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Co-relation of corporeal and exclusive rights of state and municipal enterprises and institutions: theoretical aspects

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Abstract

Corporeal right is a sub-sector of civil law, which source put together various regulatory legal acts. Accounting for the scope of regulation of civil law, property relations are influenced by the norms of other branches of law – enforcement and regulatory. This impact can be expressed, for instance, in the form of protection of subjective corporeal rights, preventive effect on the behavior of the subjects of law (criminal, administrative law), in the regulation of possible regulatory actions by public legal entities in relation to objects of corporeal rights of other persons. Exploring the problems of co-relation of corporeal and exclusive rights the author comes to the conclusion that these right represent similar, but not identical systems, respectively expressing the structure of the content and form of positive law.

Exclusive rights are one of the objects of trust management on express indication. They can move particularly under the contract of sale of an enterprise as a property complex, including the rights to the trade name, trademark, service mark or other means of identification of seller, commodities, works and services, as well as the right to use such funds on the basis of licenses. They can be vested under the enterprise rental contract with the transfer to the lessee the lessor's rights on marking out, which individualize its performance, as well as

other exceptional (for example, patent-licensing) rights. Exclusive rights can be gifted, sold at public auctions as a subject of a pledge or a sale of the enterprise (business) as a debtor under the trusteeship or bankruptcy proceedings.

Keywords

Corporeal right, exclusive right, the Civil Code of the Russian Federation, municipal enterprise, the Constitution of the Russian Federation, legal entity.

Introduction

The science of civil law has repeatedly drawn attention to the need to distinguish between property rights and intellectual property rights¹. Convincing arguments for the identification of these concepts are no longer given, but some scientists believe, for instance, that "the institution beneficially owned has cash, property and other proprietary subject matter on its balance transferred by individuals and legal entities in the form of gift, donation or bequest, products of in-

tellectual and creative work that are the results of a higher education institution activities"².

The Part IV of the Civil Code, in force since 1 January 2008, also declined from the elements of proprietary approach, using the category of "intellectual property" only in the Article 1225 of the Civil Code of the Russian Federation. However, in practice, there is still an issue of human relation to intellectual property and limited corporeal rights. Thus, on the one hand the subjects of law of economic management and right of operational management have certain powers under the order of property, which is vested in the state and municipal enterprises and institutions. In accordance with the Article 128 of the Civil

1 Sukhanov, E.A. (2008), *Civil law: in 4 vols. Corporeal rights. Inheritance rights. Exclusive rights. Moral rights: Textbook. Vol 2. 3rd ed., revised and enlarged* [Grazhdanskoe pravo: V 4 t. Veshchnoe pravo. Nasledstvennoe pravo. Isklyuchitel'nye prava. Lichnye neimushchestvennye prava: Uchebnik. Tom 2. 3-e izdanie, pererab. i dopoln.], Volters Kluver, Moscow, pp. 262-277; Dozortsev, V.A. (2000), "The concept of exclusive right" ["Ponyatie isklyuchitel'nogo prava"], *Yuridicheskii mir*, No. 3, p. 6.

2 Tokmoltseva, M.V. (2000), *Institution of higher education as a subject of relations in the field of entrepreneurship: dissertation* [Vysshee uchebnoe zavedenie kak sub'ekt otnoshenii v sfere predprinimatel'stva: dis. ... kand. yur. nauk], Moscow, pp. 22-23.

Code of the Russian Federation to the property relate property rights, including exclusive one. However, the disposition of the exclusive right is exercised by its owner, not by other persons.

In accordance with the Article 1227, Paragraph 1 of the Civil Code of the Russian Federation the intellectual property rights do not depend on ownership of physical media (item), which express the corresponding result of intellectual activity or means of individualization, and in accordance with the Article 1229, Paragraph 1 of the Civil Code of the Russian Federation the entity has exclusive rights to results of intellectual activity or means of individualization (rights holder), able to use such results or such means at its discretion in any manner not inconsistent with law. The rights holder may dispose of the exclusive right to the result of intellectual activity or means of individualization (Article 1233), if the Civil Code does not provide otherwise.

Rights holder may at its discretion allow or prevent others from using the results of intellectual activity or means of individualization. The absence of a ban is not considered as consent (permission).

On the other hand, according to the Articles 128, 1226 of the Civil Code

of the Russian Federation the exclusive rights to intellectual property relate to property rights, and, consequently, to the property. According to the Article 297 of the Civil Code of the Russian Federation the state enterprise may alienate or otherwise dispose the property assigned to it only with the consent of the owner of the property. State enterprise independently sells its production, unless otherwise provided by the law or other regulations. However, the exclusive rights subject to the category of property are clearly not classified as "product".

In accordance with the Article 298 of the Civil Code of the Russian Federation private or state-financed organizations may not alienate or otherwise dispose the property assigned to them by the owner or acquired by this organization on the funds allocated by the owner for the purchase of such property. If in accordance with the constitutive documents the institution is entitled to carry out income-bearing activities, the income derived from such activities and acquisition of property on such received income come in independent management of the institution and recorded on a separate account. In addition, under the Article 66, Paragraph 4, Sub-paragraph 4 of the Civil Code of the Russian Federation institutions may be participants of

economic societies only with the permission of the owner.

Civil Code of the RSFSR in 1964 vested "the right of operational management," and further "the right to full economic activity", but did not apply to corporeal rights. As pointed out by E.A. Suhanov, the reason was that "they do not provide the economically necessary participation of one person involved in the ownership of the property of another person, and represent only a legal form of the exercise of right of state ownership in a planned economy conditions"³.

Corporeal law in the context of foreign legislation

The institute of corporeal rights has long been known in foreign legislation. Its history dates back to ancient Roman law. Continental legal system together with the property right outlines *jura in re aliena* vesting in their individual bearers the powers relating to individual rights of the owner, but not losing the right of the last to a thing. These rights are the right of pledge, easements, usufruct and oth-

ers. In the countries of the Anglo-Saxon system all rights of property qualification identified with the property right and considered as its variants⁴.

It is not typical for foreign countries to select limited corporeal rights of legal entities, such as the right of economic management and the right of operational management. The Concept of the Development of Legal Entities Civil Law⁵ prepared on the basis of the Decree of the President of the Russian Federation on July 18, 2008 No. 1108 "On improvement of the Civil Code of the Russian Federation"⁶ justifies an inexpedience

3 Sukhanov, E.A. (2006), "On the concept and types of corporeal rights in the Russian civil law" ["O ponyatii i vidakh veshchnykh prav v rossiiskom grazhdanskome prave"], *Zhurnal rossiiskogo prava*, No. 12, pp. 42-50.

4 Vasil'ev, V.A. (1993), *Civil and commercial law of capitalist states* [*Grazhdanskoe i torgovoe pravo kapitalisticheskikh gosudarstv*], Mezhdunarodnye otnosheniya, Moscow, p. 196.

5 "The Concept of the development of civil law of the Russian Federation. Approved by the Decision of the Presidential Council for the codification and improvement of civil law on 7 October 2009" ["Kontseptsiya razvitiya grazhdanskogo zakonodatel'stva Rossiiskoi Federatsii. Odobrena resheniem Soveta pri Prezidente RF po kodifikatsii i sovershenstvovaniyu grazhdanskogo zakonodatel'stva ot 07.10.2009"], *Konsul'tantPlyus*, available at: <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n=95075>

6 "The Decree of the President of the Russian Federation on July 18, 2008 No. 1108 "On improvement of the Civil Code of the Russian Federation" ["Ukaz Prezidenta Rossiiskoi Federatsii ot 18 iyulya 2008 g. No. 1108 "O

for maintaining the unitary enterprises with the right of economic management the owner's transferred property and offers its stagewise conversion into companies with decisive public participation, while leaving only state-owned (but not municipal) enterprises with the right to operational administration on actual property.

As stated in the Concept of the Development of Civil Law, the right to operational management should be defined as the right to own, use and dispose of property of the owner within the limits established by law, as well as in accordance with the objectives of the activities, tasks of the owner and the nature of the property. The scope of restraints on the right to operational management may depend on the category of the subject of the law and the type of the object to which the law is applied.

The Draft of the Federal Law No. 47538-6 "On Amendments to the first, second, third and fourth Parts of the Civil Code of the Russian Federation, as well as to certain legislative acts of the Russian Federation"⁷, adopted by the

sovershenstvovaniy Grazhdanskogo kodeksa Rossiiskoi Federatsii"], *Sobranie zakonodatel'stva RF*, 2008, No. 29, Part 1, Art. 3482.

7 "On the Draft of the Federal Law No. 47538-6 "On Amendments to

State Duma in the first reading on April 27, 2012, remain only the right to operational management with different scope of powers depending on the type of legal entity, in particular, the type of institution.

Indeed, one can agree with the thesis that distinction between the right to economic management and operational management is eliminated. The main difference between them is the scope of property disposition, liability of the property owner, the possibility of its withdrawal, as well as the subjective composition. Along with the limited corporeal right, the right to operational management, the institution is entitled to an independent income management derived from income activities. The nature of this right does not indicate the property right, but offers great potential for the property disposition, rather than the right to economic management.

the first, second, third and fourth Parts of the Civil Code of the Russian Federation, as well as to certain legislative acts of the Russian Federation" ["O proekte Federal'nogo zakona N 47538-6 "O vnesenii izmenenii v chasti pervuyu, vtoruyu, tret'yu i chetvertuyu Grazhdanskogo kodeksa Rossiiskoi Federatsii, a takzhe v otdel'nye zakonodatel'nye akty Rossiiskoi Federatsii"], *Konsul'tantPlyus*, available at: <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=EXP;n=530622>

According to our reckoning, the concept of limited corporeal rights of legal entities should not be rejected, especially those created by public law entities and serve as state and municipal entities, providing much of the implementation of the rights that are available to citizens and legal entities of the Russian Constitution.

Exclusive rights of state and municipal enterprises and institutions

We have to admit that disposition of the entities of operational management on exclusive rights, on the one hand, has no restrictions in the law according to the Fourth Part of the Civil Code of the Russian Federation, and on the other, as belonging to the property, cannot be a subject of an individual disposition due to the limitations set by the rules of corporeal rights.

It is also possible to distinguish between the exclusive rights of legal entities derived from operational management and belong to public law entities, and the exclusive rights that are owned independently by legal entities.

The Fourth Part of the Civil Code contains a general rule of the performer's

on appurtenance of exclusive rights on intellectual property created at the expense and raising funds of the budget, which is provided only to the right to an integrated process (Chapter 77 of the Civil Code), as well as concerning the exclusive right to intellectual property which is created in the performance of the contract (by state or municipal contract for state or municipal needs (Articles 1298, 1373, 1432, 1464), under the contract confirmed by the chief controller or budget funds disponent with federal government agencies, which implementation reveals a work secret (Article 1471). In other cases, the general rule of the Article 299, Paragraph 2 of the Civil Code of the Russian Federation, under which the results, products and income from property disposition within the operational management, as well as the property acquired by the institution upon the contract or other reasons, implies coming of operational management to the institution.

Thus, the exclusive rights may be owned by a public legal institution as a right holder or by legal entity that created by this institution. The understanding of exclusive rights as a form of property is based on the use of proprietary approach and considering the concept of property in the broadest sense, including not only

items, but also property rights, which include the exclusive rights. Contrary to this approach the norms of the Fourth Part of the Civil Code of the Russian Federation provide for the allocation of rights between public legal institution and performer, as shall include state and municipal unitary enterprises and institutions.

There are manifold ways to resolve the collision. On the one hand, it is an assignment of special provision that state and municipal unitary enterprises are not entitled to dispose of the exclusive rights assigned to them or acquired for various reasons, without the consent of the property owner, who is not a right holder.

Scientists justified proposals on the use of the mechanism of trust agreement to exclusive rights in relation to legal entities that do not possess means on property rights, and those who have property rights⁸. There is a suggestion to introduce a limited exclusive right of state and municipal enterprises and

institutions. Provided that public legal institution vests a legal entity by limited corporeal rights on material objects, for instance, creates a state or municipal unitary enterprise or institution, gives them property, these legal entities as subjects of private law, which are not property owners, should not be addressed as owners of exclusive rights, which they can vest without the consent of the state. At the same time the above-mentioned entities would have the right to grant licenses, but not execute contracts for the alienation of the exclusive right.

This will solve the problem of simultaneous preservation of exclusive rights to the state and give government agencies the ability to use exclusive rights for civil transaction in accordance with their legal standing.

On the other hand, legal entities who are not owners of the property, can act as agents of limited corporeal rights and at the same time can have the rights to intellectual property. The Article 1227, Paragraph 1 of the Civil Code of the Russian Federation assumes that intellectual property rights do not depend on the ownership of physical media (item), which represents the corresponding result of intellectual activity or means of individualization. In this case, it is necessary to replace the term "prop-

8 Karelina, O.A. (2011), *The implementation of exclusive rights by legal entity in the acquisition and termination of legal capacity: Author's thesis [Realizatsiya isklyuchitel'nykh prav yuridicheskim litsom v protsesse priobreteniya i prekrashcheniya pravosposobnosti: avtoreferat dis. ... kand. yurid. nauk]*, Moscow, p. 13.

erty right" for the term "corporeal right", which means the inadmissibility of distribution on exclusive rights of state and municipal enterprises and institutions of the restrictions at behest specific to the right of economic management or operational management. In addition, on the basis of this norm, it is necessary to give an interpretation for the Resolution of the Plenum of the Supreme Court of the Russian Federation No. 5, of the Plenum of the Supreme Arbitration Court of the Russian Federation No. 29 on 26 March 2009 "On some issues that have arisen in connection with the introduction of the Part IV of the Civil Code of the Russian Federation"⁹ on its priority among norms regulating the property disposition, vested in the right to economic management or operational management.

9 "The Resolution of the Plenum of the Supreme Court of the Russian Federation No. 5, of the Plenum of the Supreme Arbitration Court of the Russian Federation No. 29 on 26 March 2009 "On some issues that have arisen in connection with the introduction of the Part IV of the Civil Code of the Russian Federation" ["Postanovlenie Plenuma Verkhovnogo Suda RF N 5, Plenuma VAS RF N 29 ot 26.03.2009 "O nekotorykh voprosakh, vznikshikh v svyazi s vvedeniem v deistvie chasti chetvertoi Grazhdanskogo kodeksa Rossiiskoi Federatsii"], *Konsul'tantPlyus*, available at: <http://base.consultant.ru/cons/cgi/online.cgi?req=doc;base=LAW;n=86879>

At the same time it is necessary to distinguish between the exclusive right of the public legal institution, on whose behalf act as representatives the government bodies and local municipalities mainly by state enterprises, and the exclusive right belonging to the subject of limited corporeal right. Whereby the institution depending on the type can act on behalf of a public legal institution as a subject of public law, as well as serving as the subject of private law in its own name.

Indeed, it is not quite correct to identify the scope of rights of institution as a subject of public law and institution as a subject private law, as there are very few norms of the Fourth Part of the Civil Code of the Russian Federation to provide the mechanisms for implementing the rights of the state in the field of intellectual property. The exercising of the functions of the state representative by the institution as a legal entity of public law does not require the rights transfer or granting, the institution carries out the disposal of state rights by virtue of competence defined by regulations.

It is necessary to develop a mechanism for securing the rights of legal entities to use the results of intellectual activity and means of individualization while preserving them at the state, as has been

done, for instance, in the Federal Law on 2 August 2009 No. 217-FZ "On amendments to certain legislative acts of the Russian Federation on the establishment of economic societies by funded research and educational institutions for purposes of practical use (implementation) of the results of intellectual activity"¹⁰, which states that institutions of higher education being budget education institutions, and higher educational institutions established by state academies of science have the right, without the consent of the property owner, with notification of the federal executive body responsible for public policy and legal regulation in the sphere of scientific and technological activities, as founders (including jointly with other entities) of economic societies, which activities imply practical ap-

plication (implementation) of intellectual activities (PC software, databases, inventions, utility models, industrial designs, selection achievements, integrated circuits topographies, work secrets (know-how), which exclusive rights belong to these higher educational institutions). In addition, the notification of creating the economic society should be forwarded by the higher educational institution being the budget educational institution, or higher educational institutions established by state academies of science within seven days of the entry into the Unified State Register of Legal Entities on the state registration of the economic society. Funds, equipment and other assets being on the operational management of these institutions of higher education may be introduced into registered capital of the created economic societies in accordance with the Civil Code of the Russian Federation.

Conclusion

Science pays a considerable attention to the legal nature of corporeal and exclusive rights. At the same time, problems of innovative development of economy in Russia are very relevant being reflected in annual messages of the President of the Russian Federation and

10 "Federal Law on 02.08.2009 No. 217-FZ "On amendments to certain legislative acts of the Russian Federation on the establishment of economic societies by funded research and educational institutions for purposes of practical use (implementation) of the results of intellectual activity" ["Federal'nyi zakon ot 02.08.2009 N 217-FZ "O vnesenii izmenenii v otdel'nye zakonodatel'nye akty Rossiiskoi Federatsii po voprosam sozdaniya byudzhетnymi nauchnymi i obrazovatel'nymi uchrezhdeniyami khozyaistvennykh obshchestv v tselyakh prakticheskogo primeneniya (vnedreniya) rezul'tatov intellektual'noi deyatel'nosti"], *Sobranie zakonodatel'stva RF*, 2009, No. 31, Art. 3923.

other key state documents. And the problems are obvious – due to both economic development and the formation of legal framework.

However, Russian government has recently made significant investments to develop innovative projects, while problems are not just of economic

character. Often the legislation on legal entities does not address specific legal regulation of relations in the sphere of intellectual property. A legal entity is mainly considered as the subject of corporeal and liability rights, but not exclusive, especially within the acquisition and termination of legal capacity.

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**Соотношение вещных и исключительных прав
государственных и муниципальных предприятий и
учреждений: теоретические аспекты**

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Аннотация

В статье рассматриваются теоретические аспекты вещных и исключительных прав, анализируется их соотношение в контексте функционирования государственных и муниципальных учреждений и предприятий.

Ключевые слова

Вещное право, исключительное право, Гражданский кодекс РФ, муниципальное предприятие, Конституция РФ, юридическое лицо.

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