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Dear Reader,

this journal, the "*Scientific Letters of Academic Society of Michal Baludansky*", has been conceived by the founders of the **Academic Society of Michal Baludansky** as a printed platform for exchanging knowledge between university scholars and experts of different countries who take a keen interest in the life and activity of the outstanding scientist, educationalist and statesman Michal Baludansky. The third issue of «Scientific Letters of Academic Society of Michal Baludansky» in 2015 includes the work of participants of the international scientific-practical conference "Economics of Sustainable Development: theoretical approaches and practical recommendations", held on 14-17th September 2015 in Kosice, Slovakia. The main organizer of the conference was the **All-Ukrainian Union of Economists**.

The All-Ukrainian Union of Economists – is a Ukrainian social organization, which counts more than 400 doctors and candidates of sciences by the state on December, 1 of 2010 and has regional organizations in all Ukrainian regions.

The Union was created on the principles of economic patriotism by the Ukrainian scientists.

The main aim of the Union is a maximum assistance of the Ukrainian social and economic development.

One of the major priorities of the Union is a popularization of advanced innovative ideas of domestic economic science, development of economic offers for quality increase of the Ukrainian social life, independent examination of the Ukrainian economic legislation.

The Union has conducted a lot of conferences and round tables, which were devoted to the most actual economic questions.

The Union created its own project of the Strategy of socio-economic development of the country "The New Economy". The practical realization of this project will provide intense economic increase, high life level of the population and leads Ukraine to the forward positions of the world economy.

The social organization "The All-Ukrainian Union of Economists" is entered by the Ukrainian Department of Justice into the accounting book of social organizations.

The head of the Ukrainian Economic Organization of Scientists is **Kendyuhov Alexander Vladimirovich**, doctor of economic sciences, professor, the head of the department of strategic management of economic development at Donetsk National Technical University and the member of the Ukrainian Academy of Economic Sciences. He is the author of the main ideas of the Strategy of socio-economic development of the country "The New Economy" (<http://vsve.ho.ua>), the concept of the Christian socio-liberal economic model, concepts of tax and pension reforms. He is the leading Ukrainian scientist by the management of intellectual capital and the theory and the practice of marketing.

Lenka Dubovická, editor

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ОЦІНКА ЗБИТКІВ ВІД НЕЗАКОННОГО ВИКОРИСТАННЯ ОБ'ЄКТІВ ІНТЕЛЕКТУАЛЬНОЇ ВЛАСНОСТІ

Ткачов Максим

Анотація

В статті автором доведено, що порушення виняткових прав передбачає наявність двох видів збитків: реальний збиток і упущена вигода.

Запропоновано реальний збиток розділити на два види витрат:

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б) майбутні витрати, які будуть потрібні правовласнику для відновлення порушених прав.

Другий вид витрат, включених автором в реальний збиток, далеко не завжди враховується при проведенні відповідних розрахунків, що, на думку автора, неправильно. Інше питання, що необхідність таких витрат і їх передбачуваний розмір повинні бути підтверджені обґрунтованим розрахунком, доказами, в якості яких можуть бути представлені кошторис (калькуляція) витрат на усунення наслідків порушення виняткових прав.

Під упущеною вигодою розуміються недоотримані доходи, які власник міг би отримати при звичайних умовах цивільного обороту інтелектуальної власності, якби його право не було порушено. Якщо особа, яка порушила право, одержала внаслідок цього доходи, особа, право якої порушено, повинна вимагати відшкодування в розмірі не меншому, ніж такі доходи.

Автором проведено дослідження існуючих методів визначення збитків від порушення патентних прав. Всі існуючі методи класифіковано на окремі групи, кожна з яких має свої специфічні особливості використання. Запропоновано методичні підходи для визначення розміру економічних збитків та упущеної вигоди, які в найбільшій мірі можуть бути використані при виробництві контрафактної продукції. Розроблено пропозиції по використанню запропонованих рекомендацій машинобудівними підприємствами.

Ключові слова: інтелектуальна власність, виключні права, контрафакт, збитки, упущена вигода.

THE ASSESSMENT OF LOSSES FROM ILLEGAL USE OF OBJECTS OF INTELLECTUAL PROPERTY

Tkachov Maksim

In the article the author proves that the violation of the exclusive rights implies the existence of two types of damages: actual damages and lost profits. Offered the actual damage be divided into two types of costs:

a) past costs that the owner incurred on the creation and use of the object of the exclusive right;

b) future costs that will be needed by the owner to restore the violated rights.

The second type of cost that is included by the author in real damage, not always taken into account when carrying out the corresponding calculations, which, in the author's opinion, incorrectly. Another issue is that the need for such expenditures and their estimated size should be confirmed by reasonable calculation, evidence which can be presented estimates (cost estimate) of the costs to eliminate the consequences of the violation of exclusive rights.

Under loss of profits refers to the lost revenue that the owner would receive under usual conditions of civil turnover of intellectual property, if his right had not been violated. If the

person who violated the law, received as a result of this income, the person whose right has been violated, should demand compensation in the amount of not less than such income.

The author of a study of existing methods of determining damages from patent infringement. All existing methods are classified into separate groups, each of which has its own specific features using. The proposed methodological approaches to determine the amount of economic damages and lost profits, to the greatest extent can be use in the production of counterfeit products. Developed proposals for the use of the proposed recommendations of the machine-building enterprises.
Keywords: *intellectual property, exclusive rights, counterfeit, damages, loss of profits.*

The problem

Protection and enforcement of intellectual property rights in modern conditions of market economy of Ukraine is important in production and business activities of its subjects, occupying clearly represent not only the essence of intellectual property, but also in terms of what material costs may result in the violation of their rights is necessary to ensure protection of results of intellectual creativity of the person, his interests in moral and material spheres that arise in its activities in various fields of innovation.

Violation of intellectual property rights from a legal point of view recognizes the unauthorized manufacture, use, importation, offer for sale, sale or other introduction into the economic turnover or storage for that purpose of a product containing the patented results of intellectual activities, as well as the use of a process protected by a patent on the result of intellectual activity or the introduction into the economic turnover or storage for that purpose of a product manufactured directly by the method protected by the patent [Muhamad, 2010]. At the request of the patentee infringement of the exclusive rights should be terminated, and the natural or legal person, to blame for their breach must compensate the losses caused in accordance with the current legislation of Ukraine. In this case, a loss from violations of exclusive rights are understood as expenses which the natural or legal person, whose right is broken, has produced or should produce for restoration of the violated right, loss of profits or damage to his property (actual and consequential damages), and also not received incomes which this person would receive under usual conditions of civil turnover, if his right had not been violated (lost profits). In these same losses in our judicial system should be added and moral damage, which usually exhibit both physical and legal persons. Assault bad actors on the market intellectual property rights of competitive products and services pose a serious danger to the public and cause significant economic and moral damage not only the ordinary citizens of our country, enterprises, institutions, organizations of all forms of ownership, but also in the whole national economy. Violation of the exclusive rights brings significant economic, social, environmental and moral damages to the participants of the market process that can be observed in the material (direct economic losses, reducing the size of the markets, the deterioration of prospects of development, etc.) and moral (harm to business reputation, reduced productivity and reduced morale level of motivation of employees, etc.). The total size of the school, caused by illegal actions contractors and forgers in some cases substantially exceeds the volume of income from production and business activities of producers, which is part of the legal field. Based on these assumptions, the task of objectively determining the size of the caused to the holders of the damage is extremely important and relevant.

The analysis of publications and highlighting unsolved problems

The relevance of the issue on the development of effective countermeasures to counterfeiting in the field of industrial property and establishing appropriate sanctions for violations for the past few centuries is the subject of scientific discussions. The problem of determining the economic losses from the production and consumption of counterfeit products is considered famous scientists Grabchenko A. [Grabchenko, 1999], Pererva P. [Pererva, 2002; 2010], Muhopad V. [Muhopad, 2010], Tsyibulev P. [Tsyibulev, 2003] and others. But a number of problems in this area remains out of sight of researchers. Despite the presence of severe

sanctions for the manufacture and distribution of counterfeit products, unscrupulous businessmen often try to use someone else's reputation and make fake goods, technologies. Unlike counterfeiting in copyright law, in the sphere of industrial property, this issue is of particular importance. This explains a certain social significance of some counterfeit goods (e.g., medicines, medical equipment, additional mechanisms for machine-building industry), in particular, possible adverse effects that may arise from the use of product that does not possess certain qualities in comparison with original products, and the result can be death or damage to the health of individuals.

Exposition of basic material of research

A compilation of existing scientific research allowed the author to highlight, complement and substantiate the following types (directions) of economic losses the owners of intellectual property infringement (production of counterfeit goods).

1. The decline in consumer confidence in goods and services, manufactured with a registered trademark. The presence of this type of loss occurs in the case where counterfeit products have significant differences in quality from the original. As experience shows, the consumer, who will purchase a particular product or service, are practically not interested in the fact, broken with someone's exclusive rights in a trademark or not. The main goal of the consumer is obtaining the required quality of the product for a certain amount of their money. If the consumer will not be satisfied with the quality of the product, or the ratio price/quality, in the future it most likely will refuse to purchase this brand and its owner have objectively or not objectively will lose the consumer (we can talk about how one particular consumer, and a certain percentage of the target market).

2. The decrease in market share, which was at the disposal of the owner of the trademark. The presence of this type of loss occurs in the case where the infringing products have no substantial differences in quality from the original. But for any product, the market capacity has appropriate boundaries that are not so easy to extend. The emergence of advanced manufactured products with the same consumer qualities will inevitably lead to some negative for the manufacturer of the consequences: a decrease in sales of original products and the creation of excess reserves; the need to reduce the prices for the elimination of surplus stocks (according to the law of demand). Note that in this case, the capacity of the target market may not be changed, or maybe to maintain the growth trend, but the relative share of the right holder (licensor and/or licensee) will decrease, not increase, or will increase at a slower pace.

3. Loss of the right holder of the royalty. The practice of patent licensing market relations implies the existence of a license agreement between the patent owner (licensor) and patentbaristas.com (the licensee), which requires official permission for the use of its intellectual product. For this permit, the licensee shall pay to licensor a fee in the form of royalties or lump-sum payment, or a combination thereof. If a trademark right or other intellectual property is infringed, the right holder will not receive any portion of these payments under existing license agreements in connection with the fact that the part of products sold in this market was replaced with a counterfeit or a complete commercial offer for supply by more favorable for sellers and consumers (primarily in terms of price). Accordingly, his total income is reduced, which reduces not only the valuation of intellectual property and the value of the business as a whole. Particularly significant may be economic losses in the case where the royalties received by the licensor royalties (is a direct correlation: less sold licensed products is less than the absolute size of royalty payments).

4. The increase in the share of fixed costs on advertising. The value and prestige of the product and, correspondingly, its brand owes much to advertising and information impact of subjects of the market process. All the costs of financing this process, usually performed by the owner, therefore, in violation of trademark rights, that is, the emergence on the market of counterfeit (and falsification), the effectiveness of promotional activities will be of objective decreasing trend. In these conditions, to achieve the goals that are linked to the object of

intellectual property, there is a need to increase the cost of additional advertising and information activities aimed at the recovery of the business reputation and consumer trust in connection with violation of intellectual property rights. Such activities will also contribute to enhanced support for original products that in a certain way can offset all kinds of negative consequences that can appear in the target market due to the appearance of counterfeit products.

5. A loss of revenue or profits (loss of profit) by the right holder or an exclusive licensee (licensee) in connection with the fact that the part of products sold in this market was replaced by a counterfeit. In this case the copyright holder is not able to sell (to hold supplies) original goods into the territory or the market of the patent due to the delivery by the infringer of counterfeit (counterfeit) products, or use of the patented method of its production on the territory of the patent. Our studies indicate that loss of profits or loss of profit is extremely difficult in the definitions and dovidenia. With her determination and justification it is necessary to show a causal relationship on the facts between the improper actions of the offender's rights and caused loss. For the purpose of obtaining the necessary calculations for information requires an examination of the amount of actual damages based on the analysis and retrospective studies practices similar violations, determine the actual conditions of infringement of the exclusive rights obtained by the offender's income, opportunities, and plans of the owner, as well as determining the presence and depth of the relationship between these factors.

6. A loss of revenue or profits (loss of profit) by the right holder due to the failure of the conclusion of commercial agreements with potential licensees, directly associated with the appearance of the target market of counterfeit (counterfeit) product or use a patented method of its production on the territory of the possible validity of the licence, which was supposed to issue a third party and the interest of which the third party as a result of actions of the offender were reduced or even disappeared. A similar situation may occur when features of an assignment of a patent on certain commercial terms, but in the same circumstances and such transaction may not be possible, potentially leading to loss of potential opportunities for the patent owner income (lost profits).

7. Potential losses (lost profits) resulting from the complete or partial failure of existing counterparties from shipments of products manufactured with the use of intellectual property objects (inventions, useful models, industrial samples, etc.) that are protected by patents. In addition, the possible cases of the collapse of negotiations with potential consumers of such products in connection with the appearance on the market of counterfeit (counterfeit) products or commercial proposals to the customer on more favourable for sellers and consumers (in terms of price). Status of lost profits in this direction may acquire the status of direct losses, if refusal to supply for the already manufactured products. But this is more than possible, because the supply doesn't always happen evenly, inventories of finished products can range from zero (no reserves), and to a very impressive size.

8. Direct economic losses along with loss of profits arise from the licensor (rights holder) when the licensee, on its own initiative exceeds the size allocated to it under the license of exclusive rights in relation to the volume of production; the territory where it is produced, sold and consumed; the type of license, etc. For example, according to the license, the licensee is authorized to issue 1,000 products, it is the amount paid to the licensor a fee (lump sum payment), which do not change in excess of production by the licensee. That is, in this case, the licensee is delinquent, assigns a percentage of the profits that rightfully belongs to the licensee (direct economic loss). If this were the case, then the licensor will at least increase the size of the lump-sum payment or royalties, or could find new licensees on more attractive terms (loss of benefit).

Conclusions

The presence of counterfeit products market leads to the emergence of various kinds of damages, among which we should highlight the main.

1. The most tangible and quantifiable economic damage. Producing counterfeit products, the pirates put it on the market at low prices, since you don't pay this tax, author's remuneration, royalties franchise. Buying cheap pirated products, consumers ignore the original products are properly licensed and certified.

2. Economic damages are the owners of brands whose goods are counterfeited by pirates. Spending huge sums on advertising, program quality, and marketing, the manufacturers of branded products then get more profit, at the expense of the incremental value created by the famous brand. However, the pirates deprive them of this opportunity, replacing the original counterfeit products, often of inadequate quality.

3. Important is social damage against counterfeiting. Consumers who purchased falsified alcohol and food products, fake medicines, get poisoning, and even die. Naturally, this situation is causing discontent among the population, developing into a social protest.

4. And, finally, the political damage is that of a country in which almost uncontrollably is produced and sold counterfeit products, lose positive image in the eyes of the world community. Political leaders of such countries are accused of weakness and inability to cope with the counterfeiters.

In conclusion, we note that a more effective use of forensic knowledge in the detection and investigation of crimes related to the production and trafficking of counterfeit goods, in our view, will be possible in conditions closer attention to these issues from the state and legislature.

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