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TÍTULO: En los medios de individualización y medios de identificación.

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RESUMEN: En la sociedad moderna, las entidades comerciales prestan gran atención a los medios de individualización; sin embargo, los conceptos de "individualización" e "identificación", así como los términos "medios de individualización" y "medios de identificación" derivados de ellos, no están diferenciados en la legislación. Los autores analizaron estos conceptos e investigaron algunos medios de individualización (marcas registradas, nombres de embarcaciones marítimas y fluviales) y medios de identificación (número de registro del vehículo, número individual del contribuyente, etc.) consagrados en los actos reglamentarios. Como resultado, se hizo una distinción entre los medios de individualización e identificación por su propósito y la función correspondiente, se distinguieron sus signos y se revelaron las características del régimen legal.

PALABRAS CLAVES: medios de identificación, medios de individualización, régimen legal.

TITLE: On means of individualization and means of identification

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ABSTRACT: In modern society, commercial entities pay great attention to the means of individualization; however, the concepts of "individualization" and "identification", as well as the terms "means of individualization" and "means of identification" derived from them, are not differentiated in the legislation. The authors analyzed these concepts and investigated some means of individualization (registered trademarks, names of maritime and river vessels) and means of identification (registration number of the vehicle, individual number of the taxpayer, etc.) enshrined in the regulatory acts. As a result, a distinction was made between the means of individualization and identification by their purpose and corresponding function, their signs were distinguished and the characteristics of the legal regime were revealed.

KEY WORDS: means of individualization, means of identification, legal regime.

INTRODUCTION.

In civil law, the concept of "means of individualization" is widely known, which is enshrined, for example, in Article 128, article 1225 of the Civil Code of the Russian Federation. In the legal doctrine, the means of individualization are defined as "a special group of intellectual property that is different from the results of intellectual activity and, in this capacity, are intellectual products protected by virtue of compliance with the requirements of the law to their content, protected, as a rule, from the moment of registration, rights that are not due to their creative nature, but the need to identify the subjects of entrepreneurial activity and their products" [A.A. Reshetnikova. 2005]. This definition corresponds to the meaning of article 1225, Part 4 of the Civil Code of the Russian Federation, where brand names, trademarks (service marks), appellations of origin and commercial designations are assigned to the means of individualization protected by law.

However, the term "identification" appears in the above definition of means of individualization, the difference between which and the concept of "individualization" is not obvious, and based on this definition, they can be considered even synonyms [T. Brazhnik 2015]. Let's find out whether this is the case.

METHODS.

According to the Great Soviet Encyclopedia, the term “identification” comes from the Late Latin word “identifico” - “identify” and means recognition of identity, identification of objects, authentication [Iva - Italics. - M.: Soviet Encyclopedia, 1972].

The concept of “identification” and terms derived from it are quite common in legislation. The Federal Law No. 289 of 03.08.2018 “On Customs Regulation in the Russian Federation and on Amendments to Certain Legislative Acts of the Russian Federation” uses the terms “identification methods” and “identification means”. The latter include control (identification) marks, stamps, and seals. Therefore, identification is a process, an activity that is carried out in various ways, and special devices, i.e. the means of identification are used.

Similarly, identification means and identification methods are described in the Customs Code of the Eurasian Economic Union. Methods for identification of products are disclosed in Articles 167, 180, 192, 206, 214 of the Customs Code of the Eurasian Economic Union, some of them involve the use of identification tools, namely seals, stamps, digital, alphabetic and other markings, identification marks, safe packs, and serial numbers (Article 341 of the Customs Code of the Eurasian Economic Union).

The concept of “identification” is also contained in the Federal Law No. 183 dated July 18, 1999 “On Export Controls” (Article 24), Federal Law No. 426 dated December 28, 2013, On Special Assessment of Working Conditions (article 10), Federal Law No. 4979-1 dated 05/14/1993 “On Veterinary Medicine”, Federal Law No. 149 dated 07.27.2006 “On Information, Information Technologies and Protection of Information”, Federal Law No. 283 dated 03.08.2018 “On State Registration of Vehicles in the Russian Federation and on introducing amendments to certain legislative acts of the Russian Federation ”and many others.

Consequently, the legislation contains a large number of rules on identification, its methods, rules and means. However, in civil law, the object of legal protection is the means of individualization.

How to distinguish between these phenomena and related terms?

We propose a hypothesis that individualization is the process of identifying an object / subject among objects / subjects that are homogeneous to it by giving it additional features. If these additional features are separable from the object of individualization (can exist separately, are not intrinsic to it), have an artificial origin (man-made, that is, created by man), exist as a symbol (sign or name) and are functionally designed for individualization; then these signs should be called means of individualization.

Results and Discussion.

The least obvious is the sign of purpose for individualization, the content of which requires disclosure. If individualization is a process aimed at isolating a subject / object, then the means of individualization must perform precisely this function. Unlike identification, there is no need for precise identification of a specific object / subject. Most often it is possible to select it by creating an interesting, bright designation or name. The obligatory conditions of such a creative process is the freedom to choose the means of individualization, which can be limited only by the conditions of using the designation or the establishment in the regulatory legal acts of prohibited means of individualization or their elements (see Article 1483 of the Civil Code of the Russian Federation). Freedom of choice of means for individualization in each individual case looks like a legally protected interest or subjective right of its future owner; however, if such a rule is observed in relation to any means of individualization, then we can talk about the principle of freedom of choice for means of individualization (Gert V.A. 2016).

Finally, it should be noted that the desire to distinguish the subject / object among others like it leads to the fact that they often try to make designations attractive for those customers who perceive the means. Therefore, there are relatively few long numerals, dissonant abbreviations and other symbols which are badly perceived by humans among them.

The subjective rights of an owner of the individualization means are based (presumably) on the right to individualization, which is realized with due regard for the principle of freedom of choice of the individualization means. Further, when using the individualization means, its owner has the right to use this means of individualization, which, if this means is recognized as intellectual property, expands to an exclusive right, including the authority to prohibit the use of the same or confusingly similar designations with regard to homogeneous objects of individualization and authority to dispose of the exclusive right itself. Thus, the rights to such means of individualization become objects of civil circulation.

Regardless of the recognition or non-recognition of the means of individualization as intellectual property, its owner has the right to refuse to use this means of individualization, to change it, and even to protect it from other people using identical or similar to the degree of confusion means of individualization in relation to a homogeneous subject / object.

Until recently, the last right was considered the monopoly prerogative of the owners of exclusive rights to the means of individualization. However, the Supreme Court of the Russian Federation in its finding dated July 11, 2017 in case No. 53-KG17-12 recognized that the non-property civil right of a non-profit organization (Donate Life Foundation) for a name in case of its violation or the threat of such a violation can be protected in court, including through the suppression of actions that violate the right or create the threat of its violation (Personal identity code, 2018).

A distinctive feature of identification is reliability, absoluteness, and not the probable possibility of separating the identified object from other types, or from other objects of the same type. As noted on the website of the Finnish Population Register Center, several people may have the same name, but there are not two people who would have the same personal identification code (Establishment of an electronic identity (E-ID) that is valid nationally and internationally, 2018).

It can be concluded from the number and nature of legal acts in which the term “identification” is present, that identification is needed in administrative and legal relations characterized by imperativeness and mainly forming relations in the sphere of public administration. For example, in

Switzerland, the project of creating an electronic identity card (E-ID) initiated by the Federal Council of Switzerland (Means of Identification Law and Legal Definition, 2018).

Respectively, means of identification is meant by designations that allow with absolute certainty to distinguish the identified object from other types of objects or from other objects of the same type. As noted above, customs bodies use for the purpose of identification a variety of different means: stamps, seals, digital, alphabetic or other markings, identification marks, and other means. In the United States, the term “means of identification” was defined as any name or number that can be used alone or in combination with any other information to identify a specific person, including any name, social security number, date of birth, official state or government issued driver's license or identification number (United States v. Hanson, 2009 US Dist. LEXIS 69435 (CD Cal. Aug.6, 2009) [C.K. Johari, 2018]. Characteristics inherent in a subject / object, such as handwriting [A.A. Tyulkin, 2014], are also referred to as means of identification in the special literature, but in this case the range of identification means becomes immense, and therefore, in order to make the study more compact, we focus only on man-made symbols.

The vehicle or its main components are identified by an identification number, that is, a combination of digital and (or) letter symbols assigned by the manufacturer of the vehicle or its main components (article 12 of the Federal Law “On the State Registration of Transport Vehicles in the Russian Federation and on Amendments to Certain Legislative Acts of the Russian Federation”).

Taxpayers are identified by a single taxpayer identification number throughout the entire territory of the Russian Federation (Part 7, Article 84 of the Tax Code of the Russian Federation). Individual entrepreneurs and legal entities are identified, respectively, by the main state registration number of the individual entrepreneur (OGRNIP) and the main state registration number (OGRN).

One can find certain common features in these means of identification, and this is undoubtedly they, since they allow one accurately and reliably to identify the subject / object among all those similar to it. Firstly, as is already noted, the means of identification are characteristic of public-law relations and will be used mainly for the purposes of public administration. Secondly, identification means

are imperative, unlike most means of individualization, and this is also related to the scope of their use. Thirdly, the scope of use, the need to accurately distinguish, and imperative means of identification lead to the fact that the future owner of the means of identification is not possible to select it, and therefore does not apply the principle of freedom of choice for the actual means of individualization.

Finally, all these factors entail the fact that the holder as a whole is not interested in the essence of the means of identification, and the authorities are interested in maximizing its utility. As a result, the majority of identification means exist in the form of alphabetic and (or) numeric and (or) character combinations that are not quantitatively limited, convenient for automated processing and do not require large expenditures when used.

It would be wrong to assume that the means of individualization and identification are completely different phenomena and there is nothing in common between them. First of all, identification in some cases can be based on a set of elements, among which there may be means of individualization.

For example, according to paragraph 3 of the Merchant Shipping Code of the Russian Federation and Article 13 of the Code of Inland Water Transport of the Russian Federation, ships and vessels of inland water transport are identified by the ship's name, call sign, the identification number of the ship's satellite communications station and the number of the call of the ship's station.

In accordance with the above signs of identification means and means of individualization, the name should be attributed to the means of individualization, and other designations to the means of identification. However, in order to identify the vessel, these means of individualization and identification are used together.

A similar situation can be observed with regard to the Article 54 of the Civil Code of the Russian Federation, where, according to traditional views, the means of individualization of a legal entity (name, location and address) are indicated. In fact, the point at issue is that for the individualization of a legal entity its own means of individualization (name), the means of individualization (name) of

the settlement (municipality) in which state registration of the legal entity (location), and the means of individualization of a specific buildings, structures (address), which must contain the body of a legal entity or its representative, are used. However, it is obvious that identification of a legal entity in this case is still not done, what is confirmed by the practice of using for accurate identification of a legal entity in addition to the specified means of individualization of such means of identification as the OGRN and TIN¹.

In summary,

1. The means of individualization is a separate man-made designation intended to distinguish the subjects / objects of civil rights among similar subjects / objects.
2. The legal regime of the means of individualization is based on the right of the subject to individualization and the principle of free choice of the means of individualization.
3. The owner of the means of individualization has the right to use it, change it and refuse to use it.
4. In the event that the means of individualizing the conditions of protectability of legally protected, designations is recognized, the holder has an exclusive right to the appropriate means, including the authority to use, prohibiting others from using identical or similar designations for similar objects / subjects and to dispose of the exclusive right itself.
5. The means of individualization is more often used in private-law relations, it is aimed at attracting or holding the attention of other persons, therefore, in most cases it is characterized by attractiveness, brightness, expressiveness, and semantic content.

The means of individualization is aimed at identifying subjects / objects among others like it, that is, it performs an individualizing function [10], but does not necessarily achieve this goal, since there may be an unsuccessful choice of a means or errors in its perception by others.

1. The means of identification is also a separate artificial designation, intended to accurately and reliably distinguish one subject / object from all others.

¹ For example, see how the parties to any civil law contract are identified.

2. The legal regime of the means of identification is based on its obligation (imperativeness) for the respective spheres of relations.

3. As a consequence, the removal, taking out, degradation and other actions that violate the identification process entail the responsibility established by law (article 16.11 Code of Administrative Offenses of the Russian Federation, article 1300 of the Civil Code of the Russian Federation).

4. The owner of the means of identification does not have special subjective civil rights to it.

5. The means of identification is essentially often a designation of the most utilitarian nature.

Civil turnover knows numerous situations of complex identifying when to accurately identify a subject / object complex means is used, incl. means of individualization. The identification function of the means of identification must be executed; otherwise the means of identification does not fulfill its main function, and is unsuitable.

CONCLUSIONS.

On the basis of the studied above, we make the conclusion that the means of individualization and the means of identification should be distinguished in the law.

As to means of individualization, it is necessary to develop a conceptual model of their legal protection, which would be a unified basis for all means of individualization, but differentiated depending on the sphere of use, the essence of designation, recognition of the means of individualization as intellectual property and other grounds. Concerning the means of identification, legal certainty should also be achieved by rigidly distinguishing them from the means of individualization, fixing in the public law an exhaustive list of means of identification and measures of responsibility for violation of the procedure for their use.

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