



IMPROVEMENT OF THE LEGAL BASIS OF TRADEMARK PROTECTION AGAINST UNFAIR COMPETITION

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Article history:	Abstract:
Received: February 7 th 2023 Accepted: March 1 th 2023 Published: April 10 th 2023	this paper conveys the argument that trademark rights may be extended in scope so as to protect the competitive interests of the rights-holder independent from a finding of consumer confusion and at the same time promote the effectiveness of competition to the benefit of consumers. Various trader interests have been put forward as justifications of rational theories of trademark protection, most of them leaning towards the idea that the rights-holder has an interest in the economic exploitation of the advertising message incorporated into his trademark. The antecedent analysis examines the legitimacy of protecting trader interests in the internalization of advertising value through exclusive rights in trademarks

Keywords: trademark, competition, unfair competition, AKAI

Even in ancient times, the trademark was an object of counterfeiting, production and sale of counterfeit goods in mutual trade relations. In particular, English craftsmen who took advantage of the popularity of Russian gas in the United States, counterfeited it and sold it as Russian gas [1].

In history, the French Civil Code, adopted in 1804, is recognized as the first normative document regulating unfair competition. According to Article 1382 of this Code, a person must and is forced to compensate for the damage caused to another person by any action due to his fault [2]. Article 826 of the German Civil Code stipulates the rule of capital offense, according to which, whoever harms a person in ways contrary to the rules of fairness, the offender must compensate for the damage caused to the person whose rights have been violated [3].

The first international rules on unfair competition were defined in Article 10 bis of the Paris Convention. According to it, unfair competition is understood as any competitive action that is contrary to fair practices in industrial and commercial activities. Such actions include actions by a competitor that may cause confusion in any way in connection with trade, industry or other commercial activities; in the course of commercial activities, false and untrue information that may discredit the competitor in any way related to trade, industry or other commercial activities; consists of instructions or information that mislead the public about the size, shelf life, composition, preparation method and characteristics of the goods during the course of commercial activity.

According to Article 13 of the Law of the Republic of Uzbekistan "On Competition" of January 6, 2012 (hereinafter referred to as the "Competition Law"),

unfair competition means any actions of economic entities (groups of persons), including economic activities of economic entities or groups of persons. to have an advantage in raising; which is contrary to business practices and harms or may harm other business entities (competitors); or their actions that damage or may damage their business reputation are understood. The simultaneous presence of all these grounds in the actions of these persons creates the composition of the offense. The existence of competitive relations between individuals is determined by the mutual exchange of goods of these individuals and their inclusion in civil circulation within the same territory (Article 4 of the Law on Competition).

In the case of exclusion of competition between individuals, if one of them controls the activity of the other, considering the relationship of mutual competition between two production entities, these entities cannot be recognized as competitors. The essence of these dishonest actions is to carry out mutually agreed actions aimed at achieving a single economic result, in the interests of the person controlling them. The activity between these persons cannot be recognized as mutual competition. Because the actions of both of them are not separate from each other, independent, but depend on the demand and desire of the supervisor who controls them. Accordingly, the participation of one person in the economic activity of another person does not exclude the fact that such persons are recognized as mutual competitors in a certain commodity market when they perform activities independently of each other.

In the scientific literature, there are views on recognizing the actions of one of the individuals as unfair competition, even when there are no cases of



mutual competition between them. The legal construction and case law on the restriction of unfair competition show that it does not exclude the application of restrictions in the relevant legislation even when there is no competitive relationship between the right holder and the infringer and considers such actions as unfair competition [4].

The acquisition of certain benefits by business entities in the implementation of their business activities is to improve their position in the market compared to other competing business entities, thereby increasing consumer demand for their goods, and the amount of profit received compared to the amount of profit that could be received if they did not engage in dishonest behavior. is understood to increase [5]. It should be proven, not assumed, that individuals will have certain benefits in the course of their business activities. Such cases of proof can be proven by third parties when buying goods, by canceling the contract with the applicants and by other methods [6]. Therefore, when studying the issue of the existence of such a situation in a person's actions, the following should be determined:

1) the right holder does not have his own trademark and the possibility of making more profit than if he had the right to use it;

2) not to allow the inevitable reduction of profits by the trademark owner even when the owner of the right does not own the trademark and does not use the rights in relation to it. The actions of the persons in question in obtaining a certain privilege, if as a result of their implementation these persons have the opportunity to increase their benefits or prevent their inevitable decrease, then their actions are considered to be aimed at obtaining direct benefits.

3) that these actions contradict the requirements of competition law, business ethics, honesty, and fairness.

When considering competitive cases, courts should, in accordance with the circumstances, evaluate the actions of the parties as fair or unfair, any participant in civil contracts should follow the established behavior, taking into account the rights and legal interests of the other party, including assistance in obtaining the necessary information. There is no need to confirm that a person's actions are contrary to the requirements of current legislation, business practices, as well as the requirements of honesty and fairness when determining the presence of a certain sign of unfair competition within the framework of the appropriate attitude. Here, it is enough to define at least one opposite state of the relationship [7].

In the practice of the courts of the Russian Federation, damage or the possibility of damage to an honest business entity, as a rule, is considered as an

objective case of expelling it from the market with appropriate actions of the owner of the trademark aimed at putting an end to the use of the disputed mark against an honest person [8]. In order to recognize the existence of the considered symptom of unfair competition among economic entities on the commodity market, it is not required to prove the existence of the damage suffered or damage to the business reputation. It is enough to prove that the business reputation of this person has been damaged or damaged.

Violation of civil and other legal regulations by a person in the course of his business activities, especially when using a trademark against the law, does not mean that unfair competition has been committed. Accordingly, when considering a dispute about the violation of the rules of free competition in the courts, the total of the following should be determined:

1) actions of a person that may affect competition;

2) the difference between the method of competition chosen by an economic person on the commodity market and the behavior of another person who can exercise his property interests, but exercise civil rights and do not deviate from normal business practices;

3) damage by an economic entity aimed at gaining priority, in particular, property interest in the implementation of economic activity at the expense of other market participants or the possibility of obtaining it, as well as by influencing the choice of goods to consumers by using the method of offering the goods of other persons in the market in fair competition (for example, the business of others use of reputation).

In cases where the actions of a person in the registration of a disputed mark are determined to be contrary to the rules of honesty, the aspects that are different from the actions that any person can perform in pursuit of his property interests are compared. At the same time, the history of entering into trade relations of the disputed mark is also taken into account. Also, the reputation of the disputed trademark used by the defendant, its popularity, and the fact that the social status of the trademark occurred before the trademark was put into circulation by the plaintiff are also taken into account. If the owner of the exclusive right knows that another person is using a means of personalization that is identical or confusingly similar to his own trademark, it may be assumed that the activity of this person has gained reputation among consumers through dishonest action, if the person thereby wants to register the disputed mark, causing his actions to be considered dishonest. Thus, in order for a person to acquire and use the exclusive right to a trademark, the following must be determined:



- duration of use of the disputed sign by the owner of the trademark until the priority date of the trademark;

- whose efforts (for example, investors) caused the disputed mark to become well-known, known to consumers;

- the time when the disputed sign gained reputation and was known to consumers;

- the fact that the right holder knew that the applicant used the same or confusingly similar mark before the priority date of the trademark, or that the right holder intended to use the business reputation of another for such a mark to be recognized by consumers;

- whether, taking into account the existing circumstances, the actions of the right holder are consistent with the rules of honesty generally followed by other economic entities pursuing their own property interests [9]. These marks are in full compliance with the requirements of the competition law, and such persons usually try to achieve a certain status in the market of goods by using the business reputation and reputation of the trademarks of others. Thus, the following can be included in the circumstances that may indicate a person's intention to claim unfair competition in obtaining and exercising a right to a trademark:

- the disputed sign was used by others in the production of goods before the person filed an application for registration of the relevant sign as a trademark;

- the fact that the person was aware of the fact of use of such a sign by others (a contract for the supply of goods was concluded under this sign) before the person filed an application for registration of the relevant sign as a trademark;

- existence of competitors at the time when the person applies for registration of the relevant sign as a trademark;

- the presence of a person's intention to harm his competitors by owning this mark (by acquiring monopoly rights) and to exclude from the market the persons who own the same or similar disputed mark;

- harming competitors by requiring them to stop using the disputed mark and creating the possibility of such harm.

The concepts of "unfair competition" and "abuse of the right" are used together in the exclusive ownership and use of trademarks. Article 9, Part 5 of the Civil Code specifies the abuse of rights as an element that can harm the participants of civil relations. Article 4 of the Competition Law also defines unfair competition as an action that may harm market participants. Competition law specifies the factors that lead to unfair competition, and accordingly we can judge the relevant action as fair or unfair. However, the criteria for abuse of rights are not defined in the law.

According to some researchers, there is no connection between "unfair competition" and "abuse of rights". "Unfair competition is not an abuse of rights, but an abuse of given economic opportunities, a violation of certain "rules of the game" in the market [10].

M.V. Navikov argues the opposite, that is, unfair competition is a form of abuse of rights. A.N. Varlamova rejects both of the above definitions and expresses this opinion. In fact, it is questionable whether the definition of the ratio of abuse of rights and unfair competition is so simple as to include all forms of unfair competition in the institution of abuse of rights. A.V. According to Golikovoy, on the one hand, unfair competition is an abuse of rights, on the other hand, it is possible to prohibit unfair competition actions by law, but these actions cannot be defined as abuse of rights [11].

For this reason, we need to determine the relationship between unfair competition and abuse of rights in trademark relations. The provisions of Article 9, Part 4 of the FC and Article 4, Part 1, Clause 4 of the Competition Law, A.S. Vorozhevich and N.V. Based on Kozlovoy's opinion, we are talking about two independent violations of rights at the stage of trademark registration, that is, unfair competition and abuse of rights. If in the first case we are talking about the violation of the norm of a specific right, in the second case, the abuse of the right is not considered a direct violation of the requirements of the law [12].

The Information Letter of the Federal Arbitration Court of the Russian Federation dated 25.11.2008 No. 127 on "Review of Article 10 of the Civil Code of the Russian Federation by Arbitration Courts" was accepted. It contains recommendations on the practice of applying the rule of abuse of rights. When assessing the abuse of rights in the registration of a person's trademark rights in a letter of recommendation [13]:

first of all, only those who have the right can abuse the right. Unfair competition is prohibited by law, and individuals abuse the right because the right to unfair competition is limited. Accordingly, by law, unfair competitive practices may not be associated with abuse of rights [14];

secondly, relying on the strict rule established by the law on the prohibition of abuse of rights, the court may not limit itself to the evidence of abuse of rights presented by the opposing party in characterizing the behavior of a person as an abuse of rights [15].

thirdly, to protect the violated rights of the person who is allowed to abuse the right against him. In this case, the main issue is not to punish the person who abused the right, but to protect the rights of the person who suffered from this abuse. In order to protect the violated rights of the person, the court may not accept the arguments of the other party to the dispute, which



justify the compliance of the actions of the other party in the exercise of their rights with the requirements of the legislation [16].

The Federal Arbitration Court of Russia refers to case law in distinguishing between the concepts of abuse of rights and unfair competition. Japanese company "Akai Electric Company Ltd" (plaintiff) to the Russian arbitration court, Hong Kong company "Akai Universal Industries Ltd." (respondent) applies for the cancellation of the "AKAI" trademark. According to the plaintiff, the defendant, by using the trademark "AKAI", caused the consumer to falsely believe that the product belongs to a Japanese company. The Hong Kong company has nothing to do with the Japanese company. The respondent stated that he had a relationship with the former owner of the Japanese company. The court rejected the plaintiff's request, stating that he has the right to the trademark "AKAI", but that the evidence that the trademark is well known to the consumer in the territory of Russia is groundless. The Japanese company rejected the court's admission, stating that the company was founded in 1929, produced the same goods on the territory of Russia, was the official sponsor of the broadcast of the Olympic Games in Moscow, the sponsor of the "Spartak" club, and was the owner of the trademark "AKAI" from 1972 to 2001. However, against these arguments, the court notes that the word "AKAI" as part of the name of the Hong Kong company is famous in Russia.

The Presidium of the Supreme Arbitration Court of the Russian Federation, considering the case in a supervisory manner, cancels the decision of the lower courts according to the fact that the Japanese company's rights to the company name were previously registered. According to the court, it is not possible and unreasonable for the lower courts to take into account the evidence that consumers associate the mark "AKAI" with the Hong Kong company within one month (from the date of registration of the Hong Kong company as a legal entity to the filing of the trademark application). In addition, the popularity of the Japanese company was confirmed by the Hong Kong company itself, which used the slogan "AKAI - the return of the legend" in its advertising. In this way, the Hong Kong company tried to create an impression on the consumer as a representative of the Japanese company.

That the representatives of the Hong Kong company are related to the Japanese company and that there is no difference between them, and that the Hong Kong company is recognized as the representative of the company established in 1929, and accordingly aims to gain a competitive advantage by using the same mark as the well-known trademark registered earlier means These arguments indicate that the registration of a trademark in the name of a Hong Kong company is

misleading to the consumer, which in turn contradicts the requirements of Article 10 bis of the Paris Convention. Accordingly, the Hong Kong company's acquisition of exclusive rights to the trademark "AKAI" constitutes unfair competition and abuse of rights. The court revoked the Hong Kong company's rights to the trademark "AKAI" and ordered the registrar to cancel this right. Therefore, based on this case law, the differences between unfair competition and abuse of rights can be distinguished as follows:

- claims of abuse of the rights of a person may not be considered as an independent claim, but claims of unfair competition may be considered by the court as a disputed case;

- if the abuse of the right first requires the existence of the corresponding right, on the contrary, unfair competition implies the opposite, that is, the violation of the prohibition established by law;

- when considering the issue of abuse of the right, the court shall not consider the issue of finding the actions of the right holder as unfair competition, unrelated to the reasons of the parties.

The purpose of the court to recognize a person as an abuse of his right is not to punish him, but to protect the rights of the person who has been harmed by this. Based on this, in the case of requesting recognition of the actions of interested parties regarding the acquisition and use of the exclusive right to the trademark at the same time as applying to the court as an act of abuse of rights and unfair competition, it should be noted that there are certain differences between these concepts and the behavior of one person - it is not possible to determine the existence of abuse of rights and unfair competition in their actions. If we recognize the situation related to the acquisition and use of exclusive rights to the trademark as unfair competition according to Article 13 of the Competition Law, we cannot evaluate it as an abuse of rights. Because the person initially did not have the right to perform such actions due to the limitation established by law. If a person's acquisition of exclusive rights to a trademark and his actions in using it do not have all the conditions of unfair competition marks, or during the review of the case, there is no requirement to recognize the person's actions as unfair, but the registration of the trademark is carried out only for the purpose of harming another person. increased, if these actions are contrary to the law, or if it is known that the civil rights are clearly unjustified, then the actions of this person can be recognized as an abuse of rights. In fact, these concepts are opposite to each other. But there may be opinions about their similarity based on Article 13 of the Competition Law, because in practice, a person has the right to register and use exclusive rights to a trademark, Article 26 of the Law on Trademarks provides that he



has the authority to register a trademark, and provides an opportunity to use the right in any way. Therefore, in this case, the right provided may be abused. However, it should be noted that here we are talking about unfair competition in the implementation of these rights, and not simply the implementation of the provided right. Therefore, if the exercise of these rights includes signs of unfair competition prohibited by Article 13 of the Competition Law, then these actions should not be recognized as an abuse of rights.

In the world, the experience of India and Dubai applies to the protection of trademarks from unfair competition. Indian companies manufacture and supply a wide variety of products for global brands. At the same time, India sells these branded goods for its population at a lower price of 30-50% [17]. That is, the state buys branded goods at a low price, while other low-quality brands try to make their products equal to these high-quality brands. It is also desirable to use Dubai's experience in combating counterfeit products. According to this experiment, the buyer downloads the store's special self-buy system from the Internet and scans the item he wants to buy, and the selected item is loaded into the store's cart. The price of the goods loaded in the cart is calculated through the mobile application of the store without a seller. The importance of this system in combating the sale of counterfeit products is that the system forces the seller to place only original goods in the store. By scanning the goods, the buyer determines whether the goods are counterfeit or not, using a barcode. If the product turns out to be counterfeit, the application will not identify the product. This indicates that there is a counterfeit product in the store and determines the responsibility of the seller, and the system sends information about it to the relevant authority for information.

In general, the factors that cause unfair competition are, mainly, the competitor's personality, degrading his business reputation through various methods, unequally comparing goods and giving false information to the consumer, forging a trademark and using this mark in a different way. As for the provisions of the law on the restriction of unfair competition, the provisions contained in it only regulate unfair competition relations of a limited content. In particular, the issues of competition law, wrongful comparison, cases of discrediting a competitor, causing confusion in choosing a trademark are not regulated. Based on the above analysis, it is proposed to add an article called "Article 13² "Limiting the prohibition of competition by defamation" to the Law of the Republic of Uzbekistan "On Competition" and establish the following provision in it:

Limitation of competition by defamation is not allowed, i.e. dissemination of false, inaccurate or

distorted information that may harm the business entity and (or) damage its business reputation, including:

another business entity - the quality and consumer characteristics of the goods offered for sale by the competitor, the purpose of such a product, the methods and conditions of its production or use, the expected results of using such a product, its suitability for certain purposes;

the amount of goods offered for sale to other economic entities - competitors, the availability of such goods on the market, the possibility of purchasing them under certain conditions, the volume of demand for such goods;

conditions offered for the sale of goods to other business entities - competitors, in particular, the price of goods.

Article 13³ of the Law of the Republic of Uzbekistan "On Competition" entitled "Restriction of competition by unfair comparison" is proposed to be included and the following provision should be established in it:

Unfair competition by falsely comparing a person and (or) his goods with another person - a competitor and (or) his goods is not allowed in the following cases:

another person - compares the product of the competitor with his own by using words such as "best", "only", "first", "best", "only", "only" and other similar words, without indicating the specific features of the product or its basis, or create an impression of the superiority of the business entity, or provide false and unsubstantiated information containing such highlighted words;

comparison with another person - a competitor and (or) its goods, the absence of specific comparable aspects or indicators, or the impossibility of an objective comparison of existing results;

based on insignificant or non-comparable indicators, comparing the activities of a competitor and (or) its goods with the activities of a competitor and (or) its goods, whose goods are negatively evaluated.

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