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Legal specific ways for protecting the form and the content of goods

In this article, the author discusses the features of the goods by the form of protection of the trademark, as well as the content of the commodity, which is a commercially valuable information as an object of intellectual property. Intellectual property is viewed as the contents of the goods. A trade secret is offered to consider as a way to protect intellectual property.

Key words: product, trademark, information, business information, commercial secret.

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Тауарлардың нысаны мен мазмұнын құқықтық қорғау құралдары

Бұл мақалада авторлар тауарлардың нысанын, сондай-ақ өнімнің мазмұнын қарау ерекшеліктерін қарастырған. Тауар нысанын қорғау құралы ретінде тауар белгісі табылады. Тауарлардың мазмұны ретінде зияткерлік меншік объектісі болып табылатын ашылмаған ақпарат саналады. Сонымен қатар коммерциялық құпияны осындай ашылмаған ақпаратты құқықтық қорғау құралы ретінде қарастыру ұсынылады.

Түйін сөздер: өнім, сауда белгілері, ақпараттық ресурстар, бизнес ақпарат, коммерциялық құпия.

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Правовые способы защиты формы и содержания товаров

В этой статье авторы рассматривают особенности защиты формы товаров, а также содержания товара. Способом защиты формы товара является товарный знак. В качестве содержания товара рассматривается нераскрытая информация, которая является объектом интеллектуальной собственности. При этом способом защиты такой нераскрытой информации предлагается признать коммерческую тайну.

Ключевые слова: продукт, товарные знаки, информационные рессурсы, бизнес-информация, коммерческая тайна.

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LEGAL SPECIFIC WAYS FOR PROTECTING THE FORM AND THE CONTENT OF GOODS

As a rule, the main object of the entrepreneurship is goods (a commodity). This is what interests a businessman and makes the core and the basis of his entrepreneurial ideas and plans. Businessman confirms himself on the market and reaches the main purpose of the activity – profit, through the production of commodities.

In a market economy the term «product» is used to denote several business results – products, services, work [1]. Positive solution to one of the main problems for the entrepreneur – improving their competitiveness in the market, under the emergence of many independent producers, depends on how high this competitiveness is in its performance.

It is considered that the high competitiveness of a commodity is determined by the presence of demand for it. The latter depends on the interrelated factors such as the utility of a product as well as high quality (it must have has its own properties to satisfy any needs).

However, it should be noted that these factors are not enough. An entrepreneur, having ensured a certain quality, customer value of its products, work and services in the market to quickly capture the market and bring maximum profit to the manufacturer should take care of the appropriate measures to protect the labor product, hence its reputation in the market where there is a large number of independent sellers and buyers of the same type of goods. This goal is achieved partly by the use of the trademark. This need is caused by periodic changes of economic conditions in competitive rivalry.

It should be noted that competition is something more serious than just a rivalry between individual entrepreneurs for the most favourable conditions for the production and marketing of goods. Competition appears in the market in various forms and implemented in different ways, including dishonest ways. And the trademark can not be the only means of protecting the commodity.

Any entrepreneur working for the future, at least tries to develop his own special system of measures, activities that improve or maintain the competitiveness of his products by constantly improving their quality characteristics, constant updating of production. Consequently this results in a constant search for new and effective entrepreneurial ideas.

It is the idea without which no business can exist. Production management and sales promotion should not be built in the form

of a frozen concept. Moreover in the market always win those who bring to it new ideas and points [2]. Therefore, along with the production of goods, the entrepreneur is working on the development, accumulation, introduction of the ideas that promote rapid, quality, low-cost production. In other words, he becomes the owner of the goods not only in the sense of the real form, but also the owner of the results of his intellectual activity. These results make the content of the goods.

Commodity is not only the product of physical work, but also the product of human mental activity, the result of « mental work « ideas. These results are embodied in various kinds of technology, knowledge, experiences that underlie the production of goods as they were materialized in the product, becoming an integral part and technological property of the entrepreneur.

In other words, today we should realize that the novelty and innovation should be recognized as an integral feature of entrepreneurship. Commodity becomes material carrier in which scientific and technical information was incorporated, that is considered to be the property of the entrepreneur, representing to him as well as goods the economic value. Consequently, as the product itself, we call it the external form and its contents must be the object of protection. Only in this case we can speak about the high competitiveness of the goods on the market, while in the first place it must be the protection of intellectual property. Thus, in addressing the issue of protection of the main object of the entrepreneurial activity a commodity, a system of protective measures should be created, measures which would include ways to protect not only the form but the content of the goods on the market, the innovation process that is recognized to be the intellectual property of the owner.

Nowadays four main ways to protect intellectual property are used in world: patents, copyright, trademark, trade secret. Let us refer to commercial secrets as a possible means of protection of innovation. Traditionally accepted, as has been noted above, the trademark protects the goods on the market. However, what kind of protection is implied – protection of the form or of the contents?

To analyze this, it is sufficient to refer to the concept of trademark and analyze some of the rules of trademark law and determine its function.

Recognized registered trademark is a verbal, visual, volumetric or other indication serving to distinguish the goods and services of some economic entities from the goods and services of the other businesses [3].

Trademark is affixed to the product or its packaging to highlight this product of similar mass, as well as allowing it to know the manufacturer or retailer. Consequently, the function of a trademark as designations is individualization of the product and its manufacturer (seller). Every entrepreneur seeks to ensure that its product was recognizable by the consumer. It should be noted that service enterprises use service marks to individualize their services (insurance, banking company, airlines, etc.). Legal regime service mark is not different from trademarks and is determined by the same regulations. In addition to these functions the trademark has some others features.

When choosing a product, trademark is regarded as a landmark by the consumer. Selecting in this case is based on the properties of the expected product (weight, the taste, the efficiency of operation, etc.). In other words trademark indicates the presence of certain consumer goods properties. In this case we speak of the guarantee function of the trademark.

Since these functions are inextricably linked to advertising function, we can say the trademark helps to create, develop consumer demand for this « labeled» goods [4].

All functions of the trademark complement each other. As a result, it becomes an effective means of promoting goods to the market in a competitive environment. Through trademark businesses are gaining popularity on the market. That is why most of the goods are labeled by the manufactures. And this is not the only cause of using a trade mark.

Currently trademark is known as a form of property, which the owner can take steps to protect, protecting their interests in the market. Trademark owners are granted exclusive powers and rights, which must be protected. The exclusive rights include:

1. the right to use the mark in product labeling, affixing it to the product or packaging ;

2. the right to impose « labeled» products into circulation by selling, offering for sale or in any other way;

3. the right to bring «labeled « goods into the country of its trademark action;

4. right to use the mark as a means of advertising their activities and their goods, placing it in advertising publications in various written documents, trade names, signs, orally etc.

Trademark protection is conferred by a trademark registration and issuance by the certificate for a trademark in accordance with the law.

In Kazakhstan, trademark, and therefore these rights receive official registration in the Patent

Office in accordance with the Law of the RK «On trademarks, services and appellations of July1999 (the Act) [5].

Trademark protection is not of a permanent nature. According of the Law on the protection document trademark (certificate) is valid for ten years from the date of application for registration. But this period may be extended each time for fifty years on payment of a fee.

Thus, obtaining legal protection for product designation as a trademark, the entrepreneur becomes a means of protection for their product and its properties from unfair competition in the market, which is not allowed to put down that other similar products on the same notation without the owner's knowledge, the same import goods such designation to the territory of the right entrepreneur to trademark without the consent of the latter, i.e. in creating the conditions that do not allow other manufacturers and distributors to use the trademark, and thereby reduce the credibility of the product having its trademark.

It seems necessary to pay attention to the fact that not every denomination may receive legal protection. The law imposes requirements on the form and content of such a design to recognize his trademark. In form notes and marks can be verbal (words, names, letters, numbers, etc.), visual (pictures, color, etc.), volume (for example, the shape of a bottle of perfume), as well as sound and combination of the above mentioned elements.

Designation on the content must be new, i.e. should not be similar, identical notation introduced earlier as trademarks. In this case novelty is recognized by not all known features, and must be applied to goods belonging to the same group of goods or close group as the evaluated mark.

However, trademark content must be original. Originality is determined by specifying the trademark devoid of originality. Designations devoid of any distinctive features or expression, which have become common in everyday use are not considered original, is also firmly included in the technique or the economic turnover as the definition of the product, which became a generic term (e g, « syringe «), descriptive marks, i.e. is directly listed on the product properties of the products, their quality, price [4].

Spurious symbols may not be a trademark, i.e. designations that carry information about the product, which is misleading for consumers. The right on the mark and its protection extends to the territory of the State where it is registered (in some countries recognized the sign protected by virtue of the application (for example, in the United States.). In other words, it is territorial in nature. Though the procedure for establishing a special law applicable to the so-called world-famous marks according to article 6 «» Paris Convention for the protection of Industrial Property of March 20, 1883 [6], the court may provide protection in the country to the unregistered mark as a well-known (e.g. the trademark « Kodak» widely known in the world market).

From what stated above we can conclude that the use of a trademark – is its use on goods, their packaging, the person to whom such a right given to them by virtue of the registration mark. The right to use can be granted to another person, but only on the basis of agreement with the owner (user license agreement or trademark assignment) registered in the Patent Office. It should be borne in mind that without this registration agreement is invalid. A trademark may be assigned by legal or natural person in respect to all or part of the goods for which it is registered.

In the case where the right to use the trademark transferred by the owner to another person under a license agreement, the main condition for the agreement is the requirement that the goods quality user (licensee) was not lower than the quality of goods of the trademark owner (licensor) and the holder's right to monitor the implementation of the offered requirements.

If a trademark is recognized as an entrepreneur in the market, we can assume that it has a real value that in business practice it is evaluated in monetary terms. As a result the trademark is included in the so-called «intangible assets « and the right to use a trademark may be the subject of the ordinary contract on purchase and sale. Note that the subject is not the trademark itself but the right to use it for a specific period of time. Besides the development of conditions of such contract is a complex procedure which involves, first of all, a thorough assessment of the buyer, his business reputation, operating principles, and most importantly – the quality of products. Whether this business information that comprises the content of the goods will be transferred is being solved separately.

Recently, as a result of the introduction of the Western schemes to use trademarks and technology the above mentioned transfer can be specified in the «franchise «. In the draft of the Civil Code of the Republic of Kazakhstan (Special Part) «franchise» is defined as an integrated enterprise license, according to which the franchisor (the franchisor) agrees to provide the user (franchisee) for a fee during a term of life or without, to use the right as

a business user a complex of exclusive rights of the owner, including the right to a trade name, to the protected commercial information, trademark, and other facilities provided by the contract of exclusive rights. In other words, the term «franchise» means not only the transfer of rights to use the trademark.

This brief analysis of the law allows us to conclude that the trademark has a certain commercial value, but does not have the protection function of commercial information that comprises the content of the goods. Trademark is a way to protect the external (substantial real) form of the commodity.

We got accustomed to pay attention to what always refers to the protection of the substantial real form of the product. At the same time we lose sight of its other special shape – intangible, composing its contents. Above, it was concluded that it is a commercially valuable information.

This product is a special source of information, which would be eagerly seized by the other competitors [7]. Hence the information itself (without being connected to a real substantial form) can be a commodity. But only if the properties of the goods are of economic (commercial) value. It takes an indirect participation in the commodity turnover associated with that information before becomes a commodity (commercial information) embodied in the material production, products coming to market. Here it becomes important and an essential part of real goods [9].

In the legal literature many definitions of such information are provided. Enough to bring the contents of one of them.

Commercial information is an information about various aspects of industrial, commercial, administrative, scientific, technical, financial activity, which is in the interests of competition and economic security of the company is the subject for protection [8]. Information component determines the quality and the value of the goods.

In the competitive environment protection of such information becomes of great importance. Largely on how it is protected by the product life cycle depends on the market. Commercial information is an unusual commodity. Therefore, its protection should be appropriate.

Let us refer to the legal specific protective features of such information. It is determined that the content of the commodity comprises information. The term «information» in this case gives information about the value of discoveries, inventions, new designs, recipes, technological methods. In other words, it is the results of the intellectual activity.

At present relations over such information are governed by the Institute of Intellectual Property (including industrial). Unfortunately, in our country, this institution has not yet received proper legislative consolidation. However, we can say that some parts of it are in the focus of lawmakers and legal literature and in varying degrees are obtaining rapid development in our country. In particular, these are the sections of patent law and copyright law. They are traditional.

The analysis of the current legislation in this regard and the relevant literature [9] suggests that the information protected under Intellectual Property Institute is divided into three categories:

– Information contained in inventions (industrial designs, utility models), the protection of which is realized through the system of patents;

– The information contained in scientific articles, reports, and similar results of creative activity, protected by copyright;

– The information is not protected by any of these methods, because of the inconsistency of certain conditions dictated by the law of patents and copyright, the protection of which is based on the general rules of civil law on intellectual property and is performed primarily by contractual agreements.

Any of these types of information can be commercial and make the content of a real product. Note that in this case the protection of the first two categories of information are considered to be effective protection mechanisms established through patent law and copyright.

Often at the heart of a commodity is a third category of information. It is diverse in its content, is not confined to patenting, although it may include information and patentable, but that the patent is not obtained for any reason, including non-patentable technical knowledge, but necessary for the production of goods, other information about various aspects of business practice.

Civil legislation of the Republic of Kazakhstan suggests the possibility of a third category of information protection by establishing a regime of trade secrets (art.10 126 CC RK (general).

The protection of information as a trade secret is to prevent leakage, theft, loss, unauthorized destruction, distortion, copying. In other words, here we have the protection of the privacy of various kinds of information.

The term «trade secret» can be regarded in the broad sense as covering a thing in the form of a legal regime to protect that information. This is expressed in the above definition. In a narrow sense, trade

secret acts as a concept directly coinciding with the object of protection, that is, a kind of information. In this meaning it is implies the information useful for the conducting of the case, giving an advantage over its competitors, who do not possess this information [10].

It should be noted that despite the varied nature of the content of trade secrets, in the study the problems of the content protection of the product must be at the forefront of scientific and technical component of trade secrets, which is better known as the « know-how « or trade secrets.

As a legal regime of information a commercial secret is considered under the Intellectual Property Institute. Besides for basic provisions it fits into the framework of state efforts to establish a «fair competition».

Let us turn to some of the main provisions of trade secrets, currently received and envisaged in the Kazakhstan legislation. Commercial secret is possible to be given to any information, but only having recourse to the professional field of their owner, namely in commercial activities.

Protection of information as a trade secret is possible on the following assumptions:

– Information should be of real or potential commercial value;

– free access is limited to Information;

– Information to a certain extent is unknown to third individuals;

– Measures to protect the information must be determined and taken by the the owner of the information;

– Information must not be included in the list of information that can not be a trade secret, in particular: refer to state secrets, information reporting and other such specific legislation (list should be established by the decision of the government).

The above considered rules on trademark and trade secret are the general norms defining the strategy to protect the goods on the market in a competitive environment. There are a lot of other problems to be solved related to these and other possible means of protection. However, it is necessary to make comparative analysis much deeper. However, this is the subject of a separate consideration.

References

1 Busigin A.V. Entrepreneurship. Textbook. – M., 1997. 182 c.

2 Batychko V.T. Business Law – Taganrog: Tsure, 2011 – 382c.

3 The Civil Code of the Republic of Kazakhstan – Almaty, 2015. – 432 p.

4 Civil and commercial law of the capitalist states. ed. EA Vasiliev. – M.: «International Relations», 1993 – 564 c.

5 The Law of the Republic of Kazakhstan dated July 26, 1999 № 456-I «On Trademarks, Service Marks and Appellations of Origin».

6 Paris Convention for the protection of Industrial Property of March 20, 1883.

7 Yarochkin V.I. Commercial information firmy. – M.: «Os-89»., 1997. – 128.

8 Vinogradov S.N. Commercial activity. – Minsk, 1998. – S. 202.

9 Sergeev A.P. Intellectual property rights in the Russian federatsii. – M: Prospect., 1996. – 734 c.

10 The practice of protection of trade secrets in the United States. Guide to protecting your business data – M., 1992. – 231 c.