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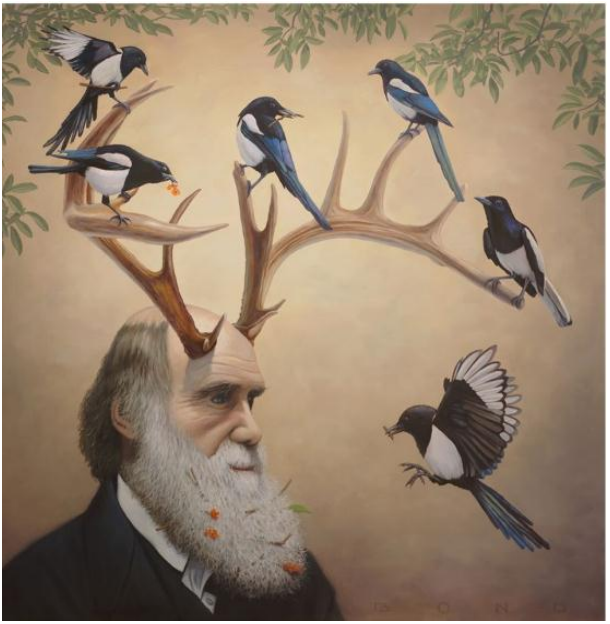

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Defining Entrepreneur's Business Reputation In Research By The Russian Civil Lawyers

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Abstract

The research is aimed at defining the nature of the entrepreneur's business reputation as an object of civil rights. Major research methods include general scientific special juridical methods. The article proves that the entrepreneur's business reputation does not acquire the features of property, but preserves the most basic attributes of an intangible benefit, namely, it is inherent in an individual and cannot be estimated in monetary form. Thus it cannot be an independent subject of a civil-law contract. As an intangible benefit, business reputation has an economic (property) function in the property relations.

Key words: intangible benefit, business reputation, inalienability, monetary valuation, legal nature, contract subject, economic function.

Definiendo Reputación Empresarial de Emprendedores por Civilistas Rusos en Sus Investigaciones

Resumen
Aquí se tiene por objetivo definir la naturaleza de la reputación empresarial de empendedores como objeto de derecho civil. Los métodos de investigación aplicados incluyen métodos científicos generales y jurídicos especiales. Aquí se prueba que la reputación empresarial de un emprendedor no adquiere los rasgos del bien pero preserva los atributos básicos de beneficios inmateriales, a saber: la reputación es propia de una persona y no se evalua de forma monetaria. Entonces, no puede ser objeto independiente de contratos civiles. La reputación empresarial como beneficio inmaterial desempeña una función económica (de propiedad) en las relaciones de propiedad.
Palabras clave: beneficio inmaterial, reputación empresarial, inalienabilidad, valoración monetaria, naturaleza jurídica, objeto del contrato, función económica

1. Introduction

In the past several years, the problem of the entrepreneur's business reputationhas gained a special scientific and practical relevance in Russia. Development of market principles in economy resulted in considering business reputationof entrepreneurs in the context of their involvement in the property relations, as a special economic asset, which creates a competitive advantage to its holder.

This tendency has stimulated scientific research of the entrepreneur's business reputation with the aim to give it a clear definition and consequently clearly definethe legal nature of this phenomenon, subject matter of the right to business reputation, and methods for its civil and legal protection. Multiple theses on the theme (Arkhiereev, 2017; Gusalova, 2012; Karaicheva, 2014; Kuliush, 2011; Mordokhov, 2017; Parygina, 2017; Timerkhanov, 2013; and others) have been defended in the last 10 years, many scientific articles have been written. It must be stated that the term "business reputation", used in Russian civil law, has a much narrower scope of meaning than the term "goodwill" accepted in the Anglo-Saxon law system.

Overall, these works can be characterised as self-contradictory, what also naturally predetermines inconsistency in their results. For example, when defining the nature of business reputation and its place in the system of

civil rights' objects, their authors mix the attributes of the objects different in their nature, what, in its turn, causes mistakes in qualifying the nature of the right to business reputation, and not quite accurate determination of the range of methods for its protection. It is clear that such a situation occurs due to methodological errors (hasty generalisation, insufficient reasons, etc.) in carrying out scientific research (Lipchiu and Lipchiu, 2013: 20, 21,24, 58; Novikov and Novikov, 2009: 80-81; and others).

All this not only prevents scientific knowledge from developing, but also can be considered as a factor, impeding improvements in the Russian civil law and its practical application. The latter is of special relevance, since to effectively protect business reputation is the key to successful and stable functioning of business sphere.

The article covers the study, which objective is to define the nature of the entrepreneur's business reputation as an object of civil rights, through overcoming methodological deficiencies, revealed in the Russian scientific literature related to this subject matter.

The value of the study is in substantiating a solid and coherent basis for further scientific research studies of the right to business reputation, and the system of methods for protecting business reputation, with the potential identification of the ways to improve the Russian Federation legislation, which regulates this sphere of public relations.

2. Materials and methods

The study is based upon the following materials:

1. Statutory regulations.

- Provisions of the Russian Federation Civil Law, which specify the list of the civil rights' objects and the place of business reputationin their system, in particular, Articles 128, 150 and 152 of the Russian Federation Civil Code (hereinafter "RF CC").
- Provisions of the Civil Law on franchise agreements (Art. 1027-1040 of RF CC) and simple partnership agreements (Art. 1041-1054 of RF CC), where business reputation is mentioned when defining the subject of an agreement or obligations of the parties.
- Provisions of the RF CCon the composition of an enterprise as a propertycomplex, being an object of civil rights (Art. 132 of RF CC).
- Provisions of part 4 of RF CC on the rights to the results of intellectual activity and means of individualisation (Articles 1225, 1226, 1229, 1233, 1473-1541).
- Sections 1 and 8 of the Accounting Regulations "Accounting of intangible assets" (AR 14-2007), where the approaches to defining the "cost" of

business reputation are specified.
2. Provisions of the Russiancivil theory about the attributes of intangible benefits as the objects of civil rights, which are generally accepted in the Russian civil law, and the provisions reflected in the modern scientific research studies of the reputation.
3. Practical materials: court cases on compensation of damage to reputation of legal entity.
The article is written using general scientific research methods: dialectical, system-based, induction and deduction, analysis and synthesis, formal logics laws, and special methods of legal research, and literal and systematic interpretation of the law provisions, in particular.
3. Results and discussion
Pursuant to Art. 128 of RF CC, the objects of civil rights are as follows:
1) property, which incorporates:
- things (including cash and certified securities);
- other property, including property rights (includingnon-cash monetary resources, uncertificated securities, digital rights);
2) results of works and rendering of services;
3) protected results of intellectual activity and equivalent means of individualisation (intellectual property);
4) intangible benefits.
The article shows that the business reputationis not an independent object of civil rights. According to Art. 150 of RF CC, business reputation relates to intangible benefits, and in Art. 152 of RF CC it is equated with such intangible benefits as honour and dignity.The term “business reputation” in scientific literature traditionally means public conceptsofbusiness (professional) personal traits.
The Russian theory of law highlights the fundamental attributes inherent in intangible benefits, which radically distinguish them from material benefits.
As per the theory, the most important attributes of intangible benefits imply that, first, they areinalienable from an entity and untransferable to others (what is directly enshrined in art. 150 of RF CC), and, second, there is no economic (property-related) content that predetermines impossibility to define the cost (monetary valuation) of these benefits (Faizutdinov, 2006: 168-170; Krasavchikova, 1994: 12, 23-25; Malein, 1985: 15; Maleina, 1997: 10, 2014: 44; Pal’kina, 2011: 10; Sitdikova, 2007; and others). Both these attributes are interrelated and interdependent. They also make it impossible to carry out transactions with intangible benefits.

Until business relations started to actively develop in Russia, there were no doubts that business reputation is an intangible benefitby its nature, like honour and dignity, since both these attributes were evident.

However, business development has led to entrenchment in RF CC of the norms that provide some reasons for anassumption that business reputation can be transferred by its holder onto others to be used under a franchise contract and be contributed to the common causeunder a simple partnership contract. According to some researchers, it means that it is possible to "alienate" it from its holder on a fee basis, which, consequently, implies a need for monetary valuation of a transferred benefit (Bakaeva, 2012: 13).

According to Accounting Regulations "Accounting of intangible assets" (AR 14-2007) (Order … No. 153-n), business reputation is subject to accounting as part of the legal entity intangible assets, which, consequently,-makes it possible to assessthe "business reputation cost": it is computed as the difference between purchase price of an enterprise and its total assets value.

Such norms, which appeared in the Russian civil law, have undermined the past confidence existing in scientific circles about the legal nature of this object of civil rights as an intangible benefit, and have led to forming an idea that the business reputation of legal entities in the present-day conditions loses the attributes that characterise it as an intangible benefit. N.G. Frolovskiy (2012) stated that the business reputation of legal entity has the attributes, quite the opposite to that of a citizen, i.e. alienability and evaluability. I. V. Bakaeva cast doubts on the features of intangibility and untransferability of some intangible benefits, including business reputation (Bakaeva, 2012: 12-13), and that the process of its "commercialisation" (commodification) takes place (Slipchenko, 2011).

The researchers were faced with a serious dilemma: on the one hand, according to law, business reputation is qualified as an intangible benefit, on the other hand, there was every reason to believe that it does not have itsintrinsic features.So, what is the business reputation as an object of civil rights?

Modern scientific publications present different viewpoints on the nature of business reputation as an object of civil rights in the new economic conditions: that it is a "really unique intangible benefit", since it combines the attributes of inalienability from its holder and potential monetary evaluation, although approximate (Parygina, 2017: 24); this is an intangible benefit, which is, however, comprehensive by its nature (a complex of economic, information legal components) (Arkhiereev, 2017; 10); that this is an

intangible benefit, which has material attributes (Kuliush, 2011: 48); that this is an object of civil rights with property content, since it has a monetary value (Mordokhov, 2017: 16); that this is an intangible benefit, which has a value form and pronounced property characteristics, involved in the civil transactions as a material benefit, that this is a property-non-property object (Karaicheva, 2014: 69, 74);that this is a benefit, intermediate between intangible benefits and intellectual property objects (Gusalova, 2012: 5); that this is an object, which should be equated with the results of intellectual activity (Timerkhanov, 2013: 7-8) and so on. However, the most interesting thing in this diversity of theories is that the indicated controversy has led many researchers to a surprising conclusion that the business reputation, they recognise (without any reservations or with certain reservations) as an intangible benefit, incorporates property elements, or is even declared to be an intangible benefit with property content. Thus, it is actually stated that an intangible object contains the elements and characteristics of a material (property) object or is even recognised as a property-non-property one. Scientific literature, without respect to the question on the nature of business reputation, expresses the opinion that in the present-day conditions of "commercialisation" of intangible benefits as such, it is probably worth completely "revising a conventional interpretation of legal essence of personal intangible benefits as the values with no property content", since to date, "the legal essence of certain intangible benefits has been converted into quite the opposite substance – material benefits" (Bakaeva, 2012: 13; Mikhailova, 2012: 7-8).

How could the researchers reach such conclusions? Is it really possible for an intangible essence to havematerial (property) elements? Is some essence (essence of business reputation) able to have a comprehensive nature or is it always intrinsically integral?

It appears that these questions can be answered only taking into account philosophical (methodological) approaches to defining the essence of the phenomenon.

Essence and phenomenon are known as pair philosophical categories reflecting continuity between the inner (essence) and the outer (phenomenon), which are not the same but correlate to each other.

Essence is not out in the open, it is behind-the-scenes, however, it is brought to light through the attributes that might be seen and jointly form the phenomenon itself. To reveal the essence is only possiblethrough careful and comprehensive examination of the phenomenon attributes, through assessment of value and significance of each of them in relation to other attrib-

utes from all possible viewpoints.It results in identifying and eliminating less important attributes and retaining most important ones, which makes it possible to define the essence of the research subject. The phenomenon essence (nature) is its underlying fundamental and the most essential and general characteristic, which is as "pure" as possible, free of anydetails and additions, this is a "gist", the core of phenomenon (Dmitrieva, 2018: 63).

Such a nature of the essence admittedly and definitely excludes any comprehensiveness and, even more so prevents its own opposite from being incorporated into it.In other words, an intangible benefit is intangible, because there is nothing material in it.

Assuming that the business reputation in its essence is an intangible benefit (more specifically, a pattern, concepts of business personal traits, existing in the public consciousness, i.e. in non-material environment), then, certainly, no property elements can be incorporated into it. Otherwise, the result will be that an object with property (material) characteristics is found in non-material environment (public consciousness). Evidently, that cannot be true since the nature of the material is quite the opposite to that of the non-material.

If we assumethe opposite, namely, the fact thatmaterial elements constitute the essence of the entrepreneur's business reputation, it cannot be classified as an intangible benefit. Here, a question should be raised about independence of this object of civil rights and, respectively, about amending Art. 128 of RF CC.

According to theseassumptions, the conclusions of modern researchers on the comprehensive nature of the business reputation or on the fact that the business reputation is an intangible benefit with property component, or, the more so, a property-non-property object, should be considered erroneous.

Quite evidently, the conclusions are erroneous due to methodological problems, associated, in particular, with applying analysis and synthesis method. Obvious inadequacy in analysing the business reputation attributes in conditions of its "commercialisation" and premature synthesis of the obtained not comprehensive information, cause logical error, defined as "hasty generalisation" (Lipchiu and Lipchiu, 2013: 59-66).

Researchers, without taking a close look at the essence of those legal norms, which create the impression about alienability of business reputation (or the right to it), and its potential monetary valuation, just referring to them as a fact, hastened to declare that the business reputation is an ob-

ject, which, having (according to their very opinion) an intangible essence, has none of its fundamental attributes, and has,vice versa, the attributes of its opposite, namely, the property benefit.

The author believes that these norms as such are not a reasonable ground to draw such conclusions. Thorough analysis of both these norms themselves and the business reputation attributes is required, to be able to come to a reasonable conclusion on the nature of business reputation, rather than to try to combine the things that cannot be combined.

First, business reputation shall be analysed in terms of the intrinsic features of an intangible benefit, namely, inalienability from an individual and untransferability, and impossibility of making a monetary valuation (absence of property content).

The attribute of inalienability from an individual and untransferability shall be further considered.

Generalisation of the definitions of the business reputation concept, presented in various scientific publications, quite definitely leads to a conclusion that researchers unanimously consider business reputation as the public conceptsofthe entrepreneur's business traits. Business reputation in all the works, even in those, where authors deem it impossible to consider this category as an intangible benefit, pursuant to Art. 150 of RF CC (as G.Yu. Mordokhov, for example), is still defined as a non-material phenomenon. For instance, the same author states that the business reputationis a personalised image of a business activity of an entity, created and existing in public perception and based on the information about the results of its business activity, variable and presenting a business entity on the market both positively, and negatively" (Mordokhov, 2017: 15).

This is good news that researchers are unanimous on the fact that the business reputation is an image existing in the public consciousness. However, it is regrettable that none of theresearchers focuses attention on the fact that the public consciousness is a non-material environment and, hence, it cannot contain an object with material (economic, property) elements. If it had been properly understood, no erroneous conclusion would have been drawn on the nature of business reputation as an intangible benefit, which incorporates property elements.

Moreover, no proper emphasis is placed by the researchers on the fact that this image not only exists in consciousness, but it exists in the public consciousness, rather than rests "in hands" of the entrepreneur, whose image is created (a holder of business reputation). And this condition, at least, requires answering the question: whether this entrepreneur is capable of

disposing (for example, by transferring onto the other) of what is related to them but belongs not to them, but to the society, which is not a subject (participant) of civil-legal relations at all. The question is rhetorical since it is obvious that such atransfer is impossible, because one cannot transfer to another party what they have no (do not "hold in hands") themselves.
Hence, it must be admitted that the business reputation being a pattern existing in the public consciousness, is an intangible object and has the most essential intrinsic featureof an intangible benefit – inalienability from its holder personality, what also means that it cannot be transferred to another party.
Some researchers as, for instance, N. N. Parygina (2017: 22, 23), accepting inalienability of the business reputation, refer to alienability of the right to using business reputation. M. N. Maleina also does not exclude alienability of the right, stating that "inalienability and untransferability of an intangible benefit shall be interpreted as inability to transfer, at the discretion of the entitled person for a fee or free of charge for temporary use or irretrievably, the very benefit rather than a subjective right thereto" (Gavrilov, 2014: 146; Maleina, 2014: 42).
It is undeniable that the entity itself, a certain public opinion about business traits of which exists, "uses" its reputation to the effect that canactuallyassist in solving some organisational or property-related problems, promote its products or services on the market, and that is exactly what allows to consider it as a factor creating a competitive advantage. Nevertheless, it appears that in this case the "use" has actual, rather than legal nature, i.e., it is a fact of objective reality, rather than the right of "enjoyment", which is usually defined as lawful, legal potential for deriving benefitfrom some object (usually, a thing, but in the context of the considered range of problems – its business reputation). What shall be done in case when the business reputation is negative? What may the right of its enjoyment involve in this case? Otherwise, it would have to be admitted that entrepreneurs, who actually are physical entities (and just physical entities),also have the right to use, for example, their life, health, and other inalienable intangible benefits, similar in their attributes(intangibility, inalienability) to the business reputation, which is completely absurd. Obviously, a human just lives, enjoys his health, has certain characteristics of socially active entity in the eyes of society, performs actions, that form the ideas about himin the collective consciousness, far from exercising the "right of enjoyment" of life, health, or reputation. It would be more absurd to talk about the possibility to transfer, alienate this right (if its existence is recognised). Transferring

the right of the object enjoyment makes sense only with transferring the object of enjoyment itself. Inalienability of the object – intangible benefit– from an individual entirely excludes any possibility of talking about alienability of the right of the object enjoymentin favour of other parties.It is therefore a completely wrong attitude of G.Yu. Mordokhov (2017: 10-11) and his like-minded associates that the right to use the business reputation not just exists but is property-related and freely transferable. The question about the essence of the right to business reputation is not a research subject in this article, however, it appears necessary to make an essential comment: no property right can arise to an intangible object, inherent in an individual and not materially embodied (as opposed to, for example, the results of intellectual activity and individualisation means). The otherwise is inconsistent with the theory of civil-law relations, existing in the Russian civil law. As regards the essence of the right to business reputation, the author believes that it implies, first of all, the potential protection of business reputation, what is confirmed by clause 2 of Art. 2 of RF CC. This thesis is reflected in a number of scientific publications, for instance, V. K. Andreev (2014: 28), E. P. Ped'ko (2009: 10) and others.

It would probably be more appropriate to conceive that there is onlyan actual carrying-over of public ideas about oneself to another party, i.e., about some "replacement" of oneself by another in the public consciousness. If this is the case, what the mechanism for this "replacement" is?

Obviously, the "replacement" is possible onlyin case of granting the right to use the right holder individualisation means to another person (business reputation holder) – trade mark, service mark, trade designation, i.e. materially embodied designations, which makes it possible to use them physically, for example, by applying them on goods. Since these designations are associated in the public consciousness with a specific person (right holder), respectively, public ideas about business traits of a right holder, i.e. his business reputation, apply to those who use them. It is impossible to apply the right holder business reputation to another party without granting them the right to use individualisation means. On relationship between means of individualisation and business reputation see, e.g., M. I. Braginskiy and V. V. Vitryanskiy (2002: 1010).

Hence it obviously follows that neither business reputation as such, nor the "right to its enjoyment" can constitute an independent subject of the contract between the entity-holder of business reputation and another entity.

This viewpoint shall be verified through analysing the attitudes, formulated in the scientific literature, towards the subject of franchise contract

in combination with the norms for this contract, since its legal regulation (namely, clause 2 of Art. 1027 of RF CC) enabled declaring that business reputation can be alienated from an entity.

It is enshrined in clause 2 of Art. 1027 of RF CC that " franchise contract" involves the user's enjoyment of a scope of exclusive rights, business reputation and commercial experience of the right holder….", whence a conclusion was drawn that the business reputation is, together with the exclusive rights to the results of intellectual activity and individualisation means, an independent subject of the franchise contract (Bakaeva, 2012: 13; Sukhanov, 2011: 625; and others).

However, clause 1 of Art. 1027 of RF CC, where the definition is given of franchise contract as an agreement, for the purpose of which "one party (right holder) shall transfer to the other party (user) for a fee for a term or for an indefinite period of time the right to use in the user's entrepreneurial activity the scope of exclusive rights, which belong to the right holder, including the right to trade mark, service mark, and other items covered by the exclusive rights, provided for by the contract, particularly, to trade designation, knowhow", makes no mention of the business reputation as the contract subject.

The text of clause 1 of Art. 1027 of RF CC reads that the subject of this contract is a scope of exclusive (i.e., pursuant to Art. 1226 of RF CC, property-related) rights to the results of intellectual activity and individualisation means, a comprehensive list of which is incorporated into Art. 1225 of RF CC, where no business reputation is included.

Thus, it is not clear in conditions of some inconsistency between cl.1 and cl. 2 of Art. 1027 of RF CC, whether the law really suggests that the business reputation should be considered as an independent subject of franchise contract, or it is an illusion, related to shortcomings in legal engineering technique. This situation shall be analysed.

Art. 1032 of RF CC, when defining the obligations of a user, states that it is the individualisation means - trade mark, service mark, trade designation, which are used pursuant to the contractually specified conditions. The article makes no special mention of the business reputation. Here, the essence of most user's obligations enshrined in Art. 1032 of RF CC, for example, to ensure that the quality of the goods produced by a user, performed works and rendered services conforms to the quality of identical goods, works, and services, directly produced, performed, and rendered by a right holder; to comply with the instructions and directions of a right holder related to ensuring that the nature, methods and conditions of us-

ing a scope of exclusive rights conform to the way of using this scope of rights by a right holder himself, including those associated with the interior and exterior decoration of commercial premises, utilised by a user when exercising the rights granted to him under the contract; to render buyers (clients) all supplementary services, on which they would have reckoned, buying (ordering) a product, work, or service directly from a right holder, quite obviously indicates that they are oriented to ensuring as much similarity between a user and a right holder as possible, when conducting the user's business activity. In fact, a holder of the business reputation (a right holder) actually extends his personality to a party that uses his individualisation means, "replaces" him by himself in the eyes of society, thus, covering him with a veil of his business reputation, not alienating it from himself. That is why the business reputation, not being alienated from a right holder, is actually utilised by a user, since in the eyes of society the distinctions between a right holder and a user become blurred.

Despite the above-mentioned general orientation of the user's obligations to ensure as much similarity between a user and a right holder as possible, no full matching in their personalities in the eyes of society is still allowed in the law. This is done by establishing a user's obligation in the same Art. 1032 of RF CC to inform buyers (clients) in the most obvious for them manner that he usesa trade designation, trademark, service mark, or other individualisation means based upon franchise contract. In the opinion of the author, this obligation is needed specifically because the activity of a user affects a right holder's reputation, rather than his own business reputation, as long as there is almost no distinction between their personalities in the eyes of society. Since a right holder's business reputation can potentially suffer from actions of a user, this obligation serves as a specific "writ of protection" for the business reputation of a right holder. If, pursuant to a contract, the business reputationwas to be transferred to a user and was to become his property, it would be obvious that there is no need in this obligation.

Article 1031 of RF CC, devoted to obligations of a right holder, also enshrines a measure, which ensures protection of business reputation of a right holder – an obligation of a right holder to provide a user with a constant technical and advisory assistance, including support in training and continuing education of employees, and to control the quality of goods (works, services), produced (performed, rendered) by a user, based on a franchise contract. It is conceivable that if the quality of goods (works and services) of a user is worse than that of a right holder, it, when there

is almost no distinction between their personalities in the eyes of society, will affect the right holder's business reputation and not a user's one. Correspondingly, if business reputation of a right holder really belonged to a user pursuant to the contract, the obligation to take care of qualification of staff and quality of goods (works, services) should be imposed on a user himself as a measure, which ensures maintaining the proper level of the business reputation. Since the considered obligation is still imposed on a right holder, rather than on a user, the finding that a right holder's business reputationis not vested in a user, should be confirmed, the idea that, coupled with the above arguments, confirms the conclusion that business reputation cannot be considered as an independent subject of franchise contract.

So, how should the rule enshrined in cl. 2 of Art. 1027 of RF CC be interpreted in such a context? Pursuant to this clause, franchise contract implies "the use of a scope of exclusive rights, business reputation, and commercial experience of a right holder to a certain extent, in a certain territory or without indicating it, applicable to some sphere of entrepreneurial activity". Does this provision mean that the subject of franchise contract is not only a scope of exclusive rights, but also the business reputation and commercial experience of a right holder? The only conclusion can be inferred from all the above said: it does not mean it. If this statutory provision is thoroughly analysed, one can see that it enshrines not a subject of the contract, but indicates other conditions, which can be defined in the contract – scope, territory, certain sphere of entrepreneurial activity, within which the scope is to be utilised (Braginskiy and Vitryanskiy, 2002: 1011). This provision can also be considered as imposing an obligation on a user to utilise the obtained scope of exclusive rights (first of all, to individualisation means) and everything that turns out to be objectively, actually associated with it (and this, throughout the text of law, is not only a business reputation, but a commercial experience of a right holder) within the frameworks specified by the contract.

Hence, systematic interpretation of the law leads to a conclusion that no reasons are provided by the law to consider the business reputation as an independent subject of franchise contract, hence, the provision of cl. 2 of Art. 1027 of RF CC, which had given the reasons for discussing its alienability from an entity-holder, should be considered awkwardly formulated.

In general, the given reasoning lead to an idea that the scientific structure of transferring business reputation (or at least the right to use it) from one person to another is absolutely unnatural and inconsistent with the

actual situation. When entities interact, each of them has business reputation (even the least, and maybe even negative), and it is impossible to "combine" one's own and someone else's reputationin the same individual. One should either "merge" (match) in the public consciousness with another personality and "work" for their business reputation (through using its individualisation means), not developing one's own business reputation therewith, or keep distance from another personality, "be oneself", prove oneself with one's own activity, using one's own individualisation means, thus fixing one's own personality and business reputation in the public consciousness. However, to this effect, it may require refusing to use in this activitysomeone else's individualisation means, since they work for another personality and reputation. In this context, the statement appears valid that the main specific feature of the franchising contract is that "a right holder, so to speak, shares a part of his personality with a user" (Avilov, 1996: 557).

A simple partnership contract shall further be considered, which, like a franchise contract, is presented as an example of alienability of business reputation. Pursuant to Art. 1041 of RF CC, under the simple partnership contract (joint activity agreement) two or several persons (partners)shall join their contributions and jointly actwith no corporate status to derive profit or attain otherlegitimate objective.

According to cl. 1 of Art. 1042 of RF CC, business reputation can be a partner's contribution to a common cause. However, simple partnership, pursuant to cl. 1of Art. 1041 of RF CC, is not a legal entity, hence, when a partner makes a contribution in the form of business reputation, no alienation of this benefit can occur from him,if only because there is no a legal capacity entity, in favour of which it could have been done. Pursuant to cl.1 of Art. 1043 of RF CC,only shared ownership of partners to the property provided by them as a contribution, i.e. material objects, may arise.

It is believed that the very fact of participation of a partner, who has a business reputation, in a partnership, on its own leads to distributing it to the partnership as an association of entities, without alienation from a holder. The same effect of transferring, distributing public concepts of business traits of a specific partner to a created association of persons occurs, similarly to how it takes place in franchise contract. This effect is strengthened when a partner is not just involved in a partnership, but acts on behalf of all partners based on cl. 1 of Art. 1044 of RF CC.

By and large, it should be noted that regardless of whether a particular partner brought his business reputation as a contribution or not, it will in

any case be spread over the entire partnership. If a partner goes out of the partnership, business reputation will "go" together with him irrespective of what other partners want. Hence, it makes no sense to make a contribution to the common cause exactly in the form of business reputation, since it is automatically spread over the common causejust when a partner enters into partnership. Correspondingly, the rule existing in Art. 1042 of RF CC about potential contribution in the form of business reputation (and professional knowledge, skills and abilities, business connections)should not be evaluated positively. The fact that such "objects" cannot be a contribution of a particular partner, also proves that not anyone individually, but each participant in a partnership has business reputation, professional knowledge, skills and abilities, business connections, and it would be strange if someone contributed a property, and someone else contributed only reputation. It makes no sense to bring reputation, professional knowledge, etc. as a contribution, since all this is just a "supplement" to a personality of each partner. It is precisely because all these are the attributes (characteristics, competences) of a contract subject, it is inacceptable to consider them as a subject (object) of the contract. It appears reasonable to contribute only property, which is a material base for joint activity. Here, it is obvious that since each of the partners actually has both business reputation, professional knowledge, skills and abilities, and has business connections, perhaps, it would be appropriate to entrench an obligation of each of them to use all this for the benefit of partnership, in the same way that an obligation of a user is enshrined in a franchise contract to use the scope of exclusive rights to a certain extent, specified in the contract (cl. 2 part 1027 of RF CC).

Nevertheless, the current version of the law not only allows tocontribute business reputation, but also to assess its cost to further, depending on the cost of contributions made by each of the partners, distribute the profit derived from joint activity, unless otherwise provided for by the contract (Art. 1048 of RF CC). Without delving so far into the question of potential monetary valuation of business reputation, it shall be noted that not a business reputation as such has a real impact on the size of profit of the entire partnership and, correspondingly, of each partner, but the activity itself (including the use of common property composed of property contributions) of all the partners jointly and severally for the benefit of a partnership. Supposing that a partner contributed only his business reputation, however, in doing so no actions were taken by him for the benefit of the partnership before third parties, it can be safely stated that he in no way

facilitated deriving profit. Perhaps, that is why the law permits partners to retreat from the principle of distributing profit in proportion to the cost of their contributions to the common cause (Art. 1048 of RF CC), where the "cost" of business reputation is included. It appears that this provision is oriented to accounting the activity itself of each one in the interests of partnership, which is a real, rather than aeriform, personal contribution to deriving profit.

Thus, cl. 1 of Art. 1042 of RF CC, creating an illusion of alienability of business reputation from its holder, should be deemed to be awkwardly formulated, likewise cl. 2 of Art. 1027 of RF CC.

Now, such an attribute of intangible benefit as absence of economic (property-related) content shall be considered, which means impossibility of determining its cost and, respectively, evaluating it in monetary form.

It is often noted in the scientific literature that business reputation cannot be precisely valuated, rather than cannot be valuated at all (Gavrilov, 2016: 64; Surzhik, 2007: 30). However, what is this accurate or approximate assessment needed for, if business reputation is inalienable from a holder? And how is it possible to evaluate someone else's concept of oneself in monetary form, specifically, if the ideas of an entrepreneur's himself about his reputation do not correspond to his image, which exists in the public consciousness?

When a question is discussed in the scientific literature about the "cost" of business reputation, the already mentioned Accounting Regulations "Accounting of intangible assets" (AR 14-2007) (hereinafter – Provision) are usually referred to.

Although it is not directly specified in this Provision, what is related to intangible assets, clause 3 of section I indicates the attributes of objects, to be taken into account as intangible assets, such as:

1) ability of an object to bring economic benefits to an organization in the future (for example, an object is designed to be used in manufacturing the product, in performing works, or rendering services, for organizational management needs, or for using in activity aimed at attaining the objectives of creating a non-profit organisation);

2) an organisation's right to gain economic benefits, which can be brought by this object in the future, what should be approved by the properly formalised documents, indicative of the existence of the asset as such and the right of this organisation to the result of intellectual activity or individualisation means –patents, certificates, other protection documents, contract on alienation of the exclusive right to the result of intellectual activity

orindividualisation means, documents, approving transfer of the exclusive right with no contract, and so on).
3) potential spin-offor separation (identification) of an object from other assets.
The above-stated attributes of the objects related to intangible assets by the Provision, quite unambiguously indicate that the objects of intellectual property and individualisation means are the case in point. However, as was already mentioned, business reputation does not relate to them. In spite of that, according to section VIII of the considered Provision, business reputation is subject to accounting as part of intangible assets of legal entity, and pursuant to this document, it is suggested that the cost of business reputation should be determined as a difference between the purchase price of an enterprise and its total assets value. It is indicated that the positive business reputation is considered as an extra charge to a price for the purchased property complex awaiting the future economic benefits, and negative business reputation, conversely, should be considered as a discount on price, given to a buyer since there are no factors of having stable buyers, quality reputation, marketing and sales skills, business connections, management experience, level of the staff qualification, etc.
As is seen, the case at hand is about determining the "cost" of business reputation applicable to the situation of purchasing (alienating) an enterprise, understood as "property complex, intended for conducting entrepreneurial activity" (Art. 132 of RF CC), i.e. the situation related to conclusion of civil-legal contract.
Respectively, two quite conventional questions arise: what is the subject of the enterprise purchase and sell agreement, and how is the price determined in this case?
If the first question is considered, attention should be paid to defining an enterprise as a property complex in Art. 132 of RF CC. Pursuant to this Article, an enterprise incorporates all types of property, intended for its activity, and the rights to designations, individualising the enterprise, its products, works, and services, and other exclusive rights. As is seen, business reputation is not incorporated by the law into the enterprise composition, what seems quite logical, since, first, it characterises non-sellableproperty complex, but its owner (legal entity or individual entrepreneur, being a seller), and second, as it has already been said, it is neither a property nor an individualisation means of a seller.
Thus, it appears that the Provision is not only self-contradictory since it requires considering as an intangible asset an object (business reputation),

which does not conform to the attributes of an intangible asset specified in the Provision itself, but it contradicts the law, namely, Art. 132 of RF CC, not incorporating business reputation into the composition of an enterprise as a property complex.

From this viewpoint, the second of the raised questions should be considered, namely, the question about the price of an enterprise as a property complex: if business reputation cannot be incorporated into it, hence, it is not subject neither to accurate, not approximate assessment, and it is therefore neither appropriate, nor legal to talk about its "cost".

Considering, however, that the Provision, contravening the law, still offers some calculation of the business reputation "cost", the existing situation shall be analysed.

It is generally known that the price is an essential condition of the enterprise purchase and sell agreement, i.e. it should be necessarily agreed by the parties, otherwise, the agreement will be deemed unconcluded. Quite obvious that when determining the price, the parties are in the sphere of the effect of contractual freedom principle, entrenched in Art. 421 of RF CC. It means that they can define any price, which suits both parties. This price can differ from the cost of the enterprise's assets both upwards, and downwards. An increase in price with respect to the price of assets can reflect, among others, "expected economic benefits", as is said in the Provision. However, why is it associated exactly with the "cost" of business reputation? These benefits can be related to multiple different factors, for example, with the unique combination of property objects and technologies, absent from potential competitors, with the intended purpose of property complex to conduct an innovative activity, not conducted by anyone else, with weak competition in the sphere of activity or in the territory, where a buyer will act, and so on, hence, there are no solid grounds for considering this extra charge as the "cost" of business reputation as such.

As an additional argument for this thesis, it seems necessary to further focus attention on the following: based on the provision, business reputation purchased as a part of property complex (what is actually unreal, as is justified above, pursuant to Art. 132 of RF CC), which characterises business reputation of a seller, for some reason should be taken into account in accounting documentation of a completely different entity – a buyer, who has nothing to do with business traits of a seller. It is not clear what logics this rule complies with. And the rule on amortisation of reputation (!) and determining the method for computing depreciation charges looksout of place here. It follows that the purchased reputation should definitely wors-

en and diminish, rather than grow and improve, what is weird in terms of the activity of any entrepreneur. On the one hand, it is clear that if this reputationis someone else's and it, by its nature, cannot become one's own for a buyer, it should stepwise "diminish". On the other hand, what should someone else's "asset" be taken into account for at all? It is far more logical in this case to take into consideration one's own reputation, formed by one's own current actions. It follows that when purchasing a company, a buyer will have to take into account two reputations: its own and purchased "someone else's" reputation, simultaneously, what seems completely unnatural. But in this case, which is obviously out of the sphere of the effect of the contractual freedom principle, the question on the "cost" of this intangible "asset" turns out to be insoluble, since there are no criteria for determining the cost of intangible benefits. O. V. Karaicheva (2014) proposes an economic methodology for computing the "cost" of business reputation, however, it is noted in the work as such that "there are no uniform approaches to define the business reputation, and classification of factors affecting it", "different sets of indices and methods for computing them are offered" (p. 92) in the economic literature, whence it follows that there are no clear objective criteria to compute the "cost" of business reputation in economic science as well. Perhaps, precisely because this object by its nature really cannot be evaluated in monetary form, since even approximate evaluation of its cost requires substantiated criteria for such calculations. Moreover, it is not clear, why it should be done at all, if the question on the "cost" of business reputation actually becomes relevant only when the contracts are concluded, whichimplies an automatic transition to the sphere of the effect of the contractual freedom principle, and everything referred to as the "cost" is actually only a consequence of applying this principle.

The absence of economic (property) content of business reputation is more obviously demonstrated by the sphere of delict obligations, where contractual freedom principle is not applied.If the business reputation, damaged as a result of delict, had a cost, it would be possible to compute, by what amount it decreased, to determine the extent of compensation (as it takes place in case of damaging property). However, it is not only impossible, since there are no tools in the court to measure it, and the contractual freedom principle cannot help here, but there is no need for it, because it is obvious that when there are damages to business reputation, the consequences have non-material nature, corresponding to the nature of the business reputation itself. They are expressed in worsening the opinion

on business traits of a subject-holder in the eyes of potential or existing partners, consumers of his products, public and law entities, which can impede the formation of or destroy already existing business connections, "deter" consumers, hinder hiring high-qualified staff and so on. Of course, these intangible consequences potentially threatenproperty welfare of a subject-holder of business reputation as well, can serve as a reason for property losses, however, they themselves are not property-relatedand therefore cannot be expressed in the form of some cost. To eliminate these non-material losses, scientific literature suggests that such a method for protection should be introduced into law as compensation of "damage to reputation" (Dmitrieva, 2016: 20-23), the more so that it is actually used by courts (Rozhkova, 2010), and Judicial Chamber on Economic Disputes of the RF Supreme Court in Definition of 18 November 2016 No. 307-ES16-8923 re: No. A56-58502/2015 confirmed that a legal entity has the right to compensation of damage to reputation as the intangible one.

4. Conclusion

Thus, the conducted comprehensive analysis of the most essential attributes of the entrepreneur's business reputationcreates grounds for synthesising the obtained results and drawing a general conclusion on the nature of this object of civil rights.

1. An entrepreneur's business reputationin conditions of market economy is neither transformed into a property-non-property item, nor a property item, and does not acquire the features of property, but preserves the most basic attributes of an intangible benefit, namely, it is inherent in an individual (inalienability and untransferability) and cannot be estimated in monetary form (absence of economic content).

These attributes contribute to the conclusion that it is impossible to consider as an independent subject of a civil-law contract. All the norms of the Russian Federation civil law, which create an illusion of alienability and evaluabilityof business reputation in monetary form, cl. 2 of Art. 1027 and cl. 1 of Art.1042 of RF CC, and section VIII of the Accounting Regulations "Accounting of intangible assets", in particular, should be corrected through eliminating there from a mention of the business reputation as a subject of contract and an item, subject to accounting as an intangible asset.

2. No freely transferable right to use a business reputation exists, since the business reputationitself is inalienable as an object of this right. There is no point in transferring the right to use an object without transferring an object of use as such.

The use of business reputation by an entity itself, being its holder, and a user under franchise contract (as a result of actual distribution of a holder's business reputation to a user through a holder's individualisation means) has actual, rather than legal nature.

3. Business reputation itself as an intangible benefit and its functions fulfilled in the property relations shall be distinguished. Despite the fact that the business reputation as such doesn't have property content as an intangible benefit, it has economic (property-related) function in the property relations, which affects an entrepreneur's property welfare in an obvious way.

It should be noted that public assessment of not only business reputation, but also of other traits inalienable from an individual and these traits as such affect any social relations, in which this individual is involved. For example, the appearance of a man, which is considered by society or professional community as model, affects their potential for becoming a model ("corporate identity"), physical and psychological data (health, capabilities, character, etc.) of a sportsman to achieve maximum competitive results and their respective evaluation affect his capability for getting in a country's national team and take part in prestigious international contests, etc. Here,it is clear that implementation of all theseattributesassociated with individual characteristics of a personality and their public assessment, somehow affects property welfare of their holders, what, following the logics of scientific studies criticised in this article, would lead to declaring that appearance, life, health, and similar material benefits have some property-related component. There are such tendencies in the scientific literature, for example, in the cited herein works of I. A. Mikhailova, S. A. Slipchenko, and others. It would be a mistake, since such a conclusion would indicate confusing an intangible benefit itself with its function in social, including, property relations.

Since entrepreneurs are involved in economic (property) relations, public assessment of their personal business traits (business reputation) affects exactly them and them only, which creates an illusion that business reputation comprises property-related elements. Actually, taking into account all the considered in the article, no property-related elements of the attributes of business reputation should be discussed, but economic (material, property) function of it. This function is expressed in the abilityof business reputation to affect the property status of an entrepreneur through increasing or decreasing the relevance of the results of his activity on the appropriate market, on an entrepreneur's capability for establishing strong and

beneficial business relationships, on his attractiveness for high-qualified staff, etc., what finally, coupled with other factors of his activity, creates a certain level of his overall property well-being.

4. Considering all the above-said, the entrepreneur's business reputation should be defined asan inseparable from an individual (inalienable and non-transferrable), intangible benefit with no cost, having therewith a pronounced function of affecting the property relations, in which its holder is involved (economic function).

If the nature and content of the right to business reputation are examined from these points of view, it appears that it can help in avoiding errors related to defining the number and content of legal powers of an entity-holder of the business reputation, and the elements of the system of methods for protecting this intangible benefit, also bearing in mind a compensation of damage to "reputation" – a method not yet defined in the Russian civil law.

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