

Harmonisation of trademark terminological definitions in Ukraine and the European Union as a condition of intellectual property rights protection efficacy: A comparative legal analysis

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Abstract

The 21st century has witnessed remarkable economic growth and the establishment of an information-driven society, which resulted in the widespread usage of intellectual property in economic activities. Since consumer preferences are not influenced solely by product quality itself and the reputation of the entities also has an impact, the development of a distinctive trademark has become an essential element of the foundation and sustenance of a business. As Ukraine is trying to strengthen ties with the European Union, a thorough analysis of its trademark protection laws in comparison with the European Union is reasonable. Hence, the research objectives include an in-depth examination of Ukraine's trademark protection laws, identification of deficiencies in national regulations, and the recommendation of legislative enhancements to harmonize it with EU legal standards. To achieve the specified objectives, the study employs a range of methodologies, including dialectical, analytical, formal-dogmatic, comparative, and prognostic approaches. As a result of the investigation, several flaws in Ukraine's trademark protection laws were revealed. The flaws include imprecise terminology, ambiguity regarding the functional purposes of trademarks, insufficient

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safeguarding of non-traditional trademarks, limitations on trademark rights, and an outdated proprietary concept. Furthermore, there are no provisions for collective trademark rights or criterion-based trademark definitions that violate public order or universally accepted moral principles. The identified flaws underscore the urgent necessity for a comprehensive reform of Ukraine's trademark protection legislation.

Keywords: intellectual property; trademark legal protection; trademark rights; collective marks; marks for goods and services; legal standards.

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Introduction

The 21st century became an era of economic boom and information society development, which contributed to the materialisation of the results of intellectual activity and the concurrent use of intellectual property objects in the usage of economic activity. Market relations accelerated the transition from a national monopoly on goods production and service provision to the performance of entrepreneurial activities in most sectors of commodity production, forming the foundation of almost every developed country's economic system. Consequently, the number of new business entities ranging from small to large increased.

The characteristics of the product itself or the received service are important to the consumer, but so is information about the entity that produced the corresponding product or provided the service. Sometimes, the brand or the relevant entity's dominant position in the domestic or international market is the main factor which ensures high sales rates and a stable client base. Similarly, a negative reputation of a product maker or service provider caused by a low-quality batch of goods, collaboration with a terrorist country, scandalous behaviour of the company's management, and other factors can result in a sharp decline in the value of the relevant enterprise's assets, clientele loss, and even bankruptcy of the business entity. As a result, one of the first things a consumer notices when purchasing goods or receiving services is the subject-goods producer identification features. In this case, it appears reasonable that the best identifier is the mark of goods and services.

In this regard, when the idea of starting own business arises, one of the first tasks a person faces is the creation of a trademark, which will help to distinguish their goods and services from others and, in the case of a successful business, can even become an intangible asset of the enterprise.

Globalisation processes in the world take place first and foremost in the economic sphere. The constant development of modern information technologies allows subjects to feel geographically settled in more than one location during economic activity. The countries themselves are becoming increasingly interested in increasing the volume of finished product exports in order to strengthen their own economic independence and economic influence over weaker countries. In this regard, the question of the regulations of doing business in different countries, particularly the rules of use and legal protection of trademarks in the national and international context, is relevant.

Since Ukraine's European integration processes intensified in 2014, it appears more urgent to conduct a comparative legal analysis of the regulation of the legal protection of trademarks in Ukraine and the European Union (hereinafter – the EU) with an objective of identifying the common and distinguishing features of such regulation, as well as formulating proposals for domestic legislators to improve the national legal mechanism for trademark protection. As history has shown, economic growth is possible after the end of hostilities following a short-term crisis and thus, Ukrainian producers are expected to enter the European market shortly. To prevent national business entities from violating European standards of trademark use and protection, these standards must be thoroughly understood and implemented in the domestic legal space ahead of time.

Thus, the importance of a comparative legal study of trademark legal regulation in Ukraine and the European Union in terms of terminological consolidation and further legal protection stems from several factors: 1) an increase in the value of intellectual assets, goodwills for the successful implementation of business activities, which includes a trademark; 2) economic globalisation and the development of the international market for goods and services, which determines the need for the unification of national rules and international standards for the legal protection of trademarks; 3) European integration processes in Ukraine.

This work aims to conduct a comparative legal analysis of the terminological definition of a trademark in Ukraine and the EU as a prerequisite for the effectiveness of intellectual property rights protection through the lens of Ukrainian legislation harmonisation with European legal standards.

To effectively achieve the outlined objectives, we believe it is necessary to define the following tasks of current scientific research:

- to investigate the specifics of Ukraine's legal regulation governing the protection of trademark rights for goods and services;

- generalise the norms of legal acts of the European Union relating to trademark legal protection;
- determine the shortcomings of national legal trademark protection, including the discrepancies between the national mechanism and European standards in this area;
- to formulate legislative proposals for improving legal standards in the trademark legal protection mechanism in Ukraine.

Methods

In order to conduct current scientific research, the following general scientific and special legal methods were used:

- the dialectical method was used to reflect the connections and distinctions between national and European mechanisms of trademark protection for goods and services and their development;
- the analytical method used to “dismember” the entire mechanism of national and European legal trademark protection into separate elements and provide them with characteristics;
- the formal-dogmatic method was used to examine the content of specific legal norms governing trademark protection in Ukraine and the EU;
- the comparative legal method was used to identify similarities and differences among the legal protection mechanisms for goods and services in Ukraine and Europe;
- the prognostic method, which was used to predict strategies to improve national trademark protection mechanisms in Ukraine while taking European standards into account.

Results and discussion

At the national level, the mechanism for protecting trademark rights for goods and services is multi-layered, as it is represented by codified acts of general purpose (civil, economic, administrative, criminal), as well as by special legislative acts aimed at regulating the legal protection of trademarks in various areas of economic activity (advertising, media, etc.) or regulating the general conditions for the protection of trademark rights. Furthermore, the legal regulation of trademark protection is ensured at the sublegal level, specifically through instruments such as the Regulations governing the National Register of Certificates of Ukraine for Marks on Goods and Services, approved by the Ministry of Education and Science of Ukraine via

Order No. 10 dated 10 January 2002 (Ministry of Education and Science of Ukraine, 2002), and the Rules pertaining to the preparation, submission, and evaluation of applications for the issuance of Ukrainian certificates for marks on goods and services, ratified by the National Patent Office of Ukraine under Order No. 116 dated 28 July 1995 (National Intellectual Property Service of Ukraine, 1995), among others.

Thus, the Civil Code of Ukraine contains general legal provisions on trademarks. The criminal liability for the illegal use of a mark for goods and services, a brand name, a qualified indication of the origin of goods, or other wilful violation of the right to these objects is established in the Civil Code of Ukraine, Article 229 (Verkhovna Rada of Ukraine, 2003a). Simultaneously, the Administrative Offences Code of Ukraine contains a more generalised formulation of the grounds for administrative liability: illegal use of an object of intellectual property rights or other intentional violation of rights to an object of intellectual property rights protected by law (Verkhovna Rada of Ukraine, 1984). In our opinion, a more differentiated approach to establishing the scope of administrative responsibility for breaking rights to intellectual property objects and imposing administrative penalties for rights to a trademark or company name violation in a separate norm is worth considering. The Law of Ukraine “On the Protection of Trademark Rights for Goods and Services” is a special legislative act in this area that regulates relations arising in connection with the acquisition and exercise of trademark rights in Ukraine, establishes countries’ authorities’ powers in this area, the conditions for granting legal protection to trademarks in Ukraine, the procedure for issuing a certificate for them, etc. (Verkhovna Rada of Ukraine, 1993).

The legislative definition of the concept of trademark, which is currently contained in several domestic regulatory legal acts, is conceptually important for the formulation of national policy regarding trademark rights protection. Thus, a trademark is a designation by which the goods and services of other persons are identified, according to the fourth paragraph of the first part of Article 1 of the Law of Ukraine, “On the Protection of Rights to Signs for Goods and Services” (hereinafter – the Law of Ukraine No 3689-XII) (Verkhovna Rada of Ukraine, 1993). Part two of Article 5 of this Law states that a trademark can be any designation or combination of designations. Such designations can be, in particular, words, including proper names, letters, numbers, pictorial elements, colours, shape of goods or their packaging, sounds, provided that such designations are suitable for distinguishing the goods or services of one person from the goods or services of other persons, and suitable for displaying them in the Register in such a way that the clear and precise scope of the legal protection provided can be determined

(Verkhovna Rada of Ukraine, 2001). According to Article 492 of the Civil Code of Ukraine, a trademark can be any designation or combination of designations suitable for distinguishing goods (services) produced (provided) by one person from goods (services) produced (provided) by other persons. Words, letters, numbers, graphic elements, and colour combinations are examples of such designations (Verkhovna Rada of Ukraine, 2003a). It can be concluded that the definitions of trademark in these legislative acts are similar, do not differ, and do not create any conflicts. However, this does not imply that the relevant legal definition is perfect and does not need to be improved.

First, the disadvantage of the domestic legal definition of the term “trademark” is conceptual uncertainty, specifically the use of different terms to denote the same concept. If the inconsistency with the Civil Code was eliminated in Law No. 3689-XII on 21 July 2020 by replacing the term “mark for goods and services” with the wider and newer concept of “trademark” (although the title of the Law itself still contains “legislative archaism”), then a large number of special legislative acts are still in terminological conflict with the Central Committee of Ukraine. For instance, Clause 27 of the first part of Article 1 of the Law of Ukraine “On Media” defines “logo” as any combination of symbols (words, letters, numbers, graphic elements, sounds, etc.) that allows one TV channel to be distinguished from another (Verkhovna Rada of Ukraine, 2022). Simultaneously, Article 2 of the Law of Ukraine “On the Regime of Foreign Investment” includes intellectual property rights to trademarks for goods and services to foreign investments, and the term “trademark” is already used in Article 21 of this Law (Verkhovna Rada of Ukraine, 1996b). The term “logo of linear audio-visual media” is used in Article 9 of the Law on Advertising of Ukraine, while the concept “trademark” is used in Article 5 of this Law (Verkhovna Rada of Ukraine, 1996a). As can be seen, the national mechanism employs various terminological designations for the object of legal protection, which is contrary to the fundamental rules of legislative technique.

Since EU Regulation No. 2017/1001 of 14 June 2017, on European Union trademarks uses the term “trade mark”, which in translation from English means trademark, as well as the Civil Code of Ukraine, we believe it is necessary to bring the legislation into compliance with the specified EU Regulation by replacing all terms with a trademark (European Union, 2017).

Second, the drawback of the national legislative definition of a trademark is its incorrectly formulated functional purpose. Thus, according to Article 492 of the Civil Code (Verkhovna Rada of Ukraine, 1984) and Article 1 of the Law of Ukraine No. 3689-XII (Verkhovna Rada of Ukraine, 2001), this means of individualization enables consumers and other business entities to

distinguish the goods and services of one person from the goods and services of other people. At the same time, the functional value of trademarks is manifested in distinguishing not just any, but rather identical or similar goods and services, which is not mentioned in any national regulatory act. It is worthwhile to pay attention to the intriguing doctrinal approaches of foreign scientists in the context of the study of the functional purpose of a trademark. In particular, T. Phan Ngoc (2011) highlights the unconventional function of a trademark within the context of the study of the protection of a well-known TM, which consists in the fact that the consumer, through the purchase or consumption of goods or services of a certain TM, demonstrates his or her lifestyle in a social context.

Third, the domestic legislative definition of the term "trademark" does not indicate the mandatory possibility of graphic reproduction of a designation that claims to receive the status of a trademark, which will be able to cover all possible designations as much as possible. At the moment, the Law of Ukraine "On the Protection of Rights to Marks for Goods and Services" employs only an approximation of trademark forms: words, including proper names, letters, numbers, pictorial elements, colours, the shape of goods or their packaging, sounds etc. The first EU Directive No. 89/104 on the harmonization of national trademark legislation, which until recently was in force since 1989, stated that a trademark can be represented by any sign which is made graphically and is perceived visually (Council of the European Communities, 1988). Such a requirement is quite logical, as it allows for proper identification of the trademark in the future and ensures effective protection of its rights. There are only a few exceptions to this general rule. Some sound trademarks, for example, which are unusual not only for Ukraine but also for EU countries, cannot be displayed graphically in the form of notes (this applies to animal sounds, natural phenomena, car engines, etc.). For example, in February 1994, Harley-Davidson applied to register the unique sound of its engine's "exhaust" – "chug" – as a trademark for their goods and services. At the same time, the following characteristics were provided briefly: "The marking includes the sound of the applicant's motorcycle exhaust, produced during operation by a two-cylinder internal combustion engine and a conventional crankshaft". The company's nine competitors immediately filed objections to the registration for the reason they all used similar technology and their motorcycles sounded the same. Harley-Davidson withdrew its application after six years of litigation (Mkrtchyan, 2018). As we can see, the inability to represent a trademark in literally graphic form has become an impediment to providing legal protection for it. This conflict could be avoided if there was a provision in the legislation that allows the registration of a sound trademark based on the

submission of a unique electronic sound recording and the provision of an expert opinion on the impossibility of displaying this sound in sheet music. The government should be interested in the growth of legal business and, as a result, in the active use of trademarks by business entities, including in non-traditional forms. Consequently, it is preferable to establish the presumption of graphic representation of a trademark in Ukrainian legislation, with an exhaustive list of exceptions, namely those non-traditional trademarks that cannot be graphically expressed (sound, flavour, smell trademarks, etc.).

Prior to the beginning of the national-level reform of Ukrainian trademark legislation (until 21 July 2020), there was a need for greater consistency regarding the legal nature of the object of legal protection – the trademark. If the concept of exclusive rights to a trademark was present in the Central Committee of Ukraine from the beginning, then the Law of Ukraine “On the Protection of Rights to Marks for Goods and Services” as amended until 21 July 2020 operated with the concept of ownership of a sign for goods and services, including the owner’s right to use the sign independently and the right to prohibit its use by third parties (Verkhovna Rada of Ukraine, 2019). Thus, at that time, the special law was determined by the proprietary concept of trademark rights, whereas the Central Committee of Ukraine followed the concept of exclusive rights. Following comprehensive amendments to Ukraine’s Law “On the Protection of Rights to Marks for Goods and Services” on 21 July 2020, this legislative act fundamentally changed the approach to the protection of trademark rights. Thereby, trademarks ceased to be considered real property rights and began to be recognised as exclusive intellectual property rights. At the same time, one special Law provision continues to be in conflict with the chosen concept of exclusive trademark rights. Thus, the agreement on the transfer of ownership of the trademark and the licence agreement are considered valid if they are concluded in writing and signed by the parties (Verkhovna Rada of Ukraine, 2020), according to the ninth part of Article 16 of the Law of Ukraine “On the Protection of Rights to Signs for Goods and Services”. The aforementioned inconsistency and conceptual collision of legislative provisions result in a judicial practice fallacy formed by the highest court and tacitly followed by all other judicial bodies. In particular, the concept of “transfer of ownership of marks for goods and services” was used in the Supreme Court Resolution of 22 September 2022, in case No. 910/2559/21 (Supreme Court of Ukraine, 2022). To finally incorporate the concept of exclusive rights to a trademark into the legal system of Ukraine, we believe it is essential to amend the ninth part of Article 16 of Ukrainian Law No. 3689-XII and replace the concept of “agreement on transfer of ownership of a trademark” with the concept of “agreement on transfer of intellectual property rights to a trademark”.

Currently, Article 16 of the Law of Ukraine No. 3689-XII on the rights resulting from trademark certificates (Verkhovna Rada of Ukraine, 2001) states: 1) the right to use the trademark and other rights defined by this Law; 2) the exclusive right to prevent others from using it without permission, unless otherwise provided by this Law; 3) the right to transfer to any person the exclusive intellectual property rights to the trademark in entire or in part concerning the goods and services specified in the certificate based on the contract; 4) the right to grant permission (issue a licence) to any person to use a trademark under the terms of a licence agreement; 5) the right to include a warning marking next to the trademark in the form of the Latin letter "R" surrounded by a circle, indicating that this trademark is registered in Ukraine (Verkhovna Rada of Ukraine, 1993).

The title of the Article "Rights deriving from the certificate", in our opinion, does not correspond with its content, which is far less broad. We believe that when developing legal support for trademark rights protection, it is critical to distinguish between the concepts of "exclusive intellectual property rights to a trademark" and "rights arising from a trademark certificate", as they are related to each other as a part and a whole. After receiving the certificate, the subject obtains a comprehensive set of trademark property rights. The acquisition of these rights is frequently the primary reason for filing a trademark registration application. At the same time, the person who received the trademark certificate's authority is limited by more than just the mentioned list of exclusive rights. The subject has the following rights as of the date of receipt of this document: 1) the right to petition to extend the validity of a trademark certificate, subject to the payment of a fee as prescribed by law; 2) the right to refuse a trademark certificate in entire or in part; 3) the right to protect infringed trademark rights, etc. In this regard, we believe establishing exclusive trademark rights in a separate Article and supplementing Article 16 with other rights arising from the certificate is required.

The definition of the list of entities that may obtain the corresponding rights is a separate problematic issue in the use and protection of trademark rights in Ukraine. Part one of Article 493 of the Civil Code of Ukraine states that natural and legal persons are the subjects of intellectual property rights to trademarks (Verkhovna Rada of Ukraine, 2003a). The third Paragraph of the first Part of Article 1 of the Law of Ukraine "On the Protection of Rights to Marks for Goods and Services" defines a subject as a natural or legal entity without reference to specific restrictive criteria (Verkhovna Rada of Ukraine, 1993). At the same time, we believe it is reasonable to investigate a trademark's ability to indicate how one person's goods and services differ from the goods and services of others. In turn, according to Article 3 of the

Economic Code of Ukraine, economic activity is the activity of economic entities in the sphere of public production aimed at the production and sale of products, the performance of works or the provision of valuable services with a price determination (Verkhovna Rada of Ukraine, 2003b). In turn, entrepreneurship is defined in Article 42 of the specified codification act as an independent, initiative, systematic, at one's own-risk economic activity carried out by business entities (entrepreneurs) to achieve economic and social results and profit (Verkhovna Rada of Ukraine, 2003b). Etymologically, the word "trading" was derived from the word "trade," which means "buying and selling goods", i.e., trades conducted for profit, according to the academic dictionary of the Ukrainian language. Therefore, a systematic examination of the aforementioned provisions of Ukrainian legislation reveals the need to enshrine the possibility of acquiring trademark rights exclusively by persons (natural or legal entities) engaged in entrepreneurial activity at the level of both Article 493 of the Civil Code and special law. This restriction on potential applicants for obtaining a trademark certificate will aid in solving the problem of fraudulent or fictitious registration and use of a trademark to the detriment of legitimate business entities. A significant number of domestic scientists agree with us. For instance, O. Kashintseva (1999) and O. Melnyk (1999) believe that only a physical person engaged in entrepreneurial activity has the right to trademark ownership. G. Androschuk and A. Pakharenko-Anderson (1997) are at the same position on this issue and refer to the practise of Western European countries, specifically the German Law on Trademarks of 1994 (Paragraph 3.1), which allows for the registration of a trademark solely by an enterprise.

In addition to our proposal to improve domestic legislation to address the issue of unfair trademark registration, we would like to draw your attention to the interesting positions of foreign scientists on this topic. Thus, F. Mostert and H. Wu proposed (2017) several trademark reforms to reduce the number of dishonest registrations in China, a notorious leader in this field:

- recognition of bad faith as a separate ground for trademark refusal, opposition, and cancellation;
- inclusion of a bad faith element [in the relevant national trademark law];
- creation of a blacklist of individuals involved in fraudulent trademark registrations (Mostert and Wu, 2017).

Within the context of the study of the Ukrainian approach to the regulation of trademark rights protection, it is advisable to focus on such a unique legal object as a collective trademark and the issues related to its legal protection. The authority to use the right to a trademark owned by multiple individuals was regulated until 21 July 2020 by Article 158 of the Commercial Code of Ukraine. Thus, the first part of this Article established

that a trademark, the right to which belongs to several subjects, is a mark that distinguishes the goods and services of members of the association of enterprises from the homogeneous goods and services of other business entities or is used jointly by several entities objects in other cases provided for by law (Androshchuk and Pakhareno, 1997). Today, the following provisions of the Law of Ukraine “On the Protection of Rights to Marks for Goods and Services” (Verkhovna Rada of Ukraine, 1993) serve as the normative basis for the existence of a collective trademark: 1) any individual, association of individuals, or their legal heirs have the right to receive a certificate in accordance with the procedure established by this Law (Part 5 of Article 5 of this Law); 2) a corresponding mark is made, and a list of persons with the right to use such a trademark is provided in the application for registration of a collective trademark. A document defining the conditions of use is also attached to the application for registration of a collective trademark (Paragraph two of Part five of Article 7 of this Law). We can identify the following shortcomings in the national legal provision for the protection of collective trademark rights: 1) the lack of a legal definition of collective trademarks and their distinction from collective trademarks owned by multiple individuals; 2) the absence of a list of entities that can acquire the right to a collective trademark; and 3) the absence of a separately established procedure for registering collective trademark rights; 4) a lack of regulation of the protection of rights to a collective trademark, particularly in cases of violation of the legitimate interests or rights of one holder of rights by another holder of such rights. It is preferable, in our opinion, to create a separate section of the special Law titled “Particularities of Acquisition, Implementation, and Protection of Rights to a Collective Trademark” provisions that would eliminate the aforementioned shortcomings. In particular, we propose enshrining the legislative definition of a collective trademark as follows: a collective trademark is a trademark belonging to a business association, trade union, or other voluntary association of legal entities intended to denote the goods or services provided by them. The specifics of exercising rights to a specific collective trademark should be prescribed in the founding documents or other local acts of the business association or union – the subject of the collective trademark rights.

Among the requirements for granting legal protection to a trademark in Ukraine, “not to contradict public order and generally recognised moral principles, requirements of laws in accordance with Part 1 of Article 5 of the Law of Ukraine No. 3689-XII” (Verkhovna Rada of Ukraine, 1993) stands out. The specified requirements include abstract categories that can be subjectively assessed by law enforcement. For a long time, the category of public order was the subject of ambiguous legal interpretation by the courts

until the Supreme Court adopted a legal position that defined the content of an act that violates public order. Thus, the Cassation Economic Court stated in case No. 910/4932/19 that public order is defined as imperative public-legal relations that determine the foundations of the country's social order. Article 228 of the Civil Code of Ukraine defines a list of transactions void for violating public order. These are acts that encroach on the country's public, economic, and social foundations, particularly acts aimed at the illegal use of communal, country, or private property; acts aimed at illegal alienation or illegal possession, use, or disposal of objects of the Ukrainian population's property rights – land as the major national wealth under the special protection of the country, its subsoil, and other natural resources (Article 14 of the Constitution of Ukraine); acts that violate the legal regime of civil law objects withdrawn or restricted in circulation, etc. All other acts aimed at violating other objects of law, as provided for by other norms of public law, are not considered to violate public order (Verkhovna Rada of Ukraine, 2020). We are convinced that both the creation of a trademark and the filing of an application for its registration are classic examples of transactions – human actions that create civil rights and obligations. As a consequence, we believe that the emphasis on the violation of the objects of public order, as defined by Article 228 of the Civil Code, is a reason for denying legal protection to a trademark.

The situation with the regulation and interpretation of this condition of legal protection is much more complicated in the case of trademark immorality. The Supreme Court stated in case No. 480/85/19 that the concept of public morality is evaluative and that in each case, the violation (or non-violation) of public morality must be assessed based on the actual circumstances (Supreme Court of Ukraine, 2020). It is also worth noting that in recent decades, the traditions and cultural values that shape public morality in society have changed. There is also no consensus among academics on how to interpret the immorality of a trademark. For example, L.D. Romanadze claims that the principles of humanity and morality contradict stamps with images of naked human bodies, religious buildings without the permission of denominations, elements that insult or harm the reputation of a living or deceased person, and so on (Supreme Court of Ukraine, 2021). In turn, O.A. Rassomakhina (2008) interprets them as designations that contradict the constitutional system's foundations and can cause dissatisfaction in society due to violations of the rules formed on the basis of moral norms, traditions, and cultural values.

We consider the absence of legislative definitions for the concepts of “trademark that disrupts public order” and “trademark that violates universally recognised moral principles” to be a drawback in the domestic

legal framework. Therefore, we propose amending Article 5 of the Law of Ukraine “On Protection of Rights to Marks for Goods and Services” to include sections that define: 1) a trademark that disrupts public order if it is intended to violate individuals’ and citizens’ constitutional rights and freedoms by causing destruction or damage to the property of a natural or legal person, the country, the Autonomous Republic of Crimea, territorial communities, or its illegal appropriation; 2) a trademark that violates universally recognised moral principles if it contains pornographic images, uses explicit or offensive language, or harms personal non-property rights in its content, or otherwise violates rules based on morality, traditions, and cultural values.

One of the final sections of the Law of Ukraine “On the Protection of Rights to Signs for Goods and Services” is devoted to trademark protection. Thus, in accordance with the first part of Article 20 of this Law, any infringement on the rights of the certificate holder provided for in Article 16 of this Law, including the commission of actions requiring his consent without the consent of the certificate holder, and preparation for the commission of such actions, is considered a violation of the certificate holder’s rights, which entails responsibility under the current Ukrainian law (Verkhovna Rada of Ukraine, 1993). As we can see, the domestic legislator does not provide at least an approximate list of offences in the field of trademark use and protection, which, in our opinion, is a disadvantage and creates a situation in which an average subject without a legal education may not understand that their rights have been violated, or, on the contrary, may see an offence where it does not exist, sending groundless statements to the court and regulatory authorities. To begin, at the national level, an approximate list of trademark rights violations should be established: export or import of goods under someone else’s trademark, provision of services under a trademark belonging to another entity, removal or change of an applied trademark, application of a trademark for a product for which it was not registered, use of a designation identical to a registered trademark, etc. Article 21 of Ukraine Law No. 3689-XII is titled “Ways to Protect Rights”, however, none of its sections include a list of special methods for trademark protection. Special methods for protecting intellectual property rights are covered in Article 432 of the Civil Code of Ukraine, which states that the court may issue a decision in cases and the manner prescribed by law, including: 1) immediate action to prevent infringement of intellectual property rights and preservation of relevant evidence; 2) stopping the passage of goods whose import or export is carried out in violation of intellectual property rights through Ukraine’s customs border; 3) removal from the civilian circulation of goods produced or introduced into civilian

circulation in violation of intellectual property rights and destruction of such products (Verkhovna Rada of Ukraine, 2003c). We believe it is necessary to include identical special methods of protection in Article 21 of the Law of Ukraine “On Protection of Rights to Marks for Goods and Services”.

Domestic science debates revolve around the issue of compensating for the damage caused by trademark infringement. According to Paragraph 5 of Part 2 of Article 432 of the Civil Code of Ukraine, in cases and the manner established by law for the protection of intellectual property rights, including trademarks, the court may issue a decision, including the imposition of a one-time monetary penalty instead of compensation for damages for the unauthorised use of an intellectual property right. The amount of the penalty is calculated following the law, taking the person's fault and other relevant circumstances into account. Simultaneously, the special law on marks for goods and services lacks a normatively determined amount of this compensation, putting the court in a complicated and unalterable situation, turning the relevant provision of civil legislation into a “dead” norm in the sphere of trademark rights protection. The Central Committee's specific method of protecting rights to intellectual property objects has its roots in the Anglo-Saxon legal system, specifically United States legislation, which introduced the concept of statutory damages. Modern foreign scientists are actively researching such a concept of compensation for damage in the context of intellectual property. Thus, according to X. Seuba, the concept of legal costs was introduced initially due to difficulties in proving the victim's losses and the offender's income, particularly when protecting intellectual property rights (Seuba, 2017). As stated by P. Samuelson, F. Hill and Wheatland (2013), “statutory damages” in the United States allow the plaintiff to collect monetary damages without proving that (1) the plaintiff suffered any actual harm as a result of the violation, and (2) the defendant received 389 income as a result of the violation. In the meantime, such damages can be awarded at the discretion of the court in the range of \$750 to \$35,000 for each illegally used work and up to \$150,000 in cases of intentional use.

A separate branch of legal protection for trademarks is the measures taken by the country's government in the form of authorised bodies to recognise a trademark as well-known. Legal protection for well-known trademarks does not require registration and instead arises from a decision of a court or a competent authority (Part 4 of Article 25 of the Law on Trademarks). Part 2 of Article 25 of the Law on Goods and Services Marks contains a list of factors that, if relevant, may be considered in determining whether a trademark is well-known in Ukraine (Verkhovna Rada of Ukraine, 1993):

- degree of trademark knowledge or recognition in the relevant societal sector;
- the duration, scope, and geographical area of any trademark promotion, including advertising, publication, and presentation of the goods and/or services to which the trademark is applied at fairs or exhibitions;
- the duration and geographical scope of any trademark registrations and/or applications provided the trademark is used or recognised;
- proof of successful trademark rights protection, particularly in the territory where the trademark is recognised as well-known by competent authorities;
- the value attached to the trademark.

The issue of taking trademark information criteria into account when the competent body decides on the issue of providing legal protection and protection has not been left out of the attention of foreign legal scholars. For example, such researcher as F. Mostert (2020) was opposed to the idea of a strict “mathematical” approach to calculating brand awareness degree. The researcher suggests that since “terms such as ‘substantial relevant circle of society’ cannot be defined with mathematical precision, it should be evaluated according to the basic provisions of trademark law: providing such privileged protection, whether consumers are protected from possible confusion and whether the owners of a particular mark are protected from possible harm?”.

In addition, M. Hawkins and T. Dolde (2019) studied the issues of legal protection of a well-known trademark in the European Union. Scientists emphasise that EU legislation distinguishes between well-known trademarks and “reputable” trademarks. The registration of a well-known trademark in the European Union is required for enhanced protection. Well-known marks have legal protection only for identical or similar goods, according to Article 6 bis of the Paris Convention. Trademarks with a reputation registered in European Union countries have enhanced protection against unfair advantage or damage to their distinctive character or reputation, which applies to a wide range of goods and services.

We now propose to examine the legal provisions for trademark protection in the EU, the majority of which will be mandatory for Ukraine upon its accession to the EU. The mechanism for legal enforcement of trademark rights in any EU member country has a multi-level structure that includes international, regional, and national levels. Our further attention will be on the first two components, which will allow us to compare the specifics of the legal provision in Ukraine and also take into account the experience of EU countries in the course of bringing legislation of Ukraine closer to European legal standards.

The Paris Convention for the Protection of Industrial Property (hereinafter referred to as the Paris Convention) is the primary international legal document governing the protection of trademark rights in the European Union (EU). Articles 6 and 7 of the Paris Convention define the conditions for the registration of goods and services marks, the issue of independence in the protection of the same mark in different countries, as well as well-known trademarks, prohibitions on the country's emblems, official control marks, and intergovernmental organisation emblems, and the transfer of trademarks and collective marks (Paris Convention for the Protection of Industrial Property, 1883). The Union for the Protection of Industrial Property was established based on the Paris Convention, and its members include all countries to which this international treaty applies. The primary significance of this Union is that its members focus efforts on developing identical or closely aligned national regulations governing industrial property relations in terms of content. In addition, they ensure that citizens of any country within the Union are granted the same privileges, protection, and legal means for safeguarding their rights and legitimate interests in industrial property objects, provided that these citizens belong to the same country. It should be noted that the terms “trademark” and “service mark” are used in the text of the Paris Convention. The countries-members of the Union agree to protect service marks in accordance with Article 6 of the Paris Convention; however, they are not required to provide for the registration of these signs (Samuelson et al., 2013).

Overall, the provisions of the Paris Convention relating to trademark protection can be divided into three major categories: national regime norms, priority rights, general rules of use, and trademark protection. On 27 October 1994, a Treaty on Laws Regarding Trademarks was signed on behalf of Ukraine in Geneva, Switzerland, based on Article 19 of the Paris Convention for the Protection of Industrial Property. This treaty states that it applies to marks consisting of visual representations of goods (trademarks) or services (service marks), or both goods and services. This agreement does not apply to holographic signs and signs that do not consist of visual signs, such as sound and smell signs, as well as collective, certification, and guarantee signs. The agreement also specifies the requirements for the trademark registration application, which involves the list of information and elements that must be included (Mostert, 2020).

The Agreement on Trade Aspects of Intellectual Property Rights (hereinafter referred to as the TRIPS Agreement) is a separate international document that regulates the protection of trademark rights, specifically Chapter 2. According to Article 15 of this Agreement, a trademark is any sign or combination of signs that allows one enterprise's goods or services to

be distinguished from the goods or services of another enterprise (Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994a). Words containing personal names, letters, numerals, figurative elements, colour combinations, and any combination of such components can be registered as trademarks. As can be seen, the TRIPS Agreement only provides a preliminary list of forms for expressing trademarks (Romanadze, 2008). Thus, the primary requirement for recognising a particular sign as a trademark under this Agreement is its distinctiveness, not its external form. If signs do not naturally distinguish the respective goods and services, members may implement registration based on acquired distinctiveness through use. Members may require that signs be visually perceptible as a condition of registration (Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994b). The TRIPS Agreement encourages WTO members to include a presumption of trademark visual perceptibility in their national legislation, as we previously suggested to Ukrainian legislators.

In regards to the main terms calculated during the use and protection of industrial property objects, it is recommended to compare domestic legislation and the TRIPS Agreement. According to Article 18 of the TRIPS Agreement, initial registration and each subsequent renewal of trademark registration are valid for at least seven years. Trademark registration may be renewed indefinitely (Mostert, 2020). The validity period of a certificate is ten years from the date of application, according to the third part of Article 5 of the Law of Ukraine on the Protection of Rights to Trademarks for Goods and Services (Verkhovna Rada of Ukraine, 2003a). Therefore, national legislation is consistent with the provisions of the TRIPS Agreement in this regard. The failure to meet the requirement of using such a trademark for a continuous period of at least three years, unless the trademark owner demonstrates valid reasons for hindrances to such use, is one of the grounds for cancelling the trademark registration (Mostert, 2020). According to the fourth part of Article 18 of the Law of Ukraine on the Protection of Rights to Trademarks for Goods and Services, any person has the right to apply to the court for an early termination of the validity of the certificate in entirety or in part if the trademark is not used in Ukraine continuously for five years in its entirety or for part of the goods and services specified in the certificate (Verkhovna Rada of Ukraine, 2003a). As we can see, there are no conflicts between national and international law in this aspect.

Domestic legislators were also drawn to international legal norms in the sphere of industrial property (primarily the Paris Convention for the Protection of Industrial Property, the TRIPS Agreement, and the Treaty on Laws Concerning Trademarks). On May 22, 2003, Ukraine adopted the Law

of Ukraine “On Amendments to Some Legislative Acts of Ukraine Regarding the Legal Protection of Intellectual Property”, which aimed to align national legislation with the TRIPS Agreement (Hawkins and Dolde, 2019). It should be taken into account that Part 3 of the TRIPS Agreement is devoted to the concept of preliminary measures, their objectives, and the procedures for their implementation, namely:

- judicial authorities should have the right to take measures to prevent violation of intellectual property rights, and especially to prevent an introduction into commercial channels under their jurisdiction of goods, that were imported immediately after passing through customs, and to be able to preserve relevant evidence of the incriminated violation;
- when precautionary measures are taken *inaudita altera parte*, the parties whose interests are affected must be notified as soon as possible, preferably immediately and at the latest – after the measures are taken;
- authorities imposing precautionary measures may require the applicant to provide information needed to identify the goods;
- preventive measures must be cancelled at the request of the defendant if the trial has not begun within a reasonable period determined by the judicial authority, according to the law, or, in the absence of such a determination, does not exceed the longer of two periods: 20 working days or 31 calendar days (Derevyanko et al., 2023).

However, there were “blank spots” in national legislation regarding specific measures to prevent intellectual property infringements until 22 May 2003. Following the adoption of the Law of Ukraine “On Amendments to Some Legislative Acts of Ukraine Regarding the Legal Protection of Intellectual Property”, regulations about intellectual property rights prevention were introduced. These regulations cover the grounds for taking preventive measures, their types, the submission, consideration, and consequences of reviewing preventive measure applications, the execution, contestation, and annulment of court decisions regarding preventive measure implementation, and compensation for damages caused by their implementation. Furthermore, the provisions of Ukraine Law No. 3689-XII (Verkhovna Rada of Ukraine, 2003b) were revised as a result of this legislative act.

The Madrid Agreement Concerning the International Registration of Marks (hereinafter referred to as the Madrid Agreement), to which Ukraine is a party, has made a significant contribution to the development of the international system for trademark protection. This international document, in particular, made it possible to provide a single trademark for national and international registration and, as a result, imposed an obligation on the Madrid Agreement participants to recognise such trademark registration by

each other. This has made the registration actions, as well as the creation and use of trademarks, more economically advantageous.

The Madrid Agreement also granted the owner of a trademark registered in the national patent office the right to obtain international registration in several countries participating in the Agreement and to apply for the territorial extension of the legal protection of this trademark to other countries participating in the Agreement, subject to payment of international duty.

The regional level of legal protection for trademarks in the EU is represented by basic acts of EU legislation such as:

- Directive (EU) 2015/2436 of the European Parliament and of the Council on the harmonisation of Member States' trademark laws (hereinafter referred to as Directive (EU) 2015/2436), which entered into force on 13 January 2016, and replaced the First Directive (Directive (EU) 2015/2436, 2015);
- Regulation (EC) No 40/94 of the Council of the European Communities on the Community trademark, as slightly amended and modified by Regulation (EU) 2015/2424, is in force as of 23 March 2016 (Council Regulation (EC) No 40/94, 1993);
- Regulation (EU) 2017/1001 of the European Parliament and the Council of 14 June 2017 on the European Union trademark (codification) (Regulation (EU) 2017/1001, 2017).

Directive (EU) 2015/2436 introduced several changes. Firstly, it allowed the registration of non-traditional trademarks. A trademark, according to Article 1 of this Directive, may consist of any signs, including sounds, provided that they are capable of: (a) distinguish one enterprise's goods or services from those provided by another; (b) be represented in the register in a way that allows competent authorities and the public to determine the clear and precise object of protection granted to their owner (Directive (EU) 2015/2436, 2015). In the context of a comparative legal study of trademark legal protection in Ukraine and the EU, it is worth noting that, following amendments to EU Commission Regulation No. 1041 (2005) in the matter of the EU trademark, it became possible to register sound trademarks in the countries of the European Union without graphic reproduction, based on an electronic recording of the corresponding sound, which cannot be expressed graphically (Directive of the European Parliament and the Council 2005/29/EC, 2005). According to modern European standards, providing such an electronic file should be interpreted as "compliance with the requirement of graphic representation in the form of an attached audio file with recorded sound, which is published in the electronic database of trademarks". As previously stated, we believe it is reasonable to include this

amendment in Ukrainian legislation. Secondly, the protection of trademark rights was strengthened by preventing comparative advertising that does not comply with the requirements of this Directive. Thirdly, it was established that the non-use of a trademark by the defendant for five years will be taken into account in cases of trademark infringement. Fourthly, the reasons for refusing trademark registration were clarified, the specifics of collective trademarks were established, and the features of licencing agreements were outlined.

As previously stated, there is currently a lack of national legal support for the use and protection of collective mark. We believe it is necessary to focus on the regulation of collective trademark features in EU legislation and compare it to the domestic legal mechanism. The legal protection of collective trademarks in the EU is more developed than in Ukraine. A separate section of Directive (EU) 2015/2436 titled “Guarantee or Certification Marks and Collective Marks” establishes (Directive (EU) 2015/2436, 2015): the definition of a collective mark as a trademark used to distinguish goods or services of members of an association that owns the mark from goods or services of other enterprises and is capable of distinguishing them; the obligation of member countries to register collective marks (Article 29); applications for collective marks may be submitted by associations of producers, suppliers of services, or traders, as well as legal entities governed by public law (Article 29); the applicant for a collective mark must submit rules governing its use to the office, which must specify at least the authorised persons for using the mark, conditions for membership in the association, and conditions for using the mark, including sanctions (Article 30); additional grounds for rejecting a collective mark registration application (e.g., lack of rules governing its use or rules contradict public policy or acceptable moral principles) (Article 31); the owner of the collective mark submits to the office any rules governing its use, with changes and additions, etc.

The Ukrainian legislator should use the provisions of Section 6 of Directive (EU) 2015/2436 regarding the legal protection and use of collective trademarks as a starting point for improving the national legal mechanism in this section by supplementing the special law with provisions devoted to the use and protection of collective trademarks.

In regards to entities that can acquire the right to a trademark, we do not see a significant conflict between Ukrainian legislation and EU law norms. Thus, according to Article 5 of the Regulation, any physical or legal entity, including agencies created under public law, can be the owner of an EU trademark (Rassomakhina, 2008).

The right to prohibit preparatory acts in connection with the use of

packaging or other means was given by Article 11 of the Directive and Article 10 of the Regulation: when there is a risk that any means bearing a trademark may be used in connection with goods or services, and such use would infringe the rights of the trademark owner, the owner of such trademark has the right to prohibit such actions if they are carried out in the course of trade: (a) affixing a mark identical or similar to the trademark on packaging, labels, tags, security or authentication devices, or any other means on which the mark can be applied; (b) offering, distributing, storing for such purposes, importing or exporting packaging, labels, tags, security or authentication devices, or any other means bearing the mark.

We believe that amendments to the Law of Ukraine “On the Protection of Rights to Marks for Goods and Services”, which establishes the rights arising from the trademark certificate and the right to prohibit preparatory actions related to the usage of packaging or other means, are required.

Finally, we must emphasise that the EU legislation that governs the use and protection of trademark rights at the regional level consists not only of special Directives, Regulations, and Recommendations containing trademark-specific norms but also of acts that indirectly govern trademark issues. These could be, for example, the following acts:

- Directive 2006/114/EU of the European Parliament and of the Council of the European Union on misleading and comparative advertising, adopted on 12 December 2006, defines the rules for the coexistence of comparative advertising and the owner’s exclusive right to prohibit all third parties from using in commerce any symbol that is identical or similar to the trademark (Directive of the European Parliament and of the Council 2006/114/EC, 2006);
- Directive No. 2005/29 / EU of the European Parliament and the Council of the EU on unfair commercial practices affecting consumers in the domestic market, which was adopted on 11 May 2005, defines unfair commercial practises as commercial activities that are misleading, in particular advertising of goods similar to the product of another manufacturer, in such a way that the consumer may get the impression that the advertised product is manufacturer by this specific manufacturer, etc. (Directive of the European Parliament and the Council 2005/29/EC, 2005).

Conclusions

Summarising the analysis of legal protection of trademark rights in Ukraine through the lens of European standards in this area, we can identify the following major shortcomings:

- lack of terminological precision in concepts such as “trademark”, “mark for goods and services”, “logo” etc., indicating the ambiguity of both the object of legal protection and its distinguishing characteristics;
- poorly defined functional purpose of trademarks;
- absence of a legislative presumption of trademark graphic representation, with an exhaustive list of exceptions (non-traditional forms of trademarks);
- absence of a separate provision of exclusive intellectual property rights to a trademark and a limited scope of rights derived from a trademark certificate;
- persistence of legal constructs based on the proprietary concept rather than the chosen concept of exclusive trademark rights (e.g., trademark ownership transfer agreement structure);
- absence of a requirement for the holder of trademark rights to participate in commercial, likely entrepreneurial activities;
- lack of regulation governing for the use/protection of collective trademark rights;
- absence of a legally defined (criteria-based) concept of trademarks that violate public order and trademarks that violate universally accepted moral principles;
- absence of legislatively defined indicative lists of main elements of trademark infringements in the domain of trademark protection and utilisation.

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