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THE RIGHT TO CLAIM FOR INVALIDATION OF INVENTION (UTILITY MODEL) RIGHTS IN THE COURT PROCEDURE

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The article is devoted to the legal analysis of the recognition of rights to an invention (utility model) as invalid in court. It analyzes the features of the subject composition of persons who have the right to file a claim for invalidation of invention (utility model) rights. It is established that in 2020, the institution of invalidating invention (utility model) patents was replaced by the institution of invalidation of invention (utility model) rights. It is proven that when initiating court proceedings, the plaintiff describes several key issues in the lawsuit: which right (interest) is violated; by whose actions or inaction such right is violated (who should be involved as a defendant in the case); whose rights or obligations may be affected by the decision in the case (who should be involved as a third party who does not make independent claims regarding the subject of the dispute); what circumstances confirm the fact of violation of the right (interest) of the plaintiff (the actual basis of the claim) and the evidence that proves that such circumstances took place; the provisions of law on the basis of which the plaintiff will substantiate his/her claims (legal basis of the claim), and within which jurisdiction the dispute should be resolved. It is established that the right to appeal the decision of the NOIP Appeals Chamber regarding invalidation of the rights to an invention or utility model is exercised only by the parties to such proceedings, i.e. the complainant, or the owner of a patent whose rights have been declared invalid in whole or in part by such a decision of the NOIP Appeals Chamber. It is substantiated that the basis for invalidating invention (utility model) rights is a combination of two proven factual circumstances: violation of the rights (legal interests) of the plaintiff as a result of the validity of invention (utility model) rights and the real existence of grounds for the court to recognize invention (utility model) rights are invalid. It is highlighted that the violation of the plaintiff's rights or legal interests in the rights to invalidate the right to an invention, a utility model can be justified by: the existence of rights to similar utility models that were registered earlier than the rights of the defendant; availability of the plaintiff's co-inventor's rights; impossibility to carry out economic activities, manufacture and use products on the territory of Ukraine (due to patent trolling of the defendant as a patent owner); impossibility to freely import into the territory of Ukraine the goods that can be considered to be manufactured using each feature included in the independent clause of the claim of the invention under the current patent; violation of the plaintiff's rights as an employer (the subject of property rights to a service invention, utility model), the existence of rights to an invention (utility model) registered by other persons, etc.

Keywords: patent, industrial property, court, intellectual property, lawsuit

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Statement of the problem. The institution of invalidation of invention patents (utility models) was replaced by the institution of invalidation of invention (utility models) rights, which eliminated inconsistencies between the provisions of the Law of Ukraine "On the Protection of Inventions (utility models)" (hereinafter – the Law) and Art. 469 of the Civil Code of Ukraine (hereinafter referred to as the Civil Code of Ukraine), which directly

provided for the possibility of invalidating intellectual property rights, rather than the patent protection document. However, the expediency and justification of such changes are in the focus of scholars in the field of intellectual property, and are the subject of scientific discussions. Invalidation of rights to an invention (utility model) can be carried out in a judicial procedure, or in an extrajudicial procedure by applying to the Appeals Chamber of the UKRNOIVI. Appealing to the court to protect one's violated right is a universal method of rights protection. The relevance of this research is indicated by the fact that in every court case the plaintiff must prove the existence of a violated right and/or interest. Interest is one of the signs of a plaintiff in any court case, and disputes about the invalidation of rights to an invention, a utility model are no exception. Law enforcement practice shows the presence of different case law, which reflects that different persons can act as plaintiffs in this category of claims. In the scientific literature, different opinions are also expressed on this matter, which additionally indicates the relevance of this scientific research.

Research status. Patent law is a field of scientific interest of the leading scholars in the field of intellectual property. In particular, the issue of legal protection of inventions (utility models) and protection of rights to them was the subject of studies by P. Borovyk [1], E. Hareiev [2], L. Tarasenko [3, 4, 5], A. Nyzhnyi [6], O. Kashyntseva [7], H. Yarema [8], V. Karaban [8] and others. At the same time, these scientific studies practically did not touch on the issues of invalidation of rights to inventions (utility models) in general and subjects who can apply for such claims, so this issue is relevant for scientific analysis.

The purpose of the article is to characterize the legislative provisions regarding invalidation of invention (utility model) rights, to determine the persons who have the right to appeal with the specified requirements, to substantiate the conclusions regarding the improvement of the legal regulation of the studied relations.

The objectives of the article are to determine the points of discussion expressed in the scientific literature and enshrined in the current legislation regarding the recognition of rights to inventions (utility model) as invalid, to analyze them, to characterize the ways of improving the current legislation of Ukraine in the researched area.

Presentation of the main material. Art. 33 of the Law of Ukraine "On Protection of Rights to Inventions and Utility Models" is devoted to the invalidation of rights to an invention (utility model) in court. Thus, in accordance with part 1 of this article, the rights to an invention (utility model) may be declared legally invalid in whole or in part in the event of:

a) non-compliance of the patented invention (utility model) with the conditions of patentability defined by Article 7 of this Law;

b) the presence in the formula of the invention (utility model) of the features that were not in the submitted application;

c) violation of the requirements of Part 2 of Article 37 of this Law;

d) state registration of an invention (utility model) as a result of submitting an application in violation of the rights of other persons.

As you can see, this norm does not say anything about the subject composition of persons who can initiate a legal dispute about the recognition of rights to an invention (utility model) as invalid. Parts 3 and 4 of the same article of the law also do not regulate the specified relations.

The only mention of a possible plaintiff in this category of cases is found in Clause 4, Part 1 of Art. 33 of the mentioned law, from which such grounds of invalidity as state registration of the invention (utility model) due to *the submission of an application in violation of the rights of other persons can be seen*. These other persons, whose rights have

been violated by the submitted application for registration of the invention, utility model, and may be proper plaintiffs in this litigation.

We draw attention to the fact that Art. 33-1 of the Law of Ukraine "On the Protection of Rights to Inventions and Utility Models" regulates the recognition of rights to inventions (utility models) as invalid out of court (by the Appeals Chamber of the UKRNOIVI), and part 1 of this article states that any person (including one acting through an intellectual property representative (patent attorney)) can submit a substantiated application to the Appeals Chamber to declare the rights to an invention (utility model) invalid in whole or in part due to non-compliance of the invention (utility model) with the conditions of patentability, determined by law.

We believe that legal proceedings regarding the recognition of rights to an invention (utility model) as invalid can be initiated by any person who considers himself a plaintiff. At the same time, in order to obtain the right to the satisfaction of the claim, such a plaintiff must be proper, and therefore must prove his interest (the presence of the violated right and/or interest).

Attention should be drawn to the fact that in separate court proceedings initiated after the amendments to the Law of Ukraine "On the Protection of Rights to Inventions and Utility Models" regarding the name of the method of protection of rights that can be applied by the court (the amendments were made by the Law of Ukraine "On Amendments to Some Legislative Acts of Ukraine on the Reform of Patent Legislation" dated 21.07.2020), the subject matter of the lawsuit continued to often be the claim to invalidate the patent itself, and not the rights to the invention (utility model). L. Tarasenko rightly emphasizes that case law initially did not fully accept the legislative changes, since the courts continued to invalidate patents, not the rights, for some time. On the other hand, invalidation of the rights to inventions (utility models) was rare during 2020-2022 [3, p. 72].

Consequently, for example, the claim to invalidate the patent of Ukraine for the utility model No. 100422 "Protective overlay of an electronic device" was the subject matter of court proceedings in the case No. 922/4722/21, although the lawsuit was filed after the entry into force of legislative amendments regarding the method of protection of rights, which can be applied by the court in such categories of cases [9].

Initiating legal proceedings, the subject whose right is violated, unrecognized, or disputed resolves several key issues: which right (interest) is violated; by whose actions or inaction such right is violated (who should be involved as a defendant in the case); whose rights or obligations may be affected by the decision in the case (who should be involved as a third party who does not make independent claims regarding the subject matter of the dispute); what circumstances confirm the fact of violation of the right (interest) of the plaintiff (the actual basis of the claim) and the evidence that proves that such circumstances took place; the provisions of law on the basis of which the claimant will substantiate his claims (legal basis of the claim), and within which jurisdiction the dispute should be resolved.

Article 33 of the Law of Ukraine "On Protection of Rights to Inventions and Utility Models" does not provide for any restrictions on entities that may apply for invalidation of rights to inventions (utility models). This gives grounds for asserting that any subject of civil relations can apply for the protection of his violated right or legitimate interest.

This conclusion also follows from the constitutional principle of the administration of justice, enshrined in Article 124 of the Constitution of Ukraine, which states that the jurisdiction of the courts extends to any legal dispute and any criminal accusation. This means that a person's right to apply to court for dispute resolution cannot be limited by law or other legal acts. Any person who believes that his/her right or legal interest has been

violated, can apply to the court. A similar provision is enshrined in Part 2 of Article 35 of the Law. Thus, the jurisdiction of the courts extends to all legal relations arising in connection with the application of this Law.

At the same time, in part 11 of Article 33^1 of the Law, which provides for an out-of-court procedure for contesting the validity of rights to an invention (utility model), provides that the parties themselves may appeal the decision of the Appeals Chamber approved by the NOIP, adopted as a result of the consideration of the case on the recognition of rights to an invention (utility model) as invalid, in court within two months from the date of its receipt. From a literal analysis of this rule, it can be concluded that only the parties to such proceedings have the right to appeal such a decision, that is, the complainant (applicant), or the owner of a patent whose rights have been declared invalid in whole or in part by the decision of the NOIP Appeals Chamber.

However, this is only one of the options for possible entities that can apply to the court in a specific situation: when they are not satisfied with the decision of the NOIP Appeals Chamber. In this case, the lawsuit submitted to the court will contain claims for annulment of the decision of the NOIP Appeals Chamber and for recognition or refusal to recognize the rights to the invention (utility model) as invalid.

Therefore, the issue of the right to appeal to the court with the demand to recognize the rights to the invention (utility model) as invalid should be considered more broadly, through the prism of the institution of the right to claim, the elements of which are: the right to appeal to the court and the right to satisfy claims.

Moreover, the out-of-court procedure for contesting the validity of the rights to an invention (utility model) is not mandatory, but an alternative option aimed at the consideration of the case directly by NOIP specialists who have special knowledge in this field, and the relief of the judicial system. Therefore, it is an option at the discretion of the applicant, and judicial protection is universal and can be applied by any subject. In particular, taking into account the fact that the jurisdiction of the courts extends to all legal relations in the state, the right to appeal to the court with a demand to declare the rights to an invention (utility model) invalid in whole or in part is vested in any subject who, in his subjective opinion, considers, that as a result of the existence of rights to such an invention (utility model), its legal rights (or interests) are violated, not recognized or disputed.

Article 33 of the Law has no details concerning the entity that has the right to apply to the court with a demand to declare the rights to an invention (utility model) invalid, and Part 11 of Article 33^1 of the Law clearly stipulates that such a right belongs to the parties: the person who filed an application to declare the rights to the invention (utility model) invalid, and the patent owner.

However, in our opinion, in this case, it should be said that the parties, if there are factual grounds, will have the right to satisfy the claim for annulment of the decision of the Appeals Chamber and recognition or refusal to recognize the rights to the invention (utility model) as invalid. However, any subject who believes that his right has been violated can file such a lawsuit.

However, even if there are legal grounds for canceling the decision of the Appeals Chamber in court, the claim cannot be satisfied if it is brought by an entity other than the parties who participated in the proceedings on the invalidation of the rights to the invention (utility model) in the Appeals Chamber. At the same time, taking into account the fact that the procedural legislation does not provide for the institution of an improper plaintiff, we believe that all such subjects (except the parties) should be considered in the level of persons who do not have the right to satisfy claims for annulment of the decision of the Appeals Chamber.

At the stage of opening proceedings in the case, even in the presence of an obvious fact of filing a lawsuit by an improper subject, the court is not empowered to decide whether a specific plaintiff has the right to satisfy his claims. This can only be done as a result of a trial. In turn, an application to the court with a demand to challenge the decision of the Appeals Chamber by another entity, and not by the parties in the sense of Part 4 of Article 33^1 of the Law, is a reason for refusing to satisfy the claims, since the plaintiff in such a case will be "inappropriate".

Therefore, only the entity whose claim is supported by proper, reliable and admissible evidence of grounds for invalidating invention (utility model) rights and the fact of violation of his right or legitimate interest has the right to satisfy such claims. The absence of circumstances that would confirm the existence of a violation of the right of the person for whose protection he/she applied, or of an interest protected by law, is the basis for refusing to satisfy the claim for invalidation of the rights to the invention (utility model). The question of whether a violation really occurred and whether the plaintiff is entitled to the satisfaction of his claims is decided by the consequences of the trial.

Consequently, for example, in the court case on invalidation of the rights to the invention (utility model), the plaintiff substantiated his claims by the fact that due to the existence of rights to utility models, he is limited in the use in the process of his production of agricultural machines of the abutment assembly of the bearing support of the working disk of the soil-cultivation unit, support unit of the bearing support of the curved working disk of the soil-cultivation unit, the bearing support of the soil-cultivation unit's working disk. The existence of rights to the specified utility models became the basis for the defendant's actions, which can be interpreted as patent trolling. And the utility models themselves do not meet the conditions for granting legal protection, in particular, they are not new, because the utility models are publicly available and were previously protected on the basis of patents that ceased to be valid on April 3, 2017 [10].

When making a decision, the court resolved two key issues in the case: the issue of the existence of a confirmed violation of the plaintiff's rights or interests due to the existence of rights to utility models that were protected by patents; and the issue of real compliance of utility models with the conditions of patentability, in particular, the "novelty" criterion.

At the same time, in another court case regarding invalidation of the rights to an invention (utility model), the court indicated in its decision that before providing a legal evaluation of the patent of Ukraine for the utility model No. 100422 "Protective cover of an electronic device", it should be established whether the plaintiff's rights are violated or protected by law interests in this contested patent (the rights it certifies) [11].

Motivating their decisions, the courts were guided by the Decision of the Constitutional Court of Ukraine No. 18-рп/2004 dated 01.12.2004 regarding the interpretation of the term "interest protected by law" as an independent object of judicial protection. In particular, such an interest must be understood as the desire to use a specific tangible and/or intangible good, determined by the general content of objective and not directly mediated in subjective law, a simple legitimate permission, which is an independent object of judicial protection and other means of legal protection in order to meet individual and collective needs that do not contradict the Constitution and laws of Ukraine, public interests, justice, good faith, reasonableness and other general legal principles.

Therefore, having established the presence of the person who brought the lawsuit, a subjective material right (interest protected by law), for the protection of which the lawsuit was filed, the court finds out the presence or absence of the fact of violation, non-recognition or dispute and, accordingly, makes a decision on the protection of the violated

right or denies the plaintiff protection, having established the groundlessness and unreasonableness of the stated demands. Implementation of civil legal protection takes place by eliminating violations of civil law or interest, imposing the obligation to restore the violated right on the violator.

Therefore, in our opinion, the basis for invalidating invention (utility model) rights is the symbiosis of two proven factual circumstances: violation of the rights (legal interests) of the plaintiff due to the validity of invention (utility model) rights as well as the real existence of grounds for the court to recognize invention rights (utility model) invalid, provided for in Part 1 of Art. 33 of the Law of Ukraine "On Protection of Rights to Inventions and Utility Models".

We believe that the violation of the plaintiff's rights or legal interests can be justified, in particular: by the existence of rights to similar utility models that were registered earlier than the rights of the defendant; availability of the plaintiff's co-inventor's rights; impossibility to carry out economic activities, manufacture and use similar products on the territory of Ukraine, taking into account, among other things, the facts of patent trolling by the subject of the rights to them; the impossibility of freely importing into the territory of Ukraine goods that can be considered as manufactured using each feature included in the independent clause of the claim of the invention under the current patent; violation of the rights of the plaintiff as an employer (the subject of property rights to a service invention (utility model)), the existence of rights to an invention (utility model), which are registered by other persons, etc.

We agree with O. Batova's position, who notes that the existence of rights to an invention (utility model) that does not actually meet the conditions for granting legal protection, say, is not new, unjustifiably deprives other persons of the right to freely use such an invention (utility model) [12, p. 53].

So, for example, by the Ruling of the Poltava Court of Appeal dated 13.01.2021, the court upheld the decision of the court of first instance, which refused to satisfy the claims, taking into account the absence of a violation of the rights of the plaintiff as an employer to the service utility model, since it had not proven the fact of creation of such a utility model by the defendant in connection with the performance of his duties as an employee or the presence of a corresponding mandate from the employer or the fact of the creation of such a utility model using the experience, production knowledge, production secrets and equipment of the employer. By order of the employer, a thread milling machine was put into operation at the enterprise. And the contested patent was issued for "Portable device for metalworking", which ruled out the identity of the equipment manufactured by the company with the utility model that was patented by the defendants [13].

Therefore, as can be seen from the materials of this case, the plaintiff (employer) exercised his right to appeal to the court with a demand to declare the rights to the utility model invalid, because he had a firm belief in the validity of his claims. On the condition that if it was proven that the defendant created a utility model in connection with the performance of his duties as an employee or an assignment of the employer or with the use of experience, production knowledge, secrets of production and equipment of the employer, it would be possible to say that the plaintiff had the right the claims to be satisfied. Such actions of the defendant could be qualified as a basis for invalidating rights to a utility model, such as "state registration of an invention (utility model) as a result of filing an application in violation of the rights of other persons" (paragraph r, part 1 of Article 33 of the Law). However, due to the lack of evidence of their claims, the fact of the absence of a violation of law or legitimate interest is established.

Considering the fact that the state registration of rights to utility models is carried out only as a result of a formal examination (without conducting a qualification examination), it is possible to register utility models that do not meet the conditions for granting legal protection (for example, the condition of "novelty"), and in the future abuse by unscrupulous the applicant with its utility model rights. Such actions are called patent trolling.

It should be noted that a claim for invalidation of invention rights (utility model) can be brought to court both as an independent claim (that is, as an original claim) and in the form of a counterclaim, if it is filed to eliminate the possibility of satisfying the original claims.

Conclusions. The Law of Ukraine "On Protection of Rights to Inventions and Utility Models" does not contain special requirements for the subject of the right to file a claim for invalidation of invention rights (utility model). An exception is the legal provision on appealing the decision of the NOIP Appeals Chamber regarding invalidation of the rights to an invention or utility model (only the parties to such proceedings can appeal the decision of the Appeals Chamber to the court). Therefore, any person can file a lawsuit in court to declare the rights to an invention (utility model) invalid. At the same time, in order to obtain the right to satisfy such a claim, the plaintiff must prove his interest in the case, that is, he must confirm with evidence his violated, contested, unrecognized right or interest.

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ПРАВО НА ЗВЕРНЕННЯ ДО СУДУ З ВИМОГОЮ ПРО ВИЗНАННЯ ПРАВ НА ВИНАХІД (КОРИСНУ МОДЕЛЬ) НЕДІЙСНИМИ

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Присвячено правовому аналізу визнання прав на винахід (корисну модель) недійсними в судовому порядку. Проаналізовано особливості суб'єктного складу осіб, які мають право на звернення з позовом про визнання прав на винахід (корисну модель) недійсними. Встановлено, що на зміну інституту визнання патенту на винахід (корисну модель) недійсними у 2020 р. запроваджено інститут визнання недійсними прав на винахід (корисну модель). Доведено, що, ініціюючи судове провадження, позивач описує в позові кілька ключових питань: яке саме право (інтерес) порушено; чиїми діями чи бездіяльністю таке право порушено (хто має бути залучений як відповідач у справі); на чиї права чи обов'язки може вплинути рішення у справі (хто повинен бути залучений як третя особа, яка не заявляє самостійних вимог щодо предмета спору); які обставини підтверджують факт порушення права (інтересу) позивача (фактична підстава позову) та докази, які свідчать, що такі обставини мали місце; норми права, на підставі яких позивач обґрунтовуватиме свої вимоги (правова підстава позову), та в межах якої юрисдикції має вирішуватись спір. Встановлено, що право на оскарження рішення Апеляційної палати НОІВІ щодо визнання недійсними прав на винахід, корисну модель мають лише сторони такого провадження, тобто скаржник, або ж володілець патенту, права на який визнані недійсними повністю або частково таким рішенням Апеляційної палати НОІВ. Обґрунтовано, що

підставою для визнання прав на винахід (корисну модель) недійсними є поєднання двох доведених фактичних обставин: порушення прав (законних інтересів) позивача внаслідок чинності прав на винахід (корисну модель) та реальної наявності підстав для визнання судом прав на винахід (корисну модель) недійсними. Аргументовано, що порушення прав чи законних інтересів позивача у правах про визнання недійсними права на винахід, корисну модель може бути обґрунтоване: існуванням у нього прав на аналогічні корисні моделі, які були зареєстровані раніше, а ніж права відповідача; наявністю в позивача прав співвинахідника; неможливістю здійснювати господарську діяльність, виготовляти та використовувати на території України продукцію (через патентний тролінг відповідача як володільця патенту); неможливістю вільно імпортувати на територію України товари, які можуть вважатися такими, що виготовлені з використанням кожної ознаки, включеної до незалежного пункту формули винаходу за чинним патентом; порушенням прав позивача як роботодавця (суб'єкта майнових прав на службовий винахід, корисну модель) існуванням прав на винахід (корисну модель), які зареєстровані іншими особами тощо.

Ключові слова: патент, промислова власність, суд, інтелектуальна власність, позов.

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