DOI: 10.18372/2307-9061.65.17047
УДК 347.77(045)

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UNFAIR COMPETITION IN PATENT LAW (PATENT TROLLING)

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The purpose *of this article is to consider problematic issues regarding unfair competition in patent law, in particular, patent trolling. For this purpose, the concepts of «patent trolling» and «patent troll» were analyzed. Types of patent trolls are also defined. The signs and peculiarities of patent trolling in Ukraine and the reasons for its spread are established. The manifestation of unfair competition, consisting in the abuse of intellectual property rights, is considered. Recommendations are given on introducing an effective mechanism to combat patent trolls and bring them to justice for unfair competition.* ***The methodological basis*** *of the research is general scientific and special methods of scientific knowledge. The use of these methods made it possible to describe and propose ways to solve the problem of unfair competition in patent law, in particular, patent trolling.* ***Results:*** *no provision in national legislation directly provides for the liability of patent trolls for abuse of rights, including under competition law. Ukrainian legislation does not provide for the liability of patent trolls for the abuse of rights, which in a certain way have a conditional nature, since they are provided under their personal responsibility in terms of compliance of the object with the conditions of patentability or the criteria of protectionability. In this regard, it is necessary to eliminate the causes and conditions that contribute to the mentioned negative phenomenon at the legislative level.* ***Discussion:*** *in fact, «patent trolls» are neither product manufacturers nor inventors, but only possess property rights to objects of intellectual property rights, buying up protective documents for them and realizing these rights only by prohibiting their use, initiating lawsuits, in fact, that's why they got that name.*

Key words: *intellectual property law; objects of patent law; unfair competition; violation of patent rights; violation of competition law; patent trolling; patent troll.*

Problem statement and its relevance. Violations in the field of intellectual property law are quite common, as are cases of unfair competition. However, the scientific community is invited to discuss issues related to offenses specifically in pa-

tent law and, in particular, to consider cases of unfair competition known as "patent trolling".

There are cases of abuse of patent rights or unfair competition by individual individuals and legal entities (entities of economic activity). "Patent trolling" is no exception, which increasingly takes the form of a profitable business, from which importers suffer primarily, losing profits [1, p. 260].

Most violations of intellectual property rights are of an economic nature, that is, the basis of violations is the policy of owners of intellectual property rights to increase and maintain a high price for products in which objects of intellectual property rights are used, and violations are mostly not individual illegal use of such objects, and industrial production of products using them.

Analysis of recent research and publications. This problem is studied by various scientists, both Ukrainian and foreign. Among the national scientists, the following should be noted: Androschuk G.O., Voronin J.G., Diduk A.G., Zharinova A.G., Levkovets O.M., Nikonchuk A.M., Okhromeev Y.G., Shatova I.O. and others Among the foreign scientists who researched this problem can be attributed, in particular: Catherine Tucker Colleen V. Chien, James Bessen, J.P. Mello, James F. McDonough III, Jenifer Ford, Lanning G. Bryer, Matthew D. Asbell, Michael Risch, Sarah Perez, Scott J. Lebson and others.

However, the analysis of the latest research and publications, in which the solution to this problem has been initiated, shows the need to determine the main features of patent trolling in Ukraine, classify it as a certain type of offense and develop proposals for a system of measures to prevent the spread of this phenomenon in Ukraine.

The purpose of the article is to analyze the concepts of "patent trolling" and "patent troll" and to determine the types of patent trolls, to determine the signs and characteristics of patent trolling in Ukraine, as well as the reasons for the spread of this negative phenomenon. Development of proposals for improving competition legislation and finding ways to prevent patent trolling in Ukraine.

Presentation of basic material of the research. As you know, a patent gives its right holder the exclusive right to use an invention, utility model, industrial design at its own discretion, provided that such use does not violate the rights and interests of other patent right holders. However, in recent years, cases of so-called "patent trolling" have become more frequent, that is, actions in which an object of intellectual property rights is patented not for the purpose of acquiring exclusive rights to use the patented object, but in order to obtain exclusive rights to prohibit other subjects from using the patented the object without the permission of its right holder - a "patent troll".

In Ukraine and many countries around the world, the terms "patent trolling" and "patent troll" are quite common both in colloquial language and in scientific works. However, there is almost no clear regulation of the phenomenon called "patent trolling" and the persons investigating it in the legislation of most countries of the world, including Ukraine.

In general, the word "trolling" comes from the English "troll" [trol], which has many meanings. In dictionaries, it is interpreted as certain actions, for example, "sing", "fish", etc. as well as a supernatural being in Scandinavian mythology (dwarf or giant), usually hostile to humans.

Wikipedia also distinguishes several types of trolling: 1) Internet provocation; 2) one of the methods of fishing [2], which is prohibited in some countries and regions, because several types of bait are used during such fishing.

However, it should be noted that modern dictionaries of foreign words, including the English-Ukrainian legal dictionary [3], do not contain the terms "patent troll" (patent troll) and "patent trolling" (patent trolling). The analysis of the mentioned words and their combinations also does not give an exact definition of the mentioned terms, since these concepts belong to figurative ones. So, the word "troll" (noun) as an image indicates the unnatural (artificial) character of a person who is hostile to people. The word "trolling" (verb) figuratively indicates the methods of activity of these persons hostile to people, namely - fishing for artificial bait (receiving income by using in a certain way "artificial" rights to the object of intellectual property rights). In Wikipedia, the term "patent troll" is deciphered as a natural or legal person who specializes in filing patent lawsuits [4].

It can be said that the concept of "patent trolling" originated in the USA in the early 90s of the last century. For the first time, this term was proposed by the American lawyer Peter Detkin, who worked at Intel Corporation, the author interpreted it as follows: "a patent troll is someone who tries to make a lot of money from patents that he himself did not use in production, and in most cases does not use has no intention of using" [5, p. 144]. Although at first he used the term "patent extortionist" (English patent extortionis), which quite accurately characterizes the persons carrying out the specified activity. However, obviously, due to the fact that there is a certain diversity of so-called patent extortionists (whose style of activity differs from each other), there was a need to apply one generalizing term for such persons and their activities in the field of patent law.

So, "patent trolls" came to be called companies that were not actually engaged in production, but only bought up patents and initiated lawsuits demanding a ban on production or payment of royalties, making money in this way. In fact, "patent trolls" in America were neither manufacturers nor inventors, but only owned property rights to objects of intellectual property rights and exercised these rights only by prohibiting their use, which is why they got that name.

That is, we are talking about the activity of patent trolls (Patent Troll), business entities (companies or entrepreneurs) whose business consists exclusively in receiving license payments for the use of patents owned by them.

Scientists also tried to give the concept of "patent trolling".

Thus, foreign scientists, in particular R. Vaikhari [6], defines "patent trolling" as the process of acquisition of patents by companies that do not carry out any production in order to further block the use of objects protected by them (patents), and their (patents) resale at higher prices to manufacturing companies.

Also, there are other positions regarding the understanding of "patent trolls" (in the sense of patents, and not the right holders of such patents), as issued without deception of patent experts, in accordance with the state of the art by the formulas of the invention. These are, as a rule, various additional options and other extensions of functionality. Instead, scholars suggest using the term "umbrella patents" (or "speculative applications"). The essence of such an "umbrella patent" is that it protects truly new and original inventions, the patenting of which is carried out with the widest scope of rights requested in the claims. It is in such a bona fide context that the principle of "umbrella protection" of one’s own developments has always been understood, i.e. broad, not limited to individual forms of application of inventions, but at the same time such that it does not intersect with other people’s rights or with intellectual property that has become public property. Instead, the practice of submitting such "umbrella applications" shows that they often include not only new inventions, but also those that have already become public property.

At the same time, there is no unified understanding of the nature of spe ew) and/or have become public property, with the aim of further monopolizing a certain market of goods (services). At the same time, in the future, the realization of the received rights by such persons is mostly carried out in the form of prohibiting other persons from using objects, in the manufacture of which (or in the provision of services) an object is used, the intellectual property rights of which are protected by a patent or certificate; most often, this is done in the form of entering objects of intellectual property rights (objects of "patent trolling") into the customs registers of such objects or by filing lawsuits to prohibit the use of said objects by other persons. Thus, "patent trolling" is one of the types of abuse of the right, in this case - to acquire the right to intellectual property.

There is also a lot of discussion among scientists about the negative and positive consequences of "patent trolling". Some scientists see only negative consequences in this phenomenon, while others talk about the positive side of such a phenomenon along with negative consequences.

Regarding the first position, the main argument is as follows: patent trolls not only cause damage, but also undermine the basic principles underlying patent law. Currently, the activities of such non-practicing organizations significantly increase business costs. For example, IPCom GmbH, infamously known as a patent troll, launched a series of law-

suits against smartphone manufacturers. The first victim of the German company was the most expensive Apple brand. The essence of the claims is Apple's use of IPCom technology in its mobile products, which it acquired from Robert Bosch GmbH back in 2007. The amount of the patent claim was 1.57 billion dollars.

As for the other position, it is about the activity of patent trolls from the point of view of protecting the interests of novice inventors and national manufacturers from large aggressive patent players in the market by controlling imported products, increasing the prices of imported goods, etc. Ukraine is no exception in this matter. For example, patents were issued for industrial designs such as screws, superglue packaging, tablet computers, etc. Even earlier, patents were issued for bottle stoppers, toothpicks and fuel briquettes, etc. Unfortunately, in Ukraine, patent trolling can also become a new type of offense in the form of extracting funds from entrepreneurs.

The first large-scale wave of patent lawsuits occurred back in the 1880s, when tens of thousands of patents were registered for small features of known technologies. For example, 6,211 plow patents - "patent sharks", as they were called at the time, dragged farmers to court, accusing them of using someone else's technology.

According to Patent Freedom, a non-profit organization that monitors the patent business in the West, the patent business falls into the category of "trolling" when the patent holder starts setting non-market prices and squeezes dissenting licensees by blocking their activities in courts. At the same time, this phenomenon is gaining momentum - the number of lawsuits increases by an average of approximately 22% annually [7].

The scale of the patent troll industry in the USA is also evidenced by the figures calculated by the American researcher Colleen Chien [8, p. 83], who in his research noted that the share of lawsuits filed by "patent trolls" was about 61% of the total number of patent lawsuits filed in the United States in less than a year.

It is also important to note that in the USA the court found it appropriate to use the term "patent troll" in official materials. Nowadays, in the scientific literature, it is used quite often to name a phenomenon that has become quite widespread in recent years [9, p. 89].

Scientists and practitioners, including lawyers, judges, use different names for this phenomenon depending on the business area in which patent trolls operate, the style of their activity, and actually classify patent trolls into the following types: persons who are not engaged in the production of goods / persons, non-practicing, (non practicing entity / NPE), patent collector (patent aggregator), non-manufacturing organization (non manufacturing entity), patent dealer/trader, intermediary (patent dealer), patent pirate (patent piracy), patent enforcer (patent enforcer), firm specializing in patent lawsuits (patent litigation firm) [5, p. 145-146], etc.

It should be noted that the debate among Western scientists is still not over as to what kind of phenomenon patent trolling should be considered: negative or useful. So, for example, James F. McDonough III in his research considered this phenomenon as "a signal of progress, the evolution of the patent market, a new perspective in the ideas of economics", because, in his opinion, patent trolling contributes to patent liquidity [10].

However, the vast majority of Western scientists, such as Colleen Chien [11], Michael Risch [12], J.P. Mello [13], and others, consider "patent trolling" a phenomenon that is negative in nature, such that it is a manifestation of unfair competition to companies, who are engaged in the invention and production of technologies, the result of their scientific research is the development of methods of combating patent trolls and restraining their activities.

A characteristic feature of this type of activity is that patent trolls, along with other opportunities to use purchased patents, widely exploit the weaknesses of the system of patent rights and commercial lawsuits to obtain funds for real and imagined infringements.

Studies of this problem conducted by American lawyers show that over the last decade, almost all high-tech companies have become victims of patent trolls, although medium and small financial companies still suffer the main financial costs.

American researchers criticize patent trolls for manipulating the patent system for large profits [14]. Such disadvantages of the system of

patent rights are, for example, the fact that patents are often formulated rather vaguely, and therefore, without conducting a corresponding examination, one cannot be sure about the violation of someone's intellectual property rights. In this regard, going to court is the only way to resolve disputes on this matter.

Studying the mentioned problem, some scientists draw attention to the fact that the relevance of "anti-troll" activities is very high: the technology of prosecution for allegedly illegal use of patented technologies has been developed, but the activities of companies working on the creation of new real technologies are increasingly complicated precisely because of patent claims [8, p. 85].

Trends in the growth of lawsuits against patent trolls indicate an increase in their activity, which is a manifestation of unfair competition in the field of patent law. With these actions, patent trolls undermine the very principles of patent law, limit scientific research and innovation, restrain entrepreneurial initiative, and harm producers and consumers of goods. The consequence of the activity of patent trolls is the violation of competition on the market, the slowdown of technological development.

A clear example of the activity of patent trolls is the operation of the company NTP IPS., which "earned" more than 600 million dollars in a patent war with the company - the manufacturer of Blackberry phones, and another well-known patent troll VimetX, which received a patent for video communication service technology, as a result of which it filed lawsuit in the most loyal court to patent trolls - the Texas court, won 368 million dollars from the company Apple 5.

According to statistics, "patent trolls" usually persecute representatives of small and medium-sized businesses, because it is much more difficult for them to defend their rights in court. As a result, small companies suffer significant losses and, accordingly, are forced to limit investment in innovation or close the business altogether. As a result, market competition is disrupted, technological development slows down, and consumer interests suffer.

However, it is not only small and medium-sized businesses that fall victim to patent trolls. Thus, one of the most famous cases of "patent trolling" in Ukraine is the registration of the "Go Ogle" trademark, which allowed the troll to register the domain UÄ (google.ua). The story ended with the fact that the Google company managed to recognize the purpose of registering this trademark as unconscionable and the registration was canceled in a court of law. However, the domain google.ua remained behind the troll, and the Google company uses the local page google.com.ua.

The arsenal of means of illegal activity of "patent trolls" is quite diverse.

It should be noted that the most common among them are the following: malicious use of the "territorial principle" of protection of objects of intellectual property rights ("patent troll", knowing about the desire of some foreign person to develop the domestic market, tries to obtain legal protection for still unprotected objects the intellectual property rights of a foreign person, using simplified systems of acquisition of intellectual property rights, such as a patent for a utility model or a certificate for an industrial design (for which only formal examination is provided); the patent troll persuades (himself or through third parties) the manufacturer or service provider to take certain actions that will violate the intellectual property rights belonging to the patent troll), etc.

Considering the menace of the above-mentioned phenomenon, the international community is systematically taking steps to counteract it. So, for example, the provisions of the so-called The Leahy - Smith America Invents Act were enacted in the USA, which are primarily aimed at complicating the patenting procedure, because the more difficult it is for patent trolls to obtain a patent, the more difficult it is for them to enter into legal disputes with real manufacturers. One of the promising innovations is the right of third parties to influence the examination of applications. For example, if a company becomes aware of a patent troll's submission of an application for patenting an invention or a utility model, which, in the company's opinion, does not meet the criteria for patentability, it can submit its research on the level of technology (prior art) of the invention and comments on it.

Another interesting innovation in the USA is the introduction by the aforementioned act of limitations on the filing of lawsuits against a group of defendants, in particular, it is prohibited to file lawsuits against a group of defendants only on the basis that each of them individually infringes a patent. After all, by filing group lawsuits, patent trolls could block the work and development of entire industries.

The analysis of foreign and national scientific publications and a number of patents issued in Ukraine gives grounds for the conclusion that patent trolling in Ukraine has certain features and differences from patent trolling in the West.

This feature in Ukraine consists in the registration with the National Intellectual Property Authority by patent trolls in their own name of intellectual property rights to non-original or even absurd (long-standing and well-known) objects, (for example, hangers, incandescent lamps, corks for bottle caps, tire protectors, laptop exteriors with rounded corners, car bodies, finger batteries, food packaging, etc.). In addition, the analysis of a number of patents issued by the National Intellectual Property Authority for utility models and certificates issued for industrial designs shows the unique facts of issuing protective documents for objects that are not only long and widely known, but also there are cases of object registration, on which patents (certificates) were previously issued to various right holders, which are still valid. Sometimes the dates of issuance of such protective documents differ by only a few months or even weeks (you can make sure of this by analyzing the issued patents, for example, for bottle caps, of which quite a few have been registered in the relevant state registers in recent years.

The specified features are due to errors in the national patent legislation, which consist in the possibility of registering industrial designs and utility models without carrying out a qualification examination on the subject of compliance of these objects with the conditions of patentability (the presence of novelty and individual character - for industrial designs and novelty and industrial suitability - for utility models), as well as certain shortcomings in the work of the patent office.

So, for example, according to Art. 6 of the Law of Ukraine "On Protection of Rights to Industrial Designs" [15] states that an industrial design meets the criteria for protection if it is new and has an individual character. In addition, such a sample is considered to be the appearance of the product that meets the criteria of security. According to Art. 14 of the above-mentioned law, in order to obtain a certificate for an industrial design, an examination of the application for the object of registration is carried out.

And according to Art. 7 of the Law of Ukraine "On Protection of Rights to Inventions and Utility Models" [16] states that a utility model meets the conditions of patentability if it is new and industrially suitable. Also according to Art. 16 of the mentioned law, in order to obtain a patent for a utility model, an examination of the application for the object of patenting is carried out, which consists of a preliminary examination and a formal examination.

So, we can say that in Ukraine, a patent for a utility model and a certificate for an industrial design are issued only based on the results of a formal examination of the application, i.e. checking the correctness of filling out the documents. At the same time, the conformity of the utility model to the conditions of patentability and the conformity of the industrial design to the criteria of protectionability remain on the conscience of the applicants, which is a significant drawback in the conditions of sending fraudsters (that is, the conditions for obtaining a certificate for an industrial design or a patent for a utility model, one can say, are only a correctly completed application and payment all meetings).

Thus, one of the main problems of the emergence of "patent trolling" is that a patent for a utility model or a certificate for an industrial design is issued under the responsibility of the applicants, without conducting a special qualification examination for patent novelty. Perhaps this gap in the legislation became the basis for all kinds of abuses on the part of unscrupulous applicants.

This is evidenced by the fact that in recent years there has been a mass registration of patents by unscrupulous applicants, who in the shortest possible time patented hangers, toothpicks,

matches, parts for VAZ cars and other long-known products, as a result of which the export and import of significant batches of goods.

After receiving a protective document (patent, certificate), its right holder receives a full package of legal tools to protect his intellectual property rights, such as civil law protection, criminal law protection or protection of intellectual property rights in an administrative procedure, in particular, protection at the customs border.

At the same time, although the law provides for the possibility of challenging such protective documents (patents, certificates) in court and obtaining their annulment, it is also known that the judicial process of considering disputes takes quite a lot of time. By this time, the "patent troll" receives serious legal leverage and has many opportunities for manipulation, including with the involvement of executive authorities and law enforcement agencies.

Thus, unscrupulous applicants receive rights to dubious objects, and the mechanism of legal protection and protection of their rights is automatically activated in relation to them. As a result, such persons get the opportunity to block the economic and foreign economic activities of other subjects and to engage in extortion on seemingly legal grounds, that is, to actually abuse rights.

However, no provision in national legislation directly provides for the liability of patent trolls for abuse of rights, including under competition law. Ukrainian legislation does not provide for the liability of patent trolls for the abuse of rights, which in a certain way are of a conditional nature, since they are provided under their personal responsibility in terms of compliance of the object with the conditions of patentability or the criteria of protectionability.

Conclusions. The actions of patent trolls are a manifestation of unfair competition, which according to the general definition given in Art. 1 of the Law of Ukraine "On Protection from Unfair Competition", there are any actions in competition that contradict trade and other fair customs in economic activity [17]. However, the current legislation lacks both norms for holding patent trolls accountable for abusing the so-called "conditional rights" to utility models and industrial designs, as well as effective mechanisms for combating this manifestation of unfair competition. Therefore, the first steps in the fight against patent trolling in Ukraine is to grant the right to the Appellate Chamber of the National Intellectual Property Authority to cancel, under an accelerated procedure, patents for utility models and industrial designs obtained by unscrupulous applicants under their responsibility, and in fact do not meet the criterion of novelty. This will enable the Antimonopoly Committee of Ukraine to prosecute patent trolls under Art. 15 of the Law "On Protection from Unfair Competition" [17] – achieving unfair advantages in competition. It is believed that the proposed mechanism for combating patent trolls will be quite effective and much faster compared to the judicial review of cases in the relevant economic and civil law disputes.

Summarizing the above, taking into account the need to prevent the occurrence of so-called "patent trolling" in the future, to eliminate the causes and conditions that contribute to the mentioned negative phenomenon, it is also considered necessary to take the following measures at the legislative level:

- to ensure a real scientific and technical approach in the system of examination of industrial samples and other objects of intellectual property law in order to eliminate cases of obtaining a certificate for well-known samples that do not have signs of novelty and individual character;
- after the application for a certificate has passed the examination stage, provide for its electronic publication, which will allow interested persons within two months to object to the registration of rights to the declared sample in the event of its non-compliance with the criteria of legal protection, as well as on the basis of the use of a trademark belonging to another person or a brand well known in Ukraine;
- to provide a mechanism for out-of-court recognition of an issued patent as invalid, if reliable information (evidence) of its non-priority is submitted, leaving the possibility of challenging such a decision in court;
- normatively enshrine the possibility of prosecuting unscrupulous patentees, if the illegality of obtaining a patent and causing damage to the protected rights and interests of other persons through

the specified illegal actions is proven in the prescribed manner [18].

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НЕДОБРОСОВІСНА КОНКУРЕНЦІЯ В ПАТЕНТНОМУ ПРАВІ (ПАТЕНТНИЙ ТРОЛІНГ)

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Метою *статті є розгляд проблемних питань щодо недобросовісної конкуренції в патентному праві, зокрема, патентного тролінгу. Для цього було проаналізовано поняття «патентний тролінг» і «патентний троль». Також визначено види патентних тролів. Установлено ознаки і особливості патентного тролінгу в Україні та причини його поширення. Розглянуто прояв недобросовісної конкуренції, що полягає у зловживанні правами інтелектуальної власності. Надано рекомендації щодо введення ефективного механізму боротьби з патентними тролями та притягнення їх до відповідальності за недобросовісну конкуренцію.* ***Методологічною основою*** *дослідження є загальнонаукові та спеціальні методи наукового пізнання. Використання цих методів дало можливість описати та запропонувати шляхи вирішення проблеми щодо недобросовісної конкуренції в патентному праві, зокрема, патентного тролінгу.* ***Результати:*** *жодна норма в національному законодавстві безпосередньо не передбачає відповідальності патентних тролів за зловживання правами, в тому числі за конкурентним законодавством. Українським законодавством не передбачено відповідальності патентних тролів за зловживання правами, які певним чином мають умовний характер, оскільки надаються під їх особисту відповідальність у частині відповідності об'єкта умовам патентоздатності чи критеріям охороноздатності. У зв'язку з цим необхідно усунути причини та умови, які сприяють зазначеному негативному явищу на законодавчому рівні.* ***Обговорення:*** *фактично «патентні тролі» не є ні виробниками продукції, ні винахідниками, а володіють лише майновими правами на об'єкти права інтелектуальної власності, скуповуючи охоронні документи на них і реалізовують ці права тільки шляхом заборони їх використання, ініціюючи судові позови, власне, тому і дістали таку назву.*

Ключові слова: *право інтелектуальної власності; об'єкти патентного права; недобросовісна конкуренція; порушення патентних прав; порушення конкурентного законодавства; патентний тролінг; патентний троль.*

Стаття надійшла до редакції 07.12.2022