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THE PROTECTION OF TRADE SECRETS AS CONFIDENTIAL BUSINESS INFORMATION

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CHAPTER 1 – INTRODUCTION

Generally, Trade Secrets refers to a business related activity which can be a secret method, design or a tool or a collection of information undisclosed to the common people and the owner makes responsible efforts to keep such information very confidential. The company's interest is protected by the way of protecting Trade Secrets among the rivals in the competitive market.

In simple terms, a trade secret is valuable commercial information kept confidential. It can encompass various details like customer lists, distribution networks, advertising strategies, or technical know-how. Unlike copyrights, patents, or designs, trade secrets don't grant exclusive rights to the owner. Others can independently discover or reverse-engineer them without infringing.

Trade secrets offer benefits without formal registration or costs, arising from their creation. However, their value relies on remaining secret. Once known or properly developed by others, their utility diminishes.

Trade secret protection traces back to traditional communities¹, where customary laws ensured knowledge remained within specific groups. During the medieval era, guild systems reinforced this by restricting technical know-how to guild members. In a 2014 OECD report on trade secret protection across 11 OECD and BRICS countries, it highlighted both similarities and differences in trade secret regimes². While there are commonalities in defining and protecting trade secrets, variations exist in

¹ Jorda KF. 2007 “Trade Secrets and Trade-Secret Licensing”. In IP Management in Health and Agricultural Innovation: A Handbook of Best Practices (eds. A Krattiger, RT Mahoney, L Nelsen, et al.). MIHR: Oxford, U.K., and PIPRA: Davis, U.S.A.

² Schultz, M. F. and D. Lippoldt (2014), “Approaches to Protection of Undisclosed Information (Trade Secrets) Background Paper”.

When addressing trade secrets, particular emphasis is placed on protecting such information within the corporate sector, where measures like the **Springboard Doctrine, Doctrine of Inevitable Disclosure, and Garden Leave** are employed to prevent employees from disclosing proprietary information to the public or competitors. This study aims to explore the legal implications surrounding the protection of trade secrets, focusing on potential conflicts with competition laws in India.

1.1 RESEARCH PROBLEM

In the age of globalization, as businesses strive to expand globally, safeguarding business strategies and secrets becomes increasingly challenging. Trade secrets serve as valuable intellectual assets for companies, influencing their market value.

Therefore, it is imperative to safeguard a company's confidential business information, particularly trade secrets, through a regulatory framework. While India has various existing legal frameworks that indirectly offer protection to trade secrets, the effectiveness of these regulations in safeguarding trade secrets and granting exclusive rights to their owners remains a subject of debate. This discussion ultimately revolves around the impact of trade secret protection as an intellectual property right for businesses over their competitors in the commercial market. The author of this research aims to address the gaps in regulatory protection of trade secrets and explore its intersection with competition law.

1.2 RESEARCH OBJECTIVES:

The primary goals of this study are as follows:

1. To investigate the historical evolution of trade secret laws globally.
2. To determine the rights of intellectual property owners within the commercial market.
3. To examine the role of trade secrets in safeguarding business information.
4. To assess the necessity and significance of trade secrets for the advancement of the Indian corporate and commercial sector.

5. To analyse how laws intersect with competition in the market, particularly in relation to the Competition Act 2002.
6. To evaluate the judicial interpretations regarding unfair trade practices and trade secrets in the business sector.
7. To conduct a comparative analysis of trade secret protection laws in foreign jurisdictions.
8. To identify and address shortcomings in the current legislative framework for enforcing trade secret protection.
9. To provide recommendations for enhancing the protection and regulation of trade secrets in India.

1.3 RESEARCH QUESTION

What are the scope and the necessity for protecting Trade Secrets in India and globally?

1.4 HYPOTHESIS

The hypothesis of the paper is “Ensuring strong protection for trade secrets within intellectual property (IP) law could unintentionally foster anti-competitive practices”.

1.5 RESEARCH METHODOLOGY

This study employs a doctoral approach, encompassing both analytical and descriptive methodologies. It draws upon a combination of primary and secondary sources, with the research gap discerned through a comprehensive review of existing literature, including various articles and research papers.

1.6 REVIEW OF LITERATURE

1. ***Legal safeguarding of confidential information and trade secrets (S.K. Verma, 2002)***³: _____

³Verma, S.K, Legal Protection of Trade Secrets and Confidential Information, Indian Law Institute, New Delhi, Journal of Indian Law Institute- Volume 44, citation:44 JILI(2002), page no.336-353,ISSN: 0019-5731, URI:<http://hdl.handle.net/123456789/12543>

In this research paper, the author talked about the ideas behind trade secrets as well as case laws where private information was shielded by the courts through judicial pronouncements due to lack of Legislative Authority to safeguard. The author also clarifies why it is impossible to define a trade secret precisely and focuses on TRIPS' trade secret agreement.

2. Regulation of Anti-Competitive Practices and Trade Secret Laws under Competition

Legislation of India: A Paradigmatic Analysis, (Nomani, Md. Zafar Mahfooz, 2013)⁴:

The paper seeks to investigate the regulation of anti-competitive practices and trade secrets within India. It concludes that such practices are widespread in the market within the context of trade secrets, and it establishes a connection between innovation laws and competition laws.

3. Some Problems of Protection of Commercial Secrets (Stephen Litvin, 2022)⁵

This article aims to address trade secret protection issues and propose solutions. The study employs both general and specialised cognitive methods to examine these problems. The findings reveal that breaches of trade secrets are viewed as unfair competition under international law.

4. India: Analyzing The Intersection Of Competition Law And IPR (Sanjana, 2021)⁶

The author studies about the IP and its intersection with the Competition Law in India and finds that the concepts intersect and there can be a need to draw a balance between IP and Competition law..

5. Trade secret in intellectual property (Malhotra and Honey, 2021)⁷

The author expresses the importance of trade secrets in the field of innovation and business and finds that the things included in Trade secrets are any commercially

⁴ Nomani, Md. Zafar Mahfooz (or M.Z.M.), Regulation of Anti-Competitive Practices and Trade Secret Laws under Competition Legislation of India: A Paradigmatic Analysis', Manupatra IPReports (2013)

⁵ Diduk, A., & Lytvyn, S. (2022). SOME PROBLEMS OF PROTECTION OF COMMERCIAL SECRETS. Scientific Works of National Aviation University. Series: Law Journal "Air and Space Law", 2(63), 119–126. <https://doi.org/10.18372/2307-9061.63.16719>

⁶ Sanjana, India: Analyzing The Intersection Of Competition Law And IPR, Khurana and Khurana, 2021

⁷ Malhotra and Honey, Trade secret in intellectual property (March 2, 2021). Available at SSRN: <https://ssrn.com/abstract=3796211> or <http://dx.doi.org/10.2139/ssrn.3796211>

valuable and sensitive information. The paper finds a lacuna in the IPR in protecting trade secrets and suggests regulations and procedures to register trade secrets.

CHAPTER II - EVOLUTION OF TRADE SECRETS

The majority of the world's technological advancements are safeguarded as trade secrets rather than through contractual obligations. This underscores the global recognition and respect for trade secrets, which are prized for their secrecy and confidentiality, crucial for the advancement of the business sector in the market.

2.1 THE EARLY HISTORY OF TRADE SECRET LAW: UNFAIR COMPETITION AND THE MORAL ECONOMY

Trade secret law emerged relatively later compared to other forms of intellectual property, such as patents, copyrights, and trademarks. While patent and copyright laws were firmly established in Europe by the time of the Republic's founding, and trademark law had roots in various trade doctrines, modern trade secret law in **Anglo-American jurisprudence** developed in the 19th century through common law principles. English and American courts first acknowledged claims for damages related to trade secret misappropriation in 1817 and 1837 respectively, with injunctive relief against such actions coming later. Trade Secret law is not a recent development but it all arose with the rise of **Industrial Capitalism** in the 19th century itself⁸. Some days the protection of trade secrets started during Roman times itself.

2.2 Doctrine Of Inevitable Disclosure

Although trade secrets are recognized as intellectual property rights, their regulation primarily falls under contractual obligations. The Doctrine of Inevitable Disclosure is *sine qua non* in trade secrets law⁹, evolving over centuries to provide a legal framework for addressing the misuse of trade secrets. This doctrine guides courts in determining whether information qualifies as a trade secret and possesses commercial value. Courts have ruled that mere speculation of trade secret theft isn't sufficient

⁸ A. Arthur Schiller (1930), Trade Secrets and the Roman Law: The Actio Servi Corrupti, 30 COLUMN. L REV. 837.

⁹ Mark Halligan, 2021, Trade Secrets:the inevitable disclosure doctrine
<https://www.reuters.com/legal/legalindustry/trade-secrets-inevitable-disclosure-doctrine-2021-11-09/>

grounds for legal action, but when there's a substantial risk of imminent harm, intervention is warranted to prevent it.

2.2.1 Application of the Doctrine in India

In India, the doctrine of inevitable disclosure is not recognised. Despite substantial investments by companies in developing techniques and training employees, there remains a risk of employees misusing critical information, skills, and techniques vital for the company's exclusivity. In India's ongoing developmental phase, safeguarding trade secrets is imperative for companies to establish dominance in the market. Indian courts have shown proactive measures in protecting individual rights, as demonstrated in landmark cases such as Diljit Titus and Priya Puri. The outcomes of these cases would have differed had the doctrine of inevitable disclosure been acknowledged in Indian law.

2.3. Protection of Undisclosed Information:

In regards to the question on who shall safeguard the undisclosed information according to TRIPS. All Natural and Legal entities are those who have the ability to lawfully prevent the information under their control from being disclosed, acquired, or utilized by others without their consent in a manner contrary to honest commercial practices.

In line with **Article 39 of TRIPs**, India underscores the importance of preserving secret information. However, legislation cannot entirely prevent violations or breaches of contract. Under Article 39(3) of TRIPs, documents submitted to the government are exempt from secrecy restrictions. **North America Free Trade Agreement (NAFTA)** defined it as "information having commercial value which should not be disclosed to public, and for that the necessary steps to be considered to maintain it in secret"¹⁰

In India, the attempt to define trade secrets within the framework of the Indian Copyright Act, 1957 created a discrepancy between acknowledging trade secrets as a distinct right and copyright protection. Court rulings under the Indian Copyright Act,

¹⁰ NAFTA, Article 1711

1957 predominantly addressed copyright issues, even when concerns regarding secrecy were raised.

CHAPTER III – A VIEW ON THE INTERSECTION BETWEEN COMPETITION LAW AND TRADE SECRETS

The introduction of Liberalisation, Globalisation, and Privatisation (LPG) reforms in India in 1991 marked a pivotal shift towards opening up the economy to foreign corporations. The Monopolies and Restrictive Trade Practices Act (MRTP), 1969, underwent amendments as required but proved ineffective in curbing anti-competitive practices and fostering market competition. The committee's report outlined several key recommendations, including:

1. Proposing the creation of a new statute, termed 'The Indian Competition Act', based on the committee's suggestions.
2. Recommending the repeal of the MRTP Act, 1969, and the dissolution of the MRTP Commission.

Additionally, it proposed that provisions concerning unfair trade practices need not be incorporated into the new Indian Competition Act, as they are already addressed in the Consumer Protection Act, 1986.

3.1 IPR Conflicting with Competition Policy

IPR and Competition are often perceived as areas with conflicting objectives. This stems from the fact that IPRs, by granting legal exclusivity or monopolies to innovators within defined boundaries, may seem at odds with the principles of fair market access and a level playing field advocated by competition rules. Restrictions on horizontal and vertical restraints, as well as on the abuse of dominant positions, further contribute to this perception. The legal monopoly conferred by IPRs can potentially result in market power or even monopoly status, particularly when substitutes are scarce in the relevant market. However, it's important to note that the mere possession of IPRs does not automatically equate to market power, as competition laws target the abuse rather than the existence of dominance.

In the case of **Entertainment Network (India) Pvt. Ltd. Vs. Super Cassette Industries Ltd**¹¹, the Supreme Court tackled the clash between intellectual property rights and competition law. The Court emphasised that even if a copyright holder enjoys a monopoly, this monopoly's scope is restricted if it disrupts market dynamics, thereby contravening Competition Law. This

principle also applies to the refusal of licenses. While intellectual property owners can profit from their innovations by granting licenses, this privilege is not absolute.

3.2. Confidentiality Agreements

To prevent trade secrets from being misused, it's common practice for businesses to establish non-disclosure agreements (NDAs). These agreements serve as a primary means of protecting trade secrets, particularly since breaches often occur through employee misconduct, such as violating employment contracts. Even in jurisdictions with specific laws on unfair disclosure, contracts remain vital for safeguarding trade secrets. Employment contracts can bolster legal protections against unfair competition or common law torts.



¹¹ 2008(5)OK 719

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CHAPTER IV – A COMPARATIVE STUDY OF TRADE SECRETS AND UNFAIR TRADE PRACTICES IN VARIOUS COUNTRIES

An adequate infrastructure to enhance the innovative creation thus becomes essential to combat current needs and also to provide an opportunity for future technology¹². This chapter discusses the regulations of various countries to analyse the efficiency of trade secrets and the confidential trade related information and its importance based on the various needs in countries. This chapter analyses countries including the USA, United Kingdom, European Union, Australia, India, and several others.

5.1 UNITED STATES OF AMERICA

In America, there has been progressive protection of trade secrets for over a century. The government of America through Law Commissions and Committee recommended laws from the 19th century. Until 1979, the state's common law depends on the Restatement (First) of Torts¹³. Again in the same year, the **National Conference of Commissioners on a Uniform State Laws** launched the "UTSA" and after that there are 46 countries that have the codified characteristics of the UTSA¹⁴. There are still many states that follow Restatement (First) of Torts or the Restatement (Third) of Unfair Competition or adopted civil laws other than UTSA. The Protection of trade secrets in USA are made through the following legislations:

- a. Uniform Trade Secrets Act, 1985
- b. Economic Espionage Act, 1996
- c. Defend Trade Secrets Act, 2016

5.2 UNITED KINGDOM:

¹² Tanushree Sangal, (2007), Unfurling the Proposed National Innovation Act, 3(3) MANUPATRA INTELLECTUAL PROPERTY REPORTS 29 .

¹³ Adam Gill(2002), The Inevitable Disclosure Doctrine: Inequitable Results Are Threatened But Not Inevitable, 24 HASTINGS COMM. & ENT. L.J. 403, 407.

¹⁴ *Id.*,

Trade secrets have become a critical asset in the modern, technology-driven and globally competitive business environment, forming the backbone of innovation and commercial success. India currently lacks a dedicated statutory framework for trade secret protection, relying on fragmented provisions under contract law, equity, and judicial interpretations, which leads to uncertainty and weak enforcement. The European Parliament has implemented a directive named Trade Secrets Directive on the protection of the undisclosed information that is treated and considered as trade secrets against unlawful usage through *Trade Secrets (Enforcement, etc) Regulations 2018*¹⁵.

The United Kingdom has introduced a new legislation aimed at addressing trade secret theft through criminal offenses, alongside the Trade Secrets Regulation. Although the National Security Act 2023 primarily focuses on countering industrial espionage conducted by foreign governments, it also

5.4 INDIA

The absence of specific legislation addressing trade secrets has posed challenges in legal proceedings, yet courts have consistently endeavored to safeguard trade secrets and provide recourse for breaches of confidentiality through their rulings.

5.4.2 National Innovation Bill 2008

Even though India lacks legislation on trade secrets, the Government of India has released a draft *National Innovation Act (NI Act), 2008* to promote research and innovation that would have inextricably protected trade related secrets in the country. The Department of Science and Technology has released this bill that intends to create a comprehensive framework¹⁶. As this legislation was a draft it was introduced as the *National Innovation Bill of 2008*.

¹⁵ (SI 2018/597)

¹⁶ Basheer S, Making India Innovative: A New India Innovation Act, 14 September 2008, SpicyIP, <https://spicyip.com/2008/09/making-india-innovative-newindian.html>

But, the bill wasn't passed by India's Parliament. It defines trade secrets in relation to Indian context, *Section 2(3)* defines trade secrets as information which is not readily accessible to the common public, such as formula, pattern, compilation, program device, method, technique, or process. This information has commercial value, and the required precautions have been taken to safeguard it.

CHAPTER V – AN ANALYSIS ON THE NEED FOR PROTECTION OF TRADE SECRETS

Trade Secret Law has the capacity to safeguard 80-90% of breakthrough technologies¹⁷. Protecting trade secrets is an effective way to safeguard invention when technical knowledge is unlikely to be patentable. As some countries raise patent-ability criteria, trade secrets are becoming a more realistic alternative for protecting inventions and keeping them hidden.

India should consider enacting proactive legislation under a sui generis system, as outlined in Art. 10 bis of the Paris Convention and Articles 39(2) and 39(3) of TRIPS, to safeguard its vast repository of undisclosed information and knowledge.

Compulsory licensing of trade secrets based on “**public interest**” is a debated issue. While there is recognition of public interest in maintaining confidence and protecting trade secrets, current laws typically do not justify enforced disclosure of trade secrets through compulsory licensing. However, in exceptional cases, courts have balanced trade secret protection against public interest, as seen in the **Detroit Med. Ctr. Vs. GEAC Computer Sys., Inc**¹⁸. case, where a court granted access to confidential information to safeguard public health interests.

6.1. Need for Legislation:

The prevalence of corporate espionage in India can be attributed significantly to the absence of dedicated legislation for safeguarding trade secrets. In cases concerning

¹⁷Jordan K F,(2008) Patent and trade secret complementarity: An unsuspected synergy, Washburn Law Journal, Page no.481

¹⁸ 103 F. Supp. 2d 1019 (E.D. Mich. 2000)

trade secret protection, Indian courts have traditionally relied on principles of equity and contract law to grant remedies. However, the lack of explicit policy becomes glaringly evident with alarming incidents of espionage that have rattled both the corporate sector and government.

For instance, the recent **cyber-attack** on the **Nuclear Power Corporation of India Limited**, a government-owned entity operating multiple nuclear reactors, underscored the vulnerability of critical infrastructure to malicious activities. Analysis by cybersecurity experts revealed that hackers had gained access to sensitive information, raising concerns about the potential theft of technical data related to reactor design and security assessments at the Kudankulam Power plant.

6.2 INTERNATIONAL PRESSURE ON NEED FOR LEGISLATION IN INDIA:

At numerous venues, the US has pressed India to strengthen its intellectual property protection and enact trade secret legislation¹⁹. As a result, in light of the US' push for a Trade Secret law²⁰, the term '**Trade Secret**' was included in the lapsed National Innovation Bill, 2008 (NIB, 2008), and the proposal for state legislation on trade secrets, the need for legislation in this area has come up for public discussion.

Currently, trade secrets in India fall under various legislative frameworks, including the Indian Contract Act, 1872, Indian Copyright Act, 1957, Indian Penal Code, 1860, Code of Criminal Procedure, 1973, Arbitration and Conciliation Act, 1996, Consumer Protection Act, 1986, Competition Act, 2002, and the Companies Act, 1956 and 2013. Despite this, the absence of a specific law dedicated to trade secrets has spurred calls for a draft, as previously proposed by the National Innovation Bill, 2008.

¹⁹ Chang S, 2018, U.S. Chamber of Commerce Special 301 Submission, https://www.keionline.org/wp-content/uploads/2018/02/2_8_Final_2018_U_S_Chamber_Special_301_Submission.pdf

²⁰ India and US Joint Statement on the Trade Policy Forum, 20 October 2016

CHAPTER VI CONCLUSION AND RECOMMENDATIONS

Trade secrets have become a critical asset in the modern, technology-driven and globally competitive business environment, forming the backbone of innovation and commercial success. India currently lacks a dedicated statutory framework for trade secret protection, relying on fragmented provisions under contract law, equity, and judicial interpretations, which leads to uncertainty and weak enforcement.

There is an urgent need to introduce a **sui generis legislation** for trade secrets in India, aligned with international standards such as TRIPS, to provide clarity, uniformity, and stronger legal protection.

- The proposed legal framework should adopt a **flexible model**, similar to the United Kingdom, combining statutory provisions with common law principles to ensure adaptability across industries.
- With the rise of artificial intelligence, digital platforms, and data-driven business models, the risk of trade secret misappropriation has increased significantly, necessitating stronger legal and technological safeguards.
- Organizations must implement robust internal protection mechanisms, including:
 - Identification and classification of trade secrets
 - Restricted access and confidentiality controls
 - Strong non-disclosure and employment agreements
 - Cybersecurity measures such as encryption and monitoring systems
- Regular employee training and awareness programs should be conducted to prevent accidental disclosure and ensure compliance with confidentiality obligations.
- The relationship between trade secret protection and competition law must be balanced to prevent anti-competitive practices while still encouraging innovation.
- Policymakers should ensure that the protection framework does not lead to monopolistic behavior or restrict market access.
- Ultimately, a combination of **strong legislation, judicial clarity, and organizational responsibility** is essential to safeguard trade secrets effectively and promote sustainable economic growth in India.

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