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**I.Yu. Polishchuk**, Head of the Department of Economic Researches of the State Enterprise Forensic science and Examination Center “Information Forensic Systems”, of State Judicial Administration, External PhD student of the National Academy of Internal Affairs  
E-mail: [assolinn@ukr.net](mailto:assolinn@ukr.net)

## **FORENSIC SCIENTIST COMPETENCE WHILE FORENSIC EXAMINATION OF TRADE MARKS IN THE WHILE INVESTIGATION INTO THEIR ILLEGAL USE**

*Limits of the procedural and scientific competence of a forensic scientist during forensic examination of intellectual property objects during an investigation into the illegal use of a trademark are outlined. An ambiguous forensic scientist task for determining similarity to the degree of mixing of the identified design with the image of the trademark has been analyzed. Issues and the scope of the forensic scientist task for determination of lost profit because of trademark infringement have been clarified.*

*Keywords: illegal use of trademark (mark for goods and services); forensic scientist competence; forensic examination of intellectual property objects; economic research in the field of intellectual property; lost profits.*

While investigation of the illegal use of trademarks (hereinafter, TM) for determining socially dangerous consequences of special knowledge use in their highest form that means Forensic Science is obligatory. Equally important is the study of the identified designation on a potentially counterfeit product with a trademark image, since such researches allow the forensic scientist to identify individual elements of a crime. These issues are included in forensic scientist tasks of the V class: forensic examination of intellectual property objects (hereinafter FEIPO). This examination is the Ukrainian invention, since no other country has a similar analogue<sup>1</sup>. Normally, FEIPO exists in Ukraine since January 2002, when it was introduced to the List of main types of forensic examinations and expert specialties by the Ministry of Justice of Ukraine.

This direction exclusiveness is presented through the lack of links to forensic scientific researches. As an example, we present a fundamental work of A. V. Ishchenko, where the results of more than 1,000 theses for almost

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<sup>1</sup> Kysyl N. V. (2017) *Rol' sudebnoj jekspertizy v processe dokazyvanija narushenij prav intellektual'noj sobstvennosti: v kontekste sudebnoj reformy. Kriminalistika i sudova ekspertiza* [Forensic science role while proving violations of intellectual property rights: in the context of judicial reform. Criminalistics and forensic science]. Issue 62. P. 424 [in Russian].

60-year period (from 1938 to 2000) are summarized, describes formation, current state and priority directions of scientific researches on issues of forensic examination, however FEIPO are not mentioned. Considering the thematic focus of dissertation researches on the methodology issues of investigation of certain types of crimes, A. V. Ishchenko merely states that “it is equally important to determine the forensic possibilities of protecting the rights of the author or the inventor ...”<sup>1</sup>.

Unique scientific effort of dissertation level considering problem issues of FEIPO is the research paper of G. K. Avdeia *Problems of forensic examination of counterfeit audiovisual production*<sup>2</sup>. Great influence on the development of this direction was made by H. V. Prohorov-Lukin, first Chairman of FEIPO Department of the Ministry of Justice of Ukraine of Ukraine and the First Head of FEIPO of Kyiv RIFE. Issues of FEIPO considered scholars and other experts in FEIPO including: P. P. Krainiev, O. F. Doroshenko, O. B. Butnik-Siverskyi, N. V. Kisil, I. V. Starodubov and others. At the same time, many issues of the general theoretical FEIPO nature including competence of forensic scientist while trademark forensic examination were not highlighted.

The purpose of the article is to consider the competence of scientists in specialties 13.6. Researches related to commercial (brand) names, trademarks (trademarks and service marks), geographic indications and 13.9 Economic research in the field of intellectual property while forensic examinations during the investigation into illegal use of trademarks.

N. I. Klymenko believes that issue of a forensic scientist competence “is one of the central issues in the theory and practice of forensic science”<sup>3</sup>. The legislator defines the rights, duties and powers of a forensic scientist, thus defining the legal aspect of his competence. *M. H. Shcherbakovskiy and L. P. Shcherbakovska. call this competence a procedural one*<sup>4</sup>. However, forensic scientist competence is a complex of his “special knowledge in the field of theory, methodology and practice of a certain kind, kind of examination”<sup>5</sup>.

In the second section of the Instruction on the appointment and performing forensic examinations and forensic researches of the Ministry of Justice of

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<sup>1</sup> Ishchenko A. V. (2003) *Metodologichni problemi kriminalistichnih naukovih doslidzhen': monografija/za redakciju I. P. Krasjuka* [Methodological issues of forensic researches: monograph/edited by P. Karassuk]. Kyiv : National Academy of Internal Affairs, p. 265 [in Ukrainian].

<sup>2</sup> Avdieieva H. K. (2006) *Problemi sudovo-ekspertnogo doslidzhennja kontrafaktnoji audiovizual'noj produkcii: dis. kand. jurid. nauk* [Issues of forensic examination of counterfeit audiovisual production : Candidate of science dissertation]: 12.00.09. Kharkiv, 235 p. [in Ukrainian].

<sup>3</sup> Klymenko N. I. (2018) *Zahalna teorija sudovoi ekspertolohii: monografija* [General theory of Forensic Expertology : monograph]. Ternopil: Krok, p. 14. [in Ukrainian].

<sup>4</sup> *Sherbakovskiy M. H. Shcherbakovska L. P. (2013) Kompetencija i kompetentnost' sudebnogo jeksperta. Kriminalistika i sudebnaja jekspertiza* [Competence and skills of a forensic expert. Forensic science and criminalistics]. Issue 58. P. 97 [in Russian].

<sup>5</sup> Klymenko N. I. Papers mentioned above, p. 15.

Ukraine (hereinafter, the Instruction) contains a number of norms regulating actions of a forensic scientist if the question goes beyond his special knowledge<sup>1</sup>. Thus, according to the 2.3 clause of the Instruction, a forensic scientist is not allowed to resolve issues beyond his special knowledge, therefore, on the basis of the 2.2 clause; he is obliged to inform the appointment subject of forensic examinations about possibility of performing a forensic examination and according to the 2.1 clause, a forensic scientist has the right to draw up a Notice of refusal to perform an examination on this basis. Besides the prohibition to go beyond the scope of his scientific competence, a forensic scientist is prohibited to investigate the law and evaluate the legality of the procedures, regulated by laws and regulations (Clause 2.3 of the Instruction).

Standards of the 1 part of Art. 242 of CPC of Ukraine do not allow performing forensic examination while criminal proceedings to clarify legal issues that means the forensic scientist competence does not include issues that require a solution based on legal knowledge<sup>2</sup>. If this is true, then it must be recognized that FEIPO forensic scientists and forensic economists while performing examinations, systematically go beyond their scientific competence. Regardless of presence or absence of an approved certified forensic technique, the legislation of Ukraine regulating economic relations is the basis for any forensic scientist task stated in the manual on the basis of forensic science regarding methodological provisions of the forensic economics<sup>3</sup>. If FEIPO experts are forbidden to refer to the substantive law that creates a “body”, for objects of intellectual property, because on this basis they receive legal protection, no expert conclusion will be drawn up.

“Expert practice demonstrates while performing forensic examinations, a person having knowledge in the field of physics ..., uses criminalistics knowledge, forensic science theory, proof theory, etc. This is primarily due to the fact that it is impossible to perform the correct forensic evaluation of results of any research without taking into account provisions of forensic identification theory, diagnosis, situational analysis, mechanism of tracing, causative relationships, etc.”, affirms E. B. Simakova-Efremian<sup>4</sup>.

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<sup>1</sup> *Pro zatverdzhennia Instruksii pro pryznachennia ta provedennia sudovykh ekspertyz ta ekspertnykh doslidzhen ta Naukovo-metodychnykh rekomendatsii z pytan pidhotovky ta pryznachennia sudovykh ekspertyz ta ekspertnykh doslidzhen: nakaz Ministerstva yustytzii Ukrainy*[On approval of the Instruction on the appointment and conducting of forensic examinations and expert studies and scientific and methodological recommendations on the preparation and appointment of forensic examinations and expert studies. Order of the Ministry of Justice of Ukraine], dated on: 08.10.1998 № 53/5. URL: <http://zakon5.rada.gov.ua/laws/show/z0705-98>.

<sup>2</sup> Sherbakovskiy M. H. Shcherbakovska L. P. Papers mentioned above, p. 97.

<sup>3</sup> *Osnovy sudovoi ekspertyzy: navch. posib. dlia fakh., yaki maiut namir otrym. abo pidtv. kvalif. sud. eksp./avt.-uklad.: L. M. Holovchenko, A. I. Lozovi, E. B. Simakova-Iefremian ta in.* (2016) [The Essentials of Forensic Science: Tutorial for experts who are going to get or confirm forensic scientist level of proficiency: L. M. Holovachenko A. I. Lozovi E. B. Simakova-Yefremyan and others]. Kharkiv : Pravo, p. 219 [in Ukrainian].

<sup>4</sup> Simakova-Yefremian E. B. (2016) *Intehratsiini protsesy v sudovii ekspertyzi: suinist ta problemni pytannia kompleksnykh doslidzhen. Teoriia ta praktyka sudovoi ekspertyzy i kryminalistyky*

In our opinion forbidding forensic scientists to clarify legal issues the legislator does not force forensic scientists to stop studying and applying the rules of procedural and substantive law for solving forensic scientist tasks. In this way, he tries to avoid the existing problem of transferring responsibility to subjects who, according to their purpose should clarify interpret and apply the legal issue, however, they try to avoid this or deliberately put to the forensic scientist decision a legal issue to take such evidence for the basis of their decision. The principle *Jura novit curia* means “the court knows the law”, so all issues clarifying law are their prerogative, and not forensic scientist prerogative. The investigator is a professional lawyer, the central figure authorized by the legislator to carry out a pre-trial investigation of criminal offenses within the limits of his competence, therefore, he only has the right to perform the deeds qualification of acts and determine the *corpus delicti*.

In legal circles of domestic and international lawyers it was decided to distinguish between the so-called “right”, and “fact”, issues. These issues are forensic scientists’ prerogative and are solved through the use of special knowledge in the opinion of many lawyers. In the forensic economics and FEIPO the boundaries of the “rights”, or “fact”, issues are arbitrary; it is very difficult to determine objective criteria reflecting such division. In some cases, determining of a particular “fact”, is a legal interpretation of the law, so forensic scientists have no right to establish such facts.

For example, in matters of tax evasion it is important to establish whether there was a real purchase of goods or there are only documents that it seems to confirm. Establishing this fact goes beyond the scientific competence of a forensic economist, because it is carried out by a court, “that evaluates and compares all evidence, including the conclusion of a forensic scientist which takes into account original documents of the failed economic transaction with other evidence that it is impossible actual implementation”<sup>1</sup>. Therefore, “forensic economist investigates objects that is information medium about the fact from which only information about a business operation can be singled out, that means data and not the fact of its realization”<sup>2</sup>.

Forensic scientists in specialty 13.6 find themselves in a similar situation, since during the investigation of illegal use of TM they are forbidden to establish the fact of “illegal use”, or “use”, of TM. In our opinion, competence limits of forensic scientists in specialty 13.6 in criminal proceedings against a Trademark infringement is the establishment of the following facts:

- the full or partial identity of the TM image to the detected symbol on (object display name);
- uniformity (homogeneity) of goods and/or services.

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[Integration processes in forensic science: the essence and problem issues of complex researches. Theory and Practice of Forensic Science and Criminalistics]. Issue 16. P. 179–180.

<sup>1</sup> The Essentials of Forensic Science: p. 204.

<sup>2</sup> Ibidem.

The similarity determination to the confusion degree of TM image with the identified designation goes beyond the scientific competence of forensic scientists in specialty 13.6 and cannot be established. The undeniable proof of the claim is the resolution of Supreme Court of Ukraine dated on 02/22/2018 regarding case № 922/3136/16<sup>1</sup>, where the court, in case of forensic scientist decision on specialty 13.6, who established the similarity to the degree of mixing of the two TM came to the conclusion that these TMs are not similar pointing out: “unique reason for the forensic examination appointment is the need of special knowledge application, whereas in this case the need of special knowledge use is not available, since the resolution of the raised issue (as regards similarity of the registered trademark and controversial designation) falls within the competence of ordinary consumer of relevant services”.

In particular, the concept of “similarity of the designation to such extent that it can be confused”, does not correspond to the terminology of forensic identification theory. It is legal and used by the legislator not only to interpret the violation of TM owner rights but also to establish the inconsistency between the registered mark and conditions for the provision of legal protection (part 2 of Art. 20 (part 1 of Art. 19, part 3 of Art. Issued under the Law of Ukraine *On Protection of Mark for Goods and Services*)<sup>2</sup>.

As V. V. Biryukov noted, “the object under test is not analogous, not similar, but by the way that it has manifested itself in the past and is involved in the investigating case”<sup>3</sup>. Therefore, H. V. Prokhorov-Lukin was right, in the opinion regarding the issue of TM similarity to the degree of mixing is the issue of “false identification by the consumer of a concrete, individually determined commercial source of goods (services)”<sup>4</sup>. The wording of this forensic scientist task should be revised from the point of view of adherence to the prohibition of decision by forensic scientists of legal issues, because here is a way beyond the limits of the forensic scientist procedural competence on specialty 13.6.

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<sup>1</sup> *Postanova Verkhovnoho Sudu Ukrainy vid 20.02.2018 v spravi № 922/3136/16. Yedynyi derzhavnyi reiestr sudovykh rishen Ukrainy* [Resolution of the Supreme Court of Ukraine of dated on: 02.20.2018 regarding the case № 922/3136/16. Unified State Register of Court Decisions of Ukraine]. URL: <http://reyestr.court.gov.ua/Review/72449740> [in Ukrainian].

<sup>2</sup> *Pro okhoronu prav na znaky dlia tovariv i posluh : Zakon Ukrainy* [On Protection of Rights to Trademarks for Goods and Services : Law of Ukraine] dated on: 15.12.1993 № 3689–XII. URL: <http://zakon0.rada.gov.ua/laws/show/3689–12> [in Ukrainian].

<sup>3</sup> Biryukov V. V. (2014) *Kryminalistychna identyfikatsiia: metod, metodyky, tekhnologii. Kryminalystyka y sudebnaia ekspertyza* [Forensic identification: method, methodology, technology. Forensic science and criminalistics]. Issue 59. P. 15 [in Ukrainian].

<sup>4</sup> *Metodyka sudovo-ekspertnoho doslidzhennia znakov dlia tovariv i posluh (torhovelnykh marok): zvit pro NDR (zakl.)/H. V. Prokhorov-Lukin [ta in.]; MIuU, KNDISE, NDTsSEIV, NDIIV AP rNU (2009)* [Methods of forensic research on trademark for goods and services (Trademarks): report on R&D (concl.). Prokhorov-Lukin [and others]; Minijust Of Ukraine, Kyiv Rife, Intellectual Property Research Center, National Academy of Legal Sciences Of Ukraine] № ДП 0108U005823. Kyiv, p. 203 [in Ukrainian].

Currently, the questions are following: “Is the designation (name) marked on (indicate where) or applied in (indicate where), identical or similar so much that it can be confused with the registered mark for goods and services according to a certificate of Ukraine (number)?”, that contained in the scientific and methodological recommendations on preparation and appointment of forensic examinations and researches violates the resolution prohibition of legal issues by forensic scientists<sup>1</sup>. So, answering this question a forensic scientist on specialty 13.6 goes beyond not only limits of procedural but also scientific competence, because it belongs to competence of psychologists.

The outlining of competence of the forensic scientist in specialty 13.9: Economic research in the field of intellectual property determining the size of lost benefit of TM owner as a result of its illegal use is no less difficult task than in case of a forensic scientist on specialty 13.6. It can be explained by the forensic and criminal-procedural criteria for classifying a forensic scientist's conclusion. According to the certainty degree from the point of view of epistemology, any forensic scientist conclusion regarding the definition of lost profit may be only probable. The statement is not only about a certain size, but also about the availability or unavailability of lost profit in *categorical* form is impossible, because it is related to events in the future and only facts in the past can be proved. This problem leads to the uncertainty of procedural competence limits of a forensic scientist on specialty 13.9, since it turns out that his conclusion establishes a mandatory feature of the crime objective side. In other words, in this case there is a coincidence of a forensic scientist task and a fact which in the legal sense can be defined only by a court. And the fact that cannot be defined in the objective reality by any subject, since it belongs to the events in the future.

Availability of a particularly determined amount of the lost benefit of the TM owner due to its illegal use allows an investigator to perform the qualification of actions of the suspect according to parts 1, 2 or 3 of the 229 article of the Criminal Code of Ukraine or to define a crime unavailability. The table demonstrates the limits of property damage for qualifying the actions of the accused for illegal use of TM according to Art. 229 of the Criminal Code of Ukraine in the equivalent of the national currency (hryvnia) and the US dollar as of 01.01.2018.

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<sup>1</sup> *Pro zatverdzhennia Instruksii pro pryznachennia ta provedennia sudovykh ekspertyz ta ekspertnykh doslidzhen ta Naukovo-metodychnykh rekomendatsii z pytan pidhotovky ta pryznachennia sudovykh ekspertyz ta ekspertnykh doslidzhen* [On approval of the Instruction on the appointment and conducting of forensic examinations and expert studies and scientific and methodological recommendations on the preparation and appointment of forensic examinations and expert studies].

Table

**Limits of Property Damage**

Part Articles	Amount of loss	Number of non-taxable minimum incomes	UAH Amount	USD Amount
1	Considerable	20 and more	from 17 620	from 628
2	Important	200 and more	from 176,200	from 6,278
3	Especially Important	1000 and more	from 881,000	from 31,389


Depending on the nature of relations between the consequence and its basis, forensic scientist conclusions are classified into conditional and unconditional. It is obvious that expert's conclusion regarding the of lost profit definition as a result of illegal TM use is *conditional* and depends on the possibility of ousting original goods with counterfeit goods. In other words, when the expert in specialty 13.9 determines lost profit size, he assumes that 10 units detected by investigation counterfeit goods sold became unique reason explaining why 10 units of the original product were not purchased.

Consequently, it is proved that all forensic scientist conclusions on the determination of lost benefit of TM owner due to its illegal use are probable or conditional. Therefore, the definition by an expert in specialty 13.9 in the categorical form of lost profit amount, without specifying conditions for replacement of the original counterfeit product sold goes beyond its procedural and scientific competence.

In the context of the above mentioned, it is necessary to draw additional attention to the fact that during the investigation into illegal TM use while formulating of forensic scientist question about lost profit definition, the widespread occurrence is the indication of the detected number of counterfeit products without distribution into manufactured, sold and stored units.

In this regard, not all experts in specialty 13.9, calculating lost profits, indicate an additional condition for those units of counterfeit products that have not been sold. This leads to an amount overestimation of lost profit and, consequently, incorrect qualification of actions and illegal court decisions.

As an example, we will present a criminal case #. 725/1466/14–k, where the court determinate:

1. The accused illicitly manufactured counterfeit bags by sewing on the CHANEL-labeled tags  and that are identical to the international registration marks # R431873 dated on 10.08.1997 and # 731984 dated on 10.02.2000 without the consent of the TM owner — company CHANEL SARL.

2. During controlled purchasing the sale of counterfeit products was fixed and documented.

3. As a result of search and seizure counterfeit bags kept for sale were confiscated.

In this case, the court qualified the actions of the accused for storage of counterfeit products for the purpose of sale, as an unfinished attempt on a crime, since the criminal intent was not brought to an end because of illegal activity termination by law enforcement agencies<sup>1</sup>.

In criminal case № 1-300/13 the court retrained the actions of the accused with the application of Part 3 of Art. 15 of the Criminal Code (unfinished attempt) to the formula for the qualification of the bodies of pre-trial investigation according to Part 3 of 229 of the Criminal Code of Ukraine. The court stated in the verdict that cigarettes manufactured by accused were not sold, but only stored in the warehouse, that did not cause any harm to the substance, but only could have caused it in the case of the implementation of counterfeit tobacco products. The criminal intention of the person was not brought to an end for reasons beyond his control<sup>2</sup>.

Similar circumstances and the logic of law enforcement in while illegal TM use, where the design of an unfinished crime for those units of contract products that was not actually sold, was followed in cases № 419/3085/2012<sup>3</sup>, № 1109/8768/12<sup>4</sup>, № 725/5024/13-к<sup>5</sup>, № 725/3081/14-к<sup>6</sup> and № 726/2324/14-к<sup>7</sup>.

It is significant that as a result of the analysis of 81 according to the verdict on illegal TM use, available in the Unified State Register of Court Decisions, it was defined more than 55 % of cases (47) qualification of actions of accused

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<sup>1</sup> *Vyrok Kirovskoho raionnoho sudu m. Kirovohrada vid 02.10.2012 u spravi* [The sentence of Kirovsky District Court of the city of Kropyvnytskyi dated on 02.10.2012 regarding the № 725/1466/14 case. Unified State Register of Court Decisions of Ukraine]. URL: <http://www.reyestr.court.gov.ua/Review/38572553> [in Ukrainian].

<sup>2</sup> *Pryhovor Lenynskoho raionnoho suda h. Luhanska* [The sentence of Leninsky District Court of the city of Luhansk] dated on 14.01.2013 regarding the № 1-300/13 case. Ibidem. URL: <http://www.reyestr.court.gov.ua/Review/28831447> [in Ukrainian].

<sup>3</sup> *Pryhovor Krasnohvardeiskoho raionnoho suda h. Dnepropetrovska* [The sentence of Krasnogvardeyskiy District Court of the city of Dnipro] dated on 17.05.2012 regarding the № 419/3085/12 case. Ibidem. URL: <http://www.reyestr.court.gov.ua/Review/24048183> [in Ukrainian].

<sup>4</sup> *Vyrok Kirovskoho raionnoho sudu m. Kirovohrada* [The sentence of Kirovsky District Court of the city of the city of Kropyvnytskyi] dated on: 02.10.2012 regarding the № 1109/8768/12 case. Ibidem. URL: <http://www.reyestr.court.gov.ua/Review/26264674> [in Ukrainian].

<sup>5</sup> *Vyrok Pershotravnevoho raionnoho sudu m. Chernivtsi* [The sentence of Pershotravnevyi District Court of the city of Kropyvnytskyi] dated on: 02.10.2012 regarding the № 725/5024/13 case. Ibidem. URL: <http://www.reyestr.court.gov.ua/Review/35816510> [in Ukrainian].

<sup>6</sup> *Vyrok Pershotravnevoho raionnoho sudu m. Chernivtsi* [The sentence of Pershotravnevyi District Court of the city of Chernivtsi] on: 02.10.2012 regarding the № 725/3081/14 case. Ibidem. URL: <http://www.reyestr.court.gov.ua/Review/40182157> [in Ukrainian].

<sup>7</sup> *Vyrok Sadhirskoho raionnoho sudu m. Chernivtsi* [The sentence of the Sadhirsky District Court of the city of Chernivtsi] dated on: 02.10.2012 regarding the № 726/2324/14 case. Unified State Register of Court Decisions of Ukraine URL: <http://www.reyestr.court.gov.ua/Review/41525435> [in Ukrainian].



based on methods of preparing a crime (manufacturing and storage) without the use of structures of the previous criminal activity that is undoubtedly a violation of the law. In these cases, forensic scientist in specialty 13.9 determined the lost profit in a categorical form without specifying the conditions for replacement of the original goods with counterfeit goods sold. Besides, while calculating property damage in the form of lost profit, they did not distribute units of counterfeit goods sold (those that could hypothetically replace original products) and only manufactured (stored) and went beyond the scope of both procedural and scientific competence.

As a result of research, it was found that the limit of competence of forensic scientists in specialty 13.6 in criminal proceedings against Trademark infringement is to define the full or partial identity of the TM image to the identified designation on (object display name) and the uniformity (homogeneity) of goods and/or services.

Similarity determination to the degree of confusion of the TM image with the identified designation is a legal issue and goes beyond the procedural and scientific competence of a forensic scientist in specialty 13.6. The lost benefit definition of the TM owner during the investigation of the illegal TM use is a forensic scientist task and the task of an investigator for definition socially dangerous consequences as an element of the objective side of a crime.

All forensic scientist conclusions on the lost benefit determination of the TM owner due to its illegal use are probable or conditional. Amount definition of the lost profits by forensic scientist on the specialty 13.9 in a categorical form, without specifying the conditions for the replacement of the original counterfeit goods sold goes beyond its procedural and scientific competence.

### **КОМПЕТЕНЦІЯ ЕКСПЕРТА ПРИ СУДОВО-ЕКСПЕРТНОМУ ДОСЛІДЖЕННІ ТОРГОВЕЛЬНИХ МАРОК У ПРОЦЕСІ РОЗСЛІДУВАННЯ ЇХ НЕЗАКОННОГО ВИКОРИСТАННЯ**

***І. Ю. Поліщук***

*Окреслено межі процесуальної та наукової компетенції експерта при проведенні судової експертизи об'єктів інтелектуальної власності під час розслідування незаконного використання торговельної марки. Проаналізовано неоднозначне експертне завдання зі встановлення схожості до ступеня змішування виявленого позначення із зображенням торговельної марки. З'ясована проблематика та рамки експертного завдання із визначення упущеної вигоди у зв'язку зі злочинним посяганням на торговельну марку.*

*Ключові слова: незаконне використання торговельної марки (знака для товарів і послуг); компетенція експерта; судова експертиза об'єктів інтелектуальної власності; економічні дослідження у сфері інтелектуальної власності; упущена вигода.*

**КОМПЕТЕНЦИЯ ЭКСПЕРТА ПРИ СУДЕБНО-ЭКСПЕРТНОМ  
ИССЛЕДОВАНИИ ТОВАРНЫХ ЗНАКОВ В ПРОЦЕССЕ  
РАССЛЕДОВАНИЯ ИХ НЕЗАКОННОГО ИСПОЛЬЗОВАНИЯ**

***И. Ю. Полищук***

*На примерах из судебной практики рассмотрены особенности применения специальных знаний в форме судебной экспертизы объектов интеллектуальной собственности в процессе расследования незаконного использования товарных знаков. В работе отдельно отражены вопросы исследования товарных знаков, в том числе по сходству до степени смешения обозначения с изображением товарного знака, а также вопросы экономических исследований в сфере интеллектуальной собственности по установлению упущенной выгоды вследствие нарушения прав на товарный знак. В результате проведенного исследования установлено, что пределом компетенции судебных экспертов по специальности 13.6 в уголовном производстве по посягательству на товарные знаки является установление полного или частичного тождества изображения товарного знака с обнаруженным обозначением на (название объекта-отображения) и однородности товаров и/или услуг. Доказано, что определение сходства до степени смешения изображения товарного знака с выявленным обозначением является правовым вопросом и выходит за пределы процессуальной и научной компетенции судебного эксперта по специальности 13.6. Выявлено, что определение упущенной выгоды владельца товарного знака при расследовании незаконного его использования как экспертная задача совпадает с задачей следователя по установлению общественно-опасных последствий как элемента объективной стороны состава преступления. Указано, что все экспертные заключения по определению упущенной выгоды владельца товарного знака, в результате его незаконного использования, являются вероятными и условными. Установление экспертом по специальности 13.9 в категоричной форме размера упущенной выгоды, без указания условия о замещении проданным контрафактным товаром оригинального, выходит за пределы его как процессуальной, так и научной компетенции.*

*Ключевые слова: незаконное использование товарного знака (знака для товаров и услуг); компетенция эксперта; судебная экспертиза объектов интеллектуальной собственности; экономические исследования в области интеллектуальной собственности; упущенная выгода.*