PATENT TROLLING AS PROBLEM OF INTELLECTUAL PROPERTY RIGHTS

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ABSTRACT

The article describes the concept of patent trolling as a modern problem of intellectual property rights protection in Ukraine and the world. The purpose of patent trolling as an offense and the negative consequences associated with its commission is determined. It has been established that one of the ways to counteract patent trolling is to adopt appropriate legislative acts. Taking into account the experience of the USA and Germany in the field of prevention of patent trolling. The emphasis is made on such ways of counteracting patent trolling as the duty of the person who holds the patent to review the dispute by a court to make a pledge in the amount of the potential costs of the parties to the trial, as well as the reimbursement of all costs to the party losing the dispute. It has been identified that Ukrainian legislation approaches differently the definition of the conditions for the patenting of inventions, utility models, industrial designs, which promotes the proliferation of patent trolling and indicates the need to provide them with the same conditions of protection. The content and reservations regarding the initiative of the European Union to create the Unified Patent Court and the introduction of a unified European patent are considered.

Keywords: Patent Trolling, Intellectual Property, Patent, Unified Patent Court, Patent Dispute.

INTRODUCTION

Today, according to Asay, the rapid increase in the number of patents has caused a number of problems, including patent trolling (Asay, 2017). According to official figures in the United States, where patent trolling cases have occurred for the first time, it is the main source of income for a big number of companies. For example, Intellectual Venture Corporation controls about 3-5 thousand patents, and in 2016, according to official data, more than 200 claims of patent infringement were filed by only three companies. However, the most vulnerable to patent trolling are consumer goods, biotechnology/pharmaceutical industry, industrial construction, computer equipment/electronics, medical equipment, software, services for business and consumers, telecommunications, automotive and chemical industries (Shkuratkov, 2017). At the same time, this situation does not only occur in the United States.

The proliferation of patent trolling phenomenon shows that today the countries are facing one of the most important tasks of the world which is the creation of a legal basis for patent trolling prevention and bringing to legal responsibility the perpetrators who has committed it, as the development of small and medium entrepreneurship and innovation activity actually depends on its resolving.

LITERATURE REVIEW

Nowadays, the majority of scientific papers on patent trolling focuses on its essence and the impact it has on the overall socio-economic development of the state. Thus, Gallini, draws attention to the fact that proper protection of intellectual property rights, in particular patent rights, promotes the development of enterprise innovation (Gallini, 2017). The fact that patents serve social interests are indicated by Lemley & Feldman (2018) & Cohen et al. (2016).

At the same time, the purpose of patent trolling, which Wu draws attention to, is not the obtaining of patents for industrial activities, but the filing of a lawsuit against misuse of the patented invention and obtaining appropriate compensation (Wu, 2017). That is, a patent troll initially acquires ownership of companies' patents that are bankrupt or acquire it through patent auctions and, after a certain period of time, file a lawsuit against a company that uses the patented invention illegally or violates the rights of the patent holder (Karpenko et al., 2018). Heinecke, G., in turn, notes that patent trolling impedes innovation companies from investing in research and development due to the threat of patent litigation being brought to trial, while patents themselves practically do not use patents that do not thereby contribute to their improvement and implementation into practice (Heinecke, 2015).

One of the ways to counteract such a negative phenomenon as patent trolling for Appel et al. is the laws against patent trolling. Scientists have argued that such laws affect the level of employment of small high-tech firms, in addition, in countries with a stable level of venture investment, the amount of such investment increases (Appel et al., 2017).

METHODOLOGY

The research of patent trolling as a modern problem of intellectual property rights protection in Ukraine and in the world was conducted using comparative legal, systemic and structural methods and the method of critical analysis. Thus, comparing the experience of foreign countries and Ukraine in counteracting and combating, patent tracing was carried out using the comparative legal method. The analysis of the latest scientific publications focused on the study of patent trolling, generalization and results presentation of the study has allowed the method of critical analysis and system-structural method.

FINDINGS AND DISCUSSION

With the signing on the 16 September 2014 by the Verkhovna Rada of Ukraine and the European Parliament the Agreement on Association between Ukraine and the European Union, the European Atomic Energy Community and their member states, Ukraine has undertaken to make reasonable efforts: (1) to facilitate the creation and commercial use of innovative products

and products of creative activity on the territory of the Parties; (2) Attaining an adequate and effective level of intellectual property rights protection.

At the same time, the norms of the operating Law of Ukraine "*On Protection of Rights to Industrial Designs"* dated from December 15, 1993, determine the patent as a patent of Ukraine for an industrial design, in turn, another act of the national legislation-the Law of Ukraine "*On Protection of Rights to Inventions and Utility Models"* established that a patent is a security document certifying priority, authorship and title to the invention (utility model), and a patent for an invention is a kind of patent, issued on the basis of the results of a examination of an invention application. Obviously, the Ukrainian legislator still demonstrates different approaches to understanding the concept of "*patent*" and establishes excellent requirements for inventions, utility models, industrial designs for their patenting. Thus, the invention must meet the requirements of patentability, if it is new, has an inventive step and is an industrially suitable, and useful model-a new and industrially applicable, and an industrial design is new as well. The procedure for examining applications for the grant of patents is also different, in particular, prior to the grant of a patent for an invention, a preliminary, formal and qualification expertises should be conducted, whereas in the case of a patent for an industrial design, only a qualification expertise is required.

It is the legislator's ignorance of the expediency of conducting a proper examination of patent applications for industrial designs to promote the shadowing of the intellectual property market and the growth of the markets for counterfeit products. At the same time, one should agree with the scientists who point out the inextricable link between the shadow sector of the economy and crime (Olga et al., 2018). In view of the fact that the shadowing of the intellectual property market promotes the violation of intellectual property rights in the field of patenting.

In this regard, scientists focus on possible ways to minimize intellectual property rights in the field of patenting, in particular, Ploskas et al. distinguish eight evaluation criteria applications for the grant of patents for invention (Ploskas et al., 2019). In turn, Leiponen & Delcamp, emphasize the expediency of strengthening the mechanisms for identifying the quality of inventions that are patented (Leiponen & Delcamp, 2019). Although not all scientists support the approach by which patent trafficking can be countered by increasing patent requirements. So, according to Asay, on the contrary, it can lead to an increase in the number of patent trolling (Asay, 2017). Thus, the additional requirements for patent applications are not the only possible way to minimize patent trolling.

In view of the above, it is advisable to draw attention to another experience of countering patent trolling. In particular, in the United States, starting in 2013, there have been many initiatives aimed at minimizing patent trolling, in particular, the The Innovation Act 2013 stipulated the obligation of the person who filed an action to provide the notified body with information on the use of which specifically the patents in the defendant's products violate patent rights of the plaintiff, as well as the obligation of the party who has lost the legal costs. It is precisely the latter point that should become an effective tool for influencing patent trolling, which often blackmailed the companies. However, this bill was not adopted, but in 2015, such provisions were consolidated in another act (Vorozhevich, 2019).

It is interesting to note the experience of Germany, where, like in most EU member states, the right of a court is provided, which examines a patent claim to oblige owner of the patent to consider a dispute to put a pledge in the amount of the potential costs of the parties to

the litigation. There is also a mechanism for putting all costs on the losing party (Wu, 2017). In view of the above, it is obvious that such measures have a significant effect on the spread of the phenomenon of patent trolling and protect the people who have directly become victims of it. However, the Ukrainian legislation does not provide for similar instruments of influence on unscrupulous patent holders, which creates favorable conditions for patent trolling in Ukraine.

In recent years, the European Union has been struggling to counteract patent trolling in other ways. One of them is the creation of the Unified Patent Court. In accordance with the Unified Patent Court Agreement, the legal personality of such a court extends to each Member State of the European Union. In addition to the creation of the Unified Patent Court, the introduction of a new, unified European patent is also envisaged, according to Thumm, Substantially changing the rules of the game in the field of patenting, as well as activating not only the creation but also the practical use of the patented objects in Europe (Thumm, 2018). Cohen & Johnson, believe that such innovations will have a particularly positive effect on the patent rights of the largest pharmaceutical companies that require wide geographic protection, in addition, a single patent will allow them to reduce costs for patent maintenance (Cohen & Johnson, 2018). Although not all states support such proposals, in particular, senior German officials caution against such proposals, despite the fact that they are contrary to the constitutional provisions in force, and limit the jurisdiction of the state directly in the relations concerning patenting and resolving disputes related to it (Rowan, 2017).

In view of the existing cautions made by the Member States of the European Union after the entry into force of the provisions of the Unified Patent Court and the new single European patent, each state has chosen one of the following options: (1) non-accession to any of the agreements (Spain); (2) joining only the agreement on the new single patent of the European standard (Poland); (3) joining only the agreement on the Unified Patent Court (Italy); (4) joining both agreements (Kopelevich, 2017). However, the existence of the Unified Patent Court is not a guarantee of protection against patent trolling. In particular, patent trolls may lodge a complaint against small and medium-sized companies that would jeopardize their direct business. Taking into account the willingness of the defendants to avoid court proceedings in the Unified Patent Court, they will be forced to pay patent fees to patent trolls.

RECCOMENDATIONS

Given the foregoing, it is obvious that today the struggle against patent trolling is relevant to all world counties without exception. At the same time, in order to strengthen the measures of counteract and fight against patent trolling, it is expedient to harmonize the provisions on the patenting of inventions, utility models, industrial designs in the legislation of Ukraine in order to provide them with equal conditions for protection, and also to provide for the possibility of placing a pledge for the trial of a patent dispute and the imposition of all litigation costs and losing party. In turn, Member States of the European Union are encouraged to take into account all existing cautions regarding the activities of the Unified Patent Court and to provide for the possibility of joining all European Union member states to the Unified Patent Court Agreement.

CONCLUSION

The increase in the number of patents and the imperfection of modern legislation has led to the emergence and spread of such a phenomenon as patent trolling. At the same time, countering and combating this negative phenomenon is conditioned by the fact that patent trolling inhibits the innovative development of the state, harms enterprises that legitimately use patented products. The foregoing makes countries to take measures counteracting and fighting against patent trolling, in particular, the experience of the USA and Germany, which is also useful and appropriate for Ukraine, besides, at the level of the European Union, the creation of the Unified Patent Court and the introduction of a uniform standard patent are foreseen, although the issue of joining all the countries of the community without exception to the respective agreements remains relevant.

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