CIVIL LAW DOCTRINES OF BIG DATA IN MODERN LEGISLATIONS

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ABSTRACT

Today, the active development of the information environment is significantly ahead of the existing legislation in this area, which creates the conditions for creating different options for the legal qualification of digital reality objects, in particular, Big Data.

For sure, if such trends continue, legislators would be forced to establish a legal regime for digital objects for the further favorable development of entrepreneurial turnover. However, for the successful implementation of new legal structures, first, it is necessary to determine the most optimal legal nature of the phenomenon under study. In light of the foregoing, it is necessary to consider several approaches to the possible legal regime of Big Data.

Key words: *Big Data, civil law, doctrines, modules, digital assets, dual unity, intellectual property, know-how, data law, personal data.*

ГРАЖДАНСКИЕ ПРАВОВЫЕ ДОКТРИНЫ БОЛЬШИХ ДАННЫХ В СОВРЕМЕННОМ ЗАКОНОДАТЕЛЬСТВЕ

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АННОТАЦИЯ

На сегодняшний день активное развитие информационной среды значительно опережает существующее законодательство в рассматриваемой области, что создает условия для создания разных вариантов правовой квалификации объектов цифровой реальности, в частности, Big Data.

Безусловно, при сохранении таких тенденций, законодатели будут вынуждены установить правовой режим цифровых объектов для дальнейшего благоприятного развития предпринимательского оборота. Однако для успешного внедрения новых правовых конструкций в первую очередь следует определить наиболее оптимальную правовую природу исследуемого явления.

В свете сказанного, необходимо рассмотреть несколько подходов к возможному правовому режиму Big Data.

Ключевые слова: *Большие данные, гражданское право, доктрины, модули, цифровые активы, двойное единство, интеллектуальная собственность, ноу-хау, право данных, персональные данные.*

INTRODUCTION

Today, information as such, even without its practical use, is already a commodity in the economic sense [1], which has clearly been demonstrated by the increase in demand for Big Data. Without a doubt, de facto information has long been actively involved in economic circulation as an object, which requires legal consolidation at the legislative level by establishing an advantageous legal framework for regulating the legal regime, if not information itself, then one of its varieties - Big Data [2].

In connection with the foregoing, it is necessary to analyze the possibility of including Big Data as a type of information in the legal system of civil law, for which it is considered necessary to consider the characteristic properties of Big Data.

CIVIL LAW DOCTRINES OF BIG DATA

Generally, common features, both for the concept of “information” and for the concept of "Big Data" are the following [3]:

1. Attributing them to intangible goods;
2. Non-consumable, i.e. moral rather than physical aging of data;
3. Subject-object affiliation without a monopoly nature, i.e. relevance to a specific person or to a specific object (with the exception of intellectual property objects and information limited in circulation);
4. Isolation, i.e. the possibility of separating information from its creator or owner by means of expression in any format, which allows it to be transferred from one subject to another;
5. “Dual unity” of information and its material carrier, which is determined by the connection between two objects [4];
6. Multi-format, i.e. a variety of format conversions without changing the content.

A distinctive feature of Big Data from other types of information is its value, which predetermines other features of Big Data:

1. The ability to arouse interest and satisfy certain needs of a subject of civil rights, in particular, through the creation of unique goods or services or the implementation of more effective corporate actions based on Big Data analysis;

2. The presence of potential (raw Big Data) or real (the result of Big Data processing) value of information in relation to a certain and limited circle of persons, which indicates the narrowly focused nature of the value of specific information in a specific legal relationship;

3. Ability to equivalent exchange;

4. The possibility of collecting and processing Big Data is limited to a certain circle of subjects with the necessary capacities, creating a kind of limited access to such data.

Consequently, the economic value acts as a prerequisite that allows this category of information to enter into civil circulation and enjoy legal protection. Big Data should be considered as a somewhat particularly significant object, the criteria of value of which relate to the content side of Big Data.

Thus, the highlighted features of Big Data make it possible to distinguish them from the entire set of ordinary information and allow the possibility of their inclusion in civil circulation.

However, the informational nature, due to its heterogeneity, creates certain difficulties with the perception of this construction [5]. In the current situation, the doctrine presented several models of possible legal regulation of Big Data within the framework of the previously mentioned approach.

CIVIL LAW MODULES OF BIG DATA

The first model is based on the possibility of establishing property rights to Big Data under certain conditions and restrictions [6].

As mentioned earlier, Big Data includes unstructured (raw) data and structured (processed) data. Considering the totality of unstructured (raw) data, one thing is clear that it is merely impossible to establish property rights to such a data set, due to the public nature of the data contained in them. As well as, the absence of a criterion for the certainty (specificity) of data (in such a situation, an analogy is seen with the impossibility of establishing ownership of generic things without their actual isolation).

Moreover, Big Data contains, among other things, also personal data, the subjects of which have personal non-property rights to such own data, an example of which is the so-called “right to be forgotten”, which lies in the ability of the subject personal data to demand the removal of incomplete, inaccurate, irrelevant data about their personality from the public domain.

As for the results of structured (processed) data, there is a specific, isolated set of data that also has economic value, to which, as expected, there is the possibility of extending exclusive rights.

In other words, by processing the same public data, we get a completely new product, which in turn requires special protection. Furthermore, M. A. Rozhkova suggests that commercially oriented depersonalized personal data, which have no connection with the subjects, and, consequently, any other subjective rights to them, which are available in relation to personal data [7].

Thus, such an approach makes it possible to extend special property rights (as M. A. Rozhkova calls: “another absolute right of a property nature” [8]) in relation not to the entire Big Data set, but only to its limited part in the form of structured (processed)) data. However, the negative point of this approach is that unstructured (raw) data remain outside the scope of legal regulation, which also have commercial value and need appropriate regulation.

The second model is to consider Big Data within the framework of intellectual property law. Some insist that it is necessary to extend the legal regime of intellectual property results to Big Data, for example, a database or know-how.

Starting with considering the issue of the possibility of establishing a legal regime for a database on Big Data, this approach is based mainly on the fact that both Big Data and the institution of intellectual property as a whole are aimed at protecting information that has a certain value [9]. In this regard, in the absence of an established legal mechanism for protecting Big Data from unauthorized use by third parties, the owners of such data have to use tools to protect the legal regime of the database, which, in our opinion, are not able to satisfy all the features of the turnover of the phenomenon under consideration [10].

We believe that there are some factors, which do not allow establishing the legal regime of databases on Big Data.

First, the difficulty lies in the fact that, according to Art. 1260 of the Civil Code of the Russian Federation, the database contains only structured data, while Big Data can include, in addition to structured, also unstructured data, which, in most cases, are of great value for business turnover due to the possibility of analyzing them in a certain way, and obtain the desired result.

The next criterion for distinguishing between two objects is differentiation according to their protect ability [11]. Thus, in accordance with Russian law, the database is protected either under copyright or in the context of related rights. Applying the legal regime of the database as an object of copyright, it is deemed as a practical impossibility to regulate Big Data in this construction. The difference

between the two phenomena is that in this case the database acts as a composite work of creative activity. That is, the compiler of the database thus systematizes the collected information, which results in an intellectual creative result in the form of a database, while the materials contained in it remain independent. Consequently, it is not the information itself stored in the database that is subject to protection, but its structure, that is, the form determined by the individual location of the data. Along with this, Big Data itself is not a creative result of someone's work, but acts only as a huge array of “random” information [12]. Therefore, there is a clear difference in content criteria between both objects.

Closer to the nature of Big Data is the database as an object of related rights, since in this construction the aspect of creativity has no legal significance [13]. In this sense, the subject is the database manufacturer, who organized the work on the collection, processing and structuring of the received materials. Moreover, according to paragraph 1 of Art. 1334 of the Civil Code of the Russian Federation, the subject can acquire the exclusive right to such a database only if significant material or organizational costs are proven, and it must also contain at least 10,000 independent information elements (materials). In this regard, there is an indirect result of creating a database through the organization of the work of the attracted resources. Therefore, it can be assumed that it is not the information inside the database that is subject to protection, but the investments made in its development [14]. In addition, a fair remark is made by A. M. Rozhkova, saying that since Big Data can be contained in several sources (in this case, databases) at the same time, it becomes difficult to determine the subject of violated rights in order to implement the procedure for their protection [15]. The presented analysis also notes the discrepancy between the legal regimes of the database within the framework of related rights.

Also, in this context, it is worth commenting on the issue of applying the legal regime of a trade secret (know-how) to Big Data, [16] which also found in specialized literatures [17].

The secret of trade, according to Art. 1465 of the Civil Code of the Russian Federation includes information of any nature (production, technical, economic, organizational, and others) on the results of intellectual activity in the scientific and technical field and on the methods of carrying out professional activities that have actual or potential commercial value due to their being unknown to third parties. If such third parties do not have free access to information on a legal basis, and the owner of such information takes reasonable measures to maintain their confidentiality, including by introducing a trade secret regime [18].

Despite the fact, this concept was introduced to protect the exclusive right of a wide category of information, nevertheless, personalized data, which are part of Big Data, certainly remain beyond its borders. For instance, in paragraph 10 of Art. 5 of the Federal Law of July 29, 2004 No. 98-FZ “On Commercial Secrets” states that the list of persons entitled to act without a power of attorney on behalf of a legal entity cannot be classified as a commercial secret, where this list also includes personal data of a person.

In addition, know-how acquires commercial value only if it is actually unknown to others [19]. As for Big Data, its commercial value lies not in confidentiality, but in the presence of a huge amount of information as such, regardless of its possession by a limited circle of people [20].

In addition, the fact that Big Data is publicly available excludes the possibility of applying know-how protection mechanism on them, which is implemented due to the following requirements: 1) unknown to third parties, 2) restriction of free access, 3) the use of organizational, technical and other measures to protect its confidentiality [21]. Some authors note that “here, the object of protection is not information, but, as in the case of confidential information, the position of the party who possessed such information” [22].

Thus, it can be concluded that neither the legal regime of the database nor the know-how can be applied to Big Data.

The second approach proceeds from the fact that it is necessary to expand the existing exhaustive list of intellectual property objects by adding a new non-traditional object to it - Big Data, which are understood "in terms of their place in the civil law system - as information and analytical services based on Big Data technology " [23].

This position is substantiated, first, by the emergence of an increasing number of objects that are precisely the results of investment activities, and, second, by the existence of the most favorable rules for regulating relations related to technologies, specifically within the framework of intellectual property [24]. In support of this theory, one can cite the words of E. A. Voinikanis that “exclusive rights with their absolute nature are the most appropriate tool for the protection of any intangible object” [25].

Nevertheless, as noted by the authors themselves, the considered theories require further discussion and detailing.

The third approach is that Big Data is considered as a special information service in the form of an activity for processing them and obtaining a certain result [26]. The practical implementation of Big Data within the framework of this design is

possible through an information services agreement, which is a type of contract for the provision of services for a fee, enshrined in Art. 779 of the Civil Code of the Russian Federation.

The complexity of using this agreement lies in the fact that neither in the doctrine nor in the legislation there is an unambiguous definition of the concept of "information services". Due to the lack of regulation of this type of contract, it is assumed that the content of the information service may include any information of interest to a particular customer, subject to certain restrictions enshrined in industry legislation.

Meanwhile, the application of this agreement to Big Data can be difficult. For example, in terms of defining the subject of the contract, since it is rather problematic to describe all the data included in Big Data, which will create legal uncertainty when implementing such a service.

If we talk about this type of contract, it is the most acceptable way of transferring information, among all others in the current legislation. However, the existing uncertainty with the content of the subject of the contract makes it difficult to apply it in relation to Big Data. Based on the above approaches, it can be seen that the common for all concepts is the intention to extend a single legal regime to the entire set of Big Data as a whole. According to the author, this approach does not fully take into account the specifics of Big Data, which lies in its heterogeneous structure, and therefore the author proposes a different approach to establishing the legal regulation of Big Data.

Since Big Data is heterogeneous in its structure, in view of the various data it contains, in our opinion, it is necessary to divide their legal regime into several components, depending on the category of data used, which will most fully satisfy the interests within each emerging legal relationship.

In the light of the foregoing, it should be pointed out that the doctrine distinguishes two general legal regimes of information for the purposes of circulation: the regime of free access and the regime of limited access. The first of them is based on the idea of increasing permissions and powers in proportion to the decrease of prohibitions and obligations; the second is based on the opposite point of view: the increase in prohibitions and obligations is directly proportional to the decrease in permissions and powers [27]. The general dividing criterion of the presented groups will be the measure of importance and the measure of accessibility.

As mentioned earlier, the structure of Big Data is heterogeneous and covers the following main categories of data: 1) big user data (in order to avoid terminological confusion, this category will be called “big personal data” in this paper), 2) big

industrial data and 3) big impersonal data, each of which is subject to its own legal regime, namely:

The first category of data is subject to the provisions of the Federal Law of July 27, 2006 No. 152-FZ "On Personal Data".

There is currently no special regulation for the second category of data.

With regard to the third category of data, Draft Law No. 571124-7 "On Amending the Federal Law "On Information, Information Technologies and Information Protection" was recently introduced, where the legislator assigned the name "Big User Data" towards them.

CONCLUSION

Summarizing the above, it is supposed to be appropriate to divide the Big Data legal regime into two components: 1) extend the limited access regime for big personal data, 2) combine big industrial data and big impersonal data into a single free access regime [28].

With regard to the three categories of Big Data-data, such differentiation depends on their nature and content, which are determined by the presence or absence of the possibility of violating the right to privacy, as well as the public or national interests of the state.

Thus, we can conclude that neither in the legal literature nor in the legislation has a clear and consistent approach to the phenomenon of Big Data has been formed.

However, it can be seen that the essence of Big Data is very heterogeneous due to the presence of different categories of data in its content, which does not allow establishing a single, universal legal regime for their entire set.

In view of this, we can conclude that it would be most optimal to consider the legal regime of Big Data through its division into two categories: a restricted access regime (large personal data) and a free access regime (large user and impersonal data).

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2. Some experts pointed to the following arguments when excluding information from Article 128 of the Civil Code of the Russian Federation. For example, E. A.

Sukhanov said: “Abstract information is not an object of civil law, in general, in many cases, it is not an object of law. In order to be an object of a legal relationship, information must be an object of the subjective civil right of its participant. (See: Prospects for the development of civil legislation in Russia: plans and modern realities: Internet interview with E. A. Sukhanov.. URL: http://www.consultant.ru/law/interview/sukhanov/. L. A. Novoselova argued that “Information as such cannot be an object of civil rights. <…> This concept has no single definition. <…> And we are talking about the object of law. In law, formal certainty is needed. (See: Proposals to transfer the entire register of real estate rights to the blockchain tomorrow seem ridiculous: an interview with L.A.Novoselova. URL:https://zakon.ru/discussion/2018/09/07/predlozheniya_zavtra_zhe_perevesti_ves_reestr_prav_na_nedvizhimost_na_blokchejn_predstavlyayutsya_sm

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8. Ibid.
9. Sergeev A.P., Tereshchenko T.A. Big data: in search of a place in the system of civil rights. P. 110
10. Referring to judicial practice, an example of an attempt to protect data with the help of a database institution is the case of VKontakte LLC against Double LLC, where the latter illegally seized and used information about users from the social

network database to use scoring systems, which determines the level of creditworthiness of bank customers. (See: Ruling of the Court for Intellectual Property Rights dated July 24, 2018 No. A40-18827/17 // Consultant Plus SPS). However, in this case, it was the unauthorized access to the database that was considered, and not the protection of the information stored in it. Also, there is a negative practice, for example, where the court expressed the opinion that VKontakte LLC, in principle, is not a database, which is an example of the impossibility of protecting information rights even through established legal mechanisms (See: Resolution of the Thirteenth Arbitration Court of Appeal case No. A56-58781/2012 dated February 9, 2016 // SPS "ConsultantPlus").

11. Sergeev A.P., Tereshchenko T.A. Big data: in search of a place in the system of civil rights. P. 123.

12. It should be added that if from such an array of data industrial data can be attributed to the results of creative work, then, speaking of personal data, which are also part of Big Data and are its essential component, it seems impossible to equate them with protected results of intellectual activity. It is the users who create and accumulate their personal data in any way, where, in fact, there is an element of creativity, which are subsequently only used by the entities that created the platform for their accumulation.

13. Civil law. Textbook. Volume 3. 2nd edition / Ed. Ed.: A.P. Sergeev. M.: Prospekt, 2018. P. 192. (The author of the chapter is A.P. Sergeev).

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secret of production, the essence of which, however, is to disclose information to access to it by others. In this regard, the literature points to a direct conflict between the essence of legal monopoly and know-how, since “it is impossible to establish an exclusive right regime on deliberately concealed information, since the factor of their being unknown to third parties does not allow one to establish the very content of information or the form of its objectification in as a subject of protection, i.e. formalize the objective boundaries of the confidentiality of information and identify it without the threat of disclosure.” (See: Gorodov O.A. Information law: a textbook for bachelors. - 2nd ed. - M .: Prospekt, 2019. P. 244 .; Commercial (entrepreneurial) law: a textbook in 2 volumes / ed. V. F. Popondopulo, 5th ed., revised and supplemented, Moscow: Prospekt, 2017, p. 295. (The author of the chapter is O. A. Gorodov)).Third, in relation to the result of intellectual activity, there is a transfer of exclusive rights to its use, in accordance with Art. 1468 of the Civil Code of the Russian Federation, as for a trade secret, there are no exclusive rights here, and the information itself is transmitted, constituting a trade secret and recorded on a material medium, in accordance with Art. 3 of the Federal Law of July 29, 2004 No. 98-FZ "On Trade Secrets".

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