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Introduction

Welcome to the Indian Journal of Legal Affairs and Research (IJLAR), a distinguished platform dedicated to the dissemination of comprehensive legal scholarship and academic research. Our mission is to foster an environment where legal professionals, academics, and students can collaborate and contribute to the evolving discourse in the field of law. We strive to publish high-quality, peer-reviewed articles that provide insightful analysis, innovative perspectives, and practical solutions to contemporary legal challenges. The IJLAR is committed to advancing legal knowledge and practice by bridging the gap between theory and practice.

Preface

The Indian Journal of Legal Affairs and Research is a testament to our unwavering commitment to excellence in legal scholarship. This volume presents a curated selection of articles that reflect the diverse and dynamic nature of legal studies today. Our contributors, ranging from esteemed legal scholars to emerging academics, bring forward a rich tapestry of insights that address critical legal issues and offer novel contributions to the field. We are grateful to our editorial board, reviewers, and authors for their dedication and hard work, which have made this publication possible. It is our hope that this journal will serve as a valuable resource for researchers, practitioners, and policymakers, and will inspire further inquiry and debate within the legal community.

Description

The Indian Journal of Legal Affairs and Research is an academic journal that publishes peer-reviewed articles on a wide range of legal topics. Each issue is designed to provide a platform for legal scholars, practitioners, and students to share their research findings, theoretical explorations, and practical insights. Our journal covers various branches of law, including but not limited to constitutional law, international law, criminal law, commercial law, human rights, and environmental law. We are dedicated to ensuring that the articles published in our journal adhere to the highest standards of academic rigor and contribute meaningfully to the understanding and development of legal theories and practices.

RIGHTS, PROSECUTION, INFRINGEMENT, AND REMEDIES IN TRADE SECRETS AND UNDISCLOSED INFORMATION IN USA, EU AND INDIA

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Abstract

In the tapestry of recent decades, an escalating imperative and heightened acknowledgment have accompanied the realm of trade secrets and undisclosed information. Distinguished by its expansive purview, the domain of trade secrets eclipses conventional realms of intellectual property rights, including patents, trademarks, and copyright. Its unique attributes, marked by enduring or perpetual protection, adaptability, and an all-encompassing scope, distinguish this echelon within the intellectual property landscape. Within the confines of this discourse, the Author delves into a comparative scrutiny of trade secret regulations across three distinct jurisdictions. Emphasizing an imperative mandate, the article underscores the pressing necessity to promulgate and codify laws that furnish robust protection against the unauthorized utilization of trade secrets. Concluding with prescient suggestions, the narrative advocates for the implementation of requisite measures poised to govern both legal frameworks and economic landscapes.

Introduction

The safeguarding of trade secrets and confidential information stands as a pivotal dimension within the realm of Intellectual property law, exerting a profound impact on global innovation, competitive dynamics, and economic progress. Even the *World Intellectual Property Organization(WIPO),* have accepted the fact that Trade Secrets comes under the realm of Intellectual Property Rights as it revolves around confidential information that acts as a backbone of a business and is only known to a handful amount of individual. Even if we look around we have a lot of examples to cite-Lays, Recipe of Dominos Pizza, Miranda, and the list will go on.

In this Research Paper, the author has endeavoured to fathom and intricately navigate the complex legal terrains overseeing Trade secrets through a discerning analysis of three consequential jurisdictions: the United States, the European Union(EU), and India. The author through this paper have tried to look into the significant details and unfurl the entitlements bestowed upon entities, the modalities for litigating trade secret transgressions, the diverse definitions and occurrences of infringement, and the extant legal redress options. Other information like how the disclosure of Trade secrets during legal proceedings serves as a disincentive to pursuing one's entitlements through the judicial system is also looked in brief by the author. In this Research Paper, the author have elucidated the juxtaposition between safeguarding trade secrets and ensuring access to pharmaceuticals. This includes instances such as impeding researchers' access to clinical trial data, hindering the expansion of manufacturing during pandemics, and discouraging whistle-blowers from disclosing industry misconduct.

The author has endeavoured to proffer measures aimed at mitigating the discord between trade secrecy and public health, ones that align with international legal frameworks and promote well-being without compromising the impetus for innovation The author while researching for the projects have realized the significance of comprehending these facets within the framework of each jurisdiction and why it is imperative for enterprises, legal professionals, and policymakers traversing the intricacies of preserving proprietary data in an ever more interconnected and fiercely competitive global milieu.

The Elegance of Trade Secrets: Unveiling the Essentials

As it was mentioned by the WIPO, to be qualified as a Trade Secret they should fulfil certain criteria. For a certain information to meet the criteria of the Trade secret, it must possess inherent commercial value derived from its confidentiality, restricted familiarity to a select cohort, and be safeguarded through prudent measures implemented by the legitimate possessor, encompassing the utilization of confidentiality agreements for associates and personnel. It can be observed that any of the confidential corporate acumen that bestows a competitive supremacy and which has to remain concealed from external cognizance is eligible for protection as a trade secret.

Infact, Trade secrets encapsulate a panorama of intelligence, embracing technical nuances like manufacturing methodologies, experimental research findings, and software algorithms, alongside commercial acumen such as distribution approaches, supplier and clientele registries, and advertising tactics. A “Trade Secret” may also comprise an amalgamation of constituent elements, each independently within the public domain; however, the clandestine fusion of these components confers a distinctive competitive advantage.

Sentinel of Intellectual Resilience: The Fortifying Mantle of Trade Secrets

Within diverse legal paradigms, the legal fortification of trade secrets seamlessly intertwines with the overarching concept of shielding against unfair competition or emanates from distinct provisions and judicial precedents delineating the conservation of privileged information. The final determination of whether trade secret protection is breached pivots on the intricacies of each singular case, typically involving surreptitious stratagems related to confidential information, spanning breaches of contractual obligations, violations of trust, and instances of industrial or commercial subterfuge.

Nevertheless, a proprietor of trade secrets lacks the authority to prohibit others from utilizing analogous technical or commercial intelligence, provided that these entities autonomously acquired or originated such information through their individual research and development, reverse engineering, marketing analyses, and similar endeavours. In light of trade secrets' inherent confidentiality, distinct from patents, their absence as public knowledge denies them the "defensive" protection akin to prior art recognition. Consequently, in scenarios where a trade secret shields a method for producing Compound X, an individual may potentially procure a patent or utility model for the identical invention, given independent origination of the innovative approach.[1]

Exploration of Eligible Subject Matter and Acquisition of Rights

The U.S. Supreme Court, elucidating on the safeguarding of trade secrets, emphasizes that to warrant protection, the subject matter must exhibit a threshold of novelty and inventiveness, preventing the extension of trade secret rights to commonplace industry knowledge. Moreover, the

Court recognizes a property interest in trade secrets, invoking the Fifth Amendment's Taking Clause. [2]Yet, due to the intangible nature of trade secrets, the breadth of this property right is contingent on the owner's diligence in safeguarding against disclosure. Companies can secure a protectable trade secret property right by implementing prudent measures to uphold the confidentiality of vital business information, affording them a tangible economic advantage—encompassing diverse assets such as customer lists, production methods, marketing strategies, pricing insights, and chemical formulations.

Safeguarding Temporality: The Duration of Protection

Trade secret protection, with potential for indefinite duration, persists as long as the confidential subject matter remains commercially valuable. However, the fragility of this shield is evident in the susceptibility to loss through accidental or intentional disclosure. Once a trade secret breaches the veil of confidentiality and enters the public domain, its protected essence dissipates irreversibly. Notwithstanding, strategic disclosures to select third parties, guided by specific purposes, can be exempt from waiving trade secret safeguards—provided the owner diligently enforces reasonable measures, including non-disclosure agreements, to preserve secrecy before and during the disclosure process[3].

Intricacies of Misappropriation: Unveiling Unlawful Acquisitions

The tortuous landscape of misappropriation unfurls through various channels, encompassing illicit acquisition via theft, bribery, misrepresentation, or espionage. Equally, breach of confidence materializes as an avenue, with instances like an employee, post-job transition, unveiling a former employer's trade secrets in defiance of a confidentiality pact. The intricate web extends further, branding the use or disclosure of a trade secret with knowledge of its improper acquisition as yet another facet of misappropriation. In this intricate dance, individuals utilizing stolen information knowingly tread the perilous grounds of culpable misappropriation.[4]

Exploration and independent development of trade secret subject matter by another entity, or the analysis of publicly accessible products or information to unveil secret knowledge, do not contravene trade secret laws. Furthermore, the practice of 'reverse engineering,' wherein one

discerns the development or manufacturing process by dissecting a known product, is deemed a legitimate means and not an impropriety in acquiring another's trade secret. Courts possess the authority to enjoin the misappropriation of trade secrets, and a defendant may face not only compensatory but also punitive damages as a consequence of such wrongful acts.

Veiled Brilliance: Trade Secrets as an Intellectual Property Paradigm

The realm of intellectual property encompasses a vast array of intangible assets, spanning these distinct domains: (1) the realm of original artistic and literary creations, including motion pictures, literature, art, photographs, music, and sound recordings, safeguarded by copyright law; (2) the realm of symbols, names, colours, sounds, and words distinguishing commercially offered goods and services, fortified by trademark law; (3) the arena of inventive processes, machines, manufactures, and compositions of matter that are useful, novel, and nonobvious, shielded by patent law; and (4) the realm of confidential and proprietary business information, under the guardianship of trade secrets law. Federal legislation confers exclusive rights upon owners of patents, trademarks, and copyrights, furnishing redress in cases of violation, commonly referred to as infringement. Litigation in federal courts empowers owners to assert these rights, while the U.S. Department of Justice reserves the authority to criminally prosecute egregious violators of copyright and trademark laws, imposing heightened penalties to potentially dissuade future transgressors. It's worth noting that the Patent Act exclusively provides civil remedies in cases of[5] patent infringement.

Distinct from the predominant federal governance of the other three intellectual property realms, trade secrets find their legal foundation primarily in state law. Consequently, owners of trade secrets encounter more constrained legal avenues when seeking redress for infringements. While state law empowers trade secret owners to initiate civil litigation against misappropriates, the federal legal landscape provides U.S. Attorneys with the authority to prosecute offenders. Notably, the current federal framework lacks provision for trade secret owners to independently pursue legal action in federal court against those involved in trade secret theft.[6]

Unlike its intellectual property counterparts with centuries-old roots, trade secret law emerges as a product crafted within the crucible of state court decisions in the mid-19th century. As eloquently

observed by a legal scholar, the intricate principles of trade secret law unfurl from a mosaic of interconnected common law torts, encompassing breach of confidence, breach of confidential relationship, common law misappropriation, unfair competition, unjust enrichment, and torts entwined with trespass or unauthorized access to a plaintiff's property. Simultaneously, the evolutionary journey of trade secret law weaves through a rich fabric of legal doctrines—both contractual and common law—pertaining to the complex realm of employer-employee relationships[7].

In 1939, the *American Law Institute (ALI)*, a consortium of legal minds, bestowed upon the legal landscape the "Restatement of Torts," a treatise meticulously crafted to articulate a lucid synthesis of common law and statutory elements, encapsulating the prevailing legal doctrine. Within its pages, Sections 757 and 758 meticulously delineated the domain of trade secrets and the constituents of a misappropriation cause of action, respectively. The ALI revisited the intricacies of trade secrets in sections 39-45 of its 1993 *"Restatement (Third) of Unfair Competition."*
Parallelly, the *National Conference of Commissioners on Uniform State Law (NCCUSL)* undertook a pivotal role by promulgating the *Uniform Trade Secrets Act (UTSA) in 1979*. This ground-breaking effort aimed at codifying trade secrets protection integrated major common law principles while addressing gaps within the judicial framework. Notably, the NCCUSL, an assembly of scholars, attorneys, and judges, proposes statutory drafts to state legislatures for potential adoption, lacking direct legislative authority itself.[8]

Federal involvement in trade secret protection materialized in the mid-1990s with the enactment of the Economic Espionage Act of 1996, marking a significant stride in national trade secret safeguarding through criminal law, a facet explored in detail in the subsequent section.

The Present Juridical Terrain: Navigating the Contemporary Mosaic of Trade Secret Safeguards

Jurisdictional Tapestry: The Realm of State Law

As elucidated earlier, the sheltering of trade secrets predominantly unfolds within the ambit of state law, where individuals or entities may invoke the purview of civil damages in state courts

through either a common law tort action for misappropriation or recourse to a state-specific statute. The Uniform Trade Secrets Act (UTSA), a lodestar embodying the fundamental tenets of common law trade secret protection, has garnered adherence from 47 states and the District of Columbia, albeit with various states introducing modifications to the original model text upon adoption. Within this legislative framework, definitions for pivotal terms such as 'trade secret,' 'misappropriation,' and 'improper means' are meticulously delineated.[9]

In this intricate legal tableau, diverse states intricately prescribe an array of injunctive and pecuniary remedies—encompassing compensatory damages, punitive damages, and attorney's fees—within the realm of civil actions addressing the misappropriation of trade secrets. Notably, a select few states elevate the gravity of trade secret theft to a prosecutable crime, further accentuating the multifaceted nature of legal recourse in safeguarding proprietary information[10]. Per the discerning insights of a March 2016 Senate Judiciary Committee report, the nuanced divergences in state laws vis-à-vis the *Uniform Trade Secrets Act (UTSA)* have given rise to disparate procedural and substantive standards wielded by state courts in adjudicating trade secret cases. While these variations may appear ostensibly minor, their impact can prove case-dispositive, influencing critical determinations such as the party burdened with establishing the non-readily ascertainable nature of a trade secret, the rights of an owner against a party innocently acquiring a trade secret, the expansiveness of information deemed protectable as a trade secret, and the requisite measures to fulfil the mandate of "reasonable measures" for maintaining the confidentiality of the information[11].

National Legal Canvas: The Realm of Federal Law

Confidentiality Enigma: The Trade Secrets Act Unveiled

Preceding the transformative year of 1996, the Trade Secrets Act stood as a pivotal federal legislation, enacted in 1948, with nuanced and limited scope. This statute, specifically tailored, prohibits unauthorized disclosures of confidential government information, encompassing trade secrets, by federal government employees and government contractors. Sanctions for transgressions under this criminal offense include removal from office or employment, coupled with a fine and/or imprisonment not exceeding one year. It is imperative to note that the purview

of this law is exclusive to federal government entities and contractors, omitting coverage for state or local government actors and private sector employees.

Covert Economic Safeguards: Unraveling the Economic Espionage Act

In the annals of 1996, Congress scripted a sweeping legal narrative with the enactment of the Economic Espionage Act of 1996 (EEA), a legislative masterpiece crafted in response to mounting concerns over escalating international and domestic economic espionage targeting U.S. businesses. Against the backdrop of burgeoning expenditures by American companies and the U.S. Government on research and development, the EEA emerged as a formidable federal scheme, shielding trade secrets comprehensively. The legislative discourse echoed apprehensions that the fruits of substantial investments in research and development could be effortlessly nullified if competitors pilfered trade secrets without incurring the developmental costs. Notably, the narrative underscored a prevailing reality wherein foreign nations, post-Cold War, strategically deployed espionage resources to purloin the intangible intellectual property—trade secrets—of inventors within the United States, threatening the economic landscape.[12]

In the intricate realm of the Economic Espionage Act (EEA), two distinct criminal offenses unfurl: (1) the act of purloining a trade secret to benefit a foreign entity, encapsulated as economic espionage under 18 U.S.C. Section 1831, and (2) the theft of trade secrets orchestrated to confer an economic advantage upon another party, delineated as theft of trade secrets under 18 U.S.C. Section 1832. This legal tapestry, however, necessitates a foundational criterion—qualifying information as a trade secret—wherein the EEA expansively defines a "trade secret" as a repository of financial, business, scientific, technical, economic, or engineering information. This encompassing definition spans tangible and intangible forms, stored in diverse mediums, and demands fulfilment of dual criteria: the owner's implementation of reasonable secrecy measures and the information's independent economic value, derived from not being widely known or readily ascertainable through proper means by the public[13].

Economic Espionage

The EEA's *"economic espionage"* provision, *18 U.S.C. Section 18*, punishes those who misappropriate, or attempt or conspiracy to misappropriate, trade secrets with the intent or

knowledge that the offense will benefit a foreign government, instrumentality, or agent. Such misappropriation must have been committed "knowingly"; in other words, the individual must have known that the information taken was valuable to its owner and that its owner had taken steps to keep it confidential.

Delving into the legislative chronicles of the Economic Espionage Act (EEA), the term *'benefit'* arising from foreign espionage efforts encompasses not merely economic gain but also extends to *'reputational, strategic, or tactical benefit.'* This expansive scope ensures a nuanced consideration of diverse advantages derived from such undertakings. Further, the definition of 'foreign instrumentality' broadens the EEA's reach to encompass any entity substantially owned, controlled, sponsored, commanded, managed, or dominated by a foreign government. Consequently, a foreign corporation engaging in espionage, lacking evidence of sponsorship or control by a foreign government, may elude prosecution under *Section 1831*. However, individuals or organizations engaging in trade secret theft, even without the intent to benefit a foreign entity, may still face liability under the more general criminal trade secrets provision outlined in *Section 1832*, as detailed in the subsequent section.

Clandestine Acquisition: Unmasking the Dimensions of Theft of Trade Secrets

Within the expansive scope of the Economic Espionage Act, the proscription encapsulated in 1831 U.S.C. Section 1832 for the *'theft of trade secrets'* exhibits a more general applicability. [14]This prohibition hinges on the intentional and/or knowing commission of acts such as theft, appropriation, destruction, alteration, or duplication pertaining to a trade secret associated with a product or service intended for use in interstate or foreign commerce. Central to an EEA claim for theft of trade secrets are the dual elements of intent: a deliberate purpose to convert the trade secret and the concurrent intent or knowledge that such actions will inflict harm upon the rightful owner. In delving into these additional facets, a discerning scrutiny unveils foundational distinctions between Sections 1832 and 1831. Foremost among them is Section 1832's omission of a requirement that the offense must confer benefit or intent to benefit a foreign entity, rendering it a law of broad applicability. Unlike Section 1831, Section 1832 necessitates that the theft result in economic benefit for someone other than the trade secret owner. Notably, Section 1831, framing

foreign economic espionage, encompasses misappropriation for varied purposes, including non-economic gains like 'reputational, strategic, or tactical benefits.' It is pivotal to recognize that establishing the offender's intent to cause injury to the trade secret owner 'does not necessitate proving malice or evil intent, but simply demands demonstrating that the actor knew or was practically certain that their conduct would impose some disadvantage upon the rightful owner.

In 2014, an FBI assistant director, testifying before Congress, illuminated the intricate challenges associated with prosecuting economic espionage, distinct from trade secret theft, emphasizing the formidable hurdle of establishing the intent to benefit a foreign government or instrumentality under Section 1831. Unravelling the beneficiary's ties to an overseas entity may be achievable, but procuring evidence solidifying the entity's affiliation with a foreign government poses formidable difficulties. The strategic decision to pursue such cases under Section 1832 (theft of trade secrets) rather than Section 1831 (economic espionage) hinges upon factors such as the accessibility of foreign evidence and witnesses, diplomatic considerations, and the presence of classified or sensitive information essential for substantiating the foreign nexus element.[15]

Juridical Ramifications: Sanctions Sanctioned by the Economic Espionage Act (EEA)

The Economic Espionage Act (EEA) wields the authority to mete out formidable penalties for economic espionage and theft of trade secrets, underscoring the gravity of these offenses. In cases of economic espionage, individuals face potential fines of up to $5 million and imprisonment up to 15 years, while corporations found culpable may be subject to the greater of (a) a $10 million fine or (b) three times the value of the pilfered trade secret. For theft of trade secrets with a commercial advantage motive, individuals risk fines reaching $250,000 and imprisonment up to 10 years, whereas organizations may face fines up to $5 million. The EEA further empowers the pursuit of criminal or civil forfeiture, targeting 'any property used, or intended to be used ... to commit or facilitate' an EEA violation, along with 'any property constituting, or derived from, any proceeds obtained directly or indirectly as a result of' an EEA offense. Additionally, offenders bear the responsibility of providing restitution to victims of trade secret theft.

Within the intricate framework of any prosecution or proceeding under the *Economic Espionage Act (EEA),* federal district courts are mandated to institute protective orders or adopt requisite measures, 'as may be necessary and appropriate to preserve the confidentiality of trade secrets,' while adhering to the stipulations of the Federal Rules of Criminal and Civil Procedure, the Federal Rules of Evidence, and all other pertinent laws. This legislative imperative underscores Congress's profound concern over safeguarding trade secrets during legal proceedings, emphasizing the proactive role of courts in assuming, especially in the early stages of a prosecution, that the material in question is, indeed, a trade secret, thereby forestalling protracted litigation on this matter.[16]

Special 301

The U.S. Trade Representative (USTR) is legislatively mandated to conduct an annual scrutiny of foreign countries' intellectual property policies and practices, culminating in the publication of th*e "Special 301" Report.* This comprehensive report serves as a compass, singling out countries deemed deficient in establishing adequate and effective intellectual property protection and enforcement frameworks. A watershed moment occurred in the *2013 Special 301 Report,* marking the inaugural inclusion of a dedicated section addressing 'the growing problem of misappropriation of trade secrets in China and elsewhere.' The report fervently urged trading partners to fortify their systems for safeguarding trade secrets, emphasizing the need for deterrent penalties against criminal trade secret theft, and pledged ongoing vigilance by the USTR in monitoring developments in this critical domain.[17]

In a 2014 congressional hearing, a witness articulated the deleterious impact of overseas trade secret theft, stating: "Inadequate protection of trade secrets abroad harms not only companies whose property is stolen, but also the country where the theft occurs, because companies are then less likely to form joint ventures and make high-value global supply chain investments in those countries.[18]

The Essence of Trade Secret Law: A Delicate Tapestry and Comparative Glimpse with Patent Law

Trade secret law emerges as the primary alternative to the intricate patent system, affording inventors exclusive rights to specific technologies, processes, designs, or formulations that might

not meet the stringent statutory criteria for patentability.[19] Opting for trade secret status offers companies a strategic advantage, as these rights remain unrestricted by a fixed timeframe—differing from the finite duration of patent protection, which expires in less than 20 years, exposing the invention to the public domain. Notably, trade secret protection is not only more expeditious and cost-effective but also instantaneously conferred upon a company's reasonable efforts to safeguard valuable business information. This stands in stark contrast to the convoluted, protracted, and costly journey of securing a patent, entailing years of engagement with the U.S. Patent & Trademark Office. While trade secret status may be preferable, patent protection becomes more compelling in situations where a technology is challenging to keep confidential due to the risk of competitors reverse-engineering or independently discovering it.

The U.S. Supreme Court articulates that the essence of trade secret law lies in fostering innovation and facilitating the cultivation of invaluable information that may fall outside the purview of patentability. By extending its protective mantle, trade secret law not only stimulates inventive endeavours in domains untouched by patent law but also motivates independent innovators to forge ahead in uncovering and leveraging their discoveries. This dynamic equilibrium nurtures healthy competition, ensuring that the public gains access to valuable inventions, even if they hover on the cusp of patentability.[20]

Furthermore, through the institution of legal redress for trade secret misappropriation, trade secret law acts as a deterrent against individuals whose singular aim and consequence are the orchestrated redistribution of wealth from one enterprise to another.

Vigilant Safeguard: The Enforcement Tapestry of Trade Secret Rights

Adversarial Arena: The Legal Confluence of Litigation and Prosecution

At the state echelon, the onus of enforcing trade secret laws predominantly falls upon the trade secret owner, who can initiate legal proceedings through a civil suit in state court against individuals or organizations accused of misappropriation. This avenue seeks remedies like injunctive relief and compensatory and punitive damages. Moreover, select states have enacted

criminal statutes targeting trade secret theft, granting state prosecutors the authority to bring criminal charges in such cases.

On the federal stage, the Economic Espionage Unit housed within the *Federal Bureau of Investigation's (FBI)* Counterintelligence Division spearheads investigations into offenses under the *Economic Espionage Act (EEA)*. The U.S. *Department of Justice (DOJ)* and its U.S. Attorneys are vested with the jurisdiction to prosecute cases involving corporate and state-sponsored trade secret theft. The Attorney General, under the EEA, possesses the authority to institute a civil action in federal court, seeking 'appropriate injunctive relief' for any violation of the EEA. However, as expounded later in this report, federal law currently lacks provision for a private, federal cause of action pertaining to trade secret misappropriation.

Presidential Manoeuvres: Executive Branch Actions Unveiled

Administration Strategy

Administration Strategy on Mitigating the Theft of U.S. Trade Secrets, delineating a robust plan to fervently combat the pilfering of U.S. trade secrets with potential repercussions for foreign entities seeking an unjust economic advantage. Acknowledging the multifaceted negative consequences, including the erosion of U.S. companies' intellectual property, impairment of American business innovation and global competitiveness, threats to national and economic security, potential reduction of U.S. exports, and an elevated risk of American job losses, the report outlined five pivotal "strategy action items." These action items aimed at bolstering coordination within the U.S. government to safeguard trade secrets, encompassing diplomatic endeavours, promotion of voluntary best practices in private industry, fortification of domestic law enforcement operations, refinement of domestic legislation, and extensive education and outreach initiatives to illuminate the perils of trade secret theft.

Trade Pacts Unveiled: TPP and TTIP - Navigating the Terrain of Free Trade Agreements

In ongoing negotiations, the U.S. Trade Representative (USTR) is actively pursuing enhancements to trade secret protection within the frameworks of two major free trade agreements: (1) the Trans-

Pacific Partnership (TPP), encompassing 11 countries in the Asia-Pacific region, and (2) the Transatlantic Trade and Investment Partnership (TTIP) with the European Union. The U.S. Chamber of Commerce underscores the imperative for significant improvements in the legal regimes of TPP countries regarding trade secret protection. Notably, certain TPP nations, including Canada, Australia, Malaysia, and Singapore, lack laws criminalizing traditional trade secret disclosure or misappropriation. Even among countries that criminalize such actions, penalties often vary, posing challenges to achieving a consistent and sufficiently deterrent effect. The absence or inadequacy of criminal penalties in some TPP jurisdictions raises concerns, given the widely held belief that criminal sanctions serve as a more potent deterrent than civil penalties alone.

In select TPP nations, including Canada, Australia, Malaysia, and Singapore, traditional trade secret disclosure or misappropriation remains outside the ambit of criminalization. For those countries where criminalization exists, the spectrum of penalties varies, ranging from insufficient deterrence to effective deterrence contingent on consistent application. The notable absence or inadequacy of criminal penalties in certain TPP jurisdictions is particularly disconcerting, given the prevailing belief that criminal sanctions wield a more formidable deterrent influence on potential trade secret thieves than the prospect of civil penalties alone.[21]

Analysing the EU portion and its dedication to the Trademark system

The term ‘trade secret’ encompasses a broad spectrum of information, extending beyond technological knowledge to include commercial data like details about customers, suppliers, business plans, market research, strategies, and new products. This information qualifies as a trade secret when it remains undisclosed and is intended to remain confidential. Businesses, spanning various sectors, leverage confidentiality as a tool for both business competitiveness and innovation management, valuing trade secrets alongside other means of safeguarding innovation, such as patents, design rights, copyrights, or other forms of intellectual property. Small and medium-sized enterprises (SMEs) particularly rely on trade secrets.

In the era of rapid digitalization across the economy and the widespread availability of technologies like artificial intelligence, trade secrets have gained increasing significance for

businesses, serving as a complement or alternative to intellectual property rights in protecting valuable know-how and business information—often dubbed the ‘currency’ of today’s knowledge and data economy. The surge in digitalization, connectivity, and globalization has concurrently heightened businesses' vulnerability to trade secret misappropriation, manifested as 'cyber theft,' data breaches, and industrial espionage.

Against this backdrop, Directive 2016/943/EU (Trade Secrets Directive) was adopted to address the protection of undisclosed know-how and business information (trade secrets) from unlawful acquisition, use, and disclosure. The Trade Secrets Directive mandated implementation into national law by all EU member states by June 9, 2018. Establishing a uniform set of minimum protection standards across the European Union, the directive allows member states flexibility to offer more extensive protection, provided they adhere to specific mandatory exemptions and safeguards outlined in the directive (e.g., exemptions for freedom of expression and whistleblowing or a maximum limitation period of six years).

What are the Unlawful Acts

Beyond defining trade secrets, a pivotal objective of the Directive was to establish a harmonized definition for the 'unlawful acquisition, use, or disclosure of a trade secret.' Prior to the Directive, significant divergences existed among Member States in the treatment of third parties who initially acquired a trade secret in good faith but later discovered its unlawful acquisition by another party. *Article 4 (Unlawful acquisition, use, and disclosure of trade secrets)* delineates the various actions constituting trade secret infringement.

The design and impact of Article 4 are characterized as establishing a 'cascade of infringing acts.' These provisions interconnect distinct sequential actions, generating individual causes of action for infringement at each phase. Consider the hypothetical scenario: (i) a third party unlawfully accesses and acquires a company's trade secret (unlawful acquisition); (ii) this party then discloses the trade secret to a rival company (unlawful disclosure); (iii) the rival company negligently utilizes the trade secret despite suspicions of its unlawful acquisition (unlawful use with constructive knowledge); and (iv) the rival company employs the trade secret to manufacture

infringing goods placed on the market. Within the framework of Article 4, each of these stages constitutes a separate trade secret infringement. A visual representation of this escalating liability is depicted below.

The analysis in Part I of this report highlighted that the kinds of evidence submitted by claimants to substantiate infringement claims are often not always easily discernible from published judgements. Nevertheless, an interesting issue to be monitored is the standard of proof required to demonstrate unlawful acquisition, disclosure, or use of a trade secret. One Spanish case provides an interesting finding in terms of the standard of proof for unlawful acquisition In this case, the Spanish courts determined that direct evidence was unnecessary, as unlawful acquisition could be reasonably presumed from the almost identical nature of complex software products, as such striking similarity could not be attributed to coincidence.[22]

Typically, the prevailing trend concerning Article 4 suggests that the resolutions of infringement claims hinge not on the interpretation of 'unlawful acquisition, use, and disclosure,' but rather on defences raised pertaining to: (a) the absence of a trade secret due to the information failing to meet the requirements under Article 2; (b) the diverse lawful methods of acquisition, use, and disclosure outlined in Article 3; and, to a lesser extent, (c) the exceptions specified in Article 5.[23] In this context, the delineations established by the definition of trade secrets hold particular significance. As discussed in Part I of this report, the most frequently successful defenses often revolve around asserting that a trade secret doesn't exist due to either failing to meet the secrecy requirement (i.e., the information being generally known) or failing to meet the reasonable steps requirement. A quantitative analysis indicates that 18% of unsuccessful claims can attribute their failure, at least in part, to not meeting the 'secrecy' requirement, 6% to not meeting the 'commercial value' requirement, and 18% to not meeting the 'reasonable steps' requirement. The lawful actions outlined in Article 3 form the basis for a successful defence against infringement for a much smaller proportion of unsuccessful claims: independent discovery (1%), reverse engineering (1%), exercise of workers' rights (4%), and other honest commercial practices (10%). The exceptions under Article 5, however, have been rarely raised and, consequently, have seen success on very few occasions: freedom of information (3), whistleblowing (1), and union disclosure (0). The singular reported case referring to a potential whistleblowing defence is intriguing, highlighting

the conceptual relationship between Article 5 exceptions and the lawful uses required or allowed under Union or national law.[24]

Several factors might explain the limited practical reach of the cascading effect. First, a surprisingly common trade secret scenario involves litigation with former employees, often founders of competing ventures. In such cases, litigation may commence at the point of unlawful use or disclosure (based on contractual or non-disclosure breaches) rather than unlawful acquisition, or it may consolidate claims of unauthorized acquisition and disclosure or use against the same defendant. Second, typical litigation patterns often involve a single infringer accused of unlawful use and disclosure, rather than the cascading effect passing among several third parties. Additionally, due to the complexity and uncertainty of trade secrets litigation proceedings, even if multiple third parties could be liable under the cascading provisions of Article 4, it may be strategically optimal to prioritize enforcement against the infringement with the greatest urgency (and risk of further secrecy-compromising disclosure) rather than managing multiple proceedings against different parties. Another notable factor is that liability for third-party infringers is a relatively new concept in the post-Directive landscape. Before the Directive, actions aimed at preventing the use of a trade secret obtained by a third party in good faith were recognized in only a limited number of jurisdictions[25].

In cases where trade secrets were exclusively protected under unfair competition law, the scope of protection might not have extended to an infringer who was not a direct competitor, as unfair competition law often applied only to undertakings in competition. Over time, as trade secret holders become increasingly aware of the various layers of liability—especially in jurisdictions where the implementation of the Directive led to significant legal reforms—it is conceivable that litigation against third parties will become more prevalent.[26]

Future developments should be closely observed for interpretations of the scope of liability under *Article 4(5)* regarding the commercialization of infringing goods. The Directive's definition of 'infringing goods' in *Article 2(4)* extends beyond the technical features or production means to include the marketing process, indicating that goods may be considered infringing if their marketing significantly benefits from unlawfully acquired, used, or disclosed trade secrets. This

broad scope of liability, outlined in *Articles 2(4) and 4(5),* particularly affects third parties engaged in trading potentially infringing goods produced by other undertakings.

Therefore, it's crucial to scrutinize how licensing agreements align with *Article 2's requirements,* especially regarding the *"reasonable steps"* mandate. The original trade secret holder, typically the licensor, may include obligations for the licensee to maintain confidentiality. *Article 4(3)* broadens the scope, addressing unlawful disclosure through breach of confidentiality agreements or duties limiting trade secret use. This underscores the importance of defining licensee obligations under statutory trade secret provisions to ensure comprehensive protection and legal compliance[27].

Measures related

While this section will mostly focus on the provisions on measures (Articles 10 and 12), it is useful to first briefly recall the various provisions in Chapter III. Article 6 provides a general obligation for measures, procedures and remedies that ensure redress against the unlawful acquisition, use and disclosure of trade secrets. These measures, procedures, and remedies must be fair, equitable, and effective. *Article 7* then stipulates that measures, procedures and remedies should be implemented in a manner that is proportionate and provides for safeguards against abuse. Article 8 sets out a maximum limitation period of 6 years, while Article 9 sets out provisions on the preservation of confidentiality of trade secrets during legal proceedings. Article 10 sets out the specific provisional and precautionary measures that are to be made available to claimants, while *Article 11 sets out certain conditions of application and safeguards regarding these measures. Article 12 sets out available injunctions and corrective measures on the merits of a case, while Article 13 sets out conditions of application, safeguards, and alternatives in relation to these measures. Article 14 sets out provisions on damages, and Article 15 provides for the specific measure of 'publication of judicial decisions'*. Therefore, the Directive's articles on measures need to be understood not in isolation, but in the context of this entire chapter of provisions, which ensure a balance between protecting the interests of trade secret holders and other policy goals.

The Trade Secrets Directive is acknowledged as distinct from the Intellectual Property Rights Enforcement Directive, with Recital 39 positioning it as lex specialis compared to the general framework of the Enforcement Directive. Despite this, legal scholars engage in ongoing debate regarding whether trade secrets should be unequivocally classified as a subset of intellectual property rights. The nuanced nature of this relationship adds complexity to the interpretation and application of these legal instruments.[28]

A wrap up of the EU system

The study's scope on trade secret disputes is limited for two key reasons. Firstly, constraints on public access to lower court judgments pose methodological challenges. Secondly, information gaps exist regarding the prevalence of private or institutional arbitration and extrajudicial settlements in resolving trade secret disputes. Parties, wary of uncertainties in trade secrets law and complexities in litigation, may opt for cautious out-of-court approaches, especially in business-to-business disputes. Stakeholder interviews in previous research indicate that perceived reputational risks might contribute to lower-than-expected litigation levels.[29]

The potential for reputational harm arising from public awareness of trade secrets misappropriation may drive companies to favour extrajudicial settlements, thereby concealing a potentially higher number of disputes than captured by this study's methodological limitations. Nonetheless, the study offers valuable insights into litigation trends, contributing to understanding the ongoing harmonization of trade secrets law across the European Union.

This paper's quantitative scrutiny of trade secret litigation unfolds a nuanced panorama, revealing substantial variations across EU Member States in case volumes, composition, legal fora, and procedural aspects. Cumulatively, it accentuates the broad and ever-evolving nature of trade secret enforcement, with distinct trends emerging. Notably, while administrative proceedings play a prominent role in some Member States, litigation predominantly remains a civil affair, with criminal proceedings constituting a relatively minor share. A pivotal observation surfaces: trade secrets litigation in the EU manifests a pronounced localization, predominantly unfolding at the national level. The 2013 Baker McKenzie Study commissioned by the European Commission

highlighted the rarity of cross-border trade secrets litigation, a consistency observed both prior to and following the enactment of the Directive.[30]

Evidently, litigation predominantly surrounds the protection of undisclosed commercial information rather than technical and manufacturing details, despite the manufacturing industry being a primary litigant. Economic literature underscores the vital role of trade secrets, particularly for SMEs engaging in incremental innovations falling below patentability thresholds or avoiding associated administrative costs. The *Trade Secrets Directive's Recitals 1-4* acknowledge the dual purpose of fostering innovation and safeguarding competitiveness, encompassing non-research investments such as advertising and commercial strategies. This observed trend underscores the pivotal role of trade secrets in securing business strategies and investments, distinct from their contribution to research and innovation outputs.

The study identifies three pivotal trends with significant implications for harmonizing the European legal framework for trade secrets law. Foremost among them is the discernible evolution in interpreting the *'reasonable steps'* requirement within the *Article 2(1) definition of 'trade secret.'* This interpretation reflects a flexible and context-specific approach, considering factors such as the trade secret's value and the capacities of the holder, ultimately pointing toward an evolving definition encompassing the principle of proportionality central to the Directive, tailored to address the diverse economic sizes and technical capacities of SMEs.

The second discernible trend emphasizes the paramount importance of explicitly identifying trade secrets within contractual measures, such as confidentiality agreements, to meet the requisite criteria for securing trade secret protection. This underscores a critical consideration for enterprises in integrating trade secret management strategies into their employment contracts and human resource frameworks. The third trend underscores persistent challenges in trade secret holders' perceptions of procedural measures to maintain confidentiality during proceedings, leading to potential dismissal of (potentially valid) infringement claims due to lack of specificity and clarity. Despite *Article 9 of the Directive* aiming to harmonize provisions on confidentiality-preserving measures, this ongoing risk directly shapes the litigation strategies of trade secret holders.

Given the relatively brief period since the adoption of the Directive, the evolution of case-law trends is ongoing; nonetheless, vigilance is essential in monitoring key issues with substantial implications for the impact of harmonized trade secrets law within the EU. Notably, continuous scrutiny of case-law developments pertaining to the definition of 'trade secret' and the scope of protectable subject matter, particularly concerning the exclusion of 'experience and skills gained by employees in the normal course of their employment,' remains imperative.[31]

Jurisprudential elucidation on various aspects concerning unlawful uses of trade secrets and remedies for infringements would be beneficial. First, additional case-law on methodologies for calculating damages and the selection of damage approaches in different infringement scenarios could instill greater confidence in trade secret holders navigating the litigation system. Second, clarity in judicial interpretations regarding the standard of negligence for third parties acquiring a trade secret unlawfully, especially upon discovery, is essential in the evolving post-Directive landscape. This may take time given the novelty of good-faith third-party liability concepts. Third, judicial clarification of the 'significant benefit' standard for 'infringing goods' is crucial, influencing potential liabilities across commercial supply chains, a significance likely to increase with growing legal certainty around the interplay of trade secrets law and big data, particularly in the production and marketing of diverse consumer goods.

Adopting a comprehensive perspective from this report underscores the intricacy of trade secrets protection—a nuanced legal domain designed to encompass diverse subject matter, inherently context-specific in its application. The challenge lies in achieving a delicate equilibrium between the legal certainties of harmonization and the necessary flexibilities to adeptly navigate the intricacies within the diverse legal frameworks across Member States. This complexity is compounded by the intersection of trade secrets law with various legal domains, including unfair competition, intellectual property law, contract law, labour law, commercial law, and general civil law. Notably, the Court of Justice of the European Union is yet to provide definitive clarification on substantial provisions of the Trade Secrets Directive, adding an additional layer of complexity to this multifaceted legal landscape[32].

The presence of shared legal norms is evident, yet the realization of genuine harmonization within the inherent complexity of the subject matter necessitates the gradual evolution of Member States' jurisprudence over time.

Decoding Confidentiality: A Comparative Exploration of Trade Secret Frameworks in India, the EU, and the USA

As per the EU Directive, a trade secret is explicated as covert intelligence, residing beyond the common knowledge or facile reach of those operating within pertinent domains; imbued with commercial significance derived from its covert nature; and subjected to prudent actions, contextualized by the lawful custodian, to perpetuate its discreet essence.[33] To put it into succinct terms, a Trade secret encapsulates confidential information, distinguished by its lack of common knowledge, commercial significance, and the safeguarding efforts undertaken by its possessor. The EU Directive establishes guidelines governing the utilization, misappropriation, illicit acquisition, and disclosure of trade secrets, focusing on efficacious civil remedies rather than criminal sanctions.

Now, if we are to talk about the Trade secret laid down by USA, the *Defend Trade Secrets Act of 2016* [34]institutes a civil cause of action against the improper exploitation of trade secrets, empowering U.S. courts to interdict illicit usage, potentially seizing misappropriated trade secrets in extraordinary situations, and granting recourse for damages and associated costs.

Within the legal milieu of India, the absence of explicit statutory provisions for trade secret protection does not foreclose avenues for enforcement; instead, these find redressal under the canopy of the Indian Contract Act through principles of equity and common law doctrines addressing breaches of confidence. This position was resoundingly affirmed by the Delhi High Court in the pivotal case of *John Richard Brady and Ors v. Chemical Process Equipment****[35]***, thereby amplifying the jurisprudential resonance of such protective measures.

Indeed, the question of characterizing trade secrets as intellectual property rights holds practical significance. If such classification occurs, the Enforcement Directive provisions for intellectual

property rights could be applied to trade secrets litigation. Notably, Recital 13 of the Enforcement Directive hints at the option for Member States to extend its provisions to the domain of unfair competition. This discretionary power allows individual Member States to broaden the scope of the Enforcement Directive to cover trade secrets, even without explicit recognition of them as a distinct category of intellectual property rights.

Analysing the Influence of Procedural Safeguard Deficiencies on the Enforcement of Trade Secret Rights Across the Triad

If we are to talk about U.S.A, even though the concept is traditionally shielded primarily through state statutes, trade secrets have undergone a contemporary paradigm shift, receiving augmented safeguarding through federal civil and criminal legislation. Reports from the year 2016 have proved that the state has been coming up with new ideas to improve the flaws in the domain of Trademark, for instance, the *117th Congress*, members have reportedly introduced multiple bills pertaining to trade secrets, primarily aimed at mitigating the perceived threat of trade secret misappropriation by foreign governments and their operatives.

1.1 The Defend Trade Secrets Act

The Defend Trade Secrets Act of 2016 (DTSA) stands as a seminal milestone in the United States, representing a paramount advancement in the realm of safeguarding trade secrets. Preceding the implementation of the DTSA, trade secrets were subject to the jurisdiction of individual state statutes. *The Uniform Trade Secrets Act (UTSA)* was embraced by forty-seven states, featuring state-specific modifications.

The DTSA, through its modification of the *Economic Espionage Act (EEA)*, has instituted a private cause of action, emblematic of a deliberate endeavour to forge uniformity in the protection of trade secrets, thereby offering a federal recourse for instances of misappropriation. The DTSA abstains from pre-empting state statutes governing the protection of trade secrets.[36] As a result, the plaintiff maintains the privilege to institute legal proceedings for the preservation of trade secrets in federal courts, simultaneously initiating litigation based on identical facts pursuant to pertinent state laws. The cause of action pursuant to the DTSA mirrors that of the UTSA, affording the

plaintiff the capacity to commence a civil action in instances of trade secret misappropriation—an avenue previously unavailable under the unamended Economic Espionage Act (EEA).[37]

The DTSA facilitates the issuance of injunctive relief to forestall imminent or existing misappropriation, with the caveat that the injunction does not impede the individual's employment. The injunctive relief provisions within the DTSA closely parallel those outlined in the Uniform Trade Secrets Act, 1979 (UTSA), with the notable distinction being the absence of certain limitations imposed by the UTSA in the DTSA. According to the UTSA, injunctions cease upon the extinction of the trade secret and are only extended to preclude the economic benefits that would have arisen from the purported misappropriation.[38]

Conversely, the DTSA refrains from imposing any such constraints on the issuance of injunctions, instead allowing for their grant on terms deemed reasonable by the court. Despite the advent of a novel legal framework enabling federal courts to provide recourse, the prevailing trend indicates that courts continue to lean on conventional principles for relief, drawing from both DTSA and state laws in their adjudication for the issuance of injunctions.[39]

The DTSA awards monetary damages encompassing both the tangible losses incurred due to misappropriation and any inequitable appropriation exceeding the amount accounted for in the actual loss.[40] It additionally sanctions the implementation of just remuneration via judicious royalty arrangements.[41] In instances of deliberate and intentional misappropriation, the quantum of exemplary or punitive damages may extend to twice the sum of unjust enrichment compensation. The judiciary, nonetheless, has exhibited marked circumspection and reluctance in bestowing seizures, reserving such authority solely for circumstances where alternative forms of redress prove inadequate.[42] The judiciary has declined to invoke the DTSA's provisions pertaining to seizure when the "*Federal Rule of Civil Procedure 65"* governs the issuance of an ex parte temporary restraining order, thereby sanctioning authoritative confiscation.[43] The temporal confines for initiating claims stand at a triennial threshold.[44]

The DTSA stipulates that, for an employer to seek redress in instances of trade secret misappropriation, it mandates the inclusion of provisions within contracts governing confidential

information, notifying employees of whistle-blower immunity. Failure to adhere to this requirement precludes employers from seeking recourse against uninformed employees.

1.2 Legal Lacunae: An Expanse of Juridical Gaps

If we are to talk about the lacunas, we can spot that the promulgation of the DTSA was principally driven by the imperative of establishing consistency in trade secret laws. Nevertheless, this endeavour has encountered resistance from both adversaries and advocates, contending that the non-pre-emption of state laws by the DTSA could compromise the sought-after uniformity.[45] The DTSA, by its very nature, has superimposed an additional stratum of protection atop the extant and variegated state laws. Disparities between the state laws and the DTSA may incentivize litigants to embark on forum shopping endeavours, strategically selecting jurisdictions to pursue legal actions against defendants.

The DTSA's lack of pre-emption over state laws precipitates a scenario where it potentially erodes state policies, mirroring a parallel situation observed in trademark law. Analogously, the Lanham Act stands unprompted by state laws, allowing for the concurrent operation of both state and federal legal frameworks.

European Union

The Trade Secret Directive, embraced by European Union (EU) members, strategically addresses the adverse ramifications stemming from the varied safeguarding of trade secrets in disparate national legislations, with a specific focus on mitigating two pivotal issues.[46]

The initial challenge centers on suboptimal incentives for cross-border innovation, stemming from disparate trade secret protections among member nations, with heightened vulnerability in jurisdictions characterized by markedly inadequate safeguards. The subsequent issue pertains to diminished business competitiveness resulting from the misappropriation of trade secrets.[47]

The Directive endeavours to establish a baseline standard mandating compliance from all EU Member States, seeking to harmonize the legal framework governing trade secrets within the EU.

Member States retain the discretion to offer enhanced protection beyond the Directive's stipulations, provided such measures align with specified obligations and adhere to the principles outlined in the *Treaty on the Functioning of the European Union (TFEU).****[48]***

While the rights accorded to trade secrets under the Directive mirror those bestowed upon intellectual property, they eschew classification as such, as European Union legislators deliberately avoided invoking EU laws pertaining to Intellectual property rights (IPR).[49] The elucidation of trade secrets as delineated by the Directive aligns with the formulation articulated in *Article 39 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).*[50] The purview of the Directive expressly excludes inconsequential information, as well as the expertise and acumen acquired by employees during their tenure, from the domain encapsulated by trade secrets. The delineation of a trade secret holder underscores the imperative of lawful dominion exercised by either a legal entity or an individual within the framework of the Directive.

The Directive preserves the common law tenets permitting independent discovery and reverse engineering as valid means for acquiring trade secrets. It additionally stipulates that acquisition aligning with workers' rights under national or union laws, for consultation or informational purposes, and conforming to *"honest commercial practices"* is deemed legitimate. Protection under the Directive is exclusively afforded in instances of illicit acquisition, disclosure, or utilization of trade secrets, encompassing activities such as copying, appropriating documents, or materials contrary to principles of honest commercial practices.

To gauge the potential for misappropriation pursuant to Article 4, a nuanced evaluation necessitates contemplation of factors such as the interplay of relational dynamics between the parties and the inherent nature of the information at hand[51].

Consideration of factors such as the context of information disclosure, potential contractual obligations, the level of difficulty in acquiring the information, and the nature of the defendant's product is crucial in assessing the legal landscape surrounding the case.

The Directive deems subsequent disclosure or use of a trade secret unlawful if carried out by the individual who initially acquired it unlawfully. Furthermore, when a well-intentioned third party becomes aware of infringement after acquiring the trade secret, an injunction may prove disproportionately harmful, making damages the preferable remedy. The Directive also addresses scenarios involving the acquisition of trade secrets by individuals with knowledge or should-have-known status regarding their illicit origin from a third party engaged in unauthorized disclosure or use, extending its scope to cover unlawfully imported or manufactured infringing goods.

The Directive incorporates exceptions such as safe harbor provisions, whistleblower immunity, and press protection, while emphasizing the preservation of employee mobility without constituting a defence. It encompasses a comprehensive range of remedies, including civil actions, corrective measures, injunctions, alternative safeguards, and damages. Member States must establish mechanisms ensuring judicial confidentiality for disclosed trade secrets in legal proceedings, involving restricted access to documents, limited access during hearings, and the preparation of non-confidential versions. Secret hearings and confidential documents are limited to a "limited number of persons," potentially consisting of at least one natural person and one attorney from each party, with a maximum limitation period of six years stipulated by the Directive.

Legal Lacunae: Unfilled Voids in the Juridical Landscape

The Directive's profound influence on Member States is underscored by its precise delineation of trade secrets, necessitating legislative revisions in jurisdictions where the criteria of secrecy, commercial value, and reasonable protective measures were not explicitly established. Consequently, instances may arise wherein information previously safeguarded as trade secrets may fall short of the elevated standard delineated in the Directive.

Despite the Directive's intent to establish uniformity in EU trade secret protection, complete harmonization may prove elusive. Member States, in adopting standards beyond the directive's baseline, may introduce variations in protection. Divergences may manifest in areas such as the limitation period, where a Member State might prescribe a shorter duration, leading to disparities

in the timing of initiating legal actions, or in awarding damages exceeding the Directive's stipulations, thereby further accentuating disparities. The emphasis on control as a prerequisite for trade secret holder status implies that an exclusive licensee possesses the capacity to assert trade secret defence independently of the original owner. The deliberate choice of the term "trade secret holder" in lieu of "trade secret owner" within the Directive signifies its intention to refrain from bestowing proprietary rights upon the holder, underscoring a nuanced approach to trade secret dynamics.

The definition of infringing goods within the Directive introduces ambiguity, particularly in the subjective interpretations of *"quality"* and *"significant,"* rendering the criteria elusive. While the Directive acknowledges that acquiring trade secrets through honest commercial practices is not unlawful, it neglects to precisely delineate the parameters of such practices, leaving room for judicial discretion or potential reference to interpretations established under TRIPS[52].

Article 4(4) potentially lends itself to a judicial interpretation encompassing secondary liability, whereby an entity, such as an employer in an employer-employee dynamic, could be held accountable if cognizant of the unlawful acquisition of a trade secret, thereby implicating the employer in the wrongful actions of the employee.

Considerable debate surrounds the whistle-blower immunity embedded in the Directive, with contention arising from the scenario where a whistle-blower obtains information from a worker contractually obligated to uphold confidentiality, potentially leading to complications for the whistle-blower upon disclosure. Despite the provision allowing disclosure in the public interest, the burden rests on the whistle-blower to substantiate their claim of acting in the public interest, leaving the ultimate determination to the discernment of the presiding judge.[53]

INDIAN POSITION

India currently lacks a dedicated legal framework safeguarding trade secrets, prompting reliance on common law remedies rooted in equity. Courts, in the absence of specific legislation, have turned to *Section 27 of the Indian Contracts Act, 1872*, strategically interpreting negative

covenants within employment contracts to extend protection to trade secrets. Notably, judicial rulings have consistently affirmed the validity of non-compete and confidentiality clauses, deeming them reasonable and essential safeguards to uphold the delicate balance between employer interests and the imperative of preserving trade secrets.[54]

Judicial precedent asserts that covenants barring engagement in business, trade, or self-employment are deemed non-restraints of trade, unless characterized by excessiveness, unconscionably, one-sidedness, or unreasonableness, thereby establishing a nuanced threshold for the enforceability of such restrictive clauses[55]. Restrictions imposed upon employees must be commensurate with the essentiality of safeguarding the employer's interests, avoiding undue oppression or harshness towards the employee, thus encapsulating a delicate equilibrium in the imposition of constraints.[56]

Courts, in response to employees acquiring confidential information during their tenure and subsequently violating the contractual obligations of confidentiality, have exercised their authority to grant injunctions as a remedy.[57] In instances devoid of a foundational contract between employer and employee, courts, guided by principles of breach of confidence and equity, have judiciously granted injunctions and imposed costs upon the parties in response to the misappropriation of confidential information.[58]

Remedial measures, including injunctive relief, have been judiciously extended when instances arose wherein employees, either induced or prompted, misappropriated trade secrets, or when third parties illicitly appropriated such proprietary information.[59]

The Supreme Court, safeguarding trade secrets against inadvertent exposure in litigation, has underscored the imperative of regulating public trials to uphold equitable justice, affirming that maintaining confidentiality of trade secrets throughout court proceedings constitutes neither a breach nor infringement of Article 19.[60]

Draft National Innovation Act, 2008

In 2008, the *Department of Science and Technology* articulated the draft National Innovation Act, aspiring to foster innovation through collaborative endeavours encompassing private entities, public initiatives, or strategic public-private partnerships.[61] It delineates trade secret safeguards within the ambit of Chapter IV, elegantly titled "Confidentiality and Confidential Information, Remedies, and Offences," spanning Sections 8 to 14.[62]

The draft Act strategically employs the terms "confidential information," deriving its definition discerningly from the parameters elucidated in Article 39 of the TRIPS agreement.[63] The Act affords parties the freedom to consensually negotiate terms, enabling the establishment of comprehensive agreements governing rights and obligations related to the preservation of confidentiality and prevention of confidential information misappropriation. Moreover, it extends protection to obligations rooted in equitable considerations rather than contractual, ensuring a holistic safeguarding of confidentiality.

The array of remedies encompasses the issuance of mandatory injunctions, implementation of in-camera proceedings, sealing of confidential information, and the authority to compel any individual to disclose such privileged data. Misappropriation of trade secrets is exempted when the information is publicly available, independently discovered, or deemed in the public interest by the court. Furthermore, the Act delineates immunity for actions conducted in good faith.

Strategic Examination of the Draft National Innovation Act of 2008: A Comprehensive Analysis

The draft act, rather than codifying the legal framework for trade secrets in India, assumes the guise of an innovation-focused legislation, incorporating scant provisions for safeguarding confidential information. It introduces an element of ambiguity by stipulating that the terms governing parties' rights and obligations will be prescribed by the appropriate government, thereby injecting a level of government intervention into contractual agreements. Furthermore, the act fails to offer any supplementary protection beyond existing mechanisms in India, relying predominantly on contractual relations and equitable principles.

The remedies outlined in the Act merely echo judicially sanctioned measures, offering no innovative additions. Criminal liability remains absent, with the Act exclusively prescribing civil remedies for trade secret misappropriation. While the Act permits disclosure in the public interest, the absence of a defined criterion for "public interest" renders this exception inherently nebulous.[64] Moreover, the Act stipulates that injunctions may incorporate provisions for future use royalties, suggesting an incorporation of compulsory licensing within the domain of trade secret law.[65]

The provision granting immunity for acts conducted in good faith within the draft Act may potentially be susceptible to misuse, given its expansive nature without a precise definition of what constitutes "good faith." Consequently, the draft Act inadequately addresses the imperative for robust protection of trade secrets in India, underscoring a pressing necessity for the codification of a comprehensive legal framework dedicated to safeguarding these proprietary assets.

Comparison and the Results

In the realm of patent applications, when concurrent submissions arise for akin inventions in both India and the European Union, the Patent Office accords exclusive consideration to the foremost applicant. Should the invention meet the criteria for patentability, priority is unequivocally bestowed upon the initial filer, wherein the filing date serves as the pivotal determinant. This protocol grants precedence to the first applicant, irrespective of any chronological precedence in ideation by subsequent applicants.

In the United States, diverging from the approach in India and the European Union, when multiple applications surface for a singular invention, a distinctive determination ensues—emphasizing the primacy of conceptualization. Through interference proceedings, the U.S. adjudicates the originator of the innovation, awarding the patent not to the mere applicant but to the actual inventor. An evolving paradigm is underway, evidenced by a proposed bill seeking to transition from the existing *"first to invent"* framework to a *"first to file"* system, aligning with the global standard observed by patent offices worldwide.

The grace period afforded to inventors diverges across U.S., EU, and Indian patent laws, wherein the revelation of an applicant's innovation to the public prior to application submission leads to outright rejection in the European Union and India. Any act rendering a patent publicly accessible—be it through sale, public use, publication, lectures, investor showcases without non-disclosure agreements, magazine features, or a confluence of these actions—triggers the patent's public domain status, regardless of whether these actions are undertaken by the innovator, another inventor, or an independent third party.

Conversely, the United States implements a more lenient one-year grace period, permitting the innovator to exploit their creation for a year before filing a patent application, ensuring the preservation of patent rights during this post-publication period. However, should the creator publicly showcase their invention beyond the stipulated one-year timeframe preceding the patent application, eligibility for patent protection becomes precluded.

Within the U.S. patent system, a comprehensive specification necessitates an intricate portrayal of the invention, detailing the methodology and processes involved in its conception, presented with a clarity, conciseness, and precision sufficient to enable those skilled in the pertinent art to utilize and create the invention. The specification must further elucidate the inventor's anticipated optimal method of implementation.

Conversely, in India, the assertion of protection mandates the disclosure of the current best method for implementing the invention by the applicant, with the obligation extending to detailing multiple best practices if they exist.

In the European Union, distinctively, there exists no parallel obligation to delineate the best method for invention implementation, requiring the specification to elucidate at least one methodology for actualizing the conceptualization.

Judicial Precedents

Case Study 1: Covert Acquisition of Customer Data

In the legal dispute of *Burlington Home Shopping Pvt. Ltd. vs. Rajnish Chibber (1995(15)PTC 278(Del))**[66]*, the defendant, formerly an employee of the plaintiff, transformed into a rival entity upon severing ties with the plaintiff, venturing into the realm of mail-order shopping. The defendant, not only engaging in direct competition but also surreptitiously obtaining a replica of the plaintiff's closely guarded database, utilized it to cultivate connections with the plaintiff's clientele. The Delhi High Court, upon meticulous comparison of both parties' datasets, conclusively declared the defendant's data as a slavish imitation of the plaintiff's, establishing a robust prima facie case of copyright infringement to the court's satisfaction.

Case Study 2: Covert Misappropriation of Confidential Information

In the case of "*Diljeet Titus and Ors. vs. Alfred A. Adebare and Ors., 2006 (32)PTC 609 (Del)**[67]*", the Delhi High Court conclusively affirmed the plaintiff's establishment of a prima facie case concerning the rights associated with the appropriated material. The court, discerning the balance of convenience, favored the plaintiff and restrained the defendants from employing the copied material. Notably, the defendants were permitted to continue their professional pursuits, utilizing retained skills and information but were explicitly prohibited from using any copied material, including agreements, due diligence reports, and client lists developed during their association with the plaintiff. The court, crucially, recognized the work as falling within the definition of literary work under *Section 2(o) of the Copyright Act**[68]*, particularly noting its inclusion as a computer database.

Conclusion

The longstanding jurisprudential framework surrounding the safeguarding of trade secrets in the United States, coupled with the formidable enactment of the Defend Trade Secrets Act (DTSA), bearing its stringent provisions and an expansive array of remedies, underscores the profound significance attributed to trade secrets, compelling a continual legal evolution attuned to industry exigencies. In parallel, the European Union, confronted with a mosaic of divergent laws within its member states, strategically ushered in the EU Trade Secret Directive, meticulously designed to

harmonize legal landscapes. While adoption by all member states is apparent, the true impact on industry awaits analysis, poised for revelation only upon the directive's full functional integration.

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[1]www.wipo.int/tradesecrets/en/tradesecrets_faqs.html#:~:text=In%20order%20for%20information%20to,Absolute%20secrecy%20is%20not%20required

[2] Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 476 (1974).

[3] 1-1 Roger Milgrim, Milgrim on Trade Secrets §1.04

[4] Restatement (Third) of Unfair Competition §40 (1994).

[5] 35 U.S.C. §281

[6] The U.S. Supreme Court in Kewanee Oil Co. v. Bicorn Corp., 416 U.S. 470 (1974), held that state trade secret laws are not pre-empted by either the Patent Clause of the U.S. Constitution (Article I, §8, cl. 8) or the federal patent statute (35 U.S.C. §§101 et seq.) Although both trade secret law and patent law protect certain kinds of information, the two fields of law are distinct.

[7] Mark A. Lemley, The Surprising Virtues of Treating Trade Secrets as IP Rights, 61 Stan. L. Rev. 311, 316 (2008)" in Bluebook citation format.

[8] www.uniformlaws.org

[9] Uniform Trade Secrets Act §1.

[10] Restatement (Third) of Unfair Competition §§44, 45 (1994)

[11] S.Rept. 114-220, at 2-3.

[12] 142 Cong. Rec. S12207, S12208

[13] 18 U.S.C. §1839(3). This definition is substantially similar to that used by the UTSA, although it is broader in coverage. For a comparison of the language of the EEA and UTSA, see James H.A. Pooley et al., Understanding the Economic Espionage Act of 1996, 5 Tex. Intell. Prop. L.J. 177, 188-197 (1997).

[14] 18 U.S.C. §1832

[15] Economic Espionage and Trade Secret Theft: Are Our Laws Adequate for Today's Threats?: Hearings Before the Senate Judiciary Comm., Subcomm. on Crime and Terrorism, 113th Cong.

2d Sess. (2014) (statement of Randall C. Coleman, Assistant Director, Counterintelligence Division, FBI).

[16] 142 Cong. Rec. S12213 (daily ed. October 2, 1996) (Managers' Statement for H.R. 3723, The Economic Espionage Bill)

[17]www.ustr.gov/sites/default/files/05012013%202013%20Special%20301%20Report.pdf.

[18] Trade Secrets: Promoting and Protecting American Innovation, Competitiveness and Market Access in Foreign Markets: Hearings Before the House Judiciary Comm., Subcomm. on Courts, Intellectual Property and Internet, 113th Cong. 2d Sess. (2014) (statement of Thaddeus Burns, Senior Counsel, General Electric, on behalf of the Intellectual Property Owners Association).

[19] Roger E. Schechter & [author name scrubbed], Intellectual Property: The Law of Copyrights, Patents and Trademarks, §24.

[20] Kewanee Oil Co., 416 U.S. at 484-85.

[21] U.S. Chamber of Commerce, The Case for Enhanced Protection of Trade Secrets in the Trans-Pacific Partnership Agreement, at 23

[22] Part III: Case 18 (Spain: Presumed Acquisition, 19 February 2019)

[23] Technically, the 'exceptions' under Article 5 are not cast as exceptions to unlawful uses or liability (as with the lawful uses under Article 3), but as exceptions to the measures, procedures, and remedies granted under the Directive.

[24] Part III: Case 16 (Luxembourg: Freedom of Information, 15 March 2017).

[25] 2013 Baker McKenzie Study, p 39.

[26] 2018 Baseline Report, p 350.

[27] Niebel, R., de Martinis, L., & Clark, B. (2018). The EU Trade Secrets Directive: all change for trade secret protection in Europe?. Journal of Intellectual Property Law & Practice, 13(6), 445-457; p 7.

[28] See generally Riis, T. (2020). Enforcement of rights in trade secrets. In The Harmonization and Protection of Trade

Secrets in the EU (pp. 219-236). Edward Elgar Publishing; p 219.

[29] 2018 Baseline Report, p 348.

[30] 2013 Baker McKenzie Study, p. 42.

[31] Recital 14.

[32] To date, the CJEU has been called upon to interpret provisions on the Trade Secrets Directive only obiter in relation to access to documents under public procurement rules (07/09/2021, C-927/19, 'Klaipėdos regiono atliekų tvarkymo
centras' v UAB; 17/11/2022, C-54/21, Antea Polska S.A. v Państwowe Gospodarstwo Wodne Wody Polskie) and applications for marketing authorisation for medicinal products (05/02/2018, T-235/15, Pari Pharma GmbH v. European
Medicines Agency).

[33] Morrison & Foerster, "Harmonization of Trade Secrets in U.S and Europe"

[34] Defend Trade Secrets Act of 2016, Pub. L. No. 114-153, 130 Stat. 376 (2016).

[35] John Richard Brady & Ors v. Chemical Process Equipment, [1987],Delhi 372

[36] 18 U.S.C. § 1838 (2016)

[37] 18 U.S.C. § 1836(b)(1) (2016).

[38] Uniform Trade Secrets Act § 2 (1985).

[39] Engility Corp. v. Daniels, No. 16-CV-2473-WJM-MEH, 2016 WL 7034976, at *10 (D. Colo. Dec. 2, 2016).

[40] 18 U.S.C. § 1836(b)(3)(B)(i) (2016).

[41] Id. at 1836(b)(3)(B)(ii)

[42] Brunswick Rail Mgmt. v. Sultanov,[2017]

[43] Magnesita Refractories Co. v. Mishra,[2017]

[44] 18 U.S.C. § 1836(d) (2016).

[45] PatentlyO, "Trade Secrets Endorsement - Criticism," (May 2014), available at http://patentlyo.com/patent/2014/05/secrets-endorsement-criticism.html.

[46] Commission Staff Working Document Impact Assessment SWD(2013) 471 final, issued on November 28, 2013 (Impact Assessment), pp.28–38 for a detailed statement of these problems and consequences

[47] 45Id. recitals 2 and 7; Prof. Tanya Aplin, A Critical Evaluation of the Proposed EU Trade Secrets Directive, Intellectual Property Quarterly Issue 4 (2014)

[48] EU Trade Secrets Directive Article 1(1), (2016)

[49] Rembert Niebel, Lorenzo de Martinis & Birgit Clark,The EU Trade Secrets Directive:

all change for trade secret protection , Europe Journal of Intellectual Property Law & Practice, Vol. 0, No. 0 (2018)

[50] EU Trade Secrets Directive Article 2(1), (2016) and TRIPS Article 39 (1994)

[51] Niebel, R., de Martinis, L., & Clark, B. (2018). "The EU Trade Secrets Directive: All Change for Trade Secret Protection." European Journal of Intellectual Property Law & Practice, 20(0), 0.

[52] Rembert Niebel, Lorenzo de Martinis & Birgit Clark, The EU Trade Secrets Directive: all change for trade secret protection in Europe?, Journal of Intellectual Property Law & Practice, Vol. 0, No. 0 (2018)

[53] James McQuade, Kayvan Ghaffari and Andrea Nicole Greenwald, Can You Keep A Secret? The European Union's New Directive on Trade Secrets and its Impacts on Whistle-blowers, Trade Secrets Watch, (May 13, 2022 6.00 pm) https://blogs.orrick.com/trade-secrets-watch/2016/05/27/can-you-keep-a-secret-theeuropean-unions-new-directive-on-trade-secrets-and-its-impacts-on-whistleblowers/

[54] Chandni Raina Trade Secret Protection in India: The Policy Debate , Centre for WTO Studies, Indian Institute of Foreign Trade New Delhi , Working Paper CWS/WP/200/22 (2015)

[55] Niranjan Shankar Golikari Vs Century Spinning and Mfg Co. Ltd 1967 AIR 1098 (1967)

[56] Superintendence Company Murgai of India (P) Ltd Vs Sh Krishan SCR (3)1278 (1980)

[57] Hi-tech Systems and Services Ltd vs. Suprabhat Roy & Ors (G.A. No. 1738 of 2014 & C.S. No. 192 of 2014); M/s Gujarat Bottling Co. Ltd (GBC) and Others vs. Coca Cola and Others (995 AIR 2372)

[58] John Richard Brady vs. Chemical Process Equipments, 81 (1999) DLT 122 (1999); Escorts Construction Equipment Ltd v. Action Construction Equipment P. Ltd, Suit Appeal Number 533 of 1998.

[59] Base International Holdings v. Pallava Hotels Corporation Limited, C.S. No. 802 of 1996, Original Application Nos. 653 and 654 of 1996 and 104 of 1997, and Application No. 1464 of 1997 (1998).

[60] Naresh Shridhar Mirajkar and Ors v. State of Maharashtra and Anr., 1966 SCR (3) 744, (1966).

[61] Preamble to the Draft National Innovation Act, 2008.

[62] Draft National Innovation Act, 2008.

[63] Draft National Innovation Act, §2(3) (2008).

[64] Peter Ollier, "Managing Intellectual Property: India Trade Secrets Law Dubbed Absurd," Managing Intellectual Property (May 13, 2022, 3:30 pm),www.managingip.com/Article/2023296/India-trade-secrets-law-dubbed-absurd.html?ArticleId=2023296.

[65] Faizanur Rahman, "Trade Secret Law and Innovation Policy in India," Manupatra, (May 13, 2022, 3:30 pm), http://docs.manupatra.in/newsline/articles/Upload/E8134C85-E745-414C-91AA-3E05D6B95581.1-H__civil.pdf

[66] Burlington Home Shopping Pvt. Ltd. vs. Rajnish Chibber, 1995(15) PTC 278 (Del)

[67] Diljeet Titus and Ors. vs. Alfred A. Adebare and Ors., 2006 (32) PTC 609 (Del)

[68] Section 2(o) of the Copyright Act.