

# OVERVIEW OF NATIONAL AND REGIONAL TRADE SECRET SYSTEMS

## REPUBLIC OF KOREA

### 1. Sources of Law

The main sources of trade secret protection in the Republic of Korea is the “Unfair Competition Prevention and Trade Secret Protection Act”<sup>1</sup> (Unfair Competition Act). Further, the Civil Act<sup>2</sup> providing regulations on tort and breach of contract and the Criminal Act<sup>3</sup> providing a chapter embezzlement and breach of trust also relates to trade secrets.<sup>4</sup>

### 2. Definition of a trade secret

According to Article 2(2) of the Unfair Competition Act, the term "trade secret" means information, including a production method, sale method, useful technical or business information for business activities, which is not known publicly, is managed as a secret, and has independent economic value. The criterion that the information is managed as a secret replaced “is the subject of reasonable efforts to maintain its secrecy” through the amendment of the Act in 2019.

According to the Supreme Court of the Republic of Korea, the criterion “not known publicly” requires that the information at issue cannot be acquired ordinarily except through the holder of the information because the information has not been disclosed to the public, for example, by being published in the media.<sup>5</sup>

Furthermore, according to the Supreme Court of the Republic of Korea, the information “has independent economic value” when the owner of the information should be able to gain competitive advantages over competitors by using the information, or when considerable efforts or costs are required to acquire or develop the information.<sup>6</sup>

### 3. Scope of trade secret protection

Article 2(3) Unfair Competition Act defines the acts considered as infringement of trade secrets as:

- (a) An act of acquiring trade secrets by theft, deception, coercion, or other improper means or subsequently using or disclosing the trade secrets improperly acquired (including informing any specific person of the trade secret while under a duty to maintain secrecy; hereinafter the same shall apply);
- (b) An act of acquiring trade secrets or using or disclosing the trade secrets improperly acquired, with knowledge of the fact that an act of improper acquisition of the trade secrets has occurred or without such knowledge due to gross negligence;
- (c) An act of using or disclosing trade secrets after acquiring them, with knowledge of the fact that an act of improper acquisition of the trade secrets has occurred or without such knowledge due to gross negligence;
- (d) An act of using or disclosing trade secrets to obtain improper benefits or to cause damage to the owner of the trade secrets while under a contractual or other duty to maintain secrecy of the trade secrets;

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<sup>1</sup> Available at: <https://www.wipo.int/wipolex/en/legislation/details/22266>.

<sup>2</sup> Available at: [https://elaw.klri.re.kr/eng\\_service/lawView.do?hseq=61788&lang=ENG](https://elaw.klri.re.kr/eng_service/lawView.do?hseq=61788&lang=ENG).

<sup>3</sup> Available at: <https://www.wipo.int/wipolex/en/legislation/details/13746>.

<sup>4</sup> This document aims to provide an overview (June 2024). It is not a complete review of the legal situation and case law. For further information, interested readers may consult Seok Hee Lee, John J. Kim and Ho-Yeon Lee in *Trade Secrets throughout the World (Jager et. al.)*, 2023, Chapter 24 Korea.

<sup>5</sup> *Ibid.*, § 24:3 with reference to the Supreme Court of the Republic of Korea, Decision 2006 Do 7916, rendered on July 9, 2009.

<sup>6</sup> *Ibid.*, § 24 :5 with reference to the Supreme Court of the Republic of Korea, Decision of July 9 - 2006 Do 7916.

- (e) An act of acquiring trade secrets, or using or disclosing them with the knowledge of the fact that they have been disclosed in the manner prescribed in item (d) or that such disclosure has been involved, or without such knowledge due to gross negligence;
- (f) An act of using or disclosing trade secrets after acquiring them, with the knowledge of the fact that they have been disclosed in a manner prescribed in item (d) or that such disclosure has been involved, or without such knowledge due to gross negligence;

Methods such as reverse engineering (where a lawfully acquired product is taken apart to discern the ideas or trade secret information from the product) do not represent an act of infringement and are considered lawful.<sup>7</sup>

#### 4. Exceptions

Article 13 provide exceptions to trade secret protection for *bona fide* recipients of trade secrets. According to Article 13(1) of the Unfair Competition Act, it is not considered trade secret infringement, if a person has properly acquired a trade secret, or uses or discloses the trade secrets within the scope of the rights the person has properly acquired through the transaction. The properly acquired trade secrets refer to acquisitions without the knowledge and without gross negligence that the trade secrets were improperly disclosed or that an act of improper acquisition or of improper disclosure of the trade secrets occurred when he or she acquired under subparagraph 3(c) or (f) of Article 2 of the Competition Act (Article 13(2)).

#### 5. Civil remedies

Chapter 3 of the Unfair Competition Act contains the relief measures available to a trade secret holder. According to Article 10(1) of the Unfair Competition Act, a trade secret holder may prohibit the infringement or prevent the infringement of a trade secret if business interests of the trade secret holder are damaged (or likely to be damaged) by the infringement. In addition, Unfair Competition Acta trade secret holder may request the destruction of goods constituting the infringement, the removal of facilities used in the infringement, or any other measures necessary to prohibit or prevent the infringement (Article 10(2)).

Article 11 of the Unfair Competition Act provides the trade secret holder with a claim of damage compensation against a person, who infringes trade secrets (either negligently or intentionally). Damage calculation is regulated by Article 14-2 of the Unfair Competition Act, whereby a punitive damage regime exists in cases of intentional trade secret infringement (Article 14-2 (6)).

Further, according to Article 12 of the Unfair Competition Act a trade secret holder whose business reputation has been damaged through an intentional or negligent infringement of trade secrets can request measures necessary to restore the business reputation in lieu of or in addition to compensation for damage under Article 11 against the infringer.

#### 6. Criminal sanctions

Article 18 of the Unfair Competition Act provides for criminal sanctions for misappropriation of trade secrets. Further, according to Article 18-2 of the Unfair Competition Act, any person who has attempted to commit a crime provided in Article 18(1) and (2) shall be punished. According to Article 18-3 Unfair Competition Act, any person who intends or conspires to commit a crime under Article 18(1) shall be punished by imprisonment with labor for not more than three years or by a fine not exceeding 30 million won. Further, any person who intends or conspires to commit a crime under Article 18(2) of the Unfair Competition Act shall be punished by imprisonment with labor for not more than two years or by a fine not exceeding

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<sup>7</sup> *Ibid.*, § 24.8.

20 million won. A violation of an issued confidentiality order according to Article 14-4 of the Unfair Competition Act may be punished pursuant to Article 18-4.

In addition to the sanctions provided for in the Unfair Competition Act, (attempted) crimes of embezzlement and breach of trust are sanctioned according to Articles 355 ff. of the Criminal Act.

#### 7. Trade secret protection in judicial proceedings

In court proceedings, rules on the protection of trade secrets are distributed and laid down in the Civil Procedure Act and individual laws such as the Patent Act and the Unfair Competition Act.

The Civil Procedure Act provides for access to litigation records. However, if the litigation record contains a trade secret, it can be protected with Article 163(1) no.2. Further, Article 344 of the Civil Procedure Act specifies the obligation to submit documents but contains with its reference to Article 315(1)<sup>8</sup> an exception with regard to secrets falling under the official functions of certain professions (Article 315(1) no.1) and when he or she is examined on matters falling under his or her technical or professional secrets (Article 315(1) no.2).

Individual laws, such as the Patent Act and the Trademark Act, also have separate regulations to protect trade secrets. For example, the Patent Act imposes an obligation to present specific aspects of behavior on infringers, but it stipulates that matters concerning trade secrets are considered (Article 126-2). Further, the court may order parties to submit materials to prove infringement or calculate losses but also considers exceptions and limitations of scope when trade secrets are involved (Article 132).

In addition, a party may obtain a confidentiality order according to Article 224-4 of the Patent Act. Confidentiality orders are also available according to Article 14-4 of Unfair Competition Act.

#### 8. Procedural provisions

##### *Burden of Proof*

There are no explicit provisions in the Trade Secrets Protection Act as to burden of proof. Therefore, general rules, refined by case law apply. For example, if the plaintiff can reasonably prove that the trade secret is not generally obtainable the information is presumed not to have been disclosed to the public, it is then defendant's burden to rebut that presumption.<sup>9</sup>

##### *Statute of Limitation*

According to Article 14 of the Unfair Competition Act, when the misappropriation of trade secrets continues, the right to request prohibition or prevention of the misappropriation of trade secrets under Article 10(1) of the Unfair Competition Act expires unless the right is exercised within three years from the date on which a person possessing trade secrets learned the fact that business interests were damaged or threatened to be damaged by an infringer and the identity of the infringer. The same shall also apply where 10 years have elapsed after the date on which the act of infringement first occurred.

##### *Competent Courts*

There is no provision on competent courts in the Trade Secrets Protection Act. The common rules according to the Civil Procedure Act apply.

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<sup>8</sup> See Article 344(1) no. 3(c).

<sup>9</sup> Seok Hee Lee, John J. Kim and Ho-Yeon Lee, *loc. cit.*, § 24:3.

### *Others*

Article 9-2 of the Unfair Competition Act provides a Certification of Original Document of Trade Secrets. With this system, the trade secret holder may register the electronic fingerprint for electronic documents containing trade secrets to certify the originality of the electronic documents.