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Abstract

This article examines the institution of trade secrets in the legislation of the Russian Federation and its place in the field of information security. Despite a large number of conducted and published studies, a unified approach to the concept of trade secrets has not been developed and the existing legislative definition does not sufficiently express its essence. The purpose of this paper is to reveal the concept of trade secrets through its essential features. The authors investigate the legal framework for regulating the trade secret regime, consider the opinions of scientists about its essence, and compare it with the related concepts of production secret, know-how, and other concepts used by the institute of information security.

Keywords

Information security – Trade secret – Know-how – Confidential information – Industrial espionage

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Introduction

The state of the economy of the Russian Federation largely depends on the functioning of entrepreneurship, which is an integral part of market relations¹. One of the most important state tasks is to provide guarantees and opportunities for conducting transparent and honest business in a highly competitive environment, including guarantees of information security².

Information technologies have now acquired a global character and have become an integral part of all spheres of life of the individual, society, and the state. Their effective application often reflects the accelerated economic development of the organization. In modern conditions, when a significant amount of time is spent on information security both from the side of commercial organizations and from the authorities, the issue of protecting various information data, including those related to trade secrets, is actively discussed in society. Trade secrets, in turn, allow organizations engaged in commercial activities to maintain their competitiveness in the market and to form effective work with partners and customers.

At present, representatives of legal science pay much attention to the issues of information security of an enterprise. Information security of an enterprise is a complex multi-level system, one of the elements of which is the organization of protection of trade secrets. The relevance of this topic lies in the fact that the very definition of the concept of "trade secret" is still a subject of dispute. Issues of regulation of the institute of trade secrets were considered by such well-known legal scholars as R.O. Khalfina³, S.S. Alekseev⁴, and A. P. Sergeev⁵, as well as and many others. Since trade secrets must be protected from unauthorized use, it is necessary to clearly know what objects are included in it, what exactly needs to be protected, its legal nature, and so on. It seems that these aspects have not been fully investigated and are not clearly reflected in the legislation. The above gives grounds to assert that the problem of legal regulation of trade secrets should be attributed to the number of actual and insufficiently studied problems of the science of civil law. These circumstances, as well as the scientific and practical significance of the chosen topic, the need to develop

¹ A. M. Chernysheva; N. P. Gusakov; A. A. Trofimova y M. A. Bulatenko, "Diversification of Transit Risks of Oil Supplies Bypassing Ukraine As the Basis of Energy Security in Europe", *International Journal of Energy Economics and Policy* Vol: 9 num 6 (2019): 461-468; A. B. Melnikov; P. V. Mikhailushkin; A. L. Poltarykhin y Z. N. Dibrova, "Economic aspects of the resolution of the issue of food security: a case study", *Entrepreneurship and Sustainability Issues* Vol: 7 num 1 (2019): 595-602 y L. B. Sitdikova y S. J. Starodumova, "Corporate agreement as a means of providing security in the course of entrepreneurship development", *Entrepreneurship and Sustainability Issues* Vol: 7 num 1 (2019): 324-335.

² E. A. Larina; I. S. Lapaev y M. V. Popovicheva, "Legal effect of exceptions to the rules", *Revista Inclusiones* Vol: 7 num Especial (2020): 490-497; S. S. Golubev; V. D. Sekerin; A. E. Gorokhova y S. V. Bank, "Problems of Economic Security in the Arctic Region", *Journal of Environmental Management and Tourism* Vol: 10 num 7 (2020): 1495-1508 y A. A. Emelyanov; E. Y. Avksentieva; S. Y. Avksentiev y N. N. Zhukov, "Applying Neurointerface for Provision of Information Security", *International Journal of Advanced Trends in Computer Science and Engineering* Vol: 8 num 6 (2019): 3277-3281.

³ G. V. Sintsov, "Sootnoshenie ponyatii "sekret proizvodstva", "nou-khau" i "kommercheskaya taina", *Yuridicheskii mir* num 9 (2012): 35.

⁴ S. S. Alekseev; B. M. Gongalo y D. V. Murzin, *Grazhdanskoe pravo: Uchebnik* (Moscow: Prospect, 2009).

⁵ A. P. Sergeev, *Pravo intelektualnoi sobstvennosti v Rossiiskoi Federatsii* (Moscow: Infra-M, 2017).

and improve legislation and law enforcement practice predetermined this choice. The purpose of this work is to review and study the essence of trade secrets and ways to protect them and offer recommendations for improving the legal framework to solve problems related to the legal regulation of trade secrets.

Methods

The research was performed using several general and special scientific methods. The dialectical method of cognition was chosen as the main one. In combination with it, the historical method was used, which allowed tracking the chronology of the phenomenon under study, as well as the methods of analysis, and synthesis. The experience of legal solutions to the problem of information security in relation to trade secrets in foreign countries (the USA, UK, Germany, etc.) was studied using the method of comparative law. The most developed countries were chosen as objects of research, where the protection of information, including commercially significant, is taken very seriously. The choice of these countries is also due to the typical and similar problems that occur and have not yet been solved in modern Russia. The formal legal method was used to develop the proposed definitions and related terminology.

Results

Information data used in a particular organization is very diverse, but researchers usually combine them into two main groups: 1. Information about the processes and means of production of goods, products or services, scientific and technical documents, as well as software of the organization; 2. Information about the economic status of the organization, its banking operations, conducted transactions, the organization's strategy, and official correspondence⁶. Undoubtedly, such information data is of different significance for the organization, so free access to it will lead to increased risks to the company's economic security. To preserve information, including commercial information, appropriate legal mechanisms are needed to allow information owners to use their powers properly.

The Federal Law "On Trade Secrets" of July 29, 2004, N 98-FL⁷, contains the following definition: trade secret is a regime of confidentiality of information that allows its holder to increase income under existing or possible circumstances, avoid unjustified expenses, maintain a position in the goods market, work, and services, or receive other commercial benefits (paragraph 1 of Article 3). As follows from the above definition, the legislator reveals the concept of trade secrets through the goals pursued by the introduction of an appropriate regime, which seems to be not entirely correct. Currently, most scholars support a legislative definition and understand a trade secret as a confidential data circulation system that allows its owner to increase revenues and avoid unjustified expenses, but most importantly, maintain a status in the market of goods, works, and services or acquire any commercial advantage⁸.

⁶ E. V. Basavro y A. P. Finkina, "Pravovoe regulirovanie kommercheskoi tainy", Vestnik studencheskogo nauchnogo obshchestva GOU VPO "Donetskii natsionalnyi universitet" Vol: 4 num 12-1 (2020): 35-38.

⁷ Federal Law N 98-FL (as amended on April 18, 2018) "On Trade Secrets", July 29, 2004. Collected Legislation of the Russian Federation num 32 (August 9, 2004) Article 3283.

⁸ E. V. Basavro y A. P. Finkina, "Pravovoe regulirovanie kommercheskoi tainy", Vestnik studencheskogo nauchnogo obshchestva GOU VPO "Donetskii natsionalnyi universitet" Vol: 4 num 12-1 (2020): 35-38.

There are other approaches to defining trade secrets.

Thus, according to the dictionary-reference book by P.A. Koshel, "A trade secret is the right to classify production, trade and financial transactions, and documentation protected by law in the conditions of market relations. The rules of secrecy and observance of trade secrets limit the access of state bodies and counterparties to information materials available to firms and organizations"⁹. Based on this definition, it is possible to distinguish legally significant features of a trade secret, namely:

- refers to the company's business activities;
- does not contain state secrets;
- belongs to the organization and is not the property of third parties;
- has real or potential value for third parties;
- access to this information is restricted by its owner;
- the organization has taken measures to protect data from unauthorized access and dissemination.

These features of a trade secret are essential, necessary, and inseparable. They should be included in the legal definition of trade secrets. At the same time, it is possible to agree that in relation related to trade secrets, the issues of its protection are the most important. From the moment that the person who legally controls the information takes measures to ensure its security, it is possible to talk about the emergence of such a person's rights to trade secrets. The right to trade secrets is a guarantee provided by law for the owner of commercial information, to use it at their discretion, and to take measures to preserve its confidentiality.

Russian legislation simultaneously uses the terms "secret of production", "know-how" and "information constituting a trade secret". In this connection, the question arises about the relationship between these concepts. Based on this, it is necessary to consider the relationship between the concepts of "secret of production (know-how)" and "trade secret" in more detail. The term know-how was first used in contractual practice between UK and US companies. Initially, know-how was understood as information specially omitted by the applicant in the description of the invention. The term was given the meaning of "know how to apply a patent"¹⁰. Over time, the term know-how has lost its original meaning and began to be taken literally: "know how to do it." This was also facilitated by the fact that know-how became an independent object of transactions, including those not related to patented inventions¹¹.

For a long time, there was uncertainty in Russian civil law regarding the classification of information as a production secret (know-how). At first, only technical achievements were

⁹ P. A. Koshel, *Slovar-spravochnik: ekonomika, vneshnyaya trgovlya, vystavki* (Moscow: Obshchestvo sokhraneniya lit. naslediya, 2012).

¹⁰ L. Bently y B. Sherman, *Intellectual property law* (New York: Oxford University Press Inc, 2009).

¹¹ Yu. I. Buch y M. A. Kolesnikova, *Okhrana nou-khau* (SPb, 2004).

considered know-how. Over time, the volume of information related to the secret of production has expanded. Several opinions appeared: 1) R.O. Khalfina believed that technical and organizational solutions belong to know-how¹². 2) E.V. Khimichuk highlighted technical know-how (design drawings, manufacturing documents, recipes for materials) and commercial know-how (organization of production, customer files, financial documents, advertising developments)¹³. 3) O.A. Potrashkova wrote about the secret of production not only as technical documents, but also professional knowledge, skills, and experience in various fields of activity¹⁴. There is no consensus among researchers about the ratio of "know-how" and "trade secret" institutions. V.I. Eremenko and A.P. Sergeev¹⁵ express an opinion on the identity of trade secrets and know-how. O.A. Potrashkova claims that the institute of trade secrets includes the institute of know-how, but is not limited to it¹⁶. D.A. Gavrilov writes that production secrets are one of the objects of trade secrets. These are unique methods and business strategies that are created as a result of intellectual activity¹⁷. V.N. Lopatin and A.Sh. Yusufov refer to know-how as non-traditional objects of intellectual property, the rights to which are protected as a trade secret¹⁸. The concept in question is currently codified by civil law. "Secret of production" is synonymous with "know-how". Part 4 of the Civil Code of the Russian Federation No. 230-FL of December 18, 2006¹⁹ in Article 1465 provides its definition. A production secret (know-how) is the information of any nature (production, technological, economic, organizational, and others), including information on the results of intellectual activities in the area of science and technology and also information on the methods of carrying out professional activities that has a real or potential commercial value due to its not being known by third persons, which is not freely accessible to third persons on legal grounds and which is covered by a trade secret regime introduced by the owner of that information. A study of the law shows that, as know-how, only information on the results of intellectual activity in the scientific and technical field and information on how to carry out professional activities can be protected. Other commercially significant information is not protected as an object of intellectual rights – know-how²⁰.

It should be noted that the link between the institutions of trade secrets and the secret of production (know-how) is manifested primarily in the non-material nature of the result, which is manifested in both the first and second cases in the form of information. Also, the content of trade secrets and production secrets (know-how) is confidential information, for which identical criteria for the protection of rights to it are applied. On the other hand, a

¹² G. V. Sintsov, Sootnoshenie ponyatii "sekret proizvodstva", "nou-khau" i "kommercheskaya taina", Yuridicheskii mir num 9 (2012).

¹³ E. V. Khimichuk, Ponyatie dogovora o peredache nou-khau. Pravo i ekonomika num 3 (2006).

¹⁴ O. A. Potrashkova, O pravovoi prirode sekretov proizvodstva (nou-khau). Informatsionnoe parvo num 2 (2008).

¹⁵ A. P. Sergeev, Pravo intellektualnoi sobstvennosti v Rossiiskoi Federatsii Moscow: Infra-M. 2017.

¹⁶ O. A. Potrashkova, "O pravovoi prirode sekretov proizvodstva (nou-khau)", Informatsionnoe parvo num 2 (2008): 5.

¹⁷ D. A. Gavrilov, Pravovaya zashchita ot nedobrosovestnoi konkurentsii v sfere isklyuchitelnykh prav na sredstva individualizatsii i inye obekty promyshlennoi sobstvennosti (Moscow: Norma; Infra-M, 2014).

¹⁸ G. V. Sintsov, "Sootnoshenie ponyatii "sekret proizvodstva", "nou-khau" i "kommercheskaya taina", Yuridicheskii mir num 9 (2012): 35.

¹⁹ The Civil Code of the Russian Federation (part four) N 230-FL (as amended on July 18, 2019), December 18, 2006. Meeting of the legislation of the Russian Federation N 52 (1 part) (December 25, 2006) Article 5496.

²⁰ N. M. Shishkina, "Sootnoshenie ponyatii "sekret proizvodstva", "nou-khau" i "informatsiya, sostavlyayushchaya kommercheskuyu tainu", Yuridicheskii fakt num 76 (2019): 30-34.

distinctive feature is the different composition of information included in the content of trade secrets and production secrets (know-how). Information constituting a trade secret is any information other than that which, by virtue of the law, cannot be such information, if it comes to persons interested in possessing this information, it may harm the copyright holder. The secret of production (know-how), based on common practice, information about the nature of protected results of intellectual activity, methods, technologies, production processes, information about ways to implement economic and organizational decisions. The concept of a trade secret is much broader than the concept of "know-how" since trade secret can also be made up of client lists, accounting documents, and much other information, the disclosure of which is undesirable for one reason or another. Know-how does not include a large block of information that could be part of a trade secret²¹. Despite the differences between the definition of "secret of production (know-how)" and the definition of "trade secret", it is clear that in fact, this refers to the same rights, the mechanism of their origin, and the objects in respect of which these rights arise.

Discussion

Within the framework of this research, the legislative approach to the concept of trade secrets and their protection in foreign countries is of greater interest.

The United States adopted the trade secret protection act (public law No. 114-153 of 2016), according to which, information that is a trade secret must have an independent commercial value since it is not publicly known to third parties. This information includes new technologies that create and store trade secret information, as well as forms of financial, commercial, scientific, technical, and economic information, including models, drawings, programs, formulas, ideas, prototypes, techniques, technologies, procedures, or codes stored in any way, provided that the holder has taken reasonable measures to maintain confidentiality²².

The research also focuses on the analysis of the legal regulation of trade secrets in the UK, for the following reasons. Despite the long history of the development of the legal framework for the protection of trade secrets and a well-established branch of law-confidential law, it is necessary to note the unique feature of UK law on the issue under study. The branch of confidential law formed based on court precedents does not contain the concept of "trade secret". Nevertheless, this branch of law, which includes certain elements of regulation of real and obligative rights, has been developing over 150 years based on judicial precedents and has been called confidential law (law of confidence).

Legal protection in the course of consideration of legal claims is granted only to information that in aggregate meets the following criteria: – the information is confidential; – the information was subject to a non-disclosure regime; – unlawful disclosure of information, that is, bypassing the confidentiality regime, caused damage to interested parties. At the same time, it is very difficult to prove the fact of damage, unless the interested person can prove the existence of a close connection of trade secrets with intellectual activity. Thus, the established judicial practice of the UK is on the way to classify trade secrets as elements of intellectual property. In this case, technologies, devices, computer programs, and databases as products of intellectual activity are subject to guaranteed legal protection. In relation to

²¹ A. I. Kozyrev, *Otsenka intellektualnoi sobstvennosti* (Moscow: Ekspertnoe byuro-M, 1997).

²² M. F. Jager, *Trade Secrets Law*, West Group Vol: 1 (2002): 5-133.

other types of information, the copyright holder must prove that the information corresponds to the above characteristics in the aggregate²³. Industrial espionage in the UK is given enough attention. However, it uses mechanisms to protect trade secrets as part of the protection of confidential information in labor relations. A significant number of litigations are based not only on the evidence of access to and work with confidential information if there is an appropriate link in the employment contract, but also on the principles of good faith and loyalty. This means that even in the absence of a pre-established clause between the employee and the employer (usually in an employment contract), the employer has grounds to demand protection of the violated right to keep important business interests secret while maintaining a balance of interests²⁴. In Germany, according to the law, trade secret refers to information that meets the criteria of secrecy (accessible only to a known limited circle of people), provided that the owner of the information has a reasonable interest in its preservation. Violation of trade secrets is considered by German law as a fact of unfair competition. In Germany, the law "On unfair competition" (Unlauteren Wettbewerbsgesetz, UWG), distinguishes two types of secrets: 1. Industrial secret includes information of an organizational and technical nature that relates to the method of production, technology, organization of labor, as well as technical discovery, invention, or information about the nature and purpose of research, etc. 2. Trade secrets, in contrast to industrial secrets, include information related to trade relations of firms: the organization and size of turnover, the state of sales markets, information about suppliers and consumers, information about banking operations²⁵. A trade secret has the following set of mandatory features: 1) availability to a limited number of people; 2) the owner has a justified economic interest in its preservation. This law establishes the criminal liability of up to three years in prison for communicating trade or industrial secrets to unauthorized persons, as well as for finding out about them. In German law, the term "secret" includes any information related to the company's activities, which, in the opinion of its owner, should be kept secret. The main role in ensuring the safety of industrial or trade secrets is played by firms themselves and not by state authorities. In Germany, there is a "non-competition pact" – the obligation of the employee not to compete with the former employer. It includes "a ban on being employed for a certain time after dismissal at a similar enterprise, having a business relationship with clients of the former employer, and disclosing information related to the former job"²⁶. In Germany, post-contractual mutual obligations are established, which are specifically stipulated when hiring. The employee undertakes to protect the information received by him/her in good faith for a certain period of time after his/her dismissal, and the owner of the secret undertakes to pay the employee a certain remuneration for this. For violation of the non-competition pact, the employee is liable for damages. It is also possible that the employee may be prohibited from entering into a new labor contract²⁷.

According to Chinese law, trade secrets are protected by civil law in the framework of protecting entrepreneurs from acts of unfair competition. Trade secrets include not only

²³ M. Budden, *Protecting Trade Secrets under Uniform Trade Secrets Act: Practical Advice for Executives* (London: Praeger, 1996).

²⁴ A. R. Avetyan, *Kommercheskaya taina kak institut zashchity kommercheski znachimoi informatsii subektov predprinimatelskoi deyatelnosti za rubezhom. V sbornike: Rossiiskaya nauka v sovremennom mire sbornik statei XXII mezhdunarodnoi nauchno-prakticheskoi konferentsii. (Nauchno-izdatelskii tsentr "Aktualnost.RF", 2019).*

²⁵ R. R. Shamsutdinov, "Analiz pravovoi zashchity kommercheskoi tainy i personalnykh dannykh v Germanii", *Alleya nauki Vol: 1 num 2* (2018): 683-685.

²⁶ R. R. Shamsutdinov, "Analiz pravovoi zashchity kommercheskoi..."

²⁷ R. R. Shamsutdinov, "Analiz pravovoi zashchity kommercheskoi..."

technical information but also closed information of a managerial nature that has signs of either economic or practical value. If it is impossible for the affected person to prove the number of damages caused by unauthorized disclosure of trade secrets, the compensation amount is subject to recovery, usually equated to the income received from the moment of using the valuable information without a legal basis²⁸.

In Japan, in 1991, the law "On trade secrets" was adopted²⁹. The main features of a trade secret that are fixed in it are its commercial value, limited access, and the use of special measures to protect it.

Considering the features of the legal regulation of the institute of trade secrets in some foreign countries allows drawing the following conclusions. First, the experience of developing economic and business relations both within a single state and at the international level has revealed the need to create protective measures that ensure confidentiality when working with business information. Second, the regulatory provision of information interests of entrepreneurs in different states occurs in different ways. In some cases, this is the publication of special laws on trade secrets, in others, it is the adoption of an array of regulatory acts either in the field of ensuring competition or in the field of protecting the results of intellectual activity, which have, as separate sections, chapters of the regulation on the protection of commercial interests of business entities.

It seems that the adoption of a separate legal document regulating the legal regime of trade secrets is most appropriate since it allows most accurately defining the main concepts (for example, distinguishing between trade secrets, production secrets, and other intellectual property objects) and ensuring protection.

Conclusion

Based on the above, it is possible to make the following conclusion. The protection of trade secrets is an essential element of a company's economic security system in a market economy. Therefore, it is so important to develop a legal framework in the field of protection of entrepreneurial activity. However, in this area, there are several unresolved problems, among them the lack of a clear definition of the concept of "trade secret" in the legislation. In this regard, the Law "On Trade Secrets" should clearly regulate the relations associated with the establishment, amendment, and termination of the trade secret regime concerning information that has real or potential commercial value due to its unknown to third parties. First of all, the legislator must clearly define what a trade secret is. The wording of this concept for introduction into legislation is seen as follows: trade secret is the secrecy of information that has real or potential economic value, established and protected by law. The protected information is not publicly known and cannot be easily obtained legally by others who could benefit from its disclosure or use. The experience of Germany, where there is a clear regulatory distinction between industrial and actual trade secrets, also deserves attention and can be used in the Russian legal field. Russian legislation does not have such a division; therefore, there is no consolidated opinion on whether a trade secret can be an object of intellectual property and several other related issues. Therefore, such a division, which is enshrined in legislation, may become appropriate.

²⁸ A. R. Avetyan, *Kommercheskaya taina kak institut zashchity...*

²⁹ A. R. Avetyan, *Kommercheskaya taina kak institut zashchity...*

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