Small Innovative Enterprise: the Problems of Protection of Commercial Confidential Information and Know-How

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Abstract: Small enterprise is a structural element of market economy, an important part of competitive mechanism. Small business contributes to effective market development and functioning. Small enterprises reflect market conditions and opportunities and make market economy more flexible. Small innovative enterprise is a special organization form of innovation activity. Such enterprise produces innovations which do not require considerable investments or serious labor or energetic resources. It plays an important role in economic development of the country and in satisfying the needs of researchers, authors and creators of inventions and innovations. The main aim of the paper is to analyze the problems of legal regulation and protection of know-how and commercial secrets in small innovation enterprise. The research is based on interdisciplinary method of analyses in economic and law spheres. The authors reveal the main problems of commercial secrets and know-how protection in economic activities of small innovative enterprises.

Key words: Small innovative enterprise · Intellectual property · Know-how · Commercial information · Knowledge economy · Knowledge creation

INTRODUCTION

Small innovative enterprise is a special organization form of innovation activity [1, p.1316]. It plays an important role in economic development of the country and in satisfying the needs of researchers, authors and creators of inventions and innovations. Small innovative enterprise can decrease social tensions caused by economic restructuring and crisis situations by providing work and employment for workers and qualified specialists.

Small Enterprise in Innovation Sphere Can Be Formed in Several Ways:

- Small innovative enterprise can be extinguished from large state scientific organizations. In this case enterprises are aimed to modernization and improvement of high-tech and innovation products created by “mother-enterprise”.
- Small innovative enterprise can be organized as branch or laboratory of scientific and research institute or university. They can be engaged in scientific and applied research and in full innovation circle.

Russian scientists create breakthrough technologies, which are able not only to provide the needs of the country, but also to create prerequisites for entering the external market of new kinds of competitive products and technologies. This can reduce the dependence on the export of raw energy resources, but scientists have to sell technologies to foreign companies due to the lack of innovational system that can establish conditions for financing the process of technologies implementing [2-3].

Small innovative enterprise can be formed as innovation agents. They promote innovations and technologies created by research institutions. This form is very popular in Russian regions [4-5].

Small innovative enterprises became leaders in new branches of economy and contribute to market structures development. They usually take part in the first venture stage of innovation process.
Small innovative enterprises can be organized by colleges and institutes of higher education (universities, academies, institutes) in the form of companies limited (Ltd) and joint stock companies. This small innovative enterprise are aimed to implement the results of innovation activities of institutes of higher education [6].

Exclusive rights on intellectual property belong to institutes of higher education. But the right of use must be invested in the capital of small innovative enterprises.

**Spheres of Economic Activities of Small Innovative Enterprises:** The most popular for small innovative enterprise became such spheres as trade, knowledge creation, knowledge economy, inventing and conversion. Practice showed that small innovative companies quickly spread in these spheres, because they have an opportunity to use resources of the state and state research institutes in their own interests.

The most profitable business of small innovative enterprise becomes export of high-tech products and technologies to developing countries. But this kind of activity causes a lot of problems with intellectual property protection. Developing countries frequently use technologies from developed countries and that’s why they are interested in spreading technological knowledge. Insufficient mechanisms of intellectual property protection causes costs increase. Intellectual property protection has visible advantages but its consequences can cause a lot of problems for developing countries. Strengthening of intellectual property protection causes contradictions between creating and transferring of innovations and toughening of intellectual property protection. Severe measures of intellectual property protection can lead to augmentation of the gap between technological level of developed and developing countries and strengthen monopoly tendencies on the new technologies market.

It is important to come to compromise on intellectual property protection in order to provide a balance between the interests of all participants. This balance can be based on a complex of legal, economic, social and political measures.

Small innovative enterprises take an active part in conversion. They help conversion enterprises to produce civilian products and create dual use technologies [7-8].

From the point of view of Russian scientific and political experts conversion is a form of realization of different political, economic, social and technical measures in order to make military oriented industries produce a variety of civilian or consumer goods instead of arms and weapons.

Conversion is a process of changing of social and economic relations, connected with that part of gross national product which is used up for the needs of defense. The aim of conversion – is to turn military plants to produce different alternative civil products.

Federal Law “On the conversion of military industry in Russian Federation” (1998) created legal foundations for the activities of military enterprises. This Law regulates the relations between the state agencies during the process of conversion and guarantees the protection of interests of all conversion participants - interest of employees, enterprises and state agencies. This Law describes a special procedure of settlement of legal, social and economic problems of conversion.

The main aim of the Law is to guarantee the best use of production capacity, scientific and research potential and professional skills of employees of military enterprises for civil peaceful purposes. These orientations are reflected in special conversion programs of military producers.

Each enterprise must create an individual program for itself with the help of special state agencies.

The state fund of conversion was founded in Russia to guarantee the financing of state conversional programs. Moreover enterprises themselves could make special funds for financing scientific research and engineering works for development of production of consumer and civilian goods.

Small innovative enterprise in conversion sphere are able to produce dual use technologies.

Today a lot of countries identified the concept of “dual use”: the emergence of a techno-military paradigm that depends on and reinforces technological advances in the civilian economy. But this concept involves distinct informational infrastructure and different product and process R andD tradition.

The serious problem of dual-use technology consists in the historical development of military economy. Two different cultures (military and civilian) have evolved divided by a wall of separation between military and civilian markets. This wall seemed to inhibit horizontal leaning as weapon systems were developed in isolation from other activities, both within firms and between firms.

The ‘technological divergence’ that resulted has had long-term consequences for the firms whose technological capabilities were developed under the protective umbrella of stable or growing military budgets.
The more serious consequences this has for the ‘soviet’ military firms which worked in the conditions of military and planning economy. Because the lots of experts consist that successful conversion of military activity will require consolidation of a single technology industrial base, not simply the removal of barriers between two separate ones (Samuels (1994), Alic at al. (1992), Gansler (1980), etc.) [9-11].

But despite the apparent logic of dual-use technology, the lost of military firms in other countries are not moving in that direction. Instead, they are merging and taking over competitors, consolidating the industry to fewer firms (Forsberg R., Peach A., Reppy J. (1994) [12], Malecki E.J. (1997) [13]).

Practically all military enterprises in Russia became joint enterprises with participation of large foreign companies. Among their investors there are a lot of well-known companies from USA, Germany, France, Spain and Italy.

Today the majority of joint ventures produces a large variety of civil (consumer) goods. For example, JSC Kirovs plant (Perm) is the largest enterprise in Russia, which produced arms, explosives and ammunition. Now it also manufactures aerosol fire-extinguishers, water-purifying filters, explosives for different industries, etc. Some military plants now produce navigation, telephone and communication equipment, etc. Military enterprises produce airplane motors and equipment. Some plants produce equipment for rockets, oilfield, micro-wave ovens, etc. Military plants which manufacture rocket and missile fuel now produce rescue systems and different types of equipment for fuel and energy complex and agro-industrial complex. Machine-building plants produce petrol motor saws, surgical equipment. Cannon-building plants in Russia, now also manufacture excavators, track-cranes, etc. Factories which produce special optic instruments and apparatus for army now also manufacture optic lens and spectacles, etc.

Small innovative enterprises can be formed as independent departments (branches) and can use know-how and trade secrets of “mother-enterprise” for their own needs and interests.

The problem is that such small innovative enterprises do not regard this information as commercial secret, because legal regulation of these questions is very weak. As a result “mother-enterprise” can loose different classes of technical secrets, which relate to innovations, inventions and production of goods.

Such department can simply steal some idea and develop it with the help of its high-qualified engineers and scientists and then sell it or begin to apply for itself.

The state can not control or stop this process.

The Problems of Know-How Protection: The serious problem of protecting trade secrets and know-how is based on shortcomings of previous legal regulation in intellectual property sphere.

Old Russian Civil Code (1964) and other Russian laws did not give the definition of know-how, trade and commercial secrets. Russian legislation said nothing about protecting and guaranteeing the categories of confidential information.

The identifying features of commercial confidential information are:

- It is not in the public domain;
- The information refers to the usage’s and practices of particular industry;
- The release of such information is injurious to the enterprise and gave advantages to other companies.

In 1994 new Civil Code of Russian Federation defined what a commercial secret is (article 139). Information can be defined as a commercial (trade) secret if it satisfies the following requirements: 1) it has real or potential commercial value, 2) it is unknown to the other persons, 3) there is no free legal access to the information, 4) the owner of the information does something to protect the information. People who received the commercial secret by using illegal means must recover the losses and pay the damages.

Some authors consider two types of confidential commercial information: know-how and business secrets.

Know-how in its turn can be divided into two classes of information.

The first class of commercial (trade) secret consists of information in the form of skill and experience built up individual employees in relation to the practical implementation of techniques or processes. It indicates the way in which a skilled man does his job a man may in writing make a fairly detailed description of how to produce a particular result by a series of chemical processes or reactions; but as all the world knows in practice the best result is obtained not by merely following all the directions in the book, but by the way in which the experienced man carries man out these directions.
Another class of such technical secrets (‘know-how’) is used to refer to disembodied information in the form of technical knowledge of industrial significance which has been built up in one organization and is not in the public domain. In this sense, the term relates to the application of technology in an industrial situation rather than to creativity. As such, know-how may comprise items of information retrieved from the general body of information which is available to all. Its importance lies, however, in the context in which those items of information are applied and their collection as a separate entity which has acquired a significance and identity of its own. Know-how of this kind can constitute a trade secret, for, as an independent entity of information, it is inaccessible and the law does not require any degree of novelty provided that information is inaccessible (Gurry F. (1984) [14]).

Business secrets consist of information about activities of the enterprise (production price, expenses, and plans, consumer lists). The Law on State secrets and Criminal Code of Russia (1996) introduced into the Russian legal system the responsibility for the breach of confidence, including breach of official secrets.

The Law on Commercial Secrets of Russian Federation dedicated to legal regulation of know-how and business secrets came into force in 2004. It is a first attempt to systematize legal regulation of confidential information. This Law consisted of 16 articles which gave definitions of different types of commercial confidential information.

In 2008 article 139 which gave the definition of commercial confidential information was excluded from the Civil Code of Russia because of introduction of the Part IV of the Civil Code of the Russian Federation.

The Civil Code of the Russian Federation (Part IV) has completed codification of the civil legislation of Russia. It completes the work on full systematization of the whole civil legislation, regulating the relations in the sphere of intellectual property and a number of related norms in the Civil Code. Introduction of the Part IV of the Civil Code of the Russian Federation allowed to systematize the federal legislation on intellectual property. The basis of this system is recognition of subjective intellectual property rights for the results of intellectual activity and the means of individualization (for intellectual property) as exclusive ones. However, they differ from property rights and other material rights because they are intangible and they differ from personal non-pecuniary rights of authors and other creators of intellectual results by the fact that they become a subject of civil circulation and allow to involve the objects of intellectual property into such circulation.

Chapter 75 of the Part IV of the Civil Code is dedicated to legal regulation of know-how. But the protection of know-how is far from being perfect. A lot of rules (norms of Law) contradict the norms of International Intellectual property Law. Russian Civil Code regards all kinds and types of commercial confidential information, including business secrets, as know-how. Civil Code introduced implementation of special commercial secret regime. Court practice in the sphere of intellectual property rights protecting has not been formed yet. This causes a lot of problems. Small innovative enterprises and “mother-enterprises” face these problems. Economic activities of such enterprises suffer from shortcomings of legal regulation in intellectual property sphere.

Introduction of the Part IV of the Civil Code of the Russian Federation did not solve the problems of appropriate legal regulation in intellectual property sphere.

CONCLUSIONS

The reasons of weak intellectual property and know-how protection within the framework of small innovative enterprises are based upon shortcomings of previous legal regulation in intellectual property sphere. The Civil Code of Russia (Part 4) can not solve the problem and overcome existing stereotype of thinking and manner of economic agents including small innovative enterprises.

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