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RESEARCH OF “KNOW-HOW”AS POSSIBLE OBJECT IN THE INTELLECTUAL PROPERTY OBJECTS SYSTEM: COMPARISON WITH FOREIGN COUNTRIES

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SUMMARY

Creative and intellectual activity is one of the most important life aspects and life forms for each person. The object of intellectual property is the result of such aforementioned activity, for example the implementation of a certain idea in life, and thus the acquisition of an objective form. At this stage of rapid and dynamic development of science, the number of intellectual property objects is steadily increasing, which, in turn, makes it impossible to establish a clear list of intellectual property objects at the legislative level.

One of the problematic and pressing issues is “know-how” belonging, or vice versa, the non-attribution of it to the system of intellectual property rights objects. This issue arises also because there is no unity in defining the above category, its essence, legal nature, mechanism of protection and protection of the right to “know-how”. Abovementioned issues make the research relevant for determining the place of “know-how” in the system of intellectual property objects. While writing the scientific article, it was analyzed the place of “know-how” in the system of intellectual property rights objects in view of the scientific opinions pluralism regarding the interpretation of the very definition of "know-how".

In the context of European integration processes, it is also important to research the positions of the foreign community representatives regarding the possibility of assigning “know-how” to the intellectual property objects system. However, it was found that the problem of securing the above-mentioned definition at the legislative level exists not only in Ukraine but also in most countries of the world. In view of this, it was found that this category does not have an exact legal substantive content that would be outside the provisions of the normative act.

Key words: “know-how”, intellectual property, object, result of intellectual activity, trade secret.

ИССЛЕДОВАНИЕ «НОУ-ХАУ» КАК ВОЗМОЖНОГО ОБЪЕКТА В СИСТЕМЕ ОБЪЕКТОВ ИНТЕЛЛЕКТУАЛЬНОЙ СОБСТВЕННОСТИ : СРАВНЕНИЕ С ЗАРУБЕЖНЫМИ СТРАНАМИ

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АННОТАЦИЯ

Для каждого человека одной из форм жизнедеятельности и важнейших сторон жизни является творческая, интеллектуальная деятельность. Результатом вышеуказанной деятельности является, в свою очередь, объект интеллектуальной собственности, то есть воплощение конкретной идеи в жизнь, а таким образом – приобретение объективной формы. На данном этапе скоротечного развития науки, количество объектов интеллектуальной собственности постоянно увеличивается, что, в свою очередь, делает невозможным закрепление на законодательном уровне их четкого перечня.

Одним из проблемных и актуальных вопросов является вопрос о принадлежности или наоборот, неотнесение «ноу-хау» в систему объектов права интеллектуальной собственности. Данный вопрос возникает также и потому, что отсутствует единство в определении вышеуказанной категории, ее сущности, правовой природы, механизма охраны и защиты права на «ноу-хау». Все это актуализирует проведение исследования для определения места «ноу-хау» в системе объектов права интеллектуальной собственности. При написании статьи было проанализировано место «ноу-хау» в системе объектов права интеллектуальной собственности, учитывая плюрализм научных мнений относительно трактовки самого дефиниции «ноу-хау».

В контексте евроинтеграционных процессов важное значение приобретает и изучение позиций представителей зарубежной сообщества о возможности отнесения «ноу-хау» в систему объектов интеллектуальной собственности. Однако, было проанализировано, что проблема закрепления на законодательном уровне вышеупомянутой дефиниции существует не только в Украине, но и в большинстве стран мира. Несмотря на это, было установлено, что данная категория не имеет точного

юридического сущностного содержания, который бы выходил из положений нормативного акта.

Ключевые слова: «ноу-хау», интеллектуальная собственность, объект, результат интеллектуальной собственности, коммерческая тайна.

Introduction. Today more and more attention is paid to the issues connected with intellectual property in general and its objects in particular. It can be explained with the necessity of compliance with the innovations and standards of international legal regulation in the field of intellectual property.

Development of science and society informatization causes the occurrence of new intellectual property rights objects. The list of intellectual property rights objects which is identified in the Civil Code of Ukraine now is somewhat outdated. Issue as to the attribution or non-attribution of "know-how" to the system of intellectual property rights objects is one of the most current. This is due, first of all, to the lack of a clear definition of "know-how", its legal nature and mechanism of protection. According to the abovementioned, it is necessary to identify the place of "know-how" in the system of intellectual property rights objects.

Analyzing "know-how" in the intellectual property rights system it should be mentioned that the issue of its attribution to such system is complicated by the ambiguity of the definition of "know-how" in the legal doctrine of Ukraine. Among all intellectual property rights objects inventions and "know-how" are most closely related, as in this capacity, most innovative developments are protected. Thus the role and importance of "know-how" in the epoch of rapid scientific and technological progress is growing every year. So, the issue of defining the term "know-how" as a whole, as well as its belonging to intellectual property objects, is relevant. According to the abovementioned article is devoted to the definition of "know-how", its legal protection and place in the system of intellectual property rights object in comparison with foreign countries.

Literature review. The theoretical background of research is based on scientific works of Ukrainian scientists as T. Biehova, V. Dmytrenko, D. Marits, B. Prakhov, O. Shtepa etc. For example, T. Biehova analyzed the position as to the identity of the "know-how" and trade secret categories [1]. V. Dmytrenko pointed out distinctive and similar features between "know-how" and innovative proposal, integrated circuit layout, scientific discovery in her scientific work [2]. O. Shtepa determined such positions as to "know-how": there is no definition at the legislative level; experience of foreign legal practice gives the possibility of "know-how" attribution to the system of intellectual property rights objects [3]. Also "know-how" was the subject of research

of such foreign scientists: Thomas Duston, Thomas Ross, Mikus Dubickis, Deishin Lee, Eric Van den Steen. However, research as to the place of "know-how" in the system of intellectual property rights objects is still relevant. However, despite the problematic, complex and debatable nature of the given issue, it should be emphasized that the issue of "know-how" attribution to intellectual property objects, or their delineation, requires thorough analysis and study.

The aim and objectives of research. The aim of the given article is to research the essence of the definition "know-how", its peculiarities and place among the intellectual property rights objects in accordance with scientific approaches, legislation and practice of its implementation. Also the aim of the research is the comparison of "know-how" definition and place with foreign countries.

To achieve the aim of research the following objectives are defined:

1. To analyze the approaches to the definition of "know-how".

2. To research the possibility of know-how" belonging, or vice versa, its non-attribution to the system of intellectual property rights objects.

3. To determine the place of "know-how" in the system of intellectual property rights objects in foreign countries, its legal regulation.

4. To compare definition of "know-how" in Ukraine and foreign countries and research the possibility of foreign experience implementation in Ukraine.

Research of existing solutions of the problem. At present, as noted above, there is no consensus among the representatives of scientific community about the "know-how" and its place among the intellectual property rights objects. The most appropriate way to research "know-how" is to carry out a comparative analysis and correlation of "know-how" with other intellectual property rights objects in order to determine whether it is possible to refer it to such system. General and single definition of the term "know-how" is absent not only in science, but also at the legislative level. In this case, analyzing court decisions in the field of intellectual property, there is no clear unanimous definition of the term "know-how" and all cases that are related to intellectual property rights in general, and "know-how", in particular, are resolved in their subjective view by the court. That's why it can cause problems and disagreements related to the regulation and protection of legitimate human rights and interests.

Traditionally it is considered that definition "know-how" firstly appeared in the Anglo-American legal system in the 19th century which is used to be short for "know how to do". While historical development different approaches to the essence and definition of "know-how" have been formed. Firstly "know-how" was understood and interpreted as solutions to problems of a technical and production nature. So in this case and such connection it is normal that it was

used initially in the meaning of “production secrets”. But later, the essence of “know-how” definition has changed and it began to include information of a different nature, for which a restricted access regime was established. In such connection with the terms “trade secrets”, “confidential information”, “information constituting a trade secret” were used .

But with time the definition of “know-how” began to include, objects that were not the result of intellectual activity and were not able to act as an object of protection in the exclusive right regime.

Copyright vs “know-how”. Analyzing the essence of “know-how” at modern stage of development it should be mentioned that without no doubt “know-how” is the result of intellectual creativity. It can be explained in comparison with other intellectual property rights objects, for example, objects of author’s and related rights. It should be noted that its common feature is its affiliation with results of intellectual, creative activity. In turn, to a certain extent dispositions of copyright, including “know-how” are extended to all intellectual property rights objects.

Right of patents vs “know-how”. In such comparison it is important to remember and understand that its common features are originality and novelty which are in some ways the criteria for patentability of patent objects and also – its intangible nature. But it should be noted also that there are distinguishing features. For example, its privacy and also – time of rights to possessions protection.

Rationalization proposal vs “know-how”. Analyzing these two categories, it is important to note that there are many common features between it. To the extent that non-disclosure protection is set in enterprise, institution or organization, rationalization proposal can become “know-how”.

Integrated circuit designs vs “know-how”. Accordance to Ukrainian law “On Protection of Rights to Integrated Circuit Designs”, such intellectual property rights objects would (integrated circuit designs) should meet eligibility requirements for protection if it is original (if it has not been created through a mere reproduction (copying) of other integrated circuit design) and also has some key distinction – has new features. In this wise, author who creates integrated circuit designs can store information on his result in confidence, and the given object falls into the category “know-how” [4].

Trade secret vs “know-how”. Such comparison is the most difficult because there are two intellectual vested interests. Some scientists are sure that these two categories are identic and can be used as synonyms. And others hold the exact opposite view and explore “know-how” and “trade secret” as autonomous and independent categories. There are also opinions that “know-

how" should be considered as a particular type of trade secret. Trade secret is a secret information notably that is unknown to people, is inaccessible for people who deal with such type of information. Also trade secret has commercial value and can be the subject of to appropriate measures to preserve its secrecy, taken by the person who lawfully controls it. Based on the above both trade secret and "know-how" is an information. But there is a difference in type of information. "Know-how" always is exposed as information in the sphere of engineering and technique, and trade secret – information on facts. But there is one important thing or even feature which has "know-how": "know-how" can consist of and include such facts which are publicly available, but in aggregate it is integrated.

The term "know-how" has more larger relationship and includes both trade secret and official secret, provisions of which are referred on protection against unfair competition, provisions of treaty-made law and tort law, also criminal provisions in cases of criminal acts attendance.

According to the given comparison it should me mentioned that there are both common and distinctive features between "know-how" and other intellectual property right objects. To common features between "know-how" and other objects belong such features as: immaterial essence; originality; social implication; economic value; result of intellectual creative activity. Such features as absence of official registration and absence of term of a substantive law according to the fact that its force is saved during the time of author's confidentiality. Conformably with the fact "know-how" has more common features with intellectual property rights objects and also it is a result of intellectual creative activity of a person, also contains the feature of originality, it should be contemplated the issue of "know-how" belonging to the system of intellectual property rights objects.

Such problem as to providing a legislative framework for "know-how" is also known for foreign countries. So it can be said that there is no exact legal definition of such category. In France it is used "savoir", in USA – "trade secret", Germany – "wissen wie". But it was found the term "know-how" in the legislation of the Great Britain and USA. Thus in the Great Britain it is used as a learning productional experience. A. Wise noted that all manufacturing information and engineering skills which are used in the process of manufacturing of goods and materials, development of captive mine, oil wells, mineral resources, during research, agrarian and forestry engineering works are referred to "know-how" [5].

As to the USA, all issues connected to the "know-how" are regulated by the Constitution of country according to which, the given issue belongs to the competence of every state. But in

accordance with the legal framework of USA there is a legal act Eqaul Law which has general recommendations for states are in fact can be subjects to adoption at the level of the latter.

A short definition of "know-how" is commonly accepted meaning in foreign countries. Thus Legal Dictionary of Strud gives such meaning of the term "know-how": it is technical knowledge and experience which were accepted as a result of highly-specialized production [6].

Also its definition we can find in German Economical Encyclopaedia according to which "know-how" is special knowledge which are originated from practical or technical experience, for example. "Know-how" can be pursued to other companies by means of transfer of best practices on a contractual basis (agreement for "know-how") like under license agreement [7].

According to the definition given at the Encyclopaedia of the Intellectual Property it should be mentioned that definition "know-how" has a broad meaning and can cover different technical or other information which is necessary for production of any product and is economic value. Also it is noted that "know-how" other than trade secret can exist without assistant of enterprise [8].

Also it is mentioned that the definition "know-how" is also can be found at the European Union legislation. Thus European Union Commission Regulation № 772/2004 from 27th April, 2004 defines "know-how" as a conjunction of unpatented practical information which is a result of experience or investigation and also is not a matter of common knowledge or easily-accessible, that means secret; sensitive, that means important and useful for production information. The term "know-how" is going from the English phrase "know how to do" and at first it was used in USA in 1916 in the judicial decision at the litigation "Disend against Braun".

Conclusions. Analyzing an experience of foreign countries as to the issue of "know-how" regulation, for Ukraine such principles should be fundamental:

- "know-how" has an economic value and belongs to a person who created it or bought in a lawful way;

- transport of "know-how" takes place on contractual basis or in other way according to native legislation;

- "know-how" is defended from illegal assumption and dissemination.

Sum it up so far, such conclusions are important for research. In Ukrainian legislation there is no definition of the category "know-how" and it creates scholarly discussions as to its belonging to the system of intellectual property objects; trade secret and "know-how" are similar with common features and it is difficult to distribute it.

As to the issue of "know-how" belonging to the system of intellectual property objects, there are features that characterize it as an intellectual property object. For such features it should

be referred the following: immaterial essence of "know-how"; non-disclosure regime as the basis of legal protection; right to "know-how" doesn't have time of protection, that means that it is actual until information is confidential.

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