

PATENT AND OTHER INTELLECTUAL PROPERTY IN A COMPANY: CHALLENGES AND OPPORTUNITIES

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Purpose: Intellectual capital is a company's most valuable asset, enabling its constant development and affecting its competitiveness. The aim of this article is to present the basic rules of protecting inventions and secrets of entrepreneurships and entrepreneurs within the Polish legal system, and to indicate their value as instruments impacting on the development of a company's innovativeness.

Design/methodology/approach: The deliberations are based on the related subject literature and an analysis of the legal provisions applicable in the area under discussion.

Findings: Adequate protection of intellectual property in a company can be invaluable for obtaining market advantage by using one's own patents in the business activity, while at the same time contributing to the scientific-technological advance of the entire economy. Financial gains related to granting licences to other parties and collecting remuneration for such are also not insignificant. In this context, knowledge of the legal regulations concerning patent protection becomes crucial.

Practical implications: The challenges entrepreneurs face include the ability to use knowledge and intellectual capital in the company, implementation of innovative solutions, and knowledge transfer. For a modern company to grow while also maintaining its presence in the market, it needs to constantly improve its offer, in particular by raising its technological and quality standards. For these reasons, the importance of knowledge about the protection of intellectual property, and in particular the obtaining of patent protection, has been increasing in value in terms of reinforcing the competitiveness of economic entities.

Originality/value: The article raises the issue of managing intellectual property laws in an organisation, which is an important aspect from the entrepreneur's perspective, and has become crucial in a knowledge-based economy.

Keywords: patent, entrepreneur's secret, company secret.

Category of the paper: viewpoint, literature review.

1. Introduction

In the modern world, intellectual property rights affect the prevailing scope of a company's operations. Not only entrepreneurs, but also their employees, contractors and competitors have such rights. This article focuses on the protection of economic activity-based inventions and the company's and entrepreneur's secrets by protecting property not subject to industrial property laws.

Appropriate intellectual property in a company can have an invaluable impact on the organisation's achieving of market advantage through using its own patents in its business activity, while at the same time contributing to the scientific and technological development of the entire economy. Companies have many opportunities to use their own patents and other intellectual property. This can be done by placing new goods, processes, or services on the market, which can help to achieve competitive advantage on the market. Entrepreneurs often make their technologies available to other economic entities by granting licences, the fees from which are a source of financial gain.

It is worth emphasising that it is not always possible to protect a given good with a patent, not even by copyright. These are items of information that are not formally protected by intellectual property law but are relevant from the perspective of the entrepreneur, and whose economic value is undisputable. The possibility of protecting such data depends on the institutions of a company and the entrepreneur's secrets. In this context, knowledge of legal regulations concerning patent protection for a given solution becomes essential.

The aim of this article is to present the basic rules of protecting the inventions and secrets of companies and entrepreneurs within the Polish legal system and to indicate their value as instruments impacting on the development of a company's innovativeness.

The article is based on an analysis of legal regulations in the above-mentioned context, while taking into account the doctrine of law and case law.

2. An invention and its protection in the company

According to the definition adopted by the World Intellectual Property Organization, intellectual property is a set of laws concerning, among others, literary, artistic and scientific works; interpretations of interpreting artists and performances of performing artists; phonograms and radio and TV programmes; inventions in all areas of human activity, scientific discoveries and industrial designs; trademarks, services marks, trade names and commercial designations; protection against unfair competition; and any other laws concerning intellectual

activity in the areas of industry, science, literature and art (Convention Establishing the World Intellectual Property Organization, 1967, Article 2 (viii)).

Intellectual property rights are mostly exclusive rights to intangible property. They function in a company alongside tangible goods, and can similarly be the subject of a legal relationship and play a role in operating a business.

Among intellectual property rights, inventions and their legal protection have a special place. In accordance with Article 24 of the Industrial Property Law, patents are granted – regardless of the field of technology – to innovations that are new, exhibit a high level of innovativeness, and are fit for industrial application (The Act, 2021, Item 324).

The Polish legislature has not yet introduced a legal definition of a patent. According to the doctrine, a patent can be a state law granting the owner the right to exclude other entities from using the invention protected by such title. A patent owner can, therefore, in accordance with the law, use their own exclusive rights in order to prevent other entities from using the patented goods or innovative technological solutions (Kabat-Rudnicka, 2012).

An entrepreneur with a patent has the right to prevent any third party not having the entrepreneur's consent from exploiting their invention for profit or for professional purposes by way of performing the acts consisting of making, using, offering, or putting on the market a product that is the subject matter of the invention, or employing a process that is the subject matter of the invention, as well as using, offering, putting on the market or importing for such purposes the product directly obtained by the process (Act, 2021, Item 324, Article 66(1)).

According to Article 24 of the industrial property law, a patent for a given invention can be obtained when three prerequisites are met: It has to be new as far as the current state of the art is concerned, it has to be inventive, and it has to be susceptible to industrial application. The above prerequisites should be met jointly (VI SA/Wa 832/17).

In order for the given solution to be granted patent protection, it is necessary to ascertain whether it has a technological character. This analysis is crucial and precludes the examination of novelty, innovativeness, and industrial applicability (Turczak, 2010). “The legislator uses in Article 24 of the Industrial Property Act the phrase ‘regardless of the field of technology’, which means that the patent protection can cover inventions in all fields of technology, and the patentable invention has to have a technological character. Therefore, a constitutive feature of patentable solutions is their ‘technological character’, implicitly contained in the term invention itself” (II GSK 487/11). The determination as to whether the given solution is technological is of particular importance with respect to computer-related inventions.

The novelty prerequisite is met if an invention does not fit into the state of the art. The state of the art is everything that before obtaining priority right to patent (i.e., before the submission of the application to the Patent Office) has been made available to the public by means of a written or oral description, and also by the use, displaying or disclosure in any other way (The Act, 2021, Item 324, Article 25).

In view of the above, an entrepreneur who wishes to patent a solution sometimes faces a difficult-to-fulfil obligation to keep the nature of the solution secret, as any public presentation of the solution precludes it from falling under patent protection.

“Inventiveness means innovative significance, non-obviousness of the submitted solution. An expert means a professional from the given field, a specialist, a person working in a particular field of technology in a professional manner. If a solution is within the area of the expert, there is no inventiveness to it. Inventive creations are about overcoming technical difficulty that wouldn't be overcome otherwise” (VI SA/Wa 1327/16). It is notable that the prerequisite will not be met in the case of unremarkable small differences between the submitted solution and the state of the art. Such differences should be special, and the expert from the given field of technology who reviews the innovativeness of the solution should not be able to obtain the result submitted for protection (Mordwiłko-Osajda, 2010). The above prerequisite (as with the remaining ones) is evaluative. “Differently than in evaluation of novelty, arguments against non-obviousness of an invention can be found not only by presenting specific known solutions but also by considering the entire state of the art” (VI SA/Wa 1558/16). An established opinion in case law is that “it is sufficient for the invention to be something more than a routine knowledge of an engineer or a mechanic” (VI SA/Wa 1558/16).

An invention has industrial applicability if it is possible to use it in practice, while ensuring the safety and stability of the results (Król, 2010).

Unlike copyright protection, patent protection is formal in character. The invention becomes protected based on the decision of the Patent Office. By receiving a patent, one has the exclusive right to exploit the invention, for profit or for professional purposes, throughout the territory of the Republic of Poland (The Act, 2021, item 324, Article 63).

The right under the patent is *erga omnes*. As such, it limits the rights of the competition to use the invention within the scope determined by the patent restrictions. To use somebody else's invention, one needs to obtain the permission of the entity holding exclusive rights by entering a licence agreement.

What is important from the entrepreneur's point of view is that the very act of submitting an application for covering the given solution with patent protection results in the inclusion of information in the patent description (from the moment it is announced) to the state of the art. This gives the applicant a guarantee that no third party will be able to reserve the exclusive rights to the submitted solution.

According to the principle of territoriality, an invention for which a patent has been obtained in Poland is not protected outside the territory of this country, although the party owning the patent rights (including an entrepreneur) can extend the scope of patent protection to other countries. Such an extension can be made by using the procedures of such countries in which the party wishes to use the protection. As this requires the submission of an application in the patent offices of the given countries, such a solution will be beneficial if the entrepreneur wishes to protect the invention in a small number of countries. Otherwise, the procedure will be

complicated (as the proceedings in each office will take place based on the legal provisions in that country), time-consuming, and costly (e.g., the obligation to use a patent agent, fees for document translations). Obtaining patent protection abroad is also possible through a European procedure. The application is made directly in the European Patent Office or in the patent office of a country that is signatory to the European Patent Convention; for example, in the Patent Office of the Republic of Poland in one of the official languages (English, German, or French) (The Act, 2004, No. 79, Item 737). One can say that a European patent is a set of country patents, as the individual patents are independent of each other. The patent rights to an invention can be also reserved by the eligible party internationally through the Patent Cooperation Treaty (The Act, 1991, No. 70, Item 303).

The application is submitted at a receiving office (Patent Office of the Republic of Poland) in the official language of the International Searching Authority, which carries out a preliminary examination of patentability. This procedure is beneficial, as by applying for patent protection abroad, the applicant has more time to decide than in the countries in which the applicant wishes to obtain protection (30 months from receiving priority for submitting an application in the patent offices of individual countries).

Irrespective of the protection mode chosen by the eligible party, patent protection is always limited in time. Patent protection is valid for 20 years but can be shortened; for example, if the patent scope does not yield the expected profit. It is worth emphasising that even if the invention meets the prerequisites for patent protection, it is not always worth patenting it.

The very act of obtaining a patent does not guarantee the market success of the given solution, and the patenting procedure has to be paid for. The costs may vary between several to tens of thousands of Polish zloty, with many factors contributing to the amount, from the amount of documentation to the number of countries in which the invention is to be protected. The very process of maintaining patent protection also costs (with adequate amounts expected to be paid annually).

An entrepreneur's decision to invest in intellectual property protection should be preceded by a preliminary analysis of the benefits versus the costs incurred. One should take into consideration not only the probability of reaching the expected income, but also the aforementioned costs of obtaining, maintaining and exercising the exclusive rights protected by a patent. However, in practice, such calculation entails a high risk (Michalczyk, 2011).

3. Company's secret vs entrepreneur's secret

The term of the secret of an entrepreneur is used in Article 5(2) of the Act of 6 September 2001 on the Access to Public Information (Act, item 902, 2022), which states that the right to public information is subject to limitation based in view of the privacy of a natural person or an entrepreneur's secret. However, the Act does not introduce a legal definition of this term.

In accordance with Article 18(3) of the Public Procurement Law of 11 September 2019, information constituting a company's secret within the meaning of the provisions of the Act of 16 April 1993 on Combating Unfair Competition (The Act, Item 1129, 2021) is not disclosed if the party, upon provision of such information, states that it cannot be shared and demonstrates that the reserved information is that company's secret. The economic operator may not reserve the information specified in Article 222(5), which relates to the obligation on the ordering party to disclose information about the entrepreneur's business, the registered seats or places of business activity and places of residence of the economic operators whose tenders have been opened, as well as prices or costs included in the tenders (Ustawa, Item 1129, 2021, Article 222(5)).

The case law of administrative courts exhibits a level of ambiguity in the interpretation of the term entrepreneur's secret, which is used in the Act on Access to Public Information. One of the opinions is that the term is consistent with the term of a company's secret as defined in Article 11 of the Act on Combating Unfair Competition (I OSK 2950/14, II SA/WA 43/17). A different approach, which assumes that the secret of an entrepreneur is derived from the company's secret, as defined in the Article 11 of the Act on Combating Unfair Competition, seems to be valid. These terms, although similar but with partly overlapping scopes, cannot be considered synonymous. It is emphasised that the concept of an entrepreneur's secret should as a rule be understood more broadly. "Information becomes 'a secret' when the entrepreneur exhibits a wish to make it unknowable by the third parties. It does not, however, lose its character by the fact that a limited number of people, bound to maintain confidentiality (e.g., company employees) know it. Maintaining certain information confidential makes the entrepreneur undertake actions to eliminate the possibility of accessing it by third parties in a normal course of events, without the need to make a special effort" (I OSK 192/13). The supporters of this opinion claim that in order to consider given information an entrepreneur's secret, there is no need for a condition of the economic value of such information, as is the case for the company's secret (I OSK 511/13). It is worth mentioning, however, that in the case of the company's secret, information should have objective economic value, which does not have to be "significant, but can also be current or potential" (II GSK 3485/15). The entrepreneur's secret can be, among others, a trade secret, a formula, new substances and materials, device descriptions, or technologies that are not under patent protection (Stec, 2017).

It can be assumed from the above that the term of entrepreneur's secret is entailed in the legal definition of the "company's secret", which is included in Article 1(2) of the Act on Combating Unfair Competition (Act, Item 1913, 2020).

An entrepreneur's secret can be invoked if two prerequisites are met: a formal and a material one. The first is the obligation of the entrepreneur to undertake actions aimed at making the given information secret. Furthermore, it is accepted that the entrepreneur's secret can include only such information the publication of which could negatively affect the market position of the entrepreneur (the material prerequisite).

When an application for providing information that is an entrepreneur's secret is submitted, it is rejected by the president of the Office of Competition and Consumer Protection, based on Article 5(2) of the Act on Access to Public Information (Jabłoński, Jarosz-Żukowska, 2012). It is assumed that in the case of an entrepreneur securing confidentiality of data for which an application to provide information may be submitted in the future, such data is an entrepreneur's secret. The problem arises when the actions aimed at making information secret were undertaken at a later time; e.g., when the information became the subject of the application for their disclosure. It can be assumed that the entity receiving the application for information disclosure should determine whether such information is subject to disclosure and examine the position of the entrepreneur on that matter. The entrepreneur cannot be limited by time in the process of making information secret and may do it at a later stage of the proceedings of their disclosure (Szustakiewicz, 2021).

A "company's secret" is the technical, technological, or organisational information of a company, or other information with economic value that as a whole or in a particular set of their elements is not known publicly to people who usually handle this sort of information, or is not easily accessible to such people, as long as the entity entitled to use such information or manage it has undertaken, with due diligence, actions in order to keep it confidential (The Act, Item 1913, 2020).

As mentioned above, in order to consider information a company's secret, it has to have economic value. The information has economic value when its use by another entrepreneur will reduce financial expenditure related to the production of the goods or provision of the services, will increase profit, or will bring new customers (II SA/Wa 2406/130).

Technical or technological information is that concerning the method of manufacturing, chemical formulae, templates, and ways of operation. Information is organisational if it relates generally to the services and information with significance to the operation of the company, but is not related directly to the manufacturing cycle (Andała-Sępkowska, 2021).

In the case of a company's secret, the entrepreneur's wish to make the information secret is also necessary. The entrepreneur should undertake such efforts that make this intention clear to third parties (e.g., competitors). It is worth emphasising, however, that the entrepreneur does not have an obligation to make specific efforts in that respect. For example, it is sufficient to notify the employee about the confidential nature of the knowledge, technology, or device.

It should be emphasised that a person who has come into possession of information that is a company's secret is exempt from the obligation to maintain confidentiality (IV CKN 211/01). Whether or not the entrepreneur has met the obligation of undertaking the necessary actions in order to maintain the confidentiality of the information is assessed considering all the circumstances of the case. One should consider, among other things, the organisation of work, the people carrying out specific tasks, or their qualifications (I CKN 1159/00).

Making data a company's secret limits the right to public information and protects the right of the entity that owns it before it is made public. Such information is economically significant for the operation of a specified entrepreneurship, and therefore, the entrepreneur may wish to maintain its confidentiality. The entrepreneur can, however, at any time waive their right to protection of information that is important for the company. Therefore, in order for the protection of the entrepreneur's rights to be successful, the restricted information cannot be shared publicly (Zdunek, 2016). In accordance with Article 11(4) of the Act on Combating Unfair Competition, one cannot restrict information that is publicly available; for example, data disclosed in the KRS or CEIDG registers or in such a way that every interested party can legally possess knowledge (I CKN 1159/00).

“Registering information as a secret is an exception from the rule of transparency, and for this reason a public sector entity cannot rely solely on an entrepreneur's statement about its existence, but should independently perform an assessment of the application submitted by the entrepreneur, verifying the existence of a company's secret within the meaning of the provision of the Act on Combating Unfair Competition” (II SA/Wa 1483/12). The entity bound to disclose information can include restricting that information after verifying whether the restricted information meets the prerequisites of the company secret within the meaning of Article 11(4) of the Act on Combating Unfair Competition. “If, as a result of verification, it turns out that the restricted information does not constitute a company secret, then the declared restriction becomes invalid” (II SA/Wa 1483/12). In order to consider the given information a company secret, it is thus necessary to separate out from the data set the data to be made confidential (Szustakiewicz, 2021).

In summary, a company secret is a broader term than the entrepreneur's secret. As a rule, every secret of an entrepreneur is a company secret, but not every company secret is an entrepreneur's secret.

Undoubtedly, the advantage of the discussed measures is the fact that, unlike patent protection, keeping information confidential is not limited by time. There is also no rule of territoriality, and the entrepreneur obtains an exclusive right to use the classified information not only in the territory of the Republic of Poland.

On the other hand, however, there is always the risk of disclosure of the classified information, irrespective of the entrepreneur's will. This can result in unlimited access to information that is valuable from the perspective of the organisation. This is the risk the entrepreneur has to cope with if they obtain a patent for the invention. Although the nature of

the invention is obligatorily disclosed, the right to exclusive use of the patented solution belongs only to the patent holder (Turczak, 2010).

4. Conclusion

In a knowledge-based economy, intellectual goods play a crucial role in the market success of an organisation. One cannot agree with opinions that diminish their value with respect to the innovative advantage of companies (Szewc, 2014). Proper intellectual property protection allows entrepreneurs to gain a strong position in the market, thus gaining advantage over the competition. Patent protection ensures additional profit from granted licences and transfer of rights. It ensures certainty of turnover, providing the subject with exclusive rights to tools allowing them to undertake actions against infringements of protected goods regulations.

A challenge lies in creating a system of intellectual property law protection that is optimal for the development of a business entity. It is undisputable that the most beneficial is the medium level of protection, and any deviations (too weak or too strong protection) are detrimental from the perspective of innovativeness (Chęcińska-Zaucha, Gródek-Szostak, Kajrunajtys, 2017).

The basic form of intellectual property protection is formal protection (among other things, obtaining a patent for an invention). It should be emphasised that proceedings at the Patent Office are time-consuming and costly and are not risk-free, as the act of obtaining a protective title for the given solution does not always guarantee its commercial success. Moreover, not every creation meets the requirements for patent protection.

One should also consider the value of other possibilities for the protection of exclusive rights in a company, including especially the company secret and the entrepreneur's secret. They allow for ensuring confidentiality of, among others, technical, technological or organisational solutions, without the need to go through complicated legal procedures and without additional financial expenditure.

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