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

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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,
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.

Violation of the Article 1 of Protocol 1 is a retrospective interference by the legislator. The current legislation of Ukraine in the field of intellectual property on “expectativa jurídica” 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.

**Key words:** constitutional right to own, use and dispose the results of intellectual and creative activity; intellectual property rights; justified expectation; restriction of intellectual property rights; the right of private property; the registration of a trademark; expectativa jurídica; international obligation; the constitutional and legal mechanism for regulating public relations in the field of intellectual property; the balance of interests.

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1. Introduction

Technological development has multiplied and diversified some directions for establishment, manufacture and use of the final production result. 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?

In the science regarding Constitutional Law, the issue for restriction of intellectual property rights provokes lively discussions. These discussions deepened the research of scientists like N. Blazhivska and O. Chepis. Thus, N. Blazhivska considers restrictions on intellectual property rights as an example of the collision of intellectual property rights with the right for information. The scholar concludes in her study that “intellectual property rights, being not absolute, may be subject to restriction in cases of conflict with other subjective rights”, which is considered debatable, because such a conflict is not to be condition for restricting intellectual property rights, as evidenced by the practice of the European Court on Human Rights (Smith Klein and French Laboratories Ltd. vs. the Netherlands (№ 12633 / 87, October 4, 1990, Anheuser-Bush Inc. v. Portugal, etc.)). She also concludes that “mostly often, intellectual property rights conflict with the right for information is due to their legal nature, object and content. At the same time, the restrictions on intellectual property rights provided by current legislation should be interpreted broadly in cases where it is necessary to ensure the balance with the right for information”.

It is clear that the right for intellectual property and the right for information are not in conflict, because the right for information is a structural element of intellectual property rights. Accordingly, it should be about the relationship between these rights and the guarantee of their realization, but neither about the existence of conflicts between them, and moreover nor about the conflict between them as the grounds for restricting property rights. O. Chepis in his research study considers the balance of interests of the subjects of intellectual property rights through the prism of principles on proportionality and justice. The scientist concludes that “compliance with the balance of interests of intellectual property rights subjects is ensured by giving them equal opportunities to realize these interests”. It is clear that such
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” protected by the provisions of the Article 1 of Protocol No. 1 to the Convention.


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 “Budejowicki 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 “Budejowicki 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 particular, 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 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” 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 jurídica” 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.

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.

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Bibliography:
1. Блажівська, Н. Е. (2018). Загальна характеристика захисту прав інтелектуальної власності в практиці Європейського суду з прав людини. Теорія і прак
Конституційно-правові академічні студії. Випуск 3. 2020

Section 1. Current issues of constitutional and legal status of human and citizen

тикання інтелектуальної власності, 5, С. 83-92. URL: http://nbuv.gov.ua/URN/Tpiv_2018_5_11/
6. Конституція України (1996) URL: https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text

References.
Конституційне право, користуватися та розпоряджатися результатами своєї інтелектуальної, творчої діяльності: "Виправдане очікування" отримання майна, що підлягає правовій охороні

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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 взятим на себе міжнародних зобов’язань "знищити" виправдані очікування суб’єктів права інтелектуальної власності шляхом прийняття певних законодавчих актів? Чи є втручання у межах користування майном рішення про застосування до заяви про реєстрацію товарної марки положень двосторонньої угоди, яка набула чинності після подання суб’єктом заяви про реєстрацію товарної марки? Чи
побуває відображення в Україні конституційно-правовий механізм регулювання суспільних відносин у сфері інтелектуальної власності щодо питань «expectativa jurídica»?

Meta статті – виявити умови, за наявності яких у заявника, який подав заявку на реєстрацію товарного знаку, є право вимоги щодо якого у нього є «виправдане очікування» його здійснення, та виявити умови, які дозволяють стверджувати, що в національному законодавстві або в устаненій практиці національних судів відсутні достатні підстави, що дозволяють стверджувати, що у заявника, який подав заявку на реєстрацію товарного знаку, є «виправдане очікування», що знаходиться під охороною положень статті 1 Протоколу № 1 до Конвенції. Методологічною основою проведеного дослідження є загальні та спеціальні методи наукового пізнання (формально-логічний метод, порівняльно-правовий, структурно-логічний).

Встановлено, що для того, щоб скористатися захистом статті 1 Протоколу № 1 до Конвенції про захист прав людини і основоположних свобод, заявник, який подав заявку на реєстрацію товарного знаку, повинен мати право вимоги, щодо якого він може стверджувати, що у нього було, зокрема, «виправдане очікування» його здійснення. Підставами висновку про таке «виправдане очікування» є: наявність підстав для такої вимоги в національному законодавстві та усталеність практики національних судів, яка свідчить, що дійсно у заявника достатньо підстав мати таке виправдане очікування.

Виявлено такі підстави, які дозволяють стверджувати, що в національному законодавстві або в усталеній практиці національних судів відсутні достатні підстави, які дозволяють стверджувати, що у заявника, який подав заяву про реєстрацію товарного знаку, є «виправдане очікування», що охороняється положеннями статті 1 Протоколу № 1 до Конвенції: у компанії-заявника було право, підпорядковане певній умові, що припинилося заднім числом через невиконання цієї умови, а саме що вона не порушувала прав третіх осіб; 2) існує суперечка / суперечки про реєстрацію товарної марки, які знаходяться в провадженні судів різних країн; 3) норма національного права, яка підлягає застосуванню, досить доступна, точна і передбачувана; 4) критерії реєстрації товарного знака є не ясними, є сумніви в належному їх тлумаченні, а також складності, пов'язані з необхідністю аналізу різних міжнародних актів.

Додатково аргументовано, що порушенням ст. 1 Протоколу 1 є ретроспективне втручання з боку законодавця. Обґрунтовано, що чинне законодавство України у сфері інтелектуальної власності щодо питань «expectativa jurídica» при подачі заявки на реєстрацію товарного знаку, а також щодо втручання держави відносно «правомірного очікування» компаній-заявників потребує вдосконалення в світлі практики Європейського суду з прав людини.

Ключові слова: конституційне право володіння, користуватися і розпоряджатися результатами своєї інтелектуальної, творчої діяльності; право інтелектуальної власності; виправдане очікування; обмеження права інтелектуальної власності; право правильної власності; реєстрація товарної марки; expectativa jurídica; міжнародне забезпечення; конституційно-правовий механізм регулювання суспільних відносин у сфері інтелектуальної власності; баланс інтересів.