

CONSTITUTIONAL RIGHT TO OWN, USE AND DISPOSE THE RESULTS OF INTELLECTUAL AND CREATIVE ACTIVITY: «JUSTIFIED EXPECTATION» FOR OBTAINING PROPERTY SUBJECT TO LEGAL PROTECTION

Lyudmyla Deshko,

*Professor of the Department
of Constitutional Law Institute of Law,
Taras Shevchenko National University of Kyiv
Doctor of Juridical Science, Full professor,
<https://orcid.org/0000-0001-5720-4459>*

Scopus ID:

<https://www.scopus.com/authid/detail.uri?authorId=57204442317>

ResearcherID: M-5779-2016

(<https://publons.com/researcher/2223938/lyudmyla-m-deshko/>)

deshkoL@yahoo.com

Summary

In the science regarding Constitutional Law, the issue for restriction of intellectual property rights provokes lively discussions. When registration of trademarks, there increasingly raises a number of theoretical and practical questions: can the state “destroy” the legitimate expectations of the subjects of intellectual property rights by adopting certain legislative acts in order to fulfill its international obligations? Is the decision to apply the provisions of a bilateral agreement to the application for trademark registration, which came into force after the subject was filed into trademark application process, considered as interference into the peaceful use of property? Does the constitutional and legal mechanism for regulating public relations in the field of intellectual property on “expectativa jurídica” issue the need to be improved?

The purpose of this article is to identify the conditions under which the applicant who has applied for registration of a trademark has the right to claim in respect of which he has a “justified expectation” of its implementation, as well as to identify conditions that allow national law or there is insufficient evidence in the settled case-law practice of National Courts to state that an applicant who has applied for registration of a trademark has a “justified expectation” protected by the provisions of the Article 1 of Protocol No. 1 to the Convention. Research methods is the general methods of scientific cognitivism as well as concerning those used in legal science: methods of analysis and synthesis, formal logic, comparative law etc.

In order to benefit from the protection of Article 1 of Protocol No. 1 to the Convention, an applicant who has applied for registration of a trademark must be entitled to claim in respect of which he may affirm that he had at least a “justified expectation” for its implementation. The grounds for concluding that such a “justified expectation” is as follows: the availability of grounds for such a requirement within national law and the consistent practice of National Courts, which shows that the applicant does have sufficient grounds to obtain this very justified expectation. 2. The mentioned reasons allow to affirm about the lack of reasonable grounds within national law or in the settled case-law practice of National Courts that are to state that an applicant who has applied for registration of a trademark has “justified expectation” protected by provisions of the Article 1 of Protocol No. 1 to the Convention: 1) the applicant company had a right that is subject to a certain condition, which was terminated retroactively due to non-compliance with this condition,

opportunities already follow up from the principle of equality. At the same time, there are no comprehensive scientific studies for conditions, under which the applicant who applied for the registration of a trademark, which is being the right to claim for “justified expectation”, i. e. to exercise this very right.

The above-mentioned indicates the relevance of the chosen topic for this scientific article, its theoretical demand and practical conditionality.

The purpose of this article is to identify the conditions under which the applicant who has applied for registration of a trademark has the right to claim in respect of which he has a “justified expectation” of its implementation, as well as to identify conditions that allow national law or there is insufficient evidence in the settled case-law practice of National Courts to state that an applicant who has applied for registration of a trademark has a “justified expectation” protected by the provisions of the Article 1 of Protocol No. 1 to the Convention.

2. Provisions of Article 41 of the Constitution of Ukraine and provisions of Article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950

The Constitution of Ukraine stipulates that the state provides protection of the rights of all subjects of property rights that are equal before the Law (Part 4 of Article 13); everyone has the right to own, use and dispose their property, the results of their intellectual, creative activities; the right of private property is acquired in the manner prescribed by law; no one may be unlawfully deprived of property; the right of private property is inviolable (Part 1. 2. 4 Article 41).

The Constitutional Court of Ukraine noted that the legal essence of Article 13 and Article 41 of the Constitution of Ukraine is to declare equal opportunities for possession, use and disposal of property and state guarantees to ensure the protection of these rights (paragraph 13 of subparagraph 3.1 of paragraph 3 of the motivating part of the Decision dated 12, February, 2002 № 3-rp / 2002); the legal status of various forms of ownership subjects of law is based on common constitutional principles; however, the legal status of

each of them has features that characterize subject of property rights as they are; the state ensures the protection of the rights for all subjects of property both in what is common to them and in its features in accordance with the laws that apply to them (the third paragraph of subparagraph 3.3 of paragraph 3 of the reasoning part of the Decision of 10, June, 2003 № 11-rp / 2003).

Provisions of Article 41 of the Constitution of Ukraine correspond to the relevant provisions of Article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (hereinafter – the First Protocol), under which every natural or legal person is entitled to the peaceful enjoyment of his possessions; no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

3. Article 1 of Protocol No. 1 to the Convention can be applied to intellectual property in general and to incorporated trademark. But can it be applied to the trademark application?

The judges of the European Court of Human Rights, L. Kaflish and I. Cabral Barretto, rightly point out in their personal opinions that in order to answer this question, it is necessary to decide whether the person presenting the trademark for registration being the “property” within the meaning of Article 1 Protocol № 1 to the Convention. In order to benefit from the protection of Article 1 of Protocol No. 1 to the Convention, the applicant must be entitled to a claim in respect of which he may affirm that he had at least a “justified expectation” of its implementation. This expectation must be more concrete than just hope, and it should be based on the provision of law or legal act, such as the Court decision. “The Decision of the European Court of Human Rights as for the case *Kopecki vs. Slovakia* contains the following legal position: “in those cases where the nature of the claim presupposes pecuniary interest, it can be considered as “property” only when there is sufficient grounds in national law for that claim, for example, when there is a well-established practice of National Courts confirming it”.

In a personal opinion as for the case of *Anheuser-Busch Inc. v. Portugal* the Judges of the European Court of Human Rights E. Steiner and H. Gadjiev rightly emphasize that the European Court of Human Rights “refuses to recognize as “property” the right for claiming, that is subject to a certain condition, which has ceased as a result of non-fulfillment of this condition. It should be noted that not every trademark application ends with its registration and that many applications are likely never to lead to the registration of the respective trademarks. In other words, it is quite clear that filing an application for trademark registration is the right that is subject to a certain condition; this condition should satisfy the terms of registration.”

Thus, the mere existence of the applicant's right for trademark incorporation, subject to a certain condition which was terminated retroactively due to non-compliance with that condition, and it was not sufficient enough to establish that the applicant who applied for trademark registration was entitled to claim to which he might affirm that he had at least a “justified expectation” of its implementation.

Judges of the European Court of Human Rights E. Steiner and H. Gadjiev also draw attention to the fact that when “Anheuser-Bush” applied for trademark registration, it was aware that “Budejovicki Budvar” would probably object to this application, even without intrusion into the case of a latter factor like the 1986 Agreement between Portugal and Czechoslovakia. At the time of filing the trademark application in 1981, the applicant company and “Budejovicki Budvar” were already in dispute all around the world over the right to use the Budweiser trademark. With those circumstances, there could be convincingly argued that the claimant's right to claim was far from being property in respect of which it could be affirmed that it had a “justified expectation” of the claim.

Thus, the existence of a trademark registration dispute, which is pending before the courts of different countries, is the foundation for the assertion that the applicant has no “justified expectation”.

The requirements of Article 1 of Protocol No. 1 to the Convention are not infringed, if the applicable rule of national law is sufficiently accessible, accurate and predictable. In particu-

lar, with regard to the registration of a trademark in the case, the Portuguese legislation provided for a certain period of three months during which any third party could raise objections to the registration of the trademark. Thus, the national legislation was clear, precise and reasonable.

Also judges of the European Court of Human Rights E. Steiner and H. Gadjiev emphasize that in the case “...” the trademark registration criteria referred to by Anheuser-Bush were, on the contrary, unclear. Doubts about the proper interpretation of the trademark registration criteria and the complexity of the need to analyze various international instruments at issue meant that it was never known for sure whether the trademark application filed by Anheuser-Bush would be granted.

According to the Article 9 of the Constitution of Ukraine, valid international treaties, the binding nature of which has been approved by the Verkhovna Rada of Ukraine (the Parliament of Ukraine) are the part of national legislation of Ukraine. At the same time, even when fulfilling its international obligations, the state cannot “destroy” the justified expectation by adopting certain legislative acts. Within the Decision on the case of “Anheuser-Busch Inc. v. Portugal” the European Court of Human Rights stated that as to whether the decision to apply provisions of the bilateral agreement to the application for trademark registration submitted before its entry into force was an interference with the peaceful use of property; the Court noted that the main complaint the applicant concerned was the way the National Courts had interpreted and applied the domestic law. In that connection, the Court reiterated that its jurisdiction to verify that national law had been correctly interpreted and applied was limited and that its functions were not to replace by National Courts, but to ensure that the decisions of those Courts were not based on arbitrariness or not were otherwise clearly unfounded, especially when, as it is here, the case concerned complex issues of Interpretation of National Law. The case of the applicant company differed from those in which the Court found retrospective interference by the legislature, like, for instance, in this case where the question of whether the legislation had been applied retrospectively was questionable within itself,

whereas in earlier cases the application of the reverse force of law was undoubtful and quite intentional. The only valid registration existing at that time when bilateral agreement entered into force was the appellation of origin of the registered trademark named after some Czech company, and although this registration was subsequently revoked, the Court could not examine the consequences of such a revocation on the right of priority assigned to the trademark. In the absence of any arbitrariness or manifest unfoundedness, the Court cannot call into question the Supreme Court's conclusions or its interpretation of the bilateral agreement. Possessing two contradictory arguments before them, private parties concerning the right to use the name of company, the Supreme Court made its decision on the basis of materials which it considered appropriate and sufficient to resolve the dispute, after hearings on the arguments of the parties concerned. Thus, the Supreme Court's decision did not interfere within the applicant company's right to peaceful possession of its property.

4. Results

Provisions of Article 41 of the Constitution of Ukraine correspond to the relevant provisions of Article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950. Article 1 of Protocol No. 1 to the Convention can be applied to intellectual property in general and to incorporated trademark. The mere existence of the applicant's right for trademark incorporation, subject to a certain condition which was terminated retroactively due to non-compliance with that condition, and it was not sufficient enough to establish that the applicant who applied for trademark registration was entitled to claim to which he might affirm that he had at least a "justified expectation" of its implementation. The existence of a trademark registration dispute, which is pending before the courts of different countries, is the foundation for the assertion that the applicant has no "justified expectation". In the absence of any arbitrariness or manifest unfoundedness, the European Court of Human Rights cannot call into question the Supreme Court's conclusions or its interpretation of the bilateral agreement.

5. Conclusions

1. In order to benefit from the protection of Article 1 of Protocol No. 1 to the Convention, an applicant who has applied for registration of a trademark must be entitled to claim in respect of which he may affirm that he had at least a "justified expectation" for its implementation. The grounds for concluding that such a "justified expectation" is as follows: the availability of grounds for such a requirement within national law and the consistent practice of National Courts, which shows that the applicant does have sufficient grounds to obtain this very justified expectation.

2. The mentioned reasons allow to affirm about the lack of reasonable grounds within national law or in the settled case-law practice of National Courts that are to state that an applicant who has applied for registration of a trademark has "justified expectation" protected by provisions of the Article 1 of Protocol No. 1 to the Convention: 1) the applicant company had a right that is subject to a certain condition, which was terminated retroactively due to non-compliance with this condition, namely that it did not violate rights of the third parties; 2) there is a dispute/disputes about the registration of a trademark, which being taken into the Court processing in different countries; 3) the applicable rule of national law is sufficiently accessible, accurate and predictable; 4) the criteria for trademark registration are unclear, there are doubts about their proper interpretation, as well as the difficulties associated with the need to analyze various international instruments.

3. Violation of the Article 1 of Protocol 1 is a retrospective interference by the legislator.

4. The current legislation of Ukraine in the field of intellectual property on "expectativa juridica" issues when filing an application for trademark registration, as well as on state interference regarding the "justified expectation" of the applicant companies needs to be improved in the light of the case-law practice of the European Court of Human Rights.

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КОНСТИТУЦІЙНЕ ПРАВО ВОЛОДІТИ, КОРИСТУВАТИСЯ І РОЗПОРЯДЖАТИСЯ РЕЗУЛЬТАТАМИ СВОЄЇ ІНТЕЛЕКТУАЛЬНОЇ, ТВОРЧОЇ ДІЯЛЬНОСТІ: «ВИПРАВДАНЕ ОЧІКУВАННЯ» ОТРИМАННЯ МАЙНА, ЩО ПІДЛЯГАЄ ПРАВОВІЙ ОХОРОНІ

Людмила Дешко,

професор кафедри конституційного права Інституту права Київського національного університету імені Тараса Шевченка

доктор юридичних наук, професор

<https://orcid.org/0000-0001-5720-4459>

Scopus ID:

<https://www.scopus.com/authid/detail.uri?authorId=57204442317>

ResearcherID: M-5779-2016

(<https://publons.com/researcher/2223938/lyudmyla-m-deshko/>)

deshkoL@yahoo.com

Анотація

В науці конституційного права жваві дискусії викликає питання обмеження прав інтелектуальної власності. При реєстрації торгових знаків все частіше постає ряд питань теоретичного та практичного характеру: чи може держава на виконання взятих на себе міжнародних зобов'язань «знищити» виправдане очікування суб'єктів права інтелектуальної власності шляхом прийняття певних законодавчих актів? Чи є втручанням у мирне користування майном рішення про застосування до заяви про реєстрацію торгової марки положень двосторонньої угоди, яка набула чинності після подання суб'єктом заяви про реєстрацію торгової марки? Чи

