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ORGANISATIONAL MANAGEMENT METHODS AS KNOW-HOW

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Purpose: The purpose of this article is to answer the question of whether a method of managing an organisation can be protected by the organisation using it against use by another entity, in particular as know-how.
Design/methodology/approach: The considerations of the present article are based on the literature on the subject and the case law of common and administrative courts. These materials were subjected to critical analysis.
Findings: The analysis leads to the conclusion that a method of managing an organisation cannot be the subject of exclusive rights, and its protection under certain conditions is only possible as a business secret under the provisions on combating unfair competition.
Pracitcal implications: The use by organisations of certain management methods gives rise to the need to protect them from use by other organisations, in particular competing entrepreneurs. The article identifies the legal bases that can be the basis for such protection, creating a framework for their practical use.
Originality/value: The problem of qualification of oragnization management methods from the point of view of intellectual property law has not been researched so far, especially in Polish literature. The addressees of this research are, in particular, entrepreneurs who use diverse methods of business management in their activity.

Keywords: method, organisational management, intellectual property, know-how, intellectual property courts.

Category of the paper: research paper.

1. Introduction

The use of management methods in an organisation is important for the realisation of the goals set for that organisation, as well as for its competitiveness in relation to other entities, and therefore raises the question of the possibility of protecting that method, especially in a situation where the method used in the organisation is original in nature, against its use by another organisation, in particular a competing entrepreneur. Consequently, the analysis of this issue becomes important not only from the point of view of an organisation wishing to protect

the management method it uses, but also from the point of view of management and quality sciences. The purpose of this article is to answer the question of whether, and if so on the basis of which regulations and in what proceedings, an organisation may seek legal protection against this type of action, and in particular whether a management method may be protected as know-how?

2. Qualification of a management method as an object of exclusive rights

The literature points to the interchangeability of concepts such as method, technique, tool, concept, approach or management system, emphasising that they are instruments in the hand of the manager, facilitating the solution of management problems (Hopej, Kral, 2011), serving to give a specific image (shape) to the management system in the enterprise (Jagoda, Lichtarski, 2003). The terminological diversity occurring in management sciences is a consequence of the relative youth of this discipline of sciences, which results in the fact that not all conceptual categories have been clarified, which leads to ambiguity in their understanding and application. At the same time, the multiplicity of closely related terms found in this area of science often fosters the misapplication of particular terms, as well as difficulties in defining the relationship of such concepts as management method and technique (Matwiejczuk, 2009; Sobaczak, 2017).

Leaving aside the analysis of existing views as to the meaning of these concepts and their interrelationship, which has already been done in the literature (Sobaczak, 2017), it should be pointed out that in the management sciences, method is defined as a way of providing an internal, temporal and logical regulation of the course of the management process. Thus, a management method is defined as a way of proceeding and implementing undertakings aimed at solving management problems arising in a given organisation. (Matwiejczuk, 2009) For the purposes of further consideration, it should be assumed that an organisation's management method can be defined as a series of guidelines on how to effectively and efficiently manage the organisation in order to achieve strategic and operational goals, taking into account the market situation prevailing in a given industry. Management methods and techniques are subject to classification on the basis of differentiated methods (e.g. Blumenthal, Jannink, 2000; Brilman, 2002; Clayton, 2011; Csath, Trzcieliński, 2009; Efere, 2003; Goodwin, Wright, 2007; Hopej, Kral, 2011; Kapferer, 2012; McNeil et al., 2015), which, however, remains irrelevant for the further considerations contained in this article.

Before proceeding to the analysis of the possible qualification of an organisational management method as one of the intangible assets, attention should be drawn to the principle of the *numerus clausus* of rights on intangible assets, which governs them. This principle assumes that it is not possible to create new subjective rights of an absolute nature other than by means of a statutory act, in particular by means of a legal act or a court decision (Kurosz,

2021; Dybowski, 2003). Therefore, in order to protect the organisation's management method, it is necessary to qualify it as one of the subjects of exclusive rights specified by the legislator.

First of all, it should be pointed out that Article 1(2^1) of the Act of 4 February 1994 on Copyright and Related Rights (consolidated text of Journal of Laws of 2022, item 2509, hereinafter referred to as the CRRA) explicitly excludes, inter alia, procedures, methods and principles of operation from copyright protection. It is emphasised that, on the one hand, they are a part of reality, inherent in it, although they have not been noticed so far for various reasons, and thus cannot be regarded as the result of creative activity, and, on the other hand, that granting property rights to such intangible goods would mean their monopolisation and the impossibility of free access to them by others (Ferenc-Szydełko, 2021). It is in this way that the methods (procedures, principles) of managing an organisation listed in the provision of Article 1(2^1) CRRA will have to be assessed. Managing an organisation on the basis of certain principles, procedures, or methods was previously possible, although this possibility was not recognised, and the monopolisation of a certain method (e.g. benchmarking or controlling) would prevent its use in relation to a given type of organisation by other entities.

At this point, a distinction should be made between a given method of managing an organisation as a potential subject of exclusive rights and its description. The method itself, just as its description has an intangible form, with the difference that the description of a given management method may be fixed on a material carrier (*corpus mechanicum*). While the management method itself cannot be, in the light of Article 1(2^1) of CRRA, the subject of copyright, which clearly results from this provision, its description can already be qualified as a work within the meaning of Article 1(1) of CRRA. In order for this to take place, the description of a management method has to meet four conditions - be a result of human activity, have a creative character, i.e. be a result of creative activity aimed at the creation of a new product, have an individual character, i.e. bear the stamp of the author, be original and be established, i.e. be externalised in a way that allows it to be perceived by third parties. The fact that a description of a management method as a work of literary character (Article 1(2)(1) of CRRA) meets the prerequisites qualifying it as a work should not pose major difficulties. Only that the object of protection as a work will then not be the method embodied in that description, but the description itself. In other words, copyright monopoly will cover the use in any field of exploitation (Article 50 of CRRA) of a description of a management method, but not the method itself. This means that although the specific description of the method will be protected as a work, the use of the method for the purpose of managing another organisation will be allowed.

Turning to the assessment of the possibility of protecting a method of managing an organisation on the grounds of the Act of 30 June 2000 Industrial Property Law (consolidated text of Journal of Laws of 2023, item 1170; hereinafter referred to as the IPL), it should be indicated that Article 28(1)(3) of IPL, which, based on Article 100(1) of IPL finds appropriate application to utility models, excludes the possibility of qualifying as an invention, as well as

a utility model, schemes, rules and methods of performing mental processes, playing games or conducting business activities. The lack of technical character of such solutions is cited as justification for this exclusion (Demendecki et al., 2015; Kostański, 2010). The sphere of technology does not go beyond the domain of the natural sciences, while its subject is the use of inanimate or animate matter. The sphere of technology, therefore, does not include solutions whose object is ideas of an abstract-intellectual nature, including organisational ones, as they solve intellectual or organisational problems (Kondrat, 2021), which is what organisational management methods are. The enumeration included in Article 28(1)(3) of IPL - similarly to the enumeration included in Article $1(2^1)$ of CRRA - mentions directly the methods of conducting thought processes, and therefore it should be considered that methods of managing an organisation are excluded from industrial property protection due to their non-technical but organisational character.

However, while it should be excluded - due to the lack of possibility to qualify the method of managing an organisation as a solution of technical nature - to qualify it as an invention, utility model or topography of an integrated circuit, as well as industrial design, it seems to be possible to qualify it as a rationalisation project. This is because, according to Article 7(2) of IPL, any exploitable solution which is not a patentable invention, utility model, industrial design or a topography of an integrated circuit. This means that an organisational management method could be qualified as a non-technical, organisational solution comprising a set of techniques, indications and processes serving to solve a specific problem, which is the implementation of specific strategic and operational objectives in the conditions of an organisation of a given type. However, the condition for recognising such a method as a rationalisation project is that the entrepreneur recognises this type of solution as a rationalisation project in the rationalisation regulations adopted by the entrepreneur (Article 7(2) *in principio* in conjunction with Article 7(3) of IPL). As it follows from the above, the possibility of qualifying a method of organisational management as a rationalisation project applies only to such organisations that have the attributes of an entrepreneur and, moreover, have adopted the rationalisation regulations (Article 7(1) of IPL).

3. Qualification of a management method as know-how

In view of the impossibility to qualify a management method as an object of exclusive rights specified in CRRA and IPL, the possibility of protecting a management method as specific know-how should be considered. This term includes both know-how which is generally known (so-called explicit know-how) and that which is confidential in nature (so-called secret, confidential know-how).

The basis for this protection of the latter should be seen in the regulation of Article 11(2) of the Act of 16 April 1993 on Combating Unfair Competition (consolidated text of Journal of Laws 2022, item. 1233, hereinafter referred to as the CUCA), which indicates that a trade secret is understood as not only technical or technological information, but also organisational information of the company or other information having economic value, which as a whole or in a specific juxtaposition and collection of its elements is not generally known to persons usually dealing with this type of information or is not easily accessible to such persons, provided that the person authorised to use or dispose of the information has taken, with due diligence, measures to keep it confidential.

As organisational information of an enterprise that may be qualified as company secrets, literature points to methods of quality control of goods and services, methods of marketing, or methods of work organisation (Szwaja, 2019), as well as principles of cooperation between individual departments of an enterprise (Nowińska, Szczepanowska-Kozłowska, 2022). Therefore, there can be no doubt that the business secrets subject to protection under Article 11 of CUCA may include management methods, provided that they fulfil the remaining statutory conditions of protection. At the same time, it should be borne in mind that due to the scope of application of the CUCA, only methods of managing an enterprise, and not other organisations, may be covered by this protection.

In turn, the condition for the information in question to be covered by the concept of business secrecy is that it is confidential and that it is covered by the entrepreneur's activities aimed at maintaining this confidentiality, as well as its economic value (Szwaja, 2019; Nowińska, Szczepanowska-Kozłowska, 2022). By its very nature, this excludes the possibility of the previously indicated well-known methods of managing an organisation to be covered as a business secret. On the other hand, it is not necessary for such information to be usable in another company (Szwaja, 2019), i.e. the management method of a given company due to its specifics may not be usable in other companies.

The disclosure, use or acquisition of someone else's information constituting a business secret constitutes an act of unfair competition (Article 11(1) of CUCA). Acquisition of such information is subject to qualification as an act of unfair competition, in particular when it takes place without the consent of the authorised person to use or dispose of the information and results from unauthorised access, appropriation, copying of documents, objects, materials, substances, electronic files comprising the information or making it possible to infer its content (Article 11(3) of CUCA). The use or disclosure of such information constitutes an act of unfair competition, also if it is done without the consent of the person authorised to use or dispose of the information and violates the obligation to restrict its use or disclosure arising from a statute, legal act or other act, or if it was done by the person who obtained the information by committing an act of unfair competition (Article 11(4) of CUCA) The disclosure, use or acquisition of such information also constitutes an act of unfair competition if, at the time of its disclosure, use or acquisition, the person knew or, exercising due diligence, could have known

that the information had been obtained directly or indirectly from the one who used or disclosed it in the circumstances specified in Article 11(4) of CUCA (Article 11(5) of CUCA). The use of such information consisting in manufacturing, offering, marketing, as well as importing, exporting and storing goods for these purposes constitutes an act of unfair competition if the person performing the indicated act knew or, exercising due diligence, could have known that the properties of the goods, including their aesthetic or functional properties, the process of their manufacture or sale, were substantially shaped as a result of the disclosure, use or acquisition of someone else's information constituting an enterprise secret, performed under the circumstances specified in Article 11(4) of CUCA (Article 11(6) of CUCA).

Acquisition of information constituting a business secret does not constitute an act of unfair competition if it was made as a result of independent discovery or manufacture or observation, examination, dissection, testing of an object available to the public or possessed in accordance with the law by a person who acquired the information and whose right to acquire the information was not restricted at the time of its acquisition (Article 11(7) of CUCA). The disclosure, use or acquisition of information constituting an enterprise secret shall also not constitute an act of unfair competition where it has occurred in order to protect a legitimate interest protected by law, in the exercise of freedom of expression or in order to disclose irregularities, misconduct, acting in breach of the law for the protection of the public interest, or where the disclosure of information constituting an enterprise secret to employee representatives in connection with the performance of their functions under the provisions of the law was necessary for the proper performance of those functions (Article 11(8) of CUCA).

4. Claims for infringement of a business secret in the form of a management method

As can be seen from the above, a method of managing an organisation - if the statutory requirements are met - can be qualified as a rationalization project, or can be protected as a company secret. In practice, however, a specific method of managing an organisation will be protected under the provisions of the CUCA. This results from the fact that the legislator has adopted a different model of protection for rationalization projects than for other industrial property rights, which have been shaped as subjective rights of an absolute nature. Consequently, an entrepreneur whose employee has created a rationalization project in the form of a specific management method is not entitled to the protection belonging to civil subjective rights of an absolute nature. (judgment of the Voivodship Administrative Court in Wrocław of 12 January 2010, I SA/Wr 1602/09, LEX no. 559606; Skubisz, 2012; Żelechowski, 2021)

The basic catalogue of claims to which the entitled organisation is entitled includes, first of all, the claim for discontinuance of the prohibited acts (Article 18(1)(1) of CUCA) and for removal of the effects of the prohibited acts (Article 18(1)(2) of CUCA). In addition, an entrepreneur affected by an act of unfair competition may claim the release of wrongfully obtained benefits (Article 18(1)(5) of CUCA), however the release of the wrongfully obtained benefits should be made in accordance with the general rules, i.e. the rules specified in the Act of 23 April 1964 - Civil Code (consolidated text of Journal of Laws of 2022, item. 1360; hereinafter referred to as the CC). The entrepreneur affected by the act of unfair competition should also compensate for the damage caused to the aggrieved party by the act of unfair competition in accordance with general principles specified in the CC (Article 18(1)(4) of CUCA). Moreover, an entrepreneur affected by an act of unfair competition, in a situation where the act of unfair competition was of a culpable nature, may claim an award of an appropriate sum of money for a specific social purpose related to the support of Polish culture or protection of national heritage (Article 18(1)(6) of CUCA), the so-called "penance". Irrespective of the abovementioned claims, an entrepreneur affected by an act of unfair competition may demand one or several announcements of a declaration of appropriate content and form (Article 18(1)(3) of CUCA). This demand includes the possibility to demand dissemination of the statement not only in the press, but also in any other manner not excluding the press and the Internet. Finally, pursuant to Article 18(2) of CUCA, the court, upon the motion of the entitled party, may also rule on products, their packaging, advertising materials and other objects directly related to the commission of the act of unfair competition. In particular, the court may order that they be destroyed or credited as damages.

Irrespective of the above claims, the provisions of the CUCA provide for specific legislative solutions addressed to the situation of committing acts of unfair competition consisting in infringement of business secrets. Firstly, due to difficulties in determining the causal link between the act of the perpetrator of an act of unfair competition and the damage, as well as the amount of the damage itself, an entrepreneur affected by an act of unfair competition in the form of infringement of its business secrets may seek, as an alternative to damages on general terms (Article 18(1)(4) of CUCA), lump sum damages. It takes the form of payment of a sum of money in the amount corresponding to the remuneration which, at the moment of its enforcement, would be due for granting by the authorised party consent to the use of information constituting a business secret (Article 18(5) of CUCA).

Secondly, an entrepreneur affected by an act of unfair competition consisting in an infringement of business secrecy may demand that the defendant is obliged to publish information about the judgement or the content of the judgement, in a specified manner and to a specified extent, if it is justified by the circumstances of the act of unfair competition, in particular the manner in which the act was committed, the value of the information to which the act relates, the effect of the act and the likelihood of the commission of the act of unfair competition in the future and, where the defendant is a natural person, if it is not precluded by

the defendant's legitimate interests, in particular the protection of the defendant's personal rights. However, the manner and scope of public disclosure of information on the judgement or its content may not lead to disclosure of a business secret (Article 18(3) of CUCA), thus in the case in question, of the management method used in the given enterprise.

Thirdly, in the case of an act of unfair competition consisting in the infringement of a business secret, the court, instead of granting a request for the cessation or elimination of the effects of the prohibited acts, or a ruling on the products, their packaging, advertising materials and other objects directly related to the commission of the act of unfair competition, may, at the defendant's request, oblige the defendant to pay the claimant appropriate remuneration, in an amount not higher than the remuneration which, at the time of the claim, would have been due as a result of the right holder's consent to use the information, for a period of time not exceeding the cessation of the state of secrecy, if three conditions are met, i.e. the defendant, at the time of using or disclosing the information constituting the business secret, did not know or, with due diligence, could not have known that the information had been obtained from the person who used or disclosed it in the circumstances referred to in Article 11(4) of CUCA, the granting of the demand for abandonment would cause disproportionate damage to the defendant, and the obligation to pay remuneration does not infringe the plaintiff's legitimate interest. (Article 18(4) of CUCA)

5. Investigating claims for infringement of a business secret in the form of a management method

As of 1 July 2020, by virtue of the regulation of the Minister of Justice of 29 June 2020 on transferring to certain district courts the examination of intellectual property cases from the jurisdiction of other district courts (consolidated text of Journal of Laws of 2022, item 1398), intellectual property divisions were separated in the structure of district courts in Gdańsk, Katowice, Lublin, Poznań and Warsaw. Thanks to this procedure and to entrusting the cognizance of appeals against decisions of these district courts to the Courts of Appeal in Poznań and Warsaw, a structure of specialised courts (hereinafter referred to as intellectual property courts) dealing with the cognizance of intellectual property cases was created (Kurosz, 2021).

The notion of intellectual property case was defined in the introduction to the Act of 17 November 1964 - Code of Civil Procedure (consolidated text Journal of Laws of 2021, item 1805 as amended; hereinafter referred to as the CPC) by virtue of the Act of 13 February 2020 amending the Act - Code of Civil Procedure and certain other acts (Journal of Laws of 2020, item 288) Article 479^{89} of CPC. In the light of Article 479^{89} § 2(1) of CPC, intellectual property cases are also cases for combating unfair competition. Thus, in the situation where the

management method of an organisation may be qualified as a business secret, the enforcement of claims in the case of infringement of such a secret, i.e. committing an act of unfair competition, as specified in Article 11(1) of CUCA, will take place before the intellectual property court.

Classification of the above-mentioned case as an intellectual property spray entails not only subjecting it to the jurisdiction of intellectual property courts, but more importantly, their examination within the framework of separate proceedings in intellectual property cases covered by the regulation of Article 479^{89} -479^{129} of CPC. Thanks to it, an entrepreneur who has been harmed by an act of unfair competition will be able to use a specific legal institution which is characteristic only of proceedings in intellectual property cases and which facilitates the pursuit of his/her claims, in particular claims for compensation and return of unjustified benefits, such as securing evidence (Article 479^{96}-479^{105} of CPC). This request may be made by an entrepreneur both before bringing an action and during the proceedings (Article 479^{97} § 1 of CPC).

On the other hand, such an entrepreneur will not be able to use the two remaining auxiliary measures provided for in the regulations on proceedings in the field of intellectual property, i.e. disclosure or issuance of evidence (Article 479^{106}-479^{111} of CPC) and request to provide information (Article 479^{112}-479^{121} of CPC). In the case of an application for disclosure or issuance of a measure of evidence and a request for information, the application of these institutions is limited - as follows respectively from Article 479^{106} *in principio* of CPC and Article 479^{113} § 1 of CPC - only to cases of infringement of exclusive rights referred to in Article 479^{89} § 1 of CPC, thus it is not possible in cases of acts of unfair competition (so the Court of Appeal in Warsaw in its decision of 15 December 2021, ref. no. VII AGz 498/21, not published; differently the Court of Appeal in Poznań in its decision of 5 April 2022, I AGz 5/22, not published).

Furthermore, it should be noted that an entrepreneur who has been harmed by an act of unfair competition has the possibility to use the institution of securing a claim (Article 730-757 of CPC), which allows him/her in particular to discontinue the use of his/her business management method by a competitor even before the decision allowing the action has been obtained. This procedural institution in intellectual property cases is characterized by certain specificity resulting from the changes introduced by the Act of 9 March 2023 amending the Act - the Code of Civil Procedure and certain other acts (Journal of Laws of 2023, item 614). It is expressed, in particular, in the departure in these cases from the principle of *ex parte* proceedings, which is the rule, in favour of a hybrid model with adversarial proceedings dominating and exceptions in favour of *ex parte* proceedings in the case of securing non-pecuniary claims (Antoniuk, 2023).

6. Concluding remarks

The considerations carried out lead to several conclusions. Firstly, it is not possible to protect the method of managing an organisation under copyright law as such, but only its description, which can be qualified as a work within the meaning of PrAut. Secondly, the possibility of protecting a method of managing an organisation as a solution subject to exclusive rights should also be excluded. Thirdly, it is possible to qualify it as a rationalisation project, provided that such a method is recognised as a rationalisation project by the entrepreneur in the rationalisation regulations adopted by it.

Fourthly and finally, an original management method used in an organisation may be protected as a business secret provided that the method meets the requirements to qualify as a business secret. In such a situation, an entrepreneur affected by an act of unfair competition will be entitled to a wide range of claims provided for in the CUCA. Pursuing these claims will take place within the framework of separate proceedings in intellectual property cases before specialised intellectual property courts, which is intended by the legislator to increase the quality of decisions in intellectual property cases.

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