

Alla Diduk,

Ph.D (Law), Associate Professor

ORCID ID: <https://orcid.org/00000003-2176-1055>

Stepan Lytvyn,

PhD (Law), Associate Professor

ORCID ID: <https://orcid.org/0000-0003-4449-8720>

SOME PROBLEMS OF PROTECTION OF COMMERCIAL SECRETS

National Aviation University

Liubomyra Huzara Avenue, 1, 03680, Kyiv, Ukraine

State higher educational establishment «Uzhhorod National University»

Institute of Educational and Professional Development

Goyosh utzo17. I / 2, 1065, Budapest, Hungary

E-mails: alisa-d@ukr.net, iepdoffice@gmail.com

The purpose of this article is to clarify some of the problems of trade secret protection and suggest ways to overcome them. The methodological basis of the study are general and special methods of cognition. The use of these methods made it possible to describe the problems of trade secret protection. Results: the study found that breaches of trade secrets are considered by international law as unfair competition. At the same time, the laws on unfair competition in the countries of the continental (pandectic) legal system are based on the theory of confidentiality (de facto monopoly). Therefore, the foreign experience of the countries of the continental (pandect) system of law is of particular importance for the formation of Ukrainian legislation on trade secrets. Discussion: given the specifics of the studied object of intellectual property rights and based on the analysis of international experience found that national approaches to ways to protect intellectual property rights to trade secrets are not effective because they do not provide and do not provide maximum material satisfaction for the person access to which is violated, and quite severe consequences for the offender. It is proposed to improve the current legislation of Ukraine on the protection of trade secrets.

Key words: confidential information; trade secret; production secrets; know-how; unfair competition; undisclosed information.

Problem statement and its relevance. In the new information age, Ukraine seeks to become a competitive participant in the international market relations, which seems impossible without proper national legal protection of particularly valuable for the business entity confidential information in the form of trade secrets. Based on the production and economic effect of the use of trade secrets, foreign countries are conducting intensive legislative work in the field of protection and enforcement of intellectual property rights. At the same time, this sphere has been left out of the attention of the Ukrainian legislator for a long time.

Protection of intellectual achievements in the field of trade, entrepreneurship is an important basis and condition for the development of innovations, improvement of economic processes, technologies, introduction of new achievements in commercial practice. Legal protection of trade secrets is designed to stimulate development in those areas where patent protection is weak or impossible.

Trade secret is important for the protection of the results of intellectual activity in the process of commercial activity of economic entities.

Therefore, the establishment of a legal framework, the consolidation of effective

mechanisms for the protection and safeguarding of trade secrets should be considered as an important element of the legal support of business in any country.

According to the international standards, the protection of trade secrets is an integral part of protection against unfair competition.

At the same time, a distinction should be made between rights and ways of protecting them, where unfair competition is only a way of protecting rights, not the rights themselves. Moreover, the rights, that are protected, are different from the rights to trade secrets.

However, Ukrainian unfair competition law, as such, does not perform this function of protecting the "rights" or "legally protected interests" of a person to trade secrets, but provides a reference to general civil law, which is also not fully capable of to solve this problem, because it does not contain special rules governing these relations.

Analysis of the latest researches and publications. A number of scholars have devoted their works to the issues of the legal protection and protection of trade secrets and unfair competition.

In particular, some aspects of legal regulation of relations regarding information, confidential information, as well as trade secrets, know-how and unfair competition, their protection are covered in scientific works of Azimov C.N., Bachylo I.L., Begova T.I., Boguslavsky M.M., Vengerov A.B., Vlasova O.V., Gelych Y.O., Diduk A.G., Dozortseva V.A., Dyukareva-Berzhanina K.Yu., Zhukov V.I., Ivchenko T.V., Izmailova O.V., Ilyashenko S.M., Kapitsa Yu.M., Kopylova V.A., Kossak V.M., Kokhanovskaya O.V., Kuzmina A.E., Kulinich O.O., Nosik Y.V., Pidoprygora O.A., Pidoprygora O.O., Popova O.V., Rosenberg V., Roshchin O.P., Saniakmetova N.O., Severin V.A., Sergeeva O.P., Sirenko I.A., Slyadneva G.O., Topalov L.D., Kharitonov E.A., Chobot O.A., Shershenevich G.F., Shishka R.B., Stumpf G., Yavorska O.S. etc.

However, acknowledging the scientific work on this issue, we recognize that the ongoing European integration of Ukraine, the constant development of strong legal systems of foreign countries and attempts to improve national legislation in the light of international experience necessitate additional and separate study of the state of trade secrets in Ukraine and developed countries.

Purpose of the article. Currently, for a fairly competitive business environment in Ukraine, which is particularly interested in attracting foreign investment, the issue of protection of trade secrets (confidential information) is becoming increasingly important, both in Ukraine and abroad. Therefore, the purpose of this article is to identify the basic premises of the approach to understanding unfair competition; analysis of the provisions of international standards for the protection of trade secrets and study of the international experience in effective protection against unfair competition; disclosure of national approaches to the protection of intellectual property rights to trade secrets; identifying shortcomings in national legal regulation and proposing possible ways to improve the current legislation of Ukraine on these facilities.

To achieve this goal, the following tasks are solved: to analyze the provisions of international standards on unfair competition and protection of trade secrets; compare international norms with the legislation of Ukraine on this issue.

Statement of basic materials. Trade secret in the modern world is an inhomogeneous part of a market economy, which consists of different in origin and composition of parts. With increased competition in all areas of business, trade secret has become a valuable object, the protection of which through legal means is an important task, as it primarily contributes to business competitiveness, development of innovation in the country, etc.

In this case, trade secret has both positive and negative aspects; the latter usually includes the concealment of shadow economic activity under the guise of trade secrets, as well as unfair competition.

Protection against unfair competition often involves ensuring the safekeeping and proper use of confidential information in general and trade secrets in particular.

A trade secret is referred by the Civil Code of Ukraine (hereinafter - the Civil Code of Ukraine) [1] to the objects of intellectual property rights (Article 420). Another norm of the Civil Code of Ukraine includes "results of intellectual, creative activity, information" in the objects of civil rights (Article 177).

Trade secret, in accordance with Art. 505 of the Civil Code of Ukraine, is "information that is secret

in the sense that it is in whole or in some form and the totality of its components is unknown and is not easily accessible to persons who normally deal with the type of information to which it belongs, in in this regard, it has commercial value and has been the subject of adequate measures to maintain its secrecy, taken by the person who legally controls this information”.

Trade secrets can be information of a technical, organizational, commercial, production and other nature, which may be of particular value to the business entity, as their use makes it exclusively and uniquely attractive in the market compared to other entities. Due to illegal possession, use, disclosure of a trade secret, a business entity always risks losing an investor who may at any time be interested in a competitor who has obtained, uses such commercial information in its activities and made a better offer.

Thus, the legislation of Ukraine classifies a trade secret as an institution of intellectual property rights, ie a set of exclusive rights to intangible objects that are the result of intellectual activity, including creative, and other objects equated to them. Trade secret rights are a type of intellectual property rights (exclusive rights).

Ukrainian legislation (which is also specific to other countries and certain international acts) also contains provisions on the protection of trade secrets in legal provisions relating to protection against unfair competition.

International standards for the protection of trade secrets are set out in the Paris Convention for the Protection of Industrial Property (hereinafter - the Convention) [2], which enshrines the need to end unfair competition. In particular, Art. Article 10 bis of the Convention prohibits any act of competition that is contrary to the fair practices of industry and trade. According to paragraph 2 of Art. 39 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter referred to as the TRIPS Agreement) [3] provides individuals and legal entities with the opportunity to oppose the disclosure, receipt and use by others of information they lawfully possess and have not consented to, subject to: 1) that the information is considered secret in the sense that it as a whole or in a certain form and set of its components is

unknown and is not easily accessible to persons who normally deal with the type of information to which it belongs; 2) that the information has commercial value and 3) is the subject of adequate measures to maintain its secrecy, taken by the person who legally controls this information.

One of the rights of the owner of a trade secret is the opportunity to protect himself in the manner prescribed by law from the actions of other entities that violate or create such threats to the established regime of trade secrets. The legislation of Ukraine does not currently provide for special means of protection of trade secrets, a specific mechanism for exercising the rights of owners of trade secrets. The shortcomings of regulation create many difficulties for business entities, limit the possibilities of realization and protection of rights to trade secrets.

Persons guilty of committing unfair competitive actions are subject to legal liability of various industries: administrative and economic in accordance with the Law of Ukraine on Protection against Unfair Competition; it is also possible to apply the civil law in the form of compensation for damage caused on the basis of the Civil Code of Ukraine, and for individuals - as well as labor and criminal law.

The main forms of protection are recourse to the competent administrative authorities or to the court.

The administrative procedure provides for the submission of an application to the Antimonopoly Committee of Ukraine, the functions of which include control and termination of unfair competition. The information and documents confirming the collection of trade secrets by illegal methods, other circumstances that confirm the existence of an offense must be provided to the Committee. The law also sets deadlines for appealing to the Antimonopoly Committee of Ukraine - 6 months from the date when the person learned of the violation of their rights, as well as a three-year statute of limitations. Thus, based on the results of the review, the Antimonopoly Committee of Ukraine is authorized to impose a fine on the offender; for damages it is necessary to go to the court.

The analysis of separate elements of judicial practice on protection of a trade secret allows to

allocate the following important conditions (circumstances) which are a subject of the proof necessary for satisfaction of requirements on protection of a trade secret: the information belongs to the business entity whose rights are violated; the information is classified as a trade secret and is subject to the appropriate protection regime; the person is informed about the classification of information as a trade secret; the person intentionally copied, memorized or otherwise collected information that constitutes a trade secret; the person acted by deception, fraud, theft of documents or other criminal means contrary to the law.

In considering a trade secret, the courts determine whether the confidential use of confidential information or its unauthorized disclosure has taken place. In particular, it is established whether the information was used in violation of the purposes that were stipulated during its transmission. If the transmitted information was used in another way, the court imposes an appropriate prohibition and obliges the defendant to reimburse the damages (both real and lost profits). The burden of proving the extent of the damage lies with the victim, which in practice does not always seem simple. It is much easier to prove cases when an unfair competitor received income through the use of illegally obtained information.

The position of the Plenum of the Supreme Commercial Court of Ukraine should be noted separately, according to which it is not important to establish restrictions or eliminate competition to qualify the actions of an economic entity as unfair competition. It is sufficient to prove the fact that the subject has committed acts defined by law as unfair competition.

In addition, the relevant acts are criminally punishable under the Criminal Code of Ukraine. Prosecution does not preclude the filing of a civil claim for damages.

It should be noted here that the relevant institution, unfortunately, is not sufficiently developed either theoretically or practically, and we borrow certain tools to combat unfair competitors from the Anglo-Saxon countries without a sufficient legal framework. With regard to legal remedies, administrative proceedings involve a

complex and incomprehensible procedure for the average citizen, the absence of clear criteria and rules for examining the case file and the Committee's wide discretion. In turn, the protection of trade secrets as a special category of cases in the courts does not contain special approaches to the collection of evidence, as well as the established case law in their assessment. Therefore, we recommend company owners not only to hope for the protection of already violated rights to trade secrets, but also to implement sufficient preventive measures, such as effective personnel policy, use of NDA agreements, miscalculation of all possible risks of information leakage, protection of information by special technical means, etc.

Therefore, in case of violation of the rights of a person who legally controls a trade secret, he may apply for protection of such rights. Legislation, as a rule, creates a whole system of means of protection of rights to trade secrets, in which it is possible to allocate means of civil, criminal, administrative, labor law. Consider them.

It should be noted that civil law does not provide for special legal norms aimed solely at protecting the right to trade secrets. According to Art. 431 of the Civil Code of Ukraine [1], infringement of intellectual property rights entails liability established by this Civil Code, other law or contract.

The grounds for civil liability may be a violation of a contractual obligation or non-contractual violations - the committing of civil torts. Contractual violations relate mainly to license agreements - they are subject to all general rules on liability for breach of obligation (Chapter 51 of the Civil Code of Ukraine) [1].

Non-contractual protection of trade secret rights is based on the general provisions on tortious liability and the peculiarities of the legal regime of trade secrets as an object of intellectual property rights. Article 432 of the Civil Code of Ukraine [1] gives every person the right to go to court to protect their intellectual property rights in accordance with Art. 16 of the Civil Code of Ukraine [1], which determines the possible ways to protect civil rights and interests.

From the peculiarities of the protection of trade secrets and its legal regime follow the

characteristics of liability for violation of rights to trade secrets. A trade secret as an informal result of intellectual activity (unlike copyright or patent law) is characterized by the principle of freedom of use and the presumption of good faith of the user of trade secrets, unless proven to violate the statutory protection regime. Whereas for the objects of copyright and patent law there is a presumption of unfair use by third parties (unless otherwise expressly provided by the contract with the right holder) - hence the responsibility regardless of fault. Instead, guilt is a prerequisite for liability for breaches of trade secrets.

It is impossible for a trade secret to have such a protection as to restore the situation that existed before the violation of the law. After all, information is disclosed irrevocably, it cannot be removed from the mind of a person who illegally read it. Accordingly, the protection can only consist in compensation for damages and a ban on continuing such a violation.

These methods can only be applied to a limited number of actual violators. The latter can be divided into two groups: 1) persons who directly unlawfully interfered in the sphere of the right holder (primary violators); 2) and persons who used the results of the primary violation (derivative violators). In any case, the primary infringer must be held liable, which is a ban on continuing to use the facility and compensation for damages. The same applies to the derivative infringer, who is an "unscrupulous" user, i.e. who knew or should have known about the illegality of the transfer to him of information that constitutes a trade secret. Another situation with a violator is a "conscientious" user who cannot be prosecuted because the right holder does not have absolute protection. Responsibility before him is borne only by the person guilty of the violation (therefore, liability without guilt is impossible).

Types of violations. The violation, which consists in the misuse committed by the infringer, should be considered as a tort, the consequence of which is both compensation for damages and a ban on further use. Illegal disposition of the right (possibly in case of illegal intrusion into a trade secret or going beyond the terms of the license agreement) is also a violation that entails

compensation to the right holder. A separate type of violation is unauthorized intrusion into a trade secret - if it was not accompanied by other violations, the result will be compensation only for non-pecuniary damage. A breach of contract may be committed by a counterparty who received information under the contract on the condition of confidentiality, but disclosed this information.

A high percentage of breaches of trade secrets and know-how are also related to employment relationships, as employees have a conditional access to such confidential information under an employment contract. The boundary between the employer's right to protect his trade secret (know-how) and the employee's right to use his professional experience in his own interests or in the interests of the new employer are difficult to determine, including this task is not easy for litigation. Among the most general rules established for employees (even former ones) are the following: the obligation to maintain confidential information (trade secrets and know-how) is enshrined in the provisions of special agreements or employment contract (contract). In foreign countries, such an obligation can usually be implied on the basis of the general requirements of honesty and loyalty in the absence of regulations. When considering a dispute, it is necessary for the court to take into account the essence of the specific employment relationship under consideration, the status of the employee, the level of availability of trade secrets and measures taken by the person controlling such information to maintain its secrecy. After the termination of employment, the requirements for the former employee are usually maintained: do not disclose information that is a trade secret, do not copy trade secrets, etc., i.e. the employee is not entitled to use the trade secret of his employer. In determining the limits of such restrictions, the court must assess whether the disputed confidential information can be considered part of the professional experience or knowledge of the employee (by the way, in England, courts are based on the criterion of "average honesty and ability"). Regarding the ban on engaging in activities that compete with the former employer, as well as on the basics of non-disclosure agreements and know-how (confidential information).

Thus, the conditions for the protection of trade secrets (know-how) cannot go beyond the reasonable protection of the interests of the employer.

Conclusions. Thus, we can say that the protection of trade secrets and know-how (confidential information) is carried out in the fight against unfair competition, provided by Article 10 bis of the Paris Convention [2]. Also in accordance with Art. 10ter in the process of providing effective protection against unfair competition, the participating countries undertake to provide such protection to citizens of other countries of the Union as follows: natural and legal persons who legitimately control trade secrets and know-how (confidential information) have the right to prevent disclosure, obtaining or using such information without the consent of others, if the latter have done so in a manner contrary to fair commercial practice.

In the notion of a method that contradicts fair commercial practice, the TRIPS Agreement [3] includes breach of contract, breach of trust, incitement to breach; the acquisition of confidential information by third parties who knew or committed gross negligence without learning that acts contrary to fair trade practice were committed in the course of such acquisition.

Along with the TRIPS Agreement [3], issues related to the protection of trade secrets and know-how (confidential information) are also addressed in the WIPO's specially developed "Model Regulations on Protection against Unfair Competition" (hereinafter - the Model Regulations) [15]. The work done is aimed, in essence, at clarifying the content of Art.10bis of the Paris Convention [2] taking into account modern realities. In particular, Art. 6 of the Model Provisions is devoted to protection against unfair competition for classified information. The norm of this article coincides with Art. 39 TRIPS Agreements [3]. However, some differences are still observed in the list of types of actions that are considered to be contrary to fair commercial activity. In addition to those listed in Art. 39 of the TRIPS Agreement [3] is industrial or commercial espionage.

Also in Art. 6 of the Standard Provisions [15] it is provided another type of dishonest business

activity - incitement to commit any act, which is given in this article (industrial espionage, breach of contract, breach of trust).

Typical provisions (such as the TRIPS Agreement) also include the unlawful nature of the method of obtaining confidential information - it is intentionally received by a third party (i.e., when such a person knew about the confidentiality of information), or received it with gross negligence (when such a person should have known about such nature of information).

In general, these documents coincide in terms of the characteristics of confidential information (classified information, undisclosed information), as well as in essence in the types of actions that are considered as a manifestation of unfair competition.

However, all these documents have different orientations: if the TRIPS Agreement [3] is aimed primarily at characterizing the interests of the person who actually controls undisclosed information, within the joint design of the document, then the Model Provisions [15] focus on characterizing actions, in which there is unfair competition, which also determines the common direction of the document - clarification of the provisions of Article 10bis of the Paris Convention [2] taking into account modern realities.

It can be said that the TRIPS Agreement [3] for the first time at the international level defined the features and concepts of protection of undisclosed information (trade secrets and know-how) as a means of protecting information, the use of which is legally controlled by a legal entity.

According to scientists, in the past, many countries have addressed the protection of trade secrets or know-how no other than the protection of trade secrets or industrial property.

In order to comply with the features of the TRIPS Agreement [3], WTO members will have to protect all secrets of commercial value.

Based on the analysis, we propose to supplement the current legislation of Ukraine with rules that would provide for such methods of civil protection of trade secrets as prohibition of production, supply, placement or use of counterfeit goods or import, export or storage of counterfeit goods to achieve these goals; recall of counterfeit products from the market; change of counterfeit

goods in order to deprive them of their appropriate quality; destruction of counterfeit goods or, where appropriate, their withdrawal from the market, provided that such a decision does not violate the protection of the relevant trade secret; destruction of all or part of any document, object, material, substance or electronic file containing a trade secret or, where appropriate, delivery to the applicant of all or part of these documents, objects, materials, substances or electronic files; criminal liability of any natural person who uses and / or disseminates an illegally obtained trade secret. However, it would still be appropriate to adopt a special Law of Ukraine "On Trade Secrets", which would regulate its legal regime.

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ДЕЯКІ ПРОБЛЕМИ ЗАХИСТУ КОМЕРЦІЙНОЇ ТАЄМНИЦІ

Національний авіаційний університет
проспект Любомира Гузара, 1, 03680, Київ, Україна
ДВНЗ «Ужгородський національний університет»,
Інститут освітнього і професійного розвитку
Гойош утцо17. I/2, 1065, Будапешт, Угорщина
E-mails: alisa-d@ukr.net, iepdoffice@gmail.com

Метою даної статті є з'ясувати деякі проблеми захисту комерційної таємниці та запропонувати шляхи їх подолання. Стаття присвячена дослідженню проблем захисту комерційної таємниці в Україні, а також вивченню міжнародного досвіду у сфері наведеної проблематики. Проведено аналіз норм чинного національного законодавства, які спрямовані на захист комерційної таємниці. Досліджено судову практику, а також практику відповідних уповноважених органів України щодо даної проблеми. *Методологічною основою* дослідження є загальнонаукові та спеціальні методи пізнання. Використання цих методів дало можливість описати проблеми захисту комерційної таємниці. *Результати:* під час дослідження було встановлено, що порушення комерційної таємниці розглядається міжнародним законодавством як факт недобросовісної конкуренції. При цьому закони про недобросовісну конкуренцію країн континентальної (пандектної) системи права засновані на теорії конфіденційності (фактичної монополії). Тому зарубіжний досвід саме країн континентальної (пандектної) системи права має особливе значення для формування українського законодавства про комерційну таємницю. Країни із сильними правовими системами, зокрема країни Європи, активно створюють та приймають нормативно-правові акти, спрямовані на захист комерційної таємниці. У цьому контексті досліджено Директиву 2016/943 Європейського Парламенту та Ради від 8 червня 2016 року про захист нерозкритих ноу-хау і комерційної інформації (комерційної таємниці) від їх незаконного придбання, використання та розкриття. Проаналізовано правовий досвід щодо захисту права доступу до комерційної таємниці деяких зарубіжних країн. *Обговорення:* з огляду на специфіку досліджуваного об'єкта прав інтелектуальної власності та на підставі аналізу міжнародного досвіду виявлено, що національні підходи щодо способів захисту прав інтелектуальної власності на комерційну таємницю є недостатньо ефективними, оскільки не передбачають та не забезпечують максимальної матеріальної сатисфакції для особи, право доступу якої порушено, та досить суворих наслідків для особи-порушника. Запропоновано вдосконалити чинне законодавство України щодо захисту комерційної таємниці.

Ключові слова: конфіденційна інформація; комерційна таємниця; секрети виробництва; ноу-хау; недобросовісна конкуренція; нерозкрита інформація.

Стаття надійшла до редакції 30.05.2022