

ON THE NEED TO REGULATE THE PROTECTION OF TRADE SECRETS IN THE PROVISIONS OF THE ACT OF 30 JUNE 2000, INDUSTRIAL PROPERTY LAW

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Abstract. Trade secrets are one of the factors that can determine an entity's economic strength. Such strength may also be determined by exclusive rights to industrial property rights, such as trade marks, granted by the Polish Patent Office pursuant to the provisions of the Act of 30 June 2000, Industrial Property Law. This article attempts to answer the question of whether, and if so to what extent, there is a need to introduce regulations concerning the protection of trade secrets in proceedings before the Patent Office, where proof of trade mark use is required. To this end, the most important provisions of the Draft Act of 8 September 2025 amending the Industrial Property Law Act will be analysed; this draft aims to introduce regulations on the protection of trade secrets in proceedings before the Polish Patent Office where the subject matter is the demonstration of trade mark use. In this context, the provisions governing access to case files, including those protecting trade secrets, applicable in proceedings before the European Union Intellectual Property Office will be analysed.

Keywords: trade secrets; trade marks; Patent Office; proceedings.

INTRODUCTION

Trade secrets are one of the factors that can determine an entity's economic strength [Nowińska 2018, 221]. They remain a relevant form of legal protection, primarily when contract fails or in the event of a misappropriation by third parties [Aplin, Radauer, Bader, et al. 2023, 854]. The subject strength can also be built through exclusive rights to industrial property rights, such as trade marks, granted by the Polish Patent Office pursuant to the provisions of the Act of 30 June 2000, Industrial Property Law.¹ These rights may be used to prevent another person from making unlawful use of them in the course of trade, in particular, identical or similar to the trade mark for which the right of protection with an earlier priority date has been granted to that right

¹ Act of 30 June 2000, Industrial Property Law, Journal of Laws of 2023, item 1170 [hereinafter: IPL].

holder for identical or similar products, where there is a likelihood of confusion which includes likelihood of association between the sign and the trade mark for which said right of protection with an earlier priority date has been granted to that right holder (Article 296(2)(2) of the IPL). This is why the proceeding for opposition against a trade mark application, as provided for in this Act (Article 152¹⁷ of the IPL), proceedings for invalidation of the right of protection (Article 166 of the IPL) or proceedings for revocation of protective right for trade mark due to its non-use are so important (Article 169(1) (1) of the IPL). The validity of the trade mark will depend on the outcome of these proceedings. In such proceedings, it is possible to request proof of use of trade mark, or the proceedings may be aimed at proving such use. Consequently, the holder of the trade mark rights, where the use of the trade mark is being challenged, must provide sufficient evidence of its use.² For the most part, these are the company's own internal documents. Depending on the specific circumstances, they may also constitute a trade secret within the meaning of the provision of Article 11(2) Act of 16 April 1993 on combating of unfair competition.³ The aim of this article is therefore to attempt to answer the question of whether, and if so to what extent, there is a need to introduce regulations concerning the protection of trade secrets in proceedings before the Patent Office, where proof of trade mark use is required. In this regard, the most important provisions of the Draft Act of 8 September 2025 amending the Industrial Property Law Act will be analysed,⁴ which is intended to introduce regulations on the protection of trade secrets.

1. CURRENT LEGAL SITUATION

Legal doctrine states that trade secrets encompass “all kinds of financial, business and economic information relating to commercial relations, as well

² In proceedings concerning an opposition to a trade mark application, if the ground relating to non-use is found to be valid, the Patent Office, according to the Article 152¹⁹(4) of the IPL, rejects the opposition. In proceedings for the invalidation of a trade mark right on the basis of an earlier trade mark, the proprietor of that trade mark is obliged, in response to a plea raised by the proprietor of a later trade mark, to provide evidence that, during the five-year period preceding the date of the application for revocation, the earlier trade mark was used within the meaning of Article 169(1)(1) and (4), in relation to the goods for which it was registered, to the extent that they form the basis of the application for revocation, or that there are valid reasons for its non-use, provided that at least five years have elapsed from the registration of the earlier trade mark by the date of the application for revocation. If no such evidence is provided, the Patent Office shall reject the application for revocation of the protection right on the basis of the earlier trade mark (Article 166(1) and (3) of the Industrial Property Law). In proceedings for revocation of a trade mark's protection right, the key issue is precisely the provision of evidence of use of the mark in dispute.

³ Journal of Laws of 2026, item 85 [hereinafter: CUC].

⁴ Draft Act of 8 September 2025 amending the Industrial Property Law Act, List number: UDER85 [hereinafter: Draft Act].

as technical, technological or organisational information connected with the business operated by the undertaking” [Matysiak and Promińska 2023, 85]. At the same time, it is pointed out that the concept of trade secrets should be distinguished from that of “know-how” [Wojcieszko-Głuszko 2002, 62]. The key provision regarding the protection of trade secrets is Article 11(2) CUC. According to this provision, a trade secret shall be understood as technical, technological, organisational information of an enterprise or other information of economic value, which, either in full or in a particular list and collection of their elements, is not commonly known to persons who usually deal with this type of information, or is not easily accessible for such persons, unless a party authorised to use the information or dispose it took, with observance of due diligence, actions in order to keep the information confidential. The broad understanding of ‘trade secret’ ensures the protection of a wide range of information, the confidentiality of which is important for the competitiveness and innovation-related performance of the undertaking who holds the secret [Korycińska-Rządca 2024, 167]. The scope of all information protected as trade secrets comprises two categories: technical information and commercial (economic) information [Sołtysiński and Gogulski 2024, nb 10]. The provision referred to above is not the only one in Polish law designed to protect trade secrets [Michalak 2006, 53-59]. However, it is this provision that the Draft Act in question refers to. At the same time, it should be noted that the entity entitled to dispose of trade secrets independently is the entrepreneur, and as the holder of such secrets, they may release an entity from the obligation to maintain confidentiality [Gryszczyńska 2014, 36].

The current Industrial Property Law contains provisions governing access to case files in application (registration) proceedings with regard to the protection of trade secrets. Provision of Article 251(1) of the IPL specifies the categories of entities to which the Patent Office provides information regarding applications for inventions, supplementary protection rights, utility models, industrial designs, trade marks, geographical indications and topographies, and grants access to application files at every stage of the proceedings. Furthermore, pursuant to Article 251(2) of the IPL, once the periods during which information on applications referred to in Article 251(1) is not disclosed have expired, the Patent Office may, at the request of a person having a legal interest therein, make available to that person the documents contained in the application file, as well as documents attached to that file in the course of the registration proceedings. The Office may refuse to disclose documents under this procedure if doing so could jeopardise the legitimate interests of the entitled party, in particular by breaching their business confidentiality (Article 251(2²) of the IPL). Representatives of the doctrine point out that the right to trade secrets “must not be abused, particularly where access to documentation is sought by a defendant in proceedings concerning an infringement of an integrated circuit layout design

(materials identifying the layout design are confidential and are not disclosed)” [Niewęglowski 2022]. In accordance with Article 152²³(1) of the IPL, the aforementioned provision of Article 251 of the Act applies *mutatis mutandis* to proceedings concerning opposition to a trade mark application. Consequently, in such proceedings, the provisions protecting trade secrets in relation to the disclosure of the case file already apply.

Where matters are dealt with by the Patent Office under adversarial proceedings,⁵ the provisions of the Industrial Property Law Act govern the openness of hearings and the restrictions thereon. The relevant literature distinguishes between two types of procedural openness: internal and external. External openness refers to the public’s ability to attend hearings, including representatives of the media, whilst internal openness concerns the parties to the proceedings and is ensured through equal access to the case file [Wit vel Wilk 2022]. The provisions of the Industrial Property Law, in relation to cases heard in accordance with Article 255 of the IPL under adversarial proceedings, establish the principle that hearings shall be open to the public (Article 255⁵(1) of the IPL). It may be excluded where the examination of the case requires the parties to rely on information protected by law under separate provisions. Such information includes information protected as a trade secret.

Decision to hear a case at non-public hearing may be made – by order – in whole or in part. Such an order may not preclude the parties from attending the hearing (Article 255⁵(2) of the IPL). Such exclusion may involve prohibiting unauthorised persons, including witnesses and experts, from being present in the courtroom, as well as prohibiting such persons from recording the proceedings. The presiding judge decides on the extent to which a hearing is closed to the public in a particular case [Szewc and Sieńczyło-Chlabicz 2020]. Closed-door hearings, as referred to in Article art. 255³ (2) IPL, are also an example of the limitations on the openness of proceedings.

The provision in question therefore applies to proceedings for invalidation of the right of protection, as well as to proceedings for revocation of protective right for trade mark due to its non-use. These cases are heard in adversarial proceedings before the Patent Office during hearings. Indirectly, they also protect the trade secrets of one of the parties to the proceedings. However, they must not result in other parties to the proceedings being deprived of the right to participate in the hearing.

2. DRAFT ACT

The subject Draft Act is intended to implement the recommendation of the Governmental Task Force on Deregulation (recommendation

⁵ Listed in Article 255(1) of the IPL.

no. 295).⁶ The legislator intends to introduce provisions into the Industrial Property Law regarding the protection of trade secrets in proceedings before the Patent Office, to the extent that it is necessary to demonstrate the use of a trade mark.

According to the Explanatory statement to this draft, the proposed provisions will apply to proceedings concerning opposition to a trade mark application (Article 152¹⁷ of the IPL) and in proceedings to invalidate a protection right on the basis of an earlier trade mark (Article 166 of the IPL), where a claim of non-use of the earlier trade mark will be raised (Article 152¹⁹(4) of the IPL and Article 166(1) of the IPL) and in proceedings concerning the revocation of trademark protection on the grounds of non-use (Article 169(1)(1) of the IPL).⁷ In these proceedings, the question of proving genuine use of the trade mark is crucial to the outcome. Evidence of use in such cases may include, in particular, packaging, labels, price lists, catalogues, invoices, photographs and press advertisements. As the legislator emphasises in the Explanatory statement to the draft legislation in question, it may in practice prove necessary in a given proceeding to submit material whose disclosure could result in the disclosure of trade secrets. On the one hand, the draft states that such situations arise only sporadically, as it is usually possible to structure the evidence in such a way that there is no risk of disclosing trade secrets. However, the introduction of these changes is justified by the growing importance and significance of protecting trade secrets.⁸

Under the Draft Act in question, upon application by the holder of a prior trademark, the Patent Office will be able, by way of a decision, to restrict access to the materials and evidence attached to the case file. The basis for issuing such a decision is to be a finding that disclosure of such materials and evidence would risk the disclosure of a trade secret, within the meaning of Article 11(2) of the CUC. At the same time, in accordance with the provisions of the draft, any restriction on the right to inspect materials and evidence must not apply to information that is relevant to the outcome of the case.

Furthermore, as the assessment of which information is relevant to the outcome of the case may change during the proceedings, provision has been made for the possibility of amending an order restricting access to documents and evidence. The amending order would modify the scope of the information subject to restriction in a manner that extends the opposing party's access to information which, under the first order, was subject to restriction. Furthermore, an application to restrict the right of access to materials and evidence

⁶ Explanatory statement for the Draft Act of 8 September 2025 amending the Industrial Property Law Act, p. 1 [hereinafter: Explanatory statement 2025].

⁷ Explanatory statement 2025, p. 1.

⁸ Explanatory statement 2025, p. 2.

must be submitted together with a statement of reasons and a version that does not contain the information subject to restriction. It should specify precisely which information and why it should be protected as a trade secret or other legally protected secret (Article 1(1) of Draft Act).

Beside, according to the Explanatory statement to this draft, as the application will be served on the other party to the proceedings, it should be drafted in such a way that it does not contain any information whose disclosure would risk revealing a trade secret. Such information should be included in an annex containing confidential information. Consequently, two versions of the documentation will be submitted alongside the application: a confidential version and a non-confidential version, which may be served on the other party to the proceedings. If the application is granted, the other party to the proceedings will be provided with evidence that does not contain information subject to restriction. If the decision to amend the order restricting the right of access to materials and evidence becomes final, the party will be served with an updated version of the non-confidential materials and evidence. The Patent Office's decisions on applications to restrict access to materials and evidence will be final (Article 1(1) of Draft Act). They may be challenged by means of a complaint to the administrative court.

3. ASSESSMENT OF THE PROPOSED REGULATIONS

It might seem that the introduction of proposed provision is necessary and appropriate. On the face of it, it is difficult to deny the need to protect trade secrets within the meaning of Article 11(2) of the CUC in proceedings before the Office where there is a need to demonstrate the use of a trade mark.

Firstly, however, the question arises as to whether the legislator should amend the provisions of this Act – in relation to the protection of trade secrets – solely in respect of trade marks. It would seem that such amendments should be systematic in nature. There may also be a need for such protection in other adversarial proceedings referred to in Article 255 of the IPL. It is conceivable that, in proceedings to invalidate a patent for an invention, it may be necessary to invoke the rights of the inventor, for example where the invention has been filed by an unauthorised person. In such circumstances, in accordance with Article 74 of the IPL, the patent holder may request that the patent be revoked. In order to establish one's entitlement to the invention, it may be necessary to refer to information constituting a trade secret within the meaning of Article 11(2) of the CUC. In practice, such situations are relatively rare. However, the relatively small number of such cases does not prevent the legislator from introducing this type of regulation in relation to proceedings before the Patent Office where proof of trade mark use is required. The Explanatory statement to the aforementioned Draft Act

states that, based on the Patent Office's current practice, such situations occur only sporadically, as in the vast majority of cases it is possible to structure the evidence in such a way that there is no risk of disclosing trade secrets.⁹ Since the legislator considers the protection of trade secrets to be so important where trade marks are the subject of protection, it seems that, for example, the protection of the rights of inventors is equally important.

Furthermore, Article 1(1) of the Draft Act provides that any restriction on the right of access to materials and evidence must not apply to information relevant to the outcome of the case. At this point, one must consider why restrictions should be imposed on access to materials and evidence that are not relevant to the case. If they are not relevant, the question arises as to what is the point of the applicant submitting them. It should be recalled that the subject matter of the proceedings to which the draft amendment relates is the demonstration of use of a trade mark. In principle, every piece of material submitted in such cases is relevant, because if not directly, then at least indirectly it may be useful in proving use.

Equally important, in the above proceedings, which are adversarial in nature, the parties must be granted access to all materials and evidence submitted in the case. If the right of access to these materials and evidence is to be restricted, it is difficult to claim that this principle is being upheld. For example, one party to proceedings concerning the presentation of evidence of trade mark use submits invoices as evidence in the case whilst simultaneously restricting access to them. In such a situation, the other party would be deprived of the opportunity to verify them, even as regards their authenticity. This calls into question the very purpose of the proceedings, where one party would be deprived of the opportunity to address the entirety of the evidence submitted in the case. If, on the other hand, these invoices were not relevant to the case, the point of submitting them is questionable.

It is worth noting here that, in justifying the introduction of the above regulations, the legislator refers to provisions contained, *inter alia*, in the Act of 16 February 2007 on the Protection of Competition and Consumers.¹⁰ Pursuant to Article 69(1) of this Act, the President of the Office of Competition and Consumer Protection may, upon request or on his own initiative, by way of a decision, restrict access to the evidence attached to the case file to the extent necessary, if disclosure of such evidence would risk revealing a trade secret, as well as other secrets protected under separate provisions. It should be noted, however, that the literature indicates that this provision involves a conflict between the right to the protection of secrets and the right of defence, or the right to be heard, which forms part of it. Furthermore, the case law of the EU courts

⁹ Explanatory statement 2025, p. 2.

¹⁰ Journal of Laws of 2025, item 1714 as amended. See also Explanatory statement, p. 2.

consistently holds that it is impermissible to find a breach of competition law on the basis of evidence to which a party did not have access and in respect of which it therefore had no opportunity to comment [Korycińska-Rządca 2020, 88-89]. Applying this to the Draft Act under discussion – here too, the provisions should guarantee the parties to the proceedings the opportunity to comment on the entirety of the material submitted in the case.

Furthermore, it is worth considering the procedure for appealing against orders by which the Patent Office would restrict the right of access to materials and evidence. Such orders, in accordance with the draft's provisions, would be final. The party would be entitled to lodge a complaint with the administrative court. This, in turn, would effectively prolong the proceedings before the Patent Office. The point is not that parties should not be able to challenge orders during the proceedings. However, the introduction of a further category of decisions would effectively prolong these proceedings. As the legislator itself indicates in the Explanatory statement to the draft in question, proceedings cannot continue until a final decision has been reached on the application to restrict the right of access to materials and evidence¹¹. Consequently, lodging a complaint would be a simple way of prolonging the proceedings in question. In my view, the introduction of such regulations would run counter to the deregulation of legal provisions, understood as the simplification and acceleration of procedures, particularly those relating to entrepreneurs.

On the one hand, the Draft Act states that “in adversarial proceedings where the burden of proof rests with the parties – such as the aforementioned proceedings concerning opposition to a trade mark application and adversarial proceedings before the Patent Office – the application of such provisions requires great caution. This is because proceedings must ensure the principle of equal treatment of the parties is upheld and guarantee the observance of procedural rights, including the right of defence, for each party.”¹² However, the restriction on the right to inspect the materials and evidence attached to the case file, as provided for in the draft amendment in question, is contrary to the above principles.

4. CONFIDENTIALITY OF DOCUMENTS BEFORE EUIPO

It is also worth comparing the provisions contained in this draft with the corresponding provisions applicable in proceedings before the European Union Intellectual Property Office.¹³ This office is responsible, amongst oth-

¹¹ Explanatory statement, p. 4.

¹² Explanatory statement 2025, p. 2.

¹³ Governed in substance by the Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark, OJ L 154, 16.6.2017, pp. 1-99.

er things, for registering trade marks and designs with effect throughout the European Union. It operates on the basis of, amongst other things, Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark,¹⁴ which also governs proceedings relating to trade marks where proof of use is required.

When it comes to regulations concerning confidential information, keeping all or part of a document confidential may be requested by EU-IPO on its submission or at a later stage, as long as there is no pending request for an inspection of files.¹⁵ The party concerned must have expressly invoked, and sufficiently justified, a special interest in keeping the document confidential.¹⁶

According to Article 114(4) EUTMR, documents relating to exclusion or objection pursuant to Article 169 EUTMR, draft decisions and opinions, and all other internal documents used for the preparation of decisions and opinions, as well as parts of the file which the party concerned showed a special interest in keeping confidential before the request for inspection of the files was made, unless inspection of such parts of the file is justified by overriding, legitimate interests of the party seeking inspection, may be withheld from inspection. As a result, EUIPO can keep documents confidential *vis-à-vis* third parties (inspection of files).

In the event that the Office invites the parties to opposition, cancellation or invalidity proceedings to consider a friendly settlement, all corresponding documents referring to those proceedings are considered confidential and, in principle, not open to inspection of files.

Access to documents that the Office has accepted as being confidential and thus, excluded from inspection, may nevertheless be granted to a person who demonstrates an overriding legitimate interest in inspecting the document.¹⁷

It should be emphasised that EUIPO cannot classified documents from the other party in *inter partes* proceedings. The right of defence requires that the other party in adversarial proceedings have full access to the evidence. It follows that all material submitted by a party should be disclosed to the other party of the proceedings. The Office has an obligation to communicate all material received to the other party. Therefore, if one of the parties requests that certain documents be kept confidential without

¹⁴ OJ L 154, 16.6.2017, pp. 1-99. Hereinafter: EUTMR.

¹⁵ EUIPO Trade mark and Design Examination Guidelines 2025. Part E. Register operations. Section 5. Paragraph 5.1.3. Inspection of files.

¹⁶ Decision of the Fifth Board of Appeal of 8 November 201808/11/2018, R 722/20185, nume (fig.) / Numederm, § 16.

¹⁷ EUIPO Trade mark and Design Examination Guidelines 2025. Part C. Opposition. Section 1. Paragraph 4.4.4. Confidential information.

mentioning whether this should be *vis-à-vis* third parties, the EUIPO will take it for granted that this is the case and will forward them to the other party and mark them as confidential in the electronic file.¹⁸ If, in the course of opposition proceedings, the EUIPO receives documents with a request that they be kept confidential *inter partes*, the sender should be informed that the documents cannot be kept confidential *vis-à-vis* the other party to the proceedings. In this situation, EUIPO will send the letter to the party that the sender may choose between disclosing or withdrawing the documents. It is up to the party to decide which of these possibilities is appropriate for its case and to inform the Office accordingly. If it confirms confidentiality, the documents will not be sent to the other party and will not be taken into account. They will be marked as confidential in the electronic file. If it wants the documents to be taken into account but not be made available for third parties, the documents can be forwarded to the other party, but must be marked confidential in the electronic file.¹⁹

In proceedings before EUIPO, it is therefore essential that each party has guaranteed access to all the documents filed in the case. The need to protect trade secrets must not result in the other party to the proceedings being denied access to all the documents filed in the case.

CONCLUSIONS

The analyses set out above indicate that the Draft Act to the Industrial Property Law, which introduces provisions on trade secrets, will not achieve its objective. More importantly, in proceedings where the subject matter is the demonstration of trade mark use, it is crucial to ensure that the parties to the proceedings have equal access to the evidence submitted in the case. The introduction of the regulations in question could undermine the equality of the parties in such proceedings.

It should be noted that public authorities are in any case under an obligation to protect information constituting trade secrets. This obligation is justified by the fact that trade secrets constitute property rights within the meaning of Article 64 of the Constitution of the Republic of Poland of 2 April 1997.²⁰ It is therefore argued in legal literature that any gaps in the specific provisions governing the protection of trade secrets within the framework of particular procedures should be filled in accordance with the constitutional principle of the protection of property and property rights, Direc-

¹⁸ EUIPO Trade mark and Design Examination Guidelines 2025. Part C. Opposition. Section 1. Paragraph 4.4.4. Confidential information.

¹⁹ *Ibid.*

²⁰ Journal of Laws No. 78, item 483 as amended.

tive 2016/943²¹ and international obligations, and with a view to ensuring effective protection of trade secrets [Sołtysiński i Gogulski 2024, nb 58].

In my view, however, the introduction of provisions protecting trade secrets into the Industrial Property Law is an idea worth considering. The adoption of such regulations should, however, also take into account other proceedings before the Polish Patent Office. The introduction of these regulations should therefore be systematic in nature, as there may be a need to protect trade secrets in various proceedings.

It also appears that, when introducing similar regulations, the Polish legislator should follow the example of the Regulation (EU) 2017/1001. Above all, such provisions should not undermine the equality of the parties in proceedings. Each party to adversarial proceedings, including proceedings concerning an opposition to a trade mark application, should have equal access to all the material gathered in the case. Although the legislator states in the Explanatory statement that “the distribution of the burden of proof in proceedings for the declaration of the expiry of trade mark protection, and the fact that currently anyone may file such an application, coupled with the lack of protection for trade secrets, may lead to inequality between the parties”, the adoption of this specific Draft Act could in fact undermine such equality. Consequently, provisions intended to protect the interests of businesses may result in their infringement. The need to protect trade secrets must not lead to a situation where one of the parties is deprived of the opportunity to refer to all the material submitted in a given case.

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²¹ Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, OJ L 157, 15.6.2016, pp. 1-18.

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