ASSERTING CLAIMS FOR INFRINGEMENT OF EXCLUSIVE RIGHTS TO THE PROJECT MANAGEMENT PLAN

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Introduction/background: The importance to an organisation of a management plan for the projects it carries out raises the question of how it can be protected from use by other organisations, particularly competing businesses.
Aim of the paper: The aim of this paper is to answer the question of whether a project management plan can be protected by the organisation using it against its use by another entity and, if so, on what legal basis and in what proceedings.
Materials and methods: The considerations in this article are based on the literature on the subject and on the case law of common and administrative courts. These materials have been subjected to critical analysis.
Results and conclusions: The analysis carried out leads to the conclusion that the project management plan qualifies as a work within the meaning of copyright law and, moreover, can be protected as a business secret under the provisions on combating unfair competition.
Keywords: project, organisational management, intellectual property, intcllectual property courts

1. Introduction

The use of management methods in an organisation in relation to a speciflc project is not irrelevant to the realisation of the goals set for that organisation and its competitiveness in relation to other entities, and therefore raises the question of the possibility of protecting both the management of such a project and the plan of that management from their use by another organisation, in particular a competing entrepreneur. This type of unlawful use of someone else's output not only saves the infringer the costs associated with creating its own model of conduct to implement a specific type of project, but also to offer similar solutions, which does not remain without impact on the competitiveness of the infringer with respect to the injured party.

It is for this reason that the question of the possibility of protecting certain management methods for the projects in question, or the management plan for such a project itself, from unlawful use by another entrepreneur remains so important and topical from the point of view of the entitled entrepreneur. 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 such actions?

2. Qualification of project management as an intangible asset

Project management can be defined, following the PMI (Project Management Institute), as a process in which the project manager carries out the deliberate planning and control of the tasks that make up the project and makes the appropriate allocation of the resources assigned to the project, using appropriate techniques and methods, in order to achieve the set goal within a specified time, at a specified cost and of appropriate quality (Pietras, Szmit, 2003).

The term project, on the other hand, is ambiguous depending on the context in which it is used. The term "draft" in the legal context means a preliminary document, presenting a proposal for changes, new legal regulations, modification of existing provisions, etc. In this case, the emphasis is on a change to existing solutions and a proposal to introduce new ones, which may be accepted or rejected by the authority competent to consider and adopt the submitted solution. In the technical sciences, a project may mean: a sketch, technical drawing, architectural drawing, architectural and urban planning drawing, urban planning drawing, construction drawing, showing a general plan of the premises, a diagram of the planned installation, technological solutions, etc. On the other hand, in the field of management sciences, a project is a concept understood in the organisational and process aspect, as a skilful combination of deliberately planned, integrated and coordinated activities, undertaken with the intention of achieving a precisely defined goal and obtaining specific results (Walczak, 2010).

There are many attempts in the management science literature to define the concept of a project (Wyrozębski, 2012). It can be assumed, following PMI, that a project is a temporary endeavour to create a unique product or service, where temporariness means that the endeavour has a well-defmed beginning and end, and uniqueness means that the product or service is clearly different from all similar products or services (Pietras, Szmit, 2003).

The process itself, which is project management, should be excluded as a potential subject of protection due to its nature. The process is only a concept, and therefore possible protection should be sought in the regulations governing the protection of intangible property. Although these regulations do not explicitly exclude the process from the circle of potential protected goods, it does not seem, however, that it can be qualified as a work or an object of related rights, or an object of industrial property being a technical solution, i.e. an invention, a utility model or a topography of an integrated circuit, not to mention an industrial design.

It should be emphasised at this point 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 CRRA) excludes from copyright protection, inter alia, procedures, methods and principles of operation. 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 seems that the process of carrying out a specific type of project using management methods will have to be assessed in a similar way. This is because carrying out a certain type of project using certain management methods was previously possible, although this possibility was not recognised, and the monopolisation of the process made it impossible to use the management methods in question for projects of a certain type.

In turn, Article 28(1)(3) of the Act of 30 June 2000 Industrial Property Law (consolidated text of Journal of Laws of 2021, item 324, as amended; hereinafter referred to as IPL), which, based on Article 100(1) of IPL, is appropriately applicable to utility models, excludes the possibility of qualifying as an invention, as well as a utility model, schemes, rules and methods of conducting thought 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-thinking nature, including organisational ideas, as they solve intellectual or organisational problems (Konrat, 2021), which is what project management is. The enumeration contained in Article 28(1)(3) of IPL, in contrast to the enumeration contained in Article 1(2^1) of CRRA, is of an exemplary nature only, and thus project management methods (organisation processes) may also be added to the list contained in this regulation, due to their non-technical, but organisational nature. It should be noted that although Article 7 of IPL provides for legał protection of rationalization projeets, in this case the project is not identified by the legislator with the organizational process, but with solving a specific social problem (Article 7(2) of IPL).

The question of whether it is possible to protect the specific plan according to which project management takes place therefore needs to be conidered.

3. Project management plan as an intangible asset

The implementation of the process, which is project management, is based on a project management plan, which is dcfined as "a description of a possible future selection and arrangement of activities united by a common goal or a possible future selection and arrangement of components of the product of activities so united" (Kotarbiński, 1982, p. 74). Commonly, a plan is identified with a document, which is used as a guide for managing the project and controlling the process. In other words, it is seen as a document describing how to achieve a goal. Such a document should contain a definition of the projects objective and the individual tasks to be implemented, an assessment of the existing situation, an indication of the resources required to implement the project, a programme of activities to be performed within the project and which of these are of a priority nature, a list of people who will perform the project and their allocation to specific activities, a schedule of the planned work, the definition of mechanisms for controlling the implementation of the plan, information about possible variants in the event of changes in the circumstances in which the project is implemented, and the assumptions underlying the preparation of the plan.

Such an approach is, however, an oversimplification. The project management plan, just like the previously mentioned process, has by its nature, as a product of the human mind, an intangible form, and the document containing the description of this plan is only its material carrier, *corpus mechanicum,* a materialisation of this product of the intellect. Conseąuently, in the search for a legal regime to protect it, it is reasonable to turn to the regulation of rights in intangible property.

4. Qualification of the project management plan as an object of exclusive rights

Before analysing the possible qualification of the project management plan as one of the intangible assets, attention should be drawn to the principle of the *numerus clausus* of rights in intangible assets. This principle assumes that it is not possible to create new subjective rights of an absolute nature otherwise than by way of legislation, in particular by way of a legal act or a court decision (Żelechowski, 2019; Kurosz, 2021; Dybowski, 2003). Therefore, in order to protect the project management plan, it is necessary to qualify it as one of the subjects of exclusive rights specified by the legislator.

First, it is necessary to consider the possibility of qualifying the project management plan as a work within the meaning of Article 1(1) of CRRA. For this to happen, the management plan has to meet four conditions - it has to be a result of human activity, have a creative

character, i.e. be a result of creative activity aimed at creation of a new product, have an individual character, i.e. bear the stigma of the creator, be original, and be established, i.e. be externalised in a manner allowing it to be perceived by third parties. While the fulfilment of the first and fourth prerequisites will in principle always be met in the case of a project management plan fixed in the form of a document, the assessment of the fulfilment of the second and third prerequisites will depend on the features of the specific plan. It should be emphasised that in order for an organisation not only to use the project management plan, but also to claim the infringement of author's economic rights to it (Article 79(1) *in principio* of CRRA), it must acquire these rights, or at least have the status of an exclusive licensee (Article 67(4) of CRRA). Acquisition of authors economic rights may take place either by concluding a contract for their transfer (Article 41(1)(1) *in fine* of CRRA) or under an employment contract from an employee who is in an employment relationship with the organisation (Article 12(1) of CRRA).

Secondly, while it should be excluded - due to the lack of possibility to recognise the plan as a technical solution - to qualify it as an invention, utility model or topography of an integrated circuit, as well as industrial design, it seems possible to qualify it as a rationalisation project. Indeed, according to Article 7(2) of the IPL, any exploitable solution that is not a patentable invention, utility model, industrial design or a topography of an integrated circuit. This means that a project management plan could be qualified as a non-technical, organisational solution consisting of a planned process of solving a specific problem, which is the realisation of an assumed project. However, the condition for qualifying such a plan as a rationalization project is the recognition of such a solution as a rationalization project by the entrepreneur in the rationalization regulations adopted by the entrepreneur (Article 7(2) *in principio in* connected with Article 7(3) of IPL). As it follows from the above, the possibility to qualify the project management plan applies only to such organisations that have the attribute of an entrepreneur and, moreover, have adopted the regulations of rationalisation (Article 7(1) of IPL).

Thirdly, the protection of the project management plan as specific *know-how* comes into play. The basis for this protection 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 of 2022, item. 1233, hereinafter referred to as the CUCA), which indicates that a business secret is understood 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. Thus, the condition for the information in question to be covered by the notion of business secret is that it is confidential and that it is covered by the entrepreneurs actions aimed at maintaining that confidentiality (Szwaja, 2019).

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, in particular when it takes place 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 when it has been carried out by the person who obtained the information, carrying out 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 acsthctic 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).

5. Claims for infringement of an exclusive right to a project management plan

As can be seen from the above, a project management plan - if the statutory requirements are met - can be qualified as a work or a rationalization project, or can be protected as a business secret. In practice, however, an organisation which is entitled to property rights to the plan will only be entitled to claims based on CRRA or CUCA. This is a consequence of the model of protection of rationalization projects adopted by the legislator, which differs from other industrial property rights which have been shaped as subjective rights of absolute character. Consequently, an entrepreneur whose employee has created a rationalization project in the form of a project management plan 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 2010,1 SA/Wr 1602/09, LEX no. 559606; Skubisz, 2012; Żelechowski, 2021a).

The catalogue of claims to which the entitled organisation is entitled, irrespective of the basis for the asserted claims, includes the claim for cessation of infringement (Article 79(1)(1) of CRRA) or prohibited actions (Article 18(1)(1) 1 of CUCA) and removal of the effects of the infringement (Article 79(1)(2) of CRRA) or prohibited actions (Article 18(1)(2) of CUCA). However, where the infringement of author's economic rights is of a culpable nature, the court may order the person who has infringed the author's economic rights, at his/her request and with the consent of the right holder, to pay an appropriate sum of money to the right holder if the abandonment of the infringement or the removal of the effects of the infringement would be disproportionately severe for the infringer. (Article 79(3) of CRRA).

Moreover, the holder of author's economic rights and an entrepreneur affected by an act of unfair competition may demand surrender of wrongfully obtained benefits (Article 79(1)(4) of CRRA; Article 18(1)(5) of CUCA), however, in the case of an act of unfair competition. surrender of wrongfully obtained benefits should be made on general terms. They may also demand compensation for the damage caused to the entitled organisation under generał rules (Article 79(1)(3)(a) of CRRA; Article 18(1)(4) of CUCA), 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 CC) Due to difficulties in determining the causal link between the act of the infringer or perpetrator of an act of unfair competition and the damage, as well as the amount of the damage itself, the holder of the author's economic rights or an entrepreneur affected by the act of unfair competition in the form of infringement of its business secret may seek, as an alternative to damages on generał terms, lump sum damages. An entitled entity based on the author's economic rights, pursuant to Article 79(1)(3)(b) of CRRA may pursue a lump-sum damages in the form of a pecuniary amount corresponding to twice the amount of the relevant remuneration which, at the moment of its pursuit, would be due for granting by the entitled entity the consent to use the plan. On the other hand, in the case of an act of unfair

competition consisting in the infringement of an enterprise secret, the authorised entity may demand, instead of damages, reparation of the damage by payment of a sum of money in the amount corresponding to the remuneration which, at the moment of its enforcement, would be due as a result of granting by the authorised entity the consent to use information constituting an enterprise secret (Article 18(5) of CUCA). Moreover, an entrepreneur affected by an act of unfair competition in a situation where committing an act of unfair competition was of a culpable nature may demand that an appropriate sum of money be awarded for a specific social purpose related to supporting Polish culture or protecting national heritage (Article 18(1)(6) of the CUCA). This claim has no equivalent in CRRA.

Irrespective of the abovementioned claims, the holder of copyrights or an entrepreneur affected by an act of unfair competition may demand one or several announcements of a statement of appropriate content and form (Article 79(2) of CRRA; Article 18(1)(3) of CUCA). However, while in the case of copyright, only the dissemination of the statement in the press may be demanded, in the case of an act of unfair competition, the statement may be demanded in any manner not excluding the press and the Internet. Moreover, both the holder of the author's economic rights and the entrepreneur affected by the act of unfair competition may request that a part or the entirety of the court decision issued in the case under consideration be made public in the manner and scope specified by the court (Article 79(2) of CRRA; Article 18(5) of CUCA). However, such a request may be granted in the case of committing an act of unfair competition 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 pertained, the effect of the act and the likelihood of committing the act of unfair competition in the future, and in the case where the respondent is a natural person - if it is not additionally opposed by the respondent’s legitimate interest, in particular the protection of the respondent's personal rights. However, the manner and scope of public disclosure of information on the judgment or its content may not lead to disclosure of business secrets (Article 18(3) of CUCA).

Pursuant to Article 79(4) of CRRA, the court, when deciding on the infringement of the right, may rule, at the request of the entitled person, on the unlawfully produced objects and the means and materials used to produce them, in particular may rule on their withdrawal from the market, awarding the entitled person due compensation or destruction. When ruling, the court shall take into account the gravity of the infringement and the interests of third parties. The said means and materials are presumed to be the property of the person who has infringed the author's economic rights (Article 79(5) of CRRA). In turn, pursuant to Article 18(2) of CUCA, the court, at the request 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 their destruction or credit for damages.

A specific regulation with regard to an act of unfair competition consisting in the infringement of business secrecy with regard to claims is contained in CUCA. In the case of such an act, the court, upon the motion of the entitled party, may oblige the defendant to publicise information about the judgement or the content of the judgement in a specific manner and within a specific scope, if it is justified due to the circumstances of the act of unfair competition, in particular the manner in which the act was committed, the value of information to which the act referred, the effect of the act and the likelihood of committing an act of unfair competition in the future, and in the case where the defendant is a natural person - if it is not additionally opposed by the justified interest of the defendant, in particular the protection of his/her personal rights. However, the manner and extent to which information on the judgment or the content of the judgment is made public shall not lead to disclosure of business secrets. (Article 18(3) of CUCA) Moreover, in the case of an act of unfair competition consisting in the infringement of an enterprise secret, the court, instead of granting the request to discontinue or remove the effects of the prohibited actions, or the ruling on 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 holders 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 dernand for abandonment would cause disproportionate damage to the defendant, and the obligation to pay remuneration does not infringe the plaintiffs legitimate interest (Article 18(4) of CUCA).

6. Judicial redress for infringement of an exclusive right to a project management plan

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 the fact that the jurisdiction of appeals against the decisions of these district courts was entrusted to the Courts of Appeal in Poznań and Warsaw, a structure of specialised courts (hereinafter referred to as intellectual property courts) dealing with the jurisdiction 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 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} § 1 of the CPC, intellectual property cases are also cases concerning protection of copyrights, thus in the case of qualifying a management plan as a work within the meaning of Article 1(1) of CRRA, the enforcement of claims in the case of infringement of economic or personal copyrights will take place before the intellectual property court. In the case where the project management plan bears the features of a trade secret, regardless of whether it constitutes a work within the meaning of Article 1(1) of CRRA, also the enforcement of claims in the case of infringement of such a secret, i.e. committing an act of unfair competition specified in Article 11(1) of CUCA, shall take place before the intellectual property court, because in the light of Article 479^{89} § 2(1) of CPC, intellectual property cases are also cases of combating unfair competition.

Classification of the above-mentioned cases as intellectual property cases entails not only subjecting them 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. As a result, an entitled person will be able to take advantage of specific legal institutions which facilitate the pursuit of his/her claims, in particular seeking damages and the surrender of wrongfully gained benefits. These institutions, which are specific only to intellectual property proceedings, include the possibility to demand securing an evidence measure (Article 479^{96}-479^{105} of CPC), disclosure or release of an evidence measure (Article 479^{106}-479^{111} of CPC), as well as a request for information (Article 479^{112}-479^{121} of CPC). While the first and the third of these requests may be included both in the statement of claim and in a separate application preceding the bringing of the action, in the case of an application for disclosure or for the issuance of evidence, it is possible to include such an application, as indicated by the content of Article 479^{106} *principio* of CPC, only in the statement of claim (Żelechowski, 2021; Manowska, 2022). Moreover, while in the case of an application for securing an evidence measure it will be possible to make such a request both in the case of an infringement of copyright in a project management plan and in the case of committing an act of unfair competition, in the case of an application for disclosure or issuance of an evidence measure and a request for information, the application of these institutions is limited - as it 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, and therefore - in the case under consideration - only in the case of infringement of copyright (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, , ref. no. I AGz 5/22, not published).

7. Concluding remarks

The above considerations lead to the conclusion that while there is no possibility of legal protection of the process of project management, the plan of such a process may be protected as a work or a business secret, provided that the plan meets the requirements for a work or allows to qualify it as a business secret. In such a situation, the entitled person will be entitled to claims provided for in CRRA and CUCA, the catalogue of which is to a large extent convergent, ensuring a similar standard of protection to entitled persons. Pursuing claims will take place within the framework of separate proceedings in intellectual property cases before specialized intellectual property courts, which according to the legislator's intention is supposed to improve the quality of decisions issued in intellectual property cases.

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