusion cases (Table 1), that is, it was determined to constitute infringement from the perspective of forward confusion. The judgment idea of equating reverse confusion with forward confusion itself has limitations and does not reflect the infringement characteristics of reverse confusion, which also led to the second instance of the “New Balance Case” Guangdong High Court to revise its judgment on the amount of compensation.

However, in the later “MK” case, the court’s exploration of the constituent elements of reverse confusion infringement went further, and the consideration factors were more comprehensive. The court clearly put forward the viewpoint of “reverse confusion” in the judgment document. The court

of first instance believed that the determination of reverse confusion needs to comprehensively consider the interests of the trademark owner, the accused infringer and consumers on the basis of confusion. On the basis of the first-instance judgment, the court also pointed out the consideration of “the the consumer groups are different and there is no confusion in the market”. Different from the judgments of the similar cases that often appeared before, the “MK” case has basically kept the same judgment ideas from the first instance to the retrial, which shows that the court not only considered the characteristics of reverse confusion on the basis of confusion, but also comprehensively consider the rights and interests of all parties from the perspective of consumers to determine whether the defendant has constituted an infringement, achieving a balance in each case.

Article 57(2) of the Trademark Law in China expressly stipulates that “confusion” infringes the trademark exclusive right: “(2) to use a trademark that is similar to a registered trademark in respect of the identical goods or use a trademark that is identical with or similar to a registered trademark in respect of the similar goods, which is likely to cause confusion, without the authorization from the trademark registrant.” The determination of trademark confusion can be simply summarized as: “similarity + likelihood of confusion”, but “likelihood of confusion” is highly abstract, and there are problems in judging the possibility of confusion in practice. How to determine the “likelihood of confusion” in individual cases is the core of determining reverse confusion infringement.

First of all, it is the issue of identical or similar goods. The classification of goods by Chinese courts is mainly based on the international “Trademark Registered by the International Classification of Goods and Services” and the domestic “Distinction Table of Similar Goods and Services”. However, in the “If You Are the One” case, the type of TV program broadcast by the defendant Jiangsu TV Station happened to be the same as the type of trademark registered by the plaintiff Jin Ahuan. It is too rigid for the court to make a mechanical determination based only on the “Distinction Table”. Therefore, in reverse confusion cases, the issue of determining the same or similar goods or services needs to be further regulated.

Secondly, it is a question whether the distinctiveness and popularity of the allegedly infringing trademark should be used as factors for judging the likelihood of confusion. The “Judicial Interpretation of the Trademark Law” in China stipulates: “When judging the similarity of trademarks, the distinctiveness and popularity of the trademarks involved should be considered.” The court of first instance in the “MK” case held that the popularity of the alleged infringing trademark should not be considered as a factor in determining trademark reverse confusion, that is, the high popularity of the accused infringing trademark should not be considered to be more likely to cause reverse confusion. In the analysis of “MK” case, the Supreme People's Court of China pointed out that “the MK trademark has been extensively used by Michael Kor Company for a long time, which has formed a corresponding relationship with the brand and has a certain degree of popularity”. It can be seen that in judicial practice, whether the distinctiveness, popularity and market position of the plaintiff and defendant of the trademark involved in the case can become the constituent elements of reverse confusion determination is debatable.

Lastly, the relevant public confusion determination problem. In “New Balance” Case, the court of first instance proposed that consumers would actually confuse to determine infringement, and the court of second instance also believed that the defendant’s behavior would cause confusion to the relevant public. In fact, neither the court of first instance nor the court of second instance clearly demonstrated the issue of public confusion. On the contrary, in the “MK” case, the court of first instance determined that there was no reverse confusion after comprehensively measuring the interests of the trademark owner, the user of the accused infringing mark and the consumers. In the second instance and the retrial, it proved that there was no confusion among the relevant public by considering the consumer groups. In comparison, the judgment ideas in the “MK” case are more reasonable. Therefore, this paper will focus on the issue of relevant public confusion.

## **2.2. The Key to Determine Trademark Reverse Confusion Infringement: Relevant Public Confusion Determination**

### **2.2.1. The Core Elements of Trademark Reverse Confusion Infringement: Likelihood of Confusion**

In 2013, the Trademark Law in China was amended for the third time, and the theory of “likelihood of confusion” was introduced in Article 57 as one of the constitutive elements of trademark infringement. Likelihood of confusion refers to the high probability of confusion and the result of confusion, which is helpful for the determination of the likelihood of confusion. It is generally said that the likelihood of confusion is the most important element in determining trademark reverse confusion infringement, which is determined by the legislative purpose of the Trademark Law. If the theory of four elements of trademark infringement is adopted, likelihood of confusion would be the core element, and the other three elements (trademark use behavior, identical or similar goods, and identical or similar trademarks) would all serve to determine the elements of likelihood of confusion.[1] On the premise that there is no likelihood of confusion, even if the same or similar trademark is used on the same or similar goods, it does not constitute trademark infringement. Trademark infringements need to be inspected by the elements of infringement, and those that cause likelihood of confusion are generally prohibited by the Trademark Law. For the behaviors that do not cause likelihood of confusion, there is no need to regulate them because they do not hinder the realization of the legislative purpose of the trademark Law.

“Likelihood of confusion” is an uncertain concept with a high degree of abstraction. How to determine the establishment of “likelihood of confusion” in a specific case is the core of clarifying trademark infringement. There are different debates on determining trademark infringement, but they all stand from the perspective of consumers, simulate the scene of consumers’ consumption, and finally based on whether confusion will occur. Since the subjective perception and understanding of the relevant public is the object of likelihood of confusion, how to examine the subjective perception of the relevant public becomes the key to judging trademark reverse confusion infringement.

### **2.2.2. An Important Factor to Determine Relevant Public Confusion: General Attention of the Relevant Public**

As mentioned above, an important consideration in determining the standard of confusion in trademark infringement is whether the trademarks are identical or similar. It is generally impossible for the public to confuse two trademarks with completely different appearances, so the basis for determining confusion is that the trademarks are identical or similar. However, relying solely on trademark similarity to determine confusion will make the judgment of trademark infringement cases too rigid. In order to protect the legitimate rights and interests of trademark registrants, other commercial entities and consumers in a balanced way, it is necessary to introduce the theory of general attention of relevant public to confusion determination standard. According to Article 8 and 10 of the Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Trademark Civil Dispute Cases in China, we learned that the general attention of the relevant public should be used as the standard for determining similarity of trademarks. The important factor of “consumer attention degree” is also mentioned in the multi-factor detection method commonly used by American courts to determine reverse confusion. In the case of *McLean v. Fleming* in 1878, the U.S. Supreme Court defined a purchaser with reasonable prudence as an “ordinary consumer with an ordinary degree of care” and held that it is necessary to measure whether the trademarks used by others is likely to be misunderstood or cause confusion by ordinary consumers with an ordinary degree of care.[2]

At the same time, we should note that the value of commodities has different effects on the general attention of relevant public.[3] Although some trademarks are very similar in appearance, the public will not confuse them based on certain shopping experience, or the user of trademarks has no intention of relying on well-known trademarks. In this case, if trademark infringement is still determined, the result of the case will be unfair. The relevant public's approximate judgment standards are obviously different for high-value products and low-value products. Commodities with higher value often require multiple comparisons and discussions to for consumers make decisions, so more attention will be paid when purchasing, and the probability of confusion is lower. However, relevant public tends to pay less attention when purchase lower-value products, and the purchase decision is more hasty and random, so the probability of confusion is naturally greater. A similar expression was also expressed by the United States Court in the specific case *McGregor-doniger, Inc. v. Drizzle, Inc.* and *Recot, Inc. v. Becton*.

### **3. Suggestions for Improving the Determination of “Relevant Public Confusion” in Trademark Reverse Confusion**

#### **3.1. Clarify the Definition and Scope of Relevant Public Confusion**

“Relevant public” is an important concept in China’s trademark law system, and it is an important concept involved in many regulations in the trademark law. In judicial practice, if the definition of “relevant public” is too narrow, the scope of trademark confusion may be limited; otherwise, the scope of trademark confusion may be expanded. Therefore, clarifying the definition and scope of relevant public confusion is of great significance to judicial practice.

##### **3.1.1. Connotation Analysis of "Relevant Public"**

The term “relevant public” specifically refers to the terms of reference in the Trademark Law for judging the distinctiveness of trademarks, similarity of trademarks, similarity of goods, and likelihood of confusion. In the legislative context of trademark law in different countries and regions, the meaning and the emphases of legislative regulation of “relevant public” are different. Some countries and regions define “relevant public” from the degree of subject attention.

Trademark Law in China does not give a clear definition of “relevant public”. The definition of “relevant public” can be found in Article 8 of the Interpretation of the Supreme People’s Court on Several Issues Concerning the Application of Law in the Trial of Trademark Civil Dispute Cases: “Relevant public in the Trademark Law refers to consumers related to a certain type of goods or services marked by a trademark and other business operators that are closely related to the marketing of the aforementioned goods or services.” And Article 2(2) of the Regulations on the Recognition and Protection of Well-known Trademarks: “Relevant public includes consumers related to a certain type of goods or services marked by a trademark, other operators who produce the aforementioned goods or provide services, and sellers and related personnel involved in the distribution channel, etc.” The main difference between the two lies in the provisions on “operators”, but there is no essential difference.

According to domestic and foreign legislation and relevant regulations, the concept of “relevant public” can be split and analyzed from two aspects. One is the perspective of the subject, that is, the “public”. According to the legislative provisions of the trademark laws of China and other countries and regions, the main types of “relevant public” are consumers and operators. The second is the degree of relationship with the trademark, that is, “relevant”. The degree of relationship with the trademark is an important criterion for defining the scope of “relevant public”. Some scholars believe that consumers or operators need to have an interest in the products identified by the trademark before

they can be regarded as "relevant public". Some scholars believe that "relevant public" refers to "relevant consumers and business operators in the same industry".[4]

This paper suggests that the relevant scope of consumers should be expanded, and the relevant scope of operators should be relatively narrowed. As long as consumers may come into contact with the trademarks of the goods and services as long as consumers may come into contact with the goods and services marked by the trademark, there is a relationship with the trademarks, which means meets the "relevant" criteria. However, operators who have close business relations with a certain type of goods or services may have the possibility of popularity, distinctiveness and confusion about such goods or services. Therefore, "relevant public" refers to consumers who are related to the goods and services marked by the trademark, and business operators who are closely related to the goods and services marked by the trademark.

### **3.1.2. Analysis of the Constituent Subjects of "Relevant Public"**

Consumers related to goods and services are one of the important constituents of the "relevant public", and they are the manifestation of the extension of the concept of "relevant public". Although Trademark Law in China did not define the concept of "customers", according to the value principle of "protecting the interests of consumers" embodied in Article 7 and Article 1 of the Trademark Law in China, the "consumer" under the concept of "relevant public" is the same as the definition in Article 2 of Consumer Protection Law in China, refers to the "person" who buys and uses goods or receives services for daily consumption.

The constituent subjects of consumers include natural persons, legal personalities and other organizations. According to the legislative provisions, the fundamental criterion for judging whether a subject is a consumer is whether there is an act of purchasing goods or receiving services. If a legal personality or other organization engages in the above-mentioned acts, it shall be regarded as a consumer. A consumer is a subject who purchases and uses goods or receives services for non-profit purposes, which includes both natural persons and legal personalities. If the consumer status of organizations such as legal personalities is excluded, it will not be conducive to the comprehensive protection of consumers.

Operators are another main constituent of the "relevant public". Article 8 of the Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Trademark Civil Dispute Cases in China stipulates that the scope of "relevant public" also includes other business operators who have a close relationship with the marketing of goods or services. The Regulations on the Recognition and Protection of Well-known Trademarks in China interpret "operators with close relations" as operators who produce goods or provide services, as well as sellers and related personnel involved in the distribution channels. The reason for determining the operator as the "relevant public" is that operators may be confused with the trademark when they come into contact with products with similar trademarks. Once this type of "relevant public" is confused about the trademark, it will have a serious impact on the business reputation of the obligee. Therefore, operators such as producers, distributors, and sellers in all links of commodity service marketing should also be regarded as one of the constituent subjects of the "relevant public".

### **3.1.3. Definition of the Scope of "Relevant Public"**

After clarifying that the "relevant public" constitutes the subject, the specific scope of the "relevant public" should also be defined in detail, so as to clarify the confusing determination of the relevant public. It is relatively easy to prove likelihood of confusion, but very difficult to prove the exist of relevant public confusion. The relevant public confusion part of the reverse confusion theory is the key to determining trademark infringement, so the concept and legal status of relevant public are very



important, which is conducive to dividing the scope of relevant public and determining trademark infringement reasonably. Neither the Paris Convention and TRIPS, nor Trademark Law in China has a clear definition of the concepts of “consumer” and “relevant public”. Only Article 8 of the “Interpretation of the Supreme People’s Court on the Applicable Law in the Trial of Trademark Disputes” mentions that “relevant public” refers to consumers related to a certain type of goods or services marked by a trademark and other business operators that are closely related to the marketing of the aforementioned goods or services. The Interpretation distinguishes the two concepts of “consumer” and “relevant public”. “Relevant public” refers to consumers or business operators who have contact with goods and services, and its scope is wider than that of consumers. In the trademark law system of China, the concept of the relevant public is solely adopted in the determination of well-known trademarks. Trademarks with strong distinctiveness can be compared to well-known trademarks, so the relevant theories of well-known trademarks can be used for reference. However, the determination of the relevant public in the well-known trademark is relatively loose, referring to the group who have direct contact with the product. According to the Interpretation, the relevant public in trademark infringement refers to consumers or operators who have contact with goods and services.[5] The scope of the two is slightly different, and the relevant theories of well-known trademarks cannot be copied directly.

The definition of “relevant public” in the Trademark Law in China is highly subjective. Therefore, in judicial practice, it need to combine actual cases to divide the scope of “relevant public”. The division of the scope of “relevant public” is to better judge the confusion of relevant public and thus determine trademark infringement. It is not conducive to making a fair and reasonable judgment by lumping all relevant consumers and operators into relevant public in individual case.

## **3.2. How to Demonstrate Confusion among Relevant Public**

### **3.2.1. Introduce the Questionnaire Survey Model as the Basis for Judgment**

Questionnaire survey model is a method often used by courts in the United States in the process of litigation to prove confusion taking place among relevant public. It refers to distinguish whether there is confusion by asking questions to consumers under the condition that the questionnaire is relatively reasonable.[6] U.S. courts have held that investigating evidence of consumer confusion (questionnaire survey) can serve as a means of uncovering actual confusion. In *Exxon Corp. v. Texas Motor Exchange of Houston, Inc.* case, the plaintiff provided evidence of actual confusion, and the Circuit Court ultimately ruled that the Exxon trademark and Texon trademark had been confused.

In practice, since there is no clear legislation on trademark reverse confusion, it is inevitable for judges to be subjective as to whether trademark reverse confusion ultimately constitutes confusion, while the questionnaire survey is relatively objective. Therefore, the conclusion of the questionnaire survey has certain reference value for judges to determine reverse confusion infringement, and should be popularized and applied in judicial practice. At the same time, the application of questionnaire survey should be cautious. Once the setting of the questionnaire is instructive or there are other factors that affect the objectiveness of the conclusion, it is very likely to affect the fair trial of the case. As a proof of trademark confusion, an objective questionnaire can reflect the real situation of the case and help the judge to make a relatively fair judgment.

In the “Blue Storm” case, the defendant Pepsi Company provided 77 notarized valid questionnaires, among which only 5 people believed that there was confusion in the disputed trademark, so as to prove that there was no confusion among the public. In the unfair competition case between Yili, Inc. v. Mengniu, Inc. case, Yili provided a survey report on consumers’ recognition of the two products, and concluded that 91.9% of the respondents believed that the outer packaging of the two products was similar, which could easily lead to confusion. This evidence was then used as an important basis

in the judgment of the case. In the “MK” case, the defendant commissioned a neutral organization to conduct a consumer survey, and more than 70% of consumers indicated that there was no confusion to prove that the use of its trademark would not cause confusion. The evidence is accepted.[7] The core criterion for determining reverse confusion is the likelihood of confusion, so questionnaire surveys very convincing to find out whether consumers are confused. In judicial practice, the method should be adopted, which is very helpful to prove whether there is confusion among consumers in specific cases. It can be seen that the questionnaire survey model has a certain reference value, and the questionnaire survey model can be introduced as a basis for judgment in judicial practice.

### **3.2.2. Construct an Analytical Model to Clarify the Specific Scope of “Relevant Public” in Individual Case.**

We can consider multiple factors in the trial of a individual case, and clarify the specific scope of relevant public by constructing an analysis model, so that the judge can observe the trademark and commodities in an all-round way from the perspective of the consumers under the simulated market background, and make fair and reasonable judgments. First of all, it is necessary to determine the approximate proportion of the consumer group that has been or will be confused. Only when it reaches a certain level can the plaintiff’s claim be justified. Although the number and formulation of the determination factors listed by different U.S. Circuit Courts of Appeals varies, “similarity of trademarks”, “intention of defendant”, “similarity of goods”, “strength of plaintiff’s trademarks”, “evidence of actual confusion” and “consumer’s own factors” are the core factors in the multi-factor test method.[8] While learning from it, we should recognize the differences in legislation and judiciary between China and the United States, so as to avoid the problems caused by the multi-factor detection method in the United States.[9] It can be seen from the previous argument that the relevant public confusion determination is the key to determine the trademark reverse confusion infringement. The observation range of the multi-factor analysis model in China can be set as follows: (1) The degree of confusion among the relevant public about the disputed trademark; (2) The degree of confusion among the relevant public about the goods of the disputed trademark; (3) Market position of the infringed trademark; (4) evidence of actual confusion. The actual confusion data can be obtained by combining the questionnaire survey model. Whether it constitutes relevant public confusion is the core element considered in data analysis. The judgment of trademark reverse confusion infringement in individual case should also be supplemented according to the dispute focus of the case. The construction of the analysis model is only an auxiliary means, and the final determination of the reverse confusion of the trademark cannot be simply determined by relying on a certain mathematical formula or a certain factor. However, data analysis is objective, which helps judges reduce subjectivity and discretion, and reasonably judge whether a trademark in an individual case constitutes infringement.

## **4. Conclusion**

The infringement type of trademark reverse confusion has appeared in a large number in Chinese judicial practices. Due to the characteristics of reverse confusion, relevant public confusion is more complex than forward confusion. However, Trademark Law in China has no clear legislative provisions for this, let alone the corresponding provisions on the determination of relevant public confusion, which leads to problems such as large differences between the judgments of the first instance and the second instance when the courts handle this type of cases. Therefore, it is very urgent to improve the determination standard of trademark reverse confusion infringement. By sorting out the typical domestic cases before 2010, and combining the “New Balance” case and the “MK” case, this paper makes an in-depth comparison of the sentence ideas, and demonstrates that in trademark

infringement cases, the relevant public is the subject of determining confusion, and the determination of relevant public confusion is the basis for determining reverse confusion. By clarifying the definition and scope of relevant public confusion, clarifying the determination criteria for trademark reverse confusion infringement, this paper propose: introduce a questionnaire survey model and construct an analysis model to prove whether the relevant public actually confuses in individual case. It is hoped that the theory of reverse confusion can be promoted into the law, so as to provide a certain basis for the application of law in the specific trial of relevant cases.

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