

Employees, Trade Secrets and Restrictive Covenants in Korea*

한국에서의 근로자, 영업비밀과 경업금지계약

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■ ABSTRACT ■

In recent years, the rapid advances in technology and the evolution in social and economic information have led to the increasing importance of trade secrets in Korea. Advanced technology in the field of information and environmentally sound technology has also increased the possibility of accidentally or intentionally acquiring information, and has been accompanied by an increase in sharp practice related to trade secrets. With the increase in industrial espionage through the enticement of present and/or former employees of a company by a competitor, the issue of protecting trade secrets has gained a great deal of attention. Thus, an efficient legal system became a necessity in order to prevent acts of unfair competition such as the misappropriation of trade secrets and to maintain fair competition in the market.

In the presence of large scale global labour mobility, the protection of trade secrets and the law on post-contractual non-compete clauses (restrictive covenants) in an employment context have presented a major problem. The paper starts with the protection of trade secrets in an employment context, then moves to restrictive covenants, post-contractual competition issues and finally problems of procedure and enforcement.

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I . Introduction

In recent years, the rapid advances in technology and the evolution in social and economic information have led to the increasing importance of trade secrets in Korea. Advanced technology in the field of information and environmentally sound technology has also increased the possibility of accidentally or intentionally acquiring information, and accompanied by an increase in sharp practice related to trade secrets. With the increase in industrial espionage through the enticement of present and/or former employees of a company by a competitor, the issue of protecting trade secrets has gained a great deal of attention. Thus, an efficient legal system became a necessity in order to prevent acts of unfair competition such as the misappropriation of trade secrets and to maintain fair competition in the market.

A member of the OECD, Korea has recently sought to pursue the 'globalisation' of all areas, including her legal system in order to deal with dynamic changes in the international trade environment. Further, Korea has developed a close cooperation with international organizations in intellectual property rights and has strengthened global cooperation in the field, thereby reflecting the increasing number of FTAs. In the presence of large scale global labour mobility, the protection of trade secrets and the law on post-contractual non-compete clauses (restrictive covenants) in an employment context have presented a major problem. The paper starts with the protection of trade secrets in an employment context, then moves to restrictive covenants, post-contractual competition issues and finally problems of procedure and enforcement.

II. The Protection of Trade Secrets in the Context of Employment Relations

1. Historical Development

Until the early 1990s, there was no direct legal protection of trade secrets in Korea. Now and then, the infringement of trade secrets was qualified as theft or

misappropriation of property under criminal law. Occasionally, civil law protection of trade secrets was granted within the framework of contracts, e.g., licensing, distribution, and employment agreements. In some cases, legal protection could be obtained under tort law.¹⁾ But hardly any case law developed under these provisions, since establishing intent or negligence appeared difficult. In addition, under a civil law action based on torts only damages rather than injunctive relief could be obtained.

In order to comply with international obligations, acquiesce to the requests of the relevant domestic circles and encourage investment in research and development in Korea, the Korean legislature amended the Unfair Competition Prevention Act (UCPA)²⁾ on 31 December 1991.³⁾ By virtue of this amendment, technical or operational information could be protected as a trade secret as of 15 December 1992. The amendment aimed at protecting trade secrets from misappropriation or unauthorised use by specifically defining patterns of sharp practice.⁴⁾

Korea amended the UCPA in 1999⁵⁾ to broaden the scope of trade secret protection. This amendment was an attempt to prevent corporate spying in Korea by imposing criminal penalties on former employees for divulging trade secrets. In 2004, the government further strengthened the scope of protection for trade secrets by extending the scope of punishable offences and increasing the penalty for the employer of infringers etc. In 2006, the Technology Leak Prevention and Industrial Technology Protection Act was enacted to increase the protection of domestic industrial technology by seeking to prevent certain key technologies from flowing outside of Korea, thereby promoting technological development and national security. Since 2009, the UCPA has been amended to include: (i) relaxation of trade secret requirements (sec. 2(2)); (ii) certification of original document of trade secrets (sec. 9bis); and (iii) strengthening penalties for trade secret infringements (sec. 18).

1) For details, see Byung-Il Kim, *The Protection of Trade Secrets in Korea* 30 IIC 403 (1999).

2) The Unfair Competition Prevention Act (*Bujeong Gyeongjaeng Bangjibeob*): Act. No. 911, 30 December 1961, wholly amended by Act No. 3897, on 31 December 1986. The title of the Act was changed from “The Unfair Competition Prevention Act” to “The Unfair Competition Prevention and Trade Secret Protection Act” in 1998 by Act No. 5621, last amended by Act No. 14839, of 26 July 2017. See Byung-Il Kim, *protection against Unfair Competition*, in: Edited by Byung-Il Kim & Christopher Heath, *Intellectual Property Law in Korea*, Wolters Kluwer, 2015, p. 147-173. An English translation of all major IP laws can be found at the site of the Legislative Center of Korea, Legislation Research Institute, http://elaw.klri.re.kr/eng_service/main.do.

3) Act No. 4478, of 31 December 1991. Trade secret protection in Korea was codified not only into the Uniform Trade Secrets Act, but also in the Japanese UCPA of 1990 (Act No. 66/1990). See Moon Hwan Kim, “Yeongeob Bimil Boho e Kwanhan Migug ui Panrye Sogo” [Protection of Trade Secrets in the USA] (1992) *The Justice* 25-1, at 37.

4) Byung-Il Kim, *supra*, note 1, at 404.

5) Act No. 5621, in force since 1 January 1999. The title of the Act was changed from “The Unfair Competition Prevention Act” to “The Unfair Competition Prevention and Trade Secret Protection Act” by Act No. 5621.

2. Definition of Trade Secrets

A definition of a "trade secret" can be found in sec. 2(2) of the UCPA. According to this provision, a trade secret is any technical or business information deemed useful for production, sale methods and other business activities, which is not generally known to the public, is of independent economic value, and has been kept secret through reasonable effort.⁶⁾ The three basic requirements for protection under the UCPA are therefore:

- the information must not be known to the public;
- it must have independent economic value; and
- reasonable efforts must have been made to keep it as a secret.

The first basic requirement for protection under the UCPA is that the information must not be known to the public at large. According to sec. 2(2) UCPA, secrecy may exist not only when the information is unknown to third parties, but also where there is not sufficient access to the elements necessary for its economic application, even though certain other elements are known.⁷⁾ Information readily obtainable does not fall within the definition of a trade secret under Korean law. The Supreme Court has affirmed the principle that the owner of a trade secret will not lose the trade secret if the information is revealed to another party in confidence and under the implied obligation not to use or disclose it.⁸⁾

As distinct from protection under patent law, the information need not be novel or inventive.⁹⁾

This applies to trade secrets as a whole, but also components thereof. The information

6) Seoul High Court, 29 June 1996 (95 La 193) - "Calculation method". Information that constitutes a trade secret is required to be 'kept secret by reasonable efforts', which is called secret management. The previous law used the term 'considerable effort' instead of 'reasonable effort' and the term was revised to its current form as of January 28, 2015. The amendment relaxed the requirement to provide relief for under-funded SMEs which do not have sufficient systems to protect their trade secrets in place. However, regarding the degree of 'considerable effort' required under the previous law, the courts have interpreted it as a 'reasonable degree of effort' that corresponds to the size of the company. With the revised law, even if there is 'no reasonable effort, as long as secrecy has been maintained', trade secrets can be recognized. Hence, criteria for satisfying secret management for SMEs are expected to be set lower than before.

7) *Ibid.*; Ho-Yeol Chung, *Bujeong Kyungjaeng Bangji Peob* [Unfair Competition Law] (Seoul 1993) 247-248; Ui-Chang Hwang and Kwang-Yeon Hwang, *Bujeong Kyungjaeng Bangji Yeongeob Bimil Boho e Kwanhan Peob* [Unfair Competition and Trade Secret Law] (Seoul, 2011) 190-193; Kook-Hyun Kim, *Yeongeob Bimil Boho e Kwanhan Peob Silmu* (Trade Secret Law) (Seoul, 2010) 18-26.

8) See Supreme Court, 23 December 1996 (96 Da 16605) - "Monami"; Sang-Jeong Lee, "Yeongeob Bimil eui Boho" [Protection of a Trade Secret] (1994) 3 *Human Rights and Justice* 97; Ho-Yeol Chung, *supra*, note 7, at 248.

9) See Supreme Court - "Monami", *supra*, note 8, at 501 et seq.; Ho-Yeol Chung, *supra*, note 7, at 249; Sang-Jeong Lee, *supra*, note 8, at 97; Hwang and Hwang, *supra*, note 7, at 162-163; ; Kook-Hyun Kim, *supra*, note 7, at 27-28.

may already be widely known, but still be protectable due to the fact that its components are applied in a different way, with different results or in a different context unknown to third parties.¹⁰⁾ It is important to note that the information is regarded as secret if accessible only under great expenditure of time and money, for example product analysis by reverse engineering.¹¹⁾ Therefore, distribution in object code form alone does not exclude trade secret protection because of the great difficulty in obtaining a useful source code by reverse engineering.

The most essential requirement for the protection of trade secrets is the intention to keep the information secret. However, the UCPA does not require absolute control in this respect.¹²⁾ Under the Korean UCPA, information can qualify as secret even if it can be readily accessed by persons other than one's competitors. Protection thus depends on the precautions taken by the company to maintain the secrecy and value of the information vis-à-vis its competitors. The trade secret owner must take all reasonable steps to maintain the secrecy of any information to qualify for trade secret protection, including limiting access to those with a need to know, and instructing employees as to what information is secret, and how it should be handled.¹³⁾

Furthermore, any protectable information has to have an independent economic value. The trade secret is valuable insofar as it gives a competitive advantage to the company vis-à-vis other competitors.¹⁴⁾ In one case, the Supreme Court found that a competitor could not duplicate the information without investing a significant amount of time, effort, and expense, and that the level of secrecy was sufficient for the owner to derive significant economic value therefrom.¹⁵⁾ Thus, a competitor's lack of knowledge can constitute and contain protectable information.¹⁶⁾ Independent value means that the owner of the information has a competitive advantage over his competitor through the information, or substantial cost or effort is needed in order to obtain or develop such information.¹⁷⁾

10) See Supreme Court, 10 November 1998 (98 Da 45751).

11) See Seoul District Court, 27 December 1995 (95 Gahab 3954) - "Corus"; Seoul High Court, 27 May 1996 (95 La 211) - "DC System"; Seoul High Court - "Calculation method", *supra*, note 6; Supreme Court - "Monami", *supra*, note 8.

12) See Ho-Yeol Chung, *supra*, note 7, at 251-252. Sang-Jo Jong, "Protection of Trade Secrets in the Context of Employment" (1995) 36 *Beobhag, No. 1*, at 164, 179, and at 172.

13) Ho-Yeol Chung, *supra*, note 7, at 250-251; Hwang and Hwang, *supra*, note 7, at 204-205; Kook-Hyun Kim, *supra*, note 7, at 40-46.

14) Kyung-Jik Kwak, "Yeongeob Bimil eui Chimhae wa Guje & Sosongsang eui Jemunje" (Infringement of a Trade Secret and its Remedies), (1997) 6 *Human Rights and Justice* 45; Ho-Yeol Chung, *supra*, note 7, at 252; Young-Chul Kim, 72 et seq.; Seoul High Court - "Calculation method", *supra*, note 6.

15) See Supreme Court, 26 January 1996 (96 Da 31574) - "Mekpo".

16) See Hwang and Hwang, *supra*, note 7, at 197-198; Kyung-Jik Kwak, *supra*, note 14, at 46-47.

17) See Supreme Court, 16 February 2008 (2005 Do 6223).

Trade secrets can be classified in two categories: "technical" and "business or administrative". Technical trade secrets relate to technical information such as design methods, blueprints, get-ups, devices, patterns or manufacturing processes,¹⁸⁾ experimental data, know-how,¹⁹⁾ raw material ratios or formulae for measuring strength. Protectable "business" information includes such diverse aspects as customer lists, production and selling programs for new products, selling systems, bookkeeping rules and office management rules.

3. Infringing Acts

(1) General Aspects

In Korea, the UCPA provides a number of provisions for various types of trade secret infringement. The provisions may overlap with the contractual protection of trade secrets, but are not limited to contractual relationships.

Infringement of trade secrets is divided into six categories, but basically falls within two types: unfair acquisition (sec. 2(3)(a)), and the breach of an obligation to maintain the confidentiality of trade secrets (sec. 2(3)(d)). The four other types of infringement can be described as *ex post facto* behaviour. The following six acts enumerated in the UCPA are considered an infringement of trade secrets:

- obtaining a trade secret by theft, fraud, coercion or other unfair means, or use of the trade secret, or disclosure to the public (or a specific person) (sec. 2(3)(a));
- obtaining, using or disclosing a trade secret knowing that it was unfairly obtained, or without knowledge of the fact owing to gross negligence (sec. 2(3)(b));
- use or disclosure to the public of any trade secret with knowledge after the fact that it was obtained unfairly, or without knowledge of the fact owing to gross negligence (sec. 2(3)(c));
- using or publicly disclosing a trade secret contrary to contractual secrecy, with the intention of obtaining an unfair benefit or inflicting loss on the owner of the trade secret (sec. 2(3)(d));
- obtaining, using or disclosing a trade secret knowing that it was disclosed to the public under the conditions stated in subsection (d), or without knowledge of the fact owing to gross negligence (sec. 2(3)(e)); and
- using or disclosing a trade secret to the public with subsequent knowledge that it

18) Supreme Court - "Monami", *supra*, note 8.

19) Supreme Court, 13 June 1997 (97 Da 8229) - "Shinhan diamond I".

was disclosed to the public under the conditions of subsection (d), or without knowledge of the fact owing to gross negligence (sec. 2(3)(f)).

(2) Acquisition of Trade Secret by Unfair or Unlawful Means

The provisions of sec. 2(3)(d) UCPA render it illegal to obtain a trade secret by theft, fraud, coercion or other unfair means, or to use a trade secret so acquired, or to disclose it to the public. Sec. 2(3)(a) covers all cases where trade secrets are acquired by unlawful means and is applicable particularly to cases where persons obtain knowledge of another's trade secrets by means that contravene criminal law or ethical standards.²⁰⁾ "Unfair or unlawful means" include the use of physical force, break-ins, and theft, as well as obtaining disclosure through misrepresentation or other forms of industrial espionage.²¹⁾ On the other hand, sec. 2(3)(a) cannot be applied to cases of discovery by reverse engineering applied to the finished product or by independent research or discovery by reverse engineering, by starting with the known product and working backward to find the method by which it was developed.²²⁾ Therefore, while the algorithms and ideas the software is based upon may be protectable as trade secrets, it is permissible to discover those algorithms and ideas by reverse engineering.

In addition, and according to sec. 2(3)(b) UCPA, it is considered a misappropriation to obtain a trade secret knowing that it has been obtained by an act of improper acquisition, or even without knowing, should this be due to gross negligence. This provision applies to cases where third parties are involved in the subsequent misappropriation of improperly acquired trade secrets. Therefore, any user of a trade secret who subsequently receives notice that the trade secret has been misappropriated will have to cease using it. In addition, sec. 2(3)(c) is applicable to acts of use or disclosure even if at the time of acquisition the subsequent user had no knowledge of the fact that the trade secret was obtained by unfair means, or had no reasonable grounds to suspect this.

(3) Breach of Confidentiality

1) General

Sec. 2(3)(d) UCPA concerns the misappropriation of trade secrets lawfully acquired

20) See Supreme Court - "Monami", *supra*, note 8; Ho-Yeol Chung, *supra*, note 7, at 262-263.

21) Kook-Hyun Kim, *supra*, note 7, at 63.

22) Supreme Court - "Monami", *supra*, note 8.

from the rightful owner. Sec. 2(3)(d) UCPA is applicable to the use or public disclosure of a trade secret contrary to a contractual obligation to secrecy with the intention of obtaining an unfair benefit or of inflicting loss on the owner of the trade secret. A typical case would involve an employee disclosing a trade secret, lawfully obtained during his employment, to a competing enterprise.

Trade secrets are usually disclosed to third parties in various business relationships, such as licensing, engineering or employment agreements.²³⁾ In these cases, the obligation to confidentiality arises from the circumstances in which the information was imparted. In its most common form, such an obligation is established by means of a contract with express terms dealing with confidentiality, or in the absence thereof, by implied terms depending on the nature of the contract.²⁴⁾ The obligation of confidentiality may extend beyond the termination of such an agreement. However, the same applies when a trade secret has already been disclosed before a contractual agreement can be reached, even if negotiations should subsequently fail. In addition, the obligation can arise from statutory law²⁵⁾ or fiduciary relationships.²⁶⁾

Therefore, any breach of confidentiality constitutes not only a breach of contract (with contractual remedies to the injured party),²⁷⁾ but also a misappropriation of trade secrets under the UCPA. Therefore, sec. 2(3)(d) UCPA may overlap with the contractual protection of trade secrets, and both may concurrently apply. Apart from the explicit consent to maintain secrecy, there may be cases where such duty is recognised based on implicit consent or under a principle of trust.²⁸⁾

In addition, according to sec. 2(3)(e) UCPA, it is a misappropriation of trade secrets to obtain, use or disclose a trade secret knowing that it was disclosed to the public under the conditions stated in clause (d), or without knowing such fact owing to gross negligence. Where the subsequent owner or user should have known that the trade secret was disclosed contrary to a secrecy obligation or had reasonable grounds to suspect such a fact, such conduct constitutes a misappropriation of trade secrets.

This applies even if the disclosure contrary to an obligation of secrecy was unbeknown at the time of acquisition (sec. 2(3)(f) UCPA).

23) See Kyung-Jik Kwak, *supra*, note 14, at 51; Ho-Yeol Chung, *supra*, note 7, at 277; Kook-Hyun Kim, *supra*, note 7, at 67-68.

24) Byung-Il Kim, *supra*, note 1, at 40; Kook-Hyun Kim, *supra*, note 7, at 68-69.

25) Sec. 60 of the Public Officials Act; sec. 52 of the Local Officials Act; sec. 26 of the Attorney's Act; sec. 23 of the Patent Attorney's Act.

26) Seoul High Court, 25 May 1995 (94 Na 37303) - "Lace".

27) For example, see sec. 350 of the Civil Code (Breach of Contract).

28) Supreme Court, 23 December 1996 (96 Da 16605).

2) Protection of Trade Secrets during Employment

An employee owes a general obligation of secrecy to his employer. This duty may be stated in the employment contract and may include obligations not to use a trade secret or not to compete with the employer.²⁹⁾ Further, in the absence of any express terms, there are implied terms imposing a duty of good faith or trust on the employee towards his employer (sec. 2 Civil Code).³⁰⁾ This duty of trust is based on the close relationship resulting from the employment. The employee can also be obliged not to engage in direct competition, either with another employer or on his own account.³¹⁾ This obligation is broader and more comprehensive than the one to maintain the confidentiality of trade secrets, and likewise independent of any contractual agreement.³²⁾ The extent of these obligations depends on the position of the employee.³³⁾ If a director of a company is responsible for a breach of trade secrets, the act can be considered a breach of trust under the Commercial Code and the Civil Code (sec. 382-4 Commercial Code and sec. 681 Civil Code).³⁴⁾ However, there is no general obligation not to prepare post-contractual activities in advance. Such agreements are impermissible if no specific trade secret is involved.³⁵⁾

Restrictive terms are often expressly used to prevent an employee from working for a competitor or setting up a competing business within a given geographical area and for a given period of time (see below).

3) Ownership and Control of Trade Secrets

The Korean law is silent as to ownership of information created by the employee during the course of employment. However, a lower court case indicates that trade secrets developed by an employee during the course of his/her employment belong to the employee.³⁶⁾ Yet there is no clear case that would have decided on the ownership issue on trade secrets developed by an employee during his personal time using personal resources. Absent an employment contract to the contrary, the employer usually has control over the invention and information created during the course of employment by

29) Seoul District Court, 27 March 1995 (94 Kahab 12987) - "Monomer"; Supreme Court - "Monami", *supra*, note 8.

30) Supreme Court - "Monami", *supra*, note 8.

31) Hwang and Hwang, *supra*, note 7, at 197

32) Supreme Court - "Monami", *supra*, note 8.

33) See Seoul District Court - "Monomer", *supra*, note 29; Seoul High Court - "Lace", *supra*, note 26.

34) See Kab-Ju Jung, "Know-how ui Boho" [The Protection of Know-How], in Beobweon Haengjeongcheo (ed.), *Chitcheok Soyukkweon e daehan Jemunje* (Ha) [Problems in Intellectual Property Law (Vol. II)] *Jaepan Jaryo* (1997) vol. 57, 244.

35) See Ho-Yeol Chung, *supra*, note 7, at 279.

36) Seoul West District Court, 27 December 1995 (95 Gahap 3594).

an employee by assignment where the terms and the scope of such rights will be defined in detail.

Under the Invention Promotion Act (IPA)³⁷⁾, employers have primary control over inventions which an employee was hired to invent. Once the invention is complete, the employee has a duty to disclose such invention to the employer (sec. 12 IPA). When such disclosure is made, the employer will then decide whether to request assignment of invention, i.e. take the control over the invention, or not (sec. 13(1) IPA). When the employer decides not to take the assignment of such invention, the employee then owns such invention and the employer will have a non-exclusive right to the invention without owing any financial obligation or accounting to the employee (sec. 13(3)). It is the employee's duty to disclose the invention to the employer and the employer must expressly notify its agreement/disagreement to the assignment of such invention in order to preserve the employer's right to a non-exclusive licence without the consent of the employee. Failure to respond to the disclosure statement submitted by an employee will result in the situation that the employer will not be able to obtain a non-exclusive licence without the consent of the employee.

An employee has a duty to maintain trade secrets of the company and the employer may seek damage for any unlawful activity against the employee who breached his duty not to disclose when the employer decides to keep the invention as a trade secret. It is noted that any person who discloses part of an employee's invention to a third party for the purpose of obtaining improper benefits or damaging the company is liable to criminal penalty in addition to compensatory damages upon a complaint by the employer.

III. Restrictive Covenants

1. In General

A duty of non-competition after the termination of the employment relationship has been highly controversial. Post-termination restrictive covenants are essentially contractual provisions made between the employer and the employee and are, in principle, enforceable.

37) Act No. 8357, of 4 November 2007.

2. Contractually Agreed Restrictive Covenants

Problems related to secrecy obligations are not quite the same for restrictive covenant s³⁸⁾ that, at least for the employer, are a very attractive means of protecting a trade secret and preventing active competition by former employees.

Covenants not to compete are restricted in scope to what is reasonable in time and territory to protect the employer and not impose undue hardship on the employee. Judicial precedents regarding non-compete clauses define such clauses as “an agreement that the employee will not engage in competitive behaviour such as being hired by the employer’s competitors or establishing and managing a competing company”.³⁹⁾ It is also impermissible to engage in preparations for setting up a competing enterprise while still in employment.

The non-compete clause, which is an agreement between the employer and the employee, is in principle enforceable under the freedom of contract principle. However, such restrictive covenants are enforceable to the extent they are reasonable and necessary in terms of time, activity and territory to protect the employer's interests.⁴⁰⁾ The covenant will be enforced only if the interests of both parties have been fairly balanced and do not contravene the public interest by depriving the employee of his means of livelihood, restrict the employee's freedom of choice of occupation, or lead to an unjust monopoly.⁴¹⁾ In other words, a post-employment covenant not to compete is valid if it is reasonable in view of the circumstances of the case.⁴²⁾ To examine the validity and enforceability of the covenant, the courts in Korea have principally considered three aspects; the rights of the freedom to choose an occupation and to engage in work,⁴³⁾ the interests of employers in protecting valuable information,⁴⁴⁾ and public policy (good morals and other social order, or restraint of free competition).⁴⁵⁾ The reasonableness of a post-employment covenant has been examined based on several factors — the existence of protectable interests of the employer, the former employee’s position in the company, duration and geographical scope of the restraint, field of work, the existence of compensation offered to an employee, reasons for termination of the employment

38) Unlike the German Commercial Code (sec. 74 et seq.), Korean law does not provide for any explicit regulation on the matter.

39) Supreme Court, 11 March 2013 (2009 Da 82244).

40) Seoul District Court, 7 November 1997 (96 Da 16605); Seoul High Court, 13 September 1995 (94 Na 36386).

41) Seoul District Court - "Monomer", *supra*, note 29.

42) Supreme Court, 13 June 1997 (97 Da 8229); Seoul District Court, 17 June 1997 (97 Gahap 758).

43) Supreme Court, 29 March 2007 (2006 Ma 1303).

44) Suwon District Court, 7 June 2000 (2002 Gahap 95).

45) Seoul Central District Court, 19 March 2008 (2007 Gahap 3903).

relationship, public interests, and so on.⁴⁶⁾

The “protectable interests of the employer” include not only the employer’s trade secrets, but also exclusive knowledge and information of the employer that the employee agrees to keep as secret.⁴⁷⁾ As for “the former employee’s position in the company”, covenants not to compete are more likely to be deemed valid if, for example, the employee was a high-ranking executive officer responsible for handling confidential business information or handled such confidential business information for a long period of time. As for “the scope of the restriction”, covenants not to compete are likely to be deemed to be valid if the scope of the covenants not to compete (as they relate to length of period of restriction, restricted geographical area and restricted line of business) are excessively wide (considering the employee’s position at the employer), because the employee’s freedom to choose an occupation becomes more limited as this scope becomes wider.⁴⁸⁾ “The existence of compensation offered to an employee” has recently been considered as an important factor in determining the validity of covenants not to compete. There are precedent cases, however, where covenants not to compete were deemed to be valid in light of other factors despite an absence of compensation.⁴⁹⁾ Therefore, compensation is not absolutely necessary. Benefits provided in non-monetary forms such as promotion, or opportunities to study abroad, can constitute consideration in connection with covenants not to compete.

3. Cases of Inevitable Disclosure

Without a valid covenant not to compete, a former employee does not owe a duty of non-competition derived from the employment contract because, unlike a non-disclosure agreement, covenants not to compete may directly restrict the constitutional right of the

46) Seoul Central District Court, 19 March 2008 (2007 Gahap 3903);); Supreme Court, 29 March 2007 (2006 Ma 1303); Supreme Court, 11 March 2010 (2009 Da 82244. The courts have shown some inconsistency and unpredictability in examining these factors in relevant precedents. For example, with regard to the scope of an employer’s protectable interests, which may be the central problem of post-employment covenants not to compete, the courts have been in disagreement. Under the Korean UCPA, most courts have confined a trade secret to a protectable interest, but some lower courts have extended this notion somewhat beyond the scope of trade secrets under the Korean UCPA. However, the Supreme Court of Korea recently recognised the court’s authority to reduce the duration of the covenant (Supreme Court, 29 March 2007 (2007 Ma 1303)).

47) They also include the employer’s relationship with its customers and maintenance of the employer’s credibility. Supreme Court, 11 March 2010 (2009 Da 82244).

48) The Court also found that in the absence of a territorial limitation, such an obligation might be invalid due to the employee’s right to freedom of profession as guaranteed under Art. 37(2) of the Constitution. Seoul Central District Court, 19 March 2008 (2007 Kahap 3903).

49) Incheon District Court, 20 May 2011 (2011 Kahap 340).

employee to choose his or her occupation freely and engage in work (Art. 15 of the Korean Constitution). Thus, the former employee may compete with the former employer and may use the knowledge or experience acquired in the course of the employment in competition with the employer.⁵⁰⁾ However, the law of post-employment restraints, which is based on the ancillary duties an employee derived from the employment contract, changed after the trade secret law was adopted in 1991 because the UCPA provided a new statutory legal basis for regulating this field.⁵¹⁾ The Supreme Court of Korea recognised the existence of post-contractual duties, stating that

“an employee owes a duty of confidence after the termination of the employment relationship even in the absence of an explicit agreement to the extent that it is reasonable under the principle of good faith as far as this does not restrain the freedom to choose an occupation guaranteed by the Constitution if the trade secret was offered based on a special relationship with mutual trust.”⁵²⁾

In the *Monami v Microceramic* case,⁵³⁾ where a former employee took trade secrets concerning an ink formula to a competing company directly after termination of employment, a preliminary injunction was granted in favour of the proprietor of the trade secret. In 2003, the Supreme Court of Korea reaffirmed that even without a valid covenant not to compete, a former employer could seek an injunction to prevent a former employee from working in a specific position in which a trade secret would be used in or disclosed to a competing firm.⁵⁴⁾ In that case, Samsung Electronics Co. and Pantech Co. Ltd. were competitors in the mobile handset business, and the defendant was an R&D team leader with Samsung Electronics Co. who left to take a CEO position with Pantech Co. Ltd. The lower court held that in the absence of a specific covenant not to compete, preventing an employee from changing jobs inevitably restricts the employee’s freedom to choose his or her occupation under the Constitution, and in principle is not allowed.⁵⁵⁾ However, the Supreme Court recognised the possible application of the Korean UCPA in issuing an injunction under limited circumstances, holding that

“when it would be impossible to protect the trade secret of the plaintiff unless the

50) See Hyun-Soo Kim, "Trade secret law, intellectual property, and innovation: Theoretical, empirical, and Asian perspectives" (Ph. D. dissertation, University of Illinois at Urbana-Champaign 2010) 140.

51) *Ibid.*

52) Supreme Court, 26 November 1996 (96 Da 31574).

53) Supreme Court - "Monami", *supra*, note 8.

54) Supreme Court, 16 July 2003 (2002 Ma 4380).

55) Seoul High Court, 12 November 2002 (2002 Ra 313).

former employee was prohibited from engaging in the trade secret-related work in the new firm, it may be possible to prohibit the former employee from engaging in the trade secret-related work in the new firm as a necessary measure to prohibit or prevent a misappropriation of the trade secret on the basis of sec. 10(1) of the UCPA.”⁵⁶⁾

IV. Post-employment Issues of Secrecy and Competition

1. In General

It has generally been accepted that a current employee in Korea is subject to a general duty of loyalty, which is an ancillary duty derived from the employment contract. Thus, if a current employee breaches these duties during the employment relationship, liability may be imposed without regard to the existence of a specific agreement with an employer. It is also generally accepted that the duty of loyalty includes a duty not to use or disclose confidential information to others acquired through employment and a duty not to compete with the former employer after termination of employment.⁵⁷⁾

2. Protection of Trade Secrets after Termination of Employment

The unauthorised use and disclosure of trade secrets that an employee has unfairly obtained during his term of employment are essentially prohibited. However, it is also recognised that an employer can impose the obligation on an employee not to disclose confidential information for a limited period after termination of employment if there is an explicit agreement between the parties. Even if such an express agreement has not been made, trade secrets can be protected on the basis of an employment contract.⁵⁸⁾ Courts have found that it was legal and effective to impose an obligation on a former employee not to engage in any competing business for a limited period of time for the purpose of protecting an employer's trade secret acquired by the employee.⁵⁹⁾ However,

56) Supreme Court, 16 July 2003 (2002 Ma 4380). This was the first Korean Supreme Court case that recognised the Korean UCPA as a legal basis for an injunction to prohibit a former worker from engaging in specific work in a competing firm in which the trade secret of the former employer would be used or disclosed.

57) See Supreme Court - "Shinhan diamond I", *supra*, note 19.

58) See Supreme Court - "Monami", *supra*, note 8, at 501 et seq.; Seoul District Court, 31 December 1993 (93 Gahab 1656).

explicit contractual clauses with such restrictions could be invalidated on the grounds that they are contrary either to the freedom of occupation under the Constitution or to the public order and good morals under the Civil Code.⁶⁰⁾ It remains to be seen in what way the courts would take the principles of free movement of labour and rewards for employees' efforts into account in developing trade secrets.⁶¹⁾ Applying this balanced test, the courts have been unable to conclude that the potential economic harm to the employee always outweighs the employer's interests in maintaining secrecy. At least the right of freedom of occupation may be restricted only if the reasonable interests of the employer make this necessary.⁶²⁾ The courts have tried to establish a particular balance between the employer's interests in maintaining confidentiality and the employee's freedom of profession, and freedom of choosing one's work.⁶³⁾

The former employer and former employee sometimes dispute whether or not certain information qualifies as "confidential information" or "company property" and whether such information or property is subject to the confidentiality obligation. It has to be observed in this respect that the courts distinguish between an employee's general skills and knowledge, and the particular knowledge of an employer's trade secrets.⁶⁴⁾ It has been recognised that the general skills and knowledge obtained in the course of employment are not the property of the employer and cannot be legally protected as trade secrets.⁶⁵⁾ Therefore, restrictions concerning a former employee's use of his general skills and knowledge are void, as they are contrary to the freedom of occupation under the Constitution and to good morals under the Civil Code.⁶⁶⁾ Nevertheless, the line between unprotectable general skills and information and protectable trade secrets belonging exclusively to the employer's sphere is often difficult to draw. In addition, proof that trade secrets have been disclosed contrary to post-contractual secrecy obligations can be extremely difficult.

V. Procedure and Remedies

59) Seoul District Court - "Monomer", *supra*, note 29.

60) Sang-Jo Jong, *supra*, note 12, at 164, 179.

61) *Ibid.* at 164, 180.

62) See Supreme Court - "Monami", *supra*, note 8; Supreme Court - "Mekpo", *supra*, note 15; Hwang and Hwang, *supra*, note 7, at 203-204; Ho-Yeol Chung, *supra*, note 7, at 279.

63) See Supreme Court - "Monami", *supra*, note 8; 11 March (2009Da82244).

64) *Ibid.*; Sang-Jo Jong, *supra*, note 12, at 169-170; Hwang and Hwang, *supra*, note 7, at 205-206.

65) See Supreme Court - "Shinhan diamond I", *supra*, note 20.

66) Sec. 90 of the Civil Code.

1. Protection of Trade Secrets Within a Trial

When enforcing the amended UCPA, the practical aspects of maintaining secrecy in court proceedings are difficult. Regrettably, little consideration was given to this problem, which is similar to the situation under the Japanese Unfair Competition Act.⁶⁷⁾

In order to oppose an infringement, the owner of the trade secret needs in camera proceedings⁶⁸⁾ where the public is excluded and only the opposing parties and their attorneys may participate.⁶⁹⁾ Since the Korean Constitution requires court trials to be open to the public, in camera proceedings, meant to protect trade secrets from competitors, are unconstitutional.⁷⁰⁾ According to the Code of Civil Procedure, parties or interested persons have a right to an inspection of files (sec. 162 Code of Civil Procedure).⁷¹⁾ On the other hand, a witness may refuse to testify if he is questioned on matters relating to a technical or professional secret (sec. 315(1) Code of Civil Procedure). This right applies not only to the protection of another person's trade secrets but also to one's own. The principle of open trial, which gives the right to be heard priority over the interest in protecting trade secrets, may result in a party having to decide between disclosing trade secrets or losing the action due to lack of evidence.⁷²⁾ At the same time, it must be taken into account that property is protected under Art. 23 of the Constitution. This is why the Code of Civil Procedure must try to balance both interests, i.e., an enterprise's concern in relation to property and the public's interest in an open trial. Depending on the circumstances, one or the other may be given precedence by the courts in balancing these interests. Although trade secrets are protected de jure by the UCPA, de facto there is no effective protection. Sec. 163 of Code of Civil Procedure allows exclusion of third parties from the inspection of court records, but this is no help for the other party to the suit. For the effective protection of trade secrets, one would essentially have to reform the Code of Civil Procedure to include provisions for in camera proceedings, sealing court records, and prohibiting any

67) See Christopher Heath, "Continuity and Development in Japanese Intellectual Property Rights" (1995) 26 *IIC* 916.

68) In the USA, this was acknowledged in the following decisions: *John T Lloyd Laboratories, Inc. v Lloyd Broat Pharmacist, Inc.*, 131 F.2d 703, 707 (6th Cir. 1942); *E.L. Bruce Co. v Bradley Lumber Co.*, 79 F.Supp. 176 (W.D. Ark. 1948).

69) Rudolf Callmann, *The Law of Unfair Competition, Trademarks and Monopolies*, vol. 2 (4th edn, Wilmette, Ill. 1982) § 14.41.

70) According to Art. 109 Korean Constitution, court trials shall be open to the public. However, they may be held in camera by a court decision when there is a danger that such trials may undermine national security or disturb public safety and order, or be harmful to public morals.

71) Minsa sosongbeob, Act No. 6626, 26 January 2002.

72) Kab-Ju Jung, *supra*, note 34, at 254.

disclosure of the trade secret without the court's permission.⁷³⁾

2. Remedies

The Korean UCPA provides for the right to claim injunctive relief and damages as civil remedies for the infringement of a trade secret.⁷⁴⁾ In addition, a claim to restore one's business reputation is also provided (secs. 10-12).

(1) Injunctive Relief

According to sec. 10(1) UCPA, any person whose business interest is likely to be damaged as a result of another person infringing a trade secret may file a restraint action with the court. A claim for injunctive relief can be granted not only against acts which have already occurred, but also against those that are imminent. The UCPA allows for a preventive claim for an injunction if there are objective circumstances whereby infringement is likely to be committed by a potential infringer. In addition, the UCPA provides that any person whose business interests have been or are likely to be damaged as a result of the infringement may not only request cessation of the unlawful act, but also the implementation of measures to prevent future infringement, e.g., destruction and removal of the medium on which the trade secret is recorded, such as floppy disks, magnetic tapes and customer lists, or any measures necessary to prohibit or prevent any further infringement (sec. 10(2) UCPA). The person causing the infringement must take proper measures to eliminate concrete disturbances and to prevent recurrences.⁷⁵⁾

A claim for injunctive relief ensues from an objective act of infringement so that in principle a perpetrator's good or bad faith does not matter, and neither does intention or negligence, which is different under general tort law. Hence, proof of the offence as such, for example the unlawful acquisition of a trade secret,⁷⁶⁾ is sufficient for a claim for injunctive relief.

A claim for a no-fault injunction may be brought before a civil court only by a person whose business interests have been damaged as a result of an infringement.⁷⁷⁾

73) See Kyung-Jik Kwak, *supra*, note 14, at 59 et seq.

74) In the case of contractual protection, a breach of contract gives the injured party a right to an action for damages (sec. 390 of the Civil Code) or specific performance (sec. 389 of the Civil Code). Unlike under the German Civil Code, injunctive relief may not be claimed in a case of breach of contract.

75) Supreme Court, 12 April 1988 (87 Daka 90) - "Aero Chemie".

76) See Byung-Il Kim, *supra*, note 1, at 413.

Injunctive relief would thus be available to owners of trade secrets, but not to trade associations or consumers because they cannot produce any proof of direct injury to their business interests.⁷⁸⁾ The concept of "infringement of business interests" must always be concrete and is broadly interpreted.⁷⁹⁾ Business interests do not refer to commercial transactions in a strict sense - simple activities of an economic nature are sufficient.⁸⁰⁾

Korean courts normally do not grant permanent injunctions in trade secret cases, but rather for a period of only two to three years.⁸¹⁾ Proceedings for provisional injunctions are available according to sec. 300 Code of Civil Enforcement.⁸²⁾ Courts generally require a security to be furnished before issuing an interlocutory injunction.⁸³⁾ Exactly what type of claims can be allowed for such an injunction is not completely clear.

Recently, the Supreme Court of Korea adopted the "head start" or "lead time" theory, whereby injunctive relief is granted only until the time the defendants or others could have acquired the trade secret by proper means, such as reverse engineering or independent discovery.⁸⁴⁾ The Court made it clear that the purpose of injunctive relief for trade secret misappropriation is to prevent the perpetrator from unjustly benefiting from a head start or lead time advantage that is attributable to the misappropriation and to put the holder of the trade secret in a position he would have been in in the absence of such misappropriation.⁸⁵⁾

The right to injunctive relief is time barred for three years after obtaining knowledge of the facts that would give rise to such claim, or after ten years have elapsed from the date of the wrongful act (sec. 14). In addition to injunctive relief, the plaintiff may request the destruction of articles that constituted the trade secret misappropriation, removal of the equipment used for the misappropriation, or other measures for suspension or prevention of the misappropriation.⁸⁶⁾

77) Supreme Court, 9 December 1980, (80 Da 829), Jijaejip, Vol. II, at 1913 et seq. - "Clairol".

78) Sang-Jo Jong, "Uncertainties relating to Computer Program Protection in Japan and Korea" (1992) 20 *Korean Journal of Comparative Law* 62.

79) See Hwang and Hwang, *supra*, note 7, at 245-246.

80) Supreme Court, 24 February 1976, (73 Da 1238), Official Gazette No. 534 - "Boryung"; Supreme Court - "Clairol", *supra*, note 55.

81) See Supreme Court - "Monami", *supra*, note 8; Supreme Court, 13 February 1998 (97 Da 24528) - "Shinhan diamond II".

82) Seoul District Court, 27 March 1995 (94 Kahab 12987); Seoul High Court - "Lace", *supra*, note 26; Seoul High Court - "Calculation method", *supra*, note 6, at 2121; Supreme Court - "Shinhan diamond II", *supra*, note 81.

83) Seoul District Court, 27 March 1995 (94 Kahab 12987).

84) See Hyun-Soo Kim, *supra*, note 52, at 132.

85) Supreme Court, 23 December 1996 (96 Da 16605) (affirming the decision of an appellate court limiting the period of injunctive order to two or three years). See also Supreme Court of Korea, 13 February 1998 (97 Da 24528) (following the head start or lead time theory).

(2) Damages

According to sec. 11 UCPA, any person whose business interests have been damaged as a result of a trade secret infringement may bring a claim for damages before a civil court if the infringer has acted intentionally or negligently. Unlike injunctive relief, an action for damages requires proof of damages as a result of unfair competitive activities and a causal link between the infringement and the damages. Sec. 11 UCPA is *lex specialis* to the general tort clause under sec. 750 Korean Civil Code.

However, an infringer is presumed to have acted at least negligently according to sec. 112 Trade Mark Act, sec. 130 Patent Act, sec. 30 Utility Model Act and sec. 116 Design Act, unless proven otherwise. Yet the UCPA does not contain a comparable provision with such a legal assumption. Therefore, the plaintiff bears the burden of proving intention or negligence on the part of the defendant.⁸⁷⁾

The amount of damages is determined by the general principles of tort law.⁸⁸⁾ According to sec. 394 Civil Code, the method of recovery is by monetary award. In the event of a trade secret infringement, it is very difficult to prove: (1) that damages have been sustained, and (2) the extent of such damages. Under the UCPA, there are generally three methods for calculating damages for infringement of a trade secret infringement. The first is the amount of actual damages/lost profits sustained by the plaintiff (sec. 14bis(1)(2)). If actual damages/lost profits are difficult to prove, an injured party may seek "the amount of money equivalent to an ordinary royalty generally accepted for the use of the trade secret" as damages, in addition to legal expenses (sec. 14bis(3)). If the actual amount of damages exceeds the amount prescribed, a claim for additional damages may be made. In this case, the court shall consider the intent or gross negligence on the part of the infringer when determining the amount of the damages (sec. 14bis(4)). If proving damages by any of the above methods is not possible due to the facts of a particular case, the court has discretion to determine a reasonable amount of damages based on an examination of all of the evidence and the parties' arguments (sec. 14bis(5)). However, courts generally will not grant damages to the extent they are speculative or estimated, nor are punitive damages available for infringement of trade secrets. In addition, the court may order the defendant to produce documents which prove the turnover of the infringing goods (sec. 14ter).

86) See Supreme Court, 23 December 1996 (96 Da 16605) (ordering a defendant to return to a plaintiff a note on which the defendant had written down the plaintiff's trade secret).

87) See Young-Jun Yang, "Yeongeob Bimil eui Boho" [Protection of Trade Secrets], in Sang-Jo Jong (ed.), *Chitcheok Chaesankkweon Peopgangeui* [Explanation of Intellectual Property Law] (Seoul 1997) 594.

88) See Young-Jun Yang, *supra*, note 87, at 595.

(3) Criminal Sanctions⁸⁹⁾

The current UCPA provides criminal liability for trade secret infringements by former employees and imposes heavier penalties. In addition, the UCPA imposes criminal liability on persons engaged in international industrial espionage for foreign parties or governments.

According to sec. 18(2)(i) UCPA, any person who has disclosed a trade secret obtained in connection with his employment without lawful authorisation, and contrary to an obligation of confidentiality, shall be subject to imprisonment for a term of up to five years or a fine of up to KRW 50 million. The same applies in the case of disclosure of a trade secret by executives or employees obtained in connection with their employment, even after the termination thereof, with the aim of gaining undue profit or inflicting damage upon the enterprise.

Further, any person who, on behalf of a foreign party, has committed an act of infringement of trade secrets, knowing, or being grossly negligent in failing to know, that the business interests of the trade secret's owner have been infringed, shall be punished with imprisonment for not more than ten years or a fine not exceeding KRW 100 million (sec. 18(1)).

It must be noted that the UCPA punishes attempts, preparation, and conspiracy (secs. 18bis and 18ter), and that actions described in sec. 18(2)(3) can be pursued by prosecutors without a request by the infringed party. Further, if an employee commits the violation, the employee's employer is vicariously liable for the violation unless the employer can prove that it was not negligent in preventing such violations (sec. 19).

(4) Exceptions for Innocent Acquisition

The provisions of secs. 10-12 do not apply to the use or disclosure of a trade secret lawfully acquired by a transaction permissible under sec. 13 UCPA. "A person who has lawfully acquired a trade secret through a legitimate transaction" is one who has acquired the trade secret in a manner described in sec. 2(2)(c) or (f), without knowing or being grossly negligent in failing to know at the time of acquisition that the trade secret had been improperly disclosed or acquired. In this way, the Korean UCPA tries

⁸⁹⁾ The general rule of "theft" in the Penal Code (sec. 329) also applies to the theft of information. However, sec. 329 punishes the theft of "objects" of another person. Since information itself is not an object, it can only be stolen if it is written on paper or recorded on tape. The same applies to "misappropriation" (sec. 356 Penal Code). The Korean Supreme Court held that the act of divulging trade secret to the competitor for the purpose of gaining economic benefit by former employees shall be punished as criminal violation of the fiduciary duty under the Criminal Code (Supreme Court, 12 March, 1999, (98 Do 4704).

to minimise unforeseeable risks for an inadvertent buyer. Therefore, a person who acquires a trade secret in good faith through a business transaction is exempt from liability so long as the trade secret is used or disclosed within the authorised scope.

VI. Conclusion

Protection of trade secrets in Korea has improved since 1999 due to the several amendment of the UCPA. One can only hope that more developments will contribute to further improvements in the future. First, Korea's international obligations in the field of protection against unfair competition should be taken into account. Article 39 of TRIPS requires that protection be given to undisclosed information, which includes data submitted to the government as well as trade secrets. The new UCPA will have to be amended to ensure protection of data submitted to the government against unfair commercial application. Secondly, it is still unclear in what way Korea will protect trade secrets in court proceedings even though sec. 14quater UCPA provides 'Confidentiality Order'. Protection against unauthorised disclosure to a third person who can utilise the trade secrets commercially can be pursued only through *in camera* proceedings. The Korean legislature is currently preparing an amendment to the Code of Civil Procedure, which is expected for the effective protection of trade secrets before (in discovery and seizure proceedings) and during litigation. It would be important for a new UCPA to develop into a comprehensive instrument for regulating the economy. Finally, It has to be noted that an appropriately drafted a restrictive covenant can be an effective tool for preventing trade secret misappropriation.

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■ 국문초록 ■

한국에서의 근로자, 영업비밀과 경업금지계약

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최근 기술의 급격한 발전과 사회와 경제적 정보시스템의 진화는 영업비밀의 중요성을 초래하고 있다. 특히 정보통신과 친환경기술 분야에서의 첨단기술의 개발과 기술이전 과정에서 영업비밀 관련 분쟁이 급증하고 있는 실정이다. 특히, 경쟁사업자가 주도하는 산업스파이 행위와 종업원 이직으로 인한 기업의 핵심기술 유출 문제는 기업뿐 아니라 국가경쟁력 관점에서도 심각한 실정이다. 영업비밀의 부정이용행위를 금지하고, 나아가 시장에서의 공정한 경쟁질서를 유지하기 위하여는 효율적인 법적 보호 체계가 시급한 과제이다.

대규모 전세계적 노동 유연성이 심화되고 있는 상황에서, 영업비밀 보호와 경업금지계약 법규범 정비는 매우 중요한 과제이다. 본 논문은 근로 관계에서의 영업비밀 보호 문제, 재직 중 그리고 퇴직 종업원의 경업금지 의무 이슈에 대한 실체법적 문제와 구제와 절차상 문제점을 검토하고, 개선방안을 모색하고자 한다.

* 주제어 : 영업비밀, 경업금지, 고용관계, 기술유출, 공개불가피

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