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Cultural Contestations in Global Trademark Law: Toward a "Cognitive Justice" Framework Beyond Orientalist-Colonial and Western-Centric Paradigms

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Abstract. Against the backdrop of expanding global trade and accelerating cultural commodification, cultural ownership disputes arising from transnational trademark registrations have become increasingly prominent. The current international trademark regime often faces a conflict between Western-centric paradigms and multicultural claims when protecting cultural symbols. On this basis, this article employs an interdisciplinary perspective of critical legal studies and postcolonial critique within trademark law to systematically examine how trademark law functions as an institutional arena for cultural power struggles in the context of globalization. The study reveals that beneath the technocratic façade of trademark law lies its deep-seated modern colonial cognitive logic. On one hand, this has historical roots: 19th-century colonial legal systems reconstructed non-Western cultural symbols as appropriable private property through strategies of "decontextualization" and "commodification." On the other hand, it extends to contemporary international trademark institutions via "Eurocentric" knowledge production models, which utilize legal requirements such as "distinctiveness" and "non-functionality" as contemporary colonial legal tools to systematically deny the cultural sovereignty of non-Western entities and increase the difficulty of trademark registration or lead to refusal. Accordingly, this article further proposes that trademark law reform must take "Cognitive Justice" as its fundamental guiding principle to promote the healthy and positive development of trademark law globalization, break the Western-dominated model, foster healthy and steady growth in global trade and economy, and construct a new ecological economic model centered on cultural exportation.

Keywords: Trademark Law, Comparative Jurisprudence, Critical Legal Studies, Orientalism, Cultural Sovereignty

1. Introduction

Within the globalized context, trademark law has long been perceived as a "technologically neutral" institutional framework, and its transnational transplantation is often legitimized as an inevitable path toward legal modernization. However, when China's millennium-old Buddhist cultural symbol "Dunhuang Feitian" is deemed a "generic design" in the EU and required to "demonstrate"

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"distinctiveness", while the "Greek Key" motif secures geographical indication protection due to its European cultural lineage, the epistemic violence and civilizational hierarchy embedded in trademark law become indisputable [1]. Such asymmetry is by no means accidental legal-technical divergence but a continuation of colonial legal epistemology within contemporary intellectual property systems—non-Western symbols are systematically stripped of cultural subjectivity and reduced to objects of appropriation, whereas Western symbols are granted exclusive rights through trademark-compatible discourses like "tradition" and "originality". This article interrogates the historical foundations underpinning the entrenched growth of modern colonial trademark institutions and their ramifications for global trade today. Under Western-centric paradigms, trademark regimes have become weapons of cultural hegemony. Rectifying systemic biases in trademark law, establishing provenance tracking for cultural trademarks, integrating legal and technological measures, and instituting a "Cognitive Justice"-oriented trademark framework hold profound significance for advancing global trade, leveraging cultural heritage to fuel commercial prosperity, and dismantling the disparity trap in trademark registration.

2. Deconstructing symbolic appropriation in colonial history through the anatomy of trademark law's formation

2.1. Revisiting said's theory of Orientalism

The 19th-century colonial trademark registration system constructed "exotic symbols" as appropriable property, epitomizing the Orientalist knowledge-production mechanism in trademark law. As Edward Said argues in "Orientalism", the West established its subjectivity by constructing the East as the "Other." This logic materialized in colonial trademark law through the systematic objectification of non-Western symbols. By enshrining core requirements like "distinctiveness" and "non-functionality," colonial trademark regimes institutionalized a mechanism of cultural exclusion [2]. This section examines the 1857 registration of the Vishnu idol as a textile trademark by the East India Company—a paradigmatic case of trademark colonialism—to reveal how trademark law's technical criteria enabled the colonial reconstruction of cultural symbols [3-5].

In practice, examiners mandated the "flattening" of three-dimensional symbols into two-dimensional graphics for "printability", demonstrating that trademark registration's legitimacy hinged on dual conditions [6]. Symbols must be rendered as graphic designs and these designs must identify the source of goods. While ostensibly universal, these requirements were rooted in colonial trade's specific imperatives. "Commercial source" was interpreted as requiring "identifiability" (distinguishing goods/services) and "commercial utility" (use in trade, not cultural contexts), effectivley excluding three-dimensional objects and abstract cultural concepts. These criteria emerged from a unique historical context in which the East India Company needed to commodify colonial symbols while preempting rights-claims by colonized peoples. This process involved several mechanisms. Firstly, symbolic reconfiguration means 3D→2D Transformation [7]. The three-dimensional Vishnu idol was reduced to a line-drawn graphic in registration archives, stripping them of their sacred materiality. Descriptions labeled these designs as "decorative pattern," severing their ties to Hindu rituals. Additionally, colonial archives unilaterally recorded a fabricated "commercial use history," claiming "20 years of continuous use in Bengal cotton trade" (despite actual users being Indian weavers) [5]. The distinctiveness of the simplified design had "unique source-identifying capacity," while refusing consumer perception evidence. Furthermore, courts excluded cultural evidence, dismissing Hindu scriptures and priestly testimonies regarding the symbol's sanctity in opposition proceedings [8]. Judges ruled that the case concerned solely the

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design's compliance with formal requirements, stating that its religious meaning fell outside trademark law's purview. These contradictions erected a legally charged barrier that excluded Indians from contesting trademark claims, proving far more reliable than Western magic .

2.2. Converging Critical Legal Studies (CLS) and postcolonial theory: trademark law as a vehicle for epistemic violence

Cognitive Coloniality of Legal Requirements (CLS) manifests in the colonial duality of distinctiveness where western symbols are naturalized granted automatic distinctiveness under Article "6quinquies" of the Paris Convention via "special protection" clauses [9]. This rests on a "presumption of cultural proximity"—Western examiners inherently recognize their source-identifying function. Objectification of Non-Western Symbols: Non-Western symbols (e.g., "Dunhuang Feitian") must prove distinctiveness through "secondary meaning". This compels non-Western communities to self-alienate via colonial commercial logic—symbols must be stripped and commodified to gain legal recognition. Moreover, trademark law enforces cultural erasure through its definition of "functionality," which is limited to physical utility, effectively sidelining cultural significance, such as sacredness or ritual purpose, as legally irrelevant factors. Thus, the religious function of a Hindu idol was discarded, permitting its registration as a textile trademark by the East India Company (1857). Legal protection for "sacredness" remains biased toward dominant religions, exemplifying double standards in cultural and trademark evolution [1]. Selectivist functionalism—denying non-Western symbols' cultural value through legal artifice—invalidates any claim of distinctiveness or source-identification based on cultural meaning. Such colonial legal practices must cease.

Postcolonial theory reveals legal evidence systems serve as key conduits of colonial epistemic violence, a reality operationalized by trademark law. In the 1857 Vishnu idol case, colonial procedural barriers suppressed local agency: Hindu priest collectives, denied legal personality, could not represent devotees in opposition proceedings. Exorbitant litigation bonds (equivalent to 20 years' wages for Indian weavers) further barred non-Western groups from judicial remedy (Sec. 7, "Indian Judicial Organization Act, 1857"), effectively disenfranchising them. Additionally, cycles of legal violence emerged as righteous trademark challenges were reframed as "unfair competition disputes". Priest protests were deemed "obstructions to free trade"; weaver resistance was charged as "monopolistic practices" (Sec. 383, "Indian Penal Code, 1860"). Repressive legislation followed: the "Indian Trademark Ordinance, 1861" imposed a 6-month deadline for challenging registrations (before most Indians learned of them) and criminalized "malicious opposition" with imprisonment (Sec. 12), creating an "evidence black hole" for non-Western communities [10].

The above analysis delineates colonial trademark law's core logic: Religious symbols were forcibly alienated into commercial graphics for appropriation → Legal dissection of cultural symbols into "registrable elements" (graphics) vs. "excluded elements" (cultural meaning) → Evidence black hole effect—systematic invalidation of non-Western evidentiary capacity, trapping claimants in "unprovability" → "Legalized symbolic violence"—repackaging cultural expropriation as "advancing modern commercial civilization" [4]. Contemporary international trademark rules (e.g., Eurocentric geographical indication recognition) perpetuate this colonial legal DNA. Understanding this history is critically imperative for rectifying inequities in global intellectual property governance, protecting fair commercial competition, preserving cultural diversity, and ensuring the authentic development of source cultures.

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3. Decoding cultural battlegrounds in contemporary trademark systems

3.1. Case study 1

"Aceto Balsamico di Modena" enjoys comprehensive protection: its "entire name" is safeguarded, and any "evocative use" potentially misleading consumers (e.g., German-made "Deutscher Balsamico") is prohibited, with EU customs empowered for proactive seizure. Conversely, China's "Jingtailan" was rejected due to the EU GI system's insufficient coverage of "non-agricultural products" (traditionally prioritizing wines/foods), which excludes East Asian traditional crafts, and China's inability to provide "written documentation of production processes" meeting EU standards [11]. Yet "Cloisonné-style" crafts from Eastern Europe circulate freely in the EU without enforcement, revealing starkly divergent protection mechanisms. A dual standard governs historical and cultural assessment [12]. The EU Court granted "Historical Privilege" to Modena by affirming its 11th-century Benedictine origins and 1747 naming, thus providing absolute protection despite "Balsamico" being deemed a non-exclusive adjective. Italy leveraged prioritized "traditional evidence", including medieval trade archives (e.g., Emperor Henry II's vinegar requisition letter) and the Estensi court's vinegar cellar registries, aligning with the EU's preference for written "historical continuity". Conversely, Jingtailan fell into the "Historical Discontinuity" trap, as oral transmission traditions were systematically discounted [13]. Ming Dynasty palace techniques reliant on master-apprentice oral transmission lacked "European-style written records" predating the 19th century, leading to rejection for "insufficient evidence". Further, EU examiners classified Jingtailan techniques as "generic craftsmanship" (e.g., wire-inlaid enamel), denying Beijing's regional uniqueness—while recognizing the "cultural specificity" of the Greek Key and Norwegian Sámi patterns. This Eurocentric GI protection, serving self-interest while undermining others, erodes mutual trade benefits, stifles cultural commerce development abroad, breeds loopholes for regional trademarks, and ironically invites cross-regional infringements against EU marks.

3.2. Case study 2

A certain African tribe (name undisclosed) sought to register "Picasso" as a trademark with the European Union Intellectual Property Office (EUIPO) [14]. EUIPO refused the application, ruling that "Picasso" as a tribal name lacked "inherent distinctiveness" for the designated goods (e.g., handicrafts, textiles) in the EU market and failed to acquire "secondary meaning". It classified the sign as within the "public domain", holding that registration would impede legitimate use by other traders. Contemporaneously, however, "Monet"—the name of French Impressionist painter Claude Monet—was successfully registered for goods including artworks and decorative items. EUIPO deemed "Monet" distinctive due to its strong association with artistic creation in European culture, concluding consumers would naturally link it to a specific commercial source. This adjudication manifests "Eurocentric logic" [15]. The differential evidentiary standards expose a double benchmark: "Monet": Distinctiveness was established based on the "prevailing perception among the European public" without requiring market evidence, presuming inherent commercial value. "Picasso": Required to submit "commercial usage data in the EU market" to prove acquired distinctiveness, otherwise categorized as a "descriptive term". This constitutes overt cultural bias in international trademark registration and perpetuates colonial legal epistemology, unequivocally serving to entrench European legal dominance and cultural hegemony [15]. Consequently, advancing "Cognitive Justice"-driven trademark reform is imperative [16].

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4. Toward "cognitive justice" in global trademark law governance

4.1. Dismantling institutional centralization and hegemony in IP governance

The disparate outcomes for “Aceto Balsamico di Modena” and “Jingtailan” fundamentally reflect the institutionalization of “Eurocentrism” in intellectual property governance: Europe’s “archival centralism” invalidates plural knowledge systems (e.g., oral/practical transmission) to self-define historical legitimacy; rules tilt toward high-value industries while marginalizing artisanal sectors; and monopolizes cultural interpretive authority by vesting Western examiners with the power to define “tradition”. Key countermeasures include: Promoting “archival internationalization” to eviscerate evidentiary bias (e.g., WIPO’s digitization of Dunhuang manuscripts); Leveraging “South-South cooperation” to reconstruct GI standards (e.g., China-Africa joint declaration on protecting “craft heritage”; Deploying “technological empowerment” to transcend institutional barriers (e.g., blockchain + traditional knowledge databases). Only when traditional crafts cease to be “ownerless techniques”, and Modena’s myth is deconstructed as a “political-economic product” rather than historical legacy, can geographical indications become bridges for civilizational dialogue —not scepters of IP hegemony.

4.2. Constructing a “South-South epistemic community”

The 2023 “China-Africa Joint Declaration on Digital Cultural Property” marks South-South cooperation’s shift from political rhetoric to institutional construction [17]. Key initiatives include the creation of a Digital Symbol Bank—an open-source databases like the “African Cultural Symbols Repository” that houses digital assets like traditional patterns and oral epics, with “blockchain-based verification” [18]. The database grants “cultural use licenses” to Global South enterprises, repatriating revenues to source communities. Furthermore, a "South-South IP Fund" aims to legally support African nations against Western cultural appropriation lawsuits, while a "Global South Legal Experts Group" seeks to amend WTO frameworks to recognize traditional knowledge as IP-protectable subject matter [19]. This cooperation dismantles Western monopolies over IP rules through shared digital tools and legal resources, achieving “decentralization of knowledge production”. Blockchain and localized databases ensure cultural symbols’ storage and interpretation remain under Southern communities’ autonomous control—realizing “data sovereignty”. Sino-African experiential cross-fertilization forges counter-hegemonic knowledge networks for “cognitive mutual aid”. Trademark law’s reconstruction transcends legal-technical refinement; it constitutes a “cognitive revolution in global cultural ordering”. As trademark law transforms from colonial legacy into an instrument of cognitive justice, it ceases to be a weapon of cultural warfare and emerges as a resilient bridge for civilizational dialogue.

5. Conclusion

This article employs a critical lens to unveil the entrenched colonial matrix within global trademark law, demonstrating how its “Cognitive Justice”-oriented reconstruction can systematically counter the exclusion of non-Western symbols. Deconstructing the dual operations of “desacralization” and “re-commodification” in 19th-century colonial trademark practices exposes the violent logic underpinning Eurocentric legal requirements like “distinctiveness” and “non-functionality”, which erase non-Western cultural subjectivity through civilizational hierarchies. Contemporary trademark

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disputes further prove that legal procedures, far from being neutral, constitute covert battlegrounds for cultural power, systematically invalidating the legitimacy of non-Western epistemic systems.

Innovatively synthesizing postcolonial critique and Critical Legal Studies, this work demystifies the myth of intellectual property's "value neutrality" and proposes "Cognitive Justice" as the core paradigm for reimagining global cultural governance. We advocate dismantling institutional centralization and hegemony in IP governance through mechanisms like South-South digital collaboration networks, aiming to transform trademark law from a tool of interest-driven cultural appropriation into a resilient bridge for cross-civilizational dialogue and equitable global commerce.

This study acknowledges limitations in case equivalence (e.g., differing rights between Jingtailan and Modena vinegar) and historical continuity, necessitating future research on homogeneous cases (e.g., Yixing Zisha pottery vs. Limoges porcelain) and legislative archives to fully map trademark law's alienation chain. The proposed "Cognitive Justice" framework requires legal-technical operationalization, such as designing judicial admissibility standards for blockchain evidence.

Subsequent research should focus on the paradox of technological empowerment (e.g., NFT verification vs. digital colonialism); the concrete design of judicial standards for blockchain evidence; and the development of cross-civilizational quantifiable metrics for distinctiveness to replace the limited "likelihood of confusion test." Only by redistributing civilizational interpretive authority through institutional design can trademark law genuinely transcend the traps of Orientalism.

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