

# **TRADE SECRETS IN INDIA- A COMPREHENSIVE STUDY**

**A Dissertation submitted to the National University of Advanced Legal Studies, Kochi in partial fulfilment of the requirements for the award of Master Of Law (LL.M Degree) in International Trade Law**



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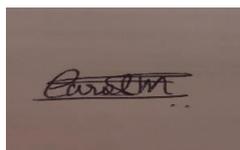
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## **LIST OF ABBREVIATIONS**

AIR	: All India Reporter
BIRPI	: United International Bureaux for the Protection of Intellectual Property
Del	: Delhi
DTSA	: Defend Trade Secrets Act of 2016
EU	: European Union
GATT	: The General Agreement on Tariffs and Trade
GI	: Geographical Indications
IP	: Intellectual property
IPR	: Intellectual property rights
MRTTP	: Monopolies and Restrictive Trade
NIA	: National Innovation Act
SC	: Supreme Court
TRIPS	: Agreement on Trade-Related Aspects of Intellectual Property Rights
WIPO	: World Intellectual Property Organization.
WTO	: World Trade Organization
UN	: United Nations
UNO	: United Nations Organisation
UPOV	: International Union for the Protection of New Varieties of Plants
UTSA	: University of Texas at San Antonio

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## **CONTENTS:**

Certificate .....	2
Declaration .....	3
Acknowledgment .....	4
Certificate of plagiarism check .....	5
Letter of approval .....	6
List of abbreviations .....	7
Table of cases .....	8

## **CHAPTER1: INTRODUCTION TO TRADE SECRETS**

1.1 Introduction.....	13
1.2 Objectives.....	14
1.3 Statement of the problem.....	14
1.4 Research questions.....	14
1.5 Significance of the study.....	15
1.6 Research methodology.....	15
1.7 Hypothesis.....	15
1.8 Review of literature.....	15
1.9 Chapterization.....	19

## **CHAPTER2: IPR &TRADE SECRETS**

2.1 Introduction.....	20
2.2Kinds of IPR.....	21
21	
2.3 Conclusion.....	29

## **CHAPTER3: PROTECTION OF TRADE SECRETS UNDER COMMON LAW AND WORLD WIDE**

3.1.1 Protection of trade secrets under common law.....	30
3.1.2 Confidential information.....	31
3.1.3 Essential requirements of trade secrets .....	33
3.1.4 Liability of the parties in the misappropriation of the trade secrets .....	35
3.1.5 Conclusion.....	38
3.2 IP Protection in Worldwide.....	39
3.2.1 Introduction.....	39
3.2.2 Procedural and substantial requirements .....	39
3.2.3 Conclusion.....	42

**CHAPTER 4: PROTECTION OF TRADE SECRETS UNDER INDIAN LEGISLATION**

4.1 Introduction..... 43  
4.2 Comparative analysis.....43  
4.3 Trade secrets and competition law .....54  
4.4 Criminal remedies for misappropriation of trade secrets ..... 55  
4.5 Conclusion.....57

**CHAPTER5: TRADE SECRETS UNDER TRIPS AGREEMENT AND INDIAN IP LAW**

5.1 Introduction.....58  
5.2 WIPO & Trade secrets .....58  
5.3 history and development of WIPO.....58  
5.4 trade secrets under WIPO.....59  
5.5 WTO & IPR .....60  
5.6 relationship between WTO & WIPO.....63  
5.7 tools for protecting trade secrets .....65  
5.8 trade secrets under NIPRP.....69  
5.8.1 Objectives.....69  
5.9 conclusion .....71

**CHAPTER6 NIA 2006 & ECONOMIC IMPORTANCE**

6.1 introduction.....72  
6.2 economic significance of trade secret protection.....75  
6.3 conclusion .....79

**CHAPTER7: CONCLUSIONS AND SUGGESTIONS**

7.1 Findings.....81  
7.2 Suggestions .....85

**Bibliography**.....91

## **TRADE SECRETS IN INDIA- A COMPREHENSIVE STUDY**

*I hate the word 'rendering,' as it equates to 'pouring concrete' on ideas that demand continuing dialog. 'Trade secrets' imply hoarding of knowledge." - Chris Jordan*

*"The secret of the business is to know something that nobody knows." - Aristotle Onassis<sup>1</sup>*

*"Secrets in manufactures are capable of being longer kept than secrets in trade."- Adam Smith*

Throughout the history, the protection of trade secrets was looked under the common law regime. The security regarding the protection of the trade secrets has not been much of the debate in the past.

There is no comprehensive or any perfect legislation or statute that deals with trade secrets in India. trade secrets rights are mainly enforced through the law of contract, equity principles or by the common law action for the breach of confidence. India is a signatory to the TRIPS agreement. The Bombay High court in case of Bombay dyeing and manufacturing co ltd v Mehar Karan Singh <sup>2</sup> laid down certain criteria's for finding out any piece of information that is to be considered as a trade secret.

- To the extent that the information has been known outside the business
- To the extent it is known to the insiders and employees
- The precautions taken by the trade secret holder to guard the secret
- The savings and value of the holder
- The amount of money that is expended for the information
- The amount of the time and the expense that others would take to duplicate the information.

Trade secrets are considered to be the subset of the confidential information. While some of the courts in India has used both terms i.e., trade secrets and confidential information as synonyms, other courts have clearly distinguished the two and held that the knowledge of the employer which are known others cannot be called as trade secrets. Indian courts and the tribunals have made it clear that in the absence of the legislation, they protect trade secrets through the common law. the main remedies in the case of the infringement can be injunction or the damages. IPR laws in India are territorial in nature and the protection gave may vary from one region to other. The most essential part of the trade secrets is that their secrecy as opposed to the novelty.<sup>3</sup>

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<sup>1</sup> Quote invigilator-teaching quotations, <https://quoteinvestigator.com/2019/04/14/secret/> (last visited August 11,2021)

<sup>2</sup> Bombay dyeing and manufacturing co ltd v Mehar Karan Singh (2010(112) BomLR375)

<sup>3</sup> Dionne v. Southeast Foam Converting & Packaging, Inc. 240 Va.297, 302 (1990).

## **INTRODUCTION**

Intellectual Property (IP) is considered as an intangible asset to a business. when there is IP protection laws, partners and institutions in the business gets confidence to further develop their businesses by investing and collaborating with other entities to expand and thus to increase profits. If the property is worldly explored, more profit can be earned by the owner. IP is divided into industrial property and copyright.

India has a large collection of traditional, oral, customary, Ayurvedic knowledge etc. The lack of protection mechanism to people is an actual setback to a developing country like India. When someone first thinks about IPR laws, patent, trademark and copyright laws comes to the mind right away. Trade secrets are also added but it is not well known comparing with others. Trade secrets are not known to the world at large, they are protected by the owners by instituting special procedures which includes technological and some legal measures. Sometimes the owner keeps the trade secrets with themselves or allow limited number of people to have access for the effective running of the business. Economic interest of the owner has to be given a prior importance; Therefore protection of trade secrets is necessary. The main function of the trade secret is to protect the information that gives a competitive advantage to those people who possess such information, provided such information is not readily available with or discernible by the competitors.

The IPR laws are normally national, not international. there are laws to protect trade secrets at international level. First protection is offered by United Nations Organization (UNO). UNO have a specialized agency known World Intellectual Property Organization (WIPO), which gives recommendations for the member countries to have an effective law to safeguard the trade secrets. WIPO directives are not binding upon its member countries including India. The instruction of the World Trade Organization is binding on the member countries. For the protection of IP, it has set out a minimum standard criterion under TRIPS agreement for the member countries and these each member countries are expected to frame or reframe its IPR laws by complying with those minimum standards.

As trade secrets comes under TRIPS, its obligatory from the part of India to protect it. TRIPS Article 39.1 clarifies that effective protection from unfair competition includes protection of undisclosed information. In India, TRIPS Article 39.1 clarifies that effective protection from unfair competition includes protection of undisclosed information. Section 27 of the contract act provides an indirect, latent and covert mention of trade secrets. Moreover, Indian courts also take approach on common law and grant some relief on dealing with trade secrets. So it must that if any country wants a definite and effective IPR law, it must have trade secrets law. Definite and effective trade secret law is one of the pre-requisite to excel the national economy.

There is no specific definition for trade secret under the Indian law. Ideas which have to be protected under trade law, if not protected, it will become detrimental for the traders. And also, if there is no law, there is less chances of conviction for the trade secrets misappropriation, as for an inventor there is no protection is under the trade secret, the another option is patent protection which may not help in the appropriate long time run. So as there is no particular IPR protection for trade secrets in India, it has become pertinent to see other laws. It is also necessary to find a model law of trade secrets as IPR, which will protect all owners without deviating from WTO-TRIPS.

Trade secret is considered as a unique feature that fits into broader framework of contract, competition, innovation as well as intellectual property rights. IP laws are generally territorial in character while trade secret protection differs according to jurisdiction of different countries and their specific laws available. A trade secret is often 'any formula, pattern, device or compilation of information which is used in one's business, and which gives human opportunity to obtain an advantage over competitors.

There are mainly three factors that is common to all types of trade secret:

1. Public has no availability of the information
2. By maintaining secrecy and confidentiality it confers economic benefits.
3. Subjected to reasonable efforts to maintain its secrecy.

Trade secrets plays an important role in protecting innovations and it extends to patterns, formulas, plans, designs, software and know-how. the main policy behind the trade protection is to give value to the owner and restrict others from misappropriating and using his trade secrets. The TRIPS agreement actually categorized trade secrets under undisclosed information but nothing is indicated on mechanism ad modalities. There is no particular definition on trade secrets, its hard to define, classify and ascertain. There is a demand for more codified and comprehensive mechanism of protection for trade secrets.

### **Objectives:**

- To understand trade secrets from the IP perspective.
- To focus on the need to have a comprehensive law for the effective and viable protection of "trade secrets" in India
- To identify the deficiencies in the existing trade secrets in India, in light of verdict of various Indian courts.

### **Statement of the problem:**

Trade secrets in India is governed by Indian Contract 1872 under Section 27, Principle of inevitable disclosure doctrine, Judicial Precedents and many other. Scope is limited but not comprehensive.

What are the flaws in existing trade legal protection? whether it is essential to adapt a comprehensive and enforcement mechanism? Effective and viable legislative protection of "trade secrets" as "Intellectual. Indian courts also sometimes depend on common law approach but its limited and its not comprehensive in nature. So, this research works focuses on finding out the flaws and existing protection, would find a comprehensive, strong, fair and legal framework for protection of trade secrets in India.

### **Research questions**

- 1) Whether there is a need for more codified system of trade secrets protection as IP?
- 2) Why India lacks a legislation for Trade Secret, but whereas US has legislation? What makes India not to have legislation?

## **Significance of study**

In India, the owners of trade secret do not realize whether they have any trade secrets rights until an ex-employee or any competitor illegally takes an owner's trade secrets. Like patents, trade secrets also protect intangible assets and are an essential part of any organization of companies IP strategy. Courts, Lawyers, Scholars argue over whether trade secrets are creature of contract, tort, property or even criminal law. But none of these justifications have ever proven persuasive. This research work focuses on codification of law for the trade secrets protection in India.

## **Research Methodology**

This research work deals with non-empirical research. The methodology used is purely doctrinal in nature. the research includes primary and secondary materials. Primary materials consist of text of laws, declaration etc. and Secondary material consists of books, articles, research paper and magazine reports etc. this research is also explanatory and comparative nature. Available and proposed laws are analysed and explained.

## **Hypothesis:**

The existing legal framework of India is not adequate to cover all aspects moreover its silent on some of the important main areas.

## **Review of literature**

- Legal Protection of Trade Secrets & Confidential Information (S.K. Verma, 2002)13:

The author have discussed about the concepts of trade secrets and have discussed the case laws where courts have protected the confidential information. The author explains that exact definition of the of trade secret is not possible. he explained trips agreement on trade secrets. He has explained significance of protection of trade secrets. He have explained protection of trade secrets under national laws.

- Unfurling the Proposed National Innovation Act (Tanushree Sangal, 2007):

This article gives us a glance on proposed national innovation act 2008. this given article mainly focuses on the various aspects of the proposed act. The author has moreover explained the positive aspect of the act and looked trade secrets as opposite of patents. Because patent has a public place in disclosure but not for trade secrets. and also, patent have an expiry time whereas trade secrets continue to occupy the field of protection as long as it's maintained as a secret .So here author has given protection on trade secrets over patents.

- Protection of Intellectual Property in the Form of Trade Secrets

By Abhik Guha Roy, 2006:

Here gives the importance to protection of trade secrets and also trade secrets under IPR has been discussed.it has opined IPR as perpetual in nature. Discussed trade secrets as much broader sense than patent, copyright, trademark etc. The springboard doctrine developed by the English courts have also explained in thus paper. There after the author discussed the employer

-employee relationship. It have discussed under the two categories when duty arises during the course of employment and also during the post employment. This paper has also discussed the remedies available to trade secrets. The inevitable disclosure doctrine is also discussed here.

- Trade secret protection in India: the policy debate (Chandni Raina 2015)<sup>4</sup>

Here , the author discussed trade secrets under two categories: First, as the confidential business information and second, as technical or technological information. This paper is then divided into mainly three parts. In the beginning part, we can see the rationale for the protection of the intellectual property and seeks whether protection of trade secrets enables the socially optimum technology developmental outcomes. The second part deals with assessment of the existing trade protection mechanism with reference to India and explains various scope for the protection. The third part then focused on the trade secret protection as an option for the technological improvement's protection. The paper also discussed the scope of the trade secrets that's given in accordance with the definitions given in the TRIPS Agreement and UTSA (uniform trade secrets act) of USA. The author also justifies trade secrets as a potent tool for the businesses in the maintenance of the competitive advantage. The author here explains three categories of the situations when should the technical know -how may be kept as a secret. In this paper, it was found that there was no specific law which protects the trade secrets in India. From the various judgements, the protection of trade secret has upheld mainly based on the equity principle and then on the common law action for the breach of confidence. It also states that the type of the protection that demanded by an inventor for the improvements depends upon the quality of the invention. It also suggests that stronger the trade secrets law, there would be an increase in the incentives which is to keep the technological improvements in the trade secrets. In this paper, the author made no recommendation for a comprehensive and strong trade protection in view of the challenges and opportunities in the future including the public interest.

- Approaches to protection of undisclosed information (trade secrets)-Mark Schultz and Douglas C. Lippoldt 2014:<sup>5</sup>

Here the author deals with the discussion of the available legal protection of the trade secrets (undisclosed information) and explains a technique for the evaluating the strength of the protection that is available in many of the countries. In this paper, the author develops an indicator known as THE TRADE SECRETS PROTECTION INDEX, which is based on the national and the international materials. The authors here felt that Indian trade secrets law as under-developed. the authors felt that trade secrets in India is seem to be abandoned. There is no enactment or policy framework for the protection of trade secrets. Also, they found a lacuna in India's statutory law as there is no definition of the trade secrets. common law actually defines trade secrets after looking at the English case law ,Saltman Engineering Co v. Campbell Engineering Co. Ltd <sup>6</sup>. This paper broadly discussed the concept of trade secrets and identified

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<sup>4</sup> Chandni Raina, "Trade Secret Protection in India: The Policy Debate", Working Paper (September 2015), Centre for WTO Studies (CWS) Indian Institute of Foreign Trade. Available at: <https://wtocentre.iift.ac.in/> (last visited march 12 2021)

<sup>5</sup> Mark F. Schultz and Douglas C. Lippoldt, "Approaches to Protection of Undisclosed Information (Trade Secrets)" -BACKGROUND PAPER; OECD TRADE POLICY Paper No. 162 (2014). Available at: OECD website at: <http://www.oecd.org/trade/>(last visited march 12 ,2021)

<sup>6</sup> Saltman Engineering Co v. Campbell Engineering Co. Ltd (1948) 65 RPC 203.

the gaps but didn't find any measures to fill those gaps for strengthening the trade secrets law. The reasons for the under-developed has also found out in the analysis are but partial in nature and it did not cover the whole of the shortcomings.

- Trade Secrets Protection in digital environment: a global perspective (ranjeet kumar and R.C Tripathi,2012)

Here the authors reviewed the choice of trade secrets vis-à-vis the patent protection. SIX FACTOR TEST is used to determine whether the information is trade secrets or not. It is used in U.S.A. status of trade secrets is outlined from the experience with UK, Brazil, China, Korea and Japan. The article defines the trade secrets in the light of TRIPS and UTSA of U.S.A. In this paper its also found that various software and methods that used in the computer related inventions may also be protected as the trade secrets rather than that of the patents. Here it is also exemplified that many people chose to protect their algorithms etc as the trade secrets. It also suggests protection to non disclosure and the non-competent agreements. The digital world is not considered as a friend to trade secrets. The authors added that except for the contract law, there is no specific law in India that protects the trade secrets and the confidential information. This form of the IP is a new entrant in India also very important. there is a need for the dedicated legislation regarding the trade secret protection, added the authors. The authors hadn't proposed the content of the legislation and also in this article they didn't explain why statutory protection of the trade secrets is better than that of the common law protection of the trade secrets.

- Intellectual property rights in trade secrets : positive of sensitive confidential information (N.S.Sreenivasulu ,2007)<sup>7</sup>

Here ,the author quoted various case laws those protected trade secrets as the confidential information. The author referred the definitions under the common law, restatement of the torts and UTSA. Although the author emphasised about the protection, the nature of such information in the view of WTO-TRIPS and the specific interest hasn't mentioned here. also, the type of the protection, i.e., whether civil or criminal or then both also is not suggested. Indian case laws which deals with positive and also the sensitive information were also not discussed in this paper.

- Legal protection of trade secret (Vandana pai and Ramya Seetharaman ,2004)<sup>8</sup>.

Here,the authors have defined many concepts of trade secrets, which including the secret information, tort of the breach of the confidence etc. The authors suggested that in order to get trade secrets to be qualified, the information should have an independent economic value and the person should be taken reasonable security measures in order to protect the trade secret. They also discussed about the misappropriation of the trade secrets cases and also have given an overview of the non-disclosure agreements. "Trade secrets" are considered the master's property and therefore there is no rule of public interest, which invalidates an agreement that prevents their transfer to third party

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<sup>7</sup> N. S. Sreenivasulu, "Intellectual Property Rights in Trade Secrets: Positive of Sensitive or Confidential Information" 2(4) MIPR (2007)

<sup>8</sup> Vandana Pai and Ramya Seetharaman, "Legal Protection of Trade Secret" (2004)1 SCC (jour) 22.

against the (owner of “trade secrets”) master’s will.<sup>9</sup> They found that there exists no special codified legislation for the trade secrets protection.

- Legal protection of trade secrets : Towards a Codified Regime (Abhinav Kumar, Pramit Mohanty and Rashmi Nandakumar, 2006)<sup>10</sup>:

The authors have defined that concept of the trade secrets and preferred trade secrets over the patent , because they opined that it can be explored to a higher level and its more economical and beneficial to the owner .this paper also has a discussion about the American as well as the European countries provisions regarding the trade secrets protection. They concluded the paper by citing a need for specific legislation regarding the trade secrets protection in India, in the era of the globalization. They did not mentioned the demerits of the common law remedies even though they argued that common law remedies are not adequate.

- Intellection of trade secret and innovation laws in India:(Md Zafar Mahfooz Nomani and Faizanur Rahman)<sup>11</sup>

This paper originally traced the origin and the development of the trade secrets law in the comparative perspective and they critically analysed the innovation law and there implications in the trade secret protection in India if the act comes into being. The paper discussed regarding the international framework for the trade secrets protection with special reference to the Paris convention, TRIPS agreement and then also the position in the U.S.A. They also discussed the data exclusivity concept and also its significance in India. They opined that statutory law is the need of hour and Indian government should quickly come with a law based on the international standard of the TRIPS. It also added that the provisions of the competition act 2002, Indian penal code 1860and also the companies act should also be amended in addition to it. they also discussed the trade secret infringement concept and those remedies which are available to the infringement but didn’t discuss the extent of the third part liability in this regard. The paper discussed the protection for the trade secrets in the light of the proposed National Innovation Act, but many of the unjust and the inconsistent provisions under the proposed act aren’t pointed out and didn’t analysed it along with their implications.

## **CHAPTERIZATIONS:**

The present work is divided into mainly seven chapters:

**Chapter 1:** this chapter deals with introduction to trade secrets and its objectives ,hypothesis along with the review of literature .

### **Chapter 2:** IPR and Trade Secrets

In this chapter the nature of intellectual property rights are discussed. This chapter also discusses the importance of the trade secrets and its concept, nature and definitions.

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<sup>9</sup> *supra* n5

<sup>10</sup> Abhinav Kumar, Pramit Mohanty et.al., “Legal Protection of Trade Secrets: Towards a Codified Regime”11(6) JIPR 397-408 (2006)

<sup>11</sup> Md. Zafar Mahfooz Nomani and Faizanur Rahman, “Intellection of Trade Secret and Innovation Laws in India” 16(4) JIPR 341-350 (2011). [https://moam.info/intellection-of-trade-secret-and-innovation-laws-in-india-nopr\\_597c85541723ddb28e0736d7.html](https://moam.info/intellection-of-trade-secret-and-innovation-laws-in-india-nopr_597c85541723ddb28e0736d7.html) (last visited october 2,2021)

**Chapter 3:** Protection of trade secrets under common law and worldwide

This chapter deals with study of trade secrets that is under the common law giving a historical background and various definitions given under the common law and study of trade secrets in the major economies of the world. The springboard doctrine , liability of the third parties in the misappropriation matter ,exception to the liabilities and remedies that's available for the breach of confidence are also discussed .

**Chapter4:** Protection of trade secrets under Indian legislation

This chapter deals with the protection of the trade secrets in India and various legislations that's applicable especially in reference to Section 27 of the Indian contract act .it consists of the historical background as well as about agreement in restraint of the trade.

**Chapter 5:** Trade secrets under TRIPS agreement and Indian IP law

In this chapter we can observe the WTO and intellectual property rights with a special reference to the WIPO (world intellectual property organization) and the TRIPS agreement.

**Chapter 6:** National Innovation Act 2008 and Economic Importance

This chapter deals with the national innovation act 2008 and also focuses on the Americas COMPETE act 2007, from which the national innovation act has been taken place. Trade secrets in the perspective of the economic importance have also been discussed in this chapter.

**Chapter 7:** Conclusion and Suggestions

The ending chapter includes certain conclusions and suggestions regarding the trade secret protection in reference to India.

## CHAPTER 2

### IPR AND TRADE SECRETS

When an individual creates a property, he enjoys the said property for personal use or use it for gaining some economic profit. Along with sufficient labour, skill, capital etc. Mind is also applied for such property formation. From these properties, where the intellect is more used, the owner safeguard the property by IPRs.

Quintessence of trade in present-time is ideas and knowledge. There is a need to give paramount importance to the ideas behind the various property. Due to this, many corporations which is having multi-national operations need to block others from using their inventions, or from other creations, and use that right to get amount in return, for others using them. These are mentioned as “Intellectual Property Rights” in the contemporary-day parlance. Intellectual property is all about the creativity of humans.. These rights are observed as reward for creative and skilful work in executing ideas. The IPR impact has spread to every aspect of life. In modern times, there is a need to protect these intellectual properties. GATT negotiations which resulted in the-formation of World Trade Organisation including TRIPS have universally recognized the IPR.

Before understanding the nature and meaning of Intellectual Property one must have to know the concept of the property. The term property includes every kind of property whether it is corporeal or incorporeal, tangible or intangible, visible or invisible, real or personal etc. According to the Encyclopaedia Americana: “Anything whether tangible or intangible, which can be reduced to possession or made the subject of ownership comes within the legal definition of property.”<sup>12</sup>

Human rights are considered as positive rights, but in case of IPRs it doesn't allow one to use everyrights, but allows owner to stop others from using the Intellectual property. In such a case IP is considered as a negative right. Intellectual properties are considered as individual right, except geographical indications and farmers rights which can be termed as group rights. The IPR are granted only for a temporary period, after that it falls into the public domain and anybody can use it. In India there is a balance between both capitalist and socialist approach is preserved. Individual rights or private rights are encouraged by the capitalist society where as socialist society encourages collective or societal rights. India being a member of WTO and one of the TRIPS signatories, it has to protect the IPR through legislation. The property which resulted out of mental labour is known as intellectual property.

Famous English jurists John Lock propounded ‘Labor theory’ states: “Human labour deserves reward in the form of proprietary rights”.<sup>13</sup> Also, in Utilitarian theory which is postulated by Bentham states, for, maximum benefit to the maximum members of the society should be provided. IPR serve benefit to the society by enhancing companies or business value and

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<sup>12</sup> Law of industrial and intellectual property , <http://mpbou.edu.in/slm/llm2p3.pdf> , (last visited on march 21, 2021)

<sup>13</sup> Leather Cloth Co. Ltd v. American Leather Cloth Co. Ltd (1863) 4 De G., J. & S. 137

providing an increasing market share. Reward for the IP owners can be justified as they hold the right only for temporary period of time and after that it falls on the public domain for the benefit of the public.

### Kinds of Intellectual Property Rights

Intellectual property involves mental labour. As they have the intellectual efforts which is having commercial value should be given protection. There are many fields such as literature, technology, science, agriculture ,manufacturing which gives rise to the definite intellectual property rights . Depends upon the nature of work and filed taken for application, IPRs have organised into different kinds:

1. Copyrights
2. Trademarks
3. Patents
4. Geographical indications
5. Industrial designs
6. Semiconductor chips and integrated circuits
7. Protection of plant varieties and farmers rights
8. Trade secrets

### 1. COPYRIGHTS

In fields such as literature, arts, drama, choreography, computers, sound recordings, cinematography etc. there is a need to put intellectual efforts, which has to be protected. Be it a poem , story , song or script, copyright protects the IPR of the authors. The Berne Convention<sup>14</sup> proposed that protection should be given where intellectual efforts have been used. Besides, the convention also compels the member states to offer protection to the subject matter that are copyrightable. Rome convention<sup>15</sup> also specify ,the protection of intellectual efforts in the performance. TRIPS agreement also designate copyright to the subject matter. In India Copyright Act 1957 provides protection to the subject matter which has been registered and universally recognized as copyrightable.

In order to get the protection under Indian Copyright Act 1957, one (owner or his representative) has to make an application for the registration. There is Copyright Registrar for this purpose which has been established under this act. In India copyright term protection is for 60 years. Till the end of the expiry, except the author or who has given the authority by the author enjoys exclusive monopoly over his/her work. when the author dies, his/her legal heirs can utilize the rights for the term of 60 years. The work, that is protected, carry a symbol of capital 'C' in a circle.that is, ©to indicate the registration and prohibits others from using it.

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<sup>14</sup> The Berne Convention for the Protection of Literary and Artistic Works 1886

<sup>15</sup> The Rome Convention (International Convention For The Protection Of Performers, Producers of Phonograms And Broadcasting Organizations) 1961

## 2 TRADEMARKS

Trade mark is usually belonging to business group, where visual representation on goods and services are displayed. These will help to market the products from other existing products. this will help in advertising strategies. those representations may be in the form of mark, symbol ,name , alphabet , numerical , colour or any combination of above. Giving particular mark gives identification to that particular product as well as market for advertising. usage of same marking by different businessman is prohibited as it will create uncertainty in the minds of the consumers with regard to the origin, quality etc. Trademark can also be registered. It helps owner to prevent others from using it an unauthorized way and also it give an assurance or safeguard to the consumer who is using the product and thus a way it removes the confusion. Trademark law invokes when it is registered. A registered trademark owner have the power to prevent others from using the registered mark and also can protect the consumers interests .It provides an exclusive right to the owner who uses this mark.

The Trademark Act of India 1958 , which was amended and reconstructed in 1999<sup>16</sup> provides for registration, protection and enforcement of trademarks. The “Paris Convention” on the protection of industrial property explains trademarks as an industrial property and provides for its legal protection. TRIPS agreement also gives protection to trademarks globally. It also introduced concepts such as service marks , collective trademarks etc. Trademark Act 1999 implements the provisions of trips agreement in giving protection to different trademarks including service marks. Trademarks have the protection for a period of 10 years.

## 3.PATENTS

Patents are considered as monopoly right which is conferred to the inventor who have contented the conditions like novelty, inventive step , industrial application and written description. There must be an innovative step which is commercially applicable.It provides 20 years period of right to the inventor. And once the inventor desires , he/she can assign or license the invention to any desirable people. Once the term of patent comes to an end it falls in the public domain and anyone can utilize it. Every inventions cannot be said to be patentable , even though it satisfies all requirements. Inventions which are against the public order are mainly not patentable. The Paris Convention 1883 was the first one to protect inventions for scientific and technological development.1970 Patent Act was only providing grants to process patents but with the coming of the TRIPS , India has amended the patent act to give effect to its agreement provisions and also grant product patents .Patent confers exclusive right to the owner .He gets exclusive monopoly over his rights . If any unauthorized use and exploitation has been taken place , the law also provides for remedies .Sometimes government has the power to interfere with the monopoly in case of public interest either by way of acquisition or granting compulsory licenses.

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<sup>16</sup> The Trademarks Act of India 1958 was amended in 1999 in order to implement the provisions of the TRIPS agreement and to restructure it.

#### 4 GEOGRAPHICAL INDICATIONS

GI are considered as indications which are arising from particular origin or manufactures with specific quality. According to Section 2(e) <sup>17</sup>“Geographical indication”, in regard to goods, means an indication that identifies goods as agricultural goods, natural goods or manufactured goods have origin, or manufacturing in the territory of a country or a region or locality in that territory, where a given quality, reputation or other characteristic of such goods is essentially attributed to its geographical origin and in case where such goods are manufactured goods one of the activities of either the production or of processing or preparation of the goods concerned takes place in such territory, region or locality, as the case may be. <sup>18</sup>

Protection in case of GI is also given by registration. But in case of geographical indication, the rights are not exclusively given to a particular individual. Only government associations of individuals are mainly eligible to seek the protection. the Lisbon agreement<sup>19</sup> postulates the protection of indications across the world. The TRIPS agreement also mandated protection through various legislations. The “Geographical Indications of Goods (Registration and Protection) Act, 1999” is an outcome of the implementations of the provisions of the “TRIPS” agreement in India. Geographical indications are protected forever.

#### 5 INDUSTRIAL DESIGN

A design means the shape, pattern , configuration or ornamentation of an article.<sup>20</sup> It should give an appeal to the eye and also have the capability for applying to industrial products .The TRIPS agreement governs protection to the designs through registration. Such design is protected in India under the Designs Act 2000. The Paris convention on IP intends to safeguard industrial design allover the world. The Designs Act denotes that if any new design that gives appeal to the eye, if not commercially exploited earlier , it has to be registered for the protection. The owner shall make an application before the controller for the protection. It confers the right to use the design foe a term of 10 years which can be extended later .

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<sup>17</sup> The Geographical Indications of Goods (Registration and Protection) Act, 1999 ( Act 48 of 1999), s. 2(e): geographical indication, in relation to goods, means an indication which identifies such goods as agricultural goods, natural goods or manufactured goods as originating, or manufactured in the territory of a country, or a region or locality in that territory, where a given quality, reputation or other characteristic of such goods is essentially attributable to its geographical origin and in case where such goods are manufactured goods one of the activities of either the production or of processing or preparation of the goods concerned takes place in such territory, region or locality, as the case may be.

Explanation.--For the purposes of this clause, any name which is not the name of a country, region or locality of that country shall also be considered as the geographical indication if it relates to a specific geographical area and is used upon or in relation to particular goods originating from that country, region or locality, as the case may be.

<sup>18</sup> Advocate khoj, GI,

[https://www.advocatekhoj.com/library/bareacts/geographicalindicationsofgoods/2.php?Title=Geographical%20Indications%20of%20Goods%20\(Registration%20and%20Protection\)%20Act,%201999&STitle=Definitions%20and%20interpretation](https://www.advocatekhoj.com/library/bareacts/geographicalindicationsofgoods/2.php?Title=Geographical%20Indications%20of%20Goods%20(Registration%20and%20Protection)%20Act,%201999&STitle=Definitions%20and%20interpretation) (last visited on march 22,2021)

<sup>19</sup> The Lisbon Agreement for the protection of Appellations of Origin and their International Registration (Lisbon Agreement) was adopted in 1958 and revised at Stockholm in 1967. It entered into force on September 25, 1996, and is administered by the International Bureau of the World Intellectual Property Organization (WIPO)

<sup>20</sup> Sahil K. Roy Choudhary and H.K. Sahang, Law of Trademark, Copyrights, Patents and Designs Vol. II 610 ,177-179(Kamal Law House, Calcutta, 2<sup>nd</sup> edn.1999).

## 6 SEMICONDUCTOR INTEGRATED CIRCUITS AND LAYOUT DESIGNS

We know that electronic gadgets are made of electronic circuits. There are circuits found inside the gadgets of the electronics which have noted functions. The electronic circuits are integrated from the e-chips, also called as semiconductor chips. The designing of the integrated circuits and chips is known as the topography or layout design which includes intellectual creativity and efforts. Lay out design means, a layout of transistors and other circuit elements which includes lead wires connecting such element. The efforts which are intellectual here is protected by the law.

The “Treaty on Intellectual Property” in respects of Integrated Circuits, 1989 proposed to make protection available for new as well as the original designs of circuits and chips. Also, the “TRIPS” agreement indicates protection to the new and original designs of circuits and chips all around the world through registration. It provides a term of ten years to use and can exploit from anywhere else. But government can use the registered chip without any permission from the owner. By validating the provisions of the TRIPS agreement the government of India has established the Semi Conductor Integrated Circuits Layout Designs Act 2000, that gives protection to integrated circuits on fulfilment of novelty, distinctiveness, originality, and those which has been previously exploited. There are also some remedies available if any violation of the exclusive rights has been happened.

## 7. PROTECTION OF PLANT VARIETIES AND FARMERS RIGHTS

India being a member of “WTO” and signatory to the “TRIPS Agreement” agreed to introduce new legislation for protection of plant varieties. Article 27.3 (b) of the ‘TRIPS Agreement’ defines that, the member nations shall provide protection of plant varieties either by patent / by an effective sui generis system. In agreement to it, India enacted “Protection of Plant Varieties and Farmers Right Act” in the year 2001 and its Rules in 2003. The “Protection of Plant Varieties and Farmers’ Right” Authority was established in the year 2005.

The “Protection of Plant Varieties and Farmers’ Right Act 2005 is considered as unique as it not only provides protection to the breeders but also look care of the farmers rights as well as rights of the many communities, rights of the researchers, benefit sharing and compulsory licensing etc.

## 8. TRADE SECRETS

In this period of globalization, it is very important to protect the trader’s interests. Even though anti-competitive laws are there to prohibit the market control, trade secret law protects traders’ interest by way of protecting the business secrets. Trade secrets are protected mainly by the common law principles like prevention of unjust enrichment and fiduciary duty. The principle of unjust benefit denotes, one should not benefit at the cost of others. Fiduciary duty means that if anyone is known by any information and if there is a relationship of trust exists between some, then it should not be misuse such information detrimental to other. India has no exclusive trade secrets law, Indian courts have given the protection to trade secrets under various statutes such as contract law, copyright law, equity principles and at times, common law action of

breach of confidence and also section 72 of the Information Technology Act 2000 also provides for protection, although its only limited to electronic records.

The subject matter of the trade secrets are always defined in broader terms and it includes many methods such as the sales, distribution, consumer profiles, advertising strategies, lists of the suppliers and the clients and the manufacturing processes. Final determination on the what leads to trade secrets are mainly depend upon the situation of the each case like unfair practises in regard of the secrets including the industrial or commercial espionage, breach of contract and the breach of confidence .it can be a formula <sup>21</sup>or computer programme <sup>22</sup>,process <sup>23</sup>,method<sup>24</sup>,technique <sup>25</sup>,device<sup>26</sup>,price information, customer lists <sup>27</sup>or any other information that has been kept as a secret. The law commission of the England and Wales,<sup>28</sup> has mainly laid down four categories regarding the information which can be considered as the trade secrets. These are the secrets which are dealing with the highly specific products, secrets that are technological, strategical business information and private collection of the individual items which are of highly public information. Also trade secrets not need to be comprised of positive details like specific formula but can include negative inconclusive.

Trade secrets have to have an economic value, as a secret. the rightful owner should take the action if its misappropriated. The very significant fragment in the IP domain is secrecy, not the creativity. As the benefits of the digital technology is rising, it also gives rise to the trade secrets of being the choice of intellectual property. In the case of American Express bank ltd v. Ms. Priya puri <sup>29</sup>, the court held that consumer data is neither trade secrets nor properties. It has been observed that within a five months span, any prudent intellect should get to know the consumers. also, the court has ruled that the rights in the workplace should not be limited on the basis that he has information of the private client details and in this case dismissed the restriction appeal. the main aim behind this privacy are the values so the IP domain must remain in practical essence. Like all other intellectual property, the IP domain is becoming more and more important and it's playing an important and growing part in the country's economy.

### **Contract law:**

In India a person is bound by the contract to not disclose the information or secret that is revealed to other in secret. section 27 of the Indian contract act points out, all agreement that restraint in trade is void.in Richard brady v chemical process equipment's Pvt Ltd <sup>30</sup> the court

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<sup>21</sup> The formula of the Coca-Cola is their companies secret recipe .the company keeps it as a secret only known to few employees.

<sup>22</sup> The source code in a computer Programme is not distributed and its kept is as a secret

<sup>23</sup> The process involved in the manufacturing of the certain goods which is not known by others and has an economic value.

<sup>24</sup> The process involved in making of the KFC chicken is not very much disclosed to anybody although ingredients are known to others.

<sup>25</sup> Technique used in certain type of the exercise for the weight lose can be considered as a secret by the body slimming center.

<sup>26</sup> Device that's made for the extraction of the petrol from the crude oil is kept as a secret.

<sup>27</sup> It can be kept as a secret by the trader so that other ones cannot approach the customer.

<sup>28</sup> Law Commission of England and Wales, "Legislating the Criminal Code: Misuse of Trade Secrets", Consultation Paper No. 150 (Her Majesty's Stationary Office, 1997)

<sup>29</sup> American Express bank ltd v. Ms. Priya puri (2006) III LJ 540 Del

<sup>30</sup> Richard brady v chemical process equipment's Pvt Ltd AIR 1987 Delhi 372

invoked a wider equitable jurisdiction and also awarded injunction in the absence of a contract. Here the plaintiff invented a fodder production unit and sought a supply of thermal panels from defendant, plaintiff shared all technical material, know-how, drawings and everything. Later defendant didn't supply the ready thermal plants has started his own fodder production unit.

### **Copyright law:**

Databases are considered as an important tool for the businesses. These databases are mainly protected under copyright law. Section 2(o) of the copyright act, 1957 defines compilations including, computer databases as literary works.

Theoretically copyright and trade secret law protects the different elements of combined business data, with copyright protecting expression and trade secret protecting underlying data. In *Burlington Home Shopping Pvt Ltd v Rajnish Chibber*<sup>31</sup>, the Delhi high court found that defendant's data base was substantially a copy of the plaintiff database, the court granted the interim injunction.

India is a signatory to the Paris convention. Article 1(2) of the agreement on TRIPS states that IP shall include protection of undisclosed information. Article 39 of TRIPS states that member nations should assure that natural and legal persons can stop the leakage of such information from their control which would be used by other persons without their consent in a manner contrary to honest commercial practice. In 1989, GATT on India established that trade secrets cannot be considered as IP rights, mainly because IP rights focus on disclosure, publication and registration, while trade secrets deals with confidentiality. India approved the National IP rights policy in 2016, which has many objectives. One of the main objective is to ensure an effective legislative and legal framework for the protection of IP rights. This has to be done by finding out the identification of important areas of study, one such area was from protection of trade secrets.

The TRIPS agreement actually entered into 1995, which established an international standard for WTO member nations to protect undisclosed information. Although trade secrets is not directly pointed out here, but this undisclosed or confidential info includes trade secrets. Section 7 speaks of protection of undisclosed information. Many countries have specific legislations to protect the trade secrets. In order to boost research and innovation, Indian govt has released a draft national innovation act. This legislation is enacted by "Department of Science and Technology" and focus at building a comprehensive framework to uplift innovation. The "Draft National Innovation Act, 2008" endeavour to bring out a comprehensive legislation to enhance research and innovation. The draft, has a three approaches.

- Firstly, it promises to encourage innovation by an innovation support system which is facilitated by the public, private or public-private partnership.
- Secondly, developing into a 'National Integrated Science and Technology Plan'.
- Thirdly, by codifying and consolidating the confidentiality law, for the protection of confidential information, "trade secrets" and innovations.

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<sup>31</sup> *Burlington Home Shopping Pvt Ltd v Rajnish Chibber* 1995 PTC (15)278.

Article 10 (b) of the Paris Convention & Article 39(2) and 39(3) of the TRIPS Agreement, 1995 gives the global standard for trade secret laws. However, in India, there is no such unique legislation. The draft National Innovation Act implemented was the first real effort in protecting Confidential Information, trade secrets and innovation.

It has three pillars. It emphasizes to encourage innovation through public-private partnerships. It expects to evolve a National Report on addressing Trade Secret Provisions in India. And finally, it focuses toward the codification and consolidation of a law of confidentiality in aid of protecting trade secrets, related information and innovation. Its salient features are:

1. Section 2(3) of the act defines<sup>32</sup> “Confidential information as an information, which includes a formula, pattern, compilation, program device, method, technique, or process, that:

(a) is a secret, not known to all generally, or easily accessible to persons within the circles that normally deal with.

(b) has a commercial value due to its secrecy;

(c) has been subjected to reasonable steps by the person, who has lawful control of the information, to keep it as a secret.

2. Under Section 8 of the Act, set out the obligations of confidentiality. Parties can decide the terms and conditions in respect of Confidential Information for maintaining confidentiality and prohibit misappropriation contractually.

3. Section 9 creates rights to maintain and prevent the disclosure of confidential information.

4. Section 10 extends the protection of information or apprehended concerns of possible misappropriation of such information

5. Section 11 gives the exceptions to misappropriation of Confidential Information. These are:

(a) The Confidential Information which was already available in the public domain; or

(b) The Confidential Information, that has been independently grabbed by the ‘claimed’ misappropriator, or by any third party from whom the ‘claimed’ misappropriator received the information; or

(c) Where disclosure is held to be in the, public interest, by the court of law.

6. Section 12 lays out the injunctive power of the courts. The courts may grant interim, ad interim or final injunction as may be required to restrain any misappropriation.

7. Section 13 prescribes Mandatory damages when confidentiality has been breached. A complainant may be entitled to:

(a) such mandatory damages, not exceeding the limit that has been notified by the Appropriate Government from time to time under Section 15 (c), in which, sum shall be recoverable as a contract debt; or

(b) those such damages as may have been agreed between the parties by a contract ; or

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<sup>32</sup> Protection of confidential information in India , <http://www.escaladelegal.com/Article-PROTECTION.html> , (last visited on march 22 ,2021)

(c) Actual damages as may be demonstrated, which includes consequential losses.

and, if the misappropriation was carried out with a malicious intention, the complainant may get three times the amount provided under Section 13. In order to secure his right to defend, the defendant may be asked to deposit 10 percent of the damages that has been claimed.

8. Immunity for acts carried out in good faith or purporting to have been so done, is given under section 14.

The implementation of the National Innovation Act would be a milestone in securing the rights of those who possess trade secrets, and hence greatly benefit businesses in India; thus making it a more competitive global market space. Yet, this Act has not yet seen the light of day.

9. Section 14 provides for Immunity for acts done in good faith or purporting to be done. However, this Act is yet to see the light of the day.

### **Right to Information Act, 2005.**

Section 8(1)(d) of the Right to Information Act, 2005<sup>33</sup> says that there is no obligation to provide any information to any citizen that includes any commercial confidence, trade secrets or intellectual property unless there is a larger public interest involved. In this circumstance, there exists a problem while balancing the right of the citizen to have access to any information and thus preserving a company's interests.

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<sup>33</sup> <https://indiankanoon.org/doc/1001313/> (last visited on 21 september 2021)

## Conclusion

Currently , the Indian trades secrets law is a judiciary made law based on common law and principle of equity, and Indian jurisprudence regarding trade secrets is unclear on number of important aspects like scope of damages , theft of trade secrets by competitors ,procedural safeguards during court proceedings etc.

The recent formation of national IP rights policy has given plans for the introduction of trade secrets law. currently there is no particular time frame has given to achieve the objective , it is undeniable that there will be a trade secret law in near future Legislation in other countries and possible influence of such legislation in India. There is a strong need for legislation with respect to the trade secrets . Indian law can be made conveniently based on English law or English court principles or federal trade secrets law of USA under 1990 uniform trade secrets act ,the Restatement (Third) Unfair and the judicial pronouncements of the same.

In India, the codified law must first define the word trade secrets and the subject matter. protection also should be extended . information in combination to other information also should be protected. to make sure that the knowledge is not in the public domain, factors such as industrial level of general knowledge and information ability can be taken. its is necessary for a codified law to take tort of misappropriation into consideration which is committed through improper means. a body specializing in deciding cases related to trade secrets as in other cases related to IPR have to be kept in conduct proceedings. disclosure of the trade secrets should be taken care of and in lieu of proceedings should be also taken care of. Starting from the Paris convention to the TRIPS agreement, there were many international agreements that were adopted for the protection of the intellectual property rights . the TRIPS agreement actually unified the IPR law in all the member states. this agreement can be considered as the magna carta of the IPR . trade secrets are confidential, at the same time they have commercial value. so in order to maintain its practical value , one has to share it with few people like the employees or the business partners. So a little disclosure about the information is a must.

## CHAPTER 3

### PROTECTION OF TRADE SECRETS UNDER COMMON LAW AND WORLDWIDE

Under the system of free private enterprise and competition, the trader should obtain as much information concerning his rival's business and let him know a little of it. This information may be a trade secret like the method of production or a business, financial secret or arrangements. Some of this information would be extremely confidential, as being potentially changing. If a competitor obtained it, some would be less so, and much would be worthless to a rival organization. Countries protect trade secrets in the form of confidential information. Where there are no specific laws for the protection of trade secrets, common law provides protection.

Common laws are uncodified. This means there is no inclusive compilation of legal rules and statutes which comprises common law. Common law mainly based on judicial precedents. These are maintained year by year through the court records and journals, and reports. The applications of precedent in each case decision are determined by presiding judges of the case. Trade secrets protection are mainly based on common law principles. Trade secrets are being protected under the contract, quasi-contract and the property rights. The trade secrets protection under contract theories include in which were existed an express contract or a confidential information etc. The quasi-contract protection includes avoidance of unjust enrichment from misappropriation of trade secrets. Trade secrets are seen as a property right under property theory, which includes subjective as well as objective approaches subjects to protective rights in its uses and disclosures. Under the common law, liability for trade secrets misappropriation needs acquisition by another by improper conduct or unfair means and the use or disclosure by such person to the detriment of the trade owner. The jurisdiction for restraining the breach of confidence has its origin in the law of contract and equity due to the remedy of injunction. The subject matter also occupies the same moral terrain as a breach of trust. In this modern era, the breaking of confidence started in 1948 by appealing an English court decision in *Saltman engineering co ltd v. Campbell engineering co ltd*<sup>34</sup>. In this case, breach of confidence is considered as a different cause of action, and liability exists detached from any other legal action. Trade secrets and confidential information are considered as an equitable right more than a property right in commonwealth common law jurisdictions.

In the case of *Coco v. A.N. Clark (engineers) Ltd*<sup>35</sup>, the test for detecting out a cause of action for breach of confidence in the common law world is set out. The court, while granting the injunction, pointed out, provided the test for a cause of action for breach of confidence as:

1. The information must contain the necessary quality of confidence concerning it.
2. Information have been imparted in the circumstances imparting an obligation of confidence.
3. There must be an unauthorized use of that information, which in turn, detrimental to the party communicating it.

If the elements of the tort of breach of confidence are satisfied, an action can be started for the trade secrets disclosure under the tort of breach of faith. Courts provide various cases for breach

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<sup>34</sup> *Supra n. 6*

<sup>35</sup> *Coco v. A.N. Clark (engineers) Ltd* [1968] F.S.R. 415

of confidence. A trade secret is an aspect that has to be kept in confidence with other people. It is impossible to run a business or trade without sharing the secret with associated people, and such sharing is done in confidence. A trade secret has monopoly value as well as use-value. Still, the former will be usually affected by the misuse of the unknown. A right of action for confidence breach, strengthens and, in many of the cases, it predates a more crystallized intellectual property right. The nature of this kind of action can be considered in the leading Spycatcher case (*Attorney general v guardian newspapers*<sup>36</sup>) where Lord Keith held that based on an equitable principle of confidence, the obligation may exist independently of any contract. Such an action seems to stem from the belief that information can be seen as a property right.

But, this assertion has been the focus of rigorous debate. The main problem is, however, occur because the secret is once revealed, the ideas of legal and equitable title cannot be applied. In certain circumstances, courts have looked trade secrets protection in a new light where traditional characteristics aren't necessary. Moreover, it was held that trade secrets disclosure in the form of breach of confidence is not allowed. It is deemed that there exists an implied contract in the case of employment. Breach of confidence in such kind of cases may amount to the disclosure of confidential information or the trade secrets and will be considered as a tort of breach of confidence.

The law of breach of confidence is focused mainly on use or disclosure, not on acquiring information. In *Saltman Engg Co v. Campbell Engg, Ltd*<sup>37</sup> Lord Green, shown that primary test for imposing an obligation for confidence breach. Suppose it proved that defendant used the confidential information directly or indirectly obtained from the plaintiff without the plaintiff's consent, express or implied. In that case, he will be considered to have done infringement of the plaintiff's rights.

### **CONFIDENTIAL INFORMATION:**

The business may have a different type of information. But all information's are not equal. Some information's are relatively important than other. Some of the reports are so important that they determine the fate of the businesses, and these are considered confidential and kept as secrets. The most valuable asset of a company is confidential information. Law may not automatically prevent others from using the most valuable information. Confidential information can be ascertained by testing the basics of the information such as objective and subjective tests. In *Thomas Marshall (EXPORTS) Ltd v Guinle*<sup>38</sup>, here Ms. Guinle was the managing director in the company of the plaintiff and then later she started a competitive company. Plaintiff after knowing this had filed a petition and sought for an injunction against the starting of the competitive business. The plaintiff said that defendant was a previous employee and he knows some confidential information. The court observed that once information is considered as confidential, it's not available in the public domain and the owner of this information has a reasonable belief that its release would be detrimental to the business. Here the idea of the owner has given the primary importance. These decisions were reviewed by the House of Lords in the famous Spycatcher case, (*attorney general v. guardian*

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<sup>36</sup> (*Attorney general v guardian newspapers* [1990] 1 AC 109)

<sup>37</sup> *Supra n6*

<sup>38</sup> *Thomas Marshall (EXPORTS) Ltd v Guinle* [1978] IRLR 174, HC

newspapers<sup>39</sup> and observed that if the holder of information himself has made the information in the public domain, no action of breach of confidence will exist.

### **Nature of confidential information**

The concept of trade secret and confidentiality of information is generally considered as equitable rights. One who receives information under confidence has a duty to bound not to disclose it. If any disclosure is made unfairly by the recipient and or third party, the law will intervene and provide a resort. Unlike in the other areas of the intellectual property, confidential information is not considered as a property in the legal sense. Legal systems those which do not consider the information as property, do protect the information under the law of equity and while giving away the protection, the form of the information is immaterial which means it can be verbal or in the written form.

### **Protection of confidential information**

Common law protects confidential information as protection of confidence in the relationship. The modern law finds its footing in *Coco v. Clark*<sup>40</sup>, which was then concluded in *Saltman v Campbell*<sup>41</sup>.

- 1) Information itself have a necessary quality of confidence in it.
- 2) That information must have communicated in a situation where confidential obligation exists.
- 3) Any unauthorized use of information made to the detriment of the party dealing it.

There is no particular categorization of confidential information. It can be of any information, such as commercial, personal or any other information.

### **The obligation of confidence in fiduciary relationships:**

there should be an obligation in confidence in a relationship to protect information from disclosure under the law of confidential information. There must be a nexus between the owner and recipient of the information, which may be in the form of legal information. Because of this relationship, there is an obligation of non-disclosure. And at the same time, information shouldn't be available in the public domain. There must be circumstances that create the relationship between the parties.

A fiduciary relationship must be of trust and confidence. Any relationship in which one party owns active confidence of other party, a fiduciary relationship exists. It can be considered as the basis of an obligation, under which there is exists protection of information and should not misuse that confidential information. The essentiality of a fiduciary relationship is that equity imposes an obligation on the trustee to act in the beneficiary's best interest. In the case of the employer-employee relationship, there is also a fiduciary relationship. the trust that confidentiality is needed throughout the employment and, in some instances, continues even after the termination. Thus, the employee is obligated to maintain confidentiality. in modern

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<sup>39</sup> *Supra n29*

<sup>40</sup> *Supra n28*

<sup>41</sup> *Supra n6*

times, even though there is no agreement, the employee must maintain confidentiality because of confidence.

Moreover, an employee is under an obligation when there exists confidential information. In general parlance, an ex-employee is free to use his knowledge, skills and experience for his future jobs. Even the ex-employee can compete with his former employer, provided he's not using any information he has unlawfully derived from his previous employment.

### **Test for considering information as confidential:**

To know, if the information has been received with an obligation to keep it secret, the courts apply an objective test. Megarry J. in *Coca v. Clark*<sup>42</sup> held: If the outlooks are such a way that that any prudent man standing in recipient's shoes regarding the information would have realized that upon practical grounds the information was being given to him in confidence, then it should impose upon him the equitable obligation of confidence.

A critical test is that of the public disclosure test. If the information is readily available in the public domain, it loses its confidential character. It should be seen that whether the general public can access the information or not. The most important part is to test the detrimental effect of disclosure of information. There is no obligation of confidentiality arises, if a person receives such information before any contractual agreements or on formation of fiduciary relation. The reverse engineering of confidential information is also not considered as a breach of confidence.

### **Essential Requirement of Trade Secrets**

"Trade secrets" law is the direction towards promoting trade. Hence, only such information must be protected that helps achieve the result. The common law adopted a functional approach for defining the concept of "trade secrets". Courts preferred to restrict between information that is in the public domain and that which is not. However, the "Law Commission of England and Wales"<sup>43</sup> has laid down specific categories of information that can be regarded as "trade secrets". The commission laid down four main specific types of information's which can be considered as "trade secrets". These are

- Secrets that are relate to specific products;
- Technological secrets;
- Secrets relate to the strategic business information; and
- Secrets that are included in the private collections of individual items of public information.

Law allows businesses to protect the information because of its potential value even though the information is not used presently but may be used later or needs to be developed. "Trade secrets" information must have three minimum specifications. These specifications are information must be secret information, have independent economic value, and reasonable security measures have been employed to maintain the secrecy of information.

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<sup>42</sup> Supra(28)

<sup>43</sup> Legislating the Criminal Code: Misuse of Trade Secrets, Law Commission of England and Wales, Consultation Paper No. 150 (Her Majesty's Stationary Office, 1997)

### 1) Secret information:

Law protects information as "trade secrets" only if the information is not publicly available in the domain or, in other words, "which is not known generally"; the information which are known generally cannot be protected as "trade secrets. The courts in many cases have even protected the relative secrecy and held that its not necessarily need to be absolute. In the case of the *Rob v Green*<sup>44</sup> the question was whether the information that's regarding the customers list, which is available in the public directories can be protected under the law of trade secrets. The queens bench held that although the information is publicly available, still, the defendant is not allowed to take the advantage as it has been collected spending too much labour for the compilation, so held that the general information is not the subject matter, but the list is.

### 2) Independent economic value:

In order to protect the law, the information must give a competitive asset over others who are not aware of the information. This advantage must provide independent economic value over others but not generally. In the *Wanke, Industrial, Commercial, Residential Inc. v Superior Court*<sup>45</sup> Wanke has installed a waterproofing systems in the southern California. Two of their employees who were signed the confidential agreement has left their current job and they formed their own waterproofing company named WP solutions and they issued a statement showing that they can use the details of the customers details as all were collected due to their hard work. But the court held that the information gained by the two employees was obtained during their course of their employment. So these information can be considered as trade secrets and wont allow to be used by the ex-employees for their own business requirements and hence so the injunction was granted.

### 3) Reasonable security measures:

The courts, in various cases, held that, in order to get the protection of the law, the owner must prove that he tried to maintain the secrecy, in a reasonable manner; it is called a "reasonable security measure" under common law. In the case of *Junkunc v SJ advanced technology & Mfg. Corp*<sup>46</sup> the process was considered as the trade secrets. The plaintiff in this case was claimed that the process of their manufacturing the fuel nozzle seal which is used in the jet engine is used by their manufacturing of nozzle-zeal. The plaintiff in the case has proved that only 5 people knew about their process and he has spent a huge amount during the past years for it. The court on this case held that if there are sufficient measures that have taken to protect the secrecy then it will amount to the trade secrets and its protected and granted injunction in this case.

### **The Springboard Doctrine: An Overview**

Where information has been acquired unlawfully, the springboard principle applies to prevent the recipient and others from utilizing the information, but not indefinitely. The factors that are kept in mind while assessing whether the springboard doctrine will apply or not include the means and manner in which the information has become public, which are the other lawful

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<sup>44</sup> *Rob v Green* (1895) 2 QB 315

<sup>45</sup> *Wanke, Industrial, Commercial, Residential Inc. v Superior Court* 1 (2012) 209 Cal.App.4th 1151.

<sup>46</sup> *Junkunc v SJ advanced technology & Mfg. Corp* 2 (1986) 149 Ill. App.3d 414

means in which the defendant may have acquired the information, and the probable state of mind of the defendant in disclosing the information. The essence of the law of confidential information is that a person who has received information in confidence is not allowed to benefit it as a springboard for activities dangerous to the person who made the confidential communication, even when all other features have been published or can be ascertained by actual inspection by the public members. As Lord Danning has remarked, the "springboard does not last forever". The common law doctrine "springboard" is often used to protect confidential information by the English courts. The protection of the springboard doctrine is available until the processor information is acquired by reasonable means, such as reverse engineering.

The possessor of the confidential information still has a long start over any member of the public.<sup>47</sup> Lord Danning remarked that springboard doctrine does not last forever<sup>48</sup>

### Liability of Third Parties for Misappropriation

The basis of third-party liability is knowledge of confidentiality and inappropriate means of obtaining the information. An action for misappropriation under common law cannot be used against a person, who purchased the information without knowing that it is confidential, and if the third party come to know that the received information by him once was confidential but now publicly available, he can use the information because it lost the essentiality of confidence law.

In the case of Cadbury Schweppes Inc. v FBI foods ltd<sup>49</sup> the issue in the question was whether the process of making of the drink named clamato, the question that involved was that whether a company that has received that confidential information as a third-party recipient, but they don't know the information to be confidential can be considered as liable or not. Learned justice Binnie has observed that, equity as the court of conscience directs itself to the behaviour of the person who has come into possession of information that is in fact confidential, and was accepted on that basis, either expressly or by implication. Equity will pursue the information into the hands of a third party who receives it with the knowledge that it was communicated in breach of confidence (or afterwards acquires notice of that fact even if innocent at the time of acquisition) and impose its remedies.<sup>50</sup>

### Exception to Liability

- General knowledge:

In the case of the mason v provident clothing and supply co ltd<sup>51</sup>, it was held that the common law as a matter of the public policy allow a person to utilise the general skill and the knowledge in his next employment. Suppose the defendant proves that the information possessed by him is of general knowledge, and such information is not derived from his previous employer or

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<sup>47</sup> Roxburgh J. in Terrapin v. Builders Supply (1967) R.P.C. 375 at 392.

<sup>48</sup> Lord Danning in Potters-Ballotini v. Weston-Baker (1977) R.P.C. 202 at 205

<sup>49</sup> Cadbury Schweppes Inc. v FBI foods ltd (1999) 1 S.C.R. 142 at Para. 19

<sup>50</sup> Ibid

<sup>51</sup> mason v provident clothing and supply co ltd (1913) AC 724, at 740-41.

not derived by unfair means. In that case, the defendant cannot be restrained from using such information.

- Parallel development:

If the defendant can prove that he develops the information, i.e., he has made a parallel development of the process, he can absolve from liability. It can be said that the owner of a "trade secrets" doesn't have an absolute monopoly over the "trade secrets"; any other person may also have developed the process through proper means. Thus, law protects any new development made by individuals through their research. In the case of *Kewanee oil company v bicron corporation*<sup>52</sup> the court held that the trades secrets owner does not hold the monopoly over the data that comprises the trade secrets. if other companies want to know they have the right to discover the element by their own research and hard work.

- Reverse engineering:

Reverse engineering means beginning with the result to get the initials. In reverse engineering, the "trade secrets" are discovered by analysis of the product. Law does not prohibit the examination of the product by honest means. But this exception is not absolute; the defendant has to prove that the process incurred in reverse engineering is fair.

In the case of the *Barr-Mullin, Inc v. browning*<sup>53</sup> the question was whether a software programme can be considered as a subject of the trade secrets. the North Carolina court of appeals held that the software was a protectable trade secret. in this case the source code f the software wasn't available in the public domain only the object code were available. The defended argued that the object code is already available in the public domain and it has been reverse engineered by the. The court held that the defence cannot be admitted . the court has held that the party that asserts the existence of a trade secret doesn't have to show the impossibility of the reverse engineering. the plaintiff should merely show that the alleged trade secret was not ascertained readily through, reverse engineering that's it .

- Innocent acquisition of information:

If a person receives information without knowing it to be confidential, then such acquisition of knowledge is an innocent one and does not amount to unlawful act. In the case of the *monister for minerals resources v Newcastle newspapers pvt ltd*<sup>54</sup>, the court has held that no liability for the confidential information should attach a bonafide purchase for the information value without noticing the confidentiality.

- The Public Interest

If the defendant can prove that information used is made for the public interest, he will not be held liable for breach of confidence. It is established law that, for a greater public good, information can be disclosed or used. But, if the plaintiff or owner of the information can prove

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<sup>52</sup> *Kewanee oil company v bicron corporation* (1974) 416 U.S. 470

<sup>53</sup> *Barr-Mullin, Inc v. browning* (1993) 424 S.E.2d 226

<sup>54</sup> *minerals resources v Newcastle newspapers pvt ltd* (1997) 40 IPR 403 at paragraph 405

that personal interest outweighs public interest, then the information is protectable as confidential information.

In the DVD copy control ass'n, Inc v bunner,<sup>55</sup> the court found out that trade secrets are of purely private concern and they are not matters of the public importance.

- Statutory Obligation/Exercise of Power

If the defendant uses or discloses the information under any statutory obligation, he will not be held liable for confidential information disclosure. There are situations where court orders dealing with those persons, who cannot be held guilty for disclosing confidential information as he was doing a duty that was authorized by law. In the case of parry jones v law society<sup>56</sup>, Lord denning held that the attorney is under an obligation for the information disclosure, if its ordered by the courts.

### **Remedies available for breach of confidence**

1. Injunctive Relief: Whenever a breach of confidence is done, the risk of availability of information as public information becomes very high. If it happens, party is affected by the irreparable damage. So, in order to preserve the utility of the information, parties apply for an injunction.

2 Damages: Remedies in the form of damages are provided in cases where the owner of the confidential information has suffered loss because of breach of confidence or confidential disclosure. Damages can be provided with the injunctive relief. Damages are calculated on the basis of the market value of the confidential information. It is very important to provide this relief to minimize the businesses' loss and as a lesson for mis appropriators.

3 Accounts of profit: In cases where the defendant uses the information and earns profit, then the law provides a remedy of "accounts of profit"—these remedy strips the defendant of profits earned by the use of confidential information.

4. Delivery of confidential information: This remedy provides that the defendant has to deliver all such things related to confidential information. The confidential information itself has to be delivered and other related things from which such information can be again generated.

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<sup>55</sup> DVD copy control ass'n, Inc v bunner (2003) 31 Cal. 4th 864

<sup>56</sup> parry jones v law society 4 (1969) 1 Ch 1

## **Conclusion**

All types of information may be obtained or disseminate in confidence, though the degree of confidentiality required may vary from partial to total. The modification of the law into more definite rules is very difficult, and this problem is faced by all the countries while formulating a legal framework. As far as a breach of confidence is concerned, English law does not distinguish between types of information that may be protected; The confidential information is of much importance for the owner as confidentiality of such information provides business advantage and chances of maximizations of profits. All the information of businesses is of not equal importance. Still, some information is relative of high importance and needs to be kept within a small group of persons, and at the same time, it should be protected from discloser by the same group. In various judgments, courts have taken steps and provided remedies for breach of confidence to maintain the confidentiality of information. If information fulfils the essentiality of confidential information, then the court protects such information under the purview of confidence law.

The cause of action is at common law an equitable action and at present, it does not only protect confidential information in the commercial sense but also the right to privacy. It is not dependent on the existence of a contractual relationship so there is a ned for the codified legislative framework for the trade secrets protection as it lacks the standard for the degree of the confidentiality , limitation on the springboard principle , no law for the third party liability and it lacks the foreseeability of the problems .

## **IP PROTECTION IN WORLDWIDE**

"Intellectual Property Rights" protection is one of the essential contemporary legal issues in international trade. As international trade and investment increases globally, copyrights, trademarks, patents and "trade secrets" have become subjects of a more global perspective. The necessity for legal protection of products, which are the outcome of the mind, is apparent in the international trade and investment context from the standpoint of developed countries. "Trade secrets" is a crucial subject matter of law worldwide. The signatory nations of "W.T.O." are obliged to protect International Trade and Investment Perspective "secrets" because of the "TRIPS agreement". It stipulates three necessary conditions which are to be contented by any information before it can be considered undisclosed information ("trade secrets"), these are: -

- Such information has to be secret, that is not generally known or readily accessible
- The information should have a commercial value, and it must be the subject of reasonable steps

It can be said that "trade secrets" mentions data or any information tht is connecting to the business which is not known to the public generally and which the owner tries to hold as a confidential secret. Usually,trade secrets give a competitive edge over their opponents in the business. Be it any kind of data, processes, or information; these can be held as the trade secrets as long as it's kept as a secret and according to the owner's economic interest. For example, a business may contain different internal processes regarding its operations, which can be considered as trade secrets. With the effect of globalization, it has now become essential to give protection of trade secrets. The TRIPS agreement induced intellectual property protection within a multilateral trade agreement and made it to dispute settlement and also potential trade sanctions in the case of non-compliance. For this, the World Trade Organisation (WTO) agreement may be considered as a significant win for the economies which generate intellectual property. The most demanding form of protection used in any business is secrecy. Remarkably, it can be assumed that the TRIPS agreement incorporated requirements concerning the trade secrets.Entry into the World Trade Organisation (WTO) agreements force gave rise to two major developments.1) It enshrined internationally as in a class of protected rights.

2) Set out legal obligations internationally for members of WTO.

Each member should, in their domestic law should provide protections which is set out in the TRIPS agreement, and don't implement those measures that are inconsistent with the agreement, that harm the business. Trade secret law, like other I.P. forms, is governed by national legal systems. In the particular TRIPS agreement, national legal systems should provide the required substantive and procedural protections in order to be consistent with the W.T.O. agreement.

### **Substantive Requirements**

Article 39 of TRIPs Agreement<sup>57</sup>, each Member in the W.T.O. must, in its domestic law, should provide protection for the

- "Undisclosed information", which is
- Not generally known or easily accessible,

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<sup>57</sup> [https://h2o.law.harvard.edu/text\\_blocks/6623](https://h2o.law.harvard.edu/text_blocks/6623) (last visited on 28 september 2021)

- It has a value
- Its subjected to "reasonable steps" to keep it a secret
- Use "in a manner which is contrary to the genuine commercial practices."

Article 39(3)<sup>58</sup> includes additional requirements approving the marketing of pharmaceutical or agricultural chemical products which use new chemical operations. A condition exists for such approval. A member requires the submission of undisclosed information; the member must protect such data against unfair commercial use and against disclosure except where it's necessary for the public. The protections appeared to be a mixture of E.U. and US. This provision has been adopted by more than 100 member countries implementation, and compilation under W.T.O. doesn't seem to be 100 per cent, but most major trading economies and step towards trade protection comes under this.

Each member may adopt and implement and give effect as the way they see. It can be assumed that the issue is not the legislative vehicle but the effectiveness of the protection. Where the executing measures are considered ineffective, there would be no resort to the domestic courts .In addition to the protection of trade secrets; the TRIPS agreement provides more general, non-discriminatory obligations regarding the Intellectual Protection.

- Article 3<sup>59</sup>: "Each Member shall accord to the nationals of other Member's treatment no less favourable than that it accords to its own nationals concerning the protection of intellectual property."
- Article 4<sup>60</sup>: "With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members."

### **Procedural requirements:**

The negotiators of the TRIPS agreement were aware that substantive protections mean smaller if domestic enforcement procedures are not adequate to the task. For this reason, Members of the W.T.O., the TRIPs Agreement includes procedural protections for effective implementation of the rights holder's rights.

Article 42 requires a "fair and equitable procedures" for the IPRs enforcement .

Article 44 deals with the injunction provision and provides that a Member must give judicial authorities, the authority to order a party to abstain from an infringement, subject to a good-faith exception,

Article 45 denotes the requirement related to the grant of damage awards. There are mainly four points concerning a "trade secret" matter:

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<sup>58</sup> Trade Secrets in International Law: The WTO's Secrets of the Trade  
<https://www.jdsupra.com/legalnews/trade-secrets-in-international-law-the-26679/> (last visited on 29 september 2021)

<sup>59</sup> WTO Analytical index : [https://www.wto.org/english/res\\_e/publications\\_e/ai17\\_e/trips\\_art3\\_jur.pdf](https://www.wto.org/english/res_e/publications_e/ai17_e/trips_art3_jur.pdf) (last visited on september 27,2021)

<sup>60</sup> WTO ANALYTICAL INDEX ,TRIPS Agreement – Article 4 (Jurisprudence)  
[https://www.wto.org/english/res\\_e/publications\\_e/ai17\\_e/trips\\_art4\\_jur.pdf](https://www.wto.org/english/res_e/publications_e/ai17_e/trips_art4_jur.pdf) (last visited on september 27,2021)

1. When investing in a jurisdiction, where protections sustained by the domestic legal system forms part of a firm's complete risk assessment and management;
2. When a firm becomes acquainted with potential loss/disclosure of a trade secret;
3. When information the firm be a trade secret been disclosed and the firm wants to get damages
4. When the firm has gone through the process of enforcement provided by domestic law, it has to assess whether the process and the outcome were fair and reasonable.<sup>61</sup>

In this globalized world , almost every country knows what are intellectual property and how can they promote the protection to it . it has now become a paramount importance. Japan has given a broad protection regarding the trade secrets .it provides comprehensive civil as well as criminal protection under the 1993 the unfair competition prevention act . the main fault with the Japanese trade secrets are dealing with the security regarding the information during the criminal proceedings and then obtaining injunctions.

In China, although they provide protections under civil, criminal and the administrative procedures, their provisions are not considered to be very much effective. the statutory laws are very strong but the limitations make them very less effective. its very difficult to prove the existence of the trade secrets so the preliminary injunctions can be found to be very rare.

In France, trade secrets are protected by through both civil and the criminal law but in the limited ways. there is no comprehensive legislation that covers the all type of the trade secrets. trade secrets in French law only addresses only one kind of trade secrets i.e. manufacturing secrets.

In England, trade secrets are protected under the common law. There are no specific provisions under the civil as well as the criminal law.

South Africa protects the trade secrets under the common law. the law for the trade secrets protection is very well developed and quite strong in the USA. The trade secrets law is governed by each American states law and in 2016, United States defend trade secrets -DTSA has created a federal civil cause of the action for the misappropriation of the trade secrets while the national law addresses the criminal trade secrets theft with the economic espionage act 1996. The US legal system is considered as consistent and generally reliable but also its expensive.

There is no specific definition for the trade secrets under the Brazilian law, but there are some provisions from which implied definitions can be taken.<sup>62</sup>Australia gives protection to the trade secrets. it's a common law country with a legal system and the laws that are delivered is similar to the legal system and the laws of the United Kingdom. In New Zealand, it protects the trade

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<sup>61</sup> *ibid*

<sup>62</sup> Elisabeth K. Fekete, " Protection of Trade Secrets Through IP and Unfair Competition

Law" AIPPI Report Q215, Brazil 7 (2010). Available at:

[https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=TAD/TC/WP\(2013\)21/FINAL&docLanguage=En](https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=TAD/TC/WP(2013)21/FINAL&docLanguage=En) (Last visited on 12,June 2021)

secrets under the common law, criminal law and as well as the civil law. the common law provisions are derived from the United Kingdom.

### **CONCLUSION:**

After analysing the provisions of "trade secrets" protection in different countries of the world, some observations are made as:

1. Even if "trade secrets" are not "secret" in the original sense, they have to be a non-public and known to only deserved people.
2. The definition of "trade secrets" is similar among countries, indicating their dual nature as confidential but commercial.<sup>63</sup>
3. Agreement on Trade-Related Aspects of Intellectual Property (TRIPs) includes specific provisions indicated toward increasing the protection of "trade secrets". Moreover, there has been a practice towards the adoption of domestic legislations specifically on increased protection of "trade secrets" throughout the world. It is observed that countries of the study have some similarities as well as dissimilarities with respect "trade secrets" protection. Basic similarities can be found with respect to the definition and scope, whereas substantial dissimilarities can be seen to the implementation of protection for "trade secrets". For example, differences are seen in the gathering of evidence and discovery process, protection of "trade secrets" during the process of litigation, and the effectiveness of legal systems with respect to the enforcement.
4. Although different countries had formulated different laws for the protection of "trade secrets", civil laws provide the most common remedy. Injunctions and accounts of profit are two common main remedies followed throughout the world. Some countries also provide for "Anton Piller orders" and ex-parte decree. Still, they are used rarely and in exceptional circumstances.
5. The criminal statutes seem to be fewer in this regard; few countries protect "trade secrets" through criminal statutes like China, the U.S.A., New Zealand. In fact, in the U.S.A. and New Zealand's criminal statutes are more effective.
6. Interestingly, many countries that have already formulated "trade secrets" laws still recognize protection through common law. Intellectual property laws are still in the developing phase, and many countries are framing new laws for the protection of "trade secrets" under Intellectual property law.
7. It is observed that the most effective way of protecting "trade secrets" is the restricted sharing of information within a close group of people. Generally, the standard way of keeping information secret as "trade secrets" is by non-disclosure agreements which are enforceable by contract law.
8. The third-party liability for misappropriation of "trade secrets" varies from country to country. Generally, innocent misappropriations are treated with lenient law, whereas negligent and voluntary misappropriations are treated with stricter law

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<sup>63</sup> APPROACHES TO THE PROTECTION OF TRADE SECRETS <https://www.oecd.org/sti/ieconomy/Chapter3-KBC2-IP.pdf> (last visited on 25 september 2021)

## CHAPTER 4

### PROTECTION OF TRADE SECRETS UNDER INDIAN LEGISLATION

It's common for the business to restrict the employees from carrying on similar business activities that they had carried on. Such restrictions are put by way of agreements. Employers put forward these non-competent agreements to avoid trade competition and protect trade secrets. These employers restrict the employees from taking similar activities to safeguard their interests. Such agreements in India can be found in section 27<sup>64</sup> of the Indian contract act. This section deals with the concept of agreements on the restraint of trade. This section provides that any agreement that restricts a person from exercising lawful possession may be a trade/business of any kind is void to that extent. The only exception to this is related to the sale of goodwill, where the buyer may restrict the seller from carrying on the specific business within the specified local limits.

The Indian contract act 1872 gives a framework of the rules and regulation which governs the function formation and the performance of a contract in India. Section 27 of the Indian contract act provides primary statutory protection for protecting trade secrets.

Though the term trade secrets are nowhere in the provision, courts have interpreted section 27 of the Indian contract act. It includes the agreement that can protect the trade secrets in the non-disclosure and non-competent contracts, if a question comes before the court, whether the restraints put by the employer is reasonable or not. Suppose the restraint is to protect the trade secrets or other confidential information for the nourishment of the trade, then it's considered as the valid restraint. With the increase in globalization and industrialization, it has become crucial to protection to the interest of the traders. The old concept such as agreement on restraint on trade has also gone to a drastic change. It's essential to know the basis of such agreement and its applicability in the trade.

The basic principle followed by English courts is that every restraint, whether general or partial, is contrary to public policy and is prima facie void. In the famous case of *Mason v Provident Clothing and Supply Co. Ltd* a restraint to carry such a business, a restraint on business to carry 25 miles away, separate district; the court held that such a covenant is against the public policy and accounts for invalid agreement on the trade policy.

The established rule is that every person has the right to carry the trade as he/she interests. But there are exceptions to this: if it's a sufficient justification and if the restriction is reasonable, especially about the interests of the public. The restraint must be reasonable and mustn't be more than what's reasonably necessary to protect the covenantor's interest.

#### **Comparative Analysis :**

English law : The main principle that has been followed by the English courts is that every restraint whether its partial or general, is contrary to the public policy and is considered prima facie void. The question arises in the case of the *Mason v Provident Clothing and Supply Co Ltd*<sup>65</sup>; is that whether an existing employee can be restricted to carry on a business on a place which

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<sup>64</sup> <https://indiankanoon.org/doc/1431516/> (last visited on september 27,2021)

<sup>65</sup> *Supra n47*

is 25 miles away from the place of opposite parties and also is situated on a separate district . The learned court held that the restriction for carrying such businesses by such a covenant is against the public policy and cannot be considered as a valid one and can amount to an invalid agreement on the restraint of trade . For determining the validity of the restraint the court of England has looked into various circumstances of the each case . The court also held in various cases that if the restraint is being reasonable then the invalidity presumption can be rebutted .

The restraint to be reasonable , shouldn't be more than that's reasonably necessary in order to protect the covenantees interest . the house of lords in this case of Esso petroleum Co Ltd v harpers garage ltd <sup>66</sup>has held that the solus agreement can be in sometimes could be lead to an unreasonable restraint on the trade . but in the case of fitch v dewes <sup>67</sup> , a lifelong restraint on a solicitors managing clerk was upheld . In this case following the termination of the clerk , the defendant started a business of same nature within the seven miles . the house of lords wile going through the clause, founded that the clause didn't exceed what was necessary reasonably to protect the business of the plaintiff. It shown that the business was such a type where the clients were likely to return and they may contact the plaintiffs clerk for the litigation and hence affecting the cliental of the plaintiff . So it was founded in this case that lifelong restrain to be valid.

American law: The American law In restraint of trade are dealt under the re -statement on the contracts under the provisions of Section 513-519. The provisions are as follows :

S513: Definition of a bargain in restraint of trade

S514: When the bargain in restraint of trade is illegal

s.515: When the restraint of trade is reasonable

s.516: Instances of the reasonable restraints

s517: Bargain to stifle competition in complete bidding is illegal

s518: Divisible promise in the restraint of trade

s.519: Collateral effect of bargain in restraint of trade

The main reason for holding restraints as invalid has been very aptly put forward in the case of Mitchell v Reynolds <sup>68</sup>.In this case plaintiff has hired defendant as the apprentice baker .Defendant gave promise not to compete with the plaintiff in a period of time . The main issues arisen in the case is whether the non-competent agreement constituted a restraint of the trade , the court found that although there was a restraint of the trade, the non-competent agreement provided an ancillary or the incidental restraint which is necessary to accomplish a legitimate purpose. However the main purpose was to train the defendant , the restraint was found to be reasonable. Reasonableness was the test to determine the legality in restraint of trade. Learned judge further elaborate: The main reasons for the divergence on which the judgments in these cases of voluntary restraints are established, are first, the mischief which may arise from them, first to the party. Secondly, to the public by depriving it of a useful member. Another reason

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<sup>66</sup>Esso petroleum Co Ltd v harpers garage ltd [1968] AC 269

<sup>67</sup> fitch v dewes (1921) 2 AC 158.

<sup>68</sup>Mitchell v Reynolds (1711) 1 P Wms 181; (1711) 24 ER 347 QB

is, the great abuses where voluntary restraints are liable to; Thirdly because in many instances they can be of no help to the bind.<sup>69</sup>

### INDIAN LAW:

Section 27 of the Indian contract act deals with an agreement on restraint of the trade. In Indian law, reasonableness is not a factor in determining the contract's validity in restraint of the trade. It can be understood from two commentaries. One commenter observes that section 27 doesn't say that only unreasonable restraint of trade is a void and unreasonable restraint of trade is valid. Another commenter said, that in Indian law, a service covenant that extends beyond the service term is void, whereas in similar cases, the English law allow reasonable restraint. The distinction is that reasonable post-contractual restraints are valid under the common law, while the post-contractual restraints are void under the section 27 of the Indian contract act 1872.

Section 27 of the Indian contract act follows the Hon. David D Fields draft code for New York.<sup>70</sup> It is based on the old doctrine of the restraint of the trade, as it prevailed from ancient time. This incorporation was that the contract in restraint of trade was allowed by the courts in decisions to a very dangerous extent. The draft, which was original of the Indian law commission does not contain any specific provision on the subject. The provision that has added into this Act is at a time gap between the resignation of the Indian law commission and the enactment. The main objective appeared to have was to protect the trade.

### Exceptions:

This section lays down a substantial rule in invalidating the restraints, not only in the general restraints but also in partial ones are considered to be void. The exception stated: The extension of modern commerce and men of the communication has displaced the old doctrine, which says that agreements of this kind must be confined within the definite neighbourhoods. But the Anglo-Indian law has then stereotyped the doctrine in a narrower form that even the old authorities would have justified. Mean the common law, on the contrary, been widening, the old fixed rules as to limits the space have broken, and the court has only to consider in every case whether the restriction was reasonable.

Even Allahabad court in *Bhola Nath Shankar Das V Lachmi Narain*<sup>71</sup>, He observed that "It is unfortunate that the section 27....seriously trenches upon the liberty of the individual in the contractual matters affecting the trade".

There are mainly two types of exceptions that are against an agreement in restraint in trade. They are statutory exceptions and restrictions placed under judicial interpretations. Statutory exceptions created through the sale of goodwill mentioned under the section and the Indian partnership act 1932. The exceptions under the judicial interpretation are exclusive dealing agreements as accepted by the vendor of a business or by the distributors of the merchandise, restraints arising from the combinations for the regulation of the trade relations and the

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<sup>69</sup> Law school case briefs, Available at: <http://www.lawschoolcasebriefs.net/2014/05/mitchell-v-reynolds-case-brief-summary.html> (last visited on march 30,2021)

<sup>70</sup> Achal gupta,agreement in restraint of trade ,published on march 20,2021 , <https://sccblog-linux.azurewebsites.net/post/2021/03/20/agreement/> ( last visited on April 11,2021)

<sup>71</sup> *Bhola Nath Shankar Das V Lachmi Narain* 136 Ind Cas 84

restraints upon employees. Such restraints occur in a contract of employment, which forms the basis of the relationship between a master and his servant. Such restrictive clauses may be incorporated in a contract of employment or at any time the employer desires to place the restrictions on his employees.

Restrictive clauses retrain one of the parties from doing an otherwise lawful activity, like, say, a job or a business, and therefore restraint trade. Such clauses are incorporated mainly in two situations: Firstly, when the business owner sells the business to another with goodwill or without goodwill. Secondly, when the employer desires to place certain restrictions on his employees. The nature of the restriction may not be defined in a definite manner because it depends upon its purpose and therefore differs from case to cases. There are restraints imposed on various stages of employment. Like they may be imposed during employment, or after the termination of the employment, or there may be even on premature removal. Sometimes they are imposed on the protection of the trade secrets.

### **Restrain during the employment**

It's a common rule that the employee is bound to serve the employer during employment, and the employer has the rights exclusively to the services of the employee. It is mainly because there is a promise on the part of the employee to perform his duty well, which operates from especially three angles.

- There is a duty to perform the work
- There is a duty to perform the work well
- There is a duty to perform the work faithfully, which includes the confidentiality and non-competition with the employer himself.

The third element is the most important one. This doctrine won't have any application unless and until the employee is sterilized of his capacity to work because of the terms of his employment. This position is the same in both English law and Indian law. In the case of *Herbert Moris v. Saxelby*<sup>72</sup>, Lord Parker observed that the reason for upholding a restraint on the part of the employee is that because the employer has some propriety rights, whether in nature of the trade connection or trade secrets nature, for the protection of such restraints is having regards to the duties of an employee, if reasonably necessary. Such restraint has never been upheld if it's directed only to prevent the competition or against the use of the personal skill and the knowledge acquired by the employee in the employer's business. Indian law also runs in a similar line. A company may restrain an employee from carrying out similar work in another establishment during employment. This is in the interest of the business houses to give the training to their employees investing in a lot of money. The employees might receive the training and leave the establishment before the termination of the contract.

In the case of *Charlesworth v MacDonald*<sup>73</sup>, the defendant has agreed to become the assistant to the plaintiff for three years, a physician and a surgeon. The appointment was then subject to a clause against practicing in the same territory. Within a year of the appointment, the defendant voluntarily left the job. Then the plaintiff filed for an injunction. While granting the restrain, Farran CJ explained the principle as an agreement doesn't fall within section 27. If it did, then

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<sup>72</sup>*Herbert Moris v. Saxelby* [1916] AC 688

<sup>73</sup>*Charlesworth v MacDonald* (1898) ILR 23 Bom

all contracts of personal service for a fixed period would be void. An agreement to serve exclusively, maybe for a week, a day or even for an hour, may prevent the person agreeing to serve from exercising the calling on that period for anybody else, then the person with whom he so agreeing. Hence the defendant here was restrained from practicing on his own will till the term end time. This same principle is also applied in coca cola v Gujarat bottling company<sup>74</sup>. But if the restraints that operate during the term of the employment may not be enforceable, if they are one-sided and intensely in favour the employer. (Gopal paper mills v, Ganesh das Malhotra )<sup>75</sup>

In case of V.N Deshpande v Arvind mills company limited<sup>76</sup> an employee has been appointed on the contractual basis for serving as a weaving master for the three years and have agreed to not work with any others during that period in India. He then left the job after one year and joined on to another mill. So the issue raised is whether such agreement can be considered as agreement in restraint of trade? and then hence void. It was then held that the agreement was reasonable and the injunction was issued against the employee. It was known that the prohibition was confined to the profession of the weaving master and so therefore was enforceable.

In the court decision of coke v. Gujarat bottling company<sup>77</sup>, the Gujarat bottling company (GBC) had mainly two stakeholders named Ahmedabad advertising and marketing consultants ltd and Mr pinakin K. Shah. The Plaintiff, the Gujarat Bottling Company (further referred as GBC) had two stakeholders, namely Ahmedabad Advertising and Marketing Consultants Ltd. and Mr Pinakin K. Shah. As the name suggests, the company is Gujarat based. The company had an ongoing contract with Coca Cola Co. which was agreed upon in 1993 and another in 1994. In the year 1995, the company has undergone certain upgradation with respect to its plants located in Ahmedabad and Rajkot. Company shares were transferred to two representatives of PepsiCo who claimed ownership rights. The Defendant, Coca Cola was actively operating in India till 1977. However, due to the change in the economic policies introduced by the government the trade setup was hampered. On 20<sup>th</sup> September, 1993, Gujarat Bottling Company entered into an agreement with Coca Cola Co to bottle and distribute “Thumbs Up”, “Maaza”, “Limca”, “Rim Zim” and “Gold Spot. This contract was then followed by another contract in the year 1994 for the purpose of registration under the registered user agreement. The contract term has reduced the duration of the prior notice from 1-year to 90 days. New owners contended that, 1994 agreement has superseded the existing 1993 agreement. The laws relied upon in adjudicating the case are the Trade Marks Act, 1999 and the Trade and Merchandise Marks Act, 1958. Section 27, 41 and 82 of the Indian Contract Act, 1872 is also invoked. the issues of the given case are the following :

- Whether the 1994 agreement superseded the existing 1993 agreement
- Whether the 1993 agreement was in restraint of trade under section 27 of the Indian Contract Act, 1872.

It was held that 1994 and 1993 agreements were distinctive in nature. Both agreements served different purpose and varied in the scope of its application. Furthermore, under Section 62 of

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<sup>74</sup> coca cola v Gujarat bottling company 1995 AIR 2372, 1995 SCC (5) 545

<sup>75</sup> Gopal paper mills v, Ganesh das Malhotra AIR 1962 Cal 61.

<sup>76</sup> V.N Deshpande v Arvind mills company limited AIR 1946 Bom 423.

<sup>77</sup> AIR 1995 SC 2372; (1995) 5 SCC 545.

the Indian Contract Act, no agreement can supersede a pre-existing agreement without the consent of the contracting parties or without the intention of substitution which was lacking in the case. It was therefore concluded that GBC failed to act in terms of the contract binding both the parties and was held responsible for the violation.

It was also held that paragraph 14 of 1993 agreement was not in restraint of trade as its application is only confined to the subsistence of the agreement and not thereafter. It was also mutually entered into by the parties for the promotion of coca cola products for their mutual benefit and therefore doesn't fall under the ambit of restraining trade. It was also contended that the interim injunction granted to the appellants was in consonance with the negative covenant terms of the 1993 contract and restricted GBC and numerous others parties involved in the due manufacture and dealings of coca cola products to carry on any such contract with any other company or trademark, for a period of one year from the date of termination notice, that is 25th January 1996. On the above grounds the plea of the appellants was dismissed.

### **Restraint after termination of employment**

The Indian courts do not set up employment contracts that restrict the employees from working elsewhere or setting up their own business after the termination of the employment. In some cases, even the employers have attempted to enforce the non-compete obligation beyond the employment period on the ground of reasonableness. In such type of cases, employers have argued that the post-termination restraints should be upheld if it's applicable for a short duration or if it's a partial restraint. But courts refuse such arguments.

In a famous case *Brahmaputra Tea Company v E. Scarth*<sup>78</sup>, the defendant, the respondent, on 1880 October 3, agree with the Brahmaputra tea company, by which he agreed to serve the company as assistant tea planter for three years which is to be calculated from the date of termination of his 4th-year service under the prior agreement. The company has agreed to pay Rs 300 per month and to Rs 350 for the sixth year and 400 for the seventh year. The employee was made into entering into an agreement according to which he was asked to restrain from competing for five years after five years. It was said that this agreement took effect on November 5 1881. on 17<sup>th</sup> May 1882, the defendant gave a notice showing his intention to leave. On November 27, he left the company without consent and became the manager of the moribund tea estate, which is about two miles distant from one of the company's gardens. One of the main question that arises before the court was whether such an agreement is valid, which restraint the party from carrying the business after the employment was over. In the judgement it was said that this contracts by which the persons were restrained from competing after the term of their agreement came to end, with their ex-employers within reasonable limits are well known in English law. But omission to make any such kind of contract is an exception to the general prohibition

In the Indian contract act 1872, section 27 points that, it wasn't intended to give them legal effect in this country. So a difference exists between the English and the Indian law on this point, and such restraint is not considered a valid restraint in India.

Though the English law provides for the restraints after the termination of the employment, it's made applicable only to protect confidential information. It won't be extended if it's in the

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<sup>78</sup> *Brahmaputra Tea Company v E. Scarth* (1885) ILR 11 Cal 545

employer's self-interest who treats the other company as its competitor. In the case of Sandhya organic chemicals private limited v united phosphorous limited <sup>79</sup>, the plaintiffs had claimed that they invented a new process for the manufacturing aluminium phosphide and zinc phosphide by substituting white/yellow phosphorous for the red phosphorous by conducting different trials, experiments and research for a long time and so entitled a declaration that the plaintiff is exclusively entitled to the right and also a permanent injunction against the defendants so by restraining them from using it in any manner like form a new process as invented by the plaintiff for the manufacture by using any kind of information, know-how that's related. The main issue that raised from this case is that, whether an ex-employee is completely barred from working with others after the employment termination where he can use his personal knowledge and skill? Supreme court under the section 27 of the Indian contract act held that a service covenant that is extended beyond that of the service is void. Punishing with a permanent injunction is like, unfair to him unless appropriate evidence has provided. although the English law provides for the restraintment after the termination of the employment, its only given to protect the confidential information.

In the case of Percept Dmarkr(India) pvt ltd v Zaheer khan and another <sup>80</sup>, it was held that a restriction that's extending beyond the tenure of the contract for the prevention of the competition is clearly hit by the contract act 1872, section 27 and its prima facie void and so unenforceable.

There are many cases where the courts have then struck down non-compete clauses that continued beyond the term of employment. Courts have then recognized the rights of an employee to explore the various business opportunities, as this is their fundamental right to earn a livelihood by practicing trade or profession by their choice.

In ambience Indian pvt limited v Shree Naveen Jain<sup>81</sup> the plaintiff (company) appointed defendant as a client executive considering his efficiency at the work. the agreement provided that the defendant should not engage in any other occupation during the tenure of the employment which would adversely affect the plaintiffs company. It was also provided that during the course as well as three years after the defendant shall not reveal any of the trade information and for a period of the two years, he wouldn't take any employment with the plaintiffs customers. The defendant has left the job and took the employment with one of plaintiff customers. The plaintiff there for filed for the permanent injunction. the court founded out that the prim facie view of the agreement between the parties dealing with the two years of not taking a employment is void and is hit by the Section 27. This was actually against the public policy and "twisting tactic" adopted by the employer. Further it held that, everybody have a right in to strive for the progress in their own career. the restriction that's has been employed by the defendant Is therefore considered to be void and unconscionable. But also held that plaintiff was allowed to get the adequate compensation in terms of the money and also damages for the breach, if happened any. But here the injunction was not granted as the agreement itself was considered to be in violation of Indian contract act, section 27.

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<sup>79</sup> Sandhya organic chemicals private limited v united phosphorous limited AIR 1997 Guj 177.

<sup>80</sup> Percept Dmarkr(India) pvt ltd v Zaheer khan and another (2006) 4 SCC 227.

<sup>81</sup> ambience Indian pvt limited v Shree Naveen Jain 122 (2005) DLT 421, 2005 (81) DRJ 538

### **Premature Removal:**

An employee is bound to be faithful to their employer when they work for him, and it's well settled that after the termination of the employment, an employee cannot be restricted to work anywhere where he uses both his knowledge and skill. But also it developed that any restraint placed against an employee who has been prematurely removed will cease to exist. Both India and the UK have similar positions.

In, general billposting company v Atkinson<sup>82</sup>, the defendant has been employed by the plaintiff, and the contract of service contained a clause restricting his right to trade within a specific area for two years after his working with the company terminated. Subsequently, the employers dismissed their employee. The employee had then sued for the wrongful dismissal and started business on his behalf. Then the employer brought an action against the employee for breach of the restraint of the trade provision. The court held that: a restraint beyond the term of the service would be considered prima facie void. The only ground on which it can be justified is bringing it up except that by showing and that's necessary for the protection of the employer's goodwill. Even if such a restraint is valid, it can be only applied after the expiry of the term in natural course and not when the employee is wrongfully dismissed earlier. There is a difference between leaving service and premature termination, and hence injunction not granted.

Similarly, a case in India, in the case of superintendence company of India Pvt Ltd v Krishnan murgai<sup>83</sup> The employing company carried a business as valuers and surveyors and developed reputation and earned goodwill in the business by developing its techniques for the quality testing and the control. The terms as well as the conditions of the employment contained a post-service restraint preventing the employee from serving any competitive firm, or carrying a business himself in the same line of the employer's company. The employee's employment was terminated by the employer. After which the employee started his own business, which competes with the employer's job. Then the employer sought a permanent injunction against an employee to prevent the breach of the terms of the employment and also claimed damages. The issue before the court was two-fold :

a) Whether the contract was in restraint of the trade and hence invalid and

b) Whether the non-competent Clause is applied only when the employee is left voluntarily or when his services were terminated.

The court decided that the injunction should not be granted. They left the appropriate interpretation of section 27 as undecided. However, one of the judges, justice Sen, held that section 27 bars all the post-contractual restraints and doesn't permit the reasonableness inquiry. The Clause of the agreement provided that the restriction contained will come into operation after the defendant left the company. But in this case the defendant has not left on his own will. Still, the plaintiff's company has terminated his services by force. According to the simple meaning of the word leave concerning the employee, voluntary leaving of the service by him

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<sup>82</sup> general billposting company v Atkinson (1909) All ER AC 118

<sup>83</sup>superintendence company of India Pvt Ltd v Krishnan murgai AIR 1980 SC 1717.

wouldn't include a case where he is discharged or dismissed or if his services are terminated by the employer.

### **Protection of the trade secrets**

One of the basic principles of valid restraint is that the master is entitled to restrain his servant after the termination of the employment for reasonable protection against the trade secrets exploitation and the maintenance of commercial confidentiality. An employment of contract is not just the employees right, which is the concern. The rights of the employer include imposition of a duty upon the employees. When it comes to the employee, he owes a duty of fidelity to his employer. The employee must not disclose confidential information to the other person, which he gets during the employment. An injunction may be granted against the disclosure of such information by the employee. However, this doesn't extend to all information that might at the time be needed during employment. An employee is only entitled to protect confidential information, which amounts to be a trade secret. Confidential information must be highly confidential before it is termed as a trade secret. Some factors have to be taken into consideration before terming information as a trade secret.

- 1) Nature of the work carried on during the employment has to be taken into account.
- 2) The nature of the information should be considered.
- 3) It must be seen whether the employer asked the employee to keep the information confidential.

The judicial pronouncement shows us that the purpose of the contractual restraints is to protect the trade secrets, but there lacks uniformity in the decisions.

In *Star India limited v. Laxmi raj Seetha ram Nayak*<sup>84</sup> the plaintiff was a company incorporated under the companies act 1956, known by the name star India Pvt Ltd. The defendant was the employee of the plaintiff's company and signed non-compete for agreement while undergoing the employment not to divulge the information and not start or work any competing business after six months of leaving service of the plaintiff. The defendant tendered his resignation; The plaintiff then refused to accept the resignation sent by the defendant and insisted he should be in the service for few more months, according to the service contract. Some days after, the defendant stopped coming to work and joined another country dealing with the circulation of the news. The plaintiff company then wanted an injunction against the defendant. The court held that the defendant can not be forced to come back and work for the plaintiff merely because of some inconvenience faced by the plaintiff. It is against the public policy to restraint healthy competition. By granting an injunction in favour of the plaintiff would be indirectly forcing the contract in respect of the personal services which otherwise may not be given, and such covenant comes under the comprehension of Section 27 of the Indian contract act 1872. But at the same time court has ordered that the defendant shall not pass or divulge the business plans of the plaintiff and franchisee agreements which he gets to know during his employment.

In another case *diljeet titus v Mr. Alfred A adebare and others*,<sup>85</sup> the defendant was an advocate in full-time employment at the plaintiff's law firm. Upon the cessation of the term, the defendant took away the crucial business data such as clients lists and proprietary rights .The

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<sup>84</sup> *Star India limited v. Laxmi raj Seetha ram Nayak* AIR 2003 Bom 563

<sup>85</sup> *diljeet titus v Mr. Alfred A adebare and others* (2006) 32 PTC 609 Del.

plaintiff contended that such items be trade secrets. The defendant argued that since there is an express relationship between the parties, which was not as that of the employer and the employee, they were the copyright owners of their work during the employment. The court rejected this contention and then held that the plaintiff had a clear right to the materials taken away by the defendant. The court restrained the defendant from carrying on a similar service by using the concerned secret information. The defendant was only restrained from using the information they took as it was necessary to protect the plaintiff's interest.

An employee may not be restrained from taking up the employment if the employer can't prove that employee may, on joining a competitor, divulge the information confidential and secrets learned while in the employer's services.

In *Gopal, paper mills limited v Surendra k Ganesh das Malhotra*<sup>86</sup>, the plaintiff carried a business of manufacture of the paper. The defendant was appointed as an assistant to serve twenty years. During these two years, he was restricted from giving advice and information to any other person or company he obtained during the employment. The defendant left after one year of service. The court has denied an injunction to the plaintiff on the ground that as no secrets or confidential information was imparted to the defendant, the protection of the employer's interest never arose. Such views are taken by the courts to protect the defendant public policy. This can be understood that there will be a restriction in competition if an injunction is granted in such and such cases based on the agreement where no confidential information is disclosed.

Similarly, In *Jet airways ltd v Mr. Jan peter Ravi Karnik*<sup>87</sup> the appellant company, employed the defendant as a pilot. The company then conducted training to enable the defendant and other co-pilots to fly new generation aircraft. Existed an agreement that the defendant will serve the appellant for seven years and will not take similar employment with any other organization during that period. But the defendant resigned within six months of completion of training and joined another airline. An injunction was then filed against the defendant. High court of Bombay refused to restrain the defendant from adopting the employment with an arrival airline because the negative covenant was one-sided and unreasonable. The court then held that there existed no proprietary interests of the employer that required protection.

The court differentiated the facts of the jet airways case from the *Golikari Case Niranjan Shankar golikari v. century spinning and a manufacturing company limited*<sup>88</sup>. It held that the training received by the defendant in the present case was not a secret link that in *Golikars* case. Even the competitor airline employees have received the same training provided by the appellant airlines. The defendant has not received any particular special knowledge of any trade secret that belonged exclusively to his employer.

In *Sandhya organics, Pvt ltd v united phosphorous ltd*<sup>89</sup>, the plaintiff and defendant were the manufacturers of the same industrial chemical. The defendant hired the plaintiff's former employee under an obligation to maintain trade secrets after the end of employment by a covenant. The plaintiff then objected to the employee engaged by the defendant as his former

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<sup>86</sup> AIR 1962 Cal 61.

<sup>87</sup> *jet airways ltd v Mr. Jan peter Ravi Karnik* (2000) 4 Bom C.R. 487.

<sup>88</sup> *Niranjan Shankar Golikari v. Century Spinning and Manufacturing Company Limited*, AIR 1967 SC 1098

<sup>89</sup>*Supra n68*

employee, so information possessed is confidential information and cannot be passed on to the defendant and is contrary to the agreement signed by the employee. It was then proved that the defendant was carrying the same business even before the employee has joined the service; further, the concerned employee was an experienced person in such a nature of work and was in such nature of work for the last 15 years in the different places. Therefore, the court held that the employee couldn't be restrained from joining the defendant and can use his skill and knowledge gained in his employment course, and the restrictive covenant is an invalid one. Still, the employee cannot use any specific business information or data while working for the defendant's company.

An employee's rights to look for a better job and employment are not curbed by an injunction even if she has confidential data and information. Freedom of changing the employment for changing the working conditions is an essential right of an employee which could not be restricted or curtailed specially on the ground that employee has employer's data and information of the customers, in a limited period which is capable of ascertainment on behalf of the defendant or anyone or independent canvass at small expenditure. Such a restriction may be hit by section 27 of the Indian contract act, and common law and the equitable doctrine of English law will not be applicable in fact and the circumstances. An injunction can be granted to protect the rights of the plaintiff and at the same time cannot be grant to let the legal rights of the defendant, especially when the court has the doubt about the integrity of the plaintiff's version and if it appears that injunction has been sought for extraneous reasons. So injunction is not granted in the case American express bank ltd v Ms. Priya puri<sup>90</sup>.

### **Protection under the right to information act 2005**

Right to information act 2005 provides provisions for the disclosure of the information by the public authorities. Even the private sector business entities doing business in India would not impact the ordinary people's lives are also included in the ambit of its Act. But the trade secrets and confidential information are still protected under the form as an exception under section 8 of the Act. Section 8 of the Act provides an exemption from the disclosure and information, and the trade secrets come under the exemption Clause. Section 8(1)(d) of the Act clearly states that the trade is protected from disclosure under the RTI 2005. So any information which is provided to any public authority or possessed by the business if comes under the category of trade secrets is protected from the disclosure unless the public interest exceeds the private interest of the owner.

The first step is to check section8(1)(d) applicability to determine the nature of the data. Suppose that nature of the data is secret concerning the affairs of the private entity, which is not required o be place in the public domain. In that case, it's essential to look at whether any disclosure may have an adverse effect on third parties. The law already acknowledge that the businesses should be in a position to protect their business secrets. Quotations, offers, tenders can also be classified as a trade secret initial to the closure of an agreement. Care also should be taken when data is being disclosed prior to the conclusion of an agreement. Care should also be taken when data is being disclosed to minimize the damage caused to a company's competitive interests. In Tata motors v state of West Bengal<sup>91</sup>, Tata has filed a writ petition in Calcutta High Court against the state information commissioners to disclose the documents

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<sup>90</sup> American express bank ltd v Ms. Priya puri . (2006) III LJ 540 Del

<sup>91</sup> tata motors v state of West Bengal W.P No.9949(W)of 2011,W.P No.10198(W)of 2011

regarding the cost price of the tata nano included in the contract concluded with the state government. The parties argue on the basis that the documents constituted trade secrets, and tata even pointed out a clause in the agreement protecting its contents from the RTI disclosures. However, the case did not decide on the merits since the court held that the state information commission was not validly constituted.

### **Trade Secrets and the Competition Law:**

Member countries of the trips agreement in Article 40 have looked into the note and deplore the main practices and the condition that's prevalent in the licensing of the IPRs which then restrain the competition, which has an adverse effect on the trade and which in turn can impede the transfer and the dissemination technology. Then according to article 40(2), member countries are authorized to prevent or control the practices or the conditions that may lead to the use of IPRs, which in turn have an adverse effect on the competitors in the relevant markets. Countries introduce a law to protect the public interest when there is an abuse of IPRs.

The trips agreement provides for the provisions for restricting the situation of the competition. IPRs and competition are considered as areas having conflicting objectives. The reason is that the IPRs appear to be against the static market principles of access and level playing fields sought by the competition rules. This legal monopoly depending upon the unavailability of the substitutes in the relevant markets may lead to market power and even monopoly as defined under the competition law.

In conflict between the IPRs on one side and the norms of the competition as the law and the policy on the other, Raghavan committee has stated the follows :All forms of IP have the capability to raise competition policy or the law problems. IP regulates exclusive rights to the holders, for the performance a productive or a commercial activity. But this doesn't contain the right to apply restrictive or monopoly power in the market or society. Also there is a requisite to curb and prevent the anti-competition behaviour that may come while the exercise of IPRs.<sup>92</sup>There is a contrast between the IPRs and the competition law. The IPRs endangers the competition, while the latter promotes the competition.

There are areas too where IPR and competition may complement each other. By creating and protecting the right of the innovators to exclude others from using their ideas and protecting the right of the innovators to exclude others from using their expressions and the ideas, IPRs provide economic agents with incentives for the technological innovation or new forms of the artistic expression. This will create more inputs for the competition in the future market and also it promotes the dynamic efficacy which is then characterized by increasing quality and the diversity of goods which is also the objective of the competition policy. So both IPRs and competition are necessary for the promotion of the innovation and then to ensure a competition policy thereof. So, it is required to ensure their co-existence.

Under MRTP Act, 1969, section 33(3) was lessly parallel to the present section 3(5), but the whole aim of "Competition Act, 2002" was to strengthen the competition and to remove the barriers found in "MRTP Act, 1969". The main idea of these provisions is that the IP right-holder to not abuse the dominant or monopolistic position resulting from the rights exclusively vested by any IP laws .

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<sup>92</sup> SVS Raghavan Committee, India May 2000.

## **Criminal remedies for the misappropriation of Trade Secrets.**<sup>93</sup>

Even though there are no special remedies available for the trade secrets misappropriation under Indian law, some provisions under the Indian Penal Code and Information Technology Act provide some remedies that can also be taken for the trade secrets misappropriation. Section 405-409<sup>94</sup> of the IPC which deals with criminal breach of the trust, and section 418, which concerns with the cheating can be invoked to get a proper remedy against the grave offence. Section 43 of IT Act 2000 makes the offender pay damages by way of the competition not exceeding one crore to the person who got affected. section 66<sup>95</sup> also provides the punishment of up to three years or a fine up to Rs 5 lakhs or both. This legislation also recognizes third-party liability.

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<sup>93</sup> <https://www.hhrjournal.org/2021/06/addressing-the-risks-that-trade-secret-protections-pose-for-health-and-rights/> (last visited on 23<sup>rd</sup> June 2021)

<sup>94</sup> The Indian Penal Code, 1860 (Act 45 of 1860), s. 405: Criminal breach of trust.

Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust".

. 406: Punishment for criminal breach of trust.

Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both. s. 407: Criminal breach of trust by carrier, etc.

Whoever, being entrusted with property as a carrier, wharfinger or warehouse- keeper, commits criminal breach of trust, in respect of such property, shall be

punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine. s. 408: Criminal breach of trust by clerk or servant.

Whoever, being a clerk or servant or employed as a clerk or servant, and being in any manner entrusted in such capacity with property, or with any dominion over property, commits criminal breach of trust in respect of that property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine. s. 409: Criminal breach of trust by public servant, or by banker, merchant or agent.

Whoever, being in any manner entrusted with property, or with any dominion over property in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits criminal breach of trust in respect of that property, shall be punished with {Subs.by Act 26 of 1955, s.117 and Sch., for "transportation for life"} [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

<sup>95</sup> 8 The Information Technology Act 2000(as amended on 2008, Act 10 of 2009). s. 66 Computer Related Offences (Substituted vide ITAA 2008)

If any person, dishonestly, or fraudulently, does any act referred to in section 43, he shall be punishable with imprisonment for a term which may extend to two three years or with fine which may extend to five lakh rupees or with both.

Explanation: For the purpose of this section,- a) the word "dishonestly" shall have the meaning assigned to it in section 24 of the Indian Penal Code; b) the word "fraudulently" shall have the meaning assigned to it in section 25 of the Indian Penal Code.

These are very rarely used, and the scope is very limited as these are not explicitly made for trade secret protection.

In *Pramod, son of Laxmi Kant sisamkar v Garware plastics and polyester*<sup>96</sup> the petitioners were engineering students employed in respondent no one company. The petitioners were initially appointed for three years but later extended to three more years after they agreed to work. However, before the completion of the three-year extended period, then left the company and joined some other company. The respondent no two company then filed a suit against the petitioners on the ground that they went on the basis of contravention of the terms and the conditions. It is also noted that while leaving, they have to pass the entire documents, which are in their possession. It was also argued that petitioners have the technical know-how, and they used it within the other company that they have joined. Based on the complaints, CJM registered cases against the petitioners for the criminal breach of trust and cheating punishable under section 408 and 420 of IPC. The petitioners then challenged the orders. The complaints did not mention the name of the documents.

The Bombay High Court held that criminal prosecution is a consequential matter. It would result to the harassment of the accused and the abuse on the process of the court if, allowed to proceed without sufficient grounds.. It has also found that the learned magistrate has not applied his mind to look at the requirements of section 408 and 420. It cannot be said that they gained the technical know-how fraudulently or dishonestly. The learned trial magistrate done error in issuing the process against them in these cases; that order directing the process against them is liable to be set aside.

The Indian contract mainly deals with the legal validity of the non-compete covenants under Section 27 of Indian contract act and stipulate that the agreement that restrains anyone from carrying a lawful profession, trade or the business, is void to that extent. The Indian law contains specific flows in the context of the present time. The Indian law is considered to be rigid in the sense that it invalidates all restraints, whether its general or partial and neither the test of reasonableness nor the test of restraint being partially applied to a case governed by Section 27 of the Indian contract act, unless they fall within the exceptions of the Act. This originates from the fundamental rights of every person to practice any trade or profession.

Section 27 of the contract act was enacted at a time when the trade was underdeveloped, and the main objective was to protect the trader from the restraints. With the passage of time, trade-in India has grown law commission of India recommended to permit the reasonable restraint on the right to carry the trade.

In Indian law, the law relating to the restraint of the trade is clear and seems to be pro-employee, unlike the UK and the USA. Section 27 of the Indian contract act implies that in order to be valid, an agreement in restraint of the trade must be reasonable between the parties and be consistent with the public's interest. The quintessence of the Indian contract act is that section 27 is that all agreements in restraint of the trade are prima facie unenforceable. But the judicial decisions show that the law doesn't condemn every such covenant as long as it is to be reasonable and , not detrimental to the public interest. The RTI act and the competition act also protects the disclosure of the trade secrets in the interest of the proprietor, and penal provision is concerned with IPC 1860. It acts 2000 to penalize the trade secrets buy such are not made

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<sup>96</sup>*Pramod, son of Laxmi Kant sisamkar v garware plastics and polyester* (1986) 3 BomCR 411.

exclusively for trade secrets. In India there lacks a uniformity of the rulings in liberal interpretation by the courts on section 27 and also this section only covers non-compete clauses. Many issues such as the trade secrets, misappropriation, disclosure are not dealt by section 27. The other provisions such as in found in competition act, it are not exclusively dealt with the trade secrets. It's high time a perfect comprehensive legislative provisions that are to be made for the protection.

**CHAPTER 5**  
**TRADE SECRETS UNDER TRIPS AGREEMENT AND INDIAN IP**  
**LAW**

Trade secrets, a form of intellectual property but are not statutorily protected in many countries, may prove to be ephemeral because once it's lost, they are like the proverbial horse that leaves the barn, impossible to put back. In the present digital era of information, including the trade secrets being stored and disseminated in electronic format, the ease with which trade secrets are lost is daunting<sup>97</sup>. As the importance of trade secret protection is increasing nowadays, it has taken precedence over protection through the patents. Agreement on TRIPS (Article 39) includes the direct provisions that are directed towards increasing the protection of trade secrets. Prior to all these agreements, Article 10bis of the Paris convention (covering the unfair competition) provides support for the international standards of trade secrets protection but there lacks a comprehensive international treaty in the line of the patent, copyright and trademark law. The nature of trade secrets is very hard to define in a subtle term and in a comprehensive manner. In this sense, trade secrets are the most difficult form of intellectual property to protect due to the prolonged secrecy and confidentiality. Owners of the trade secrets maintain their confidentiality under the legal provisions that are available and claims for injunction for the unauthorised use and the dissemination of trade secrets and the recovery of the damages. And also, the person who leaks trade secrets can also face criminal charges for breaking confidentiality. There are some internationally recognised regulatory bodies at the global level which has played an important role in the promotion and reorganising protection of trade secrets, and one of such bodies is World Trade Organization. The member nations inside the World Trade Organisation are the signatories of the TRIPS agreement, and these agreements are one of the important agreements which promote the protection of trade secrets. Also, World Intellectual Property Organization(WIPO) also provides for the protection of trade secrets.

**WIPO AND THE TRADE SECRETS:**

WIPO, which was established on Jul 14, 1967, entered into force in 1970, is a specialised agency of the United Nations since the year 1974 and manages a large number of international unions or treaties in the area of intellectual property(IP)<sup>98</sup>. Its objectives are to promote IP protection throughout the world <sup>99</sup>by the cooperation among the states and where it's appropriate in merging with any other international organisation. It also provides to ensure the administrative cooperation among the IP unions that are created by the Paris Convention and the Berne convention and sub treaties being concluded by the Paris union members. Besides ,it plays an important role in safeguarding the interest of traders and innovators.

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<sup>97</sup> Poorvi Chothani, "Trade Secret", 2(4) MIPR 33 (2007)

<sup>98</sup> WTO | intellectual property (TRIPS) ,frequently-asked ....

[https://www.wto.org/english/tratop\\_e/trips\\_e/tripfg\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/tripfg_e.htm) (last visited on April 11,2021)

<sup>99</sup> ibid

## **HISTORY AND DEVELOPMENT OF WIPO:**

The actual origins of the WIPO trace back to 1883 and 1886, with the starting of the Paris convention and the Berne convention, respectively. These were for the establishment of the international secretariats, which was then placed under the supervision of the Swiss federal government, and the administrators were placed at Berne and Switzerland. Initially there were two secretariats, one is for industrial property, and the other is for the copyright. For the administering the two conventions, but in 1893, they were united. It's known by BIRPI (United International Bureaux for the Protection of Intellectual Property) before it becomes the WIPO. In 1960, BIRPI has moved from Berne to Geneva.

The agreement existing between United Nations and WIPO states that, WIPO is subjected to the competence of the UN and its organs, and its responsible for taking of the appropriate actions in accordance with the basic instrument as well as the treaties and the agreements for the promotion of the intellectual activity and then facilitation of the transfer of technology in the developing countries for the social and the cultural development. The mission of the WIPO is to promote the creation, dissemination, use and protection of the human minds work for the economic, cultural and social progress of all mankind through international cooperation. And its effect is to contribute a balance between the stimulation of creativity worldwide by sufficiently protecting the moral as well as material interests of the creators on one side and providing admittance to the socio-economic and cultural benefits of such creativity on a global range on the other.

## **TRADE SECRETS UNDER THE WIPO**

From the beginning of the Paris Convention and the Berne convention, more emphasis was put on the protection of intellectual property in the various forms. And with the passage of time, more emphasis was put on intellectual property. Some countries sees trade secret as an aspect of the law of torts. Whereas some countries have established criminal, commercial, administrative, or the civil law provisions that are prohibiting the unauthorised use or the disclosure of trade secrets.

WIPO protects trade secrets under the Article 10bis (unfair competition) of the Paris convention 1967. This same references can be found in TRIPS agreements Section 7, which protects confidential information. The convention provides in article 10bis that the countries of the union are bound to make sure the persons that are entitled to benefit from the convention by effective protection against unfair competition. But the convention doesn't specify in the manner in which how much protection should be granted, thus leaving it to the existing laws in each of the member countries. Article 10bis defines the act of unfair competition as those acts of competition that are contrary to honest practices in industrial or commercial matters.<sup>100</sup>

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<sup>100</sup> UNDISCLOSED INFORMATION, UNFAIR COMPETITION AND ANTI COMPETITIVE PRACTICES ,  
[https://www.wto.org/english/tratop\\_e/trips\\_e/ta\\_docs\\_e/modules7\\_e.pdf\(last](https://www.wto.org/english/tratop_e/trips_e/ta_docs_e/modules7_e.pdf(last) visited on 21 august 2021)

## **WTO AND IPR: AN OVERVIEW OF THE TRIPS AGREEMENT**

As the global economy became more and more immense in trade and business, it came to the conclusion that GATT is not capable of addressing many of the new global challenges that were arising. So then starts the Uruguay round. One of the last accomplishment of this round was the creation of the WTO. WTO then replaced the GATT, which had been in force since 1948. The WTO provides a forum for negotiating the agreements aimed at reducing the difficulties in the international trade and assuring a level playing field for all, which in turn contributes to economic growth and development. The WTO provides for a legal and institutional framework for the implementation and the monitoring of these agreements, as well as for settling the disputes arising from their interpretation and the application.

The WTO agreement on the TRIPS concluded on April, 15, 1994 and has entered into force on Jan, 1, 1995. TRIPS are considered as a historic event in the history of protection and a breakthrough signal towards the protection, harmonisation, internationalisation and globalisation of IP systems. So WTO agreement is an international agreement, and it establishes a minimum standard that requires the member countries to provide strong IP protection according to their respective domestic law.

TRIPS set a minimum standard to be met by all the member countries to the WTO for the protection of the IP rights and enforcement. The main obligation for all the countries is based on the national treatment and most favoured nation treatment (MFN). The TRIPS agreement mainly consists of 7 Parts which contain 73 Articles.

Part I -General provisions and the basic principle (Article 1-8),

part II -Standards concerning the availability, scope and the use of the IPRs (9-40), section 7- protection of the undisclosed information.

part III- Enforcement of the IPR (article 41-61),

part IV- Acquisition and the maintenance of IPR and related inter-parties procedures (article 62),

part V- Dispute prevention and the settlement (article 63-64),

part VI -Transitional arrangements (65-67),

part VII-Institutional arrangements, final provisions (article 68-73)

In the copyright and the related rights, the countries have to be obliged with the articles 1-21 of the berne convention for the protection of the literary and artistic works. TRIPS need countries to protect the computer programs as the literary works under the berne convention and the to protect the data and the other kind of materials that constitute the intellectual creations because of their content arrangements.

In trademarks and the service marks, TRIPS gives the protection to the trade marks under the Paris convention for the industrial property protection in a several ways. First the TRIPS defines the trademarks, Secondly, a system including the publication and the cancellation should be available in connection with the trademarks registration and the service marks.

Thirdly , the protection of the well known marks is also extended to include the service marks . The member countries should refuse or invalidate the trademark registration that contains geographical indication with reference to the goods that's not originating from the territory that's indicated , where the trade mark use will misled the public as to the true place or the origin of the goods . in industrial designs , trips requires countries to provide the protection for the new as well as the original designs with some exceptions.

In patents , trips requires its availability everywhere . The only exception is diagnostic , therapeutic and the surgical methods for the treatment of the humans and animals and then for plants and the animals other than the microorganisms and also essentially the biological processes for the production of the plants or animals .

Also it provides that countries that are not providing patent protection for the plant varieties must provide the protection through an effective sui-generis system. With accordance to the semiconductor chip layout designs , unlike the Washington treaty on the intellectual property in respect of the integrated circuits, the trips

1. Expressly covers the article that includes the protecting chips.
2. Assurance of a reasonable royalty
3. Extending the protection to 10 years ( in Washington it was 8 years )
4. Prohibition of the compulsory licensing with connection to the semiconductor chip layout designs except the antitrust remedy or the non commercial government use .

Regarding the trade secrets, the TRIPS agreement shows the undisclosed information, but it's referring to what's called trade secrets. In addition ,to providing the protection ,TRIPS also take steps to protect counter to the unfair commercial use of the data submitted to the government agencies to obtain the marketing approval for the pharmaceutical and agricultural chemical products containing the new chemical entities.

### **TRADE SECRETS UNDER THE TRIPS AGREEMENT**

Protection of the undisclosed information is mentioned under Part 2, Section 7 of the TRIPS agreement. So undisclosed information here means the Trade secrets. Article 39.1 of the trips provide that in the course of ensuring the effective protection against the unfair competition as provided in Article 10bis of the 1967 Paris convention, members shall protect the undisclosed information of the sort which is described in the 2 and 3 paragraphs of the article 39<sup>101</sup>.

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<sup>101</sup> The TRIPS agreement 1995, Section 7: Protection of Undisclosed Information: Article 39:

1. In the course of ensuring effective protection against unfair competition as provided in Article 10bis of the Paris Convention (1967), Members shall protect undisclosed information in accordance with paragraph 2 and data submitted to governments or governmental agencies in accordance with paragraph 3.
2. Natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices so long as such information:
  - (a) is secret in the sense 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 the circles that normally deal with the kind of information in question;
  - (b) has commercial value because it is secret; and

Paragraph 2 contains the general category of confidential information, which has been protected under the common law system, where paragraph 3 provides for the protection of data submitted to the government against disclosure and the unfair use. Article 10bis contains no reference to the protection of confidential information as an ingredient of unfair competition. Article 10bis(2) defines an act of unfair competition as an act of competition contrary to the honest practises found in industrial and commercial practices.

Article 10bis (3) then lists three particular practises which are to be prohibited.

- (i) all acts of the nature , so as to create the confusion by any means whatever with the establishment or the goods, or industrial or commercial activities, of a competitor;
- (ii) false allegations in the course of trade , as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor;
- (iii) indications or allegations , to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability purpose, or the quantity, of the goods.<sup>102</sup>

So we can summarise that trips agreement provides for the protection of trade secrets by referring to the way of protection given under the Paris Convention or the provision of the WIPO.

The negotiators of the trips agreement were very anxious to preserve the confidentiality of the test data submitted to the government agencies. It contains a long approval process, particularly for the pharmaceutical product, the chances for the wrongful appropriation of such data by competitors was self-evident. This is included in article 39.3.

Article 39.3 also contains three limitations:

1. It only applies to the pharmaceutical and chemical agricultural products
2. The protection is extended ‘only’ against the unfair competition uses
3. The government authority is exempted from the confidentiality requirement in the interest of the public.

So, it had been held that a government attributing agency might use the confidential test data of an applicant while considering the applications by another applicant in respect of similar products.

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(c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

3. Members, when requiring, as a condition of approving the marketing of pharmaceutical or of agricultural chemical products which utilize new chemical entities, the submission of undisclosed test or other data, the origination of which involves a considerable effort, shall protect such data against unfair commercial use. In addition, Members shall protect such data against disclosure, except where necessary to protect the public, or unless steps are taken to ensure that the data are protected against unfair commercial use.

<sup>102</sup> Article 10bis (Paris Convention) - Harvard University. [https://h2o.law.harvard.edu/text\\_blocks/6554](https://h2o.law.harvard.edu/text_blocks/6554)

## **RELATIONSHIP BETWEEN WTO AND WIPO FOR THE IP PROTECTION**

It is explicitly set out in the preamble of the TRIPS agreement that the WTO requires a mutual supportive relationship with the WIPO. This relationship provides cooperation in mainly three areas :

- notification of, access to and transition of the national laws and the regulations
- implementation of the procedures for the protection of the national emblems
- and for the technical cooperation

The cooperation between the WTO-WIPO provides a joint work on a computerised database of the intellectual property laws and the regulations and cooperation on the implementation of the TRIPS.

Following are the categories that are recognised as trade secrets:

If any particular information qualifies the test of confidentiality, then it can be regarded as a trade secret. Following are some of the examples where the trade secret protection is approved by the different courts throughout the world and considered as confidential information can be summed as:

- formula
- patterns
- plans
- designs
- physical devices
- processes
- software
- know-how<sup>103</sup>

But the above-given list is not at all exhaustive; there are also other categories which can be considered as trade secrets . It is also observed that different courts might enter into different and contrary conclusions that concerns the trade secret status, but to the conclusion they reach would be the same, i.e. the information must be confidential in nature, the owner must take reasonable steps to keep the information confidential, and this information should not be available in the public domain.

- Formula

Formula means a group of symbols that makes a mathematical statement or a conventionalised statement expressing some of the fundamental principle or a representation of a substance using

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<sup>103</sup> TRADE SECRETS PROTECTION

[https://shodhganga.inflibnet.ac.in/bitstream/10603/291861/9/09\\_chapter%20vi.pdf](https://shodhganga.inflibnet.ac.in/bitstream/10603/291861/9/09_chapter%20vi.pdf) (last visited on 25 september 2021)

symbols for its constituent elements. It gives the right direction for making something worthwhile or lucrative. A formula can be a trade secret .example: the formula in the coco-cola company gives a high advantage in the soda market, as there is no other soda that tastes this same.

- Pattern

A pattern is considered as a form, template, or model (a set of rules ) that can be used to create things or parts of a thing. Or in other words, it can be said that the detection of the underlying patterns is called pattern recognition. If the pattern follows a basis of confidentiality, then it can be protected s the trade secrets.

For example: the mode of pattern in the packaging of the goods and the delivery of the goods, pattern of a client counselling

- Plan

A plan is considered as a proposed or an intended method of getting one circumstance to another. They move from a current situation toward the achievement of one or more objectives or goals. Generally, plans are provided or revealed in the case of patenting a product, but if the inventor wants to keep it a secret, then it can be kept under the category of confidential under the category of trade secrets. In businesses, it uses this intellect to make business plans.Ex: plan on selling a product in a particular region by using a particular kind of marketing style.

- Design

Design is considered as a decorative or artistic work. It can also be said as an arrangement of the scheme. some of the categories of goods or the invention that can be considered as designs are the follows :

- o circuitry for an advanced minicomputer
- o colour tv circuitry
- o schematics for analogous circuits

- Physical devices

A device which is having some kind of physical implementation can be termed as a physical device. If it's used in manufacturing, then it can be termed as a trade secret.

E.g., a device for manufacturing the radio parts ,machinery and the equipment used to manufacture the saw grade diamonds.

- Process

The process is considered as a generalised method of doing something, which generally involves certain steps or the operation that are usually ordered and or interdependent. A processing method or the technique that's used to make the final and the end product can be also be termed as the trade secrets.

Some of the examples: a process to manufacture the potassium sulphate ,a process to manufacture the fibreglass

## Software

A good reminder is the Broker Genius case , that's of the steps to increase the chance of being capable to safeguard software as a trade secret

- Know-how

Its information that enables a person to accomplish a particular task or to operate a particular device or the process. Know-how can be trade secrets.

Examples of the trade secrets :know-how pertaining to the plant chemical construction, methods for the test procedures, and to assure the quality of the raw material.Know-how of methods to manufacture typewriters.

## **TOOLS FOR PROTECTING TRADE SECRETS**

The owners of the trade secrets have to use various non-disclosure agreements and non-compete clauses while giving employment to the people who will have access to the trade secrets while on their courses. Various tools of protecting trade secrets ensure that misappropriation, sabotage, and privacy do not take place. Businesses must ensure that that they protect their trade secrets by adopting some of the tools. Some of the tools are given below.

- Agreement on the employment:

there should be an employment agreement depending upon the nature of the employment for maintaining confidentiality and include non-competent and non compete clauses with the employees. Such type of agreements may include the restriction of the disclosure of the specific type of information, and the way in which they can be used restrictions on post-termination of the employment.

- Trade secret policy

This is another tool found in trade secret protection. These are a must for the business; those heavily rely on trade secrets for the expansion of their businesses. The primary step to develop such a policy is to identify and to prioritise the business information that can be considered as trade secrets based on their value and sensitivity. In such cases, employees must have been informed about these policies and consequences that will happen when the breach of policy has taken place before they actually abide by the policy, .so it should be effected by giving an acknowledgement.

- Non-disclosure agreements

businesses enter into NDA with the employees and the third parties. It prevents the third party from divulging any trade secrets because of the agreement.

- Adequate documentation

it's a very important to keep a record of the trade secrets in the businesses to show that these are developed by the, and these belong to them. All updation on the trade secrets also should be kept on the record. these records would have an evidentiary value in case of any kind of disputes, and it will help them to strongly plead that trade secret that actually belongs to them

- security systems

security checking is necessary for trade secret protection. Access to trade secret protection and confidential information may be restricted to only the selected personnel by adopting the measures of the security check. e.g., in the case of an electronic environment, businesses can use available software programs, virus scans, firewalls, other security and authentication technologies to protect the trade secrets.

Trade secret protection can be extended indefinitely, and these may get them an advantage over other forms of intellectual property protection, which lasts only for a specifically limited period of time. In the olden days, trade secrets were used to keep the advanced military technologies from one's enemies, formidable foes ..but in the contemporary society and technological innovation has universalised the trade secrets.<sup>104</sup> If the proper tools of the protection have been adopted, then trade secret discovering can only be possible through adopting lawful methods such as reverse engineering, industrial espionage.

### **TRADE SECRETS IN INDIA**

If the confidentiality of the information is breached, then no more it is considered a trade secret .India is moving high to the global economic power, it's essential to protect the interest of the traders, entrepreneurs and the business. India is a member of WTO and signatory to the TRIPS. All member states of the TRIPS agreement has adopted the agreement provisions either byway of amendment to the existing laws or enactment of new legislation. Indian IP law directly not protects trade secrets as there are no specific laws that are concerning trades secrets. But the Indian courts have tried to put the trade secrets legislation through various court judgements, in order to protect the interests of the traders and businesses.

In Burlington home shopping Pvt ltd V Rajnish Chibber <sup>105</sup> case, the plaintiff owned a mail order service company. This company deals with the publishment of the mail-order catalogues that deals with several customer items. Plaintiff was doing substantial business in this way. the plaintiff has developed a database on the three years .The plaintiff pleased that he has copyright, and the defendant infringed it by some illegal acts. The critical questions that arise here are whether a database consisting of the compilation of the mailing address of the customers can be the subject matter of copyright and whether the defendant can be said to have infringed the plaintiff copyright. The court restrained the from carrying on any business, including the mail-order business, by using the customer's name. In this case, the court has protected trade secrets under copyright law.

In ambience India Pvt ltd v Shri Naveen Jain<sup>106</sup>, it was recognized by the courts that trade secret is considered as the some protected and the confidential information which the employees have acquired in the course of the employment and couldn't reach the others in the interest of the employer. A trade secret could be a formula, technical know-how or any of the

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<sup>104</sup> Cynthia M. Gayton, "Commercial Satellite Imagery: Confidential Information Knowledge Management and Trade Secret Law" 37 (2) JIKMS 192-206 (2007)

<sup>105</sup> Supra(25)

<sup>106</sup> Supra(66)

tools which are unknown to the others. But day to day affairs of the employer, which are commonly known to others, cannot be called trade secrets.

In tractor and farm, equipment ltd v . greenfield farm equipment Pvt ltd and ors <sup>107</sup> this case shows that confidentiality, in this case, is protected confidentiality through the non-disclosure agreement.

In high-tech systems and services ltd v suprabhat ray and ors <sup>108</sup> here the plaintiff company was a manufacturing one and sold technologically advanced highly engineered products and equipment for the power and process sector industries. The plaintiff was a service provider as well as the importer and the seller of certain industrial products. There are five respondents, in this case, who were ex-officers of the plaintiff company. The role of the respondent 1 and 2 was confidentiality and trust. There are many secrets that are known to the respondents, and this information is a valuable asset for the petitioner. Here lies the petitioner's competitive advantage. Respondent 1 and 2 also had the information also has the information of the logistic vendors: respondent 3 and 4 roles as manager sales and senior engineer sales and market. The petitioner has given all the information regarding the trade secrets and the computer databases and the confidential information regarding the petitioners business to respondents no 1-5. they gained this knowledge and had access to it during the course of their employment. In the year 2013, the mentioned respondents were resigned from the plaintiffs business and started a business that is directly in competition with the plaintiff's competition. The plaintiff alleged that respondent number 6 is the company started by respondent no 1-5. the respondent had already accessed all information while they were with the petitioner. The respondents were sent abroad on several occasions also and introduced to the plaintiff's suppliers while they were in the course of the employment .there were also non-disclosure agreements that were signed by the respondents with the petitioners. So hence, all this information is considered as a part of the trade secrets of the petitioners, and this cannot be used by the respondent. Then the plaintiff has filed an application principally against its ex-employees in respondent 1-5 praying, inter alia, for an order of the injunction restraining the respondents from using the petitioner's computer data or any other info which is confidential and trade secrets and to procure a breach of contract of the plaintiff with the existing customers and or suppliers.the high court, in this case, held that the :

A trade secret, which is highly confidential in nature, would be potentially damaging if the competitor has obtained such and used it detrimentally. Business information such as the cost, pricing, marketing strategies etc ... will come under the list of the trade secrets .court find out that since the said respondents have acted in the breach and are in the process of utilization of such trade secrets and the confidential information, the said respondents are restrained from acting as the selling agent three years from 2014 January. But this order doesn't control the respondents from carrying on any business, which can be the same or similar to the plaintiff without using the database that has been procured during their course of employment with the plaintiff.

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<sup>107</sup>tractor and farm, equipment ltd v . greenfield farm equipment Pvt ltd and ors 1997 (91) ELT 254 (SC)]

<sup>108</sup> In high-tech systems and services ltd v suprabhat ray and ors G.A.1738 of 2014C.S.192 of 2014

In *Ciba Inc. v sequent scientific ltd*<sup>109</sup> the court held that, in order to actuate the confidentiality breach and the violation, it has to be specially given in terms of the confidential agreement, in the absence of which, relief cannot be granted.

In the case of *Tractor and Farm equipment limited v Green field farm equipment private limited and ors*<sup>110</sup> the plaintiff has carried out the tractor business , related farm equipment's and other similar things the plaintiff having a R &D separate department and they were inventing new models every time with their own or collaboration with the foreign countries under the contract . the plaintiff entered into a program known as the hunter program to develop a tractor for the countries purpose .the development on the hunter project has been given to a UK company called omni on a contract basis for the valuable consideration. The team members who were back the programme were all aware of all the information .later the plaintiff know that the defendant were trying to manufacture a tractor with similar designs . the issues that came before the court were the following :

1. Whether the plaintiff company is having any copyright
2. Whether the defendant (second) is having any access to the information to hunter tractor
3. Whether the confidentiality clause has been violated by the defendant ?

The court here held that there exists infringement of the copyright as well as the breach of the confidentiality . so the court issued injunctions against the defendants . this case shows that court protected the confidentiality through the non-disclosure agreement .

In the case of *Desiccant Rotors International v. Bappadtya Sarkar and Another*<sup>111</sup> in this case, the plaintiffs company was incorporated under the 1956 companies act and was established in the year 1958. It was engaged in the chemicals and the steel industry . It has its research for the innovative technologies . The plaintiff was the part of the FOSECO group. The defendants were ex-employees of the plaintiff and the agreements between them was to not to disclose the confidential information .it was found that later the defendants were manufacturing the same process . It was held that disclosure of the confidential information after the cessation of the employment by the employee can be restrained.

## **TRADE SECRETS UNDER THE NATIONAL INTELLECTUAL PROPERTY RIGHTS POLICY.**

The National Intellectual Property Right Policy was adopted in May 2016 as a visionary document to guide the future development of the IPRs in the country. Its clarion call is creative India, innovative India. The first draft policy was released in 2014, December 19, .and in 2016 union cabinet has approved the final policy. So much effort was put not only to see how much importance has been put to the IPR in general for economic development but also for finding a place for the trade secrets as the sine-qua-non of a detailed IPR policy framework of India.

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<sup>109</sup> *Ciba Inc. v sequent scientific ltd* Notice of Motion No.3472 OF 2009 in Suit No.2501 of 2009]

<sup>110</sup> (2006) 32 PTC 343 Mad, available at: [https://indiankanoon.org/doc/76530/\(last](https://indiankanoon.org/doc/76530/(last) visited on April 212021)

<sup>111</sup> *desiccant rotors international v. bappadtya Sarkar and another* I.A. No.5455/2008, I.A. No.5454/2008 & I.A. No.5453/2008 in C S(OS)No.337/ 2008, Delhi HC, 14 July, 2009, available at: <https://delhicourts.nic.in/>

In addition to these objectives, close transcription of some of the critical areas are given below.

- Executive summary:

Creativity and Invention are considered as one of the most important tools for the development of the economy. A good ipr policy structure will give make people give out their full potential of IP for the growth of India while protecting the public interest. The main motive behind putting forward the national IPR policy is to create awareness about the IPR as a financial marketable asset and economic tool.<sup>113</sup>

- Vision statement :

in India, its important for the stimulation of creativity and innovation, which in turn gives the benefit for all this IP promotes the advancement in science as well s the technology, traditional knowledge, biodiversity resources etc.. in India, as knowledge is the main driver of the development, and the knowledge owned is transformed into the knowledge that is shared.

- Mission statement :

it includes fostering creativity and innovation and such away it promoted the entrepreneurship and the socio-economic and the cultural development focus on the access to healthcare, food security and the environmental protection among the other important sectors.

**There are mainly seven major objectives:**

- to give awareness about the economic, social and cultural benefits of the IPRs among the society: the 21<sup>st</sup> century is considered as a modern as well as knowledge era. A program has to be conducted in nation wide with the aim of giving and improving the awareness .such program will leads to encouragement in the public as well as private sectors . R&D centres various industries which then leads to the generation of the protectable Ips which can be commercialized .
- the creation of an atmosphere of invertibility and innovation. Which means stimulating the generation of the IPRs. India has a large set up for the scientific and the technological talent that's spread through various organizations. There is an urgent need to assess and evaluate the potential in the various sectors .
- legal and the legislative framework -ignore to have a stronger framework its important to have an effective and strong IPR law, which balances the interest of main right owners with the larger public interest. :the existing IP laws are revised after the enactment of the TRIPS agreement India is very richly stands in traditional medical knowledges and its very important to protect it from the misappropriation.
- human capital development

In order to concentrate and extract the full potential of the PRs its important too develop a pool for IPR professionals and field experts .such reservoir of the experts will be helpful in the further facilitation of the IP assets in the country.

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<sup>113</sup> Activities IPR Cell, [http://www.piet.poornima.org/public/main\\_assets/dvv/3.2.2.pdf](http://www.piet.poornima.org/public/main_assets/dvv/3.2.2.pdf)(last visited on august 30,2021)

- administration and the management

The cornerstone of the efficient and the balanced IPR system is the officers that administers different IPRs.

- commercialization of the IPR

A country can only be economically improved if the entrepreneurship has been encouraged. Its very necessary to connect the investors as well as the IP creators.

- enforcement and adjudication

There is a need to build the details and knowledge regarding the IP among the general public .such a way it can attract more investors and such a investment can be increased which in turn helps the economy .

## CONCLUSION

The era of 21<sup>st</sup> century is considered a knowledge era, and it's the main force behind the economic force. It's very necessary to reach out to the small areas, especially in the rural as well as the remote areas. Awareness is the main objective or the primary objective of this policy. India has a large talent pool that's spread over the R&D institutions, enterprises, universities and technical institutions. So there is a need to expand this level of knowledge for economic development. The corporate sector also should be used to encourage as well as develop the IPRs. Various steps also should have been taken so that the benefits of the IPR regime will reach all the inventor, MSMEs, start ups and grassroots innovators.

The IP laws that are existing today is enacted after the TRIPS agreement and are totally compliant. These laws with the various judicial decisions actually provide for the framework of the protection for the IPRs. so in order to have a stable legal and legislative framework, it's also important to have revised the existing IP laws, examine and engage in the negotiation of the international treaties and some multilateral treaties and continue and engage and actively participate in various international fora to develop the legally binding international instruments. , pursue transfer of the clean technology, revise and update the rules time to time, undertake an in-depth study etc., entrepreneurship should be encouraged so that the financial ale of the IPR is captured. Efforts should also be made for a public platform to connect the creators and the innovators. In order to get out the full potential of the IPRs for economic development, it's also essential to develop a large pool of IPR professionals and experts in the field.

## **CHAPTER 6**

### **NATIONAL INNOVATION ACT 2008 & ECONOMIC IMPORTANCE**

After the independence, India entrusted with a shattered economy. However, after 1991, when the FDI increased due to the liberalization of the economic policies, the country was developing faster. India, what we see today, can produce almost all things, from essential raw tools to advanced satellites. To expand its development more and high, it needs to protect the innovation and the trade secrets more efficiently. Not only that, but the present Government is also supporting and showing greater interest in the promotion of innovation and trading, especially in the light of 'make in India' and 'start-up India' policy.

According to the world bank report in 2020, India ranked 63rd to do business index from 142nd rank in 2015. India has a long way off to go in case of expanding its businesses. But one of the reasons for lacking behind is the lack of secureness felt by the investors.

Almost all competing countries protect their innovation and setups to make a direct investment in the present world. The protection of Innovation in many countries are by patent law and copyright law. But in many cases, business concerns do not want their innovations to be shared, and they want to make them confidential. In such cases, special laws needed, which helps the investors earn a greater extent of the profit.

Innovation is considered the primary driver of the growth and expansion of a knowledge-based economy. The Indian Government has released a Draft National innovation act to boost research and innovation which is released by the department of Science and Technology. It aims at building a comprehensive framework to encourage innovation. One of the primary objectives of this act is to codify and consolidate the law of confidentiality to protect confidential information trade secrets and innovation. The draft of the 2008 act modelled from the Americas COMPETES Act 2007. However, they joined in line with COMPETES act, the main concept of confidential information is from America's Uniform trade secrets Act. Although the state provides laws protecting trade secrets, such laws based on the model uniform trade secrets act 1979(amended in 1985).

Under the U.S. Act ( As of 2018, every state but New York has adopted the UTSA(The University of Texas at San Antonio) in one form or another.), a trade secret is defined<sup>114</sup> as an Information, which includes a formula, pattern, compilation, program device, method, a technique that:

(i) Derives an independent economic value, which are actual or potential, not generally known to and not readily ascertainable by proper means by other persons who can obtain the economic value from the disclosure or the use

(ii) is the subject of reasonable efforts to maintain its secrecy.

This is similar to section 2(3) of the proposed draft Indian innovation act 2008, which then defines confidential information as means of information that includes a formula, pattern,

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<sup>114</sup> UTSA S1.2 [https://nationalparalegal.edu/uploads/19Patents\\_Class\\_15.pdf](https://nationalparalegal.edu/uploads/19Patents_Class_15.pdf) (last visited on september 25,2021)

compilation, program device, method, technique, or the process that (a) is secret (b) has a commercial value (c) has been subjected to reasonable steps by the person lawfully in control of information to keep it as a secret.

In the U.S, in addition to the 1979 Uniform trade secret act, trade secrets are protected under the Economic Espionage Act 1996, which makes theft of confidential information a ‘crime’. The definition of the proposed innovation act is also based on Article 39.2 of the TRIPS agreement. Article 39.2<sup>115</sup> in the WTO says: that the agreement doesn't require undisclosed information to be treated as a form of property. Still, it does need that a person who is lawfully in control of like information must have the contingency of preventing it from being disclosed to or acquired by or passed down by others without their sanction in a way that is contrary to the honest commercial practices. Manner, contrary to the fair commercial practices, includes:

- Breach of contract.
- Breach of confidence & inducement to breach.
- The knowing of the undisclosed information by the third parties, who were grossly negligent in knowing such practices involved in the acquisition process.

In the National Innovation Act, trade secrets and confidential information are in chapter VI, titled as confidentiality and confidential information and remedies and offences. The chapter deals with the obligations of confidentiality and the remedies to protect and preserve confidentiality.

### OBLIGATIONS OF CONFIDENTIALITY

section 8 of the chapter deals with the obligations of party receiving the confidential information. This section provides parties with the liberty to contractually set out terms and conditions governing the rights as well as obligations regarding maintainability of confidentiality to prevent the misappropriation of confidential information. In India and worldwide, it is common to enter into confidentiality as well as non-disclosure contracts with the employees to prevent them from disclosure of trade secrets or the confidential information.<sup>116</sup>

But to date, there is non - uniformity in recognition of such agreements by the Indian courts because many a time, it came as contrary to section 27 of the Indian contract act, which provides that agreement in restraint of trade is void. Further, the provision also provides that if the appropriate Government may, by the notification, declare the minimum period for such confidentiality contract, then the party has to follow it. This section says that the parties may set out the terms and conditions contractually to govern the rights and obligations regarding maintaining confidential information and preventing misappropriation. Confidential information should be governed by the terms and conditions as prescribed by the appropriate Government.

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<sup>115</sup> WTO ,  
[https://www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_04d\\_e.htm](https://www.wto.org/english/docs_e/legal_e/27-trips_04d_e.htm) (Last visited on september 27,2021)

<sup>116</sup> Confidentiality - Privacy - India. [https://www.mondaq.com/india/privacy-protection/720496/confidentiality\(last](https://www.mondaq.com/india/privacy-protection/720496/confidentiality(last) visited on august 30,2021)

## CONFIDENTIALITY ARISING FROM NON-CONTRACTUAL RELATIONSHIPS

Section 9 provides for the provision related to the obligation of a third party to maintain confidentiality. This section provides that the confidentiality arising from the non-contractual relationships, such as the equitable considerations, may also create the right to retain the obligation to preserve confidentiality. It also provides rights to prevent the third party from disclosing the information into the public domain unless consented to by the complainant.

Although there is no contractual obligation to maintain confidential information as a secret, there is an inherent obligation at the common law. Before the draft act was passed, there exists no statutory recognition of obligation that keeps confidential information secret. Nevertheless, the draft act now, effectually codifies the equitable obligation of confidentiality at common law

## REMEDIES TO THE PROTECTION AND PRESERVATION OF CONFIDENTIALITY AND ORDERS TO PREVENT THE THREATENED OR APPREHENDED MISAPPROPRIATION THEREOF

Section 10 of the Act deals with a specific guidelines to preserve and to protect te confidential information misused during proceedings of the court. Also it provides that the court shall preserve the secrecy of subject matter which claimed as confidential information by reasonable means; such measures may include providing the mandatory protective ordered in connection with the discovery proceedings, trial in cam -holding, sealing as the confidential information, that includes filings or recordings which are confidential and requesting any person or a group of persons impleading in action not to disclose the confidential information, referred in the claim without prior orders of the court.

Section 11 prescribes the exceptions that a party can plead in action for the misappropriation of confidential information. This section also mentions some of the specific defences that can be pleaded in the misappropriation proceedings. the section prescribes three types of exception:

1. If the information is available publicly
2. It has been developed independently by the alleged mis-appropriator or any party that has received the information from the alleged misappropriation.
3. When the court of law decide that the disclosure is made for the interest of the public.

This is the only section under the proposed Act, which speaks of the defences that can be pleaded in a suit of the trade secrets misappropriation. The scope of the public interest is not anywhere defined in the act. It depends upon the will of the court to determine what amounts to the public interest. The defence, like the availability of the information in the public domain, independent development can be achieved by reverse engineering under the section accepted universally as the defence under the various laws to protect the trade secrets.

Section 12 of act deals with the court's power to grant injunctions and vacate injunctions. It authorizes the courts to grant the interim or final injunctions as it seems to be necessary. It imposes an obligation on the complainant to compensate the defendants for the actual losses arisen if the court finds out that the complainant is not entitled to such relief as he failed to establish any of the grounds important to securing the interim relief. Also, the provision

provides that the appropriate Government should provide the police and local administration machinery to aid and to assist in the implementation of any injunction granted.

Section 13 of the proposed act provides for mandatory damages on proof of confidentiality breach. This section denotes that when anyone has misappropriated the confidential information, directly or indirectly, or it give to a third person or in the public domain without the consent and knowledge of the actual owner, he shall bound to give the damages. And also, the section provides divergent options to the complainant for claiming the damages.

The complainant can elect and receive mandatory damages as notified by the appropriate government from time to time or such other damages that has been agreed in the contract by the parties, or actual damages that are demonstrated, consisting the consequential losses. Moreover, in addition to the damages, the complainant is entitled to receive a sum of money, including the attorney fees, if found that the mis appropriator has acted with the malicious intentions to incur a loss to the complainant. Such amount shall not be more than three times the mandatory damages prescribed by the appropriate Government. This section also provides for securing a grant of interim relief by the defendant; the court may ask the alleged mis appropriator to pre-deposit up to 10 per cent of the damages claimed by the complainant as a precondition to continued right to defend the suit.

Section 16 provides immunity to all persons from the judicial proceedings or claims or the action of all acted in the ambit of the act or the rules and regulations made under the act.

### **ECONOMIC SIGNIFICANCE OF THE TRADE SECRET PROTECTION**

The proprietor of the intellectual properties enjoys different kinds of rights and benefits arising out from their properties. One of the main aims of the proprietor is profit-making and maximization of these various types of rights as granted by the different IPR laws. The economic importance of the IPR is very essential because they have an crucial role in earning the proprietor and the related country. The FDI directly impacts the development of a nation, so to boost the FDI and domestic investment of a country, it's very important to give adequate protection to the investor's interest. a Trade secret is one of the classes of the IPR which having the highest economic significance in the current scenario.

Trade secrets or know-how may consist of additional information got through the exploitation of the patented invention, though not being patentable, allows more efficient use of the patented product or the process. Exclusivity of the protection offers the owner an opportunity to cast-down free use and to increase his investment. There are many reasons for expanding the reliance on protection of trade secrets .

A patent can be rejected after it granted. The process for obtaining the patent is long and uncertain. A patent's protection is only for a limited period but trade secrets exist as long. They can be enjoyed for a longer duration.

Protection of the trade secrets is not only by the registration but also by the self-initiative of maintaining the confidentiality and the contractual restrictions on use. There is also no time limitation in the context of time for trade secrets. Trade secrets that are voluntarily revealed, guarded insufficiently or reverse engineered lose all the protection and get subjected to free competition. Trade secrets affects the economic development of the country. As a result, it gives a severe challenge to the competition law keeping the information as secret. If disclosure

doesn't occur, know-how is not available for the competitors and to the general public. This high technology by the small number of enterprises leads to the concentration of the economic power, which implies a risk-free competition.

Each country has different specific laws, which controls anti-competitive policies and a protective law for trade secrets is crucial to promote innovation investment. Like, in India, the competition act 2002 regulates and prohibits unfair anti-competitive policies.

Trade secrets have more positives than negatives. Nowadays, businesses are increasingly relying on intangible and knowledge-based assets to maintain their competitiveness in the markets. It is essential that intangible assets are protected, as they play an important role in its success. Trade secrets in certain situations can last longer than that of the patent. Scientific discoveries which have greater importance also faces difficulties in patent protection. Trade secrets can also protect them. Also, where technology doesn't come under the traditional IPRs, trade secrets come in handy. Inventions, trademarked, industrial designs, etc, haven't made public yet are kept as trade secrets until published or during the registration or during the grant of the relevant IPR rights.

A substantial part of the meaningful technology, particularly new and the high technology prone to reverse engineering, such as the biotechnology computer microchip programs, is kept as trade secrets.

Many studies that assessed the trade secrets, patent, copyright, and other IPRs have shown the impact of protecting trade secrets and their impact on FDI and the voluntary technology transfer. one among them is the study of Keith E Maskus.

Keith E Maskus <sup>117</sup>examined that the IPRs should have varying importance in the different sectors to encourage FDI. Firms investing in a local R&D facility will pay special attention to the local patent and the trade secrets protection. this protection was given out by Mansfield The study by Keith E Maskus shows that India is considered the greatest concern for IPRs as 80% of the chemical firms surveyed indicated that they couldn't engage in any joint ventures or transfer new technologies to the subsidiaries or the unrelated firms in India.

Keith E Maskus summed up<sup>118</sup>: economies that are more open to trade and FDI should experience a growth premium from IPR strengthening than closed economies. Property rights that are stronger create market power, which is more abused easily in economies close to foreign competition. An essential fact of trade liberalization is to add foreign goods and techniques which compete with the previously protected oligopolies. Thus, to strengthen the IPRs, on the one hand, but to maintain the closed markets, on the other hand, is to work at the cross-purposes.

In 2010 OECD study established that an increase in intellectual property protection was associated with the FDI inflows, service imports and domestic R&D. Many studies indicated that the protection of trade secrets could encourage the development of inventions and valuable information by helping to protect the return on investment in creating such innovations. Keith

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<sup>117</sup> Intellectual property rights and foreign direct investment:  
[https://www.iatp.org/sites/default/files/Intellectual\\_Property\\_Rights\\_and\\_Foreign\\_Direc.htm](https://www.iatp.org/sites/default/files/Intellectual_Property_Rights_and_Foreign_Direc.htm)  
(last visited on august 31,2021)

<sup>118</sup> ibid

E Maskus argued that trade secrets could be substituted for patents and provide incentives to innovate.

They observed that the trade secrets could help the innovators maintain the competitive advantage, contributing to profitability and then providing incentives for further investment in innovation. It's tough to know the exact economic value of the trade secrets law because of the required trade secrets law, but some indications are available from the literature. For instance, the Hogan Lovell shows businesses suffer when the trade secrets are compromised.

A survey conducted by Baker McKenzie<sup>119</sup> in Europe shows that 75% of respondents ranked trade secrets as strategically important for their company's growth, competitiveness as well as for innovative performance.

The growing importance of trade secrets are visible in government initiatives. In 2012, the European Commission released an indicative map for an improve trade secrets initiation and confidential information from misappropriated by the third parties. In 2013, the U.S. released the administration strategy on the mitigation of the theft of U.S. trade secrets.

This includes a group of activities for improved protection domestically as well as internationally.

1. Focus on the diplomatic efforts to protect the trade secrets overseas.
2. Promote the voluntary best practices by the private industry to protect the trade secrets
3. Enhance the domestic law enforcement operations
4. Improve the domestic legislation
5. Public awareness and stakeholder outreach

In the year 2013, a study on the trade secrets and confidential business information in the domestic market of the European Commission was made; researchers observe that the relevance of trade secrets is growing steadily in the modern global economy.

They are the main reason for enhancing the competitive advantage in all the sectors for whether it's both innovative and non-innovative firms regardless of their size. This trade secret protection effectually fills the gap between copyright and patent protection., which are two traditional pillars of intellectual property for the main purpose of appropriating the results of the investments in innovation. In this survey, the researchers have pointed out a need for common legislation to ensure adequate and equivalent protection against the misappropriation of trade secrets.

The lack of a uniform law may create uncertainty and negativity, which impacts business behaviour. Firms are often needed to adopt different measures to protect their trade secrets depending on the relevant jurisdiction. And in case of the infringement proceedings in each jurisdiction where their trade secrets have been violated. The survey results show that

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<sup>119</sup> Baker and McKenzie, "Study on Trade Secrets and Confidential Business Information in the Internal Market", prepared for the European Commission (EC) in April 2013, available at: [https://ec.europa.eu/growth/industry/policy/intellectual-property/enforcement\\_en](https://ec.europa.eu/growth/industry/policy/intellectual-property/enforcement_en) . (last visited on July 20, 2021).

inefficiency in the trade secret protection has an adverse impact on the R&D activity and the investment and results in lost sales.

Here the observations made by the researcher shows the importance of trade secrets law in the present market.

Ippoldt and Shultz tested the hypothesis that increases the trade secret protection promotes:

1. domestic innovative activities that are expanded , measured by the R&D expenditures and intensity
2. Expanded international activities

Since 1991 India has adopted a globalization and liberalization policy, which encourages foreign corporations' entry into India and indicates removing those trade barriers.

It's also to be noted that if there is an effective law on trade secrets , it will low the incurred cost in the secrecy and the business protection. Suppose if there is a perfect law, which trades secrets of the traders. In that case, it will automatically help the ease of doing the business. Thus, a way the businesses can make more investment. In *E.I.DuPont de Nemours and Co v. Christopher*<sup>120</sup> the plaintiff, in this case, was constructing a chemical plant. Unknown persons hired the defendants to take aerial photos of the chemical plant under construction. For this purpose, the defendants have taken an extra measure by hiring an aeroplane to observe the construction site while taking the photos. Considering the present situation, if the law doesn't provide the protection of trade secrets against the theft of the trade secrets, then during the construction process, the plaintiff would have thought of constructing a roof over the plant to avoid aerial spying, .but if there is a law which prohibits the aerial spying, then the cost of building the roof over the plant will come done automatically and it will provide the ease of doing the business and the businesses will feel much secure in investing. As a result, it gives further way for the investment.

It's also essential to protect the recruiters' interests from the employees so that the business information can be protected effectively under the trade secrets law. In *American Express bank v Ms Priya Puri*<sup>121</sup> , the bank has the information of the customers who have given that voluntarily and may be used by the banks for future transactions. The employees know the list of clients and associated information because of their employment, not because of personal skills. So the employees should be restricted from using personal details for future transactions, which the client provides to the bank, not to the employee. If there would have been any law for the protection, then there would have a restriction on the employees. Also, if the client cam exchanges the banking relationship with the bank anytime, the ex-employee would not have been allowed to lure away the clients. So if there is a specific law, the employer would feel much secure and spent less in internal secrecy maintaining and promoting fair competition.

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<sup>120</sup> *E.I.DuPont de Nemours and Co v. Christopher* 431 F.2d 1012 (5th Cir. 1970)

<sup>121</sup> *Supra n26*

## CONCLUSION

In the Indian trade, secrets are protected by the common law. In the judicial interpretation of section 27 of the Indian Government has drafted the national innovation act to codify confidential information and trade secrets. If the draft is enacted, Indian will also fulfil the obligations under the TRIPS agreement for the protection of trade secrets. There is a need for precise legislation as the concept of confidential information has different dimensions and complexities. The main purpose of the proposed national innovation act was to provide a preliminary policy framework for promoting innovation and promoting trade by protecting trade secrets. The most substantive component of the bill is the provisions on trade secrecy or breach of confidence. This draft bill also consists of many model provisions. There are many shortcomings in the provision as it has got some unjust and inconsistency. Under section 11, it's said that the courts' disclosure of public information can be made for the public interest. This provision is very detrimental to the trade secret owner as public interest is not anywhere in defence in the draft, which gives rise to ambiguity as to what amounts to the public interest, and it is too vague.

Section 12(4) is also unjust, and it's considered detrimental to the owner of the trade secrets. This section has proposed an exception to the infringement, and it's equivalent to the compulsory licensing in the trade secrets. Also, it can be said that it would make someone steal the trade secret of a manufacturer and manufacture his product at a lower price while paying 10 per cent of the royalty fee.

Section 13(3) provides that the mis appropriator may be asked to deposit ten per cent of the damages that the complainant claims as a precondition to defend the suit during the grant of the interim injunction. This condition contradicts the basic essential rules of natural justice, which provides for the right to a fair hearing. It prevents the defendant from securing the remedy if he wont give 10% of of damages demanded by the complainants.

There is a lack of penal provisions in the case of the misappropriation of confidential information.

It would be better if a standard format is drafted in the form of a format of the non-disclosure agreement to remove the ambiguity during the litigation as the contract validity upon which the trade secrets will be claimed under section 8(1).

In India, where the literacy rate is low, the statute should also mention specifically that trade secrets are protected in the absence of any written agreement. There finds an ambiguity in the drafting. There should be exclusion clause in the enacted provision, which will then finds the things to be exempted from the trade secret category even if it qualifies to be in the trade secrets. The exemption clause may contains the things like

1. Whether the product content has actual or the potential health hazard
2. If the content level has a potential health hazard
3. If the disclosure of the information is necessary for the protection of public interest which are more significant.
4. if the protection is necessary for the national interest

5. if the meanwhile time employee develops, acquire a new skill, then such skill cannot be taken as trade secrets

6. any information got by unfair means cannot be considered as the trade secrets

Keeping the contributions of the IPR n especially the trade secrets in the economy, national and international, non-existence and weakness of the T.S. law affect the whole gamut of the IPRs. it affects the entire IPR by

1. creating a negative impact on the country's economic growth

2. an obstacle in inviting the FDI

3. denial of economic liberalization

4. affects international trade

By summing up, the draft national innovation act 2008 provides the scope for the protection of trade secrets, but it contains many loopholes that have to be removed.

Effective IPRs of a country accelerate its economic growth better, including trade secrets within it. It also stimulates the FDI. Adequate IPR protection, including trade secrets, is one 'sine qua non' of the open markets in a liberalized economy when compared to a constricted and conservative economy. It increases competitiveness in the economy. Surveys show that firms are more likely to identify the trade secrets which are more vital to their business operations than other types of I.P. Effective trade secret is an important instrument in promotion of international trade in the WTO regime

## **CHAPTER 7**

### **CONCLUSION & SUGGESTIONS**

Providing effective protection to trade secrets is not considered an secluded incident. It's not only seen in a larger perspective of intellectual property rights and the perspective of the Indian economic governance. Trade secret protection in India is currently linked with intellectual property regime not only for the existing knowledge protection but also for many other factors like boosting of the invention, innovation, developing and improving original ideas, which not without any effective, adequate or fair protection of the trade secrets, which shall remain incomplete. Giving effective protection to the trade secrets contributes significantly to the national economic development by making more trade opportunities conclusively and business environments in different areas or by moving into the new areas.

The 12th fifth-year plan period was considered a disaster to the Indian economy. The GDP rate of India during this period witnessed a steady decline which came down alarmingly just 4.7 per cent in the year 2013-2014, from 8.6 in 2009-2010. So to turn the negative results in favour of India's economic development, the government of India has begun to initiate various policy measures. Some of the most important developments can be seen in the forms of the MAKE IN INDIA, Start-Up India Launching tax reforms, digital governance and ease of doing business, etc. One of the major factors seen in the 2014 third-generation economic reform is the administrative and legal reform.

The economy of India has mainly three basic components. Agriculture, industry and then service sectors. After gaining independence over time, India being an agriculturist country has slowly moved towards the industrialization phase. The industrial sector is also considered a larger area in the national economy, flourishing day by day. It has the potential to transform the Indian economy highly. A newly emerging sector is the KNOWLEDGE SECTOR, as now agricultural land is limited. These have more potential to contribute to India's GDP and create more job opportunities for the dignified lives of the people. Apart from this, one of the major areas which have larger potentiality, but remains to a larger extent neglected as well as unexplored is the INTELLECTUAL PROPERTY of India or Indians which is the primary basis of the KNOWLEDGE-BASED ECONOMY. To find out and explore more resources of the IP laws there must be a more effective, viable, appropriate and reasonable IP laws. When something was to be invented and then promote it, its also expected that it has adequate protection. Investors, innovators, and mentors all have a motive. They aim to start a business in a friendly environment and, thus, profits want long-duration protection of their trade secrets and the business. One of the main important ways their goal can be achieved is the effective, strong, viable protection of the IPR.

Commonly, people understand trade secrets and confidential information to be the same, but there is a difference between these two. Confidential information may contain many subdivisions underneath. There is no clear definition of confidential information because it contains many things where the main is the obligation to maintain confidentiality. Contracts and agreements that come under the information define what is deemed protected and the misuse of the information. Trade secret is considered a special type of confidential information. Confidential information is mainly considered as trade secrets if, firstly, the information is not generally known to the public, Secondly, if the information provides an economic advantage to business and Thirdly, if the company takes any reasonable efforts for

the protection of trade secrets .So a trade secret is considered as a type of confidential information.

The main findings arrived from his research are :

India protects trade secrets based on the common law and judicially interpreting section 27 of the Indian contract act 1872.

TRIPS agreement provides for the provisions for the protection of trade secrets, but India did not have specific legislation or the enactment for IPR protection. Which means in India, trade secret hasn't got any recognition as the other IP protection measures.

The current impacting laws, which are in common-law form as well as the statutory form, are very limited, non-comprehensive and non-positive in nature as well as the scope.

Moreover, from the overall research its found that whatever the existing positions for the protection of the trade secrets, it's mostly negative. To expand the horizon of the national economy, there needs to be comprehensive protection for trade secrets. And also, in the 2016 national intellectual property rights policy, there is no specific recommendation and any guidelines for the enactment of the statute for trade secrets protection.

But hope exists. The government of India has considered the matters related to trade secrets in its policy build-ups. The intellectual property rights policy 2016 from the Union cabinets approval lays the future hope roadmap for Intellectual property rights in India. The main aim is to promote the study and the research for future policy developments, including the protection regarding undisclosed information, including the trade secrets. India's one of the largest as well as the oldest apex business organization, the FICCI Federation of Indian chambers of commerce and industry has suggested that , the provisions must accordingly made to statutory protection, to trade secrets so there would be no lacuna relating to their protection under the Indian law. It also suggested an urgent necessity for a specific trade secrets law in India. The lack of a recognizable regime of trade secrets is barring India from several benefits from the innovation and some non-commitment investments that would otherwise then flow from having a internationally harmonized trade secrets law.

In an introduction to trade secrets and IPR, it was founded that trade secrets are considered one of the most important classes of IPR. There is a strong need for protecting it universally. Trade secrets are commercial and confidential, so there is a need t protect them with strong legal protection. There are three importat steps to recognize trade secrets all over the world: 1) the information is not generally known or readily acceptable (2) there should be a commercial value for the trade secret, (3) the owner makes reasonable efforts to maintain the secret.

In any model laws, to have clarity and speciality, there should be an exclusion clause that enumerates the things to be exempted from the trade secrets category. Such provision is needed for the protection of public interest or national interest in which there cannot be any compromised for the protection of the investors, owners, businesses, entrepreneurs etc.. Therefore; there needs a limitation on the protection of the trade secrets as intellectual property rights to be explored trade secrets properly, fairly and then adequately.

Trade secrets under common law refer to the background of the common law protection of the trade secrets and various definitions. The law of breach of confidence protects against confidential information disclosure. The common law then gives the remedies against such

breach of duty. Confidential information or trade secrets is protected under common law by prohibition and misappropriation of trade secrets by an employee or an ex-employee, even if in the absence of the contractual duty. Common law holds for fiduciary duty. Anyone who inappropriately takes another trade secret may be held liable under the common law. Even though many countries have implemented many civil and criminal laws to protect trade secrets, the common law still holds its importance and comes forward when other laws fail. Although common laws provide effective remedies, it still contains many unsolved problems. These are the following:

1. The common law protection is mainly important for the problems that are happening immediately either by applying an existing set of the principles as well as rules but the future problems, which although foreseeable arising from similar situations aren't guarded under the common law as they do not allow common law system to deal with the new type of the situation.

2. Common law under a given situation solves each problem sometimes it may also happen that if a completely different situation arises, which is then not possible to deal with the existing set of the principles as well as the rules as set out in the previous case. It is to be dealt with some of the existing principles as well as a rule or by developing a new set of the principles completely. (STRICT LIABILITY AND ABSOLUTE LIABILITY PRINCIPLE). This is how the system of common law works, and law is developed for the existing situations. This is the main and the only reason related to trade secrets. The intellectual property rights everywhere where common law system exists though its foreseeable or could be foreseeable but are purely constrained to framing up the principles and the rules. As discussed, the common law itself lacks the foreseeability of the problems; it cannot solve unseen future problems. Therefore trade secret protection under the system of common law suffers from an inherent limitation of the legal system that is existing. These are the follows:

1. No standard for maintaining the degree of the confidentiality
2. Although there is springboard doctrine, there is a limitation to the springboard principle as it is not permanent.
3. The common law system is considered ineffective against third party misappropriation.
4. Adequate remedy is not available in all breach of confidential information cases.

In trade secret protection in the major economies chapter, there is an easy inflow and outflow of the capitals from one country to the other. Indians will go to another country as well as foreigners come to India for the same purposes. So even if the legal frameworks of India are fair and effective, it can't be served all the purpose unless it gives trade secrets are protected strongly. So when it's implied that the strong and effective protection of trade secrets implies protection not only available in future India but also other countries. So it is observed as the following:

1. The definition given to trade secrets by different countries are similar
2. It is observed that adoption of the domestic laws based on the guidelines of the TRIPS, especially for the increased protection of the trade secrets.

3. There can be seen many dissimilarities found in the definition and the scope of the trade secrets.

4. Dissimilarities can be seen with respect to the implementation of protection to the trade secrets. Civil laws provide the most common remedy for the misappropriation of trade secrets is provided by civil laws. Injunctions and the accounts of profit are the two most common remedies followed throughout the world.

5. There is a need to adopt uniform trade secret protection laws as with some country-specific reasonable and fair exceptions accepted unanimously by the WTO members.

In the chapter on the protection of trade secrets in India, it's observed that :

1. There found no single statute that deals with the protection as well as the related matters of trade secrets of the manufacturing, protection, trade or the business.

2. Uniformity in the judgements while interpreting section 27 of the contract act is sometimes lacking.

3. Section 27 doesn't cover whole aspects of the trade secrets, but only non-competent clauses.

4. The very purpose of section 27 differs from the nature of the protection needed for the trade secrets.

5. The RTI act 2005, competition act 2002, IPC 1860 and IT 2000 are all not exclusively made for the trade secrets misappropriation, therefore not effective.

In the chapter on trade secrets and Indian IP laws, it's observed that the TRIPS agreement and the WIPO have the same contents in the confidential information protection and both international documents are standard, which are followed by the majority of the nations worldwide. Still, India being a member of the United Nations and a TRIPS agreement signatory does not have a fixed specific law on the protection of trade secrets. When the TRIPS agreement took effect on 1995 January 1, time limits were fixed for many of the countries to frame or reframe their domestic laws as per the TRIPS agreement. Developed countries were given one year, developing countries and the transition economies were given five years, LDC given 11 years until 2000 and then extended to 2013 in general and 2016 for the pharmaceutical patents and the undisclosed information. But there was no period fixed for the formulation and implementation of the law to protect trade secrets, unlike patents. So due to this, many member nations still did not formulate or reformulate their domestic laws to protect trade secrets according to the TRIPS agreement.

It was observed as follows:

1. There is a need for a proper nomenclature of trade secrets, and it should not be identified as inside to undisclosed or confidential information.

2. As specific legislation is not there to protect trade secrets, there is a lack of uniformity in the various decisions given by the judges.

3. 2008 draft national innovation act only covers limited aspects of the trade secrets.

4. There is an urgent need to recognize trade secrets under an umbrella, IPR.

5. Objective 3.8.4 of national IPR policy shows that government is thinking about the future policy but is reluctant in the codification of the trade secrets laws in India as the policy lacks any intention for framing any legislation.

Certain loopholes have to be removed from the draft national innovation act 2008 .in. Under section 11, the public interest is too broad, which needs to be defined. Trade secrets by paying loyalty under section 12(4) are also unjust .section 13(3), which provides for a precondition for defending the suit, actually opposes the basic natural justice rules , which givefor the right to fair hearing .act failed to give any penalty provisions in the case of confidential information misappropriation. No standard format is drafted wrt non-disclosure agreement which in turn creates ambiguity. There can also find ambiguity in the way of drafting .also its found that there should be some exclusion clause.

Studies throughout the world show that the importance of trade secret protection is necessary for economic growth. A country, which provides effective protection to the intellectual property laws, including the trade secrets, shows that there is a stimulation in the foreign direct investment in different fields of the economy. It's one sine-qua-non of open markets in a liberalized economy compared to a constricted and conservative economy. In the knowledge-intensive industries, 70,80 per cent of the firm's value of the property lies with the trade secrets. Trade secrets stimulated growth by encouraging competitiveness in the economy. Effective protection of trade secrets promotes international trade in globalization, especially in the WTO regime.

Findings from the research show that the current regime in India for the protection of trade secrets in India is not up to the mark. Common law protection cannot be considered a specific law and cannot be explored to its fullest extent. Section 27 of the contract is also not so specific as it mainly depends upon the judges' will. It also finds out there is no uniformity in the judicial decisions. Trade secrets are considered as the salt of IPR of a countries IPR Regime. It's considered a residuary in nature and content. The successful building up of the business is substantially based on its creation and the capitalization of the trade secrets.

From the proper understanding of the trade secrets and business growth, it's evident that all intellectual properties related to the business are disclosed to the world but not the trade secrets.

One of the important issues that go unnoticed concerning trade secrets is the potentiality to pave the way for EASE OF DOING BUSINESS. The world bank should not lose sight of the protection of IPRs, including the trade secrets as the criteria o the EASE OF DOING BUSINESS.

### **SUGGESTIONS:**

“Trade secrets” are extremely vulnerable. Franchisees, master franchisors, developers, sub-franchisors, and their employees --- all enjoy a full working knowledge of the franchisor’s “trade secrets”. They are all, therefore, in an excellent position to compete for the franchisor’s market share. Sometimes even prospective franchisees acquire a good deal of valuable information. If any such persons leave the franchisor’s network, unless the franchisor’s “trade

secrets” are adequately protected, they can become its strongest competitor.- <sup>122</sup>Guriqbal Singh Jaiya Director, SMEs Division, WIPO .

India is in need of a comprehensive, effective, strong and fair legal framework for the protection of trade secrets as Intellectual property (negative as well as positive protection). If not, it would be too late to reap the benefits that arise, which have the high value-adding capacity to boost the KNOWLEDGE-BASED ECONOMY of India and encourage and protect the trade or business in India. There are many reasons why India needs strong and comprehensive legislation with regards to trade secrets. Firstly, the common law protection of trade secrets based on the law of confidence doesn't cover many of the important areas, including the procedural rules. Secondly, in civil law system of India, there are no particular protection with respect to the the protection of trade secrets, which implies that there is no law. There is no statutory law in the true sense with regard to trade secrets.

Various experts have observed different limitations as well as shortcomings of the common law. John Burrows (Queen's Counsel; Commissioner, New Zealand Law Commission; Emeritus Professor in the University of Canterbury) made an observations that "common law" is flexible, it is grounded in the practicality of individual fact situations, it is the refined product of the wisdom of many minds, it is free from political influence, and it is relatively stable; <sup>123</sup>but, he also observed that common law when it is compared with statute law, it has various shortcomings.

Firstly, it regards to its accessibility

Secondly, it is s unclarity with many situations(it's found that some of the areas as too simple and moral, but some are not; some are considered as not -certain).

Thirdly, it observed that common law is full of artifice and fiction.

Fourthly, the expert considered a very limited approach of the judges in the common law cases and the limitation for then using it in future cases. It was also observed that the incompleteness of law and consequent uncertainty are more serious in some areas than in others.

### **Advantages of statutory law :**

The importance of statutory law is that these are relevant for offering effective protection to trade secrets. Jack Beatson referred to Rosco pound while observing the statutory law. John burrows observed that statutes as the instrument of the modern government. They are the main means by which the policy of the government is implemented. Statutes are interpreted purposively. The main underlying intent and the goal are seen as more essential than the dictionary meaningthat has given. A fine observation made by john burrows regarding the importance of the statutory law is: sometimes it may go farther, and a principle originating from a statute is applied by associating in a similar common law field. These new

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<sup>122</sup> <https://doczz.net/doc/6586996/managing-trade-secrets-in-a-franchising-arrangement-guriq...>(last visited on august 22,2021)

<sup>123</sup> Burrows, John --- "Common Law among the Statutes: The Lord ....  
<http://www.austlii.edu.au/nz/journals/VUWLawRw/2008/21.html>(last visited on 21 august ,2021)

developments are well welcomed. Lord Cooke himself provided them in this country. Statutes now "feed and refresh" the common law.<sup>124</sup>

#### Common law v statutory law:

Experts believed that both common and statutory law depends upon each other for the proper administration of justice.

Professor P.S. Atiya<sup>125</sup> made a fine observation as:

In all these ways, the law seems to be a seamless web, including a huge network of inter-related rules of the common law or case law, and of the statute law. Let me now single out for more detailed attention three particular types of situations where the parliamentary work and the work of the courts are still more closely interwoven. There are

1) statutes that have deliberately adopted an open textured type of the language and then given to the courts a responsibility for creative case law development. 2) Shows the legislative-judicial partnership, specially on courts for the dispute resolution or some of such necessities. 3) A type of law in which common law and statute law develop in which statutes have been passed amending a very active living part of the common law.

John Burrows<sup>126</sup> made the final observation in his lecture at the 6th Lord Cooke Lecture (Delivered on Law School of the Victoria University of Wellington on December 5, 2007) and concluded that: So to conclude.

How is the common law existing in the world now? While smaller than it was in bulk form, it is still lively and still strong. Anyhow, it is increasingly disappointing in some aspects in meeting society's valid assumption of a modern legal system. What should we need to do? Any answer has to be sensible, feasible and comparable. Some areas of the common law are doing well. Judicial review and the law of negligence can be two. Such areas are probably not improved by any codification. We really need to continue blast off the really unsatisfactory areas and try to progressively putting them in the statutory form.

It also added that the proposed statute for the protection, even though replacing the existing common law on trade secrets, should codify the existing common law principle apart from adding the recommendations.

The gap that's between the existing protection and expected protection of trade secrets in India (considering future expectations) is so huge that it can't be filled up without a comprehensive, sufficient, strong and fair statute. But at the same time, common law principle's relevancy should not be lost.

The following are the various suggestions to make a comprehensive, strong and fair legal framework to protect trade secrets. The discussion and suggestions will be incomplete if there is no discussion regarding the TRIPS under the WTO. So keeping a view in consideration to the scope of the STANDARD MINIMUM CRITERIA, which has been set up in the TRIPS with regard to the trade secrets, has to be then incorporated to the legal frameworks of the WTO

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<sup>124</sup> John Burrows, common law among the statutes: the lord cooke lecture 2007  
[file:///C:/Users/DELL/Downloads/7703%20\(1\).pdf](file:///C:/Users/DELL/Downloads/7703%20(1).pdf) (last visited on september 7, 2021)

<sup>125</sup> P. S. Atiya, "Common Law and Statute Law", 48(1) MLR 1-28 at 3-4 (1985)

<sup>126</sup> *supra*(124)

member countries, with a mandatory deadline to all the WTO member countries to adopt the steps to give protection to trade secrets.

#### 1. Non-disclosure agreement (making a legislative provision for the non-disclosure agreement)

Before passing on or disclosing information to other persons, including the employees, there should be a trend of signing the agreement, which put limits on the right to use and tell other people about the information. This document is known as the non-disclosure agreement/trade secret agreement / or the confidentiality agreement or by any kind of wording. An NDA is considered as a contract between the two persons, that one knows the information and another to whom the information is going to pass on . And if the receiver of the information has unlawfully disclosed to another person, the opposite party have certain available rights which includes right to sue for the damages and compensation etc. enforcing of the rights can also involve filing a lawsuit to obtain injunctive relief. even though he proposed national innovation act mentions the validity of the NDA, there should be a correct format. The registration process of NDA and certain specifications should also be made regarding the types of information so that parties would get correct knowledge about their rights. The disclosure of NDA should be considered a specific offence where penalty should be in the form of monetary and imprisonment to keep a strong background.

#### 2. Defining trade secrets of each employer

While protecting the interest of the trade secrets owner, it's also pertinent to know what concludes to the trade secrets. The clause which enumerates the trade secrets by the employer should not be compulsory but optional.

#### 3. Making the provision for the registration of the trade secrets :

There should also be a provision for the trade secrets registration by the businesses under the proposed legislation. The drafted one to be like the process ,that's following in the trademark. If the registration is over, it will put the traders in a bigger and stronger position as they've got the registered trade secrets. Also, if any misappropriation has occurred, then it will become very simpler for the traders to get protection. The registration should contain the general description but not the information itself, unlike in the patent registration.

#### 4. Making the provision of the criminal penalty for the misuse of the trade secrets :

It also observed that countries which are protecting the criminal law are more effective. If there are criminal sanctions, there will be more fear of misappropriation. Although section 405-409, section 418 under IPC 1860 and section 66 of the IT act 2000 provides some remedy, these provisions aren't exclusively made for trade secrets protection, and such provisions cant be effectively used in the case of misappropriation. The Indian law dealing the trade secrets should include penal provisions in the form of civil and imprisonment, and administrative provisions.

#### 5. Validating reasonable non-competition agreement

Requirement of a non-competition agreement with the non-disclosure agreement may be able to control those persons right who sign it to compete with him. Although these non compete obligations are unenforceable in India, because of the matter of the public policy by virtue of Section 27 of the Indian contract act 1872, they reconsidered as the unlawful restraints on the trade. Still, the reasonable restrain should have to be validated to protect the trade secrets.

So while drafting, the provision should be in such a way that when the court concludes information as not confidential, the non-compete obligation applicable to it should also be unenforceable; otherwise, it'll be considered as applicable. It is high time that the recommendation, of the "Law Commission of India", regarding the amendment to section 27 of "Indian Contract Act, 1872", is made to permit reasonable restraint on the right to carry on trade.

6. Insertion of the exclusion clause in the provision of the trade secrets protection

There should be some insertion of the exclusion clause in the enacted provision, which then enumerates the things that has to be exempted from the category of trade secrets even if it's qualified to be trade secrets. Such a kind of provision is needed for the protection of the interest of the general public as a whole. Also, there are no compromise on health standards and national interest only for the sake of the investor's protection. The following things can be added to the exemption clause.

- A. If the content of the product has any health hazard (actual or the potential)
- B. If the level has any health hazard (actual or potntial)
- C. If the disclosure of the information is needed for protection of a larger public
- D. If the disclosure of the information is for the protection of the national interest.
- E. If the employee acquires any new skill in during course of the employment, then such skills can't beconsidered as the employer's trade secrets.
- F. If any of the information has been developed by way of any unfair or illegal means by the employer, but the employee concerned has legalized the method of acquiring and then started a separate business by commercially exploiting that knowledge, then such information cannot be considered as the employer's trade secrets.

7. Changing draft of Section 12(4)of the proposed National Innovation Act

This section is also cdisputed , which says that an injunction restricting the uses of the confidential information may then stipulate the conditions for the payment upon the future use of a royalty which is reasonable for not longer than the period of the time which could have been prohibited.

8. Changing the draft Section 13(3) of the proposed National Innovation Act

This provision has to be changed ,because this clause is unjustified in cases having original jurisdiction. The condition here contradicts the natural justice rule, which provides the right to a fair hearing.

9. Removing the ambiguity in the proposed act

Section 13(1)(a) refers to section 15(c), but there is no such proviso regarding Section 15; It should be 15 (2)(c).

10. Recognizing the positive right to commercialize the trade secret

When law prevents others from commercializing by setting up the new concern or sharing with the rival, it is a negative protection. It can be considered important to a greater extent. To

somewhat a small extent, the recommendations preceding offer positive protection related to the trade secrets.

Suppose the above given some of the suggestions are added. In that case, the ease of doing business will be promoted by providing strong and comprehensive protection of the trade secret in India. In the era of globalization, everyone, like traders and investors, wants assurance that a national law will protect their secrets to make a hopeful investment in India. If effective, comprehensive protection is given to the trade secrets, it will then boom the investment in India and then in such a way, the trade will flourish, which in turn helps in India's economic growth.

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