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The Role of Commercial Confidential Information in the System of Civil Law Objects

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Abstract: It is noted in the article that the problems related to the fact that the legislation provides a wide range of powers by government organs in the different tests that may affect the interests of sensitive enterprise because unset concrete facets of government intervention in economic activities of enterprises considered painful for entrepreneurs in many countries. Based on the study of foreign experience and scientific and theoretical views, ways to improve legislation in the field of regulation of confidential information were investigated, relevant conclusions were drawn and proposals were developed for the current legislation.

Keywords: intellectual property, information, confidential information, legal regime, types of information, methods of protection of information, modern criteria.

For a very long time, due to the domination of the administrative-command economy and in the period of state monopoly in the economy, the institution of confidential information was absent and the protection of information constituting a trade secret was carried out through such varieties of confidential information as official and state secrets.

It is no secret that in a market economy entrepreneurial activity is inextricably linked to the acquisition and use of various types of information. At that, in modern conditions information is a special kind of commodity, which has a certain value. In this regard, one cannot but agree with the opinion of the President of the Republic of Uzbekistan Sh.M. Mirziyoyev, who states that "improvement of the system of ensuring information security and information protection, timely and adequate counteraction to threats in the information sphere are priority directions in the sphere of ensuring security" [3].

In recent years, Uzbekistan has adopted a large number of legal acts establishing the legal status of various types of publicly available and confidential information. For example, the laws of the Republic of Uzbekistan "On Protection of State Secrets", "On Principles and Guarantees of Freedom of Information", "On Informatization", "On Copyright and Related Rights", "On Competition", "On Trade Secrets" and others. However, there is a huge number of problems in this area. On this basis, the creation of legal norms that enshrine the rights and obligations of citizens, collectives and the state to information, as well as the effective protection of various types of information become the most important aspect of the information policy of the state. Protection of information, especially in civil turnover, is a very specific and important type of activity.

For our domestic entrepreneurs, the most valuable information is often that which they use to achieve the goals of their enterprise and the disclosure of which may deprive them of opportunities to realize these goals, i.e. creates threats to the security of entrepreneurial activity. Of course, not all information can, in case of its disclosure, create various threats, but there are also such types of information, in particular, commercial and banking secrets, which need to be protected [16].

And in the conditions of fierce competition it is very important to preserve the information that contains trade secrets of any enterprise. After all, as noted in the encyclopedic dictionary of Brockhaus and Efron, "personal and property security is the most important guarantee of human development".

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As rightly notes K.S.Kushiyev, "the institute of trade secrets is one of the important components of the system of ensuring the stability of the market, limitation of monopolism in production and economic relations and through these factors to a certain extent influences the block of social relations in general. Without a detailed development of the legal institute of trade secrets it is practically impossible to progressive development of healthy market relations, as well as full provision of the rights of authors of discoveries and inventions" [11].

Today many enterprises owe their successful business to the skillful preservation of their confidential information.

In addition, trade secrets are designed to protect commercial success, priority position in a market economy and, as a consequence, protection of financial resources invested in relevant developments and research.

The objects referred to commercially confidential information may be the subject of various agreements: founding, investment, on the transfer of scientific and technical products, on the provision of reimbursable services, purchase and sale, etc.

The study of the issues of formation and development of the legal institute of trade secrets, determination of its place and role in the formation of mechanisms of information support for the activities of commercial organizations and the legal provision of their information security is currently an independent theoretical task, the establishment and fundamental importance of which involves attracting the attention of civil science [14].

Thus, when studying the nature of trade secrets, first of all, in our opinion, it is necessary to understand what is its place among the objects of civil rights, in particular, in the system of intellectual property objects, because, as rightly notes Gafurov A., "in modern conditions, intellectual property right is becoming one of the important factors determining the position of the country in the world. At the same time, solving the problems of intellectual property protection is an extremely difficult task. This is due to the insufficient development of legal norms, differences in the approaches of individual countries and groups of countries, lack of cross-border structures for the enforcement of laws" [4].

Before answering the question whether trade secrets can be considered as intellectual property, it is necessary to understand what the concept of "intellectual property" is.

The term "intellectual property" can be found for the first time in the French legislation of the XVIII century. Its justification is contained within the framework of the doctrine of natural law, presented by French philosophers-enlighteners: Voltaire, Diderot, Rousseau and others. In accordance with their views, "the right of the creator of a creative result, be it a literary work or an invention, is his inherent, natural right, arises from the very nature of creative activity and exists independently of the recognition of this right by the state power" [18].

Since its inception, this concept has given birth to two major legal theories that assess the nature of rights to creative works in different ways. The first theory is called proprietary (from the English word proprietary – property). The essence of this theory is to equate the rights to the results of creative activity with the right to property. Despite the fact that this theory has been seriously criticized from the very beginning of its existence, it still exists today. For example, in the United States, many judges consider trade secrets as common property and apply the laws on the right of ownership, definition and theft of private property and intellectual property.

The theory opposing the proprietary one is the increasingly recognized theory of exclusive rights. In accordance with the main provisions of this theory, the rights of authors, inventors, patentees, etc. should be recognized as rights of a special kind, which are outside the classical division of civil rights into proprietary, obligatory and personal rights [6].

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Intellectual property, according to the current civil legislation, in particular, article 1031 of the Civil Code of the Republic of Uzbekistan, is the exclusive right of a citizen or a legal entity to the results of intellectual activity and equivalent means of individualization of a legal entity, individualization of products, works or services. Accordingly, despite the fact that our legislation uses the concept of "intellectual property", in fact it is understood as a set of personal and property rights to the results of intellectual property, and these rights are "closely interrelated and intertwined, forming an inseparable unity".

The concept of "result of intellectual activity" is detailed in the legislative acts of the Republic of Uzbekistan, dedicated to the regulation of relations related to specific objects of intellectual property. Thus, for example, in accordance with the Copyright and Related Rights Act, the object of copyright is works of science, literature and art that are the result of creative activity [1].

Meanwhile, the Civil Code of the Republic of Uzbekistan in Article 1031 defines the object of intellectual property as "the result of intellectual activity" and not as "the result of creative activity" [2]. The concept of intellectual activity is broader than the concept of creative activity and may well include non-creative objects.

Further, the literature indicates that the object of intellectual property in all cases refers to an intangible good that is merely embodied in certain tangible objects that are its material carriers [18].

Thus, the object of intellectual property is a certain intangible good created as a result of human intellectual activity. It can also be information. As already noted, information itself is intangible and is only embodied on material carriers.

Also quite fair is the point of view of V.A.Kopylov, who believes that "information is created practically in the process of any intellectual (mental) activity of a person" [10].

Accordingly, a trade secret as a type of information may well be considered an object of intellectual property.

The question, however, is whether it actually is?

In foreign literature, for example, the issue of attributing trade secrets to intellectual property objects is solved in different ways. Thus, the American author Richard Stim writes: "Trade secrets are an important type of intellectual property rights" [20].

In Germany, on the contrary, such information is not referred to the objects of exclusive rights. Thus, according to G.Stumpf, "know-how is not a form of industrial property protection, as it does not have the characteristics of an exclusive right" [23].

Another scholar of German intellectual property law also notes: "There is neither an absolute nor an exclusive right to know-how for intangible results of intellectual activity" [8].

On this issue, the approach of Russian scientists, who have been divided into two diametrically opposed camps, is very interesting. Supporters of the first approach include information constituting a trade secret in the composition of intellectual property, while supporters of the second approach believe that information constituting a commercial secret is an independent object of modern civil law.

The attribution of trade secrets to intellectual property is due to the fact that historically the birth of the institution of trade secrets took place within the framework of such an object of civil rights as intellectual property, and its legal regulation was built on a model as close as possible to the already known one [7].

Proponents of the first approach, in particular, A.P.Sergeyev, V.A.Dozorsev, believe that the information constituting a trade secret should be considered an object of intellectual property, as it has all its properties and is a type of intellectual property. For example, A.P.Sergeyev notes that "trade

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secret is an institution of intellectual property, it has all the properties of an object of intellectual property" [18]. A.A.Fatyanov adheres to a similar point of view [21].

V.A.Dozorsev points out that "for isolated information, which is understood as special information that has commercial value and is not publicly available, it is necessary to fix an absolute right. Since the information is intangible knowledge, they are assigned the rights attributed to the number of exclusive rights. However, these are not traditional exclusive rights, but rather peculiar" [7].

V.Smirnov argues that "trade secret is not an independent object of civil rights, it can be attributed to the result of intellectual activity. He confirms the similarity of these concepts, comparing the following features: both these objects are intangible, they arise as a result of intellectual activity, although the creative level of these objects may not be comparable, the criteria of negotiability and protectability are applicable to these objects" [19].

E.V.Shishmareva adheres to a broad approach to the understanding of intellectual activity, that is, when intellectual property law regulates a wide range of property (exclusive) and related personal non-property relations arising from the results of intellectual activity and equivalent means of individualization of a legal entity, individualization of products, works and services. In this regard, it is pointed out that a trade secret is recognized as a result of intellectual activity [22].

R.V.Severin believes that "trade secret, which combines the secret of production (know-how) and commercial information, refers to "non-traditional" objects of intellectual property. In support of this conclusion, he points out that trade secrets are the result of intellectual activity, which is a sign of intellectual property" [17].

In contrast to the above authors, the proponent of the opposite approach, in particular, the Russian legal scholar O.A.Gorodov believes that "the legal regime of secret information is fundamentally different from the legal regime established in respect of protected results of intellectual activity".

In his opinion, this distinction is manifested in the following:

1. In the opposite orientation of the interests of the owner of confidential information and the interests of the owner of information representing the result of intellectual activity, since the persons of the first mentioned category are interested in taking measures to prevent the dissemination of relevant information, and the second, on the contrary, are interested in the dissemination of the intellectual product.
2. In different legal mechanisms of protection of rights and interests of the owner of the result of intellectual activity and the owner of the trade secret. The owner of information constituting a trade secret restricts its dissemination by technical and other means. Here there is an alternative to the exclusive right variant of the mechanism of protection of information – a de facto monopoly. Deliberately concealed information cannot be included in the framework of exclusive rights, because the factor of their unknown nature does not allow to establish the very content of information as an object of protection. In this case, it is impossible, as it happens with respect to the results of intellectual activity, to determine the actions that the owner of information can perform himself and authorize to perform [5].

A.V.Kolomiets also believes that "trade secret is an independent object of civil rights and does not refer to a type of intellectual activity" [9].

Belarusian scientist S.S.Losev, in turn, also points out that "undisclosed information (in particular, trade secrets) does not refer to the objects of intellectual property". The opinion on attributing trade secrets to the objects of exclusive right, according to S.S.Losev, is contradictory, "since the monopoly granted to the owner of the exclusive right presupposes to determine the positive component of the right to information, and this is impossible to do" [12].

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As far as the Republic of Uzbekistan is concerned, our national legislation and scientific literature currently reflect the approach that trade secrets relate to intellectual property, as civil legislation defines information constituting a trade secret as a form of protection of undisclosed information, which, in turn, is an object of intellectual property rights. This follows from the provisions of Chapter 64 of the Civil Code of the Republic of Uzbekistan "Protection of undisclosed information from unlawful use" [2].

A similar approach is reflected in the works of our scientists. For example, O.Okyulov [13], I.Rustambekov, A.Nuridullayev [15] also believe that trade secrets, including know-how, are included in the system of intellectual property objects.

Based on the above, we have come to the conclusion that trade secrets have a dual nature. On the one hand, in our opinion, just like intellectual property objects, the information constituting a trade secret arises as a result of intellectual activity. But, on the other hand, we believe that today certain differences exist between trade secrets and intellectual property objects, which consist in the mechanism and purposes of their protection. Intellectual property objects are open to third parties and are often valuable precisely because of their wide dissemination (e.g., copyright, patent right, trademark, service mark, etc.), while information constituting a trade secret is valuable to its owner only when it is unknown to third parties and, accordingly, hidden from them.

In addition, trade secret information is always presented in intangible form, which is not the case with intellectual property (e.g., an invention is expressed in tangible form).

Summarizing the above, it should be noted that in the modern world information is considered as one of the most valuable products of human life, and information resources and technologies that the state has, determine its strategic potential and influence in the world. As a result, the security of the state, its socio-political institutions, organizations and citizens nowadays includes information security as an obligatory component.

Over the years of independence, Uzbekistan has implemented comprehensive measures aimed at building a democratic State governed by the rule of law, a strong civil society, developing an economy based on free market relations and the priority of private property, creating conditions for a peaceful and prosperous life of the people, and finding Uzbekistan a worthy place in the international arena. Taking into account an objective assessment of the way passed and the accumulated experience, analysis of the successes achieved during the years of independence and based on the requirements of the present day, we faced a conceptual task – to identify the most important priorities and clear guidelines for further deepening democratic reforms and accelerated development of the country, including the creation of a competent information policy in the sphere of legal regulation of commercial confidential information in the Republic of Uzbekistan.

Relations to restrict access to information gave rise to information secrecy. The problem of effective legal regulation of relations on the protection of commercial confidential information today is relevant for all spheres of public life and for all branches of law.

In connection with this, in our opinion, it is necessary to develop an effective legal mechanism to regulate the commercial use of confidential information in civil turnover, which will immediately increase the economic indicators of development of our state, attract foreign contractors and create a favorable prerequisite for business development.

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