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CUSTOMS PROCEDURES ON FACILITATION OF PROTECTION OF THE INTELLECTUAL PROPERTY RIGHTS

This article focuses on analysis of customs procedures on facilitation of protection of the intellectual property rights and on its classification. The analysis of reasons and application features of customs procedures on facilitation of protection of the intellectual property rights have done. Problem of “patent trolling” that accompanies the enforcement of abovesaid procedures and the ways of contestation with it were determined.

Key words: customs procedures; facilitation of intellectual property rights protection; objects intellectual property; customs legislation; customs; owner of the intellectual property rights (right holder); violation of intellectual property rights; counterfeiting; patent trolling.

Статтю присвячено дослідженню митних процедур зі сприяння захисту прав інтелектуальної власності, проведено їх класифікацію. Здійснено аналіз підстав та особливостей застосування митних процедур зі сприяння захисту прав інтелектуальної власності. Висвітлено проблему “патентного тролінгу”, що супроводжує застосування вищевказаних процедур, визначено шляхи боротьби з ним.

Ключові слова: митні процедури; сприяння захисту прав інтелектуальної власності; об'єкти інтелектуальної власності; митне законодавство; митниця; власник прав інтелектуальної власності; порушення прав інтелектуальної власності; контрафакція; патентний тролінг.

Problem formulation. In the process of Ukraine's preparation to gain an access to World Trade Organization (further – WTO) and after Ukraine's accession to WTO [1], customs legislation of Ukraine, that regulates legal relations on intellectual property protection (hereinafter – IPR), gradually undergone serious transformation. With the becoming valid of Protocol of accession of Ukraine to WTO, Ukraine joined the Marrakesh Agreement Establishing the World Trade Organization [2], an integral part of which are treaties and connected with them legal documents, put on the amendments. One of the treaties is Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) [3]. TRIPS occupies the most important place among the international acts, that ensure the state enforcement of administrative procedures on intellectual property. That Agreement assures the enforcement of judicial and law enforcement state authorities – complex of administrative procedures to ensure security and intellectual property rights protection.

On the judicial establishment of IPR customs has a specific role – to facilitate of protection of the intellectual property rights, take measures to prevent movement of goods across the customs border of Ukraine with violation of legally protected intellectual property rights (it. 9 p. 2 art. 544 Customs Code of Ukraine) [4], that, along with others, legislator referred to

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the main tasks of the State Fiscal Service of Ukraine (hereinafter – the Customs). Complex of customs procedures on IPR at the customs border under the Agreement TRIPS and regulations of the European Community today became customs statutory provisions of Ukraine, but being relatively new to the national legislation, and therefore need additional research.

Analysis of recent researches and publications. Scope of administrative and customs procedures was researched by V. Averianov, V. Galunko, T. Kolomoets, I. Golosnychenko, U. Kunev, V. Kolpakov, I. Korostashova, D. Pryimachenko, V. Prokopenko, N. Tishchenko and others scientists. Scope of protection of the intellectual property rights on customs border was researched by scientist and practitioners: G. Androschuk, I. Vasilenko, V. Drobiazko, V. Zharov, Yu. Kapitsya, I. Korostashova, O. Tropina, T. Shevelova and others, though some aspects on research of complexity of customs procedures on facilitation of protection IPR are not paid sufficient attention in scientific research.

Purpose of the article is classification of customs procedures to facilitate of protection of the intellectual property rights, to research distinctions and to define the basic conditions of their use in customs and also to outline the problems in this sphere of activity.

Main material. The changes that took place in the customs legislation of Ukraine greatly expanded the powers of customs offices on protection of the intellectual property rights at the customs border and made national legislation closer to international standards in this area, definitely adapted it to EU criterias [5, 96–99].

Under the TRIPS Agreement required minimum procedures of protection of the intellectual property rights should allow enforcement of effective actions against any law violation. These procedures should also control further violations of human rights and grant judicial and administrative authorities powers to compel law breakers to compensate the owner of the intellectual property rights lost profits, attorney fees and other inflicted damage [6, 44].

Among the remedies to be applied under the Agreement TRIPS are: orders to stop the abuse; confiscation of illegal goods and means of production; destruction or seizure of counterfeit goods from civil circulation.

The norm about the liability for violation of intellectual property rights and norm which regulating of customs procedures on facilitation of protection of the intellectual property rights – appeared in the customs legislation of Ukraine gradually over the last fifteen years.

Therefore, in the Customs Code of Ukraine of 12.12.1991 № 1970-XII (hereinafter – CCU) provision envisaging liability for violation of intellectual property rights first appeared in 2001 after amendment of CCU by article 116-1 “Movement of goods or items/subjects across the customs border of Ukraine with violation of the intellectual property rights” [7, art.116–1].

Procedures of “registration of goods containing intellectual property objects and suspension of customs clearance of goods” (according to the Customs Register) was maintained by the State Customs Service of Ukraine according to “Regulation of the procedure of registration and movement across the customs border of Ukraine goods containing of intellectual property objects” approved by The Resolution of the Cabinet of Ministers of Ukraine of 28 April 2001 № 412 [8].

CCU of 11.07.2002 № 92-IV, that enter into force from 01.01.2004 [9], established: the term of “counterfeit goods” (i. 10 p. 1 art. 1), facilitation of protection IPR on subjects of foreign economic activities and other legal entities and individuals – was assigned to the one the main tasks of customs office (i. 4 p. 1 art. 11); also included chapter 45 “Measures of the customs offices to facilitate the protection of intellectual property rights while goods are

moved across the customs border of Ukraine” (from November 2006 named “Facilitation of the intellectual property protection while moving goods across the customs border of Ukraine”, which regulates the procedure of customs control and customs clearance of goods containing intellectual property objects art.255), procedure of registration of intellectual property objects in customs register (art. 256), procedure of suspension of customs clearance of goods on basis of customs register data of intellectual property objects (art. 257), and from November 2006 in CCU the new provision concerning suspension of customs clearance of goods at the initiative of the revenue and duties authority appeared (“ex-officio” art. 257–1). Liability on movement of goods across the customs border of Ukraine with the violation of intellectual property rights is clarified in art.345 CCU [10, 110–112; 11, 121–123].

With the adoption of the new CCU in March 2012 [12], the powers of the customs office [13, 29–34] and the list of customs procedures relating to the protection IPR definitely were expanded [14, 271–273].

In CCU legislator uses the term of “facilitation of protection of the intellectual property rights” instead of “intellectual property rights protection” because of certain peculiarities of legal regulation in the sphere of protection and enforcement of intellectual property rights. It is generally understood that the specificity of this sphere of legal relations does not allow controlling legal and law enforcement authorities to take final and, in some cases, interim decisions on goods containing intellectual property objects or to prosecute violators of such rights – without the participation of right holder in this process, rather without their active position and the participation on that subject in certain customs procedures. Therefore, application of the abovementioned term in the Customs Code of Ukraine determines the manner of the customs, meaning ensuring (creation) of the facilitatory conditions by the customs to the right holder for the protection of infringed intellectual property rights.

According to the p. 2 art. 397 CCU 2012, customs control and customs clearance of goods, containing intellectual property objects, imported into or exported from the customs territory of Ukraine are carried out by the customs. Therefore, the list of intellectual property objects for which granted the power on facilitation to the protection of intellectual property rights by the customs offices is not restricted by customs legislation of Ukraine. The basic requirement for intellectual property objects is their protection under the law.

Questions regarding the procedure of determining the legal category of “customs procedures” and its contents [15, 9–90], classification of customs procedures, undertaken by customs today is on the development stage. [16, 86–88]. The customs procedures provided by the customs legislation of Ukraine on facilitation of protection of IPR today are quite diverse and different in nature. [14, 272].

The application of the abovesaid procedures by customs can ensure the regime of facilitation that will give the owner of the intellectual property rights (hereinafter – right holder) the opportunity to defend infringed rights both in order of pre-trial investigation and in civil law appeal (appeal against the court).

Legislator also provides the administrative liability of the law violator pursuant to art. 476 Customs Code of Ukraine (“movement of goods across the customs border of Ukraine with infringement of intellectual property rights”).

Classification of customs procedures on facilitation of protection of the intellectual property rights” was set out in Chapter XIV of CCU [12], which provides a number of customs procedures that differ significantly. They should be divided into 3 groups: 1) *proce-*

procedure of registration of intellectual property objects in customs register (p. 3 art. 398 CCU), directly related to the procedure provided by art. 399 Customs Code of Ukraine (suspension of customs clearance of goods on the basis of the customs register data) and aims to ensure the necessary conditions for the application of specified suspension procedures by customs; 2) *procedure of suspension of customs clearance of goods in 2 types*: a) on basis of customs register data (art. 399 CCU) and b) at the initiative of the revenue and duties authority “*ex-officio*” (art. 400 CCU); 3) *procedure used under pre-trial investigation between the owner and violator of intellectual property rights* a) simplified procedure for destruction of goods whose customs clearance is suspended on suspicion of infringed intellectual property rights (art. 401 CCU); b) change of the marking of goods and their packing (art. 402 CCU).

In addition, pursuant to art. 476 of CCU, customs are endowed with powers to draw up a protocol on violation of customs rules for movement of goods across the customs border of Ukraine with infringement of intellectual property rights.

Applicability of using these procedures by customs is caused by a certain set of customs formalities made by right holder in this regard.

In accordance with part 3 art. 397 CCU 2012, measures related to the suspension of customs clearance shall be applied by the customs on goods imported into or exported from the customs territory of Ukraine for free circulation, except for: 1) personal effects of citizens; 2) goods that contain intellectual property objects protected by the law and are moved across the customs border of Ukraine for private use by citizens and are not intended for production or any other business activity the total cost and/or weight of which does not exceed the limits established by Section 1 of Article 374 of this Code; 3) stores.

The procedure of registration. The following customs procedure is related to the procedures for administrative-legal protection of rights of natural and legal persons [17, 72], which is a system of legal remedies, a set of different measures and establish the necessary conditions to consolidate, ensuring realization and protection of rights, freedoms and legitimate interests of individuals and legal entities.

The procedure, conditions and reasons of the registration procedures (registration in IPR customs register) is regulated by p. 2, 3 art. 398 Ukraine 2012. and “Registration procedure in the customs register of intellectual property rights, protected by the law” [18]. The main condition of such registration is providing required documents by right holder or his authorized representative. Among these documents are: a statement on the facilitation of protection IPR; documents certifying the registration of intellectual property rights (for objects of patent rights and a number of non-traditional intellectual property objects); documents evidencing intellectual property rights (for objects of copyright and related rights) and others.

Procedures of suspension of customs clearance of goods should be included into the procedures of customs and administrative protection of intellectual property rights [19, 372–376]. Reasons for application of the procedures are evolved at the Customs in case of reasonable grounds to believe that goods containing intellectual property objects move through the customs border with the violation of intellectual property rights.

The reason to apply the *procedure of suspension of customs clearance of goods* on basis of customs register data (pursuant to art. 399 CCU) is preliminary registration of intellectual property item in customs register data of IPR.

During the customs control and customs clearance of goods containing intellectual property objects (here inafter – IPO), the comparison of information on IPO in customs register is carried out with information about goods declared to customs clearance. If necessary,

customs inspection of goods and IPO identification in customs register is carried out. In case of appearance of a violation of intellectual property rights by the decision of the head of the customs, customs clearance of such goods is suspended for 10 days and can be extended by a reasoned request of the owner for 10 days on the basis of the relevant documents given by the right holder. Therefore, further action under this customs procedures depend on the activity of the owner of intellectual property rights. Active actions of right holder must appear in: a civil appeal (or economic) to court; sampling (samples) of products for which a decision on the suspension of customs clearance and transfer them for examination was made; timely presentation of custom applications and documents required for appropriate actions under this customs procedure.

The provision regarding the application of the suspension of customs clearance of goods at the initiative of the revenue and duties authority “ex-officio” (art. 400 CCU) appeared in the customs legislation in connection with Ukraine's accession to the WTO in November 2006, while the powers of the customs office were significantly expanded to facilitate of protection of the intellectual property rights. In particular, this procedure is the suspension of customs clearance of goods containing IPO and have signs of violation of intellectual property rights and are not registered in customs register of IPO. The application of this procedure is in some way different from the order of suspension of customs clearance of goods on basis of customs register data, meaning: a) exceptional condition for the application of the customs procedure is the information on customs data about the owner of intellectual property rights; b) before report to the right holder of a possible violation of his rights the customs may ask the right holder any information that may help to confirm or deny the presence of the violations; c) the period of suspension of customs clearance is 3 working days, and in the case of filing an application on the facilitation of protection IPR to the customs during this term by right holder – customs clearance of such goods is suspended for the period specified in p. 2 art. 399 CCU (10 working days and may be extended on the basis of the relevant documents provided by right holder).

Novels in the national customs legislation are: *simplified procedure for destruction of goods whose customs clearance is suspended on suspicion of infringed intellectual property rights* pursuant to art. 401 CCU [20, 169–174] and *change of the marking of goods and their packing* pursuant to art. 402 CCU [21, 53–58]. The procedures are also ensured to protect intellectual property rights, but with certain characteristics. Thus, the main condition of their use by customs is the consent of the IP right holder on customs procedures, provided as a result of pre-trial investigation in accordance with the provisions of Economic Procedure and Civil Procedure Codes of Ukraine.

Simplified procedure for destruction of counterfeit goods means embedding it the customs regime of destruction pursuant to art. 175 CCU and conditions, maintained in p. 2 art. 176 CCU. Expenditures and liability on such embedding are put on right holder IPO.

Before the destruction of goods, pursuant to p. 4 art. 401 CCU, and according to procedure concerning art. 356 CCU, their samples shall be taken and stored by the revenue and duties authority in such conditions so that they can be elements of evidence admissible in court proceedings where their use may be necessary.

After the destruction of goods on simplified procedure and samples after ending of the storing term by the revenue and duties authority an act is made and signed by customs, right holder and owner of the goods.

Written agreement of good's owner on its destruction on simplified procedure is his approval of fact of violation of intellectual property rights and gaining a status of "counterfeit goods" [22, 75–82].

Application of abovesaid procedure is possible till the time when law violator of IPR is not appealed to the court on administrative liability on art. 476 CCU.

So, in case of application of that provision person, who moved goods with the violation of IPR is not considered as law violator and fine sanctions are not applied.

Change of the marking of goods and their packing, pursuant to art. 402 CCU, is carried out by the change of identification means or marking of goods or their packing to eliminate the indications of infringed intellectual property rights. As a results of procedure of elimination of identification means or marking of goods or their packing the customs officer in presence of IP right holder and owner of the good draw up an act on absence of indications of infringed IPR according to the form, approved by the Ministry of Finance of Ukraine **"On approval of the Procedure of interactions between sub-sections of customs office on customs control and customs clearance of goods, containing intellectual property objects of 30.05.2012 № 647"** [23].

The application of abovesaid customs procedures determines commercialization of goods with eliminated identification means or marking and infringed IPR without economic reward on this operation to law violator of IPR (owner of the goods).

Also the ability of application of change of the marking of goods and their packing in some cases facilitate the flow of duties and taxes to the state budget held during the commercialization of goods in Ukraine, and eliminate the need to continuous storage of goods in customs warehouses.

In this case the owner of goods, moving across the customs border of Ukraine, while missing the certain economic reward on foreign economic operation remain those goods in his property. The IP right holder in case of compromise solution and agreement on change of the marking of goods and their packing violating his IPR: 1) reaches his main goal – commercialization of goods without marking or/and identification means; 2) avoids expenditures on storage of goods pursuant to p. 1 art. 399 CCU; 3) doesn't have need to solve the problem of eliminating the intellectual property rights in lawsuit, connected with expenditures of money, human sources and time.

However, nowadays in Ukraine and worldwide application of customs procedures on facilitation of protection IPR is connected with serious problem named "patent trolling" [24, 23–28]. It concerns IPR nuisance on "dubious" objects on which patent trolls took some security documents in Trademark Office.

Specific nature of patent trolling in Ukraine is the IPR registration in the patent authority by patent trolls rights to non-original, or even absurd (long and prevalent) objects (for example, rack, incandescent lamps, bottle corks). Abovementioned documents for customs office (on fact of its existence) are the reason of application of customs procedure on facilitation of protection IPR, that has negative effects for foreign economic activity of subjects, who are not violating IPR, however, to bring this fact – are forced to resort to long court proceedings.

Solution of the problem is to improve the competitive legislation, to determine the barriers on receiving the protective documents on "dubious" intellectual property objects and

also to adopt extinguishment of that papers with the lawsuit, procedures of administrative contestation in the Appeals Chamber of State Intellectual Property Service of Ukraine [25, 119–126].

Conclusions and further researches directions. Customs procedures on facilitation of protection of the intellectual property rights are divided into 3 groups: 1) procedure of registration (administrative-legal protection of IPR individuals and legal entities) 2) procedure of suspension of customs clearance of goods (customs-administrative procedures of IPR protection) 3) procedure used under pre-trial investigation between the owner and violator of intellectual property rights (customs-administrative procedures of IPR protection on pre-trial investigation).

The application of these procedures by customs ensures a regime of IPR protection, providing the opportunity to protect the violated rights of right holder, both in order pre-trial investigation, and in civil law appeal (appeal against the court). In addition, customs legislation provides the possibility of administrative liability to law violator pursuant to art. 476 Customs Code of Ukraine (“Movement of goods across the customs border of Ukraine with infringement of intellectual property rights”).

Each designated customs procedure has certain characteristics, which affects the grounds and procedure for their application. To conclude, the application of any abovementioned procedures by the customs are not completely independent solution cause of the need to execute previously certain customs formalities by right holder and in some cases, customs formalities are necessary for violator of intellectual property rights (owner of the goods, whose customs clearance is suspended on suspicion of infringed IPR).

However, the application of customs procedures in IPR protection facilitated to the spread of “patent trolling” in Ukraine and worldwide. The result of doings of patent trolls is the infringement of competition in the market, slowing the technological development. The solution of this problem is to develop a legal framework to combat patent trolling and to make the necessary changes in national legislation.

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