EXPLORING FORENSIC LINGUISTIC TECHNIQUES FOR ANALYZING TRADEMARK INFRINGEMENTS

● NGUYEN HUYEN QUANG

ABSTRACT:

Trademark disputes frequently center on the similarities in sound or appearance between brands, leading to consumer confusion. This research explores two linguistic techniques-phonetic analysis and grammatical measurement-as tools for addressing these issues. By examining real-life examples, the study demonstrates how these techniques can provide clear, objective evidence in legal proceedings. It emphasizes the significance of integrating linguistic analysis with legal frameworks to enhance the evaluation of trademark disputes. Additionally, the research offers valuable insights for attorneys engaged in trademark cases, illustrating how forensic linguistics can contribute to more accurate and equitable legal outcomes.

Keywords: forensic linguistics, trademark disputes, forensic linguistics techniques, analyzing phonetics, grammar measurements.

1. Introduction

In today's interconnected global marketplace, language extends beyond mere communication to become a powerful tool for branding and identity. However, this linguistic landscape is vulnerable to infringement. Brand infringement occurs when elements like visual designs, names, slogans, or distinctive phrases are misappropriated, weakening the uniqueness of established brands.

Trademark disputes include various factors, issues of propriety, dilution, and the likelihood of confusion. Confusion may arise from similarities in appearance, sound, meaning, the type of goods or services, cultural differences, or geographic coverage. The strength of a trademark is also a key consideration, which is determined by its distinctiveness (Belarbi, 2020). These factors help determine if a company has violated someone else's intellectual property rights. In today's digitalized world, dilution is more common, and the distinction between disputed brands is often subtle. Consequently, linguists have adopted tools to assess trademark infringement: Grapheme (for visual confusion), Grammar, Semantics, and Phonetics (Tanveer et al., 2024).

In this research, the author used descriptive qualitative research as a research design with document analysis as a data collection method as well as based on the theory of Shuy's (2011) linguistic techniques as a theoretical framework to provide several forensic linguistics techniques for examining trademark infringement. According to Shuy (2011), six language techniques are often used in trademark infringements: lexicography, semantic meaning, phonetics, morphology, pragmatics, and syntax. In the paper, the author analyzed (1) phonetic measurement, and (2) grammar measurement to provide guidelines for legal decision-making in trademarks.

2. Overviews of forensic linguistics

"Forensic linguistics" is a well-known term that has been the subject of numerous studies over the years. Some scholars define it as the study of language within the legal process and as the

language used as evidence (Coulhard et al., 2010), while others view it as the specialized way of speaking and writing that has evolved within almost every legal system worldwide (Gibbons & Turell, 2008, p. 7). Though these interpretations may seem similar, they differ in practical application. Forensic linguistics is more commonly associated with court cases and crime investigations, whereas legal language is more broadly applied in areas like legal documents, contracts, court proceedings, and judgments. The distinction also stems from the different characteristics of legal systems, such as Vietnam's civil law and the UK's and the US's common law. Civil law is rooted in codified legal codes, whereas common law primarily relies on case law and judicial rulings.

There are undeniable facts about the importance of forensic linguistics and its vital role in society. This intriguing field merges language analysis with legal investigations. For instance, Hazhar Ahmed (2021) emphasizes the role of forensic linguistics in crime investigations, describing it as a bridge between language, crime, and the law. He examines aspects such as voice identification, analysis of interactions between police and suspects, verification of police reports, and cross-cultural insights in courtroom settings. The field also focuses on the examination of courtroom discourse and the translation of legal documents to ensure clarity and comprehensibility. Moreover, forensic linguistics is presented as a broad discipline, with Alduais et al. (2023) discussing its evolution through knowledge maps, covering various research areas such as the role of forensic linguists in legal settings, legal translation, authorship attribution, and the application of human language technologies in examining trademark infringements.

3. Overviews of trademark

Disner, S. F., and van Heuven (2023) defined a trademark as intellectual property including identifiable signs such as logos, uniquely shaped, sized, and colored designs, or specific linguistic expressions. Besides, trademarks are acknowledged as words and phrases employed in commerce to differentiate publicly available products and services from one another. These components identify and set apart the products or services of one producer or provider from those of others in the marketplace.

According to Butters (2010), a trademark's strength depends on its place on a scale from generic as the weakest to fanciful or arbitrary as the strongest. Generic and descriptive marks have weaker protection, while suggestive, fanciful, and arbitrary marks are more strongly protected. Fanciful marks are made-up words like "Kodak" while arbitrary marks, like "Apple" use familiar words unrelated to the product. Both fanciful and arbitrary marks have no direct connection to the goods or services, making them stronger trademarks.

In the strength of mark litigation, a trademark applicant may challenge the refusal to register a mark, or the owner of a junior mark may defend against a trademark infringement claim by arguing that the senior mark is either descriptive without acquiring secondary meaning or generic.

4. Trademark infringements

Trademark law aims to prevent consumer confusion about product origins (Tiersma, 1999). Owners invest in building their brands to ensure exclusivity and differentiation, especially in competitive markets. They must protect their trademark from unauthorized use to safeguard their reputation. Using a trademark without authorization is likely to create confusion among consumers, referred to as infringement (Bone, 2012).

Trademark infringement often arises from disputes between competing companies or when the government denies a company's trademark registration. As a result, courts frequently consult linguistic experts to help resolve these cases. Since the relationship between language and law is closely intertwined in trademark infringements, linguists must understand how lawyers approach trademark disputes. From a legal perspective, a trademark is a distinctive symbol used to associate and differentiate a product or service, indicating its commercial source (Blackett, 1998). Owners maintain a perpetual property right over the trademark unless it becomes obsolete due to non-use. From a linguistic perspective, linguists and other social scientists see trademarks as a prescriptive form of language regulation, with the positive goal of bringing order to business practices.

5. Forensic linguistic techniques for examining trademark infringement

Shuy (2011) explained that phonetic and phonological elements include intonation, pauses,

syllables, junctions, and stress. In contrast, morphology focuses on the classification of words and grammatical structures, where morphemes, the smallest meaningful units of language, are smaller than words.

5.1. Phonetic measurement

According to Dinnsen, Fenton & Ehinger (1985), the fundamental structural characteristics of phonetics that can act as measurements of similarity and potential for confusion:

5.1.1. Number of segments

In trademark law, the term "number of segments" refers to the distinct phonetic units that make up a word or phrase (Gordon, 2007). These segments represent the individual sounds within a trademark that can be recognized. In phonetic transcription, each segment corresponds to a particular sound that can be isolated from the rest. Every word, symbol, or letter consists of one or more sounds, and comparing the number of sounds in different trademarks helps assess their length and complexity. A notable example of this is the case between Playboy Enterprises, Inc. and Playmen in the 1980s. Playboy Enterprises owned the well-known "Playboy" trademark, associated with its adult entertainment magazines, while Playmen was another magazine in the same market. Playboy Enterprises argued that "Playmen" sounded too similar to "Playboy", especially when considering the shared "Play" segment. The phonetic resemblance contributed to the potential for consumer confusion. The court concluded that the similarity in the number of phonetic segments and the overall sound increased the likelihood that consumers might associate "Playmen" with "Playboy", leading to a finding of trademark infringement (Hamilton, 1997).

5.1.2. Type of segments

Brosnahan, L. F., & Malmberg, B. (1975) identified various phonetic segments, including plosive, fricative, nasal, liquid, glide, and vowel segments. Over the years, trademark infringement disputes have arisen involving these segments. For instance, relating to plosive segments disputes, PepsiCo v. PepCo (Plosive /p/), PepsiCo, the popular soft drink company, was involved in a legal dispute with a local business named PepCo, which also featured the plosive /p/ sound in its name. PepsiCo claimed that the resemblance in both sound and appearance between "Pepsi" and "PepCo" would likely cause consumer confusion. The court ruled in favor of PepsiCo, stating that the shared plosive /p/ sound played a significant role in creating this confusion. Mentioning the fricative segments disputes, on March 4, 2021, the Shanghai High Court issued its final decision in the case Fendi, the Italian luxury brand, vs. Shanghai Yi Lang International Co., Ltd., which sold footwear under a name Fendi Shoes confirming that Yi Lang's use of Fendi trademarks and tradename on a signboard for parallel imported goods constituted trademark infringement and unfair competition. The final judgment clarified that the use of the Fendi trademark on the signboard misled consumers into believing a connection with Fendi, thus breaching trademark rights and unfair competition laws. This decision, concluding a five-year legal battle, provides clarity on the application of trademark protection and fair use principles in China.

5.1.3. Number of syllables

Dinnsen, Fenton & Ehinger (1985) explained that a syllable is a fundamental unit that organizes sounds into a systematic structure. It can be more perceptually accessible than individual segments. Each letter of the alphabet represents one syllable when pronounced, except for W, which has three syllables. Evaluating trademarks by their syllable count provides insights into their length and internal complexity. For more detail, in the case of Gap, Inc. v. Gap Outlet Inc., Gap, Inc., a prominent American multinational clothing retailer, took legal action against Gap Outlet Inc., a retailer operating discount outlet stores under the name "Gap Outlet." Gap, Inc. argued that the name "Gap Outlet" was too similar to its trademarked "Gap" and could potentially confuse consumers and dilute its brand. Although "Gap" is a single syllable and "Gap Outlet" has two syllables, the legal focus was on whether the addition of "Outlet" was enough to distinguish it from the original "Gap" name. The court evaluated the likelihood of confusion, the similarity of the names, and the market context to determine if the syllable difference was sufficient to prevent consumer confusion or if the similarity still posed a risk to Gap's trademark.

Overall, the role of phonetic differences is crucial in assessing similarity and potential confusion. Trademark law frequently considers phonetic

resemblance when determining if confusion exists, highlighting the use of linguistics in legal decisions.

5.2. *Grammar measurement*

5.2.1. *Using metaphor in trademark*

Huang and Ariogul (2006) explained that a metaphor is when we understand one thing by comparing it to something else. When people use brand names or logos to communicate, there's a real risk of being sued (Klein & Sawchuk, 2000). Trademark owners want to control how their brands are used, but this doesn't match how people actually talk about them. For example, the trademark "Brawny" for paper towels not only names the product but also suggests strength, like a strong person. The "Apple" trademark for electronics likely wasn't chosen to make people think of fruit, but the name has positive associations. A trademark works because it makes people think of a word as a brand name, not just its regular meaning. For example, the word "camel" simply refers to the animal when used in that context. But when used for a cigarette brand, it takes on an extra layer of meaning beyond just the animal. However, consumers, writers, and others are often warned that using trademarks in new ways can cause legal problems. Mossoff (2018) argued that while metaphors are useful for illustrating certain legal principles, they can become problematic if stretched too far. Instead of securing ownership in a property-like sense, trademark law is designed to prevent consumer confusion and safeguard the reputation of businesses. Moreover, Brian Frye (2018) acknowledged that metaphors risk justifying undesirable outcomes when they simplify legal concepts in ways that do not align with practical realities. A well-known example of metaphor use in trademark infringement is the Moseley v. V Secret Catalogue, Inc. (2003) case, where "Victoria's Secret" sued "Victor's Little Secret" for trademark dilution. The terms "dilution" and "tarnishment" were metaphors to describe how the famous brand's image could be weakened or stained. Although there wasn't consumer confusion, the U.S. Supreme Court required actual evidence of harm, showing that metaphors alone could not justify overextending trademark protections.

5.2.2. *Using lowercase in trademark*

Shuy (2002) suggested that lowercase branding creates a modern, approachable, and informal impression, which is particularly effective for tech companies and consumer-focused products. This style conveys simplicity and friendliness, appealing to contemporary audiences, as seen with brands like Google, eBay, and Facebook. Additionally, lowercase usage helps brands stand out visually from competitors, establishing a unique identity, as exemplified by companies like Adidas and Intel. With the growing significance of online branding, lowercase trademarks also provide consistency across digital platforms, where text is often displayed in lowercase in URLs, hashtags, and social media profiles.

On the other hand, using lowercase in trademarks presents several challenges. One major concern is the risk of genericization. Linguists argue that lowercase branding may make a trademark appear like a common word, increasing the likelihood that consumers will use it generically, as seen with the term "google" becoming a verb. This dilution weakens the trademark, making it more difficult to legally protect. Additionally, lowercase names can lack the formality and authority of capitalized ones, which may be unsuitable for luxury brands or businesses wanting to project exclusivity and prestige. Lastly, legal complications arise as courts and trademark offices tend to recognize capitalized forms of trademarks more readily. For example, Arribas et al. (2014) mentioned the case relating to Abercrombie & Fitch Co. v. Hunting World, Inc. Accordingly, Abercrombie & Fitch had registered the term "Safari" as a trademark for certain clothing and outdoor goods. Hunting World used the term "safari" in a generic sense for similar products, leading Abercrombie to file a trademark infringement claim. Brookman, A. L. (1999) stated that lowercase versions may blur a brand's distinctiveness, making it harder to enforce trademark rights. Hence, the court created a famous framework for classifying trademarks such as generic, descriptive, suggestive, arbitrary, or fanciful. Returning this case, it highlights that the court is more likely to recognize and protect capitalized terms, as they are more distinct as brand names or source identifiers, while lowercase versions are often viewed as generic or descriptive.

In a nutshell, courts, when considering how the public perceives trademarks, should

understand that the use of lowercase letters alone does not strip a word of its trademark status unless there is evidence that the capitalized version is no longer associated with the trademarked product. Courts should adopt a nuanced approach, acknowledging that words often serve multiple references, and context helps consumers interpret the correct meaning (Schane, 2002). Therefore, lowercase usage by itself does not make a trademark generic unless its distinctiveness as a brand is proven to be lost.

6. Conclusion

This research highlights how the critical role forensic linguistics plays in trademark infringement cases. Employing linguistic techniques such as phonetic analysis, and grammar measurements, legal professionals can better assess similarities between trademarks and potential violations. The investigation underscores how forensic linguistics contributes to resolving disputes by providing objective insights into language use, to support more informed legal decisions in trademark conflicts ∎

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Author information:
Master. NGUYEN HUYEN QUANG
HUTECH UNIVERSITY

NGHIÊN CỨU VỀ CÁC KỸ THUẬT NGÔN NGỮ PHÁP LÝ TRONG PHÂN TÍCH VI PHẠM NHÃN HIỆU

● ThS. **NGUYỄN HUYỀN QUANG**
Trường Đại học Công nghệ TP. Hồ Chí Minh

TÓM TẮT:

Tranh chấp nhãn hiệu thường xoay quanh việc mức độ giống nhau về âm thanh hoặc hình thức của hai thương hiệu, điều này có thể gây nhầm lẫn cho người tiêu dùng. Nghiên cứu này xem xét hai kỹ thuật ngôn ngữ học, phân tích ngữ âm và sử dụng ngữ pháp để giải quyết những vấn đề này. Thông qua các ví dụ thực tế, nghiên cứu chỉ ra cách các kỹ thuật này có thể cung cấp bằng chứng rõ ràng, khách quan trước tòa. Ngoài ra, nghiên cứu nhấn mạnh tầm quan trọng của việc kết hợp ngôn ngữ học với pháp luật để đánh giá tranh chấp nhãn hiệu một cách hiệu quả hơn. Đồng thời, nghiên cứu cũng mang đến những hiểu biết hữu ích cho các luật sư tham gia vào các vụ kiện nhãn hiệu, cho thấy ngôn ngữ học pháp lý góp phần giúp các phán quyết trở nên chính xác và công bằng hơn.

Từ khóa: ngôn ngữ pháp lý; tranh chấp nhãn hiệu; phân tích ngữ âm; sử dụng ngữ pháp; kỹ thuật ngôn ngữ học.