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HUMAN RIGHTS RELEVANT TO TRADEMARKS

Abstract

Human rights and trademark laws do not go well together. This is partly the result of an educational tradition and the division of legal research into private and commercial law on the one hand and public law, international law and human rights law on the other. This division is also reinforced by the historical judiciary in many countries. However, human rights concerns are becoming more and more relevant in trademark law.

Keywords: *intellectual property, trademark, human rights, freedom of expression, privacy, property*

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Ticarət nişanları və insan hüquqları

Xülasə

İnsan hüquqları və ticarət nişanı qanunları bir-birinə uyğun gəlmir. Bu, qismən təhsil ənənəsinin və hüquqi tədqiqatların bir tərəfdən özəl və kommersiya hüququna, digər tərəfdən isə ictimai hüquqa, beynəlxalq hüquqa və insan hüquqlarına bölünməsinin nəticəsidir. Bu bölgü bir çox ölkələrdə tarixi məhkəmə sistemi tərəfindən də gücləndirilir. Bununla belə, əmtəə nişanı hüququnda insan hüquqları ilə bağlı narahatlıqlar getdikcə aktuallaşır.

Açar sözlər: *əqli mülkiyyət, ticarət nişanı, insan hüquqları, ifadə azadlığı, şəxsi toxunulmazlıq, mülkiyyət*

Introduction

A. Protection of property

This aspect of human rights protection concerns the trademark holder as the property right holder. The scope of this ownership is determined by the primary function of the trademark. Property protection is usually found in national constitutions, but is not a typical feature of international human rights protection. Neither the International Covenant on Civil and Political Rights nor the International Covenant on Economic, Social and Cultural Rights contain provisions on the protection of property. The European Convention on Human Rights protects property not in its main part, but only through the First Protocol, which was added later. Article 1 of the First Protocol provides that every natural or legal person has the right to freely use their property, but the rule allows interference with this right, provided that the criterion of proportionality is met, which balances individual interests with the interests of society. Article 1 applies only to the existing property of a person and does not guarantee the right to acquire property. The meaning of the word "property" is not limited to tangible objects, but includes intangible property and rights such as planning permits, company shares, goodwill and patents. The relevant criteria for establishing "possession", "ownership" or "biens" are whether the right or interest has economic value and whether there is a legitimate expectation to obtain an effective exercise of that right (Əliyev, 2014: 25).

B. Freedom of expression

The issue of reconciling trademark rights and freedom of expression is a classic issue discussed by European scholars, which has recently been reopened due to the explicit reference to “fundamental rights and freedoms, and in particular freedom of expression” in the preamble to Directive 2015/2436 and Ordinances 2017/1001. In this article, the author argues that, in the light of EU law, conflicts between freedom of expression and trademark rights are often illusory. Indeed, in this discussion we are too quickly focusing on the issue of resolving a potential conflict, while EU trademark law itself provides restrictions that guarantee respect for freedom of expression. It should also be borne in mind that commercial expressions enjoy more limited freedom because they serve private economic interests rather than the interests of society as a whole. Consequently, freedom of commercial expression should be limited to trademark rights, which are also fundamental rights of equal value. Therefore, it seems redundant to envisage the use of a designation that reproduces or imitates a trademark, associated with freedom of expression, as a specific limitation of trademark rights, either in a specialty or in the area of enhanced protection of trademarks with reputation.

The right to freedom of expression is a human right most likely to come into conflict with the use of a trademark. In addition to national constitutions, this right can be found, for example, in article 19 of the International Covenant on Civil and Political Rights (Əliyev, 2016: 13). At the European level, Article 10 of the European Convention on Human Rights ensures the right to liberty. Expressing opinions with a qualification that allows this right to be limited in accordance with the terms of Article 10 (Əliyev, 2014). In this context, two cases are important: firstly, when the trademark is used by the owner of the trademark, which may be contrary to public policy or public order, and, secondly, when the trademark is used against the owner of the trademark by someone else, or, at least without the consent of the trademark owner, usually or predominantly outside the trade, for the purpose of artistic expression, parody or criticism of the commercial practice of an enterprise associated with the trademark.

The first situation involves cases where a trademark applicant attempts to register a mark (sometimes successfully), which is potentially contrary to public policy or generally accepted moral principles. International and national trademark laws treat such reasons as absolute grounds for refusing registration. Refusal to register may run counter to the right to freedom of expression, since commercial appearances, such as in the form of advertising, are also “expressions of opinion” and, as such, are protected, but subject to the restrictions that apply to the right to freedom of expression. Generally (Grishaev, 2007: 66). According to the European Court of Human Rights, where advertising serves more than a purely commercial function and also serves the broader public interest, national authorities have a narrower margin of appreciation. However, in the context of trademark law, this area of concern does not seem to be of much practical importance and is rather limited to some bizarre edge cases. In Italy, for example, litigation arose over the fact that wines were sold with Hitler's label and Nazi slogans. In the UK, an application has been accepted to register FCUK as a (potentially offensive) trademark. In cases where a trademark is denied for reasons of public policy and morality, the UK authorities (courts and trademark registrar) usually give due consideration to freedom of expression when deciding on an application.

The second scenario is the use of the trademark by non-owners for parody, artistic purposes or for criticism. It was only in this situation that a significant number of court cases arose in several jurisdictions. In Germany, several cases of ridicule or criticism of advertising have been tried in the German Supreme Court. In the Marlborough / Mordoro case, the defendant used the Marlboro trademark in grotesquely modified form and context in a calendar that promoted the ban on smoking. The court ruled that, in principle, violation of trademark rights can be justified on the basis of freedom of expression: economic interests should be inferior to the fundamental human right to freedom of expression, but criticism should also be materially justified when compared with the rights of the owner of the trademark. economic interests (Sergeev, 2007: 98). In BMW, an anecdote seller used the trademark of a famous car manufacturer in stickers that invited sexual intercourse using words with the same BMW initials. The court ruled that the trademark rights had

not been infringed because the use in question was not a trademark use, and the defendant did not in fact resort to anti-competitive free use of the plaintiff's reputation (and did not demean it), but presented a vulgar joke that the public acknowledged such. Consequently, the court probably did not need to explicitly invoke freedom of expression. In the recent Lila-Postkarte case, the question of the potentially competitive nature of the use of a trademark was narrowly interpreted (because it was a well-known mark), but, in turn, particular attention was paid to human rights. The plaintiff produced and sold chocolate under the trademark MILKA with a distinctive lilac background and used lilac-colored cows in his advertising. The defendant, a postcard publisher, produced postcards of the same lilac color with text that satirically referred to two famous poets and a cow, and thus referred to the plaintiff's famous brand. The Supreme Court ruled that the use of lilac is a trademark, and marketing of the postcard is indeed taking advantage of the plaintiff's trademark reputation as the spoof is based on the fact that the public can associate it with a well-known brand. However, there is still no violation, since the defendant could have invoked the constitutional right to freedom of the arts (a specific version of freedom of expression). The postcard is a satirical artistic engagement with the applicant's trademark. Unless trademarks are used in a derogatory manner or in a purely commercial context, the right to art freedom prevails (Rahmatian, 2008: 57).

C. Protection of privacy and reputation

While these rights are of great importance in copyright law, they do not have much meaning as stand-alone human rights in the context of trademarks. Problems that may arise here are usually fully resolved by remedies and protections in the trademark laws themselves (for example, protection against the use of one's own name or address, or the use of a mark solely for descriptive purposes), so that the rights to privacy and reputation are unlikely. Will be treated separately as a human right in a trademark infringement claim. Goodwill is in any case key to a brand or a claim. However, customary privacy rights may become relevant if someone's name resemblance has been registered as a trademark or without that person's permission (Geiger, 2007: 104).

D. Right to self-determination/minority culture protection

In the context of intellectual property, attempts have been made to realize the right to self-determination and protect minority cultures by introducing a regime to protect the traditional cultural expressions of indigenous peoples. Such protection clauses, which broadly cover the scope of copyright (from a Western perspective), can be found in many national laws and internationally, but they can be very problematic as they can reinforce segregation policies with neo-colonial features. disguised as the protection of indigenous / minority cultures. Typically, traditional cultural protections can be found in copyright laws as "folklore" clauses, but trademark law has also been used to achieve these goals. New Zealand Trademark Act 2002 protects indigenous marks of the Maori community. In section 17 (1) (ii), the absolute grounds for refusing to register a trademark include prohibiting the registration of marks if their "use or registration would offend a significant part of society, including Maori". Another method of protection could be a register in which designations (for example, traditional indigenous designations) can be entered, preventing such designations from being registered as trademarks (Sergeev, 2007: 77). Such "negative trademark registers" (Freizeichenrollen) existed in several German states in the first half of the 19th century. Thus, the mechanism for enforcing human rights can be partly provided by commercial law itself.

F. Other relevant rights

A number of other human rights may be relevant in the context of trademarks, but generally these aspects of human rights are not specific to trademark rights. For example, the question of whether the right to a fair trial was violated in a trademark dispute was to be decided by the European Court of Human Rights in a recent case against Russia (7). The right to a fair trial can also be important, for example with regard to the redistribution of the burden of proof in the criminal offense provision of section 92 (5) of the UK Trademarks Act 1994 and its compatibility

with the presumption of innocence clause in section 6 (2) European Convention on Human Rights. Free use of trademarked materials for educational purposes and mention of trademarks and trade names in dictionaries or encyclopedias may also be subject to human rights protection. However, these questions tend to be of very limited relevance, at least for the time being (8).

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