

Mitteilungen

der deutschen Patentanwälte

Herausgegeben vom Vorstand der Patentanwaltskammer

6

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Warenähnlichkeit ist nicht schon dann nach der Rechtsprechung gegeben, wenn die Vergleichszeichen unter einen weiten Warenoberbegriff, wie *Lebensmittel*, fallen.¹³⁰ Auch dann kommt es darauf an, ob die bspw. unterschiedlichen Lebensmittel von den gleichen oder anderen Unternehmen stammen. Nach diesen Grundsätzen besteht zwischen Nudeln auf der einen und Zutaten für *Nudelgerichte*, wie *Speiseöle* oder *Suppen*, auf der anderen Seite Warenähnlichkeit, da diese Waren sich ergänzen und von daher vom Verkehr auch demselben Unternehmen zugeordnet würden.¹³¹

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stücken und *Gepäck* aus.¹³⁴ Ist für den angesprochenen Verkehr aufgrund der Marktverhältnisse allerdings klar, dass der Dienstleister nicht nur diese selbst erbringt, sondern solche auch im Ausland vermittelt besteht bspw. zwischen *medizinischen Dienstleistungen* und der *Vermittlung kieferorthopädischen Dienstleistungen im Ausland* Ähnlichkeit.¹³⁵

Nach der Rechtsprechung des EuG besteht zwischen den Waren *Spielen/Spielwaren* auf der einen und *Turn- und Sportartikeln* auf der anderen Seite weder Warenähnlichkeit noch Branchennähe, weil sie, neben den unterschiedlichen Zwecken zum einen Unterhaltung, zum anderen der Fitness dienen – auch in der Regel nicht über dieselben Kanäle vertrieben werden.¹³⁶ Aus denselben Gründen scheidet auch eine Warenähnlichkeit zwischen *pharmazeutischen Präparaten* und *Kosmetika* aus, die zwar über dieselben Vertriebsstätten, wie Apotheken, vertrieben werden können, aber unterschiedlichen Zwecken dienen, einmal kosmetischen, das anderen Mal medizinischen Zwecken.¹³⁷

Zwischen den Waren *Putz-, Polier-, Fettentfernungs- und Schleifmittel* auf der einen und *Bürstenmaterial* auf der anderen Seite besteht nach der Rechtsprechung keine Warenähnlichkeit, da es sich bei Bürstenmaterial um Rohstoffe handelt, die zur Herstellung von Bürsten verwendet werden. Bürstenmaterial wendet sich nicht an den Endverbraucher und wird im Übrigen auch nicht unmittelbar zum Reinigen und Putzen eingesetzt, so dass diese entsprechend keine Berührungspunkte aufweisen.¹³⁸

- 129 BPatG, Beschl. vom 29.2.2022, 29 W (pat) 2/22 [Tz. 21] – LID / LIDL, mit Bezug auf EuGH GRUR 2020, 640 Rdn. 42 – Black Label / Labell.
130 OLG Frankfurt a.M., Urt. vom 17.11.2022, 6 U 277/21 [Tz. 17]; WRP 2023, 219 – Terra Greca / Terra Greca.
131 OLG Frankfurt a.M., Urt. vom 17.11.2022, 6 U 277/21 [Tz. 17/18]; WRP 2023, 219 – Terra Greca / Terra Greca.
132 EuG, Urt. vom 18.1.2023, T-726/21 [Tz. 27/29] – Kronendarstellung / Rolex.
133 BPatG, Beschl. vom 24.3.2022, 30 W (pat) 3/21 [Tz. 30] – Coachella.

- 134 EuG, Urt. vom 1.3.2023, T-217/22, [Tz. 75] – Greenwich Polo Club GPC 2002 / Beverly Hills Polo Club.
135 OLG Frankfurt a.M., Urt. vom 11.8.2022, 6 U 199/21 [Tz. 13] – beautysmile.
136 EuG, Urt. vom 21.12.2022, T-129/22 [Tz. 44/57] – BIMBA TOYS / Simba.
137 EuG, Urt. vom 12.9.2022, T-130/22 [Tz. 37/54] – TRAUMGEL / TRAUMEEL.
138 BPatG, Beschl. vom 24.3.2022, 25 W (pat) 518/21 [Tz. 49] – ALEX / ALEX.

The rise of the Ukrainian patents

Anna Shcherbyna* / Vítor Sérgio Moreira**

Historical background of the Ukrainian Patent System abounds in events. Wars have greatly traced its fate and defined the contours of current legislation. In this article we will dive into facts in order to allow a constructive view of the Ukrainian state patent system, which over many decades has sought to safeguard the scientific and technological evolution of Ukraine.

*“Thinking the past to understand the present and idealize the future.”
Herodotus*

End of tsarist empire and independence of Ukraine in 1918

Czar Alexander I established the first patent system in the Russian Empire through the publication of the “Manifesto on the Privileges for Various Inventions and Discoveries in Crafts and Arts” in 1812.

Though, the October Revolution of 1917 ruined the legal system over a vast territory from the Carpathians to the Pacific Ocean. Landowners, industrialists, craftsmen, and peasants in the hinterland felt especially affected and feared threats to their property.

* Anna Shcherbyna, Ukrainian, IP Paralegal, Inventa.

** Vítor Sérgio Moreira, Patent Manager and Trademark and Patent Attorney, Inventa.

Meanwhile, in the face of Russian Bolshevik aggression, Ukrainian sovereignty was proclaimed.

The armed confrontation prompted Ukrainians to dissociate themselves from Russia by proclaiming independence of Ukrainian People's Republic (UPR) in 1918 under the government of the President of the Central Rada Mykhailo Hrushevsky and later Pavlo Skoropadskyi, a Ukrainian Army general of Cossack heritage (see figures 3 and 4).

That year its Ministry of Trade and Industry established the Technical Department of the Inventions. This institution granted the first patents of the Ukrainian State, which acted based on the old legislation of the Russian Empire.



Figure 3: Military drills by the Ukrainian Army at the time of UPR, 1918.

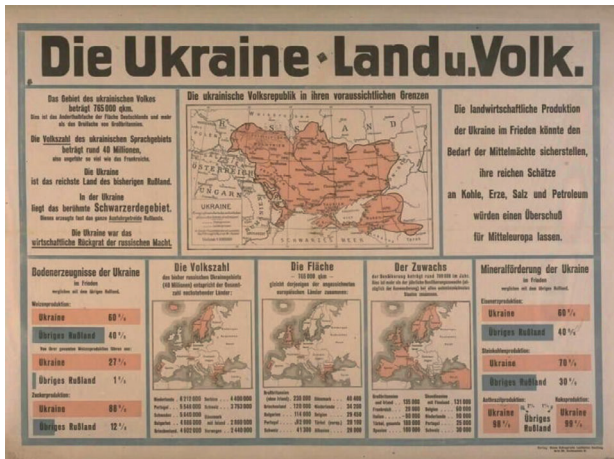


Figure 1: 1916, by Dr. Stephan Rudnytskyi, founder and director of the Ukrainian Research Institute of Geography and Cartography.



Figure 4: Hetman Pavlo Skoropadskyi (center), Prime Minister Fedir Lyzohub (left) and Chief of the Hetman's personal staff Volodymyr Dashkevych-Horbatskyi (right).

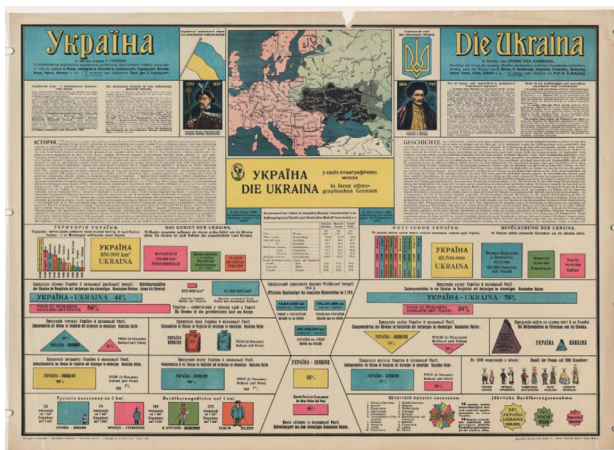


Figure 2: Educational infographic of the Ukrainian People's Republic, published in 1918 in Bucharest: about the symbols, date of independence, history, size, population, potential, and resources of Ukraine.

UPR's patents

In order to file a patent application for an invention, the inventors had to fulfill an established form issued by the

Ministry, pay a stamp duty in the amount of 31–34 rubles (at that time quite an affordable amount even for a small craftsman), provide at least two drawings of their invention on a special paper, if applicable, and a detailed description of the technology.

The issuance of a registration certificate could take a couple of months, and during this time the owner of the invention used a certificate of protection, which allowed to advertise the invention, conduct its testing, public demonstration, and even sale.

The final decision on the meeting of the patentability criteria by the invention was made by an Expert Committee, which included representatives of other ministries, because the inventions could relate to specific industries, such as the military.

The granted patent gave to its owner the right to use and distribute and even alienate the property from those who illegally used the invention (see example in figure 5).

The patent protected the rights for 15 years and, interestingly, forced its owner to implement and improve exclusively on the territory of the former Russian Empire. This obviously demonstrated that Ukrainian government saw the Ukrainian State as a partial heir of the Empire and tried to bind inventions on its territory to Ukraine, increasing the potential of its economy.



Figure 5: Registration Certificate of the Ukrainian State for the patent entitled „method of retention of coking products by absorbing them from coke gas by porous mass“.

The first Ukrainian patent

The Technical Department of the Inventions worked properly regarding its goals of promoting and protecting the Industrial Property in Ukraine. In 1918, whole trains of Russian refugees of industrialists, aristocrats, journalists, actors, and entrepreneurs poured into a relatively stable Ukraine. Local authorities taxed fees on patent owners who had been issued by institutions of the Russian Empire.

Curiously, the first registration certificate in the history of UPR went to the Russian city Rostov-on-Don. On June 27, 1918, this first Ukrainian patent decorated with a filigree trident was received by Russian entrepreneurs Grunthal and Antoshevsky, who produced a special wooden sole that replaced the use of galoshes and wooden sandals.

Currently, the archives of the Ministry of Trade and Industry in Ukraine contain information on 16 issued patents. The last certificate has number 69, dated September 26, 1918. Therefore, it is clear that a significant part of the patent documentation has been lost.

Mostly, the patents of the UPR concerned domestic needs, for example, a process of manufacture of footwear from industrial waste, heating devices, and electric heating devices. But there are also examples of other inventions, namely methods of manufacturing *babits* (special alloys that can withstand the friction of the railway), an oil-operated engine, and even a hydraulic bicycle. Patent applications filed before the Department of Inventions had several kinds of inventors, for example, engineers, merchants, and even students.

Loss of independence

However, the UPR did not resist, and its government was forced into exile as the Bolsheviks took Kyiv. But the UPR leadership dreamed of a new liberation campaign. On June 4, 1920, the head of the Department of Inventions Zenon Gornitsky wrote a memorandum to the Ministry, wherein, he compares “patent cases in some countries” and criticizes the new Russian patent system. Zenon Gor-

nitsky proposed to reform his department into the “Department of Industrial Property Protection”. In his opinion, this should “raise the prestige of the State in the eyes of the industrial world and give the Ukrainian patent the necessary shine and respect. (. . .) A matter that may not seem so important at first glance, in reality (...) may once have an unusual impact on the fate of our young Republic”.

Active armed resistance in the name of independent Ukraine lasted from 1917 to 1921. And yet, it was destined to become part of the Union of Soviet Socialist Republics (USSR), which in turn became a member of the Paris Convention (PC) in 1965 and entered in the Patent Cooperation Treaty (PCT) in 1978.

Peculiarity of the soviet patent system

During Soviet rule, there was a patent system wherein patent applications were filed and submitted to a substantive examination until the decision of granting or refusal. This regular patent system was mainly applied to non-residents in the USSR, considering that the soviet government stimulated licensing of new technologies to boost the internal industrial structure.

According to data retrieved from PatBase, almost 39,000 patent families were filed and published in the USSR, with a peak of filings in the early 70ths and a declining filing tendency until the USSR collapsed. The top five assignees were Bayer, Hoechst, BASF, Eli Lilly and Ciba Geigy.

On the other hand, the USSR created a *sui generis* inventor’s certificate system, which was used on large scale by Soviet Citizens. A patent was owned by the inventor or by the party to whom the inventor assigned it. But the inventor’s certificate was assigned to the State, for instance a state organization, wherein this embodiment of industrial property asset was also submitted to a substantive examination.

The inventors were encouraged by several incentives to use the inventor’s certificate system in large scale, such as monetary rewards, receiving better houses from the State, or a title of “Distinguished Inventor”, which was highly appreciated in the soviet society. Thus, about 790,000 inventor’s certificates were filed in the USSR in a steady state from the late 70 s to the late 80 s.

After the USSR collapsed in 1991, the newly formed sovereign countries continued to be members of the PC and the PCT. The Eurasian Patent Convention, which established the Eurasian Patent Organization (EAPO), was signed on 1994 in Moscow by the Heads of the governments of former Soviet republics, including Ukraine. The EAPO targeted the formation of a strong unified regional Patent Office. Nevertheless, Ukraine has not ratified the Convention so far.

Re-establishment of the national institute

After independence in 1991, the Ukrainian Intellectual Property Institute (Ukrpatent) has adopted a patent system similar to the European system. Though in a transition phase, the first President Leonid Kravchuk issued an order stating that all intellectual property protection documents received in the USSR are valid on the territory of Ukraine. Hence, the rights to Ukrainian inventions obtained in Moscow were preserved.

Soon after, separate laws on inventions and industrial designs appeared. At the same time, it was determined that patent attorneys are granted the rights to represent the interests of applicants both from Ukraine and from other countries.

Trends in Ukraine's patents from 1991 to 2021

The number of patent applications filed before the Ukrainian Patent Office (Ukrpatent) suffered several oscillations in the subsequent years, which are related to factors of a political-economic nature. The lowest record was registered in 1998–1999 due to a deep economic crisis that was common to all economies in the post-Soviet space. According to data released by the Ukrpatent in its Annual Reports, a larger fraction of the Industrial Property assets filed before the Institute are related to Utility Model applications, which are mainly filed by residents. Considering the lower level of inventiveness usually required to have a utility model granted when compared to the correspond for level required a patent application and considering the relative lower number of national patent applications filed by residents, it is possible to conclude that the Ukrainian society has been developing a process of becoming more familiar with the Industrial Property System. It is expected that a consolidated culture of said system would lead to a predominance of patent filings. We also observed a decreasing of filings in recent years, even regarding the entries in the Ukrainian national phase of PCT international patent applications. Therefore, it is possible to conclude that there is a stagnation in the objectives of non-residents in protecting their inventions in Ukraine.

It is also notable that more than 90 % of the patent applications claiming a Ukrainian priority were mainly filed only in Ukraine. The top 4 technological fields of this patent applications were Chemistry (27 % of the patent families), Instruments (26 %), Mechanical Engineering (24 %), and Electrical Engineering (8 %). The top 5 applicants are: National University of Food Technologies, National University of Life and Environmental Sciences of Ukraine, Bogomolets National Medical University, East Ukrainian Volodymyr Dahl National University, and Vinnytsia National Technical University (Source PatBase).

The Annual Report 2021 issued by the Ukrpatent reveals that the largest number of resident filings is concentrated in the North Region, namely from Kyiv City (32.2 %), Kharkiv Region (15.3 %), Dnipropetrovsk Region (11.0 %), Odessa Region (6.1 %), Lviv Region (5.6 %), Kyiv Region (4.5 %), Zaporizhia Region (3.5 %), Donetsk

Region (2.8 %), Ivano-Frankivsk Region (2.7 %) and Sumy Region (2.5 %).

Professional initiation of Ukrainian attorneys in Germany

Interesting fact, in the 90 s several industrial giants applied for the first Ukrainian patent, one of which was the Electric Welding Institute named after O. E. Paton. And the truth that the first patent was received by a rather small enterprise became a landmark event.

There was another significant event for all patent attorneys of Ukraine in the early 90's. A specialized training on patenting and licensing issues took place in Moscow. The lectures were given by Bernd Hansen, a representative of the German chamber of patent attorneys. After the lectures, Ukrainian attorneys asked if they could come to Germany for an internship, to which they received a positive answer. It was the first time in history, that patent attorneys from Ukraine came to Germany for an internship.

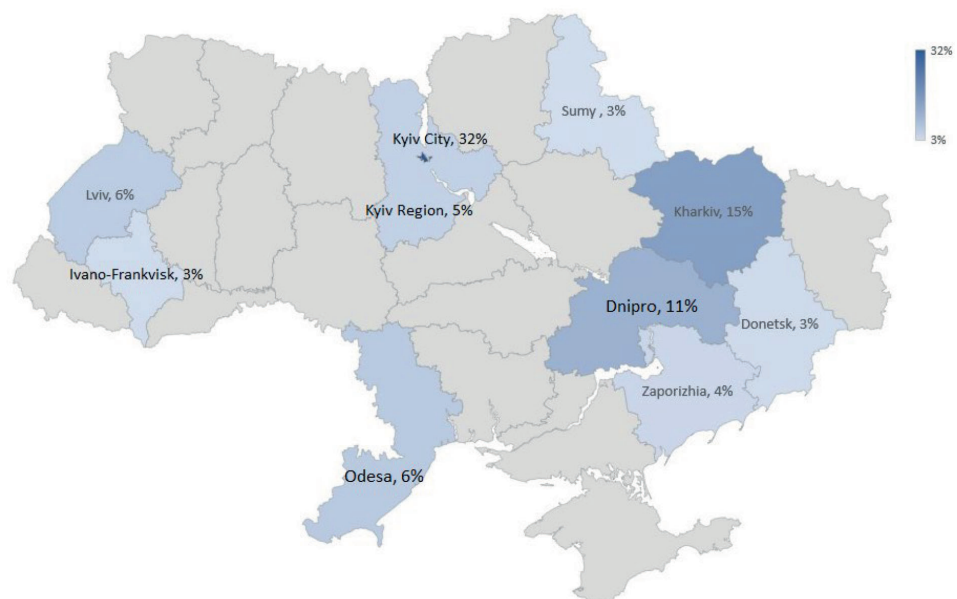
It is worth to note that German specialists have been cooperating with Ukraine since then, because, despite the shortcomings, they were able to appreciate the views of their Ukrainian colleagues on the development of the industry within the state.

Ukrainian patent system at the present

The scientific capacities of Ukraine immediately after the Fall of the USSR were inferior to those that existed during its ruling. Many research institutes, which used to be the main generators of inventive ideas, were closed. Funding for science had been reduced to a critical minimum. And if there is no great science, then there are no major inventions.

Surprisingly, that did not stop the aim of Ukrainians to develop. In 2018, Ukraine ranked first among 153 coun-

Resident applications for inventions filed in 2021



tries in the “Science and Technology” category in the Good Country Index ranking, surpassing even the United States.

In turn, industry leaders such as Oracle, Ring, Siemens, Cisco, Samsung, and others had established R&D facilities in Ukraine before the war. The Ukrainian IT sector had the largest number of IT engineers in Central Europe (130,000 engineering graduates and 16,000 IT graduates annually).

Due to the principle of confidentiality of a patent application within 18 months after its filing, it is not yet possible for us to clearly see the impact of the year-long battle between Russia and Ukraine on the patenting activity in Ukraine.

The Ukrpatent has published a report comprising a comparison between a period of 9 months in 2022 and a homologous period of 9 months in 2021. It is possible to observe a significant reduction in the indicators regarding patent applications (2434 filings in said period of 2021, and 1932 filing in the homologous period of 2022). If the fall regarding the overall number of patent applications filed in 2022 is significant, we shall consider that the decreasing of the number of national patent applications, filed by residents, are higher and correspond to only 55 % of the previous period. Moreover, a similar decreasing rate is observed to utility model applications, which are mainly filed by residents.

Therefore, after the outbreak of the war, the Ukrpatent has been facing a significant decrease of new patent and utility model applications, which is expected, considering that the war times demand a reevaluation of the investments in general, besides freezing Research and development (R&D) activities.

The Ukrpatent has also been dealing with a reduction in several internal activities referred to the prosecution of patent applications and utility models. The number of executed substantive examinations for patent applications dropped about 23 %, the number of granted patents fell by about 22 %, and the decisions regarding utility models fell in about 43 %.

Nonetheless, the Ukrainian Patenting Office (Ukrpatent) has taken great advantage of the digital resources, which we have already seen to be of great quality, to not only avoid stopping its operation, but also to ensure the evolution of the national IP system and actively promote educational activities.

Currently, Ukraine is strengthening coordination with European partners in aspects of intellectual property, giving special attention to the cooperation in post-war social reconstruction using science, technology, and innovation. Creation of new chains of added value and reintegration of human capital in the country.

Thus, the procedure for filing a patent or utility model application in Ukraine with the outbreak of war has been simplified and can be done remotely in a digital way.

Technological advances in defense industry

The outbreak of this war has a background of continuous investments in developing new technological solutions for the defense industry in the recent years.

We have identified patent applications, in the technological field regarding weapons (international classification F41), and having at least one respective national priority document, filed before the national patent offices of USA, Ukraine, Russian Federation, Germany and before the European Patent Office (EPO), from 1994 to 2018:

The United States of America, as the main military superpower, show a remarkable performance, namely 6.5 applications per million inhabitants, with 33.266 patent applications filed in this period. The Russian Federation filed 4.0 applications per million inhabitants and 9.711 patent applications filed in this period. The annual growth rate of applications originating from the Russian Federation in this technical area is 3.65 %. On the other hand, Ukraine’s performance is seven times inferior to the Russian Federation, when we compare the respective absolute numbers. The annual growth rate of applications originating in Ukraine is about 20 %. Additionally, we also identified a stagnation in the number of patent applications with German priority (18.544 patent applications), but the annual growth rate of applications filed before the European Patent Office (EPO) is quite high, around 10 % (15.133 patent applications). It should be mentioned that a significant proportion of German applicants file directly with EPO. Although there are data up to 2022, these are not statistically relevant as a significant portion of patent applications are not yet available in the databases or published.

The future

Developing new technologies, considering the weak investments in research and development in the country, and continuing studies in schools and universities, despite the absolute uncertainty of the future, while fighting against a powerful army is, without doubt, a constant challenge. The question remains whether Ukraine will be able, given its historic past, to achieve new technological and economic prosperity.