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EVALUATION OF HOLDER PROFITS VIOLATION OF THEIR EXCLUSIVE RIGHTS

Abstract. The processes of infringement of intellectual property rights in the market of technology products. Determined significant amount of economic loss holders in violation of their exclusive rights. Methodical provisions for the economic evaluation of the opportunity costs of original (licensed) production (owners) in violation of intellectual property rights, the amount of which the authors linked to the first degree holder to use their production capacity. Formed structure of unit holders lost potential and offered economic and mathematical models to determine. Theoretical proposals authors illustrated with specific examples from the practice of Ukrainian machine-building enterprises.

Keywords: intellectual property; counterfeiting; damages; loss of profits; potential businesses.

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ОЦІНЮВАННЯ УПУЩЕНОЇ ВИГОДИ ПРАВОВЛАСНИКІВ ПРИ ПОРУШЕННІ ЇХ ВИКЛЮЧНИХ ПРАВ

Анотація. Досліджено процеси порушення прав інтелектуальної власності на ринку технологічних продуктів. Визначено значні обсяги економічних збитків правовласників при порушенні їх виключних прав. Розроблено методичні положення щодо економічної оцінки розміру упущеної вигоди виробників оригінальної (ліцензійної) продукції (правовласників) при порушенні прав інтелектуальної власності, розмір якої авторами вперше пов'язане з ступенем використання правовласником своїх виробничих потужностей. Сформовано поелементну структуру втрачених потенційних можливостей правовласників та запропоновано економіко-математичні моделі їх визначення. Теоретичні пропозиції авторів проілюстровано на конкретних прикладах з практики роботи українських машинобудівних підприємств.

Ключові слова: інтелектуальна власність; контрафакт; збитки; упущена вигода; потенціал підприємства.

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ОЦЕНКА УПУЩЕННОЙ ВЫГОДЫ ПРАВООБЛАДАТЕЛЕЙ ПРИ НАРУШЕНИИ ИХ ИСКЛЮЧИТЕЛЬНЫХ ПРАВ

Аннотация. Исследованы процессы нарушения прав интеллектуальной собственности на рынке технологических продуктов. Определены значительные объемы экономический ущерб правообладателей при нарушении их исключительных прав. Разработаны методические положения по экономической оценке размера упущенной выгоды производителей оригинальной (лицензионной) продукции (правообладателей) при нарушении прав интеллектуальной собственности, размер которой авторами впервые связано со степенью использования правообладателем своих производственных мощностей. Сформирована поэлементная структура упущенных потенциальных возможностей правообладателей и предложены экономико-математические модели их определения. Теоретические предложения авторов проиллюстрировано на конкретных примерах из практики работы украинских машинострои-

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тельных предприятий.

Ключевые слова: интеллектуальная собственность; контрафакт; убытки; упущенная выгода; потенциал предприятия.

Rationality of the research topic. Analysis of global, European and national markets leads to the conclusion that the current state of the violation of the exclusive rights for various product kinds is becoming more widespread. The volume of counterfeit in some areas of entrepreneurship can be compared to legal production volumes, and often exceeds it. Capacity of the global market of counterfeit products is about 650 billion US dollars according to the Organization for Economic Co-operation and Development. Therewith there is a trend of steady and significant growth in sales of counterfeit products: the global market volume of counterfeit products at this time exceeds 1.6 billion US dollars. As a result, funds that are commensurate with the cost of officially designated gross national product stay in the shadow turnover, substantial damage is caused to Ukrainian business, and there is a threat to life and health of citizens, etc. Economic and social damage thus are huge and difficult to calculate. The current position threatens Ukraine's international prestige, preventing its entry into the international economic community. According to analysts, annual losses of companies-manufacturers through fraud in the field of intellectual property are estimated at hundreds of billions of dollars.

Formulation of the problem. In 2013-2015, bodies of the State Inspectorate for Consumer Protection in our country held more than 20 thousand inspections of products on their compliance with these requirements, the main of which is the compliance with exclusive rights to intellectual property. As a result, illegal products were found in 28% of cases. There is a growth of food, alcoholic and non-alcoholic beverages, tobacco products, software, auto parts and light industry products withdrawn from circulation. The share of counterfeit goods exceeds 20% of the total production. [1, p. 58]

Therefore, it is vital to further develop scientifically based methods and approaches to determine the amount of economic losses incurred by producers of original products in violation of their exclusive rights in the technology market.

Analysis of recent research and publications. Theoretical and methodological foundations of the economy of counterfeit activities are certainly developed in studies of domestic and foreign scientists: Hrabchenko A. I. [1], Yefimov O. M. [2] Zhehus O. V. [3], Kosenko O. P. [4], Kostin A. V. [5], Maksymov S. Y. [6], Pererva P. H. [7], Pohorelov M. I. [8], Tkachova N. P. [9], Tovazhniansky V. L. [10] and others.

Existing publications overwhelmingly consider legal support of the creation, distribution and use of intellectual property. In the economic sphere, the attention of researchers is basically given to the definition of technological product valuation and determination of its commercial potential in the commercialization or transfer.

Determination of unexplored aspects of the general problem. Analysis of the research results of domestic and foreign experts suggests the existence of problems associated with the formation and implementation of the mechanism of formation and damage assessment of right holders from infringement of their exclusive rights in the industrial production. In particular, the need for its further development and improvement of the issue of determining the areas of right holders loss formation, the structure of their components, methods of their evaluation. There are problems in the field of economic content determination in the counterfeit terminology database, which often leads to confusion with similar terms, such as "damage", "losses", etc.

Setting an objective. The main purpose of the article is to study processes in the field of counterfeit of unscrupulous market players. In the center of this activity, according to the authors, are the economic losses of exclusive right holders that they incur as a result of illegal activity. In particular, the critical issue is determining the amount of lost profits of manufacturers of original (licensed) products, which is an important tool for legal combating against counterfeit activities.

Inadequate study of the processes and mechanisms of counterfeit of industrial activities and the urgent need to improve it identified the subject and content of the article for authors.

Research results. The essence of the term "loss of profits" is most often identified with income (profit) lost by a patent holder that he/she would have received under normal conditions of economic

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turnover, if his/her exclusive right was not violated. Unlike other types of losses, lost profits or income constitute indirect losses. Availability of lost profits is seen only as a chance for a right holder to get it under certain circumstances. According to the principles of calculating losses from breach of exclusive rights by manufacturers of counterfeit goods, developed by us, we believe that the introduction into the commercial circuit of one unit of counterfeit products prevents similar introduction into the commercial circuit of at least one unit of a legal product. The worthwhile expression of the material damage (lost profits) can be determined by multiplying the number of counterfeit products by the unit cost of legal products.

Our studies indicate that the received benefit or lost profit is highly complicated in calculations and proofs. Upon its determination and justification, it is necessary to show the presence of a causal relationship of facts between improper actions of the violator of rights and damages caused. In order to obtain the necessary information required for settlement of the examination the size of the actual loss based on an analysis and research of retrospective practices of similar violations, determination of the actual conditions of infringement of exclusive rights, income obtained by the offender, potential opportunities and plans of the right holder, as well as determining the presence and depth of the relationship between these factors.

Such a common approach to determine the amount of lost profits, in our view, needs some clarification. Not objecting to the past or future realization of the potential of enterprises still needs to be clarified: does the company have such opportunities, or did it have them? If the company has 100% deployed its capacity, then what can be the lost profit? There is no opportunity for it anymore. Another thing is when such production capacity still exists. Accordingly, we offer to determine the capacity (the maximum level) of lost profit of the enterprise on additional manufacturing and marketing of this product, which can be calculated using the rate of production capacity (1) or indicator of the enterprise potential (2):

$$\textit{УП}_{\textit{мах}_t}^{\textit{пот}} \quad = \quad \textit{ВП}_t\,(1-\textit{К}_{\textit{вик}_t}^{\textit{пот}}) \tag{1}$$

$$\textit{УП}_{\textit{мах}_t}^{\textit{вир}} \quad = \quad \textit{ВМ}_t\,(1-\textit{К}_{\textit{вик}_t}^{\textit{вир}}) \tag{2}$$

where $\textit{УП}_{\textit{мах}_t}^{\textit{пот}}$, $\textit{УП}_{\textit{мах}_t}^{\textit{вир}}$ is a potential of lost profits of the manufacturer of the original products for a *t* period is calculated, respectively, on the production capacity and the production potential of the product; $\textit{ВП}_t$, $\textit{ВМ}_t$ – is, respectively, the production capacity of the industrial enterprise and the size of its production potential for these products for a *t* period; $\textit{К}_{\textit{вик}_t}^{\textit{пот}}$, $\textit{К}_{\textit{вик}_t}^{\textit{вир}}$ is, respectively, the coefficient of utilization of production capacity of the enterprise and its production capacity for the manufacture of this product for a *t* period.

Our studies indicate low urgency of foregoing assumptions, because the reserves of production capacity in many engineering enterprises of Ukraine are still quite significant. Most domestic industrial enterprises have significant opportunities to increase production, due to a significant decline in industrial production as a whole in our country and in most industries. According to our estimates the potential profits $\textit{УП}_{\textit{мах}_t}^{\textit{вир}}$ for individual machine-building enterprises of the Kharkiv industrial region was in 2013 – from 0.37 to 0.91; in 2014 - from 0.34 to 0.87; in 2015 - from 0.43 to 0.92.

The structural model of determining the total amount of profits of holders (licensees) from the violation of their exclusive rights $\textit{З}_{\textit{упущ}}$ is proposed for use as follows (3):

$$\textit{З}_{\textit{упущ}} = \textit{З}_{\textit{уп.пр}} + \textit{З}_{\textit{цр}} + \textit{З}_{\textit{достр}} + \textit{З}_{\textit{зм.пр}} + \textit{З}_{\textit{дов}} + \textit{З}_{\textit{пост}} + \textit{З}_{\textit{ліц.уг}} \tag{3}$$

where $\textit{З}_{\textit{уп.пр}}$ – is the licensor's loss of potential profits from the sale of additional units of higher quality original products at higher price; $\textit{З}_{\textit{цр}}$ - loss of a share of the target market, and therefore consumer demand for original products; $\textit{З}_{\textit{достр}}$ – licensee's damage (loss of profits) of preterm rupture of licensing agreements operating at the time or reduction in their volume; $\textit{З}_{\textit{зм.пр}}$ – a decrease in sales as a result of decrease in popularity and consumer demand for the original product; $\textit{З}_{\textit{дов}}$ – a reduction in

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consumer confidence to manufacturers of original products as a result of more favorable cost performance of counterfeit products; $З_{пост}$ - losses from breakdown of negotiations on the already approved agreements for the supply of original products; $З_{ліц.уг}$ - losses from breakdown of negotiations on the already approved agreements on the sale of licenses to potential licensees.

Let us consider types of lost profits included in the formula (3) in more detail and form the methodological approaches to their definition.

Lost opportunities of the licensor in additional profits by selling additional units of higher quality original products at higher price $З_{уп.пр}$ can be estimated as follows (4):

$$З_{уп.пр} = N_{як} (Ц_2 - Ц_1), \tag{4}$$

where $N_{як}$ - is the amount of licensor's unsold goods at the increased price $Ц_2$; $Ц_1$ is a price in force in this technology market, at which the sale of this product was made.

Lost past opportunities of the right holder due to reducing the share of the target market and, consequently, the loss of consumer demand for original products $З_{цр}$, arisen as a result of unauthorized supply of counterfeit goods into the territory, which is protected by a patent, and the loss by the right holder of an opportunity to independently supply similar batches of products during a T period shall be determined as follows (5):

$$З_{цр} = \sum_{t=1}^{T} N_{контр}^{t} (Ц_1^{t} - C_1^{t}) K_t^{нс} \tag{5}$$

where $N_{контр}^{t}$ - volumes of supply of counterfeit goods in t year; $Ц_1^{t}$, C_1^{t} - accordingly, the market price and the cost per unit of output in the licensor's or licensee's enterprises in t year; $(Ц_1^{t} - C_1^{t})$ - income from a unit of the original product, if its supply to the market was made independently by the patent holder or licensee in t year; $K_t^{нс}$ - coefficient of increasing rates in t year, which is used to bring the value of profits of the last period of each t year to the T calculation year, i.e. the date of the estimate ($K_t^{нс} = 1/K_t^{диск}$).

With the use of the developed dependence (5), the authors calculated profits for some types of products, trademark holders of which are DAFMI and AGAT LLC that were most interesting for counterfeiters. The values of lost profits reflect lost opportunities of the right holder by reducing the share of the target market and, consequently, loss of consumer demand for original products $З_{цр}$ that arose as a result of unauthorized supply of counterfeit goods into the territory, which is protected by a patent, and the loss of the holder's opportunity to independently supply a similar batch of products for the current year.

Loss of income from early termination of license agreements, according to the existing opinion, is the most typical for a direct right holder (licensor). However, according to the results of our research, these actions are not limited to licensor's losses, lost profits are also inherent in the licensee's company. Lost business opportunities of the licensee from early termination of existing licensing agreements or their partial performance (use) $З_{достр}$ because of supplies of counterfeit products to their territory by the offender, or other infringements of patent rights of the right holder for T shall be determined using analytical model (6):

$$З_{достр} = \sum_{t}^{T_l} \sum_{l1}^{L} [(N_{нп_l}^{l} \cdot Ц_1^{l} \cdot K_t^{диск})(1 - R_t^{l})(1 - Д_t^{l})], \tag{6}$$

where $N_{нп}^{l}$ - volumes of original products undelivered to market by l licensee in t year, *pcs*; R_t^{l} is a royalty rate for l licensee, relevant at the t time of calculation; T_l is an unused validity period of the license of the l licensee; $Ц_1^{l}$ is a market unit price for licensed products in t year; $Д_t^{l}$ - a proportion of tax deductions in the unit price of licensed products of the l licensee in the current t period.

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Counterfeit actions of unscrupulous market players may have far-reaching perspective. As we have noted, consumers will not understand what is what, who to blame, who is guilty, and their actions can be unpredictable. As one of the possible consequences of such a situation in the market is a current decrease in sales of original products as a result of decrease in popularity and consumer demand for original products $З_{зм.пр}$. Moreover, the decrease should be seen not as a replacement of the original products by counterfeit products (a separate loss item), but regardless of whether the additional current reduced market selling of original (licensed) products due to the psychological uncertainty of consumers in products and the market behavior of the right holder. Current potential losses of the licensor in this case may be evaluated using the following relation (7):

$$ З_{зм.пр.} = (N_{оp}^{t-1} - N_{контр}^t - N_{оp}^t) Ц_1^{оp_t} (1 - Д_t), \qquad (7) $$

where $N_{оp}^{t-1}$ - the volume of original (license) products that the right holder sold in the market during the time (t - $\underline{1}$), i.e. in the period preceding the current period; $N_{контр}^t$ - the volume of counterfeit goods, which was sold by violators of exclusive rights in the market during the current t period; $N_{оp}^t$ - the volume of original (license) products that the right holder sold in the market in the current t period; $Ц_1^{оp_t}$ - the market unit price of the original (licensed) products in the current t period; $Д_t$ – a portion of tax deductions in the unit price of the original (licensed) products in the current t period.

Size of opportunities lost by reducing consumer confidence in manufacturers of original (licensed) products as a result of more favorable cost performance of counterfeit products $З_{дов}$ shall be evaluated as follows (8):

$$ З_{дов} = \sum_{t=1}^{T_{дов}} (N_{оp}^{t-1} - N_{контр}^t - N_{оp}^t) Ц_1^{оp_t} К_t^{диск} (1 - Д_t), \qquad (8) $$

where: $T_{дов}$ – time required by the right holder to return the consumer confidence in original products (for t period = ($T_{дов}$ + 1) value $З_{зм.пр}$ = 0); $К_t^{диск}$ - a discount rate of different-time cash flows in t year for bringing damages of the right holder in the future period before the time of assessment $t_о$.

Significant lost opportunities, that is the potential losses of patent holders can $З_{пост}$ occur from the breakdown of negotiations and refusal of a potential buyer to contract on the agreed terms for supply of batches of products made using inventions (methods) that are protected by patents, due to supply of counterfeit products by violators or infringement of patent rights of the holder during T period.

Evaluation of this kind of damage, in our opinion, can be performed using the following formula (9):

$$ З_{пост} = \sum_{t=1}^{T_{пост}} N_{пост}^t (Ц_1^{пост} - С_1^{пост}) \cdot К_t^{диск} \cdot (1 - Д_t^{пост}), \qquad (9) $$

where $N_{пост}^t$ - volume of the original (licensed) products sold to customers in t year, which has not yet been made by right holders, from which the consumer refused due to supply of counterfeit products to the market segment of the license agreements; $Ц_1^{пост}$, $С_1^{пост}$ - accordingly, the contract price and the cost per unit of not manufactured original (licensed) products from which the consumer (buyer) refused in t year; $К_t^{диск}$ - a discount rate of different-time cash flows in t year to bring lost profits of right holders in the future period by the time of evaluation; $Д_t^{пост}$ – a portion of tax deductions in the unit price of not manufactured but sold original (licensed) products in t year.

The size of potential losses from the breakdown of negotiations on the already approved agreements for the sale of licenses to potential licensees $З_{ліц.уг}$ shall be determined as follows (10):

$$ З_{ліц.уг.} = \sum_{t}^{T_t} \sum_{l1}^{L} [(N_{нп_t}^t \cdot Ц_1^t \cdot К_t^{диск})(1 - R_t^t)(1 - Д_t^t)], \qquad (10) $$

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where $N_{нп}^l$ is volumes of licensed products undelivered to the market by *l* licensee in *t* year,

pcs.; R_t^l is a royalty rate for *l* licensee, relevant at the *t* time of calculation (to be determined using average sector meanings of royalty); T_l is a planned validity period of the license of the *l* licensee; $Ц_1^l$ is a market unit price for licensed products in *t* year; $Д_t^l$ - a proportion of tax deductions in the unit price of licensed products of the *l* licensee in the *t* period.

Conclusions. Results of the study suggest the following general conclusions.

1. Our studies indicate that at this time the infringement of exclusive rights to results of intellectual and innovative activity of artists (counterfeiting) in different types of products acquired industrial nature.

2. The volume of counterfeiting in certain sectors of industrial production in the world as a whole, in Europe and in our country is comparable to the volume of legal production, and in some cases even exceeds it. Analysis of the content and nature of the informal economy led to the conclusion that the central place in the criminal economy as the most important component of the informal economy is taken by the market of counterfeit products.

3. Methodological provisions for the economic evaluation of the size of lost profits of the right holders in violation of their exclusive rights, the size of which authors linked to the degree of use by the right holder of their production capacity for the first time.

4. Further research should be associated with the development of methodological provisions for evaluating direct and collateral economic damage to right holders in violation of their exclusive rights by unscrupulous players of the target market.

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