

LEGAL POLICY TOWARDS “PATRIOTIC SYMBOLICS” IN TRADEMARKS REGISTRATION AND IN ADVERTISING USE FOR GOODS IN UKRAINE**ПРАВОВА ПОЛІТИКА ЩОДО «ПАТРІОТИЧНОЇ СИМВОЛІКИ» ПРИ РЕЄСТРАЦІЇ ТОРГОВЕЛЬНИХ МАРОК І В РЕКЛАМНИХ ПОСЛУГАХ ДЛЯ ТОВАРІВ В УКРАЇНІ****Mykhailichenko O.S., Master of Laws***Educational and Scientific Institute of Law of Taras Shevchenko Kyiv National University,***Lawyer of Intellectual Property Practice***Law firm “Ilyashev and Partners”*

The article examines the legal issues of the so-called "patriotic" symbolics in trademark registration and the provision of advertising services in Ukraine. The general legal framework defining certain goods and groups of goods is explored. The author analyses the current general and special regulations in civil law and intellectual property with regard to the usage of symbols within the scope of moral standards. Existing legislative trends in additional regulating "patriotic" images and symbols for foodstuffs, alcoholic beverages, and non-consumer goods are reviewed. The author delves into the perception of such symbols from the standpoint of scientists and legal practitioners. The author also considers consumers' opinions in open sources and the media concerning the perception of certain goods as morally acceptable, as well as the factors that determine such a distinction, taking into account the active hostilities on the territory of Ukraine and war crimes committed by the Russian Federation.

The author analyses the correlation between the state interests (ensuring a positive image of Ukraine in all its manifestations), legal issues (possible legal defects, duplication of legal acts content, creation of hastily made and fast rules that potentially contradict other norms, are unnecessary or may even harm general principles) and morality (attempts to increase profits from the use of patriotic symbolics and potential economic growth).

The author's comprehensive review of the EU legislation on trademark registration and advertising services, particularly through the European Court of Justice's criteria of "public order" and "acceptable principles" of morality, offers a valuable comparative perspective.

Using the example of Ukrainian goods as intellectual property objects, the author concludes that, due to extraordinary circumstances (e.g., martial law), the perception of certain phenomena as immoral may change in society. Furthermore, the exploration of questions regarding how the State and the legislator should respond to such changes, and how the balance between the rules of law and morality can increase the recognition of Ukrainian products in foreign markets.

Key words: consumer goods, non-consumer goods, food products, alcoholic beverages, trademarks, public order, accepted principles of morality, patriotic symbolics.

Стаття розглядає правову проблематику так званої «патріотичної символіки» під час реєстрації торговельних марок та надання рекламних послуг в Україні. Вивчено загальну законодавчу базу, яка визначає ті чи інші товари, групи товарів. Опрацьовано чинні та спеціальні нормативні акти у сфері цивільного законодавства та інтелектуальної власності, які стосуються використання символіки в контексті норм моралі. Оглянуті поточні законодавчі тренди щодо подальшого врегулювання «патріотичних» зображень та персонажів при виробництві харчових продуктів, спиртних напоїв та неспоживних речей. Досліджено сприйняття таких символів з позицій науковців та практикуючих юристів. Окремо враховано думку споживачів у відкритих джерелах та засобах масової інформації щодо сприйняття тих чи інших товарів як морально прийнятних та чинники, що зумовлюють подібне розрізнення – з урахуванням ведення активних бойових дій на території України та воєнних злочинів, що скоюються російською федерацією.

Проаналізовано співвідношення державних інтересів (забезпечення позитивного іміджу України в усіх проявах), проблем права (можливі правові дефекти, дублювання змісту законів, створення різких та швидких норм, які потенційно суперечать іншим нормам, є непотрібними або можуть навіть нашкодити загальноправовим принципам) та моралі (намагання збільшити прибутки від використання патріотичної реклами й потенційне економічне зростання).

Оглянуто законодавство Європейського Союзу щодо реєстрації торговельних марок та надання рекламних послуг крізь призму критеріїв «державного порядку» та «прийнятих принципів» моралі Європейського суду справедливості.

На прикладі українських товарів як об'єктів інтелектуальної власності, Автор приходить до висновку, наскільки в суспільстві через надзвичайні умови (як воєнний стан) може змінюватися сприйняття тих чи інших явищ як аморальних, яким чином держава та законодавець мають реагувати на такі зміни, а також наскільки баланс між нормами права та моралі може підвищити пізнаваність українською продукції на іноземних ринках.

Ключові слова: споживні речі, неспоживні речі, харчові продукти, алкогольні напої, торговельні марки, публічний порядок, загально-визнані норми моралі, патріотична символіка.

Introduction. The war made the Ukrainian population more emotional and vulnerable to radical changes, including reforms in all branches of law. As a result, any abrupt and unjustified amendments tend to cause public outcry and scandals, damaging the government's reputation and harming the frontline's additional military and humanitarian supplies. This is the case of using patriotic symbolics for foods, agricultural products, and other materials made by many Ukrainian entrepreneurs since the beginning of the full-scale war, who began to use inspiring yet dubious phrases and names in their advertising in the wake of national renaissance. Given the circumstances, the Authors endeavour to cover numerous vital yet undiscovered topics.

The article's first goal is to review the definitions of consumable (foodstuffs and alcoholic beverages) and non-consumable (souvenirs, postcards, toys, and so forth) products and the definitions of patriotic symbolics and their impact on legislative reforms.

The article's second goal is to analyse recent discussions, as well as legislative and political approaches to tackle the improper usage of patriotic symbolics.

The article's third goal is to explore the concepts of public order, accepted principles of morality and how patriotic symbolics may contradict these principles.

Afterwards, the Author will provide a conclusion on how to combat the improper usage of such symbolics and how quick and rash legal decisions may lead to potential legal defects in the future.

State of development of the problem and research methods. The question of advertisements and trademarks, which violate ethical, humanistic, and moral standards and disregard the rules of decency, has been thoroughly researched by Ukrainian scholars in the field of IP law (O. Kharchenko, M. Koval, A. Yushina, O. Korenyuk, M. Abashidze, K. Zerov and so forth), scholars from journalistic and philological universities (O. Zelinska, V. Osaula, O. Bugaiova, O. Kovtun and many others). Besides, the European Court of Justice thoroughly reviewed the question of "immoral trademarks" (other jurisdictions were omitted due to scale limitations). However, the case of patriotic symbolics is unique, as it is quite new in

nature, touches many branches of law and goes into the issues of law itself. As such, there are no well-defined works for legislators and society to react to these advertisements and trademarks, which may shake the society already severely influenced by the war grievances.

Methodology of the study. The author offers his viewpoint on the doctrine of intellectual property (hereinafter – "IP") and media law concerning patriotic symbolics. This perspective derives from empirical research involving comparison and theoretical research methods, to wit: abstraction, analysis, synthesis, induction and deduction, and ascent from the abstract to specific.

Main material. To begin with, Ukrainian legislation has legal definitions that may help understand the concept of consumer and non-consumer items covered by patriotic symbolics.

The Civil Code of Ukraine (hereinafter – "CCU") is the fundamental regulatory act of private legal relations in Ukraine; Article 185 defines the so-called consumable and non-consumable items [1]. Consumable is an item that, following its one-time use, is destroyed or ceases to exist in its original form. Non-consumable is an item intended for repeated use whilst retaining its original appearance for a long time. However, other Ukrainian national acts, legal classifiers, and directories traditionally do not use such a division, instead focusing on the categories of goods and not items, and do not distinguish the pure meaning of the term "goods." In particular, the Ukrainian Classification of Goods for Foreign Economic Activity by the Law of Ukraine "On the Customs Tariff of Ukraine" № 2697-IX (hereinafter – "Classification") operates in 97 groups of products: from products of animal origin, plant origin, cereals to works of art – without any distinction based on consumption criteria [2]. The term "goods" is not quite applicable to the Articles' object, as Harry M. Flechtner – Professor of Law at the University of Pittsburgh, properly notes that the term "goods" encompasses "tangible property capable of delivery, excluding real estate and purely intangible rights, but including, e.g., raw materials, commodities, finished goods, machinery, etc." [3]. Since patriotic symbolics affects both trademarks and advertising services, the goods themselves, their labels, form, perception, and purely intangible rights, requiring simultaneous coverage of the concept of "thing" and "goods", the usage of the article mentioned above 185 of the CCU will be sufficient.

Amongst the known consumable products in Ukraine are foodstuffs and alcoholic beverages. According to Ukrainian legislation, "foodstuff" is a substance or product intended for human consumption, whether it be unprocessed, partially processed, or processed [4].

Foodstuffs also include agricultural products ("*сільськогосподарська продукція*" in Ukrainian) – goods specified in Ukrainian groups 1-24 of Classification, provided that such goods (products) are grown, fattened, caught, collected, manufactured, produced, processed directly by the manufacturer of these goods (products), as well as products of processing and processing of these goods (products) if they were produced at own or leased facilities (areas) [5].

Furthermore, the Ukrainian legislator defines alcoholic beverages as products obtained by the alcoholic fermentation of sugar-containing materials or as the ones based on food alcohols with an ethyl alcohol content of more than 0.5 percent of volume units, which are specified in commodity headings 2203, 2204, 2205, 2206 (except kvass "live" fermentation), 2208 according to the Ukrainian Classification of Goods of Foreign Economic Activity (hereinafter – "UCG FEA"), as well as products with an ethyl alcohol content, which are outlined in commodity items 2103 90 30 00, 2106 90 under the UCG FEA [6].

Trademarks and advertising services – although being different objects of legal relations, for the average consumer, are inseparably associated with one object, due to which both concepts require a parallel study that will allow us to understand why the use of patriotic symbolics for the sale of goods can cause strong indignation in society.

According to Ukrainian legislation, a trademark distinguishes goods (services) produced (provided) by one person from goods (services) produced (provided) by other persons. Such designations include words, letters, numbers, pictorial elements, and colour combinations [7]. Likewise, advertising implies information about a person, idea and/or product, distributed for monetary or other remuneration or self-promotion in any form and in any way and intended to form or support indirect (direct advertising, telesales) or indirect (sponsorship, placement of goods (product placement) method of awareness of advertising consumers and their interest in such persons, ideas and/or goods [8].

Therefore, trademarks and advertising are separate objects that give a particular item a certain recognisability and distinctiveness. Since the war began in 2014, some Ukrainian entrepreneurs have started wondering if they can increase their income by using patriotic notions (for instance, soldiers defending the country, mascots, parts from motivational speeches, and slogans against the enemy). As such, philologists, journalists, and lawyers began to show interest in distinguishing such a phenomenon and giving it a certain terminology.

D. Oltarzhevsky defines **social advertising** – as a type of communication aimed at drawing attention to society's most pressing problems and its moral values to actualise social issues. Its purpose is the humanisation of society and the formation of its moral values. This type of advertising seeks to change the audience's attitude to a certain issue and create new social values in the long run [9, p. 14]. O. Zelinska, candidate of philological sciences, notes that presenting information about social advertising is more tangential to politics, especially in crisis periods of history (war, famine), when the purpose and tasks of these types of advertising were common. She remarks that social advertising nowadays refers to appeals encouraging consumers to be proud of the Ukrainian military, to help the Armed Forces, approve of volunteering in any sphere to help the soldiers and support messages about the heroism and dedication of the military [10, p. 16]. Driven by such motives, the more ad consumers in Ukraine are aware of the social or political message topic, the more acutely they react to it [10, p. 17].

The more the ad consumer is aware of the topic of the social or political message, the more acutely they react to it, and the more effective the campaign is [10, p. 17].

O. Bugaiova, doctor of philological sciences, singles out several important functions of social advertising:

- 1) informative – informs about the presence of a certain social problem that needs immediate resolution;
- 2) educational – explains the causes of social problems and offers ways to eliminate them;
- 3) educational – forms such models of behaviour that contribute to the comfortable coexistence of people in society, the satisfaction of their physical, moral, aesthetic, and cultural needs;
- 4) economic – contributes to the receipt of taxes from citizens, at the expense of which the state will carry out funding of social programs and relevant projects;
- 5) prompting action – "soft" advertising that evokes positive emotions, forms internal readiness for action, and then the action itself and calculated for a long-term result, "tough" – has an aggressive character, shocks, and shows a social phenomenon from a negative perspective, therefore prompting the consumer of social advertising to react quickly [11, p. 125].

Under the war conditions, social advertising in Ukraine almost always began to relate to issues of national and civic self-awareness and ethnonational values, which allows us to single out a separate variety in it – patriotic, as V. Osaula properly remarks [12, p. 88].

O. Kovtun refers to patriotic advertising as a symbolic expression of patriotism using advertising as a visual channel of information since, receiving information on certain patterns of behaviour towards the Motherland, advertising of patriotism affects the formation of relevant psychological and behavioural stereotypes [13, p. 83]. Altogether, O. Kovtun states that

"today, we are observing the actualisation of the emotional aspect of patriotism of Ukrainian citizens, which is based on love for the Motherland, whilst the behavioural sphere is not fully involved." [13, p. 84].

Thus, based on legislative norms and definitions of scientists regarding social advertising itself, **the Author proposes to define patriotic symbolics as a set of ideas, images, and works that use appeals to support the homeland in countering the aggressor, designed to motivate citizens to help the country and associating with it more actively.** Such symbols may distinguish certain goods and services as trademarks from others and are distributed for monetary or other consideration or self-promotional purposes, advertising services in any form and by any means intended to form or support, directly or indirectly, the awareness of advertising consumers and their interest in such person, idea and/or product.

With the beginning of the full-scale invasion of Russia against Ukraine, many local brands began to use in their advertising of food, agricultural products and other materials (such names as "Azovstal" radish, "Bucha-Kombucha" drink, and many other trademarks) so-called patriotic expressions and names associated with the national resistance of Ukrainians, including the Armed Forces of Ukraine. To stop the disrespectful attitude of business representatives toward the topic of national defence, in early 2023, Draft Law № 9128 (hereinafter – "the Draft") appeared in the Verkhovna Rada [14].

To protect public and private interests, the Draft proposed amendments to Article 6(5) of the Law of Ukraine "On the Protection of Rights to Trademarks for Goods and Services" № 3689-XII and to Article 8(1) of the Law of Ukraine "On Advertising" № 270/96-BP. The Draft would prohibit Ukrainian businesses from using names related to national security and defence measures in trademarks and advertisements, including events related to national security and defence matters, references to hostilities and military operations, and the names of manufacturers, types of weapons, and military formations established under the laws of Ukraine.

The above restrictions would not apply to advertising films, videos, and publishing products that cover events related to implementing national security and defence measures, as well as countering and deterring the Russian armed aggression.

The case of patriotic symbolics provoked different reactions from the Ukrainian government and lawyers. Although the Ukrainian National Office of Intellectual Property and Innovation (hereinafter – "IP Office") has been moderate in its reactions towards such activities, on 27 March 2023, Deputy Head of the Office of the President of Ukraine Andriy Smirnov stated on Facebook about the necessity on amending the Ukrainian IP legislation to combat patriotic themes' abuse [15].

The Deputy Head discussed new legislative changes that would make the preventive state react to cases of unethical activity that violate the norms of public morality and make the responsibility for violations more tangible. As of 12 June 2024, the Draft remained without consideration, with fate for any vote in the Parliament.

Whilst the Author fully shares the necessity of addressing such activities, in his opinion, Ukrainian and international law already contains sufficient grounds to refuse to register such patriotic trademark applications and prevent similar advertising, rendering this Draft unnecessary.

According to Article 5(1) of the Law of Ukraine "On Protection of Rights to Trademarks" № 3689-XII [7], legal protection is granted to a trademark that does not contradict public order, generally recognised principles of morality, requirements of the Law of Ukraine "On Condemnation of Communist and National Socialist (Nazi) Totalitarian Regimes in Ukraine and Prohibition of Propaganda of Their Symbols" № 317-VIII and is not subject to the grounds for a refusal to grant legal protection established by this Law.

To determine whether a mark is protectable, all the factual circumstances, particularly the duration of the mark use, must be considered [16]. "Principles of morality" and "morality" are not static categories; what was acceptable before the war

cannot be tolerated and speculated on now. At the same time, each trademark application is unique and should be considered separately.

Article 19 of the Law of Ukraine, "On Protection of Consumer Rights" 1023-XII, prohibits unfair business practices, which include (1) any actions that are qualified by law as a manifestation of unfair competition; (2) any activity (actions or omissions) that mislead the consumer or is aggressive [17].

Another example is the regulation under Article 20 of the Law of Ukraine "On Advertising" № 270/96-BP, which, among other things, prohibits advertising using images of real or toy weapons and explosive devices [8].

As Ukrainian lawyer K. Zerov properly notes, the Draft would not prohibit filing trademark applications a priori [18]. As soon as a trademark application is filed and the state fee is paid, it is automatically entered into the public register and awaits a substantive decision from the examination body on registration or refusal of registration as a trademark. Therefore, new "parasitic" applications can and probably will continue appearing, even if the Draft could become a law.

As another Ukrainian lawyer, O. Klumchyk, promptly noted, the Draft can be considered somewhat belated and more reactive, namely, a particular legislative reflection on the processes that began in March 2022 with no rational background for changes [19].

However, the Draft would not establish new norms for already filed trademark applications (since laws establishing new legal regulation cannot have a retroactive effect), and the grounds for a refusal to register a trademark are "tied" to the date of applying, not the decision date.

The Draft's case is understandable, as its authors intended to preserve the reputation of the Ukrainian Armed Forces and Ukraine itself. Yet the opinion of Ukrainians is different depending on what kind of advertising and trademarks entrepreneurs and volunteers use. For example, according to a survey conducted by Google and Kantar among Ukrainians about creativity during the war, 71% of respondents had a positive attitude to humour in advertising, and 57% were optimistic about the use of new well-known military images (Patron the Dog, Bayraktar, HIMARS) [20].

In another survey made in Ternopil City Council, Ukraine, its participants favoured souvenirs whilst being quite wary of food, drinks, and items usually deemed immoral in society, like intimate items [21].

To better understand the line between acceptable and unacceptable cases of using patriotic symbolics on items, the Author conducted a survey in the period from May to July 2023 [22].

The survey had 67 respondents. 50 were aged 17–21, and 17 were over 22. Of them, 33 were law students, 17 were students of non-law majors, 12 were practising lawyers, and 5 were not practising law or engaged in science. 41 respondents understood the basics of Ukrainian advertising and trademark registration laws, and 26 did not. 44 respondents possessed basic knowledge of the legislation on information law and IP law, and 23 did not. 54 respondents did not support using patriotic symbolics for commercial purposes in agricultural products, foodstuffs, and alcoholic beverages), whilst 13 would approve of such use. At the same time, 54 respondents supported using patriotic symbolics for non-commercial purposes (military, humanitarian, artistic, and entertainment purposes without selling services), with only 13 being against it. 27 of 63 respondents would approve of the symbolics in the entertainment content of social networks (memes, songs, and other elements of Ukrainian culture in conditions of war), 53 respondents would allow the symbolics to be present in campaign materials/posters/when recruiting volunteers, with 46 favouring it during making products for exclusively humanitarian or military purposes.

One of the most notable survey results is that 52 respondents believed a new Ukrainian law should be drafted to combat the issue, 2 supported the Draft concept, 8 said the authorities already can prevent the misuse of symbols with the present instruments, and five said nothing should be done at all.

Of course, it is impossible to claim the conclusions finality from such a survey, and one needs to consider the speed of changes that occur under martial law. However, the author believes this survey can give useful conclusions. It supports other previously made surveys on the perception of patriotic symbolics. The survey stipulates that military-patriotic themes are acceptable in Ukrainian society to create positive stereotypes about Ukrainian power, jokes about enemies and their leadership, and motivational and ironic videos and memes. Ukrainians tend to support such symbolism in advertising non-consumable items, souvenirs, and within any volunteering campaigns for the Ukrainian army but being suspicious towards foodstuffs and alcoholic beverages.

Ukrainian and European media legislation has extensively reviewed the concepts of public order and protection of morality. According to Article 202(1) of the CCU, an individual's action to acquire, change, or terminate civil rights and obligations constitutes a juristic act. Therefore, submitting a trademark application can be considered a juristic act aimed at developing IP rights to the trademark.

According to Article 228(2) of the CCU, a juristic act is considered to violate public order if it aims to violate an individual's constitutional rights and freedoms, damage the property of a natural or legal person, the state, or a territorial community, or unlawfully seize it.

The Law of Ukraine "On Advertising" № 270/96-BP has an entire chapter dedicated to disciplinary, civil, administrative, and criminal liability for patriotic symbolics misuse under the law. For example, in order to protect the interests of society, the state, consumers of advertising, and participants in the advertising market, the state bodies specified in Article 26 of the Law may apply to the court to ban the relevant advertising and its public refutation. Though the law may be subject to further reforms, it is sufficient to address the theoretical aspect to prevent patriotic symbolics from portraying the relevant ideas in a bad light.

The legal foundations for protecting morality in society, including preventing the dissemination of products that hurt public morality, were established by the Law of Ukraine, "On the Protection of Public Morality" № 1296-IV [23]. This law defined public morality as a system of ethical norms and behavioural rules developed in society based on traditional spiritual and cultural values, concepts of goodness, honour, dignity, civic duty, conscience, and justice. Additionally, it specified a list of products prohibited for production and distribution. However, the law ceased to be in effect on March 31, 2023, given the enactment of the Law of Ukraine "On Media" 2849-IX, which led to a legal vacuum regarding the legal definition of public morality. Consequently, European practices have become more relevant in the present case.

It is worth mentioning the Methodological recommendations on certain issues of examination of the application for a mark for goods and services of the State Enterprise "Ukrainian Institute of Industrial Property" dated 04.07.2014 № 91 (hereinafter – "Recommendations"). Although not mandatory, they are still actively used by Ukrainian applicants for trademark registration and may be of qualitative origin [24].

Article 8.4 of the Recommendations contains many cases in a sign for trademark application contradicts public order and principles of humanity and morality if it, in particular, misleads the public, promotes war, national and religious enmity, violent change of the constitutional system or territorial integrity of Ukraine, in particular, contains anti-state, racist slogans, emblems and names of extremist organisations, humiliates or insults a nation or a person on a national basis.

The Recommendations further empathise that sometimes, when the essence of concepts that are considered shameful, offensive, or that violate other ethical norms and rules of behaviour established in society change over time, and it is clear that words and images that offended in earlier years are today acceptable in society and may be used as marks about certain goods or services. Likewise, other words or images that were once innocuous may now be viewed as offensive [24, p. 70].

Thus, the Ukrainian legal system provides somewhat vague but nevertheless feasible mechanisms to ensure that patriotic symbolics may be prevented and discouraged from being used purely for personal enrichment. Although the Ukrainian courts have experience in dealing with morality concepts, for the sake of the global context, it is important to single out the European Court of Justice practice, which indirectly affects the understanding of certain ideas in all EU countries with its decisions.

In the European Union (hereinafter – "EU"), according to Directive (EU) № 2015/2436 of the European Parliament and the Council, dated December 16, 2015, Article 4, titled "Absolute grounds for refusal or invalidity," it is stated that trademarks which contradict public order and/or accepted "principles of morality" are not eligible for legal protection [25].

The specified provision is reproduced verbatim in Article 193(2) of the Association Agreement between Ukraine, on the one hand, and the European Union, the European Atomic Energy Community, and their member states, on the other hand [26].

Article 7 of Regulation (EU) 2017/1001 of the European Parliament and of the Council (hereinafter – "EUTMR") mirrors Article 6 quinquies of the Paris Convention, which provides for the refusal of trademark applications and the invalidation of registrations where trademarks are "contrary to morality or public order" [27].

Furthermore, a trademark can be declared invalid if registered in violation of Article 7 and Article 4 (1)(f) of the Directive (EU) № 2015/2436, either through an application to the Office or as a counterclaim in infringement proceedings [28].

The European Union Intellectual Property Office (hereinafter – "EUIPO") has consistently maintained a stringent stance in rejecting trademark applications based on public policy and morals, which aligns with the European Court of Justice (hereinafter – "ECJ") approach. "Public policy" and "accepted principles of morality" are grounds for rejection that could overlap and be weighed separately. When a refusal based on "accepted principles of morality" involves evaluating subjective values, a denial based on "public policy" is made according to objective standards (related to laws, policies, and official pronouncements).

In the Cannabis Store Amsterdam case, the ECJ rejected the trademark application for CANNABIS STORE AMSTERDAM for confectionery and soft drinks due to the reference to Amsterdam and the presence of a cannabis leaf in the mark, which indicated higher levels of certain psychoactive ingredients. Whilst delivering the position, the ECJ stated that "EU law does not impose a uniform scale of values and acknowledges that public policy requirements may vary from one country to another and from one era to another. Member States can determine what constitutes those requirements by national needs" [29, § 71]. "[...] public policy is a normative vision of values and goals, defined by the relevant public authority, to be pursued now and in the future, that is, prospectively. The public policy thus expresses the public regulator's wishes regarding the norms to be respected in society" [29, § 72].

EU case law suggests that "public policy" entails an objective assessment of imperative legislative or administrative norms, whilst for "accepted principles of morality", a subjective evaluation is to be made of regular, accepted conduct in a society at a certain time [29].

When evaluating widely accepted moral principles, ECJ considers the perspective of an average person with a typical level of sensitivity and tolerance who is not easily offended [30, § 18]. Unlike other reasons for outright refusal, in this case, the general public encompasses anyone who may inadvertently encounter the trademark in their daily activities [31].

In Constantin Film Produktion GmbH v. European Union Intellectual Property Office, the EUIPO declined to register the mark "Fack Ju Göhte" because it would be against generally accepted moral norms. On appeal, the ECJ upheld this. However, the ECJ favoured the applicant on 27 February 2020, as it found that the EUIPO did not properly consider the trademark applicant's arguments regarding the film's suc-

cess and its audience when assessing acceptable principles of morality. The ECJ noted that the agency failed to evaluate these factors within the appropriate context. [32].

In this case, the ECJ stated that those values and norms, likely to change over time and vary in space, should be determined according to the social consensus prevailing in that society at the time of the assessment. In making that determination, due account is to be taken of the social context, including, where appropriate, the cultural, religious or philosophical diversities that characterise it, to objectively assess what that society considers morally acceptable at that time" [32, § 39].

The type of products and services used in the EU is pivotal in determining whether a trademark goes against public policy or commonly accepted moral standards. When these products and services are commonly found in regular stores and cater to the general public, there's a greater likelihood that a substantial number of individuals, including children, may encounter a trademark that could be considered offensive.

Supposing the products and services associated with a particular trademark are tailored to a specialised or "niche" market. In that case, only a specific target audience will be exposed to the mark, which is not unexpected. The EUIPO explains in *Screw You* how this factor applies. The trademark was deemed acceptable for registration in categories like "sex toys" and 'contraceptives' since the general public would unlikely encounter the mark in places like supermarkets. Conversely, the mark was denied for product categories like "clothing", with a broad target audience, including the general public [33].

On 19 April 2024, EUIPO formally began implementing Common Practice 14 (hereinafter – "CP14") governing trademark applications contrary to public policy or accepted principles of morality.

According to CP 14, "public policy" is "a set of fundamental norms, principles, and values of societies in the European Union at a given time." This definition encompasses the universal values of the EU regarding human dignity and freedom, as well as principles of democracy and the rule of law as stated in the Charter of Fundamental Rights of the European Union. Additionally, the statutory language "accepted principles of morality" in common communication refers to "the fundamental moral values and standards accepted by a society in the European Union at a given time." [34].

The EU also defined Directive 2005/29/EC of the European Parliament and the Council of 11 May 2005 as one of the main legislative acts protecting the population against improper advertising [35].

The Directive 2005/29/EC defines unfair business-to-consumer commercial practices that are prohibited in the EU as any act or omission directly related to the promotion, sale, or supply of a product by a trader to consumers, protecting the economic interests of consumers before, during, and after a commercial transaction has taken place.

A commercial practice under Directive 2005/29/EC is any act, omission, behaviour, representation, or commercial communication such (as advertising) by a trade that may affect the consumer's economic decision whether or not to buy or use a product. Any commercial practice is misleading if it contains false or untrue information or is likely to deceive the average consumer, even though the information may be correct, and cause them to make a purchasing decision they would not have taken otherwise. Examples of such actions include false or deceptive information regarding the existence or nature of the product; the main characteristics of the product (its availability, benefits, risks, composition, geographical origin, results to be expected from its use, etc.); the extent

of the trader's commitments (in codes of conduct by which the trader has agreed to be bound); the price or the existence of a specific price advantage; the need for service or repair.

Thus, EU legislation and case law provide clear criteria for determining whether a designation contradicts public policy or moral values when using patriotic symbolics. In Ukraine, numerous products, often called "patriotic" food and alcohol, have been available in supermarkets. They are intended to symbolise the unity of entrepreneurs with the spirit of Ukrainian soldiers and their integrity. When it comes to the simple consumption of these products, the issue might not necessarily be the controversial themes themselves. Instead, there is a concern that entrepreneurs may profit when Ukrainian soldiers fight for freedom, which can understandably frustrate the average consumer.

Conclusions. Patriotic symbolics is a unique phenomenon that covers the spheres of law, journalism, and philological research. It is used to invoke among the population the idea of **supporting the homeland in countering the aggressor and more actively associating with its own country.** In the current conditions, Ukrainians tend to dislike its use for self-enrichment but approve of such symbols being used for charity, volunteering, and assistance from the armed forces. Some symbols do not change in perception, but others may be subject to drastic amendments. There are also possible reasons to believe that a part of Ukrainians would support the Draft adoption despite already existing legislative mechanisms for counteraction.

Currently, Ukrainian legislation has enough methods to counter the use of patriotic symbols for self-enrichment. This includes the possibility of submitting complaints to the IP Office regarding the cancellation of the trademark registration certificate, filing a lawsuit in court, and many other remedies. Prescribing additional imperative norms-prohibitions for registering these symbols would duplicate the existing norms. In addition, Draft Law No. 9128, which was proposed to introduce similar clarifications, did not consider the possibility of registering such symbols for charitable purposes – such as volunteering or supporting Ukrainian military personnel.

Given the research results, the Author recommends the following:

1. For the IP Office – to amend the current trademark registration guidelines to define the conditions under which patriotic symbols may or may not be acceptable, violate "public order" and "acceptable principles" of morality, as well as creating special campaigns on informing the population about such concepts;
2. For The Ministry of Economy of Ukraine – as an authorised governmental body in ensuring IP policy – to develop separate advertising recommendations on the feasibility of using patriotic symbolics and the context when abuse can be excluded, as well as creating special campaigns on informing the population about it;
3. For scholars in future research – to pay special attention to the phenomenon, considering its highly unpredictable and changing nature whilst monitoring which ideas tend to amend foremost from proper to improper in short periods (or vice versa), what changes are caused by such circumstances, and whether these circumstances can be prevented by introducing certain mechanisms of resistance or encouragement.

Certainly, using the emotions of war to prey on the feelings of others personally is not something that should be approved. At the same time, such symbols, when used correctly and when society understands how these ideas can motivate Ukrainians and the international community to support Ukraine more actively, can significantly affect the country's further development.

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