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DOCTRINAL APPROACHES TO THE ANIMAL BREEDERS' RIGHTS GRANTING

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Abstract

In the paper we analyze foreign and national doctrinal approaches to the animal breeders' rights granting. Its genesis, legal nature of animal breed, and location of related legal norms are considered. We try to justify the possibility of granting animal breeders' rights in the Republic of Belarus.

INTRODUCTION

People have been engaged in development of new breeds of animals for a long time. For example, prolonged folk selection led to the nascence of Karakul and Romanov sheep, Arabian and Akhal-Teke horses, gray Ukrainian cattle, Yaroslavl and Kholmogory dairy cattle and so on. In the late 18th - early 19th centuries in Britain the first breeding nurseries and livestock breeding was organized. R. Bakewell brought Leicester breed of sheep with outstanding meat and wool qualities, the Colling brothers - Shorthorn cattle. Great Britain supplied many European and American countries with pedigree animals.¹

Selection in animal husbandry let to raise productivity and quality of products got using animals (butterfat, protein and amino acid composition of milk, length and fineness of wool, size of eggs), fertility of animal itself (especially in sheep and pigs), to improve the colour of skins, adaptability to local conditions etc.

At the same time in many countries legal protection had not been granted to the results in animal husbandry breeding activities, in contrast to plant varieties for a long time. In most countries it doesn't exist hitherto. Some countries exclude directly to protect animal breeds by

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¹ Selection / Big Soviet Encyclopedia // Mode of access: <http://lib.rus.ec/b/152534/read>. - Date of access: 21.01.2012.

intellectual property means (Argentina, Brazil, China, and USA).² Primarily it comes to the achievements that are not under the patent law and thereby are entirely excluded from the list of intellectual property objects.

Along with that the issue of legal protection granting to the animal breeders was a research object many times.³ And it is actively discussed in foreign publications today. Unfortunately in the Republic of Belarus there is a huge lack of monographic research devoted to the issue of animal breeders' rights. As a result we ought to conclude that the doctrine of the animal breeders' rights granting is not formed.

The aim of our paper is the scientific impact into the development of doctrinal approaches to the animal breeders' rights according to the Belarusian conditions. Simultaneously it is connected with the improvement of the IP legislation in general. As a result theoretical conclusions on the notion 'animal breed', its legal nature, justification of granting exclusive rights to it, and on legal rules' location among others in the system of law will be made.

A. GENESIS OF ANIMAL BREEDER'S RIGHTS GRANTING

It would be incorrect to say that there was never legal protection of animal breeds in our country. Nevertheless legal acts granting animal breeders' rights appeared quite late. In the USSR such a rule was enacted in 1959. In accordance with the Act on discoveries, inventions and rationalization proposals (1973) the Department of Agriculture of the USSR issued author's certificates to the authors-breeders on new breeds of livestock and birds, their factory and highly productive inbreeding types and factory lines, new types of fur animals and new breeds of silkworm. These author's certificates were given after registration of breeding achievement by the State Committee of the USSR Council of Ministry for Inventions and Discoveries.

² Vladimir I. Yeremenko, Part IV of the Civil Code of Russian Federation and Legal Protection of Selection Achievements, ConsultantPlus [Electronic Resource] (2012); Scholtz, M.M. A Developing Country Perspective on Recent Developments in Animal Breeders and Intellectual Property Rights, 36 *South African J. of Animal Sciences* (2006), pp. 22-25.

³ During different historical periods following scholars addressed this topic in their research papers: Boris S. Antimonov & Ekaterina A. Fleyshitz, Inventor's Right (1960); Ivan A. Bliznetz, Intellectual Property Law (2011); Vladimir A. Dozortzev, Intellectual Rights: Notion, System, Problems of Codification (2005); Vladimir Y. Ionas et al., The Rights of Inventors and Rationalizers (1959) etc.

According to the current Belarusian IP legislation legal protection is granted to the inventions that are product or process, new, industrially applicable, and have inventive step. The patent can be granted to such an invention as biotechnological product, process of its obtaining, and its application for certain purpose. To biotechnological products as objects of the invention refer products that are isolated from their natural environment or obtained by other means. Biotech products as objects of the invention may include living objects, such as plants, animals, strains of microorganisms, cells of plants and animals, and inanimate objects, such as hormones, cytokines, enzymes, antigens, antibodies, nucleic acid sequences, plasmids, and other vectors derived from plants, animals or micro-organisms or obtained by other means. Thereby legislation on inventions protects only those objects of the animal world which belong to the results of selection in Microbiology.

Civil Code of the Republic of Belarus names animal breed as a kind of selection achievements among other IP objects (art. 1003). Selection achievement in livestock is a breed that is an integrated numerous group of animals of common origin, created by man. And it has a genealogical structure and properties that allow you to distinguish it from other kinds of animals of the same species, and it is quantitatively sufficient to reproduce as a species (art.1-1003). Articles 1004-1006 CC of the Republic of Belarus define the right of the author to give name to selection achievement, exclusive right of the patent-owner, term of the patent.

But there is no legislation which has to set certain conditions of appearance of the right to patent, procedure of the patent issue etc. So, at the present time legal protection to animal breeds either as to inventions or as to selection achievements is not granted in Belarus.

B. LEGAL NATURE OF ANIMAL BREED

Before they model system of the animal breeder's rights protection it is necessary to resolve theoretical issues on legal nature of animal breed and on location of the rules which regulate social relations in question in the system of law.

The analysis of theoretical studies let us to distinguish several scientifically substantiated approaches to the definition of the legal nature of animal breeds. Some scholars considered animal breed to be an invention at its core. Thus its legal protection should be based on the same principles the protection of other patent law objects bases on.⁴ Their opponents argued that animal breeds in nature are not inventions, but, given their need for legal protection equal to them by law.⁵

Vladimir Ryasentzev claimed, ‘Soviet inventor’s right law doesn’t consider breed new or improved varieties and hybrids of crops and other cultivated plants, breed farm animals and birds, types of fur-bearing animals, breed silkworms to be inventions in common sense. But such selection achievements are equated to them in legal sense.’ This approach can be regarded successful from the point of view of legal technique and realization of the principle of judicial economy in law, but flawed in terms of improving the efficiency of legal rules which, above all, have to take into account peculiarities of the individual objects of legal protection.

There is one more position deserving special attention which expressed in the literature. Its proponents justify special nature of animal breed which necessitates protecting it by means that are different from patent law.⁶ In the opinion of Vladimir Dozortzev, ‘when the creation of new plant varieties and animal breeds had become a mass we had to admit that fundamentally new object - biological achievement emerged... Biological objects seek exclusive right also but they differ from technical ones in a number of features which correspond to other legal regime.’⁷

We support the last position, selection achievements are noted to be very similar to the inventions in terms of addressing specific practical problems. However in the field of breeding problems are solved by biological methods not technical. All leaving beings, now protected as

⁴ Vladimir Y. Ionas et al., The Rights of Inventors and Rationalizers (1959); Vitaly R. Skripko, Protection of Inventor’s and Rationalizers Rights in the USSR (1972); Alexander K. Yurchenko, The Issues of the Soviet Inventor’s Rights (1963); Konstantin K. Yaichkov, Invention and its Legal Protection in the USSR (1961).

⁵ Boris S. Antimonov & Ekaterina A. Fleyshtiz, Inventor’s Right (1960); Vladimir A. Ryasentzev, Patent Attorney Guidance (1976).

⁶ Dozortzev, supra note 3, at 353; Nadezhda G. Kouzmina, Legal Regulation of Selection Activity, PhD Paper (2004); Valery Y. Lebedev, The Issues of the Legal Protection of Selection Achievements in the Republic of Moldova (2000); Vladimir I. Levchenko, Legal Protection of Selection Achievements (1983); Iosif E. Mamiofa, On Legal Protection of Selection Achievements, 1 The Issues of Inventor.s Rights, 1969.; Aleksandr P. Sergeev, The IP Law in the Russian Federation I (1999); Peter J. Singh, Sui Generis Registration of Animal Genetic Resources: An Initiative by ICAR (Bern, 2008); Max Temmerman, Animal Breeders’ Rights? – Working Paper, No 2011/24, May 2011. – 26 p.

⁷ Dozortzev, supra note 3, at 353.

inventions, and selection achievements, have just as uniform features with respect to non-living objects that distinguish them from the latter, as special in relation to each other, they can not match that of criterion unit, which is used to determine eligibility of technical solutions and their physical manifestations.

Biological objects are always concrete. Unlike inanimate objects in the form of abstract solutions that enable materialize them living objects in such a way do not exist. With respect to the species of animals its internal form (features that characterize a given genotype, biological and morphological characteristics) is due to the external form - real biological object.

In comparison with invention abstract dismemberment of a living object into its constituent features and new compilation of their set in the human mind is possible, but in reality, a new result as the goal can only be obtained by the impact on the original live object by means of tools that are allowed by natural laws. At the same time author can change an object only in the limits permitted by nature thus adapting it to meet human needs.

We should take into account all these features creating new law on legal protection of animal breeds. Whereas an animal is a biological object, juridical notion 'animal breed' is influenced by the notions of another brunch of knowledge. In terms of biology, "breed" - it is a complete consolidated (stable) group of farm animals of one species with a common origin; it has unique exterior-constitutional and beneficial economic properties that are inherited.

For the purposes of legal protection the animal breed is a kind of selective achievement, it means the result of deliberate human activity to change the biological characteristics of a particular group of animals. Some scientists point to the fact that, as a selection achievement should not be considered a biological object itself, and should be treated as the solution of some problem inherent in breeding methods, the result of which is objectified in a biological object.⁸ Selection of criteria of patentability of animal breeds depends on the specific requirements of the

⁸Oleg A. Gorodov, Industrial Property Law (2011).

object of legal protection that are associated with their substance and studied by the special sciences: animal husbandry, biology, and genetic engineering. Besides, the criteria should be enough to compile and disseminate to the part of wildlife that can be obtained in the form of specific types of farm animals. The experience of some countries-members of CIS (Kazakhstan, Russian Federation, and Turkmenistan) demonstrates the criteria of animal breeds' patentability are analogous to that of plant varieties.

C. LOCATION OF NORMS IN THE SYSTEM OF LAW

Legal nature of animal breed predetermines location of applicable legal rules in the system of law. Animal breed is a kind of selection achievement that differs significantly from the invention and other patent law objects. Given this, well as the structure of intellectual property law, the law governing social relations that arise concerning animal breeds is to be included in the institute of Industrial Property, forming on a par with the rules on selection achievements in the field of crop substitut of legal protection of non-traditional objects of intellectual property law. The necessity of demarcation of the relevant rules is confirmed by the CC structure (Sec.V of the CC of the Republic of Belarus "Exclusive rights on intellectual activity results (IP)"). It should be noted that in spite of currently stated rule on issuance of patents in respect of selection achievements in the field of animal, such a legislator's approach confirms widespread view on the need to protect new varieties of animals not by means of patent law, and by means of law «sui generis». The latter is determined by the fact that selection achievements in general and animal breeds in particular being the results of intellectual activity are still significantly different from the other objects of intangible nature. Being a large holistic group of animals of common origin, and having a man-made genealogical structure and properties that allow you to distinguish it from other kinds of animals of the same species, and quantitatively sufficient to reproduce as the same breed, animal breed is nothing more than a biological solution to a task. In the essence this solution is not technical. It is connected direct to the animal itself and can't exist independently.

The necessity of legislation improvement in the field of new animal breeds is confirmed by the provisions of the Acts of recommendation of Interparliamentary Assembly of the CIS Member States, including the Model Code of IP, as well as by experience of other member countries of the former USSR, where agriculture plays an important role.

Adoption of norms that govern social relations arising from the selection of new breeds of animals, giving them legal protection and their subsequent use seems to be justified in statute of special character. It is explained by the structure of the national intellectual property rights, the general rules of which are concentrated in the codified statute and detailed in special laws dealing with the protection of separate results of intellectual activity and equated objects, such as in the Act of 13 April 1995 "On patents for varieties of plants".

To ensure the economic interests of the national livestock producers and food security Belarusian state legal protection of animal breeds should be based on certain principles, including the principle of balancing the interests of the authors of new varieties of plants and other rights holders, the principle of reasonable restriction of the rights of the latter in the interest of society at large.

CONCLUSION

In Belarus, as well as in some foreign countries, it is scheduled to form a system of protection of the results of the breeding of livestock, combining patent protection for microbiological and biotechnological nature and the protection «sui generis» of breeds. Given the role of selection achievements, including a new species of animals in the development of the Belarusian state as a state - the manufacturer of agricultural products – we consider it premature to adopt special law regulating the relations connected with animal breed, as long as the above problems are resolved.