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The agreement granting the use of exclusive rights as a tool to recover creation costs

Nadezhda K Chaika

Moscow Aviation Institute (National Research University), Volokolamskoe highway 4,
125080, Moscow, Russia

E-mail: a.a.rabinovich@mail.ru

Abstract. In the article we conducted the study of the existing in practice proposals of compensation to the developer of the costs of own funds for the development of objects of exclusive rights created as a result of the state defense order. The analysis showed that the existing proposals are difficult to implement and do not meet the interests of enterprises, which are the prime conductors of the state defense order.

1. Introduction

As practice shows, the enterprise developers sometimes invest their own funds in the developments. As a rule, this applies to products that are the results of intellectual activity and are capable of legal protection, patent objects and more often copyright. In the aviation industry, such objects are: computer programs (usually for onboard computer) and databases. The reason is that there is a further perspective of using such objects. Moreover, the developer company expects to receive income from the introduction of these results in economic turnover not only for the implementation of commercial orders, but also for the implementation of the state defense order.

2. Methodology

Price formation in the field of state defense order is very strictly regulated by the legislation, but it is not perfect. As a rule, the state customer does not agree with the inclusion of the above costs in the cost of production, and the reason for this is the shortcomings of the Order of the Ministry of industry and energy of the Russian Federation of 23.08.2006 № 200, which determines the composition of the costs of supply products. The costs, which we need to compensate, are lower than the actual costs [5].

It is possible to speak about the compensation on commercial deliveries, but it will not be possible to compensate them fully. Precedents and average market prices have the value in international trade and not always include cost justification.

As a result, the company has irreparable direct losses and problems with the signing (disruption) of the state contract, as the price offered under this contract does not correspond to the real cost. Any solution to this problem has not been found yet. Proposals to resolve the above-mentioned problem will be discussed further [1].

The essence of this proposal is that the state customer enters into a license agreement to grant the right to use the work and he has the opportunity to use the developed object in the supply of products. In accordance with this agreement, the contractor will receive the license fees (royalties), which will



have to cover one part of the costs incurred by the contractor at the creation the object of exclusive surfactants later [7].

Royalty is a periodic payment of the license fee for the owner of the exclusive right. We can calculate the amount of royalties using the royalty base. Royalty rate is the amount of periodic payment under the license agreement and / or the commercial concession agreement, which is established as a percentage of the royalty base. With regard to the methods of determining the royalty rate, there are several approaches [3].

A method based on the use of standard royalty rates: table 1 shows a short list of the standard rates depending on the industry and on the purpose of application. It is used for the certain types of objects.

Table 1. Short list of standard royalty rates from unit price or from sales amount (sales volume).

№	Objects of application of royalty rates	Royalty, %
<i>Industries:</i>		
1	Aviation	6-10
2	Automotive	1-3
3	Tools	3-5
4	Metallurgical	5-8

According to this table, the standard royalty rate for the aviation industry is between 6-10%. This rate is approximate and should be clarified. The factors, which affect its value show different aspects of the transaction, for example, the legal aspects would include the amount of the transferred rights. The highest rates will be for the license for the transfer of exclusive rights, lower ones will be for the exclusive license, and the lowest ones for non-exclusive licenses. The economic aspects include the amount of investment required for the production of licensed goods, the technological capabilities of the licensee to profit from the use of intellectual property, the volume of production of licensed products from the licensee and others. There is some difficulty, because that the quantitative dependence of the rate on most factors is not established in any way, that complicates the application of this method [6].

The method based on the analysis of similar transactions involves the analysis of analogues. (with the reference with the licensor's license transactions from the past). In this case, the royalty rates taken from the previous license agreements for similar products for this industry are the basis. Its application in solving the problem is not possible due to the complexity of the choice of an analogue [4].

Determining the value of royalties on the basis of standard (tabular) rates is only a special case. The algorithm of the general case of determining the royalty rate includes the definition of the acceptable range from the possible rates.

Fair royalty rates should cover the licensor's costs related to the transfer of the object to the licensee, including assistance in training licensor specialists (if required), participation in the launch of the license object, provision of additional technical information etc. Also, the royalty rate should compensate the profit, which was lost after the appearance of a new competitor in the market (licensee). Finally, the royalty rate should consider at least the minimal compensation for the transfer of the object to the licensee. All of the above should be covered by the minimum royalty rate [9].

The maximum amount of royalty can be based on the cost of the best alternative solution as:

- carrying out its own scientific research in this area;
- purchase under the license of comparable (similar) technology from another supplier;
- abstinence from work with licensor technology [14].

The determination of royalty rates by analogy with the previously applied rates is based on the analysis of analogues from previous license transactions of the licensor or the application of royalty rates for similar products for the industry [8].

There is a whole group of calculation methods for determining the royalty rate, such as:

- method of calculating the value of the licensee's additional profit ("Ultimate royalty" method). It is applicable only in cases where the economic effect of the introduction of a license or know-how is expressed in the additional profit of the licensee;
- method of calculation of royalty rates based on the respective share of the licensor in the gross profit of the licensee;
- method of calculation of the royalty rate based on the accounting of indicators of specific costs.

The above calculation methods consider the economic effect of the licensee's use of the facility. The base to which royalty rate is applied may be:

- gross income;
- net income;
- additional profit arising from the licensee;
- the unit price of the products;
- cost price;
- the cost of the main processed raw materials [15].

Since we are talking about the state defense order, the amount of license fees or royalties must be justified for the state customer. The above-described methods can be applied only in those cases, when a licensee plan to use the facility in the commerce. In case of delivery under the state defense order there is no commercial use, the finished products are supplied for use in order to maintain the country's defense capability. There is no official methodology for determining the base and the royalty rate. The prime conductor of the state defense order has nothing to rely on in the matter of determining the base and the royalty rate. So, the decision remains with the state customer [13].

Since the object of copyright is created by the intellectual work of employees of the enterprise, the valuation of which is wages, we can say that it will be possible to reimburse the costs of creating an object of exclusive rights only in the amount of the basic salary of employees of the enterprise involved in its creation.

Thus, the signing of a license agreement for the right to use will allow to compensate only a small part of the funds, and the enterprise bears losses in the amount of non-reimbursed costs. The absence of an official methodology for the formation of royalties, in turn, entails a large number of uncertainties, without the solution of which there will be no possibility of practical implementation [12].

As the analysis of the proposed solutions to the issue of reimbursement of funds spent on the development of the object of exclusive rights under the state defense order for the supply of products shown, in the process of their implementation there will be a large number of difficulties, and the result of their implementation will not satisfy the interests of the developer. But some principles can form the basis of a decision that will satisfy the interests of both: the state customer and the prime contractor [2].

First of all, it is necessary to solve the problem about the transfer of exclusive rights to the developed object in favor of the state customer. In order to exclude this option, it is proposed not to carry out state registration of the object of exclusive rights. This will be the first methodological principle [11].

The objects of exclusive rights in this article are computer programs and databases (subject to copyright). It is not necessary to register the work or do any other formalities for the creation, implementation and protection of copyright. Thus, computer programs and databases upon their creation become objects of copyright, their author becomes the owner of the exclusive right, and in accordance with the principle of service it belongs to the enterprise-employer. State registration of the assignment

agreement in the Russian Federal Service for Intellectual Property is obligatory for the recognition of its legal force. The signing of the contract must be carried out in respect of the registered object. Thus, if the object of exclusive rights is not registered, the proposal to assign the rights to such object disappear automatically [10].

The signing of the agreement on granting the right to use computer programs and databases, as was noted above, does not allow to reimburse the funds spent on their creation in full. The idea is that the money spent is returned to the contractor in parts-fixed amounts as payment for the software provided. The idea of including fixed amounts in the value of each of the delivery samples is correct, but it requires the implementation in a different form. This can be done by including the object of exclusive rights as part of the product. If the object is a component and it is included in the picking list, the cost of its development is included in the cost of the delivery sample.

3. Results

Since the objects of exclusive rights do not have a real expression, the computer program itself or the database cannot be a component. In this case, it will be a machine-readable medium, such as a disk or diskette. The principal point is that in such a medium is a part of the past work on the creation of an object of exclusive rights, which means that these costs can be included in the cost of the product.

4. Conclusions

Thus, summarizing the above, we can deduce three methodological principles that allow to include the developer's own costs for the development of objects of exclusive rights:

1. State registration of intellectual property rights should not be carried out.
2. The object of exclusive rights must be an integral part of the product for which it was developed.
3. The component is a machine-readable medium, which has the past work on the creation of an object of exclusive rights.

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