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# THE LEGAL NATURE OF THE AGREEMENT ON THE OFFICIAL NATURE OF THE TECHNICAL SOLUTION CREATED BY THE EMPLOYEE

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**Abstract:** In this article, the author conducts a study of the legal nature of the agreement between the employee and thae employer on the rights to technical solutions, created by the employee within the framework of labor functions. Absence of comprehensive legislation of legal relations between the employee and the employer concerning potential objects of patent law created by the employee, and absence of unitized scientific approach about the nature of the agreement between them negatively influence the process of administration of the law. The analysis of the court practice conducted by the author allows us to understand that in most cases the employer and the employee who created the patentable technical solution do not have a legally formalized agreement. This implication mat lead to conflict situations between the parties, that can negatively affect the stability of stream of commerce. The author concludes that such situations are a consequence of the ambiguity of the legal nature of the agreement (contractual terms) on the procedure for creating patentable technical solutions by an employee and determination of its legal status. From a practical point of view, the existing uncertainty leads to difficulties for both parties to the employment contract in determining the form and content of the document in which the relevant arrangement should be enshrined. In this article the author, examineting the legal nature of the agreement between the employee and the employer, regulating their legal relations concerning the official objects of patent law, finds additional arguments in support of the concept of interbranch nature of regulation of the institute of official objects of patent law.

**Keywords:** patent law, service objects of patent law, employment contract, sectoral affiliation, multi-sector agreement, agreement on the service object of intellectual property.

At the current stage of development of domestic scientific thought, there is no unity of approach for defining the legal nature of such an agreement, and the question of the branch of law (labour or civil law) to which its legal regulation refers has not been resolved.

Determining the legal nature of an agreement on the distribution of rights to a patentable technical solution created by an employee has scientific and practical relevance. From the point of view of the doctrinal approach to the topic under study, the importance of determining the sectoral affiliation of the relevant agreement between the employee and the employer stems from the need to clarify the legal nature of the institution of service objects of patent law, designed to ensure the effective commercialisation of technical solutions created by employees.

Article 1370 (3) of the Civil Code of the Russian Federation establishes that the exclusive right to the employee's invention, the employee's utility model or the employee's industrial design and the right to obtain a patent belong to the employer unless the employment contract or the civil law contract between the employee and the employer provides otherwise. Consequently, the civil law norm regulating the legal regime of the service object of patent law allows agreeing the legal fate of technical solutions created by employees both in the form of an independent condition included in the employment contract and in the form of a civil contract not named in the Civil Code of the Russian Federation (obviously, regardless of which contract the employee and the employer agreed on the named issue, the legal nature of such agreement will remain unchanged).

Relevant legal relations between the employee and the employer are regulated by a single rule of civil legislation (Article 1370 of the Civil Code of the Russian Federation), while allowing additional contractual regulation of such relations. Therefore, mandatory legislative regulation must be supplemented by agreements between the subjects of legal relations, at least as regards the legal fate of the technical solutions created by the employee and the mechanism for determining the technical solutions that fall under the category of professional solutions. A lack of clarity about which branch of law governs such agreements and when and to what extent an employee and an employer need to reach an agreement on the said issues often becomes the reason why such agreements (provisions in contracts and local acts of the employer) do not exist. This situation leads to abuses and impairment of the rights of both the employee and the employer and has a negative impact on the stability of civil rights turnover in the field of patent rights.

Law enforcement practice has developed a specific approach to determining the mechanism for classifying technical solutions created by employees as business-related, in the absence of a clear agreement on such a mechanism between the employee and the employer.

Thus, in its judgment dated 18.07.2019 in case No. SIP-721/2017 the Intellectual Rights Court Presidium noted that in determining whether a particular technical solution was created within the framework of employment duties of its authors a wide range of circumstances may be taken into account, including subsequent conduct of the employee and employer, documents prepared by them in the course of the employee's employment, which together could indicate that technical solutions were developed in connection with performance of employment duties, other circumstances in conjunction. This approach correlates with the explanations contained in paragraph 129 of the Resolution of the Plenum of the Supreme Court of the Russian Federation of 23.04.2019 No. 10 "On Application of Part Four of the Civil Code of the Russian Federation" and with the previously established law enforcement practice on this issue as reflected in the information note of the Scientific Advisory Board of the Intellectual Property Rights Court[1].

The analysis of court practice on disputes regarding the establishment of the patentee of the patent right object, which, from the employer's point of view, is serviceable, shows that in most cases, the court resolves the relevant issue on the above indirect signs if there are no any agreement between the employee and the employer (for example, cases No. SIP-598/2018, No. SIP-477/2018, No. SIP-775/2016 considered by the Intellectual Property Rights Court). For the parties to a dispute, the judicial assessment of such circumstantial features of their legal relationship regarding the creation of a patentable technical solution (or registered object of patent right) and the distribution of rights thereto is not obvious, which affects the duration and complexity of the dispute and predetermines an unpredictable outcome of the latter.

The algorithm for protection of infringed rights and establishment of relevant circumstances becomes linear and simpler in cases when the employee and employer have determined, at least in advance, a mechanism for classifying technical solutions created by the employee as proprietary and the procedure for allocation of rights to such technical solutions. This contributes to stability of civil circulation of industrial property and effectiveness of their commercialisation. Otherwise, situations often arise when an employer, believing that a technical solution created by an employee is a proprietary solution, acquires exclusive rights to that solution, proceeds to use it (introduces it into production, manufactures products, contracts to sell goods) but loses the exclusive right by court decision because the employee proves in court that the invention was created outside the scope of his employment. There are also reverse situations where employees acquire the exclusive right and attempt to use it (e. g. conclude a licensing agreement), believing that the created solution is not proprietary or that the employer has lost the right to obtain a patent, but the court later determines that the employee's position is wrong.

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[1] Intellectual Rights Court Information Brief of the Academic Advisory Council // Zhurnal suda po intellektual'nym pravam = Journal of the Intellectual Rights Court. 2017. No. 18. P. 45.

Such situations, taking into account the dispositive nature of Article 1370 of the Civil Code of the Russian Federation, demonstrate the need for separate contractual regulation of the respective legal relations between the employee and the employer.

As mentioned above, the issue of the sectoral nature of the agreement (or the terms included in an employment or other contract) to create a patentable technical solution in the course of employment, as well as the allocation of rights to such a solution, remains debatable.

Article 1370 of the Civil Code of the Russian Federation, which regulates the legal regime of service objects of patent law, does not "bind" such an agreement to a particular branch of law, moreover, paragraph 3 of the article allows the inclusion of relevant conditions in both employment and civil law contracts concluded between the employee and the employer. The study of scientific approaches to this issue has established that scholars believe that labour law or civil law, respectively determines the sectoral affiliation of such agreements.

The study of the sectoral affiliation of the agreement between the employee and the employer takes place in the context of resolving two questions: 1) which branch of law regulates the legal relationship between the employee and the employer in the process of creating a technical solution; 2) which branch of law regulates the legal relationship between the employee and the employer in the distribution of rights to the technical solution created by the employee.

A number of scholars believe that in both cases the predominant regulation belongs to labour law. Therefore, D. Y. Shestakov points out: "labor norms characterize relations of a creator of creative result with administration of enterprises, institutions, organizations concerning service works"[1]. S. A. Kazmina believes that "the emergence, amendment and termination of the rights and obligations of the parties in connection with the creation and use of service inventions are the necessary elements of the relationship between employees and employers, transferring these relations from the field of patent to labor and contract law"[2]. A. A. Inyushkin agrees with the above position and believes that "the basis for the regulation of obligations to create databases within the framework of labor relations should be recognized as the labor law. The basis for the regulation of relations between the employee and the employer is the employment contract"[3].

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[1] *Shestakov D. Yu.* [Intellektual'naya sobstvennost' v sisteme rossiyskogo prava i zakonodatel'stva] Intellectual property in the system of Russian law and legislation // Rossiyskaya yustitsiya. 2000. No. 5.

[2] *Kazmina S. A.* [Pravovoe regulirovanie sluzhebnykh izobreteniy v Rossiyskoy Federatsii] Legal regulation of service inventions in the Russian Federation: Extended abstract of dissertation. ... Candidate of Juridical Sciences.

[3] *Iniushkin A. A.* [Grazhdansko-pravovoi rezhim baz dannykh] Civil law regime of databases: Thesis. ... Candidate of Juridical Sciences.

Thus, the institute of service objects of patent law, according to a number of scholars, in all its manifestations belongs to the sphere of labour law and should be regulated by its norms.

Scholars with the opposite viewpoint refer to the employee-employer relationship, in one way or another, with the proprietary intellectual property to civil law regulation.

Thus, V. O. Dobrynin, notes that labour relations, as a legal fact which are giving rise to civil law relations on the use of rights to proprietary facilities, only create a precondition for the emergence of such objects, and the legal regime of proprietary facilities is not the subject of labour law regulation[1].

V. S. Vitko, examining the legal nature of the condition on the creation of a specific intellectual property object included in an employment contract, comes to the conclusion that such a condition can only be civil law in nature, since "at the moment when the employer gives the employee an official task to create a work, along with the existing employment obligation, the contract of copyright is concluded, from which a civil law obligation to create a work by the employee arises"[2].

E. P. Gavrilov, pointing out the civil law nature of legal relations arising in the field of creation and use of service inventions[3], associates it with the impossibility to include the obligation to create an invention in the official functions of an employee.

A third view holds that the legal regulation of the employee-employer relationship in the process of creating a technical solution is a matter of labour law and the distribution of rights to the technical solution created by the employee is a matter of civil law.

According to I. S. Krupko, "for the legal regime of a service invention to arise and for any agreements that may be concluded between the author and the employer to be valid, there must be an employment relationship and the creation of the object within the performance of the work function"[4].

E. A. Ivanova and Y. V. Antonova believe that legal relations in the sphere of service work are regulated by the rules of civil law, but for the recognition of a work,

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[1] *Dobrynin V. O.* [Osobennosti pravovogo regulirovaniya sluzhebnykh izobreteniy] Peculiarities of legal regulation of service inventions: Thesis. Candidate of Juridical Sciences.

[2] *Vitko V. S.* [Pravovaya priroda dogovorov o sozdanii proizvedeniy nauki, literatury i iskusstva] The Legal Nature of Contracts for the Creation of Works of Science, Literature and Art. Moscow: Statut, 2019.

[3] *Gavrilov E. P.* [O sluzhebnykh izobreteniyakh. Ch. I] On service inventions. Part I // Patents and Licences. 2011. No. 9.

[4] *Krupko S. I.* [Institut sluzhebnykh izobreteniy. Novelly i problem pravovogo regulirovaniya] Institute of service inventions. Novels and Problems of Legal Regulation // Intellektual'naya sobstvennost' v Rossii i ES: pravovye problemy = Intellectual Property in Russia and EU: Legal Problems: Collection of Articles edited by M. M. Boguslavsky and A. G. Svetlanov. M.: WoltersKluwer, 2008.

as such it is necessary to have labour relations between the author of the work and the employer, regulated by labour law[1].

O. A. Ruzakova also draws attention to the fact that it is the employment contract that is the basis for the legal regime of the service object, noting: "if the employment contract includes conditions on the distribution of rights to the created object, the mutual rights and obligations of the parties, this indicates its multi-branch nature"[2].

A similar position is held by B. E. Semenyuta who believes that "labour law does not regulate relations in the sphere of authorship, and civil law does not regulate relations in the sphere of performance of labour functions by an employee", based on which he states that "in this case there is a duality of legal relations between the parties, which are linked by both civil law and labour relations"[3].

B. S. Antimonov and E. A. Fleischitz also noted: "copyright, unlike labour law, mostly regulates not the process of creation of a work, not "live labour". It more often regulates only the subsequent relations arising in connection with the result of work, with the created work. This is the usual distinction between labour law and copyright law"[4].

Attention should be drawn to the non-obviousness of the provision on the admissibility of the application of labour law to any legal relationship between an employee and an employer regarding the creation and use of a proprietary item of patent law.

The labour law provisions for the following reasons cannot regulate the relations of the mentioned subjects concerning the distribution of property rights to a technical solution created by an employee (namely, the right to obtain a patent and, accordingly, the exclusive right). Thus, Article 8 (1) (5) of the Civil Code of the Russian Federation establishes that civil rights and obligations arise from the creation of works of science, literature, art, inventions and other results of intellectual activity with respect to such objects. This standard, which establishes the subject matter of civil law regulation, in our opinion, excludes the possibility of

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[1] *Ivanova E. A., Antonova Y. V.* [O problem rasporyazheniya sluzhebnym proizvedeniem] On the problem of disposal of service work // Nauka i obrazovanie: khozyaistvo i ekonomika; predprinimatel'stvo; pravo i upravlenie = Science and Education: Economy and Economics; Entrepreneurship; Law and Management. 2012. No. 6 (25).

[2] [Pravo intellektual'noy sobstvennosti] Intellectual Property Law. Copyright: Coursebook (vol. 2) under general editorship of L. A. Novoselova. M.: Statut, 2017.

[3] *Semenyuta B. E.* [Grazhdansko-pravovye dogovory o predostavlenii prava ispol'zovaniya programmy dlya EVM] Civil law contracts on granting the right to use a computer programme: Thesis. ... Candidate of Juridical Sciences. P. 152.

[4] *Antimonov B. S., Fleischitz E. A.* [Avtorskoe pravo] Copyright. P. 345–346.

attributing the issue of distribution of rights to a technical solution created by an employee to the sphere of labour law regulation.

Thus, it must be concluded that the said issue will in any case be resolved from the standpoint of civil law, including the dispositive contractual regulation permitted by Article 1370 of the Civil Code of the Russian Federation.

The more complicated question is which branch of law regulates the legal relations between the employee and the employer in the process of creating a technical solution, in other words, which branch of law can be applied to the conditions to create potential proprietary objects in the employment contract (another document agreed by the employee and the employer) or to the specific assignment of the employer for such creation, mentioned in Article 1370 of the Civil Code of the Russian Federation.

As can be seen from the above scientific points of view, this issue is the most debatable. As rightly pointed out by V. I. Eremenko, the main difficulty in resolving the issue of sectorial affiliation of the institute of proprietary objects of patent law lies in distinguishing similar in purpose (creation of a not yet existing work) labor and civil legal relations; and "the main criterion for this distinction is the performance by the author-employee for payment of a labor function (work in accordance with the staff schedule, profession, specialty with a specified qualification, a specific type, the work assigned to the employee"[1]. However, this issue is of paramount importance for determining the legal nature of an agreement on the proprietary nature of a technical solution created by an employee, as it is relevant in establishing the substance of such an agreement as well as its subsequent implementation.

Studying the employee-employer relations in the above area, the author proceeds from the position that "an employee's work can be created only within the framework of labor relations existing between the parties"[2], and that "only those works whose creation is directly related to the employee's work duties in accordance with his employment contract, job description or other acts governing his activities may be regarded as work-related works"[3].

The proprietary nature of a technical solution created by an employee depends directly on the presence or absence of an employment relationship between the author of the solution and the content of the employment relationship, which is not regulated by civil law, which leads to the conclusion that the institute of propri-

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[1] *Eremenko V. I.* [Razvitie institute sluzhebnykh proizvedeniy v Rossii] Development of the institution of service works in Russia // Legislation and Economy. 2013. No. 1.

[2] *Gursky R. A.* [Sluzhebnoe proizvedenie v rossiyskom avtorskom prave] Service work in Russian copyright law: Extended abstract of dissertation... Candidate of Juridical Sciences. P. 7.

[3] [Pravo intellektual'noy sobstvennosti] Intellectual Property Law: Coursebook / Under the editorship of I. A. Bliznets. 2nd ed., revised and enlarged edition. M.: Prospekt, 2016. P. 150–151.

etary objects of patent law and the agreement on proprietary objects of intellectual property, which is one of its elements, cannot be studied without reference to the provisions of labour law.

Regarding the position of a number of scholars on the fundamental impossibility of regulating relations over proprietary objects of patent law, including at the stage when a technical solution has not yet been created or is in the process of creation, it should be noted that such approach is applicable only to situations where it clearly follows from the job function of the employee that the creation of technical solutions is not part of the employee's job function. For example, if the employee working as a lawyer is fond of computer modeling and can create a patentable design and the employer requests (commissions) him to create such a design, the labour law rules cannot regulate the developing legal relations regarding the creation of the design. However, the object created as a result of such an assignment will most likely not have the attributes of work, since its creation is beyond the scope of the employee's work function. In this case, the relevant agreement between the employer and the employee engaged to perform a task not covered by the employment function is more like a copyright contract, as V. S. Vitko points out[1].

In situations where the employee's job function is to conduct knowledge-intensive research, develop new technical solutions, create solutions for the appearance of products (such situations are characteristic of patent law regulation) employees (scientists, engineers, industrial designers and other specialists) are engaged by employers to conduct scientific and technical research, create potential industrial designs. As E. P. Gavrilov[2] rightly points out: an employer cannot oblige its employees to invent anything, but the employer, based on the job function and competence of such employees, can give a task to conduct scientific (technical) work in a certain direction and provide the conditions for such work, which may result in the creation of an invention (utility model or industrial design). In most cases, such employees create patentable technical solutions, since the creation of an invention by employees of a scientific team is more likely than the creation of an invention by an employee whose job function is not in any way connected to scientific (technical) research.

Foreign jurisdictions, in order to effectively regulate the legal relationship arising from the creation of technical solutions by employees, differentiate between different categories of employees by establishing different legal regulations for the technical solutions created by employees, depending on the purpose of their employment.

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[1] *Vitko V. S.* Op. cit.

[2] *Gavrilov E. P.* Op. cit.

For example, Sean M. O'Connor, Professor of Law at the University of Washington School of Law, referring to the US Supreme Court case United States v. Dubilier Condenser Corp., points to the US "the work-made-for-hire" doctrine. Under the doctrine, in cases where an employee was specifically hired to invent something that was eventually invented, the right to such invention would rightly vest in the employer1[1].

Domestic doctrine has no clearly developed and articulated doctrine on the need to assess the propriety of technical solutions created by employees, depending on the conditions under which these employees were hired by the employer. However, some authors express a similar point of view: E. P. Gavrilov writes: "The contract between the author and the employer is a typical employment contract, in the implementation of which service copyright works are created"[2].

In our opinion, the legal relations between an employee hired "to invent" and the employer which are prior to the creation of a patentable technical solution, belong to the sphere of labour law regulation, which determines the procedure and form of agreement between the employee and the employer on the work function and the employee's work duties, the procedure for the employer to form the relevant goals and objectives, the determination of the form in which the employee will receive tasks, report on the work done and on its result. It is clear that civil law (unlike labour law) does not contain any mechanisms by which these relationships can be regulated.

Regarding the possibility of a civil law relationship between an employee and an employer in the situation in question, similar to an author's contract: Article 15 of the Labor Code of the Russian Federation establishes that no civil law contracts governing the actual employment relationship between an employee and an employer may be concluded. This means that if the employee's job function under the employment contract or other acts of the employer is to carry out work aimed at creating a technical solution, a civil law contract with a similar assignment cannot be concluded, as this would be contrary to the labour law provision.

Assuming that the terms and conditions of the employment function or employment duties included in an employment contract or other agreement are of a civil law nature, it would need to be stated that such an employment contract does not have its own subject matter, as the terms and conditions of the employment function in such a case are of a civil law nature. In this situation, it would seem that

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[1] *Sean M. O'Connor.* Hired to Invent vs. Work Made For Hire: Resolving the Inconsistency Among Rights of Corporate Personhood, Authorship, and Inventorship // https://digitalcommons.law.seattleu.edu/cgi/viewcontent.cgi?article=2098&context=sulr (accessed on October 10, 2019).

[2] *Gavrilov E. P.* [Pravo intellektual'noy sobstvennosti] Intellectual Property Law. General provisions. The XXI Century. Moscow: Yurservitum, 2015. P. 276.

the legal relationship between employers and employees hired "to invent" until the creation of a patentable technical solution falls within the sphere of labour law, but, as noted above, the distribution of rights to such a technical solution and the determination of its further legal fate falls within the civil-law sphere of regulation. Where an employment contract between an employee hired "to invent" and an employer contains provisions on the procedure for creating technical solutions and on the distribution of rights to them, such contract should be recognised as a multisectoral one regulating both labour and civil law relations of the mentioned subjects.

The research carried out in this article has highlighted the problems encountered in determining the legal nature of a service agreement in patent law and the consequences that these problems create: impairment of the rights of both the employee and the employer, as well as the unpredictable outcome of the protection of infringed rights.

Investigation of the legal essence of such an agreement involves finding answers to the questions of which branch of law governs the legal relations between the employee and the employer in the process of creating a technical solution and which branch of law governs the legal relations between these entities regarding the distribution of rights to the technical solution created by the employee. Determination of the legal nature of the agreement between the employee and the employer on the intellectual property object is impossible without examining each of the stages of the potential intellectual property object creation (from the stage when the employer sets the task to create the technical solution or the employee incurs a labour obligation to determine the legal fate of the technical solution created by the employee).

In our opinion, the issue of distribution of property rights to a technical solution created by an employee should be resolved in favour of referring the said legal relations to the sphere of civil law regulation. The civil standards apply to the legal relations between the employee and the employer arising in the process of the employee's creation of a potential intellectual property object and relating to that object when the employee's creation of such objects is not part of his employment function. If the employee's job function includes carrying out work aimed at creating technical solutions, the relevant condition should be attributed to the subject matter of the employment contract and the scope of labour law regulation.

The foregoing leads to the conclusion that the analysis of the stage preceding the direct creation (implementation) of a technical solution, in order to better understand the content of the legal relationship between the employee and the employer in each particular case, should be conducted with due regard to the circumstances of employment of the employee who is the author of the patent right object.

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