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INTELLECTUAL CAPITAL – NEW OBJECT REGULATED BY PROPERTY LAW?

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Annotation. *The article attempts to present a thorough analysis of intellectual property, as main property of a modern company, from the perspective of private law. The article analyzes the essence of the intangible resources that form the intellectual capital and discusses whether the modern institutes of law allow the universal protection of companies' intellectual capital.*

The first part of the article analyzes the conception of intangible resources and provides their classification. The second part of the article discusses the understanding of intellectual capital and importance thereof to modern companies. In the third part of the article, the possibility to financially account all intellectual property of a company is analyzed. The fourth and fifth parts of the article reveal the possibilities of legal protection of intellectual capital. The law on intellectual property is not sufficient to protect all intellectual capital because it protects only that part of intangibles, which become the objects of the intellectual property.

Keywords: *intellectual capital, intangible resources, knowledge economy, intellectual property law, property, goodwill.*

Introduction

The paramount economical-social changes in the 20th century caused the transition from industrial economy to knowledge-based economy. Industrial economy is described as the economy where economic growth is determined by the efficient use of tangible resources. Whereas in knowledge-based economy, defined as the third stage of economic development, competitive advantage is based on the efficient use of intangible resources. Thus the capital and manpower are no longer the key elements determining competitive advantage in modern economy. Rapid technological development, modern means of communication, global use of internet and globalization have drawn the attention of authorities, societies, companies and individuals to intangible resources. Such concepts as “knowledge society”, “knowledge economy” and “information society” which emerged in the 20th century were designed in order to emphasize the consequences of economic changes and the influence of knowledge on the economic development. Consequently, due to such substantial structural changes in economy, knowledge became the commodity and the object of various economic transactions. Furthermore, the need of global spread of knowledge promotes the creation of knowledge networks.

Intellectual capital, generally defined as the knowledge that creates an economic value, became the object of numerous interdisciplinary researches. Different scientists¹ propose various definitions of intellectual capital (from 37 to 45). Defining the concept of intellectual capital or providing a thorough classification of intangible resources is not the purpose of this article. Therefore, the concept of intellectual capital and the classification of the intangibles will be analyzed in a nutshell.

In 1998 – 2001, the European Commission financed the high level expert group’s research MERITUM aimed at the analysis of the nature and classification of the intangible resources. In the outcome of this research, the Guidelines for Managing and Reporting on Intangibles² were prepared. These guidelines became the keystone for further researches³ and the basis for the European Union legislation. Thus in this article, these guidelines shall be regarded as the core source.

The concept „intangible resources“ derives from the field of financial accounting, whereas the concept „intellectual capital“ derives from the field of human resources management. Eventually these concepts were brought into practice as inter-changeable

- 1 Arenas, T.; Lavanderos, L. Intellectual Capital: Object or Process? *Journal of Intellectual Capital* [interactive]. 2008, 1: 77 [accessed 2009-03-15]. <www.emeraldinsight.com/1469-1930.htm>; Marr, B.; Moustaghfir, K. Defining Intellectual Capital: a Three-dimensional Approach. *Management Decision* [interactive]. 2005, 9: 1114 [accessed 2009-03-15]. <www.emeraldinsight.com/0025-1747.htm>; Swart, J. Intellectual Capital: Disentangling an Enigmatic Concept. *Journal of Intellectual Capital* [interactive]. 2006, 2: 136 [accessed 2009-03-15]. <www.emeraldinsight.com/1469-1930.htm>.
- 2 Guidelines for Managing and Reporting on Intangibles. MERITUM project [interactive]. 2001 [accessed 2009-04-02]. <http://www.pnbukh.com/site/files/pdf_filer/MERITUM_Guidelines.pdf>.
- 3 For instance, research carried out by the high level of expert group and financed by the European Commission - RICARDIS, aiming to help small and medium sized business to identify, evaluate, account and create intellectual capital. Reporting Intellectual Capital to Augment Research, Development and Innovation in SME’s [interactive]. 2006 [accessed 2009-04-02]. <http://ec.europa.eu/invest-in-research/pdf/download_en/2006-2977_web1.pdf>.

terms to describe incorporeal resources creating future economic value, which often cannot be disclosed in financial reports. However, the term “intangible resources” is more concrete because it denotes incorporeal investments, which can be appraised according to the standards of financial accounting, whereas these operating standards of financial accounting preclude from appraisal and disclosure of intellectual capital.⁴

Unfortunately, intellectual capital still lacks attention of Lithuanian scientists, though it is rather widely analyzed by scientists abroad. The majority of publications on this subject-matter are focused on intellectual capital as a concept either of financial accounting or human resources management fields. However, publications that provide a legal approach to the nature of intellectual capital and its legal protection are scarce. Professor William van Caenegem from Bond University (Australia) should be distinguished among authors analyzing intellectual capital for his thorough analysis on legal protection of intangibles, including intellectual capital.

The purpose of this article is to thoroughly examine intellectual capital as an essential asset of modern company from the perspective of private law. Therefore next to the analysis of the nature of intangibles, the evaluation of operating legal institutes (e.g. intellectual property law, property law in general) to the effect of due legal protection of intellectual capital is provided in this article. Comparative, descriptive and systematic analysis qualitative methods of data processing have been used for the purposes of this research.

1. Classification of Intangible Resources

The intangible resources are generally defined as non-monetary sources of probable future economic profits that lack physical substance, are controlled (or at least influenced) by a company as a result of previous events, and may or may not be sold separately from other corporate assets⁵.

Generally speaking, the objects can be divided into two major groups according to their form, i. e. corporeal and incorporeal. Incorporeal objects lack tangible form because they cannot be defined in space. Thus this lack of tangible form is regarded as the first criteria in dichotomous distinction between corporeal and incorporeal objects. The second distinction is inconsumability and renewal of incorporeal objects after their use. Of course, some corporeal objects possess the ability to renew or are inconsumable. Therefore, this feature cannot be the distinguishing one.

Thirdly, incorporeal objects can change during their usage. Obviously, corporeal objects can also change their form in the process of usage, e. g. raw materials are processed into things. However, the corporeal objects usually decrease in quantity while being used, whereas the incorporeal objects are capable to increase in quantity while being used. For instance, the transmitting of knowledge (information) to the third parties

4 Guidelines for Managing and Reporting on Intangibles.

5 *Ibid.*

results in its qualitative and quantitative increase. Thus, the latter feature should be regarded as the demarcation criteria of incorporeal and corporeal objects.⁶ In respect of the abovementioned, the incorporeal objects (intangible resources) can be generally defined as: (i) all things of immaterial existence, (ii) which are used or potentially usable for whatever purpose, (iii) which are renewable after use, (iv) which can remain or increase in quantity or (and) quality after being used.

The fundamental intangible resources in knowledge-based economy are information and knowledge. Knowledge is dynamic, in other words, it is information in action, information understood and put into practice. The term “knowledge” implies a connection between information and process of constant learning. Therefore knowledge always associates with originality, novelty and innovation. Knowledge is the ability to gain information and use it efficiently and thus knowledge is more valuable than information. Furthermore, company knowledge can be either tacit or codified. Tacit knowledge is defined as knowledge in the heads of company’s employees, whereas codified knowledge is expressed in some kind of records and can be retrieved; hence it can be reviewed and shared among others. However in order the knowledge could create economic profit it must be understood and interpreted. Although in innovation driven economy knowledge can be externalized, it rarely can be used separately from people or transferred to other people because knowledge usually does not possess the ability to participate in civil turnover. A company can obtain, control or transfer codified knowledge; codified knowledge can be more easily turned into intellectual property, although intellectual property law does not cover all codified knowledge. Meanwhile, tacit knowledge contained in the heads of the employees, can be controlled inasmuch as the employees themselves. Thus, the transfer and control of tacit knowledge is covered not by the intellectual property law but by the labour law. In other words, labour markets but not knowledge markets determine knowledge mobility and transfer.⁷

Intangible resources are classified in the following groups:

1. *Human capital* – tacit knowledge that belongs to a person, i. e. personal skills, qualification, abilities, individual values, hopes, health, manpower, competence of assessing, deciding, acting, behaving, personality, legally protected qualification, degrees in science, etc. The distinguishing feature of this group of intangibles is that they are permanently linked to the person, and cannot be separated and thus transferred.
2. *Social capital* – intangibles linked to several people, i. e. personal relationship, social norms, traditions, trust, commitment, social competence (ability to discourse, conflict and cooperation), personally produced services, power and reputation based on personal characteristics. The distinguishing feature of this group of intangibles is that they are shared by a group of people who know each other directly.

6 Diefenbach, T. Intangible Resources: a Categorial System of Knowledge and Other Intangible Assets. *Journal of Intellectual Capital* [interactive]. 2006, 3: 409 [accessed 2009-04-12]. <www.emeraldinsight.com/1469-1930.htm>.

7 Caenegem van, W. Intellectual Property and Intellectual Capital. *Law Papers* [interactive]. Bond University, Faculty of Law. 2002, 3: 11 [accessed 2009-04-12]. <http://epublications.bond.edu.au/law_pubs/20>.

3. *Cultural capital* – intangibles shared by a group of people but not linked to that group, i. e. language, cultural traditions and heritage, corporate culture, working climate, informal rules, social norms, values, rules, law. If certain people leave the group, this cultural capital is transferred to other individuals because this kind of intangibles is deeply embedded in the institutions and routines of this social group.

Human, social and cultural capitals merge within the individual in the course of socialization, learning and performance of daily activity. Thus, it is merely possible to single out these intangibles or separate them from individuals and transfer them to other individuals.

4. *Statutory capital* – intangibles shared by a group of people, which are not linked to that group and may be separated and transferred to other people, i. e. role, social position, power, status and influence related to a position, rights and duties related to a position. The distinguishing feature of this group of intangibles is that they are transferable. This category describes person-independent positions in a social system and exclusive possibilities and responsibilities arising from or related to such a position. Whoever holds the position gets access to the intangible resources related to it.

5. *Informational and legal capital* – transferable intangibles, i. e. data, information, explicit knowledge, intellectual property, contractual rights and duties. These intangibles are not necessarily linked to any group of people or individual, because they exist autonomously. It is something that can be identified individually without being necessarily shared or understood by one or more individuals.

6. *Embedded capital* – intangibles not linked to any individual and not transferable, i.e. immaterial infrastructure (hierarchies, planning, information, communication, coordination, administration, and controlling structures and processes), organizational knowledge and abilities embedded in technologies and models, routines, knowledge embodied in processed or produced goods (“artefacts”). The distinguishing feature of this group of intangibles is that they are non-separable, embedded either in immaterial structures and processes or material goods.

Such full-scale classification of intangibles permits to identify and classify absolutely all intangible resources. However, the prevalent and universally accepted classification of intangibles was provided by the Guidelines for Managing and Reporting on Intangibles drawn up by high level expert group of MERITUM project.⁸ According to these guidelines, intangible resources are divided into three groups:

1. *Human capital*, consisting of knowledge, skills, experience and abilities of a firm’s employees, i.e. the intangibles that are in the heads of the employees, which cannot be separated from individuals and thus transferred. For instance, employees’ innovation, creativity, loyalty, education, know-how, motivation, flexibility, ability to learn, teamwork ability, and etc.

2. *Structural capital*, consisting of organizational structures, routines, procedures, databases, i.e. everything what is left in a company when employees leave. For instance, organizational flexibility, ability to document information, the existence of knowledge

8 Guidelines for Managing and Reporting on Intangibles.

centre, the general use of information technologies, organizational learning capacity, etc. Some of these intangibles may be legally protected and transform into intellectual property, legally owned by a company under separate title.

3. *Relational capital*, consisting of all resources linked to the external relationships of a company with customers, suppliers or research and development (R&D) partners. It includes that part of human and structural capital linked with the company's relations with investors, creditors, customers, suppliers, etc., and the perceptions that they hold about the company. For instance, image, goodwill, customers loyalty, customer satisfaction, links with suppliers, commercial power, negotiating capacity with financial entities, environmental activities, and etc.

2. Intellectual Capital – the Core Asset of a Modern Company

The concept of asset (wealth) plays the essential part in private law because this branch of law regulates all property relationship, which is not regulated by public law.⁹ Furthermore, the fundamental principle of private law establishes a rule that only objects that are owned by a certain individual can participate in the civil turnover.¹⁰ In respect of the aforesaid, it is obvious that every object of any property relationship is an object of ownership and thereby a certain form of wealth.

In the initial stage of development of law, wealth was perceived very narrowly, i.e. as a totality of corporeal things useful for individual. As the economic relationship developed and became more complex due to progress of science, the concept of wealth expanded insomuch that it includes incorporeal assets (e. g. intellectual property, property rights, securities, etc.).¹¹ Gradually the industrial economy has been replaced by the knowledge-based economy. And next to customary intellectual property, new form of wealth emerged – intellectual capital. In other words, intellectual capital containing information and knowledge becomes the essential asset of a modern company operating in knowledge-based economy.

Intellectual capital consists of human, organizational resources and external relationship of a firm. However, it is more than a mere sum of firm's human, structural and relational capital for the distinguishing feature of intellectual capital is the company's ability to “employ” knowledge so that it produces profit. In order to gain profit in a knowledge-based economy a company must use different intangibles in due course.¹²

Evidently intellectual capital is more than intellectual property because it consists of all intangibles of a company, notwithstanding the fact that not all intangibles can be protected by intellectual property law or disclosed in a financial statement. The majority

9 Civil Code of the Republic of Lithuania. *Official Gazette*. 2000, Nr. 74-2262. Article 1.1 (1).

10 Pakalniškis, V. Daiktai civilinių teisių objektų sistemoje. [Pakalniškis, V. Things in the System of Civil Rights' Objects]. *Jurisprudencija*. 2005, 71: 76-85.

11 *Ibid.*, p. 80-81.

12 Guidelines for Managing and Reporting on Intangibles.

of intangibles cannot be appraised and disclosed according to the operating standards of financial accounting. For instance, such intangibles as skills, abilities, experience of company's employees, organizational culture, structure, learning ability and technological advantage cannot be covered (or are covered only scarcely) by intellectual property law. Although some constituent parts of intellectual capital are impossible to externalize and evaluate, they determine the market value of a company.¹³

The circumstance that only industrial property and objects of copyright are covered by intellectual property law is due to the fact that intellectual property law originated before the rise of knowledge economy. Therefore human capital, knowledge, skills and other intangibles crucial to knowledge economy should fall under a separate group of objects not covered (or only scarcely covered) by intellectual property law.

Lately the perception of intellectual capital has altered. Theretofore, it had included only company's activity in research and development (R&D), patents and trademarks, whereas now the concept of intellectual capital embraces human resources, employees' skills, organizational structures (e. g., databases, technologies), networks of customers and suppliers. This shift can be explained by the fact that R&D is no longer the sole factor of innovation or creation of value of a firm. All intangibles take part in this process. Of course, intangibles *per se* do not create the value of a company nor promote economic growth. They must be combined with such factors as retaining high skilled and innovative employees or (and) promotion of employees' initiative, etc.¹⁴

In respect of the abovementioned, it can be concluded that intellectual capital is defined as a set of firm's intangibles, which create their economic value and determine competitive advantage notwithstanding whether they can be evaluated and disclosed in financial statement or not. Moreover the majority of intangibles is permanently linked with the people and thus cannot participate in civil turnover separately from them.

3. Evaluation of Intellectual Capital¹⁵

The operating international¹⁶ and national¹⁷ standards of financial accounting preclude the appraisal and disclosure of the majority of intangibles. Therefore financial statements provided by a company do not reflect the real market value of it. Moreover, financial analysts relying on such incomplete financial statements can provide finan-

13 Caenegem van, W., p. 10.

14 Bismuth, A.; Tojo, Y. Creating Value from Intellectual Assets. *Journal of Intellectual Capital* [interactive]. 2008, 2: 231-232 [accessed 2009-03-27]. <www.emeraldinsight.com/1469-1930.htm>.

15 Due to limited scope of this article, evaluation of intellectual capital is examined inasmuch as necessary to achieve the purposes of this research, i.e. answering the question whether intangibles can contain external value.

16 International Accounting Standards Board [interactive]. About the IASB. <International Accounting Standards Board (IASB)>. [accessed 2009-04-25] IASB prepares, issues and publishes international accounting standards.

17 In Lithuania the national Business Accounting Standards are prepared and approved by the Authority of Audit and Accounting. Law on Accounting of the Republic of Lithuania. *Official Gazette*. 2001, Nr. 99-3515. Article 3.

cial forecasts of company's activities which turn out to be either too optimistic or too pessimistic. Consequently, investors unaware of the real market value of a company can make decisions that can result in economic losses and thus can fully restrain from investing at all.¹⁸

The competition motivates companies to accumulate intangibles and to use them efficiently by creating profitable innovations. Since operating financial accounting standards preclude companies from disclosure of all their intangibles and therefore investors can no longer trust financial statements, companies voluntarily have to disclose this information. Such disclosure should be desirable for companies because it increases their market value. Although eventually financial accounting standards should be amended so that more intangibles could be appraised and disclosed, it is almost impossible to create such financial accounting system, which would cover every single intangible, due to the specific nature and unstable value of intangibles.¹⁹

Almost every operating indicator of financial accounting shows how efficient the economic activity of a company was in the past. However these indicators do not reveal to what scope a company can potentially generate profit in the future. In order to evaluate firm's future profit investors must take into account all company's means and tools for achieving long-term goals. This information can be obtained via market or directly from a firm. In 2003, the European Commission and Council passed the so called "modernization directive."²⁰ The goal of this directive is to help investors to evaluate a company's future prospects. According to the guidelines delivered by MERITUM project, the directive proposes two ways of disclosure: (i) to provide a descriptive statement indicating all organizational structures and other value-creating means of a company; (ii) to provide a stand-alone statement on intangibles.

In Lithuania the first method of disclosure proposed by the "modernization directive" was implemented by amending the Law on Financial Statements of Entities.²¹ Article 25 of the said law provides that private juristic persons (e.g., private limited liability companies, partnerships, etc.) must provide annual report, which is a part of annual financial statement. The annual report must include information on *inter alia* environmental and employee matters, operating plans and forecasts, activities in the field of research and development (R&D), etc. However, the Law on Financial Statements does not oblige firms to provide a stand-alone statement on intangibles. Although the lack of such provision should be regarded negatively, it does not preclude firms from providing stand-alone statement on intangibles on voluntarily basis. It should be noted that the disclosure of firm's intangible resources is foremost beneficial for the firm itself because it increases its market value.

18 Guidelines for Managing and Reporting on Intangibles.

19 Bismuth, A.; Tojo, Y., p. 234.

20 Directive 2003/51/EC of the European Parliament and of the Council of 18 June 2003 amending Directives 78/660/EEC, 83/349/EEC, 86/635/EEC and 91/674/EEC on the annual and consolidated accounts of certain types of companies, banks and other financial institutions and insurance undertakings. [2003] *OJL* 178/16.

21 Law on Financial Statements of Entities. *Official Gazette*. 2001, No. 99–3516.

In respect of the aforesaid, it might be concluded that it is rather impossible to create a financial accounting system, covering every single intangible due to the specific nature and unstable value of intangibles. However, thorough information on company's intellectual capital can be disclosed by providing stand-alone statements of its intangibles because only few of value-creating intangibles are appraised and disclosed in companies' financial statements.

4. Legal Protection of Intellectual Capital

In a knowledge-based economy, the disproportion between input of manpower, capital, energy and output is rather huge. Therefore, nowadays the accumulation of knowledge is more likely stimulated out of profit and benefit and not for public interest. In other words, the more profit is made of knowledge, the more a company is interested in creation or appropriation of knowledge. Public interest determines the need of legal protection of the investments put into the creation of knowledge. Thus knowledge-based economy is often defined as the expansion of property law into the field of knowledge as the scope of property law gradually covers more knowledge.

As the period of technological process and innovation cycle decreases and the importance of knowledge increases, modern companies must be capable to obtain, create and transfer knowledge very rapidly. A company can either create knowledge internally, i.e. by investing in R&D, or obtain it from outside, i.e. autonomous intellectual property firms, in a course of imitation, by employing high-skilled employees, buying learning and consulting services.

However the most efficient way of increasing the company owned value-creating knowledge is by educating its staff. During the learning process, companies' human capital is increased. Unfortunately, human capital is hardly controlled. Nowadays the costs of educational system is constantly climbing, thus the continual learning of firm's employees becomes more and more expensive. In knowledge economy, the prevalent tool of knowledge management is intellectual property law. Unfortunately, it does not and cannot cover the entire intellectual capital. As the value of knowledge is increasing, the need to appropriate more knowledge also increases. Consequently, the scope of legal protection of intellectual property law includes more knowledge and the implementation of this legal protection is exercised in more aggressive forms.

None of the modern companies own all necessary knowledge. Likewise single acts of knowledge appropriation do not create a permanent competitive advantage of a company. Therefore, the possibility to access knowledge owned by other companies or public bodies is of vital importance to every company in knowledge economy. Hence companies depend on each other in modern economy. Only the interplay of different companies results in a company's permanent access to necessary tacit and codified knowledge owned by others. Thus the creation and participation in knowledge networks is truly beneficial for every company.²²

22 Caenegem van, W., p. 13.

In knowledge economy the significance of intellectual property law is undoubted. However, it does not cover tacit knowledge contained in the heads of company's employees because this knowledge can be controlled by a company only fractionally. The relationship between a company and its employees is covered by labour law where the employee is always the weak party. The law protects information inasmuch as it can be regarded as commercial secret, therefore tacit knowledge, being very mobile and impossible to externalize, normally is not protected by the law. Another weakness of intellectual property law is temporality of its protection. However, the intellectual property law provides that the employer and not the employee possesses exclusive rights to intellectual property created in the workplace.²³ Consequently it can be concluded that a company should aim to (i) externalize tacit knowledge, (ii) employ and retain innovative and high-skilled staff.

Since it is no longer sufficient to rely on the protection of intellectual property law, companies must create protection strategies based beyond intellectual property law. Moreover, the ability to transfer intellectual property and its exchange value comes to the front, as the significance of exclusive rights that affect the holder's ability to forbid using its intellectual property gradually diminishes. In other words, the preventive function of intellectual property no longer prevails because in knowledge economy the intellectual property law is regarded as a tool for knowledge transfer.²⁴

Due to expensive, limited and inoperable legal protection provided by intellectual property law, modern companies must focus on getting competitive advantage by using knowledge more rapidly and efficiently, rather than merely trying to imitate their competitors. As the global innovation level spurs, the process of imitation becomes longer than the lifetime of imitated product, thus imitation is no longer profitable. Although intellectual property law is no longer efficient, its scope of regulation nevertheless is expanding. First of all, legislators and courts tend to provide legal protection for knowledge using intellectual property law. Secondly, companies are also interested in this kind of legal protection. Thereby such expansion of intellectual property law may result in inaccessibility of vitally important information. Hence the only way to avoid it, is to create and develop knowledge networks based on reciprocity, confidentiality and inter-license agreements, so that companies could interchange value-creating knowledge.²⁵

Companies operating in such context encounter the dilemma whether innovation is worth investing at all, because the majority of their created knowledge would not be duly legally protected and it might be rather impossible to gain profit for the transfer of knowledge. Although laws prevent monopolization of ideas, the legal protection of goodwill might be the keystone of legal protection of companies' intellectual capital. Since

23 Patent Law of the Republic of Lithuania. *Official Gazette*. 1994, No. 8–120. Article 8; Law on Copyright and Related Rights of the Republic of Lithuania. *Official Gazette*. 1999, No. 50–1598. Article 9; Law on Industrial Design of the Republic of Lithuania *Official Gazette*. 2002, No. 112–4980. Article 13; Law on the Legal Protection of Topographies of Semiconductor Products of the Republic of Lithuania. *Official Gazette*. 1998, No. 59-1655. Article 4(3), and etc.

24 Caenegem van, W., p. 13–15.

25 *Ibid.*, p. 17–18.

legal protection of different objects of intellectual property is complex, limited and expensive, in order to strengthen company's goodwill consumers should be orientated to a certain producer (company) rather than a particular trademark. The concept of goodwill embraces all company's products, intellectual property and intellectual capital, thus the value of goodwill contains the value of the said constituents.

5. Legal Nature of Goodwill

Article 4.38 of the Civil Code of the Republic of Lithuania (hereinafter referred as the Civil Code) provides that things and other assets are the objects of ownership. Section 1 of Article 1.97 of the Civil Code provides that objects of civil rights are things, money, securities, other assets and property rights, results of intellectual activity, actions and results of actions, other property and non-property values. According to the essential principle that only objects owned by a certain individual can participate in civil turnover,²⁶ it is obvious that all property values, i.e. objects possessing economic value and capable of participating in civil turnover, can be regarded as objects of ownership.

The question is whether goodwill, being the essential part of intellectual capital of a modern company, can be regarded as an object of ownership. In other words, the matter of the question is whether goodwill possesses an objective economic value and is capable of participating in civil turnover.

The concept of goodwill derives from English case-law, wherein the oldest known case which gave birth to the perception of goodwill is *Broad v. Jollyfe*²⁷ (1620). In the said case the plaintiff purchased all defendant's goods for a price three times higher than their market value on a condition that the defendant shall no longer compete with the plaintiff. However the defendant was in breach of the obligation not to sell similar goods in the same area as the plaintiff. The court held such promise valid for the defendant by voluntarily selling his all stock also sold the possibility to sell goods to his clients and receive profit out of it, i.e. the defendant sold the goodwill of his business. The classical definition of the goodwill was formed by *Cruttwell v. Lye*²⁸ (1810) case, establishing a rule that goodwill is "nothing more than the probability that the old customers will resort to the old place." Eventually the courts acknowledged that the value of goodwill can be attached not only to business place but to business name,²⁹ trademarks, etc.

At the turn of the 20th century, the concept of goodwill went through a major change. Starting from *Brett v. Ebel*³⁰ case, the courts finally started to dissociate the transfer of goodwill from the transfer of certain corporeal assets. In the said case, a freighter transferred the goodwill of his business by agreeing not to offer his services to old customers. Although no corporeal assets were transferred by this deal, the court held that

26 Pakalniskis, V., p. 80-81.

27 *Broad v. Jollyfe* (1620) 79 ER 509.

28 *Cruttwell v. Lye* (1810) 34 ER 129.

29 *Metropolitan Bank v. St. Louis Dispatch Co.* (1893) 149 U.S. 436.

30 *Brett v. Ebel* (1898) 29 A.D. 256, 51 N.Y.S. 573.

the promise not to offer services to old clients in the future is valid. This case, alongside with other leading cases³¹ of that time, could be regarded³² as the breakthrough of the concept of property law in common law tradition. Whereupon the objects of ownership were considered as anything of economic value or even of future value irrespective of its physical form. In other words, goodwill was universally recognized as a form of property,³³ without attempting to put it into specific category of property, because it was obvious that goodwill includes objective economic value and is transferable. Subsequently, the economic value, rather than easily-identifiable corporeality, became the distinguishing feature of any object of ownership.

Due to the dematerialization of objects of ownership, common law courts have started to increasingly perceive economically valuable intangibles as property. Eventually the question arose whether every single intangible can be regarded as an object of ownership because the content of ownership was perceived as a set of absolute rights *in rem*. The growing significance of intangibles in economy influenced the alteration of the concept of the content of ownership in common law tradition. Consequently, it was recognized that the right of ownership is a set of valuable rights limited according to the situation rather than an absolute dominion over things. The new concept of property accepts that property can exist whether or not there is any tangible thing to serve as an object of right.³⁴ In other words, property right ceased to be a fixed and homogenous set of rights because its content depends on the object it is attached to.

According to the new property concept, the property right consists of a set of relationships between the owner and other persons. Property is no longer attached to any *res* and thus has become merely a bundle of legal relations. In its modern sense, property is perceived as including four constituent elements: rights, privileges, powers, and immunities, with their correlatives: duties and not rights, liabilities, and disabilities. In common law tradition, the trend is the same even to this date, i.e. all valuable interests, their totalities and other objects of economic value, are regarded as property, if it is necessary and possible. The risk of such trend is that the circle of the objects of ownership can become too wide, inasmuch that every single economically valuable object could be regarded as property. Therefore, with the view of regarding a valuable interest as property, it must be justifiable inasmuch as the public interest allows it. In other words, a valuable interest can be property only if public interest demands that it should be protected by property law. Thus next to traditional results of intellectual activity (e.g., trademarks, inventions), unregistered trademarks and goodwill of business are a form of property

31 See for instance, *Wetherbee v. Green* (1871) 22 Mich. 311.

32 See for instance, Vandavelde, K. J. The New Property of the XIX Century: The Development of the Modern Concept of Property. *Buffalo Law Review* [interactive]. 1980, 29: 325–367 [accessed 2009-04-15]. <http://heinonline.org/HOL/Page?handle=hein.journals/buffr29&div=16&collection=journals&set_as_cursor=0&men_tab=srchresults>.

33 Bone, R. G. Hunting Goodwill: A History of the Concept of Goodwill in Trademark Law. *Berkeley Center for Law and Technology* [interactive]. 2006, 17 [accessed 2009-04-15]. <<http://repositories.cdlib.org/bclt/lts/17>>.

34 Vandavelde, K. J., *op. cit.*

even if they are permanently linked to a person. Such liberal approach to property does not preclude the origination of new property objects, as innovative forms of assets are easily accepted by the common law.³⁵ In respect of aforesaid, it should be emphasized that although recognition of goodwill as property is natural to common law, the content of the property right is always regarded as *sui generis*.

Nowadays the concept of goodwill embraces such intangibles as skilled employees, reputation of firm, good market connections, location of business in space and in market, and other unique features of a firm that increase its market value. Goodwill is an intangible asset of a company, which is impossible to appraise and disclose in its financial statement. Moreover, goodwill is usually permanently linked to a company and thus cannot be transferred separately from a company or a separate branch of business.³⁶ In other words, goodwill is that added value of a company, created by efficient use of the company's intellectual capital. Therefore goodwill, as well as intellectual capital, should be regarded as constituent parts of a property complex owned by a company.

In response to the question whether the perception of goodwill in the continental tradition of law allows putting goodwill amongst other property objects, the answer would be negative. Lithuanian private law is of no exception because it provides that objects of property should be separable from an individual in order to be transferred. Nevertheless, as the significance of intellectual capital and goodwill increases tremendously in the modern world, the need for protection of such assets under property law is a matter of public interest. The lack of self-sufficient civil turnover should not preclude perceiving these intangible assets as property, obviously on the condition that the content of property right in continental law tradition is to be revised in order to adjust it to intangibles.

Summarizing the aforesaid, it can be concluded that the legal protection of intellectual capital is not homogeneous, whereas the intangibles which can be transformed into intellectual property (e.g., inventions, industrial design, trademarks, etc.) are covered by intellectual property law, while the intangibles which can be separated from firm or its employees (e.g., commercial secrets, know-how, and etc.) can be protected by concluding agreements on confidentiality or non-competition. The rest of intangibles permanently linked to a company fall under the scope of goodwill and can be protected by unfair competition institute. However, a company cannot rely only on legal protection of its intellectual capital and thus has to apply management strategies integrally. Only such all-round protection strategy results in permanent competitive advantage with full-scale protection of a company's intellectual capital.

35 Ball, J. The Boundaries of Property Rights in English Law. *Electronic Journal of Comparative Law* [interactive]. 2006, 10.3: 3, 6, 18, 20 [accessed 2009-04-15]. <<http://www.ejcl.org/103/article103-1.pdf>>.

36 Seetharaman, A.; Sreenivasan, J.; Sudha, R. Managing Impairment of Goodwill. *Journal of Intellectual Capital* [interactive]. 2006, 3: 338 [accessed 2009-04-02]. <www.emeraldinsight.com/1469-1930.htm>.

Conclusions

Summarizing the analysis presented above, it could be concluded that:

1. Intangible resources can be generally defined as everything of immaterial existence, which is used or potentially usable for any purpose, is renewable after use, and can remain of the same quantity and (or) quality, or increase in quantity or (and) quality after being used.
2. The distinguishing feature of company's intellectual capital is the ability to "employ" knowledge so that it makes profit. Intellectual capital is more than a mere sum of a company's human, structural and relational capital because it consists of all intangibles of a company, notwithstanding the fact that not all intangibles can be protected by intellectual property law or disclosed in a financial statement.
3. It is rather impossible to create a financial accounting system that covers every single intangible due to its specific nature and unstable value. Full-scale information on a company's intellectual capital can be disclosed by providing stand-alone statements of its intangibles because only few of value-creating intangibles are appraised and disclosed in companies' financial statements.
4. The intangibles which can be transformed into intellectual property (e.g. inventions, industrial design, trademarks, and etc.) are covered by intellectual property law, while the intangibles which can be separated from firm or its employees (e.g. commercial secrets, know-how, and etc.) can be protected by concluding agreements on confidentiality or non-competition. The rest of intangibles permanently linked to a company fall under the scope of goodwill and can be protected by unfair competition institute.
5. Liberal approach to property in common law tradition, wherein the objects of ownership are regarded as anything of economic value or even of future value irrespective of its physical form, does not preclude the origination of new property objects, as innovative forms of assets are easily accepted by common law. The right of ownership is a set of valuable rights limited according to the situation rather than an absolute dominion over things. Therefore, goodwill is universally recognized as a form of property in common law tradition, having in mind that the content of the property right is *sui generis*.
6. The perception of goodwill in the continental law tradition does not allow putting goodwill amongst other property objects yet, as the objects of property should be separable from an individual in order to be transferred. However, as the significance of intellectual capital and goodwill increases tremendously, the need for protection of such assets under property law is a matter of public interest. The lack of separability should not preclude perceiving these intangible assets as property, on the condition that the content of property right needs to be revised in order to adjust it to intangibles.

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INTELEKTINIS KAPITALAS – NAUJAS NUOSAVYBĖS TEISĖS OBJEKTAS?

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Santrauka. Straipsnyje siekiama pateikti visapusišką intelektinio kapitalo, kaip pagrindinio šiuolaikinės bendrovės turto, analizę iš privatinės teisės perspektyvos. Straipsnyje analizuojama nematerialiųjų išteklių, sudarančių intelektinį kapitalą, prigimtis, svarstoma, ar dabartiniai teisės institutai padeda visapusiškai apsaugoti bendrovės intelektinį kapitalą.

Pirmoje straipsnio dalyje analizuojama nematerialiųjų išteklių samprata ir pateikiama jų klasifikacija. Nematerialiaisiais ištekliais laikytina viskas, kas yra nematerialios prigimties, faktiškai ar potencialiai gali būti naudojama bet kokiam tikslui, atsinaujina po naudojimo pagal paskirtį, naudojant gali ne tik kiekybiškai sumažėti, bet ir išlikti nepakitus ar kiekybiškai ir (ar) kokybiškai padidėti. Nematerialieji ištekliai yra skirstomi į žmogiškąjį, struktūrinį bei „sąryšinį“ kapitalą.

Antroje straipsnio dalyje aptariama intelektinio kapitalo samprata ir jo svarba šiuolaikinei bendrovei. Esminė intelektinio kapitalo savybė yra bendrovės gebėjimas „įdarbinti“ turimas žinias ir kitus nematerialiuosius išteklius taip, kad jie nešytų pelną. Intelektinis kapitalas yra daugiau nei vien tik intelektinė nuosavybė, nes jis susideda iš visų bendrovės nematerialiųjų išteklių, nepaisant to, gali jie būti išimtinių teisių objektu ar ne, atsispindi bendrovės balanse ar ne.

Trečioje straipsnio dalyje analizuojama galimybė finansiškai apskaityti bendrovės intelektinį kapitalą. Išanalizavus galiojančius finansų apskaitos standartus daroma išvada, kad dėl šių išteklių prigimties ir jų nepastovios vertės beveik neįmanoma sukurti sistemos visiems nematerialiesiems ištekliais apskaityti ir įvertinti. Dėl to išsami informacija apie bendrovės turimą intelektinį kapitalą gali būti suteikta sudarant specializuotas savarankiškas ataskaitas.

Ketvirtoje ir penktoje straipsnio dalyse aptariamos galimybės teisiškai apsaugoti intelektinį kapitalą. Tai daroma analizuojant intelektinės nuosavybės teisės ir nuosavybės teisės bendrąją prasme institutus. Intelektinės nuosavybės teisė nėra pakankama apsaugoti visą intelektinį kapitalą, nes ji saugo tik tą dalį nematerialiųjų išteklių, kurie tampa

intelektinės nuosavybės objektais. Nematerialieji ištekliai, kurie gali būti objektyvizuoti bei atskirti nuo bendrovės ir jos darbuotojų, gali būti apsaugomi sutarčių teisės nuostatomis, sudarant konfidencialumo, nekonkuravimo susitarimus. Likusi dalis nematerialiųjų išteklių, kurie neatskiriami nuo bendrovės, yra bendrovės prestižo (angl. goodwill) sudėtinė dalis, todėl jiems taikoma tokia pati teisinė apsauga kaip ir bendrovės prestižui.

Reikšminiai žodžiai: *intelektinis kapitalas, nematerialieji ištekliai, žinių ekonomika, intelektinės nuosavybės teisė, nuosavybė, bendrovės prestižas.*

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