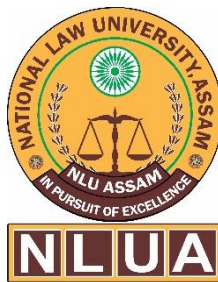


**PROTECTION OF TRADE SECRETS: A COMPARATIVE ANALYSIS
WITH SPECIAL REFERENCE TO INDIA, USA AND OTHER
DEVELOPED NATIONS**



Dissertation submitted to National Law University, Assam
in partial fulfilment for award of the degree of
MASTER OF LAWS

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DECLARATION

I, AAKRITI NAUTIYAL, do hereby declare that the dissertation titled “PROTECTION OF TRADE SECRETS: A COMPARATIVE ANALYSIS WITH SPECIAL REFERENCE TO INDIA, USA AND OTHER DEVELOPED NATIONS” submitted by me for the award of the degree of MASTER OF LAWS/ ONE YEAR LL.M. DEGREE PROGRAMME of National Law University and Judicial Academy, Assam is a bonafide work and has not been submitted, either in part or full anywhere else for any purpose, academic or otherwise.

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49. *V.N. Deshpande v. Arvind Mills Company Limited*
50. *V.V. Sivaram and Ors. v. Foseco India Limited*
51. *Wheatley v. Bell*
52. *Wright v. Gasweld Pvt. Ltd.*

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India

1860- The Indian Penal Code

1872 – The Indian Contract Act

2000 – The Information Technology Act

2005 – The Right to Information Act

2008 – The National Innovation Act

2016 – The National Intellectual Property Rights Policy

USA

1979 – The Uniform Trade Secret Act

1993 – The Restatement (Third) of Unfair Competition

1995 – The Uniform Trade Secrets Act

1996 – The Economic Espionage Act

2007 – The America COMPETES Act

2016 – The United States Defend Trade Secrets Act

Brazil

1996 – The Industrial Property Law

Japan

1993 – The Unfair Competition Prevention Act

China

1991 – The Chinese Civil Procedure Code

1993 – The Law on Unfair Competition

France

The Code Du Travail (French Labour Code)

The French Code of Civil Procedure

The French Intellectual Property Code

South Africa

2003 – The International Civil Procedure, South Africa

Table of Abbreviation

Serial no.	Abbreviation	Explanation
1.	AIR	All India Reporter
2.	Anr.	Another
3.	Asst	Assistant
4.	Bom	Bombay
5.	DTSA	United States Defend Trade Secrets Act
6.	ed.	Edition
7.	EEA	Economic Espionage Act
8.	etc.	Etcetera
9.	EU	European Union
10.	GATT	General Agreement on Tariffs and Trade
11.	Hon'ble	Honourable
12.	IPC	Indian Penal Code
13.	IPR	Intellectual Property Rights
14.	M RTP	Monopolistic and Restrictive Trade Practice
15.	NAFTA	North American Free Trade Agreement
16.	NIPRP	National Intellectual Property Rights Policy
17.	Ors	Others
18.	p.	Page
19.	SC	Supreme Court
20.	SCC	Supreme Court Cases
21.	Sec.	Section
22.	TRIPS	Trade-Related Aspects of Intellectual Property Rights

23.	U.P.	Uttar Pradesh
24.	UNO	United Nations Organisation
25.	UTSA	Uniform Trade Secret Act
26.	WIPO	World Intellectual Property Organization
27.	WTO	World Trade Organisation

Chapter 1

INTRODUCTION

1.1. Introduction

The demand for intellectual property is expanding at a rate that is unprecedented. The term “Intellectual Property” pertains to creations made by individuals. “Intellectual Property Rights” is a comprehensive phrase encompassing patents, trade secrets, copyrights, trademarks, service marks, designs, and various other forms of protection. Each of these factors relies on knowledge. Intellectual property is an intangible asset that instills confidence in business partners and financial institutions, thereby attracting investment and collaboration for business growth and profit maximization. In addition to safeguarding their creations, business owners can increase the value of their intellectual property in several ways, including franchising, licensing, and international transactions. The greater the global exploration of intellectual property, the greater the profits earned by its proprietor. In the current era of global industrialization, it is essential to recognize and protect such properties.

Nations establish intellectual property laws in fields such as industry, science, literature, and art for two main purposes. Firstly, these laws aim to legally acknowledge the economic and moral rights of creators in relation to their works, while also recognizing the public's right to access those works. Secondly, they serve as a deliberate government strategy to foster creativity, promote the sharing and utilization of creative outcomes, and encourage fair trade, thereby contributing to economic and social progress.¹ The primary objective of IP law is to safeguard the rights of creators and producers of intellectual products by granting them temporary control over the utilization of their creations. These rights are applicable to the intellectual creation itself rather than the physical manifestation of that creation. Intellectual property law is typically categorized into industrial property and copyright, representing the traditional classifications in this field.²

In the current era of globalization, new challenges and opportunities emerge, influencing market growth and generating new opportunities in nations such as India. Globalization has a significant impact on India's industrialization, agriculture, service sector, employment opportunities, and economic fairness at its current stage of development. If the protection

¹ “WIPO Intellectual Property Handbook: Policy, Law and Use”, Chapter 1 – Introduction P.3, available at: <http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/ch1.pdf>

² Ibid.

mechanisms are equitable and reasonable, intellectual property rights have the potential to significantly contribute to India's development in terms of globalization and progress. Effective IPR can facilitate India's pursuit of a thriving knowledge-based economy. Protection of intellectual property is essential for economic growth and development, particularly in the high-technology industry. It is advantageous to enterprises, the general public, and technological advancement. In India, as in many developing nations, the abundance of traditional, oral, folklore, customary, agricultural, and traditional medicinal knowledge (such as Ayurveda) continues to present challenges.³ In addition to limited resources and infrastructure, the lack of IPR awareness among all segments of India's population is a significant hindrance for the nation's development. In the current environment, aggressive and targeted patenting is vital.⁴ Not only do intellectual property rights have enormous potential in knowledge-based economies, but also in national and international trade and industry, with the ability to transform the national economy.

Individuals and organizations engaged in scientific and technological research, the creation and interpretation of learning, culture, entertainment, and the marketing of products seek legal protection against unjust competition to safeguard their investments and distinctiveness. Patents, trademarks, designs, copyrights, and other branches of intellectual property law confer legal exclusivity in the marketplace.⁵ Intellectual property is a specialized discipline because defining the right to prevent the unfair use of ideas or information for commercial gain requires sophisticated legal mechanisms. In industrialized, free-market economies, however, these intangible property rights are becoming increasingly valuable in the struggle for market share. A larger group of individuals requires a fundamental comprehension of their implications.⁶

Patents, trademarks, and copyrights come to mind immediately when discussing Intellectual Property Rights (IPRs) protection, whereas “trade secrets” are frequently neglected despite their enormous potential.

³ Infra note 4.

⁴ Aayush Sharma, “India: The Intellectual Property Rights - Something Which Needs to be Cared”, available at: <http://www.mondaq.com> (last visited on June 12, 2023).

⁵ Supra note 1.

⁶ Md. Zafar Mahfooz Nomani and Faizanur Rahman, “Intellection of Trade Secret and Innovation Laws in India”, vol. 16 2011, JIPR, Aligarh, U.P. <https://nopr.niscpr.res.in/bitstream/123456789/12449/1/IJPR%2016%284%29%20341-350.pdf>.

A “trade secret” is confidential information, such as formulas, practices, processes, designs, patterns, or compilations that gives a company an advantage over its competitors.⁷ Contrary to other forms of intellectual property, “trade secrets” are not disclosed to the public. The owners of “trade secrets” take technological and legal precautions to protect the information from competitors. They maintain the secrecy of “trade secrets” by instituting specific procedures and restricting access to only a small number of individuals who are essential to the operation of the business. Due to the economic stakes involved, it is vital to safeguard “trade secrets”. Certain internal business processes that provide a company with a competitive advantage can be considered trade secrets.⁸ By protecting trade secrets, businesses are able to maintain low-cost production, resulting in increased profits and customer base. Trade secrets include information that provides a competitive advantage to those who possess it, so long as it is not easily accessible or discernible by rivals. Customer profiles, technical data, internal processes, methodologies, techniques, and formulas are examples of trade secrets. The generation of trade secrets is dependent on the acquisition and application of knowledge. The key to protecting trade secrets is maintaining their confidentiality; their value rests in their secrecy.

Innovative ideas, business practices, and products allow businesses to maintain a market advantage and advance their economic interests. Legal protection is required to prevent others from exploiting innovative ideas, knowledge, or confidential information. “The majority of the laws governing the protection of “trade secrets” are derived from common law. In 1939, the “Restatement (First) of Torts” was the first attempt to codify judge-made trade secret law.⁹ Chapter 757 of the “Restatement (Second) of Torts” provides guidance on the definition and identification of misappropriation of trade secrets”.¹⁰

Although IPRs are typically national rather than international, “trade secrets” are protected by international laws. The United Nations Organization provides the initial level of protection, with the World Intellectual Property Organization functioning as its IPR protection agency. WIPO provides member nations with recommendations for establishing effective laws to protect “trade secrets”. Concerning “trade secrets”, the WIPO encourages

⁷ Mark F. Schultz and Douglas C. Lippoldt, “Approaches to Protection of Undisclosed Information (Trade Secrets): Background Paper”, Paper No. 162, 2014 OECD Trade Policy, OECD Publishing, Paris. Available at: <http://www.oecd.org/trade> (last visited on May 10, 2023).

⁸ Ibid.

⁹ Zubair Ahmed, “Protection of Trade Secrets in India a Study of the Legal Framework”, <https://shodhganga.inflibnet.ac.in/handle/10603/291861>(last visited on May 10, 2023).

¹⁰ Ibid.

member nations to adhere to Article 10 of the 1967 Paris Convention which is regarding “unfair competition”. However, WIPO directives are not legally binding for its member nations, such as India. On the other hand, the World Trade Organization has binding mandates in international trade. Under the Trade-Related Aspects of Intellectual Property Rights agreement, the WTO establishes minimum standards for the protection of intellectual property that member nations are required to incorporate into their IPR laws. India must ensure the safeguarding of "trade secrets" in line with the basic shared criteria, as the primary objective of TRIPS is to safeguard such confidential information.¹¹ At the national level, Section 27 of the “Indian Contract Act of 1872” contains indirect references to “trade secret” protection, and Indian courts adopt a common law approach and provide some relief in trade secret cases. For a country to have a comprehensive and effective IPR law, including protection for “trade secrets”, a specific “trade secrets” law is a prerequisite for economic development.

In India, traders (including manufacturers) face several common difficulties and problems in the absence of specific “trade secrets” protection: a lack of a specific definition of “trade secrets” under Indian law, inadequate protection of ideas that fall under “trade secrets” in other jurisdictions, low chances of convictions for “trade secrets” misappropriation, reluctance to share information even within close business circles due to the absence of exclusive protection, and a limit on the amount of damages that can be awarded for “trade secrets” misappropriation.¹² Since there is no specific IPR protection for “trade secrets” in India, it is crucial to investigate the nature and scope of “trade secrets” protection in other laws and to fill any existing gaps. Based on this understanding, it is necessary to develop a model law on “trade secrets” as part of IPR in order to defend the interests of investors in India in accordance with WTO-TRIPS standards.

1.2. Statement of Problem

The establishment of effective and viable legislative protection for “trade secrets” as a form of Intellectual Property Rights creates a favourable environment for innovation and investment, directly impacting the national economy. Currently, “trade secrets” in India are protected under Section 27 of the “Indian Contract Act, 1872”, and Indian courts adopt a common law approach to provide relief in trade secret cases. However, this protection is

¹¹ Aayush Sharma, “India: The Intellectual Property Rights - Something Which Needs to be Cared”, available at: <http://www.mondaq.com> (last visited on June 12, 2023).

¹² Ibid.

limited in scope and lacks comprehensiveness. As a result, investors and innovators suffer significant economic losses. It is crucial to address this issue urgently to prevent the country from missing out on economic opportunities. Therefore, this research aims to identify the shortcomings of the existing legal protection and strives to develop a comprehensive, robust, and equitable legal framework for trade secret protection in India.

1.3. Aims and Objective

The research work has the following objectives:

1. To identify the shortcomings in the current “trade secrets” laws in India.
2. To examine the inadequacies in the proposed legislation concerning the protection of “trade secrets” in India.
3. To analyze the protection systems for “trade secrets” in selected foreign countries.
4. To emphasize the necessity of a comprehensive law that effectively and viably safeguards “trade secrets” in India, taking into account:
 - a) Rulings from various Indian courts.
 - b) International experiences.
5. To propose the scope and content of a model law for the protection of “trade secrets” in India, with a focus on preserving the interests of the country as a whole, as well as the innovators and investors specifically.

1.4. Scope of the study

The scope of the research paper is to have an in-depth analysis of the laws concerning trade secrets in India and other developed nations like US, China, Japan, South Africa and Australia. The research paper also seeks to investigate the extent upto which the laws in India are effective and efficient. The research paper tries to provide with some suggestions so as to bridge the gaps and loopholes in the laws in India.

1.5. Hypothesis

The proposed National Innovation Act includes a definition for “trade secrets” but it is not efficient enough for the efficacy of the protection. Moreover there may be potential gaps or limitations that require further consideration and refinement of the proposed legislation. Certain amendments and additions are necessary to address existing loopholes, enhance enforcement mechanisms, and provide better safeguards against misappropriation.

1.6. Literature Review

1. David Quinto and Stuart Singer, "Trade Secrets: Law and Practice", 2nd ed. 2013, LexisNexis, United States.

In this book, the writers extensively study the laws in the US governing trade secrets. Their main focus is on two key legislations, i.e. the "Uniform Trade Secrets Act" (UTSA) and the "Economic Espionage Act of 1996". Additionally, they draw insights from various established resources on the subject. The book takes a trial attorney's viewpoint to explore the concept of trade secrets and the importance of safeguarding confidential information. It offers valuable strategic advice for handling both prosecution and defense in legal disputes concerning the unauthorized use of trade secrets.

As per the authors' perspective, trade secret law in the United States is strong and highly developed. The legal framework for civil trade secret protection varies among states, while the Economic Espionage Act specifically addresses criminal misappropriation of trade secrets. Furthermore, certain states have their own criminal statutes pertaining to trade secrets. This book thoroughly examines both federal and state laws that govern criminal liability in cases involving the misappropriation of trade secrets.

This book outlines the general principles of U.S. trade secret law. For determination of trade secret, U.S. courts consider six factors, according to the authors. These factors include:

- i. "The level of familiarity with the information beyond the claimant's company,
- ii. The level of awareness among employees and individuals connected to the company,
- iii. The steps taken by the claimant to safeguard the confidentiality of the information,
- iv. The significance of the information to the business and its competitors,
- v. The investments and efforts made by the business in the development of the information, and
- vi. The ease or difficulty with which others can access the information".

According to the authors' viewpoint, the efficacy of criminal law surpasses that of civil law due to the more stringent remedies provided by criminal law in the United States. They did not, however, investigate the gaps in civil statutes, which, if addressed, would strengthen

and improve the efficacy of civil laws as well. It is essential to emphasize that the analysis of trade secret protection in this book applies specifically to the United States.

2. Darin W. Snyder and David S. Almeling, “Keeping Secrets: A Practical Introduction To Trade Secret Law And Strategy”, 1st ed. 2012, Oxford University Press, United States.

This book provides a comprehensive and practical guide to identifying, utilizing, and protecting valuable “trade secrets”. It emphasizes the use of nondisclosure agreements by employers in order to protect “trade secrets”. The book presents “trade secrets” law in a manner that is accessible to both businesspeople and legal professionals by using contemporary cases and examples. It provides knowledge that can be applied immediately in critical areas such as employer-employee relations, physical and data security, and contractual issues.

According to the book, there are no substantial limitations on confidentiality agreements in the United States. However, the handling of non-compete agreements varies significantly. Certain states explicitly forbid such agreements, while others approach them with caution, and some states support their implementation. In states where non-compete agreements are permissible, courts assess their reasonableness by considering factors such as business necessity, duration, and geographical coverage. Regarding data security, the authors believe that the legal system of the United States offers sufficient protection. After securing marketing approval for a new chemical entity, the United States grants a period of five years called “data exclusivity”. During this time, the government is prohibited from approving a competitor's application based on the data provided by the original company. During this timeframe, the government is restricted from approving another company's application based on the newly submitted data. The authors deem these provisions extremely effective for protecting “trade secrets” and investor interests. Additionally, the United States has distinct regulations for biologics derived from living organisms that are used in medical treatments.

The authors praise the U.S. model of trade secret protection, especially the extensive pre-trial discovery procedure in civil and criminal cases. They perceive it as one of the world's most extensive discovery and disclosure systems. Parties have the ability to seek and obtain physical evidence, documents, submit written inquiries, conduct depositions, and employ various other means to gather evidence. Parties may request restrictions on the disclosure

and discovery of “trade secrets”, and the court may hear relevant evidence and witness testimony in closed sessions. Courts routinely issue protective orders in response to such petitions, which aids in maintaining the confidentiality of the information.

The book concludes with a summary of the various provisions of U.S. laws for the protection of “trade secrets”, arguing that “trade secrets” are effectively and efficiently protected under this legal framework. The authors did not, however, discuss the exceptions and conditions for the use and exploration of “trade secrets” and physical data by non-owners. In addition, the book does not discuss trade secret protection from an Indian perspective.

3. Chandni Raina, “Trade Secret Protection in India: The Policy Debate”, Working Paper (September 2015), Centre for WTO Studies, Indian Institute of Foreign Trade, New Delhi.

This paper consists of three sections. Section I, explores the rationale behind intellectual property protection and investigates whether the preservation of “trade secrets” results in socially optimal outcomes for technology development. Section II evaluates the extant protection mechanisms for “trade secrets” in India, including remedies against third parties, criminal remedies, and disclosure that is inevitable during litigation. The concluding section examines trade secret protection as one of the options for safeguarding technological advances.

In Section I, the author defines intellectual property as the result of human intellect and contends that technological advances, which represent creativity, are mutually exclusive in use. The paper then addresses market failure and technological advancements in its discussion of trade secret protection as a form of intellectual property protection. The writer highlights two factors that contribute to market failure in technological advancement: the challenge of preventing others from utilizing the improvements and the positive impact that arises from the widespread sharing and expansion of knowledge. To provide a comprehensive comprehension, this paper examines the definitions provided by the TRIPS Agreement and the Uniform Trade Secret Act in the United States to determine the scope of “trade secrets”. There are two categories of “trade secrets”: confidential business information, such as customer lists and distribution networks, and technical or scientific information. Using cost analysis and marginal benefit in the context of research and development expenses, this paper examines the impact of keeping technological

advancements as “trade secrets”. The author's conclusion suggests that the preservation of “trade secrets” leads to a suboptimal equilibrium, causing a lower level of research output than what would be ideal for society. This is because “trade secrets” neither contribute to the advancement of knowledge nor foster the progress of third parties. In spite of these arguments against trade secret protection, the author argues that “trade secrets” are a potent tool for businesses to maintain their competitive advantage, thereby incentivizing inventors. However, the author acknowledges that, from a societal standpoint, trade secret preservation is not the best course of action, as it hinders the seamless diffusion of technology and the production of public benefits.

The second section of the paper emphasizes that India lacks a specific trade secret protection law. In its place, protection has evolved via equity-based judgments and the common law action for violation of confidence. This paper examines Indian court decisions pertaining to trade secret protection, with an emphasis on the fact that protection is granted not only on the basis of underlying contracts, but also on grounds of equity and violation of confidence. In addition, the scope of trade secret protection during litigation and the possibility of disclosure to the general public, including competitors, are discussed.

The third section of the paper examines the types of protection sought by inventors for technological advancements, taking into consideration the quality of the invention and the efficacy of alternative options such as trade secret protection and patent protection. As one of the alternatives, the paper cites Supreme Court decisions justifying trade secret protection. It discusses the Uniform Trade Secret Act, which has been adopted progressively by the majority of U.S. states. The author argues that trade secret protection offers individual inventors certain advantages over patent protection. A patent is granted on the basis of the invention's merit and can be challenged and invalidated, whereas “trade secrets” include any confidential information or technical know-how.

In its conclusion, the paper acknowledges that India lacks a specific law for the preservation of “trade secrets”. Through the analysis of case law, however, the paper exposes a growing body of jurisprudence on trade secret protection, encompassing essential aspects such as the definition of “trade secrets”, remedies for substantive protection, and the issue of inevitable disclosure in court. The author observes that the Information Technology Act of 2000 and its subsequent amendments provide protection against the electronic theft of confidential information by imposing severe penalties, damages, and imprisonment. The

conclusion of the paper is that stronger trade secret laws encourage inventors to keep technological advancements covert. Nonetheless, this action can have negative repercussions for society, as it impedes full disclosure and the general advancement of knowledge, ultimately undermining the goals and rationale of intellectual property rights. The author, who is opposed to effective trade secret protection, makes no suggestion for making trade secret protection more comprehensive, viable, strong, effective, and reasonable, taking into account future challenges, opportunities, and public interest.

4. Mark F. Schultz and Douglas C. Lippoldt, “Approaches to Protection of Undisclosed Information (Trade Secrets): Background Paper”, Paper No. 162, 2014 OECD Trade Policy, OECD Publishing, Paris.

This study examines the existing legal provisions for safeguarding trade secrets and presents a methodology for assessing the effectiveness of the protection regime across various countries. The authors examine the trade secret statutes of certain WTO member nations that are subject to the TRIPS agreement. The paper evaluates the level of legal protection for “trade secrets” in these nations by creating an indicator known as the “Trade Secrets Protection Index” using national and international sources. While there are similarities between countries in terms of the definition and scope of “trade secrets”, there are significant disparities in the implementation of trade secret protection, according to the authors. These distinctions include evidence collection, discovery, protection during litigation, technology transfer requirements, and the overall efficacy of legal systems in enforcing trade secret rights. The “Trade Secrets Protection Index” reflects this diversity through a broad spectrum of country scores.

The authors observe, when discussing the provisions in India, that Indian trade secret law is underdeveloped. They note a lack of case law and a dearth of legislative or policy frameworks for trade secret protection in India. Furthermore, Indian statutory law lacks a comprehensive definition for “trade secrets” and instead, Indian law relies on common law principles, specifically referring to the English case laws such as *Saltman Engineering Co. vs. Campbell Engineering Ltd.*¹³ The authors conclude that Article 39 of the TRIPS Agreement has an impact on the definition and extent of "trade secrets" in the countries

¹³ (1948) 65 RPC 203.

analyzed in the study. They highlight the diverse approaches taken by these nations in implementing their TRIPS obligations pertaining to “trade secret” protection.

While this paper discusses laws globally, identifies gaps, and emphasizes the underdeveloped nature of Indian laws, it does not propose any solutions to resolve these deficiencies and strengthen trade secret protection. Considering the authors' acknowledgement of the underdevelopment of Indian law, this is a notable omission. In addition, the analysis of India's trade secret laws is limited in scope and does not address all of the identified flaws.

5. Ranjeet Kumar, R.C.Tripathi and M.D.Tiwari, “Trade Secrets Protection in Digital Environment: A Global Perspective” Vol. 2, No. 4, 2012, IJEMS.

In this paper, the authors compare the preservation of “trade secrets” versus patent protection. The authors provide an overview of the current status of trade secret protection under TRIPS (Agreement on Trade-Related Aspects of Intellectual Property Rights), with a concentration on potential misappropriations and violations in digital environments. In addition, the authors analyze the state of trade secret protection in a number of countries, including India, using court cases as examples. The United States is an additional country examined in the paper, in which the authors discuss the application of the "SIX FACTOR TEST" to determine whether information qualifies as a trade secret. The article also discusses the encounters with “trade secrets” in the United Kingdom, Brazil, Japan, China, and South Korea and provides recommendations for effectively utilizing “trade secrets” in corporate sectors, small and medium-sized enterprises (SMEs), and research and development laboratories.

The authors underscore the significance of protecting intangible assets, especially in light of the internet and globalization. They emphasize that the value of intangible assets such as trademarks, copyrights, patents, designs, and “trade secrets” can frequently surpass that of tangible assets. The article defines “trade secrets” in accordance with TRIPS and the “United States Uniform Trade Secrets Act” (UTSA). The authors suggest that when deciding between trade secret protection and patent protection for a new idea, inventors or owners should consider the advantages and disadvantages of each form of protection based on the nature of the invention and the desired level of protection. In order to facilitate this decision-making process, the authors provide a reference chart.

In addition, the paper discusses the protection of computer-related software and methods, noting that trade secret protection may be preferable to patent protection for algorithms and other aspects. The article also discusses misappropriation of “trade secrets”, stating that in order to prove misappropriation, it must be demonstrated that the accused person knew or should have known the “trade secrets” and had a specific opportunity to acquire them. The authors contend that individuals who unintentionally obtain “trade secrets” should not be held responsible if they were unaware that the information qualified as a “trade secret”.

This paper examines “trade secrets” in the digital environment, emphasizing the difficulties posed by digitized information and the potential for forensic analysis to detect unauthorized access or use. Regarding Indian trade secret law, the authors observe that apart from contract law, there is no specific legislation for protecting “trade secrets” and confidential information in India. However, Indian courts have recognized trade secret protection under contract law, equity principles, and breach of confidence actions under common law.

In conclusion, as businesses expand globally, the authors assert the need for an effective framework for trade secret protection, particularly for vital information pertinent to manufacturing, services, commerce, and trade. They recommend that the corporate sector and innovative small and medium-sized enterprises adhere to specific agreements and secrecy criteria to safeguard information through a well-implemented framework for “trade secrets”. While the authors recognize the inadequacies of trade secret protection in India and advocate for specific legislation, they do not propose the specifics of such legislation in this article. In addition, no arguments in favor of statutory protection of “trade secrets” over common law protection are presented.

6. S.K.Verma, “Legal Protection of Trade Secrets and Confidential Information”, vol. 44, no. 3, 2002, Journal of the Indian Law Institute, New Delhi.

The author examines the common law concept of “trade secrets” in the United Kingdom and the United States. The author examines court cases involving the protection of confidential information by the courts. The author argues that it is difficult to provide a precise definition of “trade secrets” because each business operation is unique. Nevertheless, the author suggests taking into account several factors when determining

whether confidential business information meets the criteria to be classified as a trade secret. These factors encompass the extent of external familiarity with the information, the level of awareness among employees and individuals associated with the business, the protective measures implemented by the business, the significance of the information to the business and its competitors, the investments made in its development, and the level of difficulty in obtaining or replicating it.

According to the author, the UTSA definition surpasses the “Restatement of Torts (1939)” definition. The broader UTSA definition extends protection to trade secret proprietors who have not yet had the opportunity or means to utilize the information. The author provides examples of “trade secrets” based on the UTSA's definition, noting that it includes information with commercial value from a negative perspective, such as research results indicating that a particular process will not work, which could be valuable to a competitor. The author believes that the UTSA codifies the fundamental principles of common law for trade secret protection and emphasizes that both the UTSA and common law principles permit multiple parties to claim trade secret protection for identical information. In addition, the author acknowledges that remedies exist for misappropriation of “trade secrets” under Indian common law.

In conclusion, the author praises the UTSA model in the United States and suggests the need for specific trade secret protection legislation in India. However, neither the distinctions in approach between British and American courts regarding trade secret protection nor Indian cases are discussed. Although the author advocates for specific legislation, the proposed trade secret protection legislation in India is not discussed. Similar to the previous article, the authors do not present arguments supporting statutory protection for “trade secrets” over common law protection.

7. Abhinav Kumar, Pramit Mohanty and Rashmi Nandakumar, “Legal Protection of Trade Secrets: Towards a Codified Regime”, vol. 11 2006, JIPR, Kolkata.

In this paper, the authors define “trade secrets” and highlight their advantages over patents, including their increased exploration potential, economic benefits, and owner preferences. The paper examines the limited statutory protection afforded “trade secrets” under Section 27 of the Indian Contract Act of 1872, as well as the availability of common law remedies. However, the authors argue that common law remedies do not provide adequate protection for “trade secrets”. The authors also discuss the significance of “trade secrets” in the

globalized era and the necessity of implementing the TRIPS mandate in India, particularly with regard to “trade secrets”. The paper includes a discussion of the American and European perspectives on trade secret protection, supported by pertinent cases. The use of nondisclosure agreements as a prevalent method for protecting “trade secrets” is investigated.

In conclusion, the authors argue for specific legislation in India to safeguard “trade secrets”, especially in the globalization era. Furthermore, they assert that the existing legal provisions in India fall short of meeting international standards. As a signatory to the WTO-TRIPS agreement, India should comply with the common minimum standards and enact a robust trade secret protection law, according to this paper.

Although the authors argue that common law remedies are insufficient for trade secret protection, they make no mention of their deficiencies in this regard. In addition, while the paper advocates for specific legislation, it does not offer any suggestion regarding the content of such legislation, despite the current needs and prospective obstacles to achieving full trade secret protection.

8. Abhik Guha Roy, “Protection of Intellectual Property in the Form of Trade Secrets” vol. 11 2006, JIPR, Kolkata.

This paper makes a strong case for the protection of “trade secrets” and explores the concept of “trade secrets” in the context of intellectual property rights. Due to their perpetual nature, the author contends that “trade secrets” are poised to become the most important category of intellectual property rights. Compared to other types of intellectual property rights, such as patents, copyrights, and trademarks, “trade secrets” are viewed as having a broader scope and ambit. Unlike these other forms, “trade secrets” are protected solely on the basis of their utility and do not require the disclosure of knowledge-related information to the granting authority. The paper emphasizes the significance of keeping “trade secrets” content and expression covert.

The paper suggests separating the confidential information from the general information to assure proper recognition and protection by the court, as "information" has a broad meaning.

The author investigates further the application of confidential information in the employer-employee relationship, differentiating between duties arising during employment and those

arising after employment. The author draws parallels between “Inevitable Disclosure Doctrine” and non-compete clauses used when former employees join a competitor.

Concerning India's approach to confidential information, the author asserts that Indian law is substantially less protective than those of the United States and the United Kingdom. The fact that “trade secrets” are predominantly protected through contracts in India demonstrates the need for specific legislation in this area. The paper concludes by recommending a balanced approach to trade secret protection and noting that the United States offers injunctive relief and damages, whereas the United Kingdom offers accounts of profits, damages, and constructive trusts. India, lacking specific legislation, relies on persuasive international precedents. The author emphasizes the imperative need for a specific law to strengthen trade secret protection, providing clarity to trade secret owners and dispelling ambiguities and uncertainties.

The paper does not explicitly justify the need for trade secret protection in India, despite the author's strong advocacy for such protection. In addition, despite emphasizing the need for dedicated legislation, the author makes no recommendations regarding the proposed legislation's content for further investigation.

9. Md. Zafar Mahfooz Nomani and Faizanur Rahman, “Intellection of Trade Secret and Innovation Laws in India”, vol. 16 2011, JIPR, Aligarh, U.P.

This paper offers a comparative analysis of the origin and evolution of trade secret law and analyzes critically the implications of the proposed "Innovation Law" for trade secret protection in India. After introducing the concept of “trade secrets”, the paper focuses on the unfavourable treatment “trade secrets” have received in India in comparison to other intellectual property laws such as patents and copyrights. The dearth of effective trade secret legislation can be attributed to the need for secrecy and privacy in their protection. The authors discuss the increased global focus on trade secret protection due to significant developments such as NAFTA and TRIPS. “Trade secrets” are defined in accordance with UTSA and TRIPS, and numerous mechanisms for their protection, such as employment agreements, “trade secrets” policies, non-disclosure agreements, appropriate documentation, and security systems, are investigated.

In addition, the paper analyzes trade secret infringement and available remedies. Also discussed are defenses such as general knowledge, parallel development, reverse engineering, innocent information acquisition, public interest, and statutory obligations.

The international framework for trade secret protection is investigated, with a concentration on the Paris Convention, the TRIPS Agreement, and the United States. The significance of data exclusivity in India is also discussed, highlighting the need for a more effective implementation of TRIPS standards.

This paper examines the provisions for trade secret protection in Section 27 of the “Indian Contract Act of 1872” and discusses “trade secrets” in the proposed “National Innovation Act of India”. In conclusion, the authors argue for the enactment of legislation to protect “trade secrets” in India, highlighting the need for a statute founded on TRIPS standards. They propose amending the Competition Act of 2002, the Indian Penal Code of 1860, and the Companies Act to conform to the proposed law.

The paper does not, however, examine the extent of third-party liability for trade secret infringement, nor does it address the unjust and inconsistent provisions of the proposed National Innovation Act or their implications. In addition, while advocating for the protection of “trade secrets” in India and proposing a dedicated law, the paper lacks specific suggestion regarding the content and provisions of the proposed law to protect the interests of individuals and businesses involved in “trade secrets”.

1.7. Research Questions

1. Whether “trade secrets” is defined in any legislation and if so does it need a better explanation for removal of ambiguity and efficient working?
2. Whether the proposed National Innovation Act sufficient and efficient enough for safeguarding the misappropriation of the trade secrets?
3. What are the amendments and inclusions required to be made for strengthening the legal protection?
4. Whether there are criminal remedies also along with civil remedies?

1.8. Research methodology

This study employs a strictly doctrinal methodology and is therefore non-empirical. It required a comprehensive analysis of source materials, literature evaluations, and case studies from national and international contexts. There are two categories of materials utilized in the research: primary materials and secondary materials. Texts of laws, declarations, and other pertinent documents are examples of primary sources. The

secondary sources for a topic include books, articles, encyclopedias, research papers, newspapers, and periodicals. The nature of the research methodology is analytical, explanatory, and comparative. Existing and proposed laws pertaining to the protection of “trade secrets” are analyzed and explained, and a comparative analysis of existing laws in various nations is conducted. The research employs a deductive approach, relying on numerous national and international legal sources and analyzing pertinent cases. The paper adheres to a style of citation approved by the National Law University and Judicial Academy, Assam, which is universally acknowledged.

Chapter 2

DEMYSTIFYING THE CONCEPT OF TRADE SECRETS

2.1. Introduction

In the eyes of the law, intellectual property is anything that can be owned and administered. The law recognises IP rights as property. In some jurisdictions, a monetary compensation is not necessary for a transfer of intellectual property rights to be legitimate. Our definition of property no longer rests exclusively on its physical manifestations. In addition to the tangible item that can be held, the term “property” also refers to the ownership rights and

fractional ownership that go along with it. It encompasses both a party's actual and potential rights and interests.¹⁴

The Supreme Court has reiterated that Article 19(1)(f) of the Constitution's definition of "property" shall be liberally and expansively read to include all forms of interests that are commonly understood to be protected by proprietary rights. In 1979, Article 19(1)(f) was repealed and replaced with Article 300A, which recognises the right to property as a constitutional rather than a fundamental right. However, the definition of "property" under that provision remains applicable and relevant to Article 300A.¹⁵

2.2. Importance of Trade Secrets

When determining a company's worth in the modern day, the value of its intangible assets will almost always outweigh the value of its physical assets. The market places a different value on intangible assets like goodwill, branding, patents, trademarks, copyrights, and trade secrets, which explains the discrepancy in valuation. "Trade Secrets", in particular, are an important type of intangible asset.¹⁶

In today's information-based economy, "trade secrets" have emerged as a popular and effective kind of intellectual property. Protecting assets through patent law was especially important during the "industrial age", when machines and mechanisms were the focus of innovation.¹⁷ In the nineteenth century, English courts developed the common law of unfair competition, which eventually gave rise to modern trade secret law. The main purpose of trade secret law is to protect and encourage honest and ethical behaviour in business. Fundamental to any successful business are the tenets of good faith, honesty, and fair play. For time-sensitive, non-patentable business intelligence that is nonetheless essential in today's "information age," trade secret protection is the best option.¹⁸

In contrast to other forms of IP, trade secret protection requires ongoing action on your part. The information age has enhanced the value of "trade secrets" but also raised the likelihood that they will be stolen. "Trade secrets" are analogous to trademarks in this

¹⁴ Abhik Guha Roy, "Protection of Intellectual Property in the Form of Trade Secrets" vol. 11, JIPR, (2006), p. 192.

¹⁵ Ibid.

¹⁶ Infra note 17.

¹⁷ Md. Zafar Mahfooz Nomani and Faizanur Rahman, "Intellection of Trade Secret and Innovation Laws in India", vol. 16, JIPR, (2011) p. 341

¹⁸ Ibid.

respect.¹⁹ According to precedent set by the United States Courts, the extent to which one can claim ownership of a trade secret depends on the steps taken to keep it hidden. Even in well-established businesses, “trade secrets” are often poorly understood and handled despite their high value.²⁰

The protection afforded to “trade secrets” goes beyond that of patents, trademarks, and copyrights. In order to be granted a patent, an invention must meet a number of criteria, including being new, useful, and not obvious, being made public, and fitting within a narrow range of allowable subject matter. After twenty years from the priority date of the granted application, the exclusive rights given by patents expire. Copyrights protect the form of expression but not the content, idea, information, or concept being transmitted, while trademarks only protect the printed word or image representing a product or service. However, “trade secrets” are not need to follow the same rules as patentable subject matter. They need not be original or counterintuitive.²¹ The value and anonymity of a trade secret are its defining characteristics. A trade secret must be kept hidden in both its substance and form.

2.3. Confidential Information

Proving that the disclosed information was confidential is the most important step in proving a breach of confidence. Justice O’Connor emphasised the claimant’s obligation to identify and detail the sensitive material they wish to keep private.²² If there isn’t enough information to evaluate the claim, it could be thrown out on the grounds of conjecture or abuse of procedure. Due to the breadth of the term “information,” it is important to establish its limits. When deciding what constitutes secret information, courts have been picky, rejecting anything that is either irrelevant or immoral or too nebulous or too easily accessible to the general public. Justice Megarry highlighted that equity should not intervene to protect insignificant gossip or rumors, no matter how confidential they may

¹⁹ Supra note 14.

²⁰ Md. Zafar Mahfooz Nomani and Faizanur Rahman, “Intellection of Trade Secret and Innovation Laws in India”, vol. 16, JIPR,(2011) p. 342.

²¹ Ibid.

²² Abhik Guha Roy, “Protection of Intellectual Property in the Form of Trade Secrets” vol. 11, JIPR, (2006), p. 192.

be.²³ While most cases involving breaches of confidence include particular, detailed facts, others involve more broad notions and concepts like television shows.

A corporation that had been working on oil-water separation techniques sued several of its former workers who had gone on to compete in the industry.²⁴ The court, however, ruled that remedy was not warranted since a trade secret cannot protect an abstract concept or purpose without more. This highlights the significance of detail and substance in private communications.

Importantly, information cannot be protected under breach of confidence if it is already available to the general public. Information that appears to be in the public domain can't be legally protected.

“Confidential Information” necessitates a higher level of privacy than other forms of intellectual property. Some information can be known by a small group of people without it being deemed common knowledge. Information in the public domain, however, may one day be treated as confidential. Lord Justice Shaw said that it was unacceptable to bring up old information that could hurt someone else.²⁵

Different types of information, different levels of publication within a given domain, different types of publication formats, and different levels of likelihood of pursuit within a given domain all contribute to what level of publication is required to lose secrecy. The claimant should also be protected from any potential injury that could result from further publishing. The need for harm and the need for confidentiality have both been considered as alternative reasons in specific situations.²⁶ It's worth noting that worries about disclosure are always a possibility when working with sensitive information.

In *Mars vs. Teknowledge*²⁷, the claimants designed and manufactured coin accepting and exchanging devices with “discriminators”. These discriminators were used to verify the legitimacy of a coin and its monetary worth. However, difficulties emerged when it became

²³ Abhik Guha Roy, “Protection of Intellectual Property in the Form of Trade Secrets” vol. 11, JIPR, (2006), p. 193.

²⁴ Md. Zafar Mahfooz Nomani and Faizanur Rahman, “Intellection of Trade Secret and Innovation Laws in India”, vol. 16, JIPR,(2011) p. 342.

²⁵ Abhik Guha Roy, “Protection of Intellectual Property in the Form of Trade Secrets” vol. 11, JIPR, (2006), p. 193.

²⁶ Md. Zafar Mahfooz Nomani and Faizanur Rahman, “Intellection of Trade Secret and Innovation Laws in India”, vol. 16, JIPR,(2011) p. 342.

²⁷ [2000] FSR 138.

necessary to reprogram the discriminators every time the currency was altered. In contrast, the defendants created a new discriminator they named “cash flow” that could be updated with fresh currency information. The accused cracked the encryption system and deduced the cash flow discriminator’s inner workings using reverse engineering. The plaintiffs brought action, claiming the defendant’s reverse engineering efforts were an invasion of privacy. Taking into account the cash flow machine’s widespread availability, Justice Jacob ruled that its encryption failed to provide adequate protection for sensitive data. He said, “anyone with the required skill to decrypt the information had access to it”.²⁸ Since any buyer can train themselves to obtain the necessary abilities, the court held that the scarcity of the requisite expertise was not a sufficient safeguard.

2.3.1. Springboard Doctrine

The springboard concept was created by the English legal system to stop anyone from utilising insider information to their advantage. The idea behind this philosophy is to punish individuals who violate confidences by denying them any gain.²⁹ That is to say, if you learn something from someone in confidence, you can’t turn around and use it to damage the person who confided in you. It is nevertheless useful as a starting point even if all the information has been made public or may be found through examination. The court’s ability to prevent the person from utilising the material as a springboard, however, is time-limited. The courts have recognised the challenge of pinpointing the exact moment the springboard effect began and have indicated that monetary compensation, rather than injunctive relief, may be more appropriate in such circumstances.³⁰

2.3.2. Application of Confidential Information to Employer–Employee Relationship

Special considerations arise when applying the idea of breach of confidence to the relationship between an employer and an employee. They are:

- i. During the Course of Employment

²⁸ Abhik Guha Roy, “Protection of Intellectual Property in the Form of Trade Secrets” vol. 11, JIPR, (2006), p. 194.

²⁹ Abhik Guha Roy, “Protection of Intellectual Property in the Form of Trade Secrets” vol. 11, JIPR, (2006), p. 194.

³⁰ Ibid.

Typically, an employee's obligation of confidentiality towards an employer will be laid out in detail in the employment contract.³¹ The law usually backs up these stipulations in contracts. Even if confidentiality isn't mentioned in the fine print, that doesn't imply the employee is free from any responsibilities in that regard.³² The courts have sometimes ruled that workers have an implied duty of faithfulness to their employers, which includes a duty to protect the privacy of their companies' proprietary information.

ii. Post Employment

The court must weigh the competing interests of the employer and the worker when there is no employment contract. It would be unfair to bar workers from ever returning to their previous field. Employers will sometimes insert a "restrictive covenant" in the employment contract as a means of protecting their business interests. The employee agrees that, for a certain time after termination, he or she will not seek employment in the same field. This is done because protection afforded by non-disclosure obligations alone may not always be adequate. Employee-acquired skills and "trade secrets" can be difficult to distinguish.

Employers also want to hang on to workers who have specialised knowledge of the company's inner workings and dynamics. The worker will be paid in full regardless of whether or not they show up to work during this time. The length of this arrangement, known as "garden leave," is depending on the value of the knowledge the employee possesses and the needs of the business.³³

The courts will imply modest requirements regarding the use of information received during employment even if there is no express duty of confidence in the employment contract. These duties typically involve protecting "confidential information" like "trade secrets" in a commercial setting.

2.4. Trade Secrets

The term "trade secret" is commonly used to refer to information that is confidential related to commercial and industrial activities. But there have been cases where judges have offered a different view. Justice Staughton distinguished between "trade secrets" and

³¹ Abhik Guha Roy, "Protection of Intellectual Property in the Form of Trade Secrets" vol. 11, JIPR, (2006), p. 194.

³² Md. Zafar Mahfooz Nomani and Faizanur Rahman, "Intellection of Trade Secret and Innovation Laws in India", vol. 16, JIPR, (2011) p. 342.

³³ Abhik Guha Roy, "Protection of Intellectual Property in the Form of Trade Secrets" vol. 11, JIPR, (2006), p. 195.

“confidential information”.³⁴ A trade secret is defined as “information that, if disclosed to a competitor, would cause significant harm to the owner of the secret. It must be information used in trade or business, and the owner must limit its dissemination or, at the very least, not encourage or permit widespread publication”.³⁵

The modern definition of a trade secret includes any information that is valuable, secretly preserved to provide a real or potential economic advantage over others, and can be used in the running of a business or industry. The “Uniform Trade Secrets Act” provides protection for “trade secrets” if certain conditions are met and has been implemented by some states in the United States.³⁶

Therefore, the information’s lack of availability is more important than its novelty. The information’s potential worth to the bearer should make it a high priority. As “trade secrets” might include almost any information developed by a corporation through its own efforts and unknown to its competitors, defining “what is a trade secret” is difficult. “trade secrets” might be either technical in nature or strictly commercial.³⁷ Inventions, production methods, chemical compositions, engineering blueprints, “trade secrets”, recipes in the cosmetics, food, and pharmaceutical industries, and other similar information are all examples of technical secrets. Cost and pricing information, sales figures, client lists, supply sources, market estimates, promotional strategy, and growth plans are all examples of the informations that might be deemed to be “trade secrets”, all of which are created by the company itself. Such knowledge might give a company a leg up on the competition.³⁸

In *Faccenda Chicken vs. Fowler*³⁹, the Court of Appeal ruled that when determining whether information qualifies as a trade secret, four factors should be considered. The first consideration is the employee’s position in relation to the employer’s private conversations. The company only considers confidential the information shared with a small number of trusted personnel. Second, the information needs to be very particular and comprehensive; broad commercial strategies and tactics do not qualify for patent protection. It has been

³⁴ Abhik Guha Roy, “Protection of Intellectual Property in the Form of Trade Secrets” vol. 11, JIPR, (2006), p. 195.

³⁵ Ibid.

³⁶ Md. Zafar Mahfooz Nomani and Faizanur Rahman, “Intellection of Trade Secret and Innovation Laws in India”, vol. 16, JIPR,(2011) p. 342.

³⁷ Ibid.

³⁸ Abhik Guha Roy, “Protection of Intellectual Property in the Form of Trade Secrets” vol. 11, JIPR, (2006), p. 195.

³⁹ [1986] 1 All ER 617

made clear, nonetheless, that merely being technical in nature does not make one's knowledge a trade secret. An employee's expertise in a certain sector may need them to have in-depth and specialised knowledge of that field.⁴⁰

The third consideration is whether or not the employer has stressed the need of maintaining the confidentiality of the material at issue. Last but not least, it must be determined whether the information can be easily separated from other knowledge, such as the employee's own gained expertise or experience, which can be provided without infringing any agreements.⁴¹

Avoiding public disclosure is the fundamental motivation for not patenting a trade secret. The confidentiality of a company's "trade secrets" is guaranteed indefinitely. For instance, the "Coca Cola" recipe is a well guarded trade secret because it is the key to the success of the beverage.⁴² The corporation would lose its exclusive right to use the recipe after a couple of decades if it were patented. However, as long as the formula is kept secret, the firm will have unchallenged control. Unlike patents, which are protected by law, "trade secrets" are safeguarded through contractual arrangements between the parties involved.

Courts have created the "inevitable disclosure" theory⁴³ as a legal justification for issuing injunctive relief against threatened disclosure of a trade secret. A prima facie showing of the existence of the trade secret is required for remedy under this doctrine.⁴⁴ To seek legal protection for a trade secret, however, is fraught with the possibility that it will become public knowledge through the litigation process.

2.4.1. Nature and Definitions of Trade Secrets

The term "trade secret" is commonly used to refer to any type of exclusive business knowledge that gives its owner an advantage in the marketplace. Both "trade secrets" and industrial or manufacturing secrets are included. It is unfair and a breach of the trade secret if anyone other than the owner uses this information. Safeguarding against unfair competition, in its broadest sense, or specific regulations and legal precedents governing

⁴⁰ Abhik Guha Roy, "Protection of Intellectual Property in the Form of Trade Secrets" vol. 11, JIPR, (2006), p. 195.

⁴¹ Ibid.

⁴² Abhik Guha Roy, "Protection of Intellectual Property in the Form of Trade Secrets" vol. 11, JIPR, (2006), p. 196.

⁴³ Md. Zafar Mahfooz Nomani and Faizanur Rahman, "Intellection of Trade Secret and Innovation Laws in India", vol. 16, JIPR, (2011) p. 342.

⁴⁴ Ibid.

the protection of sensitive information, underpin the practise of keeping “trade secrets” secret.⁴⁵

Sales procedures, distribution channels, customer types, advertising plans, vendor and customer databases, and production techniques are only few of the many common areas covered by “trade secrets”. What constitutes a trade secret is factually determined in each individual instance. The theft, disclosure, or misuse of “confidential information” constitutes unfair competition and is illegal under international law.⁴⁶ “trade secrets” include things like recipes, computer code, procedures, methods, gadgets, techniques, prices, lists of customers, and anything else of value that has been guarded from the public eye.

“A trade secret is defined by the fact that it is not generally known or used, has financial worth, involves intellectual work, is viewed as secret by its proprietor, and is kept secret from the public”.⁴⁷ Although trade secret definitions may differ in their language, they all have the following three elements:

- i. The information can't be anything that everyone working with the same kind of data would already know or have easy access to.
- ii. The concealed worth of the knowledge must be substantial to economic interests.
- iii. The rightful owner is obligated to keep its existence secret by any means necessary.

In common law, “trade secrets” are defined in a way that makes a functional distinction between knowledge that is in the public domain and information that is not. When an employee quit before the conclusion of their contract, the court in *Thomas Marshall Ltd. vs. Guinle*⁴⁸ supported the value of secrecy and ordered the former employee to protect the company's secrets. While delivering judgment Megarry, V.C. identified four factors to be considered for determining confidentiality in an industrial or trade setting namely:

⁴⁵ Md. Zafar Mahfooz Nomani and Faizanur Rahman, “Intellection of Trade Secret and Innovation Laws in India”, vol. 16, JIPR,(2011) p. 346.

⁴⁶ Abhik Guha Roy, “Protection of Intellectual Property in the Form of Trade Secrets” vol. 11, JIPR, (2006), p. 196.

⁴⁷ Ibid.

⁴⁸ (1978) 3 All ER 193.

- i. “the owner must believe that the release of the information would be injurious to him or of advantage to his rivals or others;
- ii. the owner must believe that the information is confidential or secret, that is, not already in the public domain;
- iii. the owner’s belief must be reasonable; and
- iv. the information must be judged in the light of the usage and practice of the particular industry or trade concerned.”⁴⁹

In England and Wales, the Law Commission has classified four types of information as “trade secrets”. These categories include secrets associated with highly specialized products, technological secrets, strategic business information, and private collections of individual items with significant public value. A trade secret can be anything of value, not just something that can be proven with absolute certainty, like a formula.⁵⁰ It can also include null results, ambiguous data, or very suggestive studies. A knowledgeable individual in the field can get an advantage through the use of this data that they might not have had access to without the owner’s research efforts.⁵¹

2.4.2. Tools of protecting trade secrets

The individuals or organizations that possess “trade secrets” must take precautions to prevent competitors from gaining access to them. This can be accomplished by instituting non-disclosure agreements (NDAs) and non-compete clauses when hiring employees with access to trade secrets during their employment.⁵² Contrary to most intellectual properties, which typically require novelty or tangible value, “trade secrets” can refer to any confidential information that qualifies for protection. The only requirement is that the information remains confidential. Employing diverse strategies to safeguard trade secrets serves as a preventive measure against the unauthorized acquisition, sabotage, and piracy of crucial information.⁵³

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Md. Zafar Mahfooz Nomani and Faizanur Rahman, “Intellection of Trade Secret and Innovation Laws in India”, vol. 16, JIPR,(2011) p. 346.

⁵² Ibid.

⁵³ Zubair Ahmed, “Protection of Trade Secrets in India A Study of the Legal Framework”. Available at: <https://shodhganga.inflibnet.ac.in/handle/10603/291861>(last visited on May 10, 2023).

“Here are some instruments businesses can use to protect their “trade secrets”:

- **Employment Agreement:** “Employers may include confidentiality, non-disclosure, and non-compete clauses in employment contracts or distinct agreements with employees. These clauses can restrict the disclosure of particular types of information, prescribe how certain information is to be used, and impose restrictions on the disclosure of information after employment termination”.
- **Trade Secret Policy:** Developing a trade secret policy is essential, particularly for companies that rely significantly on their trade secrets for growth. Developing such a policy requires identifying and ranking the most important and confidential business information that qualifies as trade secrets. Before agreeing to adhere by a policy, employees should be made aware of its details and the repercussions of violation. Implementing the policy should involve obtaining employee signatures on acknowledgment forms.
- **Non-disclosure Agreements:** NDAs are prominent and effective instruments for protecting ‘trade secrets.’ Businesses can engage into nondisclosure agreements with both employees and third parties. These contracts are especially useful when discussing business opportunities and ventures with third parties, such as independent contractors, who can be legally obligated to keep ‘trade secrets’ confidential.
- **Adequate Documentation:** Businesses should keep records of the ‘trade secrets’ they have developed, including any revisions. To prove proprietorship of “trade secrets” in the event of a dispute, it is crucial to have sufficient documentation. These records also have evidentiary value and bolster the company’s claim to the ‘trade secrets.’
- **Security System:** Implementing a comprehensive security system is necessary for the protection of ‘trade secrets.’ Through security checks, access to these secrets and confidential information should be restricted to authorized personnel only. In electronic environments, businesses can use software programs, virus scanning, firewalls, and other security and authentication technologies to protect their trade secrets”.⁵⁴

⁵⁴ *Infra* note 59.

The indefinite duration of ‘trade secret’ protection provides an advantage over other forms of intellectual property protection, which have time limits. Historically, ‘trade secrets’ were associated with concealing advanced military technology from adversaries. However, in today’s society and with the advancement of technology, ‘trade secrets’ have become more universal.⁵⁵ ‘Trade secrets’ can only be discovered through legal means, such as reverse engineering or industrial espionage, if the appropriate protection measures are in place.

2.4.3. Trade Secrets as Intellectual Property Right

A company’s “trade secrets”, like other forms of intellectual property rights, can be extremely valuable to its development and, in extreme cases, to its very existence. Companies take precautions to safeguard their internal procedures, technical know-how, and proprietary information from the prying eyes of their rivals. The owner of such data or information may have a financial stake in keeping it secret from competitors. In some developing markets, “trade secrets” are regarded second only to patents in terms of relevance when it comes to intellectual property protection.⁵⁶

Investment choices are directly impacted by the robustness of trade secret protection. When “trade secrets” are not adequately protected or enforced, corporations may choose to put more resources into physical security rather than research and development. Alternatively, it could make companies reluctant to invest at all.

Spotless Group, an Australian catering firm, successfully sued a former employee for disclosing “trade secrets”. While employed by Spotless, the employee met with representatives from Blanco Catering and shared sensitive information, financial models, and client and supplier lists with them. Although the court found that the employee had violated their duty to Spotless, quantifying the exact damages was difficult because Spotless could not demonstrate that it would have won a particular contract if the information hadn’t been taken.⁵⁷

Kolon Industries, established in South Korea, and its officials were indicted for conspiring to steal “trade secrets” from DuPont, an American company, and Teijin, a Japanese

⁵⁵ Zubair Ahmed, “Protection of Trade Secrets in India A Study of the Legal Framework”. Available at: <https://shodhganga.inflibnet.ac.in/handle/10603/291861>(last visited on May 10, 2023).

⁵⁶ Ibid.

⁵⁷ Ibid.

company.⁵⁸ Hiring current and former employees of DuPont and Teijin as “consultants” and getting private information allowed Kolon to compete with Kevlar para-aramid fibre made by DuPont and Twaron para-aramid fibre made by Teijin. This dispute led to a civil lawsuit, which DuPont ultimately won with a sizeable award and an injunction.

Based on equitable considerations and lawsuits for breach of confidence, which amount to breaches of contractual commitments, Indian courts have recognised trade secret protection. Owners of “trade secrets” have the right to pursue various legal remedies when there is breach of confidentiality, including injunctions to prohibit disclosure, the return of sensitive information, and monetary compensation for losses.

2.4.4. Pariah of IPR

What do the criteria for choosing books for the New York Times’ annual bestseller list, the Big Mac’s secret sauce, and Google’s search algorithm all have in common? Protected as “trade secrets” are the methods, recipes, and criteria used to make these decisions.⁵⁹ While other forms of intellectual property protection may be more well-known, “trade secrets” are nonetheless very important. The fact that everyone has secrets and that secrecy is the best way to safeguard them means that “trade secrets” are one of the earliest types of intellectual property rights. However, it’s important to separate personal secrets from company secrets, as the latter might have significant economic worth (think of the Coca-Cola formula).⁶⁰

There is disagreement among both governments and academics on the validity of “trade secrets” as a type of intellectual property. The Coca-Cola formula is still a well guarded secret, despite widespread dissemination of information. On its website, the company proudly displays some information about its recipe, stressing the fact that it has been guarded for over a century. Similarly, KFC has gone to great lengths to guard its signature 11-herb and spice blend developed by Colonel Harland Sanders. More than seventy years have passed since the recipe was allegedly scribbled on the back of a door, but it is being

⁵⁸ Abhinav Kumar, Prमित Mohanty and Rashmi Nandakumar, “Legal Protection of Trade Secrets: Towards a Codified Regime”, vol. 11, JIPR, 2006, p.398.

⁵⁹ Hetvi Trivedi, “Trade Secrets — Intellectual Property’s Underdog...”

<https://www.sconline.com/blog/post/2019/05/02/trade-secrets-intellectual-property-s-underdog/>

⁶⁰ *ibid.*

used today. KFC has even created a state-of-the-art facility to house the original handwritten recipe, giving it the highest level of security possible.⁶¹

“Trade secrets” are handled differently in various countries. Countries’ approaches to dealing with breaches of “trade secrets” vary widely, with some having passed legislative redress and others relying on common law principles like breach of confidence.⁶² Unanimity on whether “trade secrets” should be considered contractual, tort, property, or criminal law has made unified treatment difficult to achieve.

In contrast to other types of intellectual property, “trade secrets” are not issued or registered by a government entity. Misappropriation of “trade secrets” is usually found in circumstances where the secrets were stolen or gained improperly, or where the secrets were exposed in violation of a confidential relationship agreement. No product can be protected against reverse engineering by competitors who obtain the product legitimately or via independent discovery or creation.⁶³ Damages and possibly injunctions against further use or disclosure may be awarded to the owner of a trade secret if it is violated.

Internationally, “trade secrets” were first given express protection in the Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement. “trade secrets” are defined in the agreement as “confidential but commercial information”, and the significance of securing such information from disclosure is emphasised.

Confidential company information like as client lists and marketing tactics are included in the broader category of “trade secrets”, which also includes technical knowledge like plans and formulas. “Trade secrets”, in contrast to patents and copyright, do not grant exclusive rights for a set period of time and may be lost to regular competition if they are discovered by others through legal means or if they enter the market.⁶⁴

Article 39 of international agreements, like the Paris Convention, mandates the protection of undisclosed information. Trade secrets include a wide range of topics, including business and technical data. Trade secrets, unlike patents or copyrights, do not grant exclusive rights

⁶¹ Hetvi Trivedi, “Trade Secrets — Intellectual Property’s Underdog...”

<https://www.scconline.com/blog/post/2019/05/02/trade-secrets-intellectual-property-s-underdog/>

⁶² Hetvi Trivedi, “Trade Secrets — Intellectual Property’s Underdog...”

<https://www.scconline.com/blog/post/2019/05/02/trade-secrets-intellectual-property-s-underdog/>

⁶³ Abhinav Kumar, Pramit Mohanty and Rashmi Nandakumar, “Legal Protection of Trade Secrets: Towards a Codified Regime”, vol. 11, JIPR, 2006, p.398.

⁶⁴ Hetvi Trivedi, “Trade Secrets — Intellectual Property’s Underdog...”

<https://www.scconline.com/blog/post/2019/05/02/trade-secrets-intellectual-property-s-underdog/>

for a set period of time and may be discovered or exploited by others through legitimate techniques or normal competition.

Chapter 3

PROTECTION OF TRADE SECRETS IN INDIA

3.1. Introduction

Businesses frequently put limitations on their employees through agreements established during their former employments, which prevent them from engaging in comparable actions at other enterprises. Employers use non-compete agreements to keep employees from poaching clients and employees from learning competitive strategies. However, conflicts regularly arise about the legality of agreements that limit people's ability to earn a living in their chosen profession.⁶⁵

⁶⁵ Zubair Ahmed, "Protection of Trade Secrets in India A Study of the Legal Framework". Available at: <https://shodhganga.inflibnet.ac.in/handle/10603/291861>(last visited on May 10, 2023).

With the hope of maintaining a long-term working relationship, companies spend a lot of money on training their personnel. On the flip side, once workers have acquired the essential skills, they may look for more financially rewarding employment elsewhere or even contemplate founding their own rival businesses. Therefore, in order to protect their own interests, businesses prevent their employees from taking similar jobs elsewhere. As a result, there will be friction between management and staff.⁶⁶

The Indian Contract Act of 1872, specifically Section 27, governs the review of such agreements. This section deals with “agreements on restraint of trade.” In accordance with this provision, no contract may prohibit a person from engaging in a lawful profession, trade, or business. The only exception to this is when selling goodwill, in which case the buyer may place geographical restrictions on the seller’s ability to operate a similar firm.⁶⁷

3.2. Indian Contract Act 1872

The “Indian Contract Act, 1872” regulates the making and carrying out of contracts in India according to a set of rules and regulations. “Section 27 of this Act is where the bulk of the legal protection for “trade secrets” can be found. As an added safeguard, common law standards also apply”.⁶⁸ Although “trade secrets” is not defined in Section 27, courts have broadly interpreted this provision to include non-disclosure and non-compete agreements that protect “trade secrets”.⁶⁹

An agreement in restraint of trade occurs “when one party agrees to restrict the other’s ability to engage in a particular trade or profession, either on their own or in concert with third parties who are not a part of the agreement”.⁷⁰ Throughout the duration of the agreement, these constraints will be enforced. A court will consider whether or whether the restrictions imposed by an employer are reasonable in circumstances involving non-compete agreements. Restrictions are valid if they are designed to safeguard commercially valuable information such as “trade secrets”.⁷¹

⁶⁶ Abhinav Kumar, Pramit Mohanty and Rashmi Nandakumar, “Legal Protection of Trade Secrets: Towards a Codified Regime”, vol. 11, JIPR, 2006, p.398.

⁶⁷ Ibid.

⁶⁸ Zubair Ahmed, “Protection of Trade Secrets in India A Study of the Legal Framework”. Available at: <https://shodhganga.inflibnet.ac.in/handle/10603/291861>(last visited on May 10, 2023).

⁶⁹ Zubair Ahmed, “Protection of Trade Secrets in India A Study of the Legal Framework”. Available at: <https://shodhganga.inflibnet.ac.in/handle/10603/291861>(last visited on May 10, 2023).

⁷⁰ Ibid.

⁷¹ Abhinav Kumar, Pramit Mohanty and Rashmi Nandakumar, “Legal Protection of Trade Secrets: Towards a Codified Regime”, vol. 11, JIPR, 2006, p.398.

3.2.1. Historical Background of Development of Section 27 of Indian Contract Act 1872

The “Hon. David D. Field’s Draft Code for New York” and the ancient English idea of restraint of trade both inspired Section 27 of the Indian Contract Act of 1872. Because prior court rulings had authorized contracts restricting trade to an unsafe extent, this provision was included to limit the scope of common law. New York did not adopt the provision, but four other states in the United States did.⁷²

The Indian Law Commission’s initial proposal lacked a paragraph explicitly addressing this issue. Between the time when the Indian Law Commission resigned and the Act was enacted, this provision was added. The inclusion of this rule appears to have been motivated by a desire to safeguard commerce. It has been hypothesized that because trade in India was only getting started, lawmakers there tried to make as few exceptions as possible to the general prohibition on trade-restraining contracts.

3.2.2. Exceptions under Section 27 of Indian Contract Act 1872

With its wide phrasing, Section 27 of the Indian Contract Act, 1872 declares void and unlawful all agreements that restrict trade, with a few exceptions. This section lays out a hard and fast rule that renders all forms of constraint invalid. The previous idea of limiting such agreements to certain geographical boundaries has been supplanted,⁷³ it has been remarked, with the expansion of modern business and communication. While the earlier authorities may have justified a broader application of this idea, the Anglo-Indian legal tradition has kept a limited one. Common law, on the other hand, has been broadening its reach and taking into account the necessity of certain restraints.

The Allahabad High Court shared citizen concerns about Section 27 in *Bholanath Shankar Das vs. Lachmi Narain*⁷⁴, by pointing out that it restricts freedom of contract in commercial transactions. The plaintiffs in this case were members of a commission agents’ firm in Fatehgarh (Uttar Pradesh), while the defendants—a group of seventeen people from the “Anaj Behohar Sabha” in the Lindsayganj market in Farrukhabad—were not formally

⁷² Zubair Ahmed, “Protection of Trade Secrets in India A Study of the Legal Framework”. Available at: <https://shodhganga.inflibnet.ac.in/handle/10603/291861>(last visited on May 10, 2023).

⁷³ Md. Zafar Mahfooz Nomani and Faizanur Rahman, “Intellection of Trade Secret and Innovation Laws in India”, vol. 16, JIPR,(2011), p. 341.

⁷⁴ AIR 1931 All 83

recognized by the state. The plaintiffs charged that the defendant association used illegal methods to establish a monopoly and drive out competitors.⁷⁵

The learned court held that There is no question that the defendants did nothing wrong or illegal to cause the plaintiffs' claimed contract breaches. The defendants did not collude with the plaintiffs' suppliers to withhold products. Members of the association were put under some pressure to follow the group's rules and cut relations with anyone outside of the group if they wanted to keep their membership. They were not forced to do anything against their will by the defendants. When a person is presented with two options, each with their own set of benefits and drawbacks, it is possible that coercion is not at play. The defendants did not engage in a concerted effort to injure the claimants. The defendants' group wasn't out to damage the plaintiffs' business, but rather to preserve the status quo in the industry. Therefore, the affiliation did not involve any illegal activity, and a claim based on a conspiracy is not warranted. As a result, the plaintiffs cannot obtain the relief they seek.⁷⁶

In India, there are two types of exceptions to agreements in restraint: those that are explicitly written into law and those that are implied from judicial precedent. The clause and the "Indian Partnership Act, 1932" both make provisions for goodwill sales to qualify as exemptions from the law.⁷⁷ However, exclusions based on judicial interpretations include non-compete agreements, employee limits, and exclusive dealing agreements adopted by businesses and distributors of goods and services.⁷⁸

Employment contracts, which define the relationship between an employer and employee, might include provisions that limit the worker's freedoms. Restrictive covenants can be written into an employment contract at the outset or added at any point the employer sees fit.

Employment contracts, which restrict workers' actions by their very nature, have long been used as examples of violations of the law of restraint of commerce. Contract provisions that prohibit one party from engaging in a certain legitimate activity (such as seeking a

⁷⁵ Zubair Ahmed, "Protection of Trade Secrets in India A Study of the Legal Framework". Available at: <https://shodhganga.inflibnet.ac.in/handle/10603/291861>(last visited on May 10, 2023).

⁷⁶ Md. Zafar Mahfooz Nomani and Faizanur Rahman, "Intellection of Trade Secret and Innovation Laws in India", vol. 16, JIPR,(2011), p. 341.

⁷⁷ Ibid.

⁷⁸ Zubair Ahmed, "Protection of Trade Secrets in India A Study of the Legal Framework". Available at: <https://shodhganga.inflibnet.ac.in/handle/10603/291861>.

particular employment opportunity or establishing a business) are known as restraints on commerce. Both sellers and buyers of businesses (with or without goodwill) and employers (who desire to impose limits on employees) commonly include such terms in their contracts. Depending on its intended use, a restriction's specifics may change from one instance to the next.⁷⁹

Restrictive covenants are provisions in employment contracts that forbid the employee from engaging in certain activities after leaving the company, such as starting their own business, joining a competitive firm, or engaging in any other trade or business. During employment, after termination, or even following premature termination, certain restrictions may be applied. They are sometimes used to shield commercial secrets and defend vested interests.⁸⁰

3.2.2.1. Restraint during Employment

It's widely acknowledged that "during the term of an employment contract, an employer can legally forbid an employee from working for a competitor or looking for other work".⁸¹ During the employment period, the employer has the right to the employee's full and undivided attention and productivity. Under Section 27, impediments of trade are prohibited unless they last longer than the life of the job relationship. It's generally accepted that workers owe their loyalty to their employers and that their employers have first dibs on using their services. This responsibility includes keeping information about the company's business discreet and not working for a competitor while employed there.⁸²

The obligation of loyalty is the most important factor, and unless the employee is prevented from working as a result of the terms of the agreement, the law of restraint of commerce does not apply. This basic tenet is shared by English law and Indian law. Employees might be prohibited from engaging in activities during their employment that are in direct competition with their employer's interests, and the case of *Herbert Morris vs. Saxelby*⁸³ recognized that "trade secrets", including customer lists, belong to the employer. Companies have the right to safeguard their intellectual property, including "confidential

⁷⁹ Md. Zafar Mahfooz Nomani and Faizanur Rahman, "Intellection of Trade Secret and Innovation Laws in India", vol. 16, JIPR,(2011), p. 341.

⁸⁰ Zubair Ahmed, "Protection of Trade Secrets in India A Study of the Legal Framework". Available at: <https://shodhganga.inflibnet.ac.in/handle/10603/291861>.

⁸¹ Ibid.

⁸² Ibid.

⁸³ (1916) All ER 1 AC 688.

information” and relationships with clients. The employer has legal proprietary rights that must be safeguarded, which is why these restrictions must be enforced. Unless the restriction is geared only at preventing the employee from competing with their former employer or from employing their newfound skills and knowledge in a different business, it is unlikely to be upheld as fair.⁸⁴

This stance is consistent with Indian law. During their employment, a person may be prohibited from working for a competitor or in a comparable capacity. This benefits corporations that have spent considerable time and money on employee training. *Niranjan Shankar Golikari vs. Century Spinning and Manufacturing Company Limited*⁸⁵ dealt with a dispute over the disclosure of proprietary technological knowledge between an employer and a foreign collaborator. The Supreme Court maintained the employer’s ability to protect “trade secrets” by requiring employees to sign nondisclosure agreements and prohibiting former employees from working for competitors. The court issued a preliminary injunction, finding that the service period and substantially similar work were the only relevant factors in interpreting the provision.⁸⁶

In *V.N. Deshpande vs. Arvind Mills Company Limited*⁸⁷, an employee signed a noncompete clause promising not to work for any other Indian employer during his three years as a weaving master. The validity of such an agreement was called into doubt when the worker began working as a weaving master for a different mill before the end of the period. An injunction prohibiting the employee from violating the agreement was given by the court, which found that it was reasonable. The ban was enforceable because it was specific to the occupation of “weaving master”.⁸⁸

The defendant in *Charlesworth v. MacDonald*⁸⁹ was a medical assistant who, for three years, had agreed not to practice medicine in the same area as the plaintiff. Plaintiff sought an injunction after defendant resigned from employment within a year. After hearing that such an arrangement does not fall under Section 27, the court issued the injunction.

⁸⁴ Md. Zafar Mahfooz Nomani and Faizanur Rahman, “Intellection of Trade Secret and Innovation Laws in India”, vol. 16, JIPR,(2011), p. 341.

⁸⁵ AIR 1967 SC 1098.

⁸⁶ Zubair Ahmed, “Protection of Trade Secrets in India A Study of the Legal Framework”. Available at: <https://shodhganga.inflibnet.ac.in/handle/10603/291861>(last visited on May 10, 2023).

⁸⁷ AIR 1946 Bom 423.

⁸⁸ Abhinav Kumar, Pramit Mohanty and Rashmi Nandakumar, “Legal Protection of Trade Secrets: Towards a Codified Regime”, vol. 11, JIPR, 2006, p.398.

⁸⁹ (1898) ILR 23 Bom

Contracts of this nature are enforceable since they forbid the employee from working for a competitor.

The Supreme Court has used same reasoning in *Coke vs. Gujarat Bottling Company*⁹⁰. In this instance, Coke and Gujarat Bottling Company (GBC) signed a franchise agreement in 1993 that authorized GBC to produce, bottle, and sell Coke products. GBC also committed to a one-year notice period for termination and to refrain from working on any other beverage brands for the course of the arrangement. In the event of a change in control of GBC without Coke's approval, GBC was also free to stop delivering syrup under the terms of the agreement. Coke's 1993 agreement was a common law concession.⁹¹

When GBC and Coke signed another agreement in 1994, it became a "Registered User Agreement" and had to be registered with the state. No provision was made to replace or substitute the 1993 agreement, even though the termination notice time was lowered to 90 days. After selling its shares to Pepsi, GBC gave Coke 90 days' notice that it was terminating the 1994 agreement, but it was still planning to abide by the 1993 agreement's one-year termination notice requirement.⁹²

Coke hoped that by giving GBC a year's notice, it might prevent the company from selling or distributing Pepsi products. Paragraph 14 of the 1993 Agreement was challenged as being a restraint of commerce, which would render the Agreement null and unenforceable under Section 27 of the Indian Contract Act.⁹³

The Supreme Court decided that the two contracts were very different in terms of their purpose and scope. The 1993 agreement was a common law license grant, but the 1994 agreement was executed to meet statutory registration requirements. As a result, the Agreement of 1994 could not serve as a replacement for the Agreement of 1993.⁹⁴ The court remarked that the idea of "Novation of Contract" allowed for the replacement of one agreement with another, provided that all parties involved were in full agreement and

⁹⁰ AIR 1995 SC 2372

⁹¹ Md. Zafar Mahfooz Nomani and Faizanur Rahman, "Intellection of Trade Secret and Innovation Laws in India", vol. 16, JIPR,(2011), p. 341.

⁹² Zubair Ahmed, "Protection of Trade Secrets in India A Study of the Legal Framework". Available at: <https://shodhganga.inflibnet.ac.in/handle/10603/291861>(last visited on May 10, 2023).

⁹³ Ibid.

⁹⁴ Md. Zafar Mahfooz Nomani and Faizanur Rahman, "Intellection of Trade Secret and Innovation Laws in India", vol. 16, JIPR,(2011), p. 341.

intended to replace the previous agreement with the new one. In this scenario, the 1994 agreement was not meant to serve as a replacement for the 1993 accord.⁹⁵

The court further noted that a contract cannot be considered a restraint of trade if it encourages, furthers, or facilitates trade. For the most part, restraints of trade are not recognized to exist if they only apply during the term of the contract and disappear afterward unless the contract is completely one-sided and unconscionable. However, the relative rights of the parties must be taken into account when interpreting a covenant in light of Section 27.⁹⁶ Since employees typically have less negotiating power in employment contracts and are forced to accept conventional contracts, any restrictions placed on them should be thoroughly investigated. The prohibition on dealing with competitor goods was judged a facilitator of the franchiser's (Coke's) distribution of goods and not a restraint of commerce in the context of the 1993 agreement, which was a commercial arrangement with the goal of jointly boosting the sale and manufacturing of Coca Cola products. The court found that the negative covenant was not a restraint of commerce because it applied solely during the term of the 1993 contract and was not disproportionately harsh or unconscionable.⁹⁷

However, if an employment restriction is too one-sided in favor of the employer, it may not be enforceable during the work period. For the duration of his 20-year term, the defendant in *Gopal Paper Mills vs. Ganesh Das Malhotra*⁹⁸ was forbidden from working for competitors or sharing any information about the plaintiff. The pay raise was minor, and the company might fire the plaintiff without warning. The court found that the agreement was harsh and unbalanced, and so the negative covenant that prevented the employee from working for a competitor was invalid.

3.2.2.2. Restraint after Termination of Employment

Employment agreements in India that prevent former employees from finding new jobs or starting their own enterprises are not enforceable in a court of law there. Employers have argued that “non-compete” requirements should be upheld beyond the employment duration. They argue that restrictions placed on a former employee after their employment

⁹⁵ Ibid.

⁹⁶ Abhinav Kumar, Pramit Mohanty and Rashmi Nandakumar, “Legal Protection of Trade Secrets: Towards a Codified Regime”, vol. 11, JIPR, 2006, p.398

⁹⁷ Zubair Ahmed, “Protection of Trade Secrets in India A Study of the Legal Framework”. Available at: <https://shodhganga.inflibnet.ac.in/handle/10603/291861>(last visited on May 10, 2023).

⁹⁸ AIR 1962 Cal 61.

has ended should be upheld if they are temporary or conditional in nature. In court, however, similar arguments have consistently failed.

For three years, the defendant in *Brahmaputra Tea Company vs. E. Scarth*⁹⁹ agreed to work as an assistant tea-planter for the Brahmaputra Tea Company. Employee was prohibited from competing for a period of five years following the end of their employment under the terms of the agreement. The court was requested to rule on the legality of an agreement prohibiting the party from working in a competing industry after their employment ended. According to the decision, the Indian Contract Act of 1872 does not include allowances for contracts that constrain competition within reasonable bounds after the agreement's term, although English law does. Since Indian law differs from English law on this issue, such prohibitions are null and void in India.¹⁰⁰

The plaintiff in the matter of *Sandhya Organic Chemicals Private Limited v. United Phosphorous Limited*¹⁰¹ sought to protect its exclusive interest in a novel production method. A non-disclosure agreement was signed by one of the defendants while they were still employed by the plaintiff. It was up to the court to decide whether the former employee was fully forbidden from working with others following the termination of employment, where they may utilize their own talents and knowledge. According to Section 27 of the Indian Contract Act, the Supreme Court ruled that a service covenant that persists after employment terminates is null and unenforceable. It would be unreasonable to prevent the defendant from using the skills and information acquired during their employment if an injunction were granted to validate such restrictions. It would be unfair to ban them from using the knowledge they gained on the job unless there is proof that they disclosed or used secret information.

Though post-employment restrictions to preserve “confidential information” are permissible under English law, they cannot be maintained if they benefit just the employer's self-interest by labeling the former employee's new employer as a rival.¹⁰²

An Indian cricket player named Zaheer Khan signed a three-year contract with Percept D'Markr (India) Pvt. Ltd. (the “appellant company”) to handle his media relations. The

⁹⁹ (1885) ILR 11 Cal 545.

¹⁰⁰ Zubair Ahmed, “Protection of Trade Secrets in India A Study of the Legal Framework”. Available at: <https://shodhganga.inflibnet.ac.in/handle/10603/291861>(last visited on May 10, 2023).

¹⁰¹ AIR 1997 Guj 177.

¹⁰² Zubair Ahmed, “Protection of Trade Secrets in India A Study of the Legal Framework”. Available at: <https://shodhganga.inflibnet.ac.in/handle/10603/291861>.

agreement said that the plaintiff would have the “right of first refusal” over any proposals for media management services that the defendant might receive from third parties. This meant that the defendant had to provide the plaintiff an opportunity to counter any third-party offer before accepting it. A permanent injunction was sought by the plaintiff after the agreement was terminated and the defendant entered into a new arrangement with a third party. The parties argued over whether the covenant violated section 27 of the Indian Contract Act, which forbids agreements that restrict competition.¹⁰³

The court in this case i.e. *Percept D’Markr (India) Pvt. Ltd. vs. Zaheer Khan & Anr.*¹⁰⁴ found that the parties’ agency contract was of a personal nature, and that implementing the negative covenant would require the defendant to continue having the plaintiff company manage their affairs after the arrangement had legitimately expired. This would limit the defendant’s ability to engage in free commerce. When the agreement is still in effect, the covenant can be enforced, but attempting to do so after its termination is a breach of Section 27. Section 27 of the Contract Act of 1872 makes it plain that a non-compete clause that lasts beyond the duration of the contract is null and void.

Courts have repeatedly invalidated non-compete agreements that go beyond the duration of an employee’s employment. The courts have upheld an employee’s freedom to seek out new business prospects as a natural extension of their freedom to engage in whichever line of work they see fit.¹⁰⁵

When Ambiance India Pvt. Ltd. filed suit against Shri Naveen Jain, he was working for the plaintiff as a “Fabric Technologist.” The parties agreed that during the term of his employment and for three years afterward, the defendant would not engage in any other occupation, business, or job. During the time of employment and for a period of two years after cessation of employment, the defendant was also barred from having any business dealings with the plaintiff’s clients, either directly or indirectly. However, the defendant allegedly breached the agreement with the plaintiff when, shortly after terminating the agreement, the defendant joined one of the plaintiff’s customers.¹⁰⁶

¹⁰³ Ibid.

¹⁰⁴ (2006) 4 SCC 227.

¹⁰⁵ Zubair Ahmed, “Protection of Trade Secrets in India A Study of the Legal Framework”. Available at: <https://shodhganga.inflibnet.ac.in/handle/10603/291861>.

¹⁰⁶ Zubair Ahmed, “Protection of Trade Secrets in India A Study of the Legal Framework”. Available at: <https://shodhganga.inflibnet.ac.in/handle/10603/291861>(last visited on May 10, 2023).

The court in this case i.e. *Ambiance India Pvt. Ltd. vs. Shri Naveen Jain*¹⁰⁷ was requested to decide if the contract signed on August 30, 2003, went against the Indian Contract Act's section 27. The court ruled that the agreement's clause prohibiting the defendant from working for a competitor of the plaintiff for two years was unenforceable since it ran counter to section 27 of the Contract Act. The Indian public viewed this clause as an unjust hiring practice that discriminated against a young man. There was no initial basis for preventing the defendant from continuing to work for the plaintiff after the contract with the customer had expired. The employment agreement between the plaintiff and the defendant was terminable at will, and the defendant was free to look for work elsewhere. The agreement's restrictions on the defendant were declared null and unenforceable as being unconscionable.¹⁰⁸

In the event of a breach, however, the plaintiff was permitted to demand monetary damages. Since the agreement itself was in violation of section 27 of the Indian Contract Act of 1872, the court did not issue an injunction.¹⁰⁹

3.2.2.3.Premature Removal

While employed, employees have a duty of loyalty to their employer, but it is well-established that once employment has ended, an employee has no right to be prevented from working elsewhere that can benefit from their unique set of talents and experience. However, it is recognized that any restrictions imposed on a worker who is terminated prematurely will be null and void. In many ways, the situation in India mirrors that in the UK.

For two years after his employment with the plaintiff terminated, the defendant in *General Billposting Company vs. Atkinson*¹¹⁰ was prohibited by the terms of his contract from competing with the plaintiff in the same geographic area. The company ultimately decided to fire the worker. The worker filed a claim for unfair termination, won, and went on to create his own company. The company filed a lawsuit against the worker after they broke the non-compete clause. A constraint that lasts longer than an employee's employment term is automatically invalid, as determined by the highest court, unless it is absolutely required

¹⁰⁷ (2005) 122 DLT 421.

¹⁰⁸ Zubair Ahmed, "Protection of Trade Secrets in India A Study of the Legal Framework". Available at: <https://shodhganga.inflibnet.ac.in/handle/10603/291861>(last visited on May 10, 2023).

¹⁰⁹ Md. Zafar Mahfooz Nomani and Faizanur Rahman, "Intellection of Trade Secret and Innovation Laws in India", vol. 16, JIPR,(2011), p. 341.

¹¹⁰ (1909) All ER AC 118.

to protect the employer's goodwill. However, if the employee is unlawfully terminated, the restraint will not apply until the term of service has ended. An injunction was denied on the grounds that there is a difference between voluntarily leaving a job and being terminated prematurely.¹¹¹

The employer in the case of *Superintendence Company of India Pvt. Ltd. vs. Krishan Murgai*¹¹² in India was known as "Valuers and Surveyors," and it had established a name for itself in the market thanks to the innovative methods it had pioneered in quality control. These methods and its clientele were protected information that the company relied on to succeed. Employee was prohibited from working for a competitor or beginning a business in a similar field following termination of employment, as stipulated in the terms and conditions of employment with the appellant. After being fired from the plaintiff company, the employee went on to form his own business that directly competed with the employer. Both the validity of the non-compete clause and whether it extended just to voluntary separations or even to terminations of employment were at question in the case before the court. Two of the three judges on the bench interpreted the word "leave" to mean only voluntary departure and not termination. This interpretation led the court to conclude that an injunction could not be issued, however it did not reach a conclusion about how Section 27 should be interpreted.¹¹³ On the other hand, Justice Sen, the third judge, decided to delve into the issue at length, ruling that section 27 outlaws all post-contractual constraints and precludes any inquiry into reasonableness. According to the agreement's restrictive language, the clause wouldn't kick in until "after the defendant left the company." The defendant in this case did not willingly depart the organization, but rather the plaintiff terminated their services. The plain grammatical meaning of the word "leave" in the context of an employee would suggest that it refers only to the employee's voluntary departure from the service and does not cover situations in which the employee is discharged, dismissed, or otherwise has their services terminated by the employer.¹¹⁴

3.2.2.4. Trade Secret Protection

¹¹¹ Zubair Ahmed, "Protection of Trade Secrets in India A Study of the Legal Framework". Available at: <https://shodhganga.inflibnet.ac.in/handle/10603/291861>(last visited on May 10, 2023).

¹¹² AIR 1980 SC 1717.

¹¹³ Supra note 113.

¹¹⁴ Md. Zafar Mahfooz Nomani and Faizanur Rahman, "Intellection of Trade Secret and Innovation Laws in India", vol. 16, JIPR,(2011), p. 341.

In order to reasonably preserve “trade secrets” and maintain commercial confidentiality, one of the grounds of a lawful restraint is that an employer has the right to restrict an employee after the termination of employment. Both the employee’s rights and the employee’s responsibilities are at issue in an employment contract. Employees are expected to remain loyal to their employers and keep any proprietary information learned on the job under wraps. To prevent the employee from releasing the information, an injunction may be issued. However, not all information that might be useful in the course of work is shielded from disclosure. Only trade secret information is legally protected from disclosure by an employee.¹¹⁵

Information must be extremely secretive in order to be termed a trade secret. Considerations include the sensitiveness of the information at issue, the nature of the work performed by the employees, and whether or not the employers specifically ordered the employees to maintain the confidentiality of the information at issue. Judgments show that contractual restrictions exist to safeguard “trade secrets”, however the decisions are inconsistent.

In *Star India Limited vs. Laxmiraj Setharam Nayak*¹¹⁶, the plaintiff (a television production company) claimed that the defendant (an employee) violated a non-compete agreement by using “confidential information” and starting a competing business within six months of leaving his employment with the plaintiff. The defendant tendered his resignation, but the claimant rejected it and insisted he stay on until a later date. The accused skipped out on work and went to work for a rival firm. The court decided that it would be against public policy to limit fair competition for the benefit of the plaintiff. To enforce the negative covenant through an injunction would be to indirectly force a contract for personal service, which is prohibited by Section 27 of the Indian Contract Act of 1872.¹¹⁷ The court did require the defendant to keep secret the plaintiff’s business strategies and franchise agreements he knew about on the job.

After leaving his position with the plaintiff legal firm, the defendant in *Diljeet Titus vs. Mr. Alfred A. Adebare and Others*¹¹⁸ stole sensitive information, including client names and confidential drafts. The plaintiff claimed that this data was confidential and therefore the defendant could not utilize it. The court concluded that the plaintiff had an absolute right

¹¹⁵ Zubair Ahmed, “Protection of Trade Secrets in India A Study of the Legal Framework”. Available at: <https://shodhganga.inflibnet.ac.in/handle/10603/291861>(last visited on May 10, 2023).

¹¹⁶ AIR 2003 Bom 563

¹¹⁷ Supra note 117.

¹¹⁸ (2006) 32 PTC 609 Del.

to the stolen property and disregarded the defendant's contention that the parties' relationship was not one of employer and employee. For the sake of the plaintiff's interests, the court forbade the defendant from using the "confidential information" to offer a competitive service.¹¹⁹

Employees cannot be prevented from accepting other work without the employer providing evidence that the employee poses an unacceptable risk of disclosing "trade secrets" and sensitive information. During his twenty years of employment, the defendant in *Gopal Paper Mills Limited vs. Surendra K. Ganesh Das Malhotra*¹²⁰ was an assistant who was forbidden from giving services or information to outsiders regarding the plaintiff's affairs. The defendant fled after only one year, prompting the plaintiff to seek an injunction. The court found that there was no need to issue an injunction to protect the employer's interests because the defendant did not receive any secret information during his brief employment. For reasons of public policy and to avoid stifling competition, the courts take this stance even when no secret information is shared.

The defendant in *Jet Airways Ltd. vs. Mr. Jan Peter Ravi Karnik*¹²¹ was also a pilot for the appellant business, which had hired him and given him with training to fly modern airplanes. The defendant agreed to work for the appellant for a period of seven years and not look for similar work elsewhere during that time. The defendant, however, joined another airline only six months after completing the training. Although the court agreed that the negative covenant was unfair, it declined to issue an injunction against the defendant. The court ruled that the company had no legitimate proprietary interest that needed to be preserved.¹²² In contrast to *Golikari*, the court here emphasized that the defendant's training was not secret because it had been supplied by the appellant airlines to employees of the competition airline as well. The defendant did not know any secrets or techniques that were proprietary to his employer.¹²³

Manufacturers of the same industrial chemical were at odds in the case of *Sandhya Organics Pvt. Ltd. vs. United Phosphorous Ltd.*¹²⁴ the defendant had hired an ex-employee

¹¹⁹ Zubair Ahmed, "Protection of Trade Secrets in India A Study of the Legal Framework". Available at: <https://shodhganga.inflibnet.ac.in/handle/10603/291861>(last visited on May 10, 2023).

¹²⁰ AIR 1962 Cal 61.

¹²¹ (2000) 4 Bom C.R. 487.

¹²² Supra note 121.

¹²³ Zubair Ahmed, "Protection of Trade Secrets in India A Study of the Legal Framework". Available at: <https://shodhganga.inflibnet.ac.in/handle/10603/291861>.

¹²⁴ AIR 1997 Guj 177.

of the plaintiff who was bound by a commitment not to disclose any “trade secrets” of the plaintiff even after their employment had ended. At trial, it came out that the defendant had been running the same operation for years before they hired the employee, and that the worker had been doing similar work for 15 years in a variety of locations. Therefore, the employee is free to join the defendant and put their gained skills and knowledge to use. The court found the restrictive covenant to be unenforceable. However, while working for the defendant, the employee was forbidden from exploiting any proprietary information or data belonging to the plaintiff.

The plaintiff in the case of *American Express Bank Ltd. vs. Ms. Priya Puri*¹²⁵ was a U.S.-based bank with an Indian branch in New Delhi. The defendant worked for the plaintiff as the northern region head of wealth management. Defendant was required to give one month’s notice of resignation or pay in lieu of notice per the terms of her employment contract. A clause guaranteeing the privacy of all communications was also inserted.

The defendant resigned in accordance with their appointment terms by submitting a letter of resignation with 30 days’ notice. However, the plaintiff claimed that the defendant gained access to private information on September 24, 2005, including the names and contact details of almost 800 clients. Ms. Shikha Sharma gave the defendant access to a file containing sensitive customer information to another employee, Mr. Kaustubh Majumdar. Information about customers’ investment accounts was included in the file.¹²⁶

It is alleged that the defendant pressured two other employees into disclosing a password to secret material that she herself did not know. According to the plaintiff, the defendant should be prohibited from using confidential client information and data relating to the plaintiff bank’s wealth management operations.

The court ruled that an injunction cannot prevent an employee who possesses sensitive information from seeking better employment elsewhere. The plaintiff could establish a situation in which customers remain with “American Express” indefinitely by restricting the employee’s freedom to change employment. The court ruled that the plaintiff cannot use the promise of privacy to coerce a company into hiring her. An employee has the right

¹²⁵ (2006) III LLJ 540 Del.

¹²⁶ Md. Zafar Mahfooz Nomani and Faizanur Rahman, “Intellection of Trade Secret and Innovation Laws in India”, vol. 16, JIPR,(2011), p. 350.

to seek better working circumstances elsewhere, and their ability to do so should not be limited because they happen to be in possession of sensitive company information.

The court added that the equitable doctrine of English law would not apply in such a case because it would be in conflict with Section 27 of the Indian Contract Act, 1872. An injunction can be issued to safeguard a plaintiff's interests, but it cannot be used to restrict a defendant's legal options, especially if the merits of the plaintiff's claims are in question or if the injunction is being sought for an improper purpose. As a result, the court ruled that it could not issue an injunction in this matter.¹²⁷

3.3. Right to Information Act 2005

There are provisions in the "Right to Information Act, 2005" that require public bodies to make certain types of data available to the public. In recent years, the Act's purview has expanded to include private sector enterprises with operations in India that affect the daily lives of ordinary citizens. However, the Act still has provisions that protect corporations' "trade secrets" and other "confidential information". "Trade secrets" fall under the exemption granted from information disclosure in Section 8 of the Act.¹²⁸ The "Right to Information Act, 2005" protects "trade secrets" under Section 8(1)(d). Therefore, unless the public interest surpasses the private interest of the owner, any "trade secret" material submitted to or possessed by a public authority is protected from disclosure.

3.4. Competition Law

Article 40 of the "TRIPS" agreement recognizes and criticizes licensing methods and conditions that limit competition, hurt commerce, and obstruct the spread of technology among nations that have signed the agreement. Article 4(2) grants member countries the authority to prevent or regulate conditions that represent an abuse of IPRs and have a negative impact on market rivals. Each participating state is free to determine for itself whether or not a certain IP licensing method or circumstance constitutes an abuse of intellectual property rights.¹²⁹

¹²⁷ Zubair Ahmed, "Protection of Trade Secrets in India A Study of the Legal Framework". Available at: <https://shodhganga.inflibnet.ac.in/handle/10603/291861>(last visited on May 10, 2023).

¹²⁸ Ibid.

¹²⁹ Md. Zafar Mahfooz Nomani and Faizanur Rahman, "Intellection of Trade Secret and Innovation Laws in India", vol. 16, JIPR,(2011), p. 341.

It is a misuse of intellectual property rights and a kind of unjust enrichment when the owners of such rights charge exorbitant rates for their creations. When this happens, governments pass regulations to safeguard the general populace. Anti-competitive practices can be limited thanks to the “TRIPS” agreement. It makes clear that countries are free to outline in their own laws the kinds of licensing practices and terms that, in their view, amount to an abuse of intellectual property rights. The “TRIPS” agreement makes it clear in Article 8(2) that government action against anti-competitive, dominant, or monopolistic activity by rights holders is not hindered by the terms of the agreement.¹³⁰

The “Competition Act, 2002” was passed in India with the goals of fostering economic growth, halting anti-competitive behaviors, safeguarding consumers’ rights, and guaranteeing unrestricted exchange between businesses. The primary goals of both the “Competition Act, 2002” and the “Monopolistic and Restrictive Trade Practice (MRTP) Act, 1969” were and are, respectively, the regulation of monopoly, predatory practices, restrictive business practices, unfair trade practices, and the promotion of competition, honesty, fair play, truthful advertising, and consumer welfare.¹³¹

Enterprises are not allowed under the “Competition Act” to enter into any agreements that have or are likely to have a “substantial adverse effect” on competition in India. Producing, supplying, distributing, storing, acquiring, and controlling commodities and services are all possible topics for such contracts. Agreements that restrict competition are illegal, and the law also identifies other types of agreements that are deemed to have a negative impact on competition.

Holders of intellectual property rights are exempt from some of the requirements of Section 3 of the Act. They are authorized to engage in activities like entering into anti-competitive agreements to restrain infringement or setting reasonable conditions to maintain IP rights in order to safeguard the IP rights granted to them under certain statutes. The Act’s Section 3(5) provides the legal basis for this exception.¹³²

The “Raghavan Committee” on competition policy and law underlined that while intellectual property grants exclusive rights, it does not include the right to wield restrictive

¹³⁰ Ibid.

¹³¹ Md. Zafar Mahfooz Nomani and Faizanur Rahman, “Intellection of Trade Secret and Innovation Laws in India”, vol. 16, JIPR,(2011), p. 341.

¹³² Zubair Ahmed, “Protection of Trade Secrets in India A Study of the Legal Framework”. Available at: <https://shodhganga.inflibnet.ac.in/handle/10603/291861>(last visited on May 10, 2023).

or monopolistic power in the market, which is in violation with competition rules. Competition policy and law should address anti-competitive behavior resulting from the exercise of IPRs and other actions detrimental to consumer or public interest. Competition, effort, and investment should all be rewarded through the use of IPRs. The public interest should not be sacrificed to protect monopolies that abuse their exclusive rights under IPRs.¹³³

While a provision comparable to the current section 3(5) existed in the MRTP Act, 1969, the “Competition Act, 2002” was passed to improve upon the “MRTP Act, 1969” and to strengthen competition. The primary goal of these clauses is to ensure that holders of IP rights do not abuse the monopolistic power that comes from those rights.¹³⁴

3.5. Criminal Remedies

While the Information Technology Act of 2000 and the Indian Penal Code do not contain any laws addressing the theft of “trade secrets” per se, they do contain provisions that can be invoked in appropriate circumstances. Criminal breach of trust is addressed under Sections 405-409 of the IPC, while cheating is addressed in Section 418, both of which can be used to pursue legal redress in cases involving serious wrongdoing. Furthermore, Section 43 of the Information Technology Act establishes the responsibility of offenders to pay damages or compensation to the affected party, with the maximum limit set at Rs 1 crore. In addition, Section 66 stipulates that offenders can face imprisonment for a period of up to three years or a fine of up to Rs 5 lakhs, or both. The law also makes third parties liable if they knowingly accept stolen information or have cause to suspect they have received stolen information. Despite the fact that these statutes contain criminal penalties for trade secret theft, they are rarely enforced and have a narrow application because they were not drafted with trade secret theft in mind.¹³⁵

In *Pramod, Son of Laxmikant Sisamkar... vs. Garware Plastics and Polyester...*¹³⁶ two petitioners who worked as engineers for the company named as respondent No.1 in that case. When they started working for the company, they promised to abide by certain guidelines. Their initial three-year appointment was extended for another three years. They

¹³³ Md. Zafar Mahfooz Nomani and Faizanur Rahman, “Intellection of Trade Secret and Innovation Laws in India”, vol. 16, JIPR, (2011), p. 341.

¹³⁴ Supra note 134.

¹³⁵ Ibid.

¹³⁶ (1986) 3 BomCR 411.

did not stay with the company for the full extended period, however, and instead went to work for a competitor. The complainant No. 1 Company claims that the defendants breached the terms of service by departing the company and removing confidential materials. It was also claimed that the petitioners were able to put the technical knowledge they had acquired during their time with the company to work in their new jobs. The Chief Judicial Magistrate opened cases of criminal breach of trust and cheating against the petitioners based on the written complaints. These crimes are defined in sections 408 and 420 of the Indian Penal Code.¹³⁷

Petitioners contested the trial magistrate's orders that had called for process to be issued against them. The petitioners' objections did not mention what paperwork they had with them when they left their jobs, nor did they give a blanket statement about what paperwork is customarily turned over to an employer at the end of an employee's tenure. According to the highest court, there wasn't enough evidence to press charges at this point. It highlighted that criminal prosecution is not a tool for harassment or to settle personal scores. As the petitioners had not been shown to have made use of the specialized knowledge or to have engaged in fraudulent or dishonest acts, the court ruled that the charges brought against them under Sections 408 and 420 of the Indian Penal Code were groundless. The trial magistrate's decision to issue summonses against the petitioners was reversed because it was erroneous.

¹³⁷ Zubair Ahmed, "Protection of Trade Secrets in India A Study of the Legal Framework". Available at: <https://shodhganga.inflibnet.ac.in/handle/10603/291861>(last visited on May 10, 2023).

Chapter 4

IPR PROTECTION OF TRADE SECRETS IN INDIA

4.1. Introduction

Forever safeguarding “trade secrets” depends on keeping them secret. It is no longer a secret once its secrecy has been breached. Given India’s prominence in the global economy, it’s critical to protect the rights of its commercial sector. As a member of the World Trade Organization (WTO) and a signatory of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), India is bound to follow the requirements of TRIPS with regard to preserving “trade secrets” through intellectual property.¹³⁸

The Trade Related Intellectual Property Rights (TRIPS) Agreement seeks to recognize and protect intellectual property rights around the world. It provides a complete framework for

¹³⁸ Aayush Sharma, “India: The Intellectual Property Rights - Something Which Needs to be Cared”, available at: <http://www.mondaq.com> (last visited on June 12, 2023).

intellectual property rights and regulations and has led to global standardization of intellectual property laws. All TRIPS Agreement signatory jurisdictions have passed new or revised laws to reflect the terms of the treaty. The Indian government has also updated its patent law, copyright law, and trademark law, as well as its legislation for geographical indications, industrial designs, and integrated circuits, in order to bring it into conformity with the rest of the member states.

However, India's legal structure isn't quite there yet when it comes to protecting "trade secrets" and other forms of "confidential information". When compared to other countries, India is falling behind in this field of IP protection.

Due to the lack of specific legislation in this area, "trade secrets" do not enjoy direct and specific protection by Indian intellectual property laws. However, in an effort to protect corporate interests, Indian courts have broadened the definition of "trade secrets" covered by other laws. Courts have recognized the protection of "trade secrets" under some intellectual property statutes, including copyright laws and designs law, in addition to contract law and common law grounds in the following way.

4.2. Judicial Approach of Trade Secret Protection

4.2.1. The plaintiff in *Burlington Home Shopping Pvt. Ltd. vs. Rajnish Chibber*¹³⁹ ran a catalog publishing and mail order service that collected and stored customer addresses. Over the course of three years, the plaintiff spent a great deal of time and energy accumulating and building this database. The defendant, a former employee of the plaintiff, infringed upon the plaintiff's copyright by obtaining a copy of the database and using it to launch his own mail-order business.

The court agreed with the plaintiff that allowing the defendant to use the database would result in irreparable, incalculable harm. In light of this, the court imposed an injunction during the course of the case, preventing the defendant from operating any kind of company, including mail-order services, which would exploit the plaintiff's proprietary

¹³⁹ (1995) 61 DLT 6

client database. The court upheld the copyright protections afforded to the “trade secrets” in this case.¹⁴⁰

4.2.2. In *Puneet Industrial Controls Pvt. Ltd. vs. Classic Electronics*¹⁴¹, another instance, the plaintiff made and sold electronic relays for use in a variety of fields. The electrical and electronic circuits in the plaintiff’s products were both innovative and proprietary, making them protected as “artistic work” under the Copyright Act of 1957 and “trade secrets.”

The plaintiff first helped the defendant, who had extensive background in mechanical engineering, launch a firm selling voltage regulators and shock absorbers under the trade name “Hi-Tech Controls.” After becoming familiar with the “EPOXY” sealed electrical/electronic circuits during the course of their tight business connection, the defendant was given strict instructions not to share or utilize this information in any way.

But the plaintiff found out that the defendant had started up a rival company called “Classic Electronics” and was making products that were either identical to or very similar to the plaintiff’s. To determine if this constituted an infringement of copyright under Section 51 of the Copyright Act of 1957, the court considered the evidence presented.¹⁴²

The court found that the defendant’s products were visually comparable to the plaintiff’s, and that the electronic circuits contained in the “EPOXY” sealing were the same as those employed by the plaintiff. The court did not buy the defendant’s argument that the plaintiff hadn’t shown they were the original owners because the defense hadn’t submitted any documentation or physical artifacts to back up their claim.

The court issued an injunction after determining that the defendant had clearly used “confidential information” received during their affiliation and that the time of the defendant’s business creation matched with the discovery made by the plaintiff. The court decided that the defendants had clearly used the plaintiff’s sensitive information, therefore there was no way they could claim any inconvenience. Here, “trade secrets” were targeted for copyright protection.

¹⁴⁰ Aayush Sharma, “India: The Intellectual Property Rights - Something Which Needs to be Cared”, available at: <http://www.mondaq.com> (last visited on June 12, 2023).

¹⁴¹ (1997) Sup ARBLR 195 Del

¹⁴² Zubair Ahmed, “Protection of Trade Secrets in India A Study of the Legal Framework”. Available at: <https://shodhganga.inflibnet.ac.in/handle/10603/291861>

4.2.3. The plaintiff company created the concept and designs of “Pick-N-Carry Hydraulic Self Mobile Cranes” based on their 100% know-how in *Escorts Const. Equipment Ltd. vs. Action Const.*¹⁴³ Since 1971, the plaintiff had manufactured and sold these cranes. A confidentiality agreement prevented employees from exposing manufacturing techniques, specs, and technological know-how. Industrial blueprints, production procedures, and supplier data were the plaintiff’s “trade secrets.”

The plaintiffs owned the industrial drawings, crane shape, and appearance under the 1957 Copyright Act. They also had the exclusive right to reproduce or depict the drawings in three dimensions.

The second defendant was the plaintiff’s Assistant Production Manager and then Purchase Manager, sourcing crane materials. The second defendant had full access to industrial drawings and production and marketing processes in these roles. The employment contract mandated secrecy. In 1995, the plaintiffs learned that the second defendant had wrongfully introduced “Pick-N-Carry Hydraulic Self Mobile Cranes,” a replica of their crane.¹⁴⁴

The plaintiffs claimed that the defendants’ crane was based on their copyrighted industrial drawings. They accused the second defendant of stealing their industrial drawings to profit from their crane designs and market repute. The defendants profited from misrepresenting their cranes as the plaintiffs’. Plaintiffs sued for a permanent injunction against copyright infringement and passing off, damages, and profits.¹⁴⁵

The defendants were barred from manufacturing, marketing, or selling “Pick-N-Carry Hydraulic Self Mobile Cranes” that were identical or deceptively similar to the plaintiffs’ cranes by an interim injunction under Order 39 rules 1 and 2 of the CPC. The defendants denied the action, alleging the plaintiffs were industrial drawing pirates. They claimed that over 30 Indian and foreign companies had produced and sold identical cranes before 1971 and that crucial component and part designs were public.

The injunction was issued because to the plaintiffs’ crane attachments’ exclusivity with their goods. It forbade the defendants from making, selling, or trying to sell large copies of

¹⁴³ IA No. 2460 and 4638/98

¹⁴⁴ Aayush Sharma, “India: The Intellectual Property Rights - Something Which Needs to be Cared”, available at: <http://www.mondaq.com> (last visited on June 12, 2023).

¹⁴⁵ V K Ahuja, “Law Relating To Intellectual Property Rights”, 2nd ed. 2013, Lexis Nexis, Haryana.

the plaintiffs' industrial drawings. Until the litigation was resolved, the defendants could not use the plaintiffs' technical know-how, specifications, or drawings.

4.2.4. A "Holiday Inn Crowne Plaza" was to be built in Madras by the defendants in the case *Base International Holdings vs. Pallava Hotels Corporation Limited*¹⁴⁶. Defendants were given access to "confidential information" about the "Holiday Inn System," hotel designs, recommendations, advice, and reservation systems as part of the initiative. By the end of 1995, the defendants were supposed to have finished building, and then they could apply for a license to utilize the "Holiday Inn system." If the construction is not finished by the deadline specified in the agreement, the plaintiff can cancel the contract. When the defendants missed the deadline, the plaintiff did not take action to cancel the contract.

The first defendant's failure to meet the deadline for construction was stated in a letter submitted by the second defendant in February 1996. On that very same day, the defendants and "Hilton International" signed a management contract for the hotel. The court had to decide if the information the defendants obtained might be used for their own benefit or if their actions constituted misappropriation of secret information.¹⁴⁷

The court ruled that the defendants had tried to avoid following the terms of the agreement and had terminated it without giving proper notice to the plaintiff. Plaintiff and Defendants accept that "Hilton International" is aware of the Agreement. Due to the complexity of the issue, the court ruled that it was unreasonable to require the plaintiff to prove actual damages caused by the defendants' decision to discontinue the agreement and enter into a partnership with "Hilton International." As a result, the court issued injunctions against the defendants, barring them from making unauthorized use of or modifications to the "Holiday Inn System." The defendants were also restrained from commissioning and managing the hotel, as well as from transferring or creating any stake in the proposed hotel.¹⁴⁸

4.2.5. Mr. Anil Gupta, the plaintiff in the case *Mr. Kunal Dasgupta vs. Mr. Anil Gupta*¹⁴⁹, had the idea for a matchmaking-themed reality TV show named "Swayamvar." The claimant gave the defendants a memo outlining an idea. The plaintiff afterwards

¹⁴⁶ (1999) 19 PTC 252 (Mad).

¹⁴⁷ Zubair Ahmed, "Protection of Trade Secrets in India A Study of the Legal Framework". Available at: <https://shodhganga.inflibnet.ac.in/handle/10603/291861>

¹⁴⁸ Ibid.

¹⁴⁹ AIR 2002 Delhi 379.

learned that the defendants were going to use his idea to create a reality program named “Shubh Vivah,” which would be quite similar to his own. The plaintiff filed for an injunction to stop the broadcast of the “Shubh Vivah” show produced by the defendants. The court had to decide if a concept could be the subject of copyright.

The court agreed with the plaintiff that he or she had come up with an original business strategy by making use of resources that were otherwise hard to come by in the public domain. Although the idea itself was not secret, the fact that the plaintiff had used their own imagination and created something truly original meant that it was. The court sided with the plaintiff and issued an injunction. The defendants would be allowed to air their show “Shubh Vivah” after the four-month deadline if the plaintiff was unable to air their program “Swayamvar” on television. Nonetheless, the defendants were barred from airing any match-making-related program for an additional two months should the plaintiff debut their program within the first four months.

4.2.6. The petitioner in *Hindustan Composites Ltd. vs. Jasbir Singh Randhawa and anr.*¹⁵⁰ was a manufacturer of brake linings and other friction materials with an R&D division devoted to improving their processes. Respondent No. 1 worked for the petitioner but later resigned to start a rival company using “confidential information” he had gained while employed by the petitioner. The petitioner filed suit asking the court to issue a permanent injunction barring the respondents from using the techniques, skills, and knowledge that Respondent No. 1 learned while employed by the petitioner.

The court ruled that the petitioner’s manufacturing process was not secret because it could be found in published sources. As a result, the legislation did not safeguard the information because it was not considered private.

4.2.7. The plaintiff in *Star India Private Limited vs. Laxmiraj Seetharam Nayak & anr.*¹⁵¹ is a company that buys the rights to distribute motion pictures, and they sued an employee for exposing their “confidential information”. The court, however, determined that the plaintiff’s detailed list did not include any genuine “trade secrets” or information that was confidential. The items on the list were not special or hidden knowledge, but rather common knowledge among professionals. The court ruled that information that is already publicly available, such as pricing and marketing plans, cannot be protected as proprietary.

¹⁵⁰ (2002) 5 Bom CR 511

¹⁵¹ (2003) 3 Bom. C.R. 563

The court drew parallels between the departure of a salesman and the fact that the latter's acquired skills and expertise cannot be legally protected as intellectual property. The specified information did not meet the criteria for "trade secrets", hence the court did not issue an injunction to protect them.

4.2.8. The plaintiff in *Emergent Genetics India Pvt. Ltd vs. Shailendra Shivam and Ors*¹⁵². is a seed research and sales company that claims its former workers and a third party misappropriated its intellectual property and confidential secrets. The lawsuit sought a permanent injunction against the defendants' production and distribution of genetically identical seed stock. Without copyright protection, the court looked into whether the plaintiff may seek an injunction based on "trade secrets" and sensitive information. The court ruled that in order for material to qualify as a trade secret, the owner must show that reasonable steps were made to maintain its secrecy. The court, however, concluded that the plaintiff did not prove that the alleged knowledge was exclusive or confidential and therefore denied the claim. The court highlighted that procedures and information could not be termed confidential if they were not novel but generally available or extensively practiced. The court expressed skepticism that awarding exclusivity based on unproven assertions would not have far-reaching consequences. As a result, the application for an injunction was denied by the court.

4.2.9. In the case of *Ambiance India Pvt. Ltd. vs. Shri Naveen Jain*¹⁵³, the defendant worked as a "Fabric Technologist" for the plaintiff company under an agreement dated August 30, 2003. While employed by the plaintiff, the defendant was prohibited from engaging in any other activities, either directly or indirectly, that could be detrimental to the success of the plaintiff's business. During the course of his employment and for three years afterward, the defendant was also obligated not to share any of the plaintiff's confidential business information. Furthermore, the defendant shall not, for a period of two years following termination, seek employment or business dealings with the plaintiff's present or former customers, vendors, importers, agents, potential consumers, or others.

When the defendant quit the plaintiff's company on June 19, 2004, the contract was officially over. However, on June 10, 2004, he started working for one of the plaintiff's customers, "M/s. Indigo Orient Limited" of the UK. The plaintiff claims that the defendant's conduct here constitutes a breach of the agreement dated August 30, 2003.

¹⁵² I.A. Nos. 388/2004, 1267/2004 & 1268/2004 in Del HC CS (OS) 50/2004

¹⁵³ (2005) 122 DLT 421.

According to the complaint, the defendant violated the terms of the agreement by convincing the aforementioned customer to set up shop in India and then joining them. The plaintiff wants a permanent injunction against the defendant to keep him from doing business with the plaintiff's clients or customers in any way.¹⁵⁴

The Court did not, however, agree that the plaintiff had established a prima facie case. The defendant, who needed to work in a field where he had experience, also benefited from the greater convenience. The Court acknowledged that "trade secrets" refer to information that an employee has learned in the course of their employment that is confidential and should not be shared with third parties. Formulas, technical know-how, or even just the company's own special approach to doing business can be considered a trade secret. Common knowledge about the employer's day-to-day operations, on the other hand, cannot be protected as "trade secrets."

4.2.10. Two countersuits were filed in the case of *Mr. Diljeet Titus vs. Mr. Alfred A. Adebare and Ors.*¹⁵⁵, with each side alleging wrongdoing on the part of the other. The argument revolved over the advocates' professional relationship and methods of working together. The plaintiff claimed that the defendants were his employees and had been paid by him in the form of fees while he remained in charge of the company. However, the defendants claimed that their relationship with the plaintiff was more akin to that of partners.

Initially working together, the defendants ultimately chose to go their separate ways with Mr. Titus. Mr. Titus alleged that the accused, former employees of his legal company "M/s. Titus and Company," had stolen "confidential information". Liability to clients could result from the use of this information by anybody other than Mr. Titus. The plaintiff filed a criminal charge and an injunction suit alleging copyright infringement. The plaintiff sought interim reliefs because the defendants still held the data in question. The defendants, on the other hand, insisted that their work was original and hence entitled to copyright protection. They claimed to have counseled and advised clients using data generated by computers and kept in the plaintiff's database.

¹⁵⁴ Mukesh Shukla, "Non Regulation Of Protection Of Trade Secrets In The Indian Corporate Sector A Comparative Analysis With USA Through The Lens Of Global IPR Regime",

<https://shodhganga.inflibnet.ac.in/handle/10603/362381>

¹⁵⁵ (2006) 32 PTC 609 Del

Four former employees filed countersuits, claiming ownership of copyrights to their work and “confidential information”. They are Ms. Seema Ahluwalia Jhingan, Mr. Alishan Naqvee, Mr. Dimpy Mohanty, and Mr. Alfred A. Adebare. They sued Mr. Titus and his company, asking the court to issue a permanent injunction barring any further disclosure or use of the information at issue. The issue at stake was who, if anyone, had sole ownership of the creations or if ownership was shared.¹⁵⁶

The court ruled that the client list and addresses were a literary work protected by copyright legislation. It also understood that the data was private. The court ruled that the defendants could keep using their education and experience in their chosen field. The duplicated materials belonged to the plaintiff, however, and they were prohibited from exploiting them in any way. The plaintiff would suffer irreparable harm if interim relief was not granted. Defendants were barred from using any of the “confidential information” they obtained from the plaintiff in any way.

4.2.11. *Tractor and Farm Equipment Ltd. vs. Green Field Farm Equipment Pvt. Ltd. and Ors*¹⁵⁷. was a tractor and farm equipment firm that had been in operation since 1961 (the plaintiff). They had a specialized division named “R & D” that frequently developed new varieties of tractors by teaming up with rival businesses overseas. The plaintiff, in an effort to provide the country with a modern tractor, conceived of the “Hunter Program” in 2000. The design of the “Hunter Tractor” was outsourced to a firm in the United Kingdom named “M/s. Omni Design International Ltd.” (henceforth “Omni”). From January 2000 through September 2001, during the development phase, Omni worked with the plaintiff to establish a design that met all of his needs.

The creation of the new model tractor was expensive for the company. Omni’s research and development staff members contributed to the aesthetic and functional design of the “Hunter Tractor”. Workers have access to sensitive information such as project correspondence, detailed designs, technical specifications, budgets, and more. The claimant contracted with a third party to develop sheet metal parts. As part of the deal, we agreed to supply CAD drawings and other data pertaining to the metal parts.

¹⁵⁶ Mukesh Shukla, “Non Regulation Of Protection Of Trade Secrets In The Indian Corporate Sector A Comparative Analysis With USA Through The Lens Of Global IPR Regime”,

<https://shodhganga.inflibnet.ac.in/handle/10603/362381>

¹⁵⁷ (2006) 32 PTC 343 Mad.

In October 2003, one of the defendants who had been a senior member of the R&D department and had worked directly on the “Hunter Project” resigned from the plaintiff’s company. The terms of his employment agreement stipulated that he keep all work-related secrets secret for three years after he left his position. The plaintiff found out that the first defendant intended to produce a tractor dubbed the “Maharaja 3300,” which was virtually identical to the plaintiff’s “Hunter Tractor.” It was discovered via further inquiry that the second defendant’s wife was responsible for the incorporation of the first defendant’s company and that the second defendant himself joined the company as a director. The second defendant had complete access to all “trade secrets” and methods developed for the “Hunter Project” and hence was able to successfully copy the plaintiff’s technology.¹⁵⁸

In this case, the court had to rule on several issues, including whether the plaintiff company had enforceable copyright over the “Hunter Tractor,” whether the second defendant had access to the design information, and whether the second defendant violated the confidentiality clause by producing the “Maharaja 3300 Tractor.” An injunction was issued against the defendants after the court found copyright infringement and a breach of confidentiality had occurred. However, it was made clear that the injunction did not preclude the defendants from manufacturing tractors that did not infringe on the plaintiff’s rights, regardless of the design or configuration.

4.2.12. American Express Bank Ltd., a banking corporation with headquarters in Connecticut, USA and an Indian branch office in New Delhi, India, was the plaintiff in the case *American Express Bank Ltd. vs. Ms. Priya Puri*¹⁵⁹. Defendant worked for Plaintiff at a high level and was considered a manager there. If the defendant wanted to resign, she was required to give one month’s notice or pay in lieu of notice as part of the terms of her employment. The same notice or pay would apply if the corporation decided to terminate her employment. Employment was contingent on agreeing to keep all information confidential.

The defendant, in his role as northern region head of wealth management, had access to sensitive information and “trade secrets” belonging to the plaintiff, including customer data. The plaintiff said that it had taken reasonable measures to safeguard this information

¹⁵⁸ Mukesh Shukla, “Non Regulation Of Protection Of Trade Secrets In The Indian Corporate Sector A Comparative Analysis With USA Through The Lens Of Global IPR Regime”,

<https://shodhganga.inflibnet.ac.in/handle/10603/362381>

¹⁵⁹ (2006) III LLJ 540 Del

by using encryption and other security measures. However, the defendant gave 30 days' notice of resignation to the Director and Head of Wealth Management in a letter dated September 19, 2005.¹⁶⁰

The complainant claims that on September 24, 2005, they learned of a threat to sensitive information from the director of wealth management. Another employee, allegedly at the defendant's direction, produced a file with extensive customer information, including investment account details, it was claimed. The plaintiff sought a permanent injunction against the defendant on the grounds that she had stolen the secret information.

The defendant claimed the action was brought to harass her and stop her from seeking employment with a rival company. She claimed she did not have any documents holding proprietary information. She insisted that information such as client names, phone numbers, and addresses did not constitute a trade secret because it was easily accessible to the general public. She added that the plaintiff's proprietary rights did not underlie her connection with her clients. The defendant claimed that the plaintiff was interfering with her ability to do business by seeking to keep customers from switching banks.

The court ruled against the injunction, saying the defendant had done her job effectively and that the plaintiff's charges were an attempt to intimidate her. The court rejected the assumption that the defendant will always be treated as an American Express customer and stressed the defendant's right to seek better employment. It claimed that the employee's rights would be violated if the plaintiff were to prevent the defendant from working due to the existence of secret information. Section 27 of the Indian Contract Act of 1872 was cited by the court as further evidence that the plaintiff's attempt to impose confidentiality requirements on the workplace was illegal.

4.2.13. Established in 1958 under the Companies Act, 1956, the plaintiff company in *V.V. Sivaram and Ors. vs. Foseco India Limited*¹⁶¹ manufactured specialty chemicals and related goods for the foundry and steel industry. The plaintiff, a subsidiary of the internationally recognized FOSECO Group of Companies, owned patents for several

¹⁶⁰ Mukesh Shukla, "Non Regulation Of Protection Of Trade Secrets In The Indian Corporate Sector A Comparative Analysis With USA Through The Lens Of Global IPR Regime",

<https://shodhganga.inflibnet.ac.in/handle/10603/362381>

¹⁶¹ (2006) 1 KarLJ 386.

products, including one called “Turbostop,” which was first introduced in India in 1992 and was created using a Contoured Impact Pad (CIP).

The first two defendants used to work for the corporation that is now the plaintiff. For a period of five years after leaving the company, they were contractually obligated not to compete with the plaintiff or utilize any proprietary knowledge learned during their time there. Both defendants worked for Tundish Products, with defendant 2 beginning as a Senior Product Engineer before rising to the position of Group Product Manager. Both of the accused had access to proprietary data, including specifics on the project codenamed “Turbostop.”

In exchange for a manufacturing contract with the plaintiff, Defendant 3 agreed not to compete with the plaintiff directly or indirectly for the term of the contract and for a period of five years following its expiration. Defendant 4, a company founded by the spouses of Defendants 1 and 3, began supplying the plaintiff’s largest customer, “Jindal Vijayanagar Steel Limited” (JVSL), with a product comparable to “Turbostop” but at a cheaper price.

The plaintiff took exception to this, thinking that Defendants no. 1-3 were copying their work and selling it under a new brand. To restrict the defendants from selling the same or similar product, the plaintiff filed for an injunction.¹⁶²

In its analysis, the Trial Court concluded that Defendants 1 and 2 had acquired knowledge of the “Turbostop” manufacturing process through their employment. Both the existence of a trade secret for “Turbostop” and the defendants’ unauthorized acquisition of it were disputed by the plaintiff. In addition, they claimed that the “Turbostop” patent held in the United States did not apply to the situation in India.

The High Court ruled that the employment contract was enforceable despite the defendants 1’s and 2’s voluntary retirement and resignation. The court recognized the possibility of restraint of disclosure of secret information upon termination of employment. The injunction in this case only prevented the defendants from making and selling “Turbostop” knockoffs, so it did not affect their core operations. In light of these considerations, the Appellate Court affirmed the Trial Court’s order.¹⁶³

¹⁶² Zubair Ahmed, “Protection of Trade Secrets in India A Study of the Legal Framework”. Available at: <https://shodhganga.inflibnet.ac.in/handle/10603/291861>

¹⁶³ Ibid.

4.2.14. The plaintiff and defendant No. 2 in *Desiccant Rotors International vs. Bappaditya Sarkar and Anr.*¹⁶⁴ were both engaged in the marketing and sale of evaporative cooling components, goods, and systems. In 1998, Defendant No. 1 began working for “M/s Artic India Sales,” a company owned by “Mr. Deepak Pahwa.” He held the position of “Area Sales Manager.” Defendant No. 1 started working for “Arctic India Engineering Pvt. Ltd.” in 1998, and he was transferred there in 2000. The “Mr. Deepak Pahwa” family owned a number of businesses, and this one was one of them. When “Arctic India Engineering Pvt. Ltd.” was renamed “Desiccant Rotors International Pvt. Ltd.” in 2006, it was a significant move. As of 2004, “Arctic India Sales” was a part of “Bry Air (Asia) (P) Ltd.,” another group firm owned by “Mr. Deepak Pahwa”.

Defendant No. 1 joined the plaintiff company on December 22, 2000, and as part of his employment he signed a “Confidentiality Agreement” acknowledging that he had access to proprietary information including, but not limited to, “proprietary technology, trade secrets, methods and processes, markets, sales, customer lists, accounting methods, competitive data, financial plans, and other proprietary information”. He committed to keeping this information confidential. Defendant No. 1 resigned from his position with the plaintiff company on June 12, 2007, and at the time he signed a “Obligation Agreement” promising not to compete with the company, not to disrupt its relationships, not to disclose “confidential information”, and to return all plaintiff property in his possession.¹⁶⁵

After quitting the company, the plaintiff claims that Defendant No. 1 immediately joined Defendant No. 2 as it’s “Country Manager” and assumed marketing responsibilities for products that competed with the plaintiff’s. The plaintiff claims that the first defendant broke the non-compete and secrecy provisions of the Obligation Agreement, as well as the declarations. Defendant No. 1 is further accused of taking with him a copy of all the information stored on his laptop, including the plaintiff’s trade secrets, supplier and customer lists, business plans, marketing strategies, etc. Furthermore, the plaintiff claims that the first defendant contacted the plaintiff’s vendors and customers on behalf of the second defendant.

To this, defendant No. 1 asserts that the signed declarations were too general and failed to describe the nature of the secret information to which he had access during his employment

¹⁶⁴ I.A. No.5455/2008

¹⁶⁵ Zubair Ahmed, “Protection of Trade Secrets in India A Study of the Legal Framework”. Available at: <https://shodhganga.inflibnet.ac.in/handle/10603/291861>

with the plaintiff. He says he had to sign them before the plaintiff would release his debts. On top of that, he claims the agreements the plaintiff is relying on are not enforceable because of Section 27 of the Indian Contract Act of 1872.

After evaluating the evidence, the court found that the plaintiff failed to identify any specific “confidential information” that was shared with the defendant. The court ruled that not everything an employee encounters on the job may be considered a trade secret or private information that should be kept hidden. It cast doubt on the validity of the plaintiff’s cited agreements.

4.2.15. Mehar Karan Singh, a full-time director at the plaintiff’s company in *Bombay Dyeing and Manufacturing... vs. Mehar Karan Singh*¹⁶⁶, was sued for disclosing “trade secrets” to a rival firm, ‘Dawnay Day India Land Private Limited’ (DD). The information was purchased by the plaintiff from ‘Oracle,’ a software developer. The defendant maintained that he resigned, whereas the plaintiff maintained that he was fired. To prevent the defendant from disclosing proprietary information, the plaintiff brought suit.

After reviewing the evidence, which included emails, the court ruled that the defendant could not disclose or provide the software manual or “Memorandum of Understanding” attached to the defendant’s email, which pertained to the plaintiff’s property in Goa. The court further ordered that the defendant not use the information for his or her own benefit or reveal it to any third party, including a rival of the plaintiff.¹⁶⁷

4.2.16. The petitioner in *Fairfest Media Ltd. vs. Ite Group Plc & Ors*¹⁶⁸. was a travel trade show organizer that had begun negotiations with the respondent for a joint venture agreement. To ensure the privacy of sensitive information, both parties have signed a non-disclosure agreement. The petitioner gave the respondent access to proprietary, non-public financial and marketing data. However, the respondent then bought stock in a competing business, and it has been stated that the respondent is considering merging with that company.

Petitioner claimed that Respondent improperly put the “confidential information” to use for Respondent’s and the other company’s benefit. As a result of the court’s ruling, the

¹⁶⁶ Notice of Motion No.4248 of 2008, Suit No.3313 of 2008; Bom HC 24 Aug 2010

¹⁶⁷ Zubair Ahmed, “Protection of Trade Secrets in India A Study of the Legal Framework”. Available at: <https://shodhganga.inflibnet.ac.in/handle/10603/291861>

¹⁶⁸ CS No.329 of 2014 Cal (HC)

respondent was ordered to comply with a number of stipulations, including the removal of certain photos from brochures and the prohibition on publicizing their name as a joint organizer, before the other firm could use the material it had acquired in its travel shows. Up to a certain date, the court has ordered an injunction prohibiting the petitioner's marketing strategy and customer base information from being shared.

The court upheld the petitioner's right to privacy and imposed requirements to prevent the respondent's travel show from using the petitioner's sensitive information without permission.

4.2.17. The plaintiff company in the matter of *Hi-Tech Systems & Services Ltd vs. Suprabhat Ray & Ors*¹⁶⁹. produced and sold technologically advanced items and equipment for use in the power and process industries. They also imported and marketed industrial products and supplied services to these sectors. As former officers of the plaintiff, the defendants were present at senior management meetings where sensitive technological information and business decisions were addressed. The plaintiff benefited from their knowledge of the purchase price and suppliers of products, which was seen as important information. The defendants were familiar with logistic providers, their pricing structures, and their interactions with the departments and officers of these providers. The defendants quit their jobs with the plaintiff to launch a rival firm. The plaintiff claimed that the defendants used proprietary information obtained through their employment, such as "trade secrets" and a computer database. The injunction was requested so that the defendants could not breach the plaintiff's contracts with its customers and suppliers or disclose or use the "confidential information" and "trade secrets". The court ruled that "trade secrets" and commercial strategies can include things like financial agreements, customer lists, pricing and cost information, and promotional plans. The court ruled that the defendants had broken their contract by using the proprietary knowledge and "trade secrets" without permission, thus they were barred from functioning as a sales agent for three years. As long as the defendants did not use the plaintiff's database or "trade secrets", they were free to operate a competing firm.¹⁷⁰

¹⁶⁹ C.S.192 of 2014 Cal (HC)

¹⁷⁰ Mukesh Shukla, "Non Regulation Of Protection Of Trade Secrets In The Indian Corporate Sector A Comparative Analysis With USA Through The Lens Of Global IPR Regime", <https://shodhganga.inflibnet.ac.in/handle/10603/362381>

4.2.18. *Ciba Inc. vs. Sequent Scientific Ltd*¹⁷¹. examined the need for a precise definition of “confidential information” inside a nondisclosure agreement. Ciba Inc. sued Sequent Scientific Ltd. and others for an injunction preventing them from continuing production of the chemical Tetrakis or PEPQ. Except for some publicly available information, Ciba claimed that they had created the unique manufacturing technique for PEPQ, and that the only other manufacturer of PEPQ was Clariant Group. In order to aid Sequent Scientific Ltd. in establishing a manufacturing facility for PEPQ, Ciba released the process to Plama Laboratories, formerly known as the company. As a result of Sequent’s breach of the secrecy agreement, Ciba filed a lawsuit against the company. The lawsuit claimed that Sequent had transferred all of its undertaking, including agreements and contracts, to a third party without alerting Ciba. Sequent stated that the hearing was necessary because the confidentiality agreement lacked specifics regarding the nature, duration, and protection of secret information. The court ruled that Ciba had not adequately described the scope of the nondisclosure agreement, thus it had to throw out the case since it could not provide relief to Ciba without doing so.¹⁷²

These rulings show that India’s trade secret protection laws are inconsistent. Courts in India try to protect “trade secrets” by applying multiple statutes and common law principles because there are no laws for trade secret protection in Indian intellectual property law.

“With the release of the Draft National Innovation Act, 2008 in 2008, the Indian government took a step toward preserving trade secrets and encouraging innovation and research. The Department of Science and Technology is proposing an act with three primary goals:

- (i) protecting confidential information, trade secrets, and innovations;
- (ii) developing a National Integrated Science and Technology Plan; and
- (iii) encouraging innovation through a support system.”¹⁷³

¹⁷¹ Notice of Motion No.3472 OF 2009 in Suit No.2501 of 2009 Bom HC

¹⁷² Zubair Ahmed, “Protection of Trade Secrets in India A Study of the Legal Framework”. Available at: <https://shodhganga.inflibnet.ac.in/handle/10603/291861>

¹⁷³ Ibid.

In terms of innovation, the National Innovation Act draft emphasizes the significance of “trade secrets” and “confidential information”. These valuable assets allow businesses to maintain a market advantage and advance their economic interests.¹⁷⁴

4.3. Draft National Innovations Act

The “National Innovation Act, 2008” draft borrows ideas from the “COMPETES Act” and integrates the basic concept of secret information from the “Uniform Trade Secret Act” of US. “Although trade secret laws are adopted at the state level in the United States, many of these laws are based on the model Uniform Trade Secrets Act, 1979, which is helpful in understanding the federal government’s stance”.¹⁷⁵

“Trade secret” is defined by “the Uniform Trade Secrets Act of 1995”, as “information, including a formula, pattern, compilation, program device, method, technique, or process, that derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use, and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy”.¹⁷⁶

Comparable language can be found in Section 2(3) of the proposed draft “Indian Innovation Act, 2008”, which defines “confidential information” as “information, including a formula, pattern, compilation, program device, method, technique, or process that

- (a) is secret, in that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within circles that normally deal with the kind of information in question;
- (b) has commercial value because it is secret, and
- (c) has been subject to responsible steps under the circumstances by the person lawfully in control of the information, to keep it secret.”¹⁷⁷

U.S. “trade secrets” are safeguarded not only by “the Uniform Trade Secrets Act of 1979” but also by the Economic Espionage Act of 1996, which makes it illegal to steal “trade secrets” under specific conditions. For this reason, “trade secrets” are regarded “property”

¹⁷⁴ Ranjeet Kumar, R.C.Tripathi and M.D.Tiwari, “Trade Secrets Protection in Digital Environment: A Global Perspective” Vol. 2, No. 4, 2012, IJEMS. Available at: <https://www.hilarispublisher.com/open-access/trade-secrets-protection-in-digital-environment-a-global-perspectiv-2162-6359-2-131.pdf>

¹⁷⁵ Ibid.

¹⁷⁶ Section 1.2, UTSA, 1995.

¹⁷⁷ Section 2(3)National Innovation Act 2008 (Draft).

in the United States, while in England, the right to secrecy is considered an equitable right rather than a property right under Common Law Principles.¹⁷⁸ The proposed Indian Act does not recognize “trade secrets” as property, which is a crucial distinction to make. The proposed “Innovation Act” likewise uses “Article 39.2” of the TRIPS Agreement as the basis for its definition.

Article 39.2 of the WTO stipulates that a person lawfully in control of such information must have the possibility of preventing it from being disclosed to, acquired by, or used by others without his or her consent in a manner contrary to honest commercial practices. Acquisition of undisclosed information by third parties who knew, or were grossly negligent in failing to know, that such practices were involved constitutes “manner contrary to honest commercial practices,”¹⁷⁹ which also includes breach of contract, breach of confidence, and inducement to breach.

Chapter VI of the proposed “National Innovation Act” is titled “Confidentiality and Confidential Information and Remedies and Offenses,” and it provides specifics about “trade secrets” and “confidential information”. This section addresses “Obligations of Confidentiality” and details the safeguards in place to maintain secrecy. The various aspects of “confidential information” and the laws protecting it are discussed in Sections 8 through 14 of this chapter.¹⁸⁰

4.3.1. Obligations of Confidentiality

Section 8 of the chapter describes the responsibilities of receiver of the “confidential information”.¹⁸¹ Purpose of this section is to prevent the unauthorized use or disclosure of “confidential information” by allowing the parties to establish contractual terms and conditions governing the rights and obligations related to maintaining confidentiality. The practice of entering into confidentiality and non-disclosure agreements with employees to prevent the disclosure of “trade secrets” or “confidential information” is widespread in India and around the world. There has been inconsistency in the recognition of such

¹⁷⁸ Zubair Ahmed, “Protection of Trade Secrets in India A Study of the Legal Framework”. Available at: <https://shodhganga.inflibnet.ac.in/handle/10603/291861>

¹⁷⁹ “Part II — Standards concerning the availability, scope and use of Intellectual Property Rights”, https://www.wto.org/english/docs_e/legal_e/27-trips_04d_e.htm

¹⁸⁰ Zubair Ahmed, “Protection of Trade Secrets in India A Study of the Legal Framework”. Available at: <https://shodhganga.inflibnet.ac.in/handle/10603/291861>

¹⁸¹ Section 8, Obligations of Confidentiality, National Innovation Act 2008 (Draft).

agreements by Indian courts, as they frequently conflict with Section 27 of the Indian Contract Act of 1872, which considers any agreement restricting trade to be null and void.

In addition, if the appropriate government issues a notice specifying a minimum time period for confidentiality contracts, the parties must comply with it. Section 8 states:

- (a) “The parties are free to define the terms and conditions regulating rights and obligations pertaining to “confidential information”, including measures to preserve confidentiality and prevent misappropriation.
- (b) Subject to any agreed-upon terms and conditions, the rights and obligations pertaining to “Confidential Information” shall be determined in accordance with the provisions prescribed by the “Appropriate Government” in accordance with Section 15(d).
- (c) Despite the provisions of subsection (1), parties may still enforce any rights related to “Confidential Information” that arise from equity or circumstances that impose a duty of confidentiality.”¹⁸²

4.3.2. Confidentiality Stemming from Non-Contractual Relationships

Section 9 outlines the provision regarding a third party’s obligation to maintain confidentiality.¹⁸³ It specifies that “non-contractual relationships, such as equitable considerations, may also establish rights and obligations to maintain confidentiality”.¹⁸⁴ This section confers the right to prevent a third party from disclosing private information to the public without the consent of the individual whose privacy is at stake. This section may be rewritten as follows:

“Confidentiality obligations can derive from non-contractual relationships, including equitable considerations, and establish both the right and duty to maintain confidentiality. It is prohibited for third parties who have received such “confidential information” to disclose or release it without the consent of the complainant. Common law imposes an inherent obligation to maintain confidentiality even in the absence of a contractual obligation. Effectively incorporating and codifying the equitable obligation of

¹⁸² Section 8, Obligations of Confidentiality, National Innovation Act 2008 (Draft).

¹⁸³ Section 9, Obligations of Confidentiality, National Innovation Act 2008 (Draft).

¹⁸⁴ Ibid.

confidentiality recognized under common law, the proposed act draft now incorporates and codifies this obligation”.¹⁸⁵

4.3.3. Preservation and Protection of confidential information in Court Proceedings and Orders to Prevent Actual or Anticipated Misuse

Section 10 of the Act states that the court must take reasonable measures to protect the secrecy of the disputed subject matter alleged to be “Confidential Information”. These measures may include issuing mandatory protective orders during the discovery phase, conducting closed-door hearings, sealing “confidential information” such as court filings or records, and prohibiting any party from disclosing the claimed “Confidential Information” without prior court approval. The section precisely states as follows:

“In any proceeding involving the actual or anticipated misappropriation of “confidential information”, the court shall take reasonable measures to protect the confidentiality of the information claimed as Confidential Information. This may include granting mandatory protective orders during discovery proceedings, conducting hearings in-camera, sealing the “confidential information”, including confidential filings or records related to the case, and issuing orders prohibiting any party involved in the proceedings from disclosing the claimed “confidential information” without the court’s prior authorization”.¹⁸⁶

4.3.4. Exceptions in Misappropriation Actions

In Section 11, the exceptions that can be used as defenses in a misappropriation litigation involving “confidential information” are outlined. This section outlines three categories of exceptions that may be raised in court. First, determine whether the information in question is already in the public domain. Second, if the alleged infringer or a third party developed the information independently without using the original source. Thirdly, if a court determines that disclosing the “confidential information” is in the public interest. This section is written as follows:

“Misappropriation of “confidential information” shall not be deemed to have occurred when:

- (a) the confidential information was already publicly available;

¹⁸⁵ Ibid.

¹⁸⁶ Section 10, Obligations of Confidentiality, National Innovation Act 2008 (Draft).

- (b) the alleged misappropriator or a third party independently derived the confidential information without receiving it from the alleged misappropriator; and
- (c) the court determines that disclosure of the confidential information is in the best interest of the public.”¹⁸⁷

This section is the only provision in the proposed Act that addresses defenses that may be raised in a lawsuit alleging trade secret misappropriation. It is up to the discretion of the court to discern what constitutes “public interest” because the Act does not define “public interest.” In numerous laws governing the preservation of “trade secrets”, the defenses of information availability in the public domain and independent development, including reverse engineering, are widely accepted.

4.3.5. Preventive or Mandatory Injunction Restraining Misappropriation of Confidential Information

In Section 12 of the Act, the court’s authority to grant and rescind injunctions is outlined. “It grants the court the authority to issue temporary, ad interim, or permanent injunctions to prevent the actual, threatened, or anticipated misuse of confidential information”.¹⁸⁸ In addition, the section states that if an injunction has already been issued, it can be modified or revoked if it is determined that the information falls under one of Section 11’s exceptions. These exceptions include instances in which the information was already accessible to the public, was independently developed by the opposing party, or the court deems disclosure to be in the public interest.¹⁸⁹

In addition, the provision states that the appropriate government must provide the necessary resources, such as local and police administration, to assist with the enforcement and implementation of any court-issued injunction. Sec 12 specifies that “a court must issue injunctions, including interim, ad interim, and final injunctions, to prevent the actual, threatened, or anticipated misappropriation of confidential information”.¹⁹⁰ “The court may also modify or rescind an injunction issued pursuant to this section if it determines that the

¹⁸⁷ Section 11, Obligations of Confidentiality, National Innovation Act 2008 (Draft).

¹⁸⁸ Zubair Ahmed, “Protection of Trade Secrets in India A Study of the Legal Framework”. Available at: <https://shodhganga.inflibnet.ac.in/handle/10603/291861>

¹⁸⁹ Section 12, Obligations of Confidentiality, National Innovation Act 2008 (Draft).

¹⁹⁰ Ibid.

“confidential information” at issue falls under any of the categories described in clauses (a) through (c) of Section 11”.¹⁹¹

If a plaintiff obtains a temporary injunction against a suspected or anticipated misappropriation but later fails to meet the required grounds for such relief, or if the matter is ultimately decided in favor of the defendant, the plaintiff is obligated to compensate the defendant for any actual losses directly caused by the temporary relief.

In extraordinary circumstances, an injunction may include provisions for the future use of “confidential information”, with the condition that a reasonable royalty is paid. In addition, “the “Appropriate Government” is responsible for providing the necessary resources, including police and local administration, to assist with the implementation and enforcement of any injunction or other court orders issued pursuant to subsection (1) of this section”.¹⁹²

4.3.6. Mandatory Damages on Proof of Breach of Confidentiality

In the event of a violation of confidentiality, Section 13 of the Act mandates the payment of damages. According to this section, “anyone who directly or indirectly misappropriates “confidential information” or discloses it to a third party or the public without the owner’s consent must pay damages”.¹⁹³ The section also provides the complainant with multiple options for claiming damages.

The complainant has the option of receiving either:

- i. “Mandatory damages within the prescribed limit established by the relevant government and notified periodically.
- ii. Contractual damages agreed upon by the parties.
- iii. Actual damages, inclusive of any demonstrable consequential losses”.¹⁹⁴

The section also includes a provision for the defendant to obtain interim relief. As a prerequisite for continuing to defend the litigation, the court may require the alleged

¹⁹¹ Ibid.

¹⁹² Section 12, Obligations of Confidentiality, National Innovation Act 2008 (Draft).

¹⁹³ Section 13, Obligations of Confidentiality, National Innovation Act 2008 (Draft).

¹⁹⁴ Ibid.

misappropriator to deposit up to 10 percent of the damages claimed by the plaintiff, as stated in subsection (1).¹⁹⁵

As stated in Section 13:

1. “If a misappropriator utilizes “confidential information” or is directly or indirectly responsible for it falling into the hands of a third party or becoming public, the complainant may choose to receive:
 - (a) Mandatory damages, not to exceed the amount specified by the appropriate government under Section 15 (c). These damages are contractually recoverable obligations.
 - (b) Contractual damages agreed upon by the parties.
 - (c) Actual, demonstrable damages, including consequential losses.
2. In addition to the damages specified in subsection (1), if the misappropriator is found to have acted intentionally or maliciously, the complainant may be awarded up to three times the mandatory damages specified in section 15 (1) (a), plus costs and attorney fees.
3. In order to qualify for interim relief, the court may require the alleged misappropriator to deposit up to 10 percent of the damages claimed by the plaintiff, as specified in subsection (1), before continuing to defend the litigation.”¹⁹⁶

4.3.7. Immunity for Acts Done in Good Faith or Purporting to be so done

The final section of Chapter VI is Section 14, which exempts individuals from judicial proceedings, claims, or actions if they have acted in good faith in accordance with the Act or its Rules and Regulations.

According to Section 27, “no legal proceedings, claims, or actions may be brought against any person for actions taken in good faith in accordance with this Act or its enacted rules and regulations”.¹⁹⁷

4.4. National IPR Policy 2016

¹⁹⁵ Mukesh Shukla, “Non Regulation Of Protection Of Trade Secrets In The Indian Corporate Sector A Comparative Analysis With USA Through The Lens Of Global IPR Regime”, <https://shodhganga.inflibnet.ac.in/handle/10603/362381>

¹⁹⁶ Section 13, Obligations of Confidentiality, National Innovation Act 2008 (Draft).

¹⁹⁷ Section 14, Obligations of Confidentiality, National Innovation Act 2008 (Draft).

India needs a National Intellectual Property Rights Policy (NIPRP) that is strong, practical, exhaustive, and equitable. This policy should be consistent with the TRIPS agreement and protect national interests. In addition, the NIPRP should maximize the contribution of the intellectual property rights (IPR) industry to national economic development. The policy's initial draft was released on December 19, 2014.¹⁹⁸ The Union Cabinet subsequently authorized the National Intellectual Property Rights Policy on May 12, 2016, and the final policy document was published on August 8, 2016. It is necessary to evaluate not only the significance of IPR as a tool for economic development in this policy, but also the role of "trade secrets" in a comprehensive IPR policy framework for India.¹⁹⁹

The protection of "trade secrets" is mentioned in the policy's objectives under section 3.8.4, "Legal and Legislative Framework".²⁰⁰ This objective seeks to establish strong and effective IP laws that are aligned with national priorities and international obligations, while balancing the interests of rights holders with the greater public interest. Objective 3.8 emphasizes the identification of essential areas for study and research in the development of future policies, including "trade secrets". This indicates that the government is contemplating the development of future trade secret protection policies.

The initial draft of the policy, released on December 19, 2014, included provisions for trade secret protection in objectives 3.2 and 3.6.3. Objective 3.2 required the enactment of laws to secure "trade secrets" in order to satisfy national requirements. Objective 3.6 centered on identifying crucial study and research areas, including "confidential information". Under objective 3.6.3, there was a reference to "Protection of undisclosed information not extending to data exclusivity". Nonetheless, it is surprising that the final policy document approved on May 12, 2016, retained provisions comparable to objective 3.6.3 from the initial draft in the form of 3.8.4 but omitted objective 3.2, which advocated for the enactment of laws to protect "trade secrets".²⁰¹

In the initial draft, Objective 3.2 read as follows:

"Enact laws to address national needs; to fill gaps in the protective regime of IPRs such as Utility Models and Trade Secrets; to keep up with advancements in science and technology;

¹⁹⁸ Zubair Ahmed, "Protection of Trade Secrets in India A Study of the Legal Framework". Available at: <https://shodhganga.inflibnet.ac.in/handle/10603/291861>

¹⁹⁹ National IPR Policy, available at: dipp.nic.in, pdf.

²⁰⁰ *ibid*

²⁰¹ Zubair Ahmed, "Protection of Trade Secrets in India A Study of the Legal Framework". Available at: <https://shodhganga.inflibnet.ac.in/handle/10603/291861>

*to strengthen IP and innovation eco-system, for example IP created from publicly funded research; to protect and promote traditional knowledge.”*²⁰²

In the national interest of traders and to accomplish international obligations under the TRIPS Agreement, it is crucial for India to enact legislation for the protection of “trade secrets”. To encourage foreign investment, which will strengthen the economy through increased capital inflow, it is also necessary to have a robust law protecting “trade secrets”. By omitting provisions for the preservation of “trade secrets” from the policy framework, the drafters of the policy overlooked a crucial step in meeting the TRIPS Agreement’s requirements. It is time for India to recognize “trade secrets” as a distinct form of intellectual property and enact legislation to ensure their protection.²⁰³

Chapter 5

Trade Secret Protection in Other Parts of the World

5.1. Introduction

During the Uruguay Round of Multilateral Trade Negotiations under the General Agreement on Tariffs and Trade (GATT), the protection of Intellectual Property Rights (IPRs) was a major topic of discussion. Similarly, the preamble of the North American Free Trade Agreement (NAFTA) reflects the concerns of the contracting nations (Canada, Mexico, and the United States) regarding the legal protection of these rights, with an emphasis on the promotion of creativity, innovation, and trade involving intellectual property rights. While adopting a more nuanced approach, the European Union (EU) acknowledged the need for harmonized rules to protect IPRs²⁰⁴.

²⁰² Ibid.

²⁰³ Zubair Ahmed, “Protection of Trade Secrets in India A Study of the Legal Framework”. Available at: <https://shodhganga.inflibnet.ac.in/handle/10603/291861>

²⁰⁴ Kunal Arora, “Trade Secrets- As an intellectual property and its protection”, available at: www.legalserviceindia.com.

As global trade and investment expand, the protection of intellectual property rights, including copyrights, trademarks, patents, and “trade secrets”, has become a crucial legal issue in the context of international trade. In the context of international trade and investment, developed nations recognize the importance of safeguarding intellectually produced goods.²⁰⁵ For instance, an English or Canadian manufacturing firm would be more likely to invest in Singapore or Venezuela if they were confident that their patented inventions and confidential manufacturing processes would be adequately protected against illicit use or theft. Similarly, a software developer in the United States would distribute its products via the Internet if there are safeguards in place to prevent unauthorized duplication.²⁰⁶

Globally, “trade secrets” are of great importance in the sphere of law. Due to the TRIPS agreement (Trade-Related Aspects of Intellectual Property Rights), the member nations of the World Trade Organization (WTO) are required to provide protection for “trade secrets”. Certain conditions must be met under TRIPS for information to be considered confidential or a trade secret: it must be secret (not generally known or easily accessible to those in the relevant industry circles), have commercial value due to its secrecy, and be subject to reasonable steps taken by its owners to maintain its confidentiality.

In essence, “trade secrets” refer to non-public business-related data or information that is intentionally kept private by its owner. Typically, “trade secrets” provide businesses with a competitive advantage over their competitors. Any data, processes, or information that is intended to be kept secret, entails the economic interests of the owner, and provides a competitive advantage can be classified as “trade secrets”. For instance, a company may have internal processes that contribute to its operational efficiency and give it a competitive advantage. Such procedures qualify as “trade secrets”.²⁰⁷

In light of globalization, the importance of effective trade secret protection has grown. Numerous nations have enacted legislation to resolve this need. Understanding the concept of “trade secrets” necessitates a comprehensive examination of economically prosperous nations worldwide. This chapter focuses on the legal standing and concept of “trade

²⁰⁵ Zubair Ahmed, “Protection of Trade Secrets in India A Study of the Legal Framework”. Available at: <https://shodhganga.inflibnet.ac.in/handle/10603/291861>

²⁰⁶ Kunal Arora, “Trade Secrets- As an intellectual property and its protection”, available at: www.legalserviceindia.com

²⁰⁷ Kunal Arora, “Trade Secrets- As an intellectual property and its protection”, available at: www.legalserviceindia.com

secrets” in various countries, emphasizing the significance of safeguarding “confidential information” and “trade secrets”, as evidenced by an examination of prevalent laws around the globe.

5.2. Analysis of the Laws of Other Countries

Intellectual property law plays a crucial function in propelling industrial development. Particularly, “trade secrets” have gained international attention as an effective legal instrument when other forms of protection, such as patents or copyrights, may not provide investors with the desired level of security.

The importance of safeguarding “trade secrets” in the industrial economy has increased dramatically in recent years due to a number of factors. First, “trade secrets” provide greater certainty than other forms of intellectual property, including patents, trademarks, and copyrights. The rapid technological advancements in many fields, which frequently outpace existing laws designed to encourage and protect inventions and innovations, are the second factor contributing to the growing importance of “trade secrets”. Patents, for instance, necessitate a disclosure procedure and are subject to the granting authority’s decision, which introduces an element of uncertainty. If a patent application is denied, the disclosed information becomes public.²⁰⁸

Numerous nations have instituted measures to safeguard “trade secrets”. This chapter examines the laws governing “trade secrets” on various continents, concentrating on prominent and developed nations in each region. Given that all these countries are members of the WTO and have ratified the TRIPS agreement, it becomes crucial to analyze the level of trade secret protection within these nations, including India.²⁰⁹

The study encompasses the subject matter and scope of “trade secrets” in relevant countries, identifies acts considered as violations under their respective laws, explores the remedies available under prevailing legislation, and investigates the procedures followed by courts in each country when handling trade secret cases.

5.2.1. Asian Continent

²⁰⁸ Zubair Ahmed, “Protection of Trade Secrets in India A Study of the Legal Framework”. Available at: <https://shodhganga.inflibnet.ac.in/handle/10603/291861>

²⁰⁹ Ibid.

The Asian continent, which is home to the world's greatest population, exerts significant global influence. It consists of countries such as China and India, the two most populous countries in the world. Asia's economies, including those of China, Japan, and India, play a crucial role on the international arena, as they manufacture and provide products and services that are utilized by nations worldwide.²¹⁰ With abundant natural resources, innovation and technological advancements are abundantly possible. This section examines the topic of trade secret protection in Japan and China, two prominent Asian nations.

5.2.1.1. Japan

As a forerunner in technological innovation, Japan experienced remarkable growth and emerged from the post-World War II economic crises as one of the world's strongest economies. It has played a significant role in the global advancement of technological development.

5.2.1.1.1. Subject matter and scope

In Japan, the "Unfair Competition Prevention Act, 1993" defines the subject matter and scope of "trade secrets" in order to protect against unjust competition. According to this legislation, "trade secrets" are defined as confidential technical or business information that holds commercial value for activities like manufacturing or marketing. These trade secrets are required to be kept confidential and undisclosed to the public.²¹¹ "Japanese law does not differentiate between technical information and confidential business information, and the courts have provided protection to a broad range of secrets".²¹² This includes "product designs, methods of production, customer lists, sales manuals, and supplier inventories".²¹³

5.2.1.1.2. Prohibitions under law

In Japan, the law prohibits both the unauthorized use of "trade secrets" and their improper disclosure in violation of contractual obligations. Prevention of Unfair Competition Act, Article 2(1) describes misappropriation of "trade secrets" as "acts of wrongful acquisition." This encompasses the acquisition of trade secrets through illegal means such as theft, deceit, coercion, or other unlawful methods. This prohibition applies to the party that

²¹⁰ Ibid.

²¹¹ Art. 1(6), The Unfair Competition Prevention Act (Act No. 47 of 1993).

²¹² Mark F. Schultz and Douglas C. Lippoldt, "Approaches to Protection of Undisclosed Information (Trade Secrets): Background Paper", Paper No. 162, 2014 OECD Trade Policy, OECD Publishing, Paris, p.267.

²¹³ Zubair Ahmed, "Protection of Trade Secrets in India A Study of the Legal Framework". Available at: <https://shodhganga.inflibnet.ac.in/handle/10603/291861>

obtained the information improperly in the first place, to third parties who acquire the information knowing or having reason to know that it was obtained improperly, and to third parties who become aware or should have become aware that the information was obtained improperly.

Under Article 21(1), Prevention of Unfair Competition Act, misappropriation of “trade secrets” is punishable by criminal charges. The law encompasses both theft and violation of duty. The criminal “trade secrets” law in Japan was substantially strengthened by amendments made in 2005 and 2009.²¹⁴ The criminal law on “trade secrets” also applies extraterritorially, so offenses committed outside Japan involving “trade secrets” controlled in Japan are also covered.²¹⁵

5.2.1.1.3. Remedies

As stated in Article 3 Paragraph 1, Prevention of Unfair Competition Act, Japanese law offers numerous remedies for violations of “trade secrets”. “These remedies include preliminary and permanent injunctions, damages based on the defendant’s profits or a reasonable royalty, compensatory damages (including lost profits) and the destruction of infringing products or equipment or the closure of facilities where infringement takes place”.²¹⁶ “Individuals and corporations may be subject to criminal sanctions, including imprisonment and fines”.²¹⁷

5.2.1.1.4. Procedures followed

In Japan, there are limited pre-trial procedures for the preservation of evidence, with the court typically requiring the party in possession of the documents to preserve them rather than mandating access or submission. Discovery is also restricted, and justices are hesitant to issue orders for the production of documents unless their relevance to the proceeding is clear. Parties do not have an automatic right to conduct depositions, nor are they obligated to exchange witness lists or requests for admissions.²¹⁸

²¹⁴ Supra note 211.

²¹⁵ Art. 21(4), The Unfair Competition Prevention Act (Act No. 47 of 1993).

²¹⁶ Mark F. Schultz and Douglas C. Lippoldt, “Approaches to Protection of Undisclosed Information (Trade Secrets): Background Paper”, Paper No. 162, 2014 OECD Trade Policy, OECD Publishing, Paris, p.271.

²¹⁷ Art. 3 paragraph 1, The Unfair Competition Prevention Act (Act No. 47 of 1993).

²¹⁸ Zubair Ahmed, “Protection of Trade Secrets in India A Study of the Legal Framework”. Available at: <https://shodhganga.inflibnet.ac.in/handle/10603/291861>

During civil litigation, the Japanese legal system provides extensive protections for “trade secrets”. Parties are permitted to withhold testimony or documents containing “trade secrets”. “Confidentiality measures are in place for proceedings and trial records related to trade secrets, limiting access to the records and allowing for in-camera proceedings. Courts issue protective orders to safeguard trade secrets, and failure to adhere to these orders can lead to significant penalties. However, in contrast, there is no mechanism in place to prevent the disclosure of trade secrets during criminal proceedings, as the constitutional requirement for open trials overrides the need for secrecy in such cases”.²¹⁹ As a consequence, criminal proceedings involving “trade secrets” are uncommon, as businesses are hesitant to reveal their secrets.²²⁰

5.2.1.2. Republic of China

As the world’s most populous nation, the People’s Republic of China has successfully developed its resources and acquired global acceptance for its products

5.2.1.2.1. Subject matter and scope

The concept of “trade secrets” was first addressed in China in the “Civil Procedure Law” enacted in 1991, which briefly mentioned their protection in civil proceedings.²²¹ The “Law on Unfair Competition, 1993” is the primary source of regulations regarding “trade secrets”. Under this legislation, the unauthorized use of trade secrets can result in the imposition of administrative sanctions, and the owners of trade secrets may be eligible to receive compensatory financial restitution.²²² With the reintroduction of the “Criminal Law” in 1997, the theft of “trade secrets” became a felony punishable by imprisonment. While the “General Principles of Civil Law” do not specifically address “trade secrets”, provisions for their preservation and remedies for misappropriation can be found in a number of commercial and civil statutes, such as the Contract Law, Labour Law, Labour Contract Law, and Company Law.²²³

“The definition of trade secrets in Chinese law is similar to that of the majority of other countries. It defines technical and business information as:

²¹⁹ Supra note 216.

²²⁰ Ibid.

²²¹ Art 66 & 120, Civil Procedure Law, 1991.

²²² Unfair Competition Law, 1993.

²²³ Zubair Ahmed, “Protection of Trade Secrets in India A Study of the Legal Framework”. Available at: <https://shodhganga.inflibnet.ac.in/handle/10603/291861>

- that is not publicly known,
- has economic value and practical utility, and
- for which the owner has taken steps to maintain confidentiality”.²²⁴

“While the information remains confidential, it is recognized and safeguarded as a trade secret. However, the protection of the trade secret ceases to apply once the information becomes publicly available”.²²⁵

According to Chinese law, owners of “trade secrets” are obligated to maintain their confidentiality. The 2007 "Unfair Competition Judicial Interpretation" clarifies that the implementation of protective measures must be reasonable based on the specific circumstances. When evaluating the adequacy of these measures, courts consider various factors such as the nature of the information, the owner's intent for maintaining confidentiality, the effectiveness of the measures, the level of difficulty for others to legally acquire the information, and other relevant considerations. The interpretation also provides a non-exhaustive list of acceptable security measures, such as access restrictions, display of confidentiality notices, and engagement in non-disclosure agreements. Both China's civil and criminal laws encompass the same definition, scope, and subject matter for trade secrets.

5.2.1.2.2. Prohibitions under law

According to Chinese legislation, legal responsibility for the improper use of "trade secrets" is based on the principles of misappropriation and breach of duty. Misappropriation refers to the unlawful or unethical acquisition of trade secrets, followed by their disclosure, use, or facilitation of use by others. “The term improper means is not explicitly defined but generally encompasses any methods that are not considered independent research and development, reverse engineering, or obtaining trade secrets in good faith from another party”²²⁶. When a party breaches its duty to maintain the confidentiality of trade secrets by disclosing, using, or permitting their use, it constitutes a breach of duty. This obligation can arise from an explicit contract, employment agreement, or a business relationship.

5.2.1.2.3. Remedies

²²⁴ Article 10, Unfair Competition Law, 1993.

²²⁵ Ibid.

²²⁶ Mark F. Schultz and Douglas C. Lippoldt, “Approaches to Protection of Undisclosed Information (Trade Secrets): Background Paper”, Paper No. 162, 2014 OECD Trade Policy, OECD Publishing, Paris, p.274.

According to Chinese law, “the remedies for misappropriation of trade secrets include compensatory damages, which can encompass lost profits, the profits obtained by the defendant, and a reasonable royalty”.²²⁷ If the defendant has disclosed the “trade secrets”, he or she is also liable for consequential damages. Injunctions are technically available, but they are rarely granted in cases involving “trade secrets”, rendering them effectively unavailable. Also possible are administrative and criminal sanctions. Administrative authorities possess the authority to conduct investigations and impose penalties for the trade secrets misappropriation. “They can impose fines, require the return of materials containing trade secrets, and order the destruction of infringing products”.²²⁸ Theft of a trade secret that results in “serious” or “exceptionally serious” losses is punishable by the criminal justice system, with prison time and fines as appropriate punishments.

5.2.1.2.4. Procedures followed

Article 74, Chinese Civil Procedure Code permits parties to file for an ex parte order to preserve evidence.²²⁹ Usually initiated by the judge, these actions may include immediate document production, inspections, and document submission mandates. Chinese courts are increasingly issuing orders to preserve evidence in cases involving the unauthorized use of “trade secrets”. “Nonetheless, within civil law, there is no provision for pre-trial discovery, which poses a difficulty for plaintiffs as they are responsible for gathering and presenting their own evidence to meet the burden of proof”.²³⁰ Documentary evidence is given substantial weight by Chinese courts, which generally only take evidence in its original form. Evidence obtained illegally is inadmissible, and its admission can result in reversible error on appeal. Consequently, potential plaintiffs of the “trade secrets” misappropriation must have a comprehensive plan for amassing the necessary evidence.²³¹

Given the challenges associated with obtaining a preliminary injunction and the uncertainty surrounding the parties' relationship, it is strongly advised to protect trade secrets through the use of confidentiality agreements. “The Chinese Civil Procedure Code includes provisions to ensure the confidentiality of trade secrets during litigation, such as maintaining the secrecy of documents and conducting in-camera proceedings upon

²²⁷ Ibid.

²²⁸ Ibid.

²²⁹ Chinese Civil Procedure Code, 1991.

²³⁰ Ibid.

²³¹ Zubair Ahmed, “Protection of Trade Secrets in India A Study of the Legal Framework”. Available at: <https://shodhganga.inflibnet.ac.in/handle/10603/291861>

request”.²³² However, these protections do not extend to the defendant party, and in-camera hearings are restricted to excluding the general public while permitting participation from the parties involved in the litigation, including court clerks, judicial officers, defendants, plaintiffs, and their agents.

5.2.2. European Continent

Europe is the second-smallest continent in terms of land area and is comprised of roughly fifty nations. Russia is the largest nation in Europe by both area and population, comprising 40 percent of the continent (although it also extends into Asia). In contrast, Vatican City is the smallest nation. Europe ranks third in terms of population after Asia and Africa. The euro is the common currency in many European nations. In this context, we will discuss trade secret protection in France.

5.2.2.1. France

France is one of the world’s earliest countries, and its capital is Paris. It is famous for its fashion houses, museums of classical art such as the Louvre, and landmarks such as the Eiffel Tower. Particularly through the French Revolution, which inspired reformist and revolutionary movements for generations, the country has played a significant role in promoting reforms. Additionally renowned for its refined gastronomy and wines, France is a desirable location for trade and business opportunities.

5.2.2.1.1. Subject matter and scope

In France, three categories of “trade secrets” are protected: manufacturing secrets, confidential business information, and know-how. Protection focuses primarily on manufacturing secrets. “Employees who disclose a company’s manufacturing secrets without authorization are subject to criminal liability”^{233, 234} under the French Labour Code and Intellectual Property Code, although these statutes do not provide a precise definition of “manufacturing secrets”.²³⁵ “French courts have established that manufacturing secrets refer to valuable processes, devices, or inventions related to manufacturing that are

²³² Ibid.

²³³ Article L. 1227-1, Labour Code.

²³⁴ Article L. 621-1, Intellectual Property Code.

²³⁵ Zubair Ahmed, “Protection of Trade Secrets in India A Study of the Legal Framework”. Available at: <https://shodhganga.inflibnet.ac.in/handle/10603/291861>

intentionally kept confidential by the manufacturer”.²³⁶ It consists of manufacturing processes with practical or commercial value that the manufacturer conceals from rivals. Other topics related to manufacturing that can be considered manufacturing secrets include methods, inventions, advancements, and the use of particular devices or software. Nevertheless, protection as a manufacturing secret is contingent on the information remaining private, and manufacturers must take precautions to maintain secrecy and prevent accidental disclosure.²³⁷

In contrast, the case law in France does not offer a comprehensive definition of confidential business information. The commercial structure of a company, confidential contracts, internal policies, sales-related information, client lists, financial plans, and investments are examples of confidential business information. “When there is a contractual obligation to maintain confidentiality, civil law provisions, such as actions for breach of contract under the Civil Code, can be used to address trade secret infringement. Without a contractual obligation, trade secrets can be protected through tort law”.²³⁸

5.2.2.1.2. Prohibitions under law

An important advancement in French criminal law involves the application of “breach of trust” provisions to prosecute cases of trade secret misappropriation, encompassing manufacturing secrets, know-how, and confidential business information. To prevail in trade secret litigation under tort law, a party must prove damage and causation, but intent is not necessarily required.²³⁹ Typically, criminal acts such as breach of trust, theft, misappropriation, or fraud used to prosecute theft of “trade secrets” require proof of intent.

5.2.2.1.3. Remedies

Compensatory damages, lost profits, moral damages (such as injury to reputation), injunctive relief, legal fees, preliminary injunctive relief and destruction of infringing

²³⁶ Mark F. Schultz and Douglas C. Lippoldt, “Approaches to Protection of Undisclosed Information (Trade Secrets): Background Paper”, Paper No. 162, 2014 OECD Trade Policy, OECD Publishing, Paris, p.238.

²³⁷ Ibid.

²³⁸ Art. 1392, Civil Code.

²³⁹ Article L. 1227- 1, the Labour Code.

goods are available under French law for trade secret infringement. Criminal sanctions for infringers can include fines of up to 30,000 Euros and up to two years in prison.

5.2.2.1.4. Procedures followed

In accordance with Article 145, the “French Code of Civil Procedure”, French law allows for summary proceedings, which enable the preservation of evidence pertaining to alleged misconduct. These proceedings, overseen by a magistrate, are limited to the collection of documentary evidence. “Courts have the authority to order the production of documents and other essential evidence, even from third parties, to substantiate a party's claim”.²⁴⁰

Nevertheless, certain elements of French civil procedure may contradict the requirement to safeguard trade secrets during litigation. The involved parties have access to case documents, court proceedings are open to the public, and decisions are rendered publicly. While document access for the parties is generally unrestricted unless agreed otherwise or in exceptional circumstances, in-camera hearings are only granted when all parties make such a request. “Furthermore, there are no legal provisions enabling the court to restrict access to its judgment or create multiple versions to address confidentiality concerns while providing the complete decision to the parties and a redacted version to third parties”.²⁴¹

5.2.3. African Continent

Africa is the second largest and most populous continent in the world. It is bounded to the north by the Mediterranean Sea, to the northeast by the Suez Canal and the Red Sea along the Sinai Peninsula, to the southeast by the Indian Ocean, and to the west by the Atlantic Ocean. In this context, we will discuss South Africa’s “trade secrets” law.

5.2.3.1. South Africa

Numerous foreign laws have influenced South African law, which is predominantly based on Roman Dutch law. Moreover, South African law incorporates components of customary law, English common law, the 1996 Constitution and statutes. Unlike certain other countries, South Africa does not have dedicated statutes specifically addressing “trade secrets”. In the absence of specific statutes, violations of trade secrets in South Africa are addressed through the common law concept of unfair competition. This cause of action is

²⁴⁰ Articles 11 and 138 – 141, the French Code of Civil Procedure.

²⁴¹ Zubair Ahmed, “Protection of Trade Secrets in India A Study of the Legal Framework”. Available at: <https://shodhganga.inflibnet.ac.in/handle/10603/291861>

rooted in the Roman law principle of Lex Aquilia, which seeks to compensate parties for the "unlawful infliction of harm".²⁴²

5.2.3.1.1. Subject matter and scope

Numerous court cases, despite the lack of a statutory definition of "trade secrets" in South African law, have helped define its understanding. Case law has identified the following components to define "trade secrets" as:

- i. "The information must be pertinent to business and industry.
- ii. It must be restricted to a small number of individuals or a small group.
- iii. The information must be of economic value to the entity requesting confidentiality".²⁴³

The South African definition of "trade secrets" is consistent with international standards and can be summed up as follows: "To qualify as a trade secret, the information in question must possess commercial significance, be kept confidential, be subject to reasonable measures taken by the owner to safeguard its confidentiality and derive value from its secrecy".²⁴⁴ The law in South Africa protects both confidential business and technical information.

South African courts have recognized and protected various forms of confidential business information. These examples include customer lists, telegraphic codes, names of fruit farmers, manufacturer information, information compiled by traders, client lists with contact details, tender prices, accounting and administrative system computer programs, trade connections, specialized sales techniques, information relevant to securing consulting contracts, evaluation results, telecommunications codes, and telecommunications networks.²⁴⁵

To grasp the nature and extent of trade secrets law in South Africa, "it is important to delve into its historical roots as a cause of action for unfair competition rooted in the ancient Roman law called Lex Aquilia".²⁴⁶ The "Lex Aquilia" establishes liability for intentional

²⁴² Ibid.

²⁴³ Advtech Resourcing (Pty) Ltd v. Kuhn (2007) 4 ALL SA 1386

²⁴⁴ Ibid.

²⁴⁵ Mukesh Shukla, "Non Regulation Of Protection Of Trade Secrets In The Indian Corporate Sector A Comparative Analysis With USA Through The Lens Of Global IPR Regime", <https://shodhganga.inflibnet.ac.in/handle/10603/362381>

²⁴⁶ F. Schultz and Douglas C. Lippoldt, "Approaches to Protection of Undisclosed Information (Trade Secrets): Background Paper", Paper No. 162, 2014 OECD Trade Policy, OECD Publishing, Paris, p.298.

or negligent property damage. What sets this premise apart from English common law is its broader and more flexible approach to trade secret liability. The “Lex Aquilia” holds individuals accountable for actions considered morally wrong according to the community's legal convictions, known as “boni mores”.

Due to its foundation in the “Lex Aquilia”, South Africa’s trade secret protection includes both misappropriation and breach of duty. Courts place an obligation on third parties who acquire information due to a breach of duty by another party, provided that the third party is aware of the breach. The influential case *Dun and Bradstreet (Pty) Ltd. vs. SA Merchants Combined Credit Bureau (Cape) (Pty)*²⁴⁷ illustrates this point. In this instance, two credit bureaus in competition were implicated, and the defendant unlawfully acquired and resold the plaintiff's “confidential information”, fully aware of its confidential nature. The defendant's actions were intended to gain advantage in their competitive business, resulting in harm to the plaintiff. The court concluded that the third party had committed a wrongful act against the plaintiff and should be held accountable for damages. “In this case, the defendant did not violate a duty owed to the plaintiff; instead, their liability was based on a wrongdoing that was assessed according to the principles of fairness and honesty in competition”.²⁴⁸

5.2.3.1.2. Prohibitions under law

In South Africa, “trade secrets” liability is established through either a breach of duty or misappropriation. “Breach of duty can result from either an explicit agreement, such as a commercial or employment contract, or an implied duty based on fiduciary responsibilities deriving from employment or certain commercial relationships”.²⁴⁹

The central question in cases concerning misappropriation is if the defendant committed an illegal action. Acts that contravene the “boni mores”, which are the community’s legal convictions, are also encompassed by the “Lex Aquilia”. Fair competition is permissible, but obtaining information through means that contravene commercial morality is likely to violate the “boni mores” and result in liability.

5.2.3.1.3. Remedies

²⁴⁷ (1968)1 SA 209.

²⁴⁸ Supra note 242.

²⁴⁹ Ibid.

In cases of “trade secrets” misappropriation, South African courts offer a variety of remedies. These available remedies encompass both temporary and permanent injunctive relief, which may include ex parte injunctions and injunctions aimed at preventing the defendant from gaining an unfair advantage. Additionally, courts have the authority to issue delivery-up orders, enabling them to seize and destroy infringing materials. Monetary relief is also an option, which can involve the recovery of the defendant's profits or the compensatory damages.

It’s important to observe that South Africa has no criminal statutes that apply specifically to “trade secrets,” meaning there are no criminal law remedies for such cases.

5.2.3.1.4. Procedures followed

In terms of procedures, South Africa permits the “Anton Piller Order”, which allows plaintiffs to seek court intervention to preserve evidence. This order, if granted, permits the plaintiff to search the premises of the defendant and seize relevant documents. The court has the discretion to issue an “Anton Piller Order” if the necessity of preserving evidence is demonstrated.²⁵⁰

“In litigation concerning trade secrets, the scope of pre-trial discovery is typically restricted to documentary evidence, overseen by the court”.²⁵¹ Throughout the litigation proceedings, specific measures are implemented to protect the confidentiality of the plaintiff's sensitive information.²⁵² While South African courts generally permit unrestricted inspection and duplication of relevant documents, “they have the discretion to impose restrictions if there is a risk of unlawful disclosure of confidential information due to pending litigation”.²⁵³ The principle is to ensure that defendants have access to evidence, but with adequate protections.

5.2.4. North American Continent

North America is a continent located in the Northern Hemisphere and Western Hemisphere. Located north of the expansive American continents, this landmass is situated in the

²⁵⁰ Mukesh Shukla, “Non Regulation Of Protection Of Trade Secrets In The Indian Corporate Sector A Comparative Analysis With USA Through The Lens Of Global IPR Regime”, <https://shodhganga.inflibnet.ac.in/handle/10603/362381>

²⁵¹ Supra note 242.

²⁵² Section 5.2, International Civil Procedure, South Africa, 2003

²⁵³ Mark F. Schultz and Douglas C. Lippoldt, “Approaches to Protection of Undisclosed Information (Trade Secrets): Background Paper”, Paper No. 162, 2014 OECD Trade Policy, OECD Publishing, Paris, p.300.

vicinity of the Atlantic and Pacific Oceans to the east and west, while being bounded by the Arctic Ocean to the north. In addition, it shares its southeastern border with South America and is surrounded by the Caribbean Sea. North America is approximately 24,709,000 square kilometers in size. Canada and the United States are the continent's two largest countries in terms of land area. This section will focus specifically on the "trade secrets" law in the United States.

5.2.4.1. United States of America

In US, the "Uniform Trade Secret Act" (UTSA) prohibits the commercial use of "trade secrets" without authorization. In addition, the "Economic Espionage Act of 1996" (EEA) provides the Attorney General with broad authority to criminally prosecute individuals for misappropriating "trade secrets." The EEA contains provisions penalizing both the provider and the recipient of illicit "trade secrets." The United States was the first nation to enact a law addressing "trade secrets," known as the "Uniform Trade Secret Act" (UTSA).²⁵⁴ Numerous European and developed nations have modeled their own "trade secrets" laws after the UTSA. In May 2016, the United States also enacted new legislation known as the "United States Defend Trade Secrets Act" (DTSA), which established a federal civil cause of action for "trade secrets" misappropriation. Before the DTSA was enacted, civil cases involving "trade secrets" were governed by state laws founded on versions of the UTSA.

5.2.4.1.1. Subject matter and scope

With the recent inclusion of the federal statute DTSA, the scope and subject matter of civil "trade secrets" law in the United States are primarily governed by state law. Prior to 1939, the law governing "trade secrets" in the United States was governed solely by common law. The American Law Institute (ALI) published the "Restatement of the Law" (Torts), also known as the "First Restatement," in 1939. This was the first significant attempt to create American "trade secrets" law. The National Conference on Uniform State Laws authorized the "Uniform Trade Secrets Act" (UTSA) in 1979, which many states have used to codify their own "trade secrets" laws. "The Restatement (Third) of Unfair Competition" aka the "Third Restatement," was published by the American Law Institute (ALI) in 1993 and includes sections addressing actions involving "trade secrets." The principles of "trade

²⁵⁴ *Infra* note 244.

secrets” law described in Section 39 of the Third Restatement apply to both actions under the “Uniform Trade Secrets Act” and actions under common law, unless otherwise specified.²⁵⁵

In US, criminal law pertaining to “trade secrets” is governed by both federal and state statutes. While the federal “Economic Espionage Act, 1996” plays a significant role, it is worth noting that over 25 states have their own criminal statutes related to “trade secrets”, which are not preempted by the federal law. These state statutes aim to criminalize the intentional theft of “trade secrets”. It is important to exercise caution when generalizing the law governing “trade secrets” in the United States due to the widespread adoption of the UTSA, as well as the presence of federal laws such as the EEA and the DTSA. The definitions of "trade secrets" found in state statutes typically align with the UTSA. In US, the legal definition of “trade secrets” encompasses both technical information and confidential business information. According to the UTSA, "trade secrets" are defined as “information such as formulas, patterns, programs, methods, or techniques that hold economic value by virtue of not being widely known or easily discoverable by others who could derive economic benefit from their disclosure or use. Additionally, these trade secrets must be subject to reasonable efforts to maintain their secrecy”.²⁵⁶ The EEA, a federal law concerning criminal offenses, includes a definition of "trade secrets" that closely mirrors the definition found in the UTSA. In fact, a significant portion of the definition is identical between the two.²⁵⁷ The federal definition of "trade secrets" provides an extensive list of examples and underscores the importance of taking reasonable steps to preserve secrecy. It also emphasizes that the information should possess independent economic value by not being commonly known or easily accessible to the public, regardless of its format or means of storage.

5.2.4.1.2. Prohibitions under law

When a party intentionally misappropriates “trade secrets” in the United States, they are liable for misappropriation. However, as a result of numerous judicial decisions, it has become clear that a wide variety of actions constitute misappropriation. The focus of the

²⁵⁵ Mukesh Shukla, “Non Regulation Of Protection Of Trade Secrets In The Indian Corporate Sector A Comparative Analysis With USA Through The Lens Of Global IPR Regime”, <https://shodhganga.inflibnet.ac.in/handle/10603/362381>

²⁵⁶ Section 1, Uniform Trade Secrets Act, 1979.

²⁵⁷ 18 USC § 1839(3).

UTSA is primarily on determining if a trade secret was obtained through improper methods. The UTSA provides the following actions as remedies for misappropriation of trade secrets:

- i. “Acquiring the trade secrets of a third party while knowing or having reason to believe they were acquired improperly.
- ii. Disclosure or use of a third party’s trade secrets without their explicit or implied consent.
- iii. Obtaining trade secrets from a person who obtained them through unethical means.
- iv. Obtaining trade secrets under conditions that impose a duty of secrecy or restrict their use.”²⁵⁸

Obtaining “trade secrets” from a person who owed a duty to the party seeking relief to keep them private or restrict their use.

Understanding the definition of “improper means”, which is broad but subject to certain restrictions, is crucial. The UTSA includes theft, bribery, misrepresentation, breach of duty to maintain confidentiality and espionage by electronic or other means as improper means. Inappropriate means include not only illegal and tortious acts, but also go beyond them.

In *E.I. DuPont deNemours & Co. vs. Christopher*²⁵⁹, the court determined that the photographers' conduct in capturing aerial photographs of a chemical plant under construction was deemed inappropriate. The court predicated its decision on the violation of business ethics and the unanticipated attempt to circumvent reasonable efforts to maintain confidentiality.

In trade secret law, reasonable endeavors to maintain secrecy are essential. The owner of “trade secrets” must take precautions commensurate with the value of the secrets, but is not required to protect against unanticipated or undetectable methods of espionage. Knowledge of “trade secrets” that is subject to a confidentiality obligation may be shared with employees or licensees.²⁶⁰

²⁵⁸ Mukesh Shukla, “Non Regulation Of Protection Of Trade Secrets In The Indian Corporate Sector A Comparative Analysis With USA Through The Lens Of Global IPR Regime”, <https://shodhganga.inflibnet.ac.in/handle/10603/362381>

²⁵⁹ (1970) 5 th Cir. 431 F.2d 1012.

²⁶⁰ Supra note 247.

The evaluation of the reasonableness of efforts to protect “trade secrets” takes into account the value of the secrets, wherein the costs of implementing security measures are balanced against the level of additional security they provide. More valuable secrets necessitate more stringent security measures, whereas low-value secrets may not necessitate substantial protection costs.

The “Economic Espionage Act” and the “Uniform Trade Secrets Act” have identical definitions of “trade secrets”, resulting in a comparable subject matter and scope for civil and criminal protection. Criminal law is more effective in combating economic espionage, particularly when foreign companies commit misappropriation.

Under the EEA, the act of stealing "trade secrets" is defined as the deliberate misappropriation of confidential information pertaining to products or services involved in interstate or foreign trade, with the intention of benefiting someone other than the rightful owner. The act encompasses a variety of offenses, including theft, unauthorized appropriation, duplicating, transmitting, receiving, or conspiracy to commit any theft-related offense involving “trade secrets”.²⁶¹

5.2.4.1.3. Remedies

The “Uniform Trade Secrets Act” (UTSA) and “the Defend Trade Secrets Act” (DTSA) provide a comprehensive array of remedies commonly granted by U.S. courts.

A plaintiff in civil cases may seek both preliminary and permanent injunctions. “These injunctions may remain in effect until the “trade secrets” are made public, and they may be extended for a reasonable amount of time to extinguish any commercial advantage resulting from the unauthorized use”.²⁶² In rare instances where the defendant received the information without knowledge of the trade secret violation, royalty may only be required to be paid by them.

Damages are another type of available remedy for the litigant. Damages may include both the actual losses sustained by the plaintiff and the defendant’s unjust enrichment.²⁶³ Alternately, damages can be determined using a “reasonable royalty”. In cases of intentional infringement, “exemplary or punitive damages of up to twice the amount of

²⁶¹ Section 1832, the Economic Espionage Act, 1996.

²⁶² Section 2, Uniform Trade Secrets Act, 1979.

²⁶³ Section 3, Uniform Trade Secrets Act, 1979.

compensatory damages may be awarded to the plaintiff”.²⁶⁴ In exceptional circumstances, if the opposing party acted in poor faith, the court may award reasonable attorney’s fees to the prevailing party. Each party pays its own legal fees in US.²⁶⁵

The Economic Espionage Act of 1996 imposes significant fines and imprisonment as penalties under criminal law. The penalties vary depending on whether the larceny of a trade secret was committed for the benefit of a foreign government or a competitor. “Individuals can receive up to a 10-year prison sentence or an indeterminate fine for the theft of ordinary trade secrets between companies, while organizations can be fined up to \$5 million”.²⁶⁶

5.2.4.1.4. Procedures followed

“Both civil and criminal procedures are designed to safeguard “trade secrets”. Although there is no complete entitlement to prevent the disclosure of relevant evidence in civil cases, a court’s protective order commonly serves as the foundation for penalizing the improper use or disclosure of “trade secrets”. Parties can seek ex parte seizure and impoundment orders to preserve evidence, including in cases involving “trade secrets”, but such orders are not automatically granted. In criminal proceedings, ex parte seizure and search orders are more common and require probable cause and a judge’s warrant”.²⁶⁷

The law of the United States provides extensive discovery procedures for both criminal and civil proceedings. The court has the authority to compel the opposing party to provide requested documents, respond written questions, participate in depositions, and engage in other evidence-gathering procedures. Parties may also request non-public proceedings to limit the disclosure and discovery of “trade secrets”, a request that courts frequently grant under protective orders such as Federal Rule of Civil Procedure.²⁶⁸

²⁶⁴ Ibid.

²⁶⁵ Section 4, Uniform Trade Secrets Act, 1979.

²⁶⁶ 18 U.S.C. § 1832(a) and (b).

²⁶⁷ Zubair Ahmed, “Protection of Trade Secrets in India A Study of the Legal Framework”. Available at: <https://shodhganga.inflibnet.ac.in/handle/10603/291861>

²⁶⁸ Rule 26(c), Federal Rule of Civil Procedure.

In both civil and criminal proceedings involving “trade secrets”, the pleading must be specific. Plaintiffs must plainly state the basis for their cause of action and frequently provide a list of the “trade secrets” at issue at the outset of a lawsuit. Courts protect “trade secrets” by permitting the submission of such inventories and other sensitive portions of the complaint under seal and with a protective order. Both the indictment and the entire case file may be sealed in criminal cases, preventing public disclosure and accessibility.²⁶⁹

5.2.5. South American Continent

South America is situated in the Western Hemisphere, with a small portion extending into the Northern Hemisphere. “It is surrounded by the Pacific Ocean to the north and west, the Atlantic Ocean to the east, and shares borders with North America and the Caribbean Sea to the northwest. South America consists of twelve countries: Argentina, Brazil, Bolivia, Cambodia, Chile, Ecuador, Guyana, Paraguay, Peru, Suriname, Uruguay, and Venezuela.”²⁷⁰ It ranks as the fourth largest continent in terms of area and the fifth most populous continent.

5.2.5.1. Brazil

This discussion concentrates on Brazil’s laws regarding “trade secrets”. Although Brazilian law does not define “trade secrets”, it does recognize and protect them in accordance with international standards. According to state laws, “trade secrets” include both commercial and technical information, and both criminal and civil remedies are available for their protection. The law addresses both theft and violations of duty. However, it is noted that Brazil’s criminal penalties are relatively light. A specialist has observed that the violation of “trade secrets” is considered a “crime with a lower offensive potential”. The law prescribes lenient punishments (such as “detention for three to twelve months” or a fine), and their ineffectiveness, coupled with difficulties in recouping damages, impedes its enforcement.

5.2.5.1.1. Subject matter and scope

²⁶⁹ Mukesh Shukla, “Non Regulation Of Protection Of Trade Secrets In The Indian Corporate Sector A Comparative Analysis With USA Through The Lens Of Global IPR Regime”,

<https://shodhganga.inflibnet.ac.in/handle/10603/362381>

²⁷⁰ Ibid.

In terms of subject matter and scope, “Brazilian law lacks a precise definition of trade secrets”.²⁷¹ However, statutory provisions provide a tacit understanding of the concept. The Industrial Property Law describes unjust competition offenses. “Unauthorized disclosure, exploitation, or use of confidential knowledge, information, or data that could be used in industry, commerce, or services”²⁷² constitutes a violation of these provisions. This applies to non-public or non-obvious information obtained through a contractual or employment relationship, even after the contract has been terminated. The definition provided in these statutory sections suggests that “trade secrets” refer to information of commercial value that is kept covert.²⁷³

As mentioned earlier, the criminal offenses outlined in the Industrial Property Law of 1996 also form the basis for the definition of "trade secrets" in Brazilian criminal law. It is important to highlight that “civil damages can be pursued in a connected civil lawsuit, not only based on the general principle that a crime can result in a civil liability, but also due to a specific provision in the Industrial Property Law, 1996”.²⁷⁴ This provision expressly contemplates the possibility that a victim of a criminal act may sue for civil damages.

The subject matter protected in Brazil by “trade secrets” appears to be expansive. As stated previously, the Industrial Property Act gives protection to “confidential knowledge, information, and data that could be used in industry, commerce, or services”. This terminology includes confidential technical information, business information and know-how.

5.2.5.1.2. Prohibitions under law

According to Brazilian law, “both misappropriation and improper use or disclosure of trade secrets is regarded as infractions of duty”.²⁷⁵ “Article 195, Section XII prohibits the unauthorized disclosure, use, or exploitation of trade secrets when the information was obtained through illegal or fraudulent means. Article 195, Section XI prohibits the

²⁷¹ Ibid.

²⁷² Article 195, Sections XI and XII, the Industrial Property Law, 1996.

²⁷³ Mukesh Shukla, “Non Regulation Of Protection Of Trade Secrets In The Indian Corporate Sector A Comparative Analysis With USA Through The Lens Of Global IPR Regime”, <https://shodhganga.inflibnet.ac.in/handle/10603/362381>

²⁷⁴ Article 206, the Industrial Property Law, 1996; supra note 242.

²⁷⁵ Ibid.

unauthorized disclosure, use, or exploitation of trade secrets obtained through a contractual or employment relationship, even after the contract has expired”.²⁷⁶

In Brazil, “the concept of misappropriation is not precisely defined, but it incorporates illegal means and fraud, which would presumably include crimes, torts, and other clearly unlawful acts. It is unclear if opportunistic varieties of industrial espionage that are neither torts nor crimes are covered. Nevertheless, based on the opinions of experts, industrial and commercial espionage are covered by Brazilian law”.²⁷⁷

Brazilian law expressly defines breach of duty as “a contractual or employment relationship that imposes a duty not to disclose, use, or leverage a trade secret. Whether or not an explicit contract exists, both employees and fiduciaries have an implicit obligation not to disclose”.²⁷⁸ If a third party inappropriately uses or discloses a trade secret, they can be held liable. However, third parties who are blameless are not liable.

5.2.5.1.3. Remedies

Under Brazilian law, “remedies for violations of “trade secrets” are extensive and include preliminary and permanent injunctions, compensatory damages (including lost profits), damages based on the defendant’s profits or the license fee the defendant would have paid to the plaintiff, seizure and eventual destruction of infringing goods and related articles and documents, and ex parte injunctions in the form of temporary restraining orders”.²⁷⁹ In criminal proceedings, violation of “trade secrets” is regarded as a crime with a diminished offensive potential, resulting in relatively light punishment. Only individuals are subject to criminal penalties, which range from three months to one year in prison, and the amount of fines for violations of “trade secrets” is unspecified.²⁸⁰

5.2.5.1.4. Procedures followed

In Brazil, both criminal and civil law provide for procedural actions such as preliminary search and seizure to acquire evidence. Such orders are granted if the plaintiff can prove

²⁷⁶ The Industrial Property Law, 1996.

²⁷⁷ Zubair Ahmed, “Protection of Trade Secrets in India A Study of the Legal Framework”. Available at: <https://shodhganga.inflibnet.ac.in/handle/10603/291861>

²⁷⁸ Mark F. Schultz and Douglas C. Lippoldt, “Approaches to Protection of Undisclosed Information (Trade Secrets): Background Paper”, Paper No. 162, 2014 OECD Trade Policy, OECD Publishing, Paris, p. 215.

²⁷⁹ Ibid.

²⁸⁰ Article 195, Sections XI and XII, the Industrial Property Law, 1996.

that irreparable harm would result in their absence. In Brazil, “pre-trial discovery is limited and concentrates primarily on documentary evidence under the supervision of the judge. There is no such thing as party-initiated pre-trial discovery, and parties cannot compel one another to produce evidence without court intervention”²⁸¹. The law gives litigants the right to have “trade secrets” examined in closed-door proceedings, and they “may also request that the court provide special security for the preservation of physical evidence”.²⁸²

5.2.6. Australian Continent

Australia has a total geographical area of 8,560,000 square kilometers, making it the smallest and lowest-lying human-inhabited continent on Earth. The continental shelf, which includes the Bass Strait and the Shelf, encompasses approximately 2.5 million square kilometers and connects the islands of Australia; half of it is shallower than 50 meters. Australia is referred to informally as an island continent encircled by oceans because it consists primarily of a single landmass and comprises the majority of the continent. The discussion of “trade secrets” law on this continent concentrates on Australia and New Zealand, two prominent nations within it. Australia employs a similar common law legal system to England.

5.2.6.1. Australia

All commercially valuable “confidential information” is protected as “trade secrets” under Australian law. There is no distinction between non-technical business information, such as customer listings, and technical business information, such as manufacturing diagrams or formulas.

5.2.6.1.1. Subject matter and scope

In Australian law, the definition of “trade secrets” is influenced by prominent English cases, with *Coco vs. A.N. Clark (Engineers) Ltd.*²⁸³ being a significant case. According to this case, three elements are typically required to establish a breach of confidence:

- i. “the information must possess the necessary quality of confidence,

²⁸¹ Supra note 273.

²⁸² Mukesh Shukla, “Non Regulation Of Protection Of Trade Secrets In The Indian Corporate Sector A Comparative Analysis With USA Through The Lens Of Global IPR Regime”, <https://shodhganga.inflibnet.ac.in/handle/10603/362381>

²⁸³ (1969) RPC 41.

- ii. it must have been disclosed under circumstances implying an obligation of confidence, and
- iii. the information must have been improperly used to the detriment of the party who disclosed it”.²⁸⁴

The term “confidential information” refers to non-public facts and knowledge. The principal categories of “confidential information” recognized by Australian courts are “know-how” and “trade secrets”. While these terms lack established definitions in Australian law, Australian courts have provided commentary on them. “Trade secrets” refer to more specialized, comprehensive, and “confidential information” than “know-how” does. In broader terms, a trade secret is something that an honest and intelligent individual would recognize as the property of their former employer and not as their own to use at will.²⁸⁵

The law in Australia provides broad protection for “trade secrets” and numerous types of business information. Case law examples include data on therapeutic substances, information on contraceptive devices, customer history cards, details of premises fit-out, test reports, informant identities, information on agents and manufacturers, plant cuttings, equipment designs, and specifications.²⁸⁶ The information should only be shared with parties obligated to maintain its confidentiality. “If the information enters the public domain, especially due to the plaintiff’s actions, it typically loses its confidential status. Courts evaluate the measures taken by the plaintiff to secure the information, as well as the plaintiff’s level of knowledge within and outside the organization”.²⁸⁷

Citing *Moorgate Tobacco Co. Ltd. vs. Philip Morris Ltd.*²⁸⁸, Australian courts also emphasize the requirement that the information be communicated under conditions creating a duty of confidentiality. “The concept of an obligation of conscience deriving from the circumstances under which the information was communicated or obtained is the basis for the protection of trade secrets. There are instances in which crimes committed in the course of appropriating “trade secrets” are punished, despite the fact that Australian criminal law

²⁸⁴ Ibid.

²⁸⁵ *GlaxoSmithKline Australia Pvt. Ltd. V. Ritchie* (2008) 77 IPR 306

²⁸⁶ *Australian Broadcasting Corporation v. Lenah Game Meats Pty Ltd* (2001) 54 IPR 161. (2001) 54 IPR 161.

²⁸⁷ *Wright v. Gasweld Pvt. Ltd.* (1991) 22 NSWLR 317

²⁸⁸ (No. 2) (1984) 156 CLR 414 at 438.

does not explicitly protect trade secrets”.²⁸⁹ However, criminal law contains no specific sanctions for the protection of “trade secrets”.

5.2.6.1.2. Prohibitions under law

A crime is committed when information is disclosed in violation of a legal duty, independent of the intent of the party using or disclosing the information or the harm caused to the claimant. Even blameless third parties can be held accountable. In *Wheatley vs. Bell*²⁹⁰, “the New South Wales Supreme Court rejected the applicability of the concept of a bona fide purchaser for value and issued an injunction against the defendant’s innocent franchisees”²⁹¹. In this case, the first defendant disclosed a business concept obtained from the plaintiff in Perth and sold it to three buyers (other defendants) in Sydney in violation of a confidentiality agreement. Chief Justice Helsham determined that the first defendant either had knowledge or should have had awareness that the information was shared in a confidential manner. The other defendants were oblivious that the information had been shared in confidence with the first defendant.²⁹²

The attorneys for the second, third, and fourth defendants argued that their clients were comparable to bona fide purchasers for value without notice and should therefore be permitted to use the information they received in good faith. However, Chief Justice Helsham rejected this argument, stating that the bona fide purchaser for value defense is an equitable defense intended to resolve property rights priorities, and there are no property rights associated with the form of equity involved in this case.

The issue of covertly obtained information arose in the case of *Franklin vs. Giddins*²⁹³, in which the defendant stole “nectarine budwoods” with unknown genetic makeup from the plaintiff’s orchard. Liability was established on the grounds that the thief’s actions in using the stolen information to compete with the plaintiff were comparable to those of a “traitorous employee.” Justice Dunn determined that the thief’s conduct was unconscionable because he intended to and did use his own illegal actions to improve his

²⁸⁹ Mark F. Schultz and Douglas C. Lippoldt, “Approaches to Protection of Undisclosed Information (Trade Secrets): Background Paper”, Paper No. 162, 2014 OECD Trade Policy, OECD Publishing, Paris, p. 208.

²⁹⁰ (1982) 2 NSWLR 544.

²⁹¹ Mark F. Schultz and Douglas C. Lippoldt, “Approaches to Protection of Undisclosed Information (Trade Secrets): Background Paper”, Paper No. 162, 2014 OECD Trade Policy, OECD Publishing, Paris, p.210.

²⁹² Zubair Ahmed, “Protection of Trade Secrets in India A Study of the Legal Framework”. Available at: <https://shodhganga.inflibnet.ac.in/handle/10603/291861>

²⁹³ (1978) Qd R 72.

competitive position and obtain an advantage over the owner, surpassing the position of a person who engaged in consensual transactions with the owner.

Due to the lack of statutes specifically addressing the issue, culpability is irrelevant in criminal law matters.

5.2.6.1.3. Remedies

The courts of Australia offer the following remedies:

- i. “Temporary (interlocutory) or permanent injunctive relief.
- ii. Through a delivery-up order, infringing materials are seized and destroyed.
- iii. Monetary relief, including compensatory damages and profit recovery from the defendant. Although exemplary damages exist in theory, they have not yet been applied in practice.”²⁹⁴

Injunctive relief is discretionary. If the information has been made public by the defendant’s actions, it may no longer be considered confidential, which would preclude an injunction. Nevertheless, monetary remedies may be pursued. “In cases where information has become public, a defendant may still be enjoined for a limited time to prevent them from obtaining an unfair advantage”.²⁹⁵

5.2.6.1.4. Procedures followed

In Australia, “there is a prospective ex parte procedure referred to as the “Anton Piller Order” that permits plaintiffs to preserve evidence. This procedure permits the plaintiff to petition the court without notifying the prospective defendant. If granted, the plaintiff may search the premises of the defendant and seize pertinent documents”.²⁹⁶The court has discretion to issue an “Anton Piller Order” upon a showing of the need to preserve evidence.

In some instances, however, “Anton Piller Orders” have been the subject of controversy. “In response to criticism, the Chief Justice of the Australian Federal Court issued Federal Court Practice Note No. 24—Search Orders aka Anton Piller Orders. This practice note governs the issuance of “Anton Piller Orders” to ensure that they do not contravene the

²⁹⁴ Zubair Ahmed, “Protection of Trade Secrets in India A Study of the Legal Framework”. Available at: <https://shodhganga.inflibnet.ac.in/handle/10603/291861>

²⁹⁵ Supra note. 286.

²⁹⁶ Ibid.

rights of the parties. The orders should not be granted as a matter of course, but rather must be completely justified by an extremely strong prima facie case and the likelihood of evidence destruction or concealment”.²⁹⁷

It is possible to conduct pre-trial discovery, which permits entry into the defendant’s home or place of employment predominantly for the collection of documentary evidence. In addition, there are procedural safeguards in place to protect the confidentiality of the plaintiff’s “confidential information” during “trade secrets” litigation.²⁹⁸

5.2.6.2. New Zealand

Protection of “trade secrets” in New Zealand is based on common law principles derived from the United Kingdom. “The country provides both civil and criminal protection for trade secrets. The most explicit and exhaustive legal protection for trade secrets can be found in criminal law, specifically the “Crimes Act 1961”. Several observers believe that New Zealand’s civil commerce secrecy law is somewhat deficient. As a common law jurisdiction, New Zealand’s courts look to the decisions of other nations for guidance, particularly those of England, Australia, and Canada”.²⁹⁹

5.2.6.2.1. Subject matter and scope

The scope of trade secrecy protection in New Zealand encompasses all commercially valuable “confidential information”, including both technical and non-technical business information (such as customer databases). “The definition of “trade secrets” in New Zealand law is derived from leading English case law, specifically *Coco vs. A.N. Clark (Engineers) Ltd.*³⁰⁰, in which Megarry, J., outlined the three elements necessary for a successful violation of confidence claim:

- i. The information itself must possess the necessary trustworthiness.
- ii. The information must have been disclosed under conditions that impose a duty of confidentiality.

²⁹⁷ Md. Zafar Mahfooz Nomani and Faizanur Rahman, “Intellection of Trade Secret and Innovation Laws in India”, vol. 16 2011, JIPR, Aligarh, U.P. Available at:

<https://nopr.niscpr.res.in/bitstream/123456789/12449/1/IJPR%2016%284%29%20341-350.pdf>

²⁹⁸ Ibid.

²⁹⁹ Mark F. Schultz and Douglas C. Lippoldt, “Approaches to Protection of Undisclosed Information (Trade Secrets): Background Paper”, Paper No. 162, 2014 OECD Trade Policy, OECD Publishing, Paris, p.281.

³⁰⁰ (1969) RPC 41.

- iii. This information must have been used improperly to the detriment of the party who disclosed it”.³⁰¹

In New Zealand, a trade secret is information that is kept covert, disclosed in confidence, and used or disclosed without the owner’s consent and to the owner’s detriment.

New Zealand amended its criminal law in 2003 by instituting Section 230, the “Crimes Act 1961”, which addresses “trade secrets” specifically. It defines a trade secret as “information that is or could be used industrially or commercially, is not generally available for industrial or commercial use, has economic value or potential economic value to its possessor, and is subject to reasonable efforts to maintain its secrecy”.³⁰² Section 230(1) defines the crime of stealing, duplicating, or obtaining “trade secrets” with the intent to gain a financial advantage or cause damage to another party.

The subject matter of “trade secrets” is extensively interpreted by New Zealand courts to include both confidential business information and technical information. This includes manufacturing and product technology, confidential business information such as customer and supplier lists, subscriber-provided economic forecasts, manufacturing processes, machine workings, business forms, and various formulas or confidential plans.

“As indicated by the Court of Appeal in the influential privacy case *Hosking vs. Runtig*³⁰³, New Zealand’s approach to “trade secrets” is likely to be more traditional. The existence of a relationship imposing confidentiality obligations is emphasized, and courts may focus on a breach of duty as opposed to misappropriation through surveillance or trespass. However, courts may impose a duty on a third party who receives information due to a transgression of duty by another party”.³⁰⁴

5.2.6.2.2. Prohibitions under law

In New Zealand civil law, the cause of action for “trade secrets” is not based on negligence, such as negligent or intentional disclosure. Instead, the offense rests in the use or disclosure of the information in violation of a duty, regardless of whether the offender intended to

³⁰¹ Supra note 294.

³⁰² Section 230(2), the Crimes Act 1961.

³⁰³ (2005) 1 NZLR 1 (CA).

³⁰⁴ Mark F. Schultz and Douglas C. Lippoldt, “Approaches to Protection of Undisclosed Information (Trade Secrets): Background Paper”, Paper No. 162, 2014 OECD Trade Policy, OECD Publishing, Paris, p. 288.

breach the duty or cause harm to the claimant. Innocent third parties may be exempt from liability, but it is unclear what level of knowledge is necessary for exemption.

5.2.6.2.3. Remedies

According to New Zealand law, these remedies are available:

- i. “Both temporary (interlocutory) and permanent injunctive relief.
- ii. An order for the seizure and destruction of infringing materials”.³⁰⁵

“Injunctive relief is discretionary. If the defendant’s actions make the information public, it may no longer be considered confidential, preventing an injunction from being granted. Nonetheless, monetary remedies may be pursued. Under the springboard doctrine, a defendant may be restrained for a limited period of time to negate any improper advantage garnered from accessing public information”.³⁰⁶ Criminal law provides for a maximum sentence of five years in incarceration.

5.2.6.2.4. Procedures followed

In New Zealand, “a plaintiff who wishes to preserve evidence may employ an ex parte procedure known as an “Anton Piller Order.” This permits the plaintiff to file directly to the court without informing the potential defendant. If granted, the plaintiff may search the premises of the defendant and seize pertinent documents. The order’s scope must be limited to the preservation of essential evidence”.³⁰⁷ The court grants this remedy at its discretion when a compelling need to preserve evidence is demonstrated.

Moreover, the plaintiff may request confidential or “in camera” proceedings for both pre-trial and trial proceedings. Subject to prior court approval, the court may also protect the

³⁰⁵ Md. Zafar Mahfooz Nomani and Faizanur Rahman, “Intellection of Trade Secret and Innovation Laws in India”, vol. 16 2011, JIPR, Aligarh, U.P. Available at: <https://nopr.niscpr.res.in/bitstream/123456789/12449/1/IJPR%2016%284%29%20341-350.pdf>.

³⁰⁶ Mukesh Shukla, “Non Regulation Of Protection Of Trade Secrets In The Indian Corporate Sector A Comparative Analysis With USA Through The Lens Of Global IPR Regime”, <https://shodhganga.inflibnet.ac.in/handle/10603/362381>

³⁰⁷ Hosking v. Runting (2005) 1 NZLR 1 (CA).

opposing party by restricting access to specific information or denying access to certain attorneys, professionals, or experts involved.³⁰⁸

Chapter 6

Conclusion and Suggestions

6.1. Conclusion

Chapter 2 of the research paper explores the concept of “trade secrets” and their significance in today’s information-based economy. It begins by discussing the broader concept of intellectual property (IP) and how it is recognized as property by the law. The chapter highlights the evolving definition of property, which now includes intangible assets and ownership rights.

³⁰⁸ Zubair Ahmed, “Protection of Trade Secrets in India A Study of the Legal Framework”. Available at: <https://shodhganga.inflibnet.ac.in/handle/10603/291861>

The importance of “trade secrets” is emphasized, as they are often valued more than physical assets and can provide a competitive advantage in the marketplace. “trade secrets” have become increasingly popular in the modern age, especially in the “information age,” where time-sensitive and non-patentable business intelligence is essential.

Trade secret protection is contrasted with other forms of intellectual property, such as patents, trademarks, and copyrights. While these forms of protection have specific requirements and expiration dates, “trade secrets” rely on ongoing efforts to keep them hidden. The chapter emphasizes the need for businesses to understand and handle “trade secrets” properly, despite their high value.

The chapter also delves into the concept of “confidential information” and the importance of proving that the disclosed information was indeed confidential. Courts have set criteria for determining what qualifies as “confidential information”, including relevance, morality, accessibility to the general public, and the need to establish limits on the information.

The springboard doctrine is introduced as a means to prevent individuals from using insider information to their advantage. It aims to deny any gain obtained from breaching confidences. The chapter explains that the courts’ ability to prevent the use of “confidential information” as a springboard is time-limited, and monetary compensation may be more appropriate in certain cases.

Special considerations arise when applying the breach of confidence concept to the employer-employee relationship. Employment contracts often contain provisions regarding confidentiality, but even in the absence of such explicit clauses, employees have an implied duty of faithfulness to protect their employers’ proprietary information. The chapter explores post-employment restrictions, such as restrictive covenants and garden leave, which aim to protect business interests and prevent unfair competition.

The chapter concludes by providing a comprehensive understanding of “trade secrets”. It defines “trade secrets” as valuable and “confidential information” that provides a competitive advantage to its owner. The definition encompasses a wide range of information, both technical and commercial, developed by a company and unknown to its competitors. The requirements for trade secret protection are discussed, including the need for limited dissemination, independent economic value, and reasonable precautions to maintain secrecy.

Overall, the chapter highlights the significance of “trade secrets” in today’s business landscape and provides insights into their nature, definitions, and protection. It emphasizes the need for businesses to understand the value of “trade secrets” and take necessary measures to safeguard them from theft or disclosure.

In conclusion, Chapter 3 explores the safeguards for “trade secrets” in India, with a focus on non-compete agreements and their legality. The Indian Contract Act of 1872, specifically Section 27, governs the review of such agreements and states that no contract can prohibit a person from engaging in a lawful profession, trade, or business. However, exceptions exist for the sale of goodwill, where geographical restrictions can be imposed.

Historical background shows that Section 27 was included to limit the scope of common law, which had previously authorized contracts restricting trade to an unsafe extent. While the Act does not explicitly define “trade secrets”, courts have broadly interpreted it to include agreements that protect commercially valuable information.

There are two types of exceptions to agreements in restraint in India: those explicitly written into law and those implied from judicial precedent. Goodwill sales are exempted under both the Indian Contract Act and the Indian Partnership Act. Additionally, judicial interpretations have allowed for non-compete agreements, employee limits, and exclusive dealing agreements to be considered exceptions.

During employment, employers can legally restrict employees from working for competitors or engaging in activities that directly compete with their interests. After the termination of employment, agreements that prevent former employees from finding new jobs or starting their own businesses are not enforceable in Indian courts. Arguments to uphold “non-compete” requirements beyond the employment duration have consistently failed, as Indian law does not allow for such post-employment restrictions.

Overall, the Indian Contract Act provides a framework for the protection of “trade secrets”, balancing the interests of employers and employees. While employers can impose reasonable restrictions during employment, post-employment restrictions are generally not upheld in India, ensuring individuals’ freedom to pursue their chosen profession or trade.

The Right to Information Act, 2005 mandates public bodies to disclose certain data to the public, and it has expanded to include private sector enterprises impacting citizens’ lives. However, “trade secrets” and “confidential information” are protected under Section

8(1)(d) of the Act unless the public interest outweighs the private interest. The TRIPS agreement recognizes and criticizes licensing methods that limit competition, and countries can determine what constitutes an abuse of intellectual property rights.

The Competition Act, 2002 aims to foster economic growth, prevent anti-competitive behaviors, and ensure fair competition and consumer welfare. Agreements that harm competition are illegal, but holders of IP rights have exceptions to engage in activities to protect their rights. The Raghavan Committee highlights that intellectual property rights should not lead to monopolistic power or harm consumer/public interest.

Criminal remedies for trade secret theft are addressed in the Indian Penal Code, although their enforcement is limited. In a specific case, the court ruled that charges of criminal breach of trust and cheating were groundless due to insufficient evidence and highlighted that criminal prosecution should not be used for harassment or personal vendettas.

Chapter 4 of the research paper discusses the protection of “trade secrets” in India and provides several judicial precedents. As per the chapter:

- Protecting “trade secrets” relies on maintaining their secrecy, and once breached, they lose their status as secrets.
- India, as a member of the World Trade Organization (WTO) and a signatory of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), is obligated to protect “trade secrets” through intellectual property laws.
- Although India has updated its intellectual property laws to conform to international standards, it still lacks specific legislation for protecting “trade secrets”, which puts it behind other countries in this aspect of IP protection.

Judicial precedents were further discussed in the chapter as follows:

- *Burlington Home Shopping Pvt. Ltd. vs. Rajnish Chibber*: The court recognized the protection of “trade secrets” under copyright laws and imposed an injunction against a former employee who had used a customer database to start his own business.
- *Puneet Industrial Controls Pvt. Ltd. vs. Classic Electronics*: The court found the defendant’s products to be visually similar to the plaintiff’s, using the same

“confidential information”, and issued an injunction to prevent copyright infringement.

- Escorts Const. Equipment Ltd. vs. Action Const.: The court issued an interim injunction against the defendants for manufacturing and selling identical or deceptively similar cranes based on the plaintiff’s copyrighted industrial drawings.
- Base International Holdings vs. Pallava Hotels Corporation Limited: The court issued injunctions against the defendants for misappropriating “confidential information” and terminating an agreement without proper notice.
- Mr. Kunal Dasgupta vs. Mr. Anil Gupta: The court granted an injunction to prevent the defendants from broadcasting a show similar to the plaintiff’s original idea, recognizing the concept as an original business strategy.
- Hindustan Composites Ltd. vs. Jasbir Singh Randhawa and anr.: The court ruled that manufacturing processes available in published sources are not considered “trade secrets” and are not protected.
- Star India Private Limited vs. Laxmiraj Seetharam Nayak & anr.: The court determined that the plaintiff’s detailed list did not include genuine “trade secrets”, as the information was common knowledge among professionals.
- Emergent Genetics India Pvt. Ltd vs. Shailendra Shivam and Ors.: The court denied the claim for an injunction, as the plaintiff failed to prove that the alleged knowledge was exclusive or confidential.
- Ambiance India Pvt. Ltd. vs. Shri Naveen Jain: The court did not find a prima facie case of trade secret protection, as common knowledge about the employer’s operations cannot be protected as “trade secrets”.
- Mr. Diljeet Titus vs. Mr. Alfred A. Adebare and Ors.: The case involved allegations of stolen “confidential information” between partners. The plaintiff sought interim reliefs, but the defendants claimed their work was original and entitled to copyright protection.

In conclusion, India does not have specific legislation for protecting “trade secrets”, but courts have recognized trade secret protection under other intellectual property laws, such

as copyright, and have issued injunctions to prevent the misuse of “confidential information”. However, the effectiveness of trade secret protection in India varies depending on the specific circumstances and evidence presented in each case

With the release of the “Draft National Innovation Act, 2008” , the Indian government took a step toward preserving “trade secrets” and encouraging innovation and research. The Department of Science and Technology is proposing an act with three primary goals:

- (i) protecting “confidential information”, “trade secrets”, and innovations;
- (ii) developing a National Integrated Science and Technology Plan; and
- (iii) encouraging innovation through a support system.

These valuable assets allow businesses to maintain a market advantage and advance their economic interests.

The draft National Innovations Act, 2008 borrows ideas from the COMPETES Act and incorporates the concept of “trade secrets” from the Uniform Trade Secret Act of the United States. It defines “confidential information” as information that is not generally known, has commercial value, and has been subject to reasonable efforts to maintain its secrecy. However, unlike the United States, the proposed Indian Act does not recognize “trade secrets” as property.

Chapter VI of the proposed National Innovation Act focuses on confidentiality and “confidential information”. It addresses obligations of confidentiality, obligations stemming from non-contractual relationships, preservation and protection of “confidential information” in court proceedings, exceptions in misappropriation actions, preventive injunctions, mandatory damages for breach of confidentiality, and immunity for acts done in good faith.

Section 8 of the Act outlines the responsibilities of the recipient of “confidential information” and allows parties to establish contractual terms and conditions for maintaining confidentiality. However, there has been inconsistency in the recognition of such agreements by Indian courts.

Section 10 provides guidelines for protecting the secrecy of “confidential information” in court proceedings, including issuing protective orders, conducting closed-door hearings, and sealing “confidential information”.

Section 11 outlines exceptions that can be used as defenses in misappropriation litigation, such as information already in the public domain, independent development of the information, or disclosure in the public interest.

Section 12 provides the court with the power to issue or revoke injunctions to prevent the unauthorized use of "confidential information." Furthermore, it stipulates that if temporary relief is considered unwarranted, the complainant must compensate the defendant for any proven losses incurred.

Section 13 mandates the payment of damages for the violation of confidentiality and provides options for claiming damages, including mandatory damages, contractual damages, or actual damages.

Section 14 provides immunity from judicial proceedings, claims, or actions for individuals who have acted in good faith in accordance with the Act or its rules and regulations.

In addition to the National Innovations Act, the National IPR Policy 2016 aims to establish strong and effective intellectual property laws in India. The policy recognizes the importance of "trade secrets" under the "Legal and Legislative Framework" objective. However, the final policy document omitted specific provisions for the enactment of laws to protect "trade secrets", which were present in the initial draft.

Overall, the draft National Innovations Act and the National IPR Policy 2016 address the need for trade secret protection in India and provide guidelines and measures for maintaining confidentiality, preventing misappropriation, and enforcing remedies.

Chapter 5 begins by emphasizing the importance of intellectual property rights (IPRs) in the context of international trade and investment. The chapter highlights the recognition of the significance of safeguarding intellectual property by developed nations and international agreements such as the TRIPS agreement.

The analysis then focuses on trade secret protection in different regions, starting with the Asian continent. Japan, known for its technological innovation, has a comprehensive legal framework for trade secret protection. The "Unfair Competition Prevention Act" defines "trade secrets" broadly, covering technical and business information that is beneficial for commercial activities and kept confidential. The law prohibits unauthorized use and disclosure of "trade secrets" and provides remedies such as injunctions, compensatory damages, and criminal charges for misappropriation.

China, as the world's most populous nation, has also established regulations for trade secret protection. The "Law on Unfair Competition" addresses "trade secrets" and imposes administrative penalties and compensatory damages for misappropriation. Chinese law defines "trade secrets" as technical and business information that is not publicly known, has economic value, and is kept confidential. Remedies include compensatory damages, administrative sanctions, and criminal punishments.

The chapter then briefly mentions trade secret protection in France on the European continent. In France, manufacturing secrets, confidential business information, and know-how are protected. Manufacturing secrets, in particular, are focused on, and employees who disclose such secrets without authorization can face criminal liability. While the statutes do not provide a precise definition of manufacturing secrets, French courts have interpreted them to include valuable manufacturing-related processes, devices, or inventions kept private by manufacturers.

Further the chapter discusses the "trade secrets" law in the United States, specifically under the Uniform Trade Secret Act (UTSA) and the Economic Espionage Act of 1996 (EEA), prohibits the unauthorized use and misappropriation of "trade secrets". The UTSA and EEA provide a list of specific actions that constitute misappropriation, including acquiring "trade secrets" through improper means, disclosing or using "trade secrets" without consent, and obtaining "trade secrets" from someone who obtained them through unethical means.

Civil and criminal remedies are available for trade secret violations in the United States. Civil remedies include preliminary and permanent injunctions, damages, and royalty payments. In cases of intentional infringement, punitive damages may also be awarded. Criminal penalties under the EEA can include fines and imprisonment.

In Brazil, the law recognizes and protects "trade secrets", although it lacks a precise definition of "trade secrets". Brazilian law prohibits the unauthorized disclosure, use, or exploitation of "trade secrets" obtained through illegal or fraudulent means, as well as those obtained through contractual or employment relationships. However, the criminal penalties for trade secret violations in Brazil are relatively light.

Overall, the chapter highlights the importance of trade secret protection in different parts of the world and provides insights into the legal frameworks, prohibitions, remedies, and procedures followed in Japan, China, France, Africa, America and Australia.

6.2. Suggestions

6.2.1. Establishing Guidelines for Non-Disclosure Agreements and Strengthening Legal Protection

Before sharing sensitive information with others, including employees, it has become standard practice for the recipient to execute an agreement restricting their rights to use or disclose the information. These agreements, commonly known as “Non-Disclosure Agreements” (NDAs), “Trade Secret Agreements”, or “Confidentiality Agreements”, function as contractual documents between the owner of the information and the recipient. Similar to other contracts, non-disclosure agreements enforce the parties' rights and provide remedies for non-compliance.

Typically, enforcing these rights requires legal action, including a request for injunctive relief prohibiting the recipient from using the information. However, such relief may only restrict the recipient's use of the information and may not prevent the unauthorized disclosure of the information to third parties. To circumvent this limitation, it is necessary to establish a contractual relationship or legal obligations between the parties in order to prevent unauthorized use by third parties. Therefore, while nondisclosure agreements do not guarantee absolute protection of information, they do impose liability on the contracting parties.

The proposed “Innovation Act” recognizes the validity of standardization and registration agreements. Nevertheless, it is essential to establish a standard format and registration procedure for NDAs. In addition, the categories of information that are protected under these agreements should be clearly specified. This would provide proprietors of information with a structured framework for protecting their data. With readily available NDA templates and a registration procedure, the parties' rights and responsibilities would be clearly defined.

The disclosure of non-disclosure agreement-protected information should be considered a specific offense punishable by monetary fines and imprisonment. This would constitute a strong deterrent against the disclosure of protected information without authorization. In addition, liability provisions should extend to third parties who knowingly use such information, and measures should be implemented to restrict the future use of protected information, even by innocent third parties.

Establishing guidelines for non-disclosure agreements and enhancing legal protection for sensitive information is essential in the current business environment. By standardizing the format, instituting a registration procedure, and imposing severe penalties for noncompliance, a stronger foundation can be established to protect sensitive data. In addition, liability clauses and restrictions on third-party use will increase the efficacy of NDAs in protecting the confidentiality of sensitive information.

6.2.2. Defining and Safeguarding Trade Secrets: Strengthening Legal Clarity

In order to ensure the protection of businesses through trade secrets laws, it is essential to have a clear comprehension of what constitutes “trade secrets”. One of the main focal points during litigation is determining whether the misappropriated information meets the criteria to be classified as trade secrets. This difficulty can be overcome by delineating each owner's trade secrets. Although the proposed legislation includes a definition clause, it can be simplified if the individuals seeking to protect information as trade secrets identify and classify the specific information as trade secrets related to their trade. The determining factor in litigation is whether the necessary measures of confidentiality were observed. It indicates the presence of trade secrets if implemented. The inclusion of these clauses in non-disclosure agreements provides employees with explicit instructions not to disclose or misuse such information and streamlines the litigation process. However, the provision requiring employers to list trade secrets should be voluntary rather than obligatory, empowering merchants to specify their trade secrets and bolstering their position in litigation cases.

Determining the scope of trade secrets is crucial for securing the legal interests of business owners. By defining and classifying trade secrets according to the discretion of each proprietor, legal clarity can be achieved. Compliance with confidentiality requirements is a deciding factor in litigation, confirming the existence of trade secrets. Trade secret clauses in non-disclosure agreements clarify employee expectations and simplify the litigation process. Nonetheless, it is essential that the legislation include an optional provision that permits merchants to identify their trade secrets, thereby enhancing their position in future litigation cases.

6.2.3. Introducing Registration for Trade Secrets: Strengthening Legal Protection

The proposed legislation should include provisions for the registration of trade secrets by enterprises. This registration procedure should resemble that for trademarks, under which both registered and unregistered marks are protected. By registering their trade secrets, companies would strengthen their position and acquire "Registered Trade Secrets." This registration would facilitate legal protection in the event of theft. Moreover, subsequent registration attempts can be readily identified to determine the rightful owner if the information is acquired and utilized improperly.

However, registration should not be mandatory in order to facilitate individuals who are less educated or less informed. The registration procedure should involve disclosing a general description of the information, as opposed to the information itself. This method differs from patent registration, in which comprehensive specifications are revealed for patent grants. By maintaining confidentiality during registration, trade secrets are safeguarded.

The introduction of a registration system for trade secrets within the proposed legislation would increase legal protection for businesses. Similar to trademark registration, this process would empower businesses with "Registered Trade Secrets" and streamline legal recourse in the event of misappropriation. It is essential to strike a balance between allowing less-educated individuals to secure their trade secrets and maintaining confidentiality throughout the registration process. By implementing a registration system, businesses can strengthen their position and protect sensitive data.

6.2.4. Enhancing Trade Secret Protection through Criminal Sanctions

Countries whose laws include criminal penalties to protect trade secrets have proved more effective at combating misappropriation. The prevalence of criminal penalties deters potential wrongdoers more effectively. By imposing criminal penalties, such as imprisonment, those contemplating trade secret theft are instilled with a greater psychological dread.

Although certain sections of the IPC and the IT Act provide some remedies for the trade secret protection, these provisions are not specifically designed for the trade secret protection. Therefore, they cannot be utilized effectively in instances of trade secret misappropriation.

In addition to civil and administrative remedies, the Indian legislation governing the trade secret protection should include specific penal provisions, including imprisonment. Civil remedies should include injunctive relief and monetary compensation, while criminal remedies should include imprisonment. The dread of a harsh prison sentence and the potential harm to one's reputation serve as a significant deterrent against trade secret theft.

By incorporating criminal penalties into the Indian legal framework for the preservation of trade secrets, a stronger defense against misappropriation can be established. While civil and administrative remedies address compensatory and injunctive measures, criminal penalties, such as imprisonment, increase fear and deter potential wrongdoers from misappropriating trade secrets. By effectively combining civil, administrative, and criminal provisions, India can strengthen its trade secrets protection and cultivate a climate in which misappropriation is more deterred.

6.2.5. Enhancing Trade Secret Protection: The Role of Non-Competition Agreements

By introducing a separate "Non-Competition Agreement" alongside the "Non-Disclosure Agreement," it is possible to restrict the competitive activities of those who execute it. In spite of the fact that non-compete clauses are generally unenforceable in India due to the public policy considerations enumerated in Section 27 of the Indian Contract Act of 1872, reasonable restraints should be validated to protect trade secrets.

Careful attention should be given to the formulation of provisions to ensure that if a court determines that certain information lacks confidentiality, any non-compete obligations associated with that information become unenforceable. Conversely, if the court deems the information to be confidential, the non-compete clause should remain valid and enforceable. In addition, it is essential to state that this provision is not affected by Section 27 of the Indian Contract Act of 1872, which invalidates trade-restraining agreements. The sole purpose of the new law's validation of restrictions is the preservation of trade secrets. Thus, the Law Commission of India's recommendation to amend Section 27 to permit reasonable restrictions on the right to engage in commerce should be implemented.

When crafting a non-compete agreement, it is advisable to have two separate agreements: a "Non-Disclosure Agreement" and a separate "Non-Competition Agreement." This approach assures that a court's refusal to enforce a non-compete clause will not affect the enforceability of non-disclosure clauses.

If a non-compete clause is included in the "Non-Disclosure Agreement," it is essential to include a segregation clause. This clause states that the unenforceability of one provision (the non-compete provision) does not influence the enforceability of the other provisions (the non-disclosure provisions).

By integrating separate "Non-Competition Agreements" alongside "Non-Disclosure Agreements," the ability to restrict competitive activities can be strengthened. To validate reasonable trade restrictions to protect trade secrets, Section 27 of the 1890 Indian Contract Act must be amended. The efficacy of non-compete and non-disclosure obligations is bolstered by including segregation clauses and writing provisions that are enforceable.

6.2.6. Inclusion of Exclusion Clauses: Balancing Trade Secret Protection and Public Interest

To secure the public interest and guarantee that health standards and national interests are not jeopardized in the pursuit of investor protection, it is necessary to include an "Exclusion Clause" in the statute. This clause would specify grounds for exemption from the classification of "Trade Secrets", even if the information meets the criteria for such a classification. This strategy establishes a balance between safeguarding trade secrets and putting societal concerns first.

Proposed Reasons for Exemption are:

- i. If the composition or nature of a product poses actual or prospective health risks, it should not be classified as a trade secret.
- ii. If the concentration of a product's contents or components poses actual or prospective health risks, it should not be classified as a trade secret.
- iii. If the disclosure of information is necessary to safeguard the greater public interest, it should not be protected as a trade secret.
- iv. If the disclosure of information is necessary to protect national interests, it should not be classified as a trade secret.
- v. The skills that an employee gains or develops as a natural and gradual result of their employment cannot be considered trade secrets of the employer.
- vi. If the owner or employer initially acquired or developed information through unfair or illegal means, but the employee later legalized the acquisition method and utilized the knowledge for starting a separate business, the information should not be considered trade secrets of the employer.

The inclusion of an “Exclusion Clause” in the enacted provision is crucial for striking a balance between the preservation of trade secrets and the public interest. This clause exempts from trade secret classification certain categories of information, such as those posing health risks or serving national interests. In addition, it recognizes that employee skills developed during employment and information acquired through unfair or unlawful means but later legalized by the employee are not trade secrets. By incorporating these exclusion grounds, the law promotes transparency, protects the public welfare, and maintains a fair and equitable balance between trade secret protection and broader societal concerns.

6.2.7. Need for change in Section 12(4) of the Proposed National Innovation Act

The provision regarding injunctions restricting the use of confidential information in Section 12(4) of the proposed “National Innovation Act” has sparked controversy. The provision specifies that these injunctions may impose conditions for future use, subject to the payment of a reasonable royalty. However, these conditions can only be enforced for a duration equivalent to the period for which the use of the information could have been prohibited. This provision establishes the concept of “compulsory licensing” for trade secrets as an exception to infringement. However, trade secret proprietors are concerned about this provision because it weakens their control and complicates legal disputes.

Difficulties with the Clause are:

- i. The incorporation of this clause is detrimental for trade secret owners. It introduces the possibility that their confidential information could be used by others for a fee, without the owner's explicit consent.
- ii. The clause complicates legal matters by necessitating the determination of whether the information may be used in exchange for a fee. This adds to the complexity and uncertainty of the dispute resolution procedure.
- iii. Allowing the court to intervene and impose restrictions on the use of “trade secrets” contradicts the fundamental principle of protection. It undermines the proprietor's exclusive rights to the “trade secret”.

The contentious Section 12(4) of the proposed National Innovation Act, which establishes conditions for the future use of trade secrets through the payment of royalties, causes

concern among trade secret proprietors. This provision undermines their control and authority over their confidential information. To preserve the integrity of trade secret protection, it is essential to safeguard the owner's independence and prohibit court intervention in determining the use of trade secrets.

6.2.8. Amendment required in Section 13(3) of the Proposed National Innovation Act

Section 13(3) of the proposed "National Innovation Act" has raised concerns regarding the requirement for the misappropriator to deposit 10% of the damages claimed by the plaintiff as a prerequisite to defending the suit during the grant of an interim injunction. This provision is deemed unjustified in cases of original jurisdiction and contradicts natural justice principles, specifically the right to an impartial hearing. The clause restricts the defendant's access to legal recourse if they cannot pay ten percent of the claimed damages. To ensure that the right to defend is not compromised due to financial constraints, it is essential to review and amend this provision.

Objections to the Clause are:

- i. Inconsistency with Natural Justice Section 13(3) is inconsistent with the fundamental principles of natural justice, including the right to an impartial hearing. By imposing a monetary requirement on the defendant to defend the lawsuit, it impedes their access to justice and restricts their ability to adequately present their case.
- ii. This provision effectively denies the defendant the right to defend themselves if they cannot afford the 10% deposit. It unfairly burdens the defendant and undermines their right to present a strong defense.
- iii. In cases of misappropriation of trade secrets, the complainant's damages claims can be exorbitant, sometimes reaching into the crores of rupees. A ten percent deposit may be unaffordable for the defendant, further impeding their ability to mount a defense.

Section 13(3) of the proposed National Innovation Act must be modified to uphold the principles of justice and guarantee an equitable legal process. Particularly in cases of original jurisdiction, the clause should be amended to prevent the denial of the right to

defend based on financial constraints. The imposition of such financial obligations on defendants is unjust and should not impede their access to justice.

The inclusion of Section 13(3) in the proposed National Innovation Act raises concerns about the denial of the right to defend in cases of misappropriation of trade secrets. The requirement of a ten percent deposit on claimed damages undermines the principles of natural justice and impedes defendants with limited financial resources' access to justice. It is crucial to amend this clause to safeguard the right to defend in the court of original jurisdiction and to ensure that financial constraints do not impede the legal process.

6.2.9. Need to remove the ambiguity in the proposed act

The drafted sections of the proposed "National Innovation Act" contain ambiguities and errors that must be corrected. Section 13(1)(a) specifically references Section 15(c), which does not exist. It should refer to Section 15(2)(c) instead. Section 13(2) also refers to Section 15(1)(a), which does not exist. It should refer to Section 15(2)(c) instead. These inconsistencies and errors in the formulated provisions must be rectified to ensure the clarity and accuracy of the law.

Clarifying Ambiguities and Errors:

- i. Correction to Section 13(1)(a): Section 13(1)(a) currently incorrectly references Section 15(c), which is not a genuine provision. To correct this error, the reference should be changed to Section 15(2)(c). This amendment will reconcile the reference with the correct provision and remove the ambiguity.
- ii. Correction to Section 13(2): Section 13(2) contains an additional inconsistency, as it incorrectly refers to Section 15(1)(a), which does not exist in the statute. The reference should be modified to accurately reflect Section 15(2)(c) in order to resolve this issue. This modification will ensure the provisions' consistency and clarity.

Addressing these ambiguities and errors is crucial for the efficacy and validity of the proposed National Innovation Act. It is essential for the proper implementation and interpretation of the law that its provisions be precise and clear. By correcting these errors, any potential ambiguity or misinterpretation can be avoided, resulting in a more robust and trustworthy legal framework.

6.2.10. Exploring positive protection mechanisms for trade secrets

The recommendations so far are centered on the concept of negative protection mechanisms. Negative protection occurs when the law prohibits others from commercializing trade secrets that have been developed and innovated over time, whether by establishing a new business or sharing them with rivals. Nonetheless, this does not imply that negative protection lacks value or significance; it is undeniably vital to a substantial degree. In a lesser degree, the previous recommendations also provide positive protection, which entails recognizing the rights and control of business and trade proprietors over the intellectual property associated with their trade secrets and utilizing it in the best interests of their respective businesses. For the protection of "Intellectual Property Rights," particularly trade secrets, it is necessary to abandon the conventional protection mechanisms and adopt a new strategy. This new mechanism should strive to increase the economic value of protection. In addition, protection should involve exploring new opportunities so that trade secret owners can make better commercial use of their intellectual property not only within a specific region, state, or country, but also globally, given the opportunities for international trade offered by the World Trade Organization (WTO). Without comprehensive, robust, equitable, and sufficient protection mechanisms, trade secrets cannot serve their intended purpose. What use are trade secrets if their proprietors do not use them to their economic advantage? What is the purpose of possessing trade secret knowledge if it does not contribute to the nation's development? Positive intellectual property rights for trade secrets serve a distinct function and are essential for the development of India's knowledge-based economy.

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