

УДК 339.137.2

CONFOUNDING AS A TYPE OF UNFAIR COMPETITION (BE THE EXAMPLE OF TRADE NAMES)

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The article determines effects that result in confounding regarding competitor's or other business entity's sales activity. It has been proved that the confounding with other business entity's activity may be caused by product appearance. Thus a form shall be considered as an indication that is protected against unfair competition. It has been determined that in case of confounding the following factors are considered: trademark distinctiveness, owner's range activity and reputation, customers' information level and similarity of trademarks, goods or services. It has been considered that actions regarding infringements of right for trade name are unfair competition. It has been proved that use of trade name imposes several important duties on its owner regarding its image. It has been concluded that objects of illegal activity become trade names or other marks that are objects of business entities' industrial property. Copying or imitation of such industrial property objects results in confounding competitors' activity by customers, having negative impacts in terms of illegal use of business entities' goodwill.

Швец Г.О., Мелешко Є.В. Змішування як вид недобросовісної конкуренції (на прикладі фірмових найменувань).

В статті визначенні дії, які викликають змішування щодо торговельної діяльності конкурента, іншого суб'єкта господарювання. Доведено, що змішування з діяльністю іншого суб'єкта господарювання може бути викликано зовнішнім виглядом продукту. Тому форма повинна розглядатися як вказівка, що охороняється від недобросовісної конкуренції. Визначено, що при наявності змішування розглядаються такі фактори: ступінь розрізняльної здатності знака, масштаби діяльності і репутація власника, рівень поінформованості споживачів і схожість знаків, товарів або послуг. Розглянуто, що дії відносно порушення прав на фірмове найменування – це є недобросовісна конкуренція. Доведено, що використання фірмового найменування покладає на його користувача ряд важливих обов'язків щодо свого іміджу. Зроблено висновок, що об'єктами неправомірних дій конкурентів стають фірмові найменування та інші позначення, які є об'єктами промислової власності суб'єктів господарювання. Копіювання або імітація цих об'єктів промислової власності призводить до змішування діяльності конкурентів споживачами, що має негативні наслідки у вигляді незаконного використання ділової репутації суб'єктів господарювання.

Швец Г.А., Мелешко Е.В. Смешивание как вид недобросовестной конкуренции (на примере фирменных наименований).

В статье определены действия, которые вызывают смешивание, относительно торговой деятельности конкурента, другого субъекта хозяйствования. Доказано, что смешивание с деятельностью другого субъекта хозяйствования может быть вызвано внешним видом продукта. Поэтому, форма должна рассматриваться как указание, которое охраняется от недобросовестной конкуренции. Определенно, что при наличии смешивания

рассматриваются такие факторы: степень различительной способности знака, масштабы деятельности и репутация владельца, уровень осведомленности потребителей и схожесть знаков, товаров или услуг. Рассмотрено, что действия относительно нарушения прав на фирменное наименование – это есть недобросовестная конкуренция. Доказано, что использование фирменного наименования возлагает на его пользователя ряд важных обязанностей относительно своего имиджа. Сделан вывод, что объектами неправомерных действий конкурентов становятся фирменные наименования и другие обозначения, которые являются объектами промышленной собственности субъектов хозяйствования. Копирование или имитация этих объектов промышленной собственности приводит к смешиванию деятельности конкурентов потребителями, что имеет негативные последствия в виде незаконного использования деловой репутации субъектов хозяйствования.

Problem statement. The basis of market is trade turnover that is the main source of profit from regular, risk, initiative and independent activity. Along with that its proper function in the modern world is impossible with appropriate individualization system for participants of the corresponding relations. Such individualization is necessary for creation of firm customer's associations with particular characteristics of goods, service or person, and finally is directed to goods promotion within the market [1].

By purchasing the certain goods at the first time the customer after its use can usually tell whether he is going to buy the similar thing labelled with the corresponding mark. In such circumstances, sellers of less successful goods naturally try by some means use counter agent's goodwill for better sales of their goods or otherwise arrange conditions to discredit other manufacturer's goods. In such situation protection of lawful interests of person who created positive image of goods with his efforts, unconditionally is beneficial for such entity, which can fully use result of own work, for customers, which obtains the clear reference for positive choice of products and for the government, which economy gains the more profit the more turnarounds perform [1].

The confounding can relate to:

1. Copying, use of mark (trade/commercial name) itself (in order to generate profit);
2. Use of similar mark (parasitizing on reputation);
3. Imitation, use of similar appearance (color scheme, assembly of elements) [8].

In such cases when form, image or other functional characteristics of the product is mainly associated for customers with certain source or origin, the confounding threat for the product origin shall be considered as act of unfair competition [2].

A review of recent studies and papers. Problems of unfair competition are studied by many scientists such as G. O. Androschuk, O. Bezukh, Z. Borisenko, A. Varlamova, I. Dakhno, T. Demchenko, A. Deringer, I. Koval, S. Kuzmina, N. Kruglova, V. Lagutin, O. Melnichenko, T. V. Nestulia, S. Paraschuk, M. Panchenko, Yu. Slobodchikov, S. Stefamovskii, S. Shkliar, etc.

The object of article – to determine actions that result in the confounding regarding competitor's or other business entity's sales activity by the example of trade names.

Study results. As it is known that competitors in struggle for market often resort to illegal measures. Such illegal activity reaches menacing proportions, becoming very harmful for any economy. Thus in Paris Convention for the Protection of Industrial Property dd. March 20, 1883, the unfair competition was declared as illegal action directed to infringement of rights for industrial property's objects. The Convention obliged it participants to provide effective protection against unfair competition for citizens of member-countries. Under an act of unfair competition is considered any act of competition that contradicts fair customs in industrial or trade cases. In particular, any actions that are able by any means result in confounding for enterprise, products or industrial or trade activity of the competitor are subject to prohibition [3].

In accordance with Article 4 of Law of Ukraine “Concerning protection against unfair competition” actions that result in confounding are often connected with illegal use of marks or copying of product appearance; in accordance with Article 6, in turn, it means illegal use of

business entity's goodwill. But it does not exclude and limit protection of other attributes or achievements against confounding [5].

During business activity name commercial name, trademarks, other marks are advertised, gaining goodwill due to use of goods they are labelled with. Gaining of such goodwill requires some time, efforts and material expenses. By confounding of enterprise activity, a law-breaker utilizes reputation of other goods without expenses borne by other business entity [2].

Nobody can prohibit a citizen to use his own name in business activity. In order to avoid confounding in enterprises activity where persons with the same names participate, the law provided a requirement to add to the name used in commercial name additional point of difference that eliminates confounding with other business entity activity. Ascertained by this provision law violation is that manufacturer's marks are deleted from foreign goods and then the goods are introduced to turnover under own mark. In this case the high reputation of foreign goods is misappropriate without own expenses and law-breaker's trademark gain certain goodwill without any efforts [2].

The confounding with other business' entity activity can arise from the product appearance. If the product appearance (form) is well-known, customers connect a certain commercial origin with it (for example, Coca-Cola bottle). So such form shall be considered as the indication that is protected against unfair competition [2].

In accordance with Article 10-bis (3)1 of Paris Convention "an intention" to bring the confounding does not give rise to determine the definition of one or another action as the act of unfair competition. However, an imitator's unfairness can effect on choice of sanctions to be applied. Moreover it is not always necessary for the confounding to take place, because similarity to the confounding often is a sufficient evidence for court decree on unfair competition occurrence. The protection against confounding is provided without any limitations in time. The protection is provided during whole period of time when a probability of confounding exists, but estimated sufficient space to perform characteristics that do not result in the confounding regarding goods, services and entrepreneurship in order not to limit competition on this market. However, as soon as market product becomes conventional or well-known, it loses original or generic appearance, the probability to define the confounding becomes smaller [5].

The fact of confounding can be determined by different means. The simplest type of confounding happens to be when similar mark copies another mark as much as it can result in their confounding for major quantity of customers regarding commercial origin of goods or services. By determination of confounding the following factors are considered: trademark distinctiveness, owner's range activity and reputation, customers' information level and similarity of trademarks, goods or services [2].

In many countries the term "confounding" comes down to the simple confounding regarding commercial origin and applies also to confounding cases, when the impression of strong business relations between two users of same or similar trademarks is created, so it comes to the confounding-confusion from the point of affiliation with organization. However use of identical or similar marks that are not obviously interconnected or completely different goods, as a rule, is not subject to protection, because significant difference of goods or services convinces customers that goods and services sources of origin are different and users of such marks do not have business relations [5].

Actually it is quite hard to protect trade names from use by other persons of analogical (similar), but not identical (same) trade names. In case of available registered trademark nowadays is near impossible [6].

So it is recommended to choose a name of your company, nevertheless of her type (commercial or not) in such way it can be registered as trademarks for certain goods or services. Then in case of conflict it would be easier for you to assert rights for trade name, because from the one hand it would be protected as trademark and from the other hand as commercial name [6].

Let's use as an example the Decree of Higher Commercial Court dd. July 12, 2005 on the case No. 5/20H. Limited Liability Company "Rio-Plus" Publishing House" (hereinafter referred to as "Rio-Plus" Publishing House", LLC) filed an application to Administrative Board of Anti-Monopoly Committee of Ukraine in connection with unfair competition by Limited Liability Company "Olviko" (hereinafter referred to as "Olviko", LLC) in the form of illegal use by the latter name of printed media that is similar to the extent of confounding with mark of established by the third person newspaper. The Anti-Monopoly Committee of Ukraine has determined that "Rio-Plus" Publishing House", LLC has established the newspaper "RIO-plus" and "Olviko", LLC has established the newspaper "R.I.O-lux", both newspapers are published in town of Alchevsk. Having considered the application of "Rio-Plus" Publishing House", LLC the Anti-Monopoly Committee of Ukraine decided that by its actions, namely establishment and publication of the above-mentioned newspaper by "Olviko", LLC is an act of unfair competition that violates rights of "Rio-Plus" Publishing House", LLC, particularly, for commercial name. In the decision of the Anti-Monopoly Committee of Ukraine is particularly mentioned that mark (name) of the newspaper "R.I.O-lux" can result in the confounding with activity of "Rio-Plus" Publishing House", LLC, so "Olviko", LLC is obliged to stop violation of other business entity (the Applicant).

"Olviko", LLC didn't agreed with position of the Anti-Monopoly Committee of Ukraine, filed the application to Commercial Court with request to revoke the decision of the latter. But Commercial Courts (first, appeal, cassation court) agreed with position of the Anti-Monopoly Committee of Ukraine regarding unfair actions of "Olviko", LLC on publication of the newspaper name of which is similar to confounding with the name of "Rio-Plus" Publishing House", LLC [9].

In accordance with cl. 4 of Article 489 of Civil Code of Ukraine, persons may have same commercial names if they don't confuse customers regarding goods they are produced and/or sale and services rendered. The customer usually doesn't draw attention on legal entity's form of business and see only recognized part of the name that results in confounding of commercial names [6].

The protection of right on commercial name can be carried out through administrative and legal proceedings. Through administrative proceedings conflicts are settled by the Anti-Monopoly Committee and decisions adopted on through administrative proceedings can be challenged in the court [6].

If goods and services of companies are not faced on the market, there is no unfair competition in their activity; attempts to prohibit use of identical name in the company name can be hardly successful [6].

In accordance with part 1 of Article 489 of Civil Code of Ukraine "The legal protection is provided to commercial name, if it gives a possibility to define one person among the others and doesn't confuse customers regarding their true activity" [6].

The legislation of Ukraine, unfortunately, doesn't contain a definition of commercial (company) name. In the literature the essence of commercial name, as a rule, comes down to the certain indication (mark) under which an entrepreneur is represented in civil commerce and identifies such persons close to other participants of civil commerce [10].

In accordance with part 2 of Article 489 of Civil Code of Ukraine intellect property right for commercial name becomes effective from the moment of first use and is protected without obligatory request for it or its registration, regardless of it is part of commercial name of trademark or not [10].

So the legislation of Ukraine connects occurrence of right for protection of commercial name with the fact of its first use. Such approach completely meets the requirements of Article 8 of Paris convention for the Protection of Industrial Property that provides protection of commercial name in all member-countries without obligatory request for it or its registration, regardless of it is part of commercial name of trademark or not [10].

At the same time part 3 of Article 489 of Civil Code of Ukraine warrants that information about commercial name is subject to be entered to registers, procedure of keeping of which is

established by the law. Nowadays there are no such register in Ukraine and a law warranting the procedure of keeping. As for legal effect of such registration, it shall be provided in accordance with Article 8 of Paris convention for the Protection of Industrial Property and part 2 of Article 489 of Civil Code of Ukraine. So the registration itself doesn't have constitutional effect for occurrence of intellectual property right for commercial name. Based on the above-mentioned, provisions of part 2 of Article 159 of Commercial Code of Ukraine regarding the fact that business entity, commercial name of which has been entered to the register earlier, has the priority right for protection against other entity identical commercial name of which has been entered to the register later are not quite correct. On the basis of mentioned provisions of Paris convention for the Protection of Industrial Property and Civil Code of Ukraine, by settlement of disputes between business entities on possession of the right for commercial name, the Commercial Court shall proceed from the fact that which of subjects started legal use of the corresponding mark earlier [10].

In other words, the special legislation for protection of commercial name is absent in Ukraine. Main regulatory acts that control matters on legal protection for intellectual property such as commercial name in Ukraine are laws of Ukraine "Concerning Companies", "Concerning State Registration of Legal Entities and Individuals" (as amended effective from January 14, 2009), Commercial code and Civil Code (effective from April 1, 2004) and also Order of Cabinet of Ministers of Ukraine "Concerning Registration of Business Entities" No. 740. Therefore commercial name is subject to protection from the moment of organization registration [11].

An assignment of property rights for commercial name to other person is possible only if such rights are assigned along with integral property complex of the person or its appropriate part. For example, the right for commercial name can be transferred to other person in case of the enterprise sale as integral property complex (Article 191 of Civil Code of Ukraine) or incase of legal entity reorganization [10].

Thus the use of commercial name imposes several important duties for its image on the user. Individualization of enterprise, organization or institute by commercial name causes the necessity of protection of such commercial name. Without legal protection the use of commercial name losses its practical meaning [6].

A number of conflicts connected with commercial names grows. First of all it is connected with imperfection of legal entities' registration system and also imperfection and inconsistency of legislation in sphere of commercial names. It means that absence of unified central database and procedure of determination of "similarity to confounding" regarding commercial names [11].

Conclusions. Objects of competitors' illegal actions become commercial names, marks of goods and services (trademarks), other marks, which are objects of industrial property of business entities. Copying or imitation of such objects of industrial property results in confounding with competitors' activity, bringing negative impacts in illegal use of business entities' goodwill, achievement of certain competitors of unjustified advantage in competition, customers choice of goods on the basis of doubtful information. Such actions distort mechanisms of social effective economic competition that is defined by Article 1 of Law of Ukraine "Concerning Protection of Economic Competition" is determined as competition between business entities in order to achieve advantage by own efforts over other business entities and hinders development of native market-oriented economy [7].

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Keywords: unfair competition, confounding, competitor, trade name, reputation

Ключові слова: недобросовісна конкуренція, змішування, конкурент, фірмове найменування, репутація

Ключевые слова: недобросовестная конкуренция, смешивание, конкурент, фирменное наименование, репутация

УДК 352/354:001.891.3:34.6

**ДЕЦЕНТРАЛІЗАЦІЯ ВЛАДИ В УКРАЇНІ:
ЗМІСТ, РИЗИКИ, МОЖЛИВОСТІ ТА АДМІНІСТРАТИВНА РОЛЬ
ГРОМАДЯНСЬКОГО СУСПІЛЬСТВА**

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Borodina O. Decentralization of power in Ukraine: the content, risks, opportunities and administrative role of civil society.

The article, based on the analysis of the latest changes in the regulatory framework for state regional policy and local government reform, a theoretical consideration of the modern state capable of forming territorial communities, fiscal decentralization and practical recommendations given the author's vision of state-building processes. Define the scope and content of local and regional self-government, individual consideration found powers and resources formed the territorial communities. Noted that the strategic goal of the reform is to create a system of governance that is able to provide quality services to the population, because one of the main tasks of the existence of the state is to ensure a sufficient level of access of the population, regardless of place of residence, to receive quality and timely administrative services.

Бородіна О.А. Децентралізація влади в Україні: зміст, ризики, можливості та адміністративна роль громадянського суспільства.

В статті, на основі аналізу останніх новітніх змін у нормативно-правовій базі стосовно державної регіональної політики, а також, реформування місцевого самоврядування, проведено теоретичний розгляд сучасного стану формування спроможних територіальних