

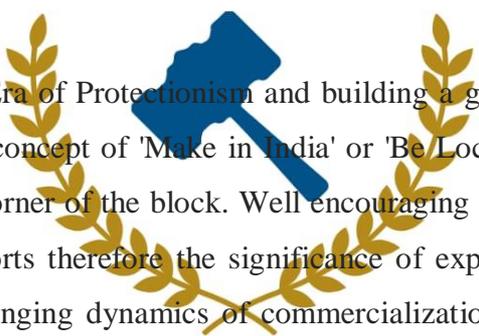
'TRADE SECRETS' REGIME IN INDIA**DE JURE NEXUS LAW JOURNAL**

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Introduction

In today's age and day an Era of Protectionism and building a global economy is a parallel. We all are doomed by the concept of 'Make in India' or 'Be Local' ¹which has led to a new business venture at every corner of the block. Well encouraging local business is good but it also means increasing exports therefore the significance of exports become higher, with a higher significance and changing dynamics of commercialization². These extended exports need heightened protection. With a rise in Globalization it has eased the process of setting up any kind of business or an organization and with the advancement in technology storing and accumulating data, creative and innovative ideas which would help them stand out and have a edge over the others has become much more simpler.

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Alongside the ease comes some challenges, one of the biggest challenge is safeguarding their Confidentiality agreement and business information. There are various online and offline tools that help in transferring data, this data does not necessarily has to be transferred from the externals but can be done from internal sources who have firsthand access to the data. In a work set up it is very common for employees to leave and with every exit some kind of information also leaves the office for several reasons. In order for Businesses to survive the burden of these acts, they should be backed up for its consequences. Though such kinds of

¹Make in India is a major national programme of the Government of India designed to facilitate investment, foster innovation, enhance skill development, protect intellectual property and build best in class manufacturing infrastructure in the country. The primary objective of this initiative is to attract investments from across the globe and strengthen India's manufacturing sector. It is being led by the Department for Promotion of Industry and Internal Trade (DPIIT), Ministry of Commerce and Industry, Government of India. The Make in India programme is very important for the economic growth of India.

²Commercialization is the process of bringing new products or services to market. The broader act of commercialization entails production, distribution, marketing, sales, customer support, and other key functions critical to achieving the commercial success of the new product or service.

doings are not covered under patent or copyright laws that do not mean formal protection is not needed. This kind of information, data etc ready for such acts to take place qualify as a 'Quasi-Intellectual property' known as the Trade Secrets.

IP law has various laws under it and one of it which is a vital part of Intellectual Property Rights is Trade Secrets. The concept of trade secrets is wide concept and extremely valuable concept for a company's growth and survival. In laymen language Trade secret's policy is protection, maintenance, promotion of ethical standards and fair dealings³. It protects anyone who is not a Trade secret holder and has unauthorized access to information which would lead to violation of trade secrets and unfair practice.

Defining Trade Secret



Trade secret can be defined as Business information and unpublished data not known to public and kept confidential, which provides commercial value and has a competitive edge over other businesses, this information can be related to sales, manufacturing, consumer profile, instrument, methods and formulas, practice, traders, advertising and business strategies, clients etc depending the genre of business. The information used by any third person other than the person in charged without permission would result in an unfair practice and hence infringement of trade secrets. For example, Coco Cola's Coke formula, McDonald's PeriPeri 'secret masala' are all maintained under trade secret.

Under Article 39(2) of the Trade Related Aspects of Intellectual Property Rights (TRIPS) there are three factors that that need to be considered and have common in all definitions;

- (i) It must not be readily accessible by people who normally deal with such type of information.
- (ii) it must have commercial value.
- (iii) Reasonable efforts must be taken to maintain its secrecy.

India's Common Law approach

³United States trade secret law, http://www.mccormacklegal.com/pdf/US_TradeSecretLaw.pdf

An obligation stands under TRIPs for India as a signatory to protect undisclosed information. However under Article 10 of the Paris Convention and Articles 39(2) and 39(3) of the TRIPs a unique power is vested with the member states where common law principles have been applied to protect information, since India does not have a specific codified legislation to protect Trade secrets. Nevertheless Indian courts with the help of equity upheld Trade Secret protection with remedies like injunction or damages available to the owner of trade secrets preventing them to disclose Trade Secret and return all confidential information with compensation for losses incurred due to disclosure. Along with Specific Reliefs Act, 1877 which may apply in favor of the wronged as mentioned under the Law of injunction in India⁴. On the contrary many cases have been refused the grant of injunction on the basis insufficiency of prima facie, as in order to grant injunction there must be an actual concealment of fact.



Besides that a restrictive clause has been imposed under Section 27 of the Indian Contract Act that states that any person can be bound contractually to not disclose any information revealed to them in confidence other than the agreed information resulting in those agreements restraining trade. This section generally says that any agreement that restrains trade is void but the rigidity of restraint was valid at the time when trade had not developed and the only scope of this section is to look at protection of restraint of trade. Section 27 is valid to those who invoked a wider equitable jurisdiction and awarded injunction even in the absence of contract.⁵ In the end when injunction is granted by the court the party would not be allowed to use the information which they had access to in breach of confidentiality and in case of parties who worked together cannot use data which was handed out to them in confidence at the time of work.

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IPR and Trade Secrets

Indian courts have endorsed Trade secrets under various laws but the main essence of it comes from the consonance to IPR. IPR being of territorial nature makes Trade secrets

⁴An injunction is a prohibitive writ issued by a court of equity, at the suit of a party complainant, directed to a party made a defendant for that purpose, forbidding the latter to do some act, or to permit his servants or agents to do some act, which he is threatening or attempting to commit, or restraining him in the continuance thereof, such act being unjust and inequitable, injurious to the plaintiff, and not such as can be adequately redressed by an action fit law.-Black's Law Dictionary.

⁵ John Richard Brady And Ors v. Chemical Process Equipments P. Ltd. and Anr [AIR 1987 Delhi 372]

geographically flexible, with a list from various courts across the country pronouncing what information is considered confidential. Under IPR Trade secrets essential is its secrecy than its novelty, so if any information which is not 'confidential' or kept in secrecy does not come under Trade Secret⁶. In recent times Trade Secret has caught eyes of the people and is preferred due to its advantages; however it has not reached the mark in drawing legislation in India. Intellectual Property Rights include Patents, Trademarks, and Copyrights all of which are codified laws. These laws work on protection of work whereas Trade Secret when disclosed will lose the whole essence of protection that other IPR's give. Once a trade secret is exposed there is no turning back and hence any protection.

India's Future in Trade secrets



Let's look at the brighter side with India being a signatory to the Paris Convention and the mention of protection of undisclosed information under article 1(2) of the TRIPs reduces the concern of the validity of Trade Secrets. However article 10(b) of the Paris Convention and Article 39(2) and 39(3) of the TRIPs agreement has set a global standard for trade secret laws which kind of puts India at risk for not having any unique legislature. A question arises of how the fundamental requirements of Trade Secret does not match the requirements of IP LAWS i.e. disclosure, publication, registration and the governance of Trade Secret should be shifted to civil law⁷.

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To answer the above question the National Innovation Act comes to rescue as a real effort put by the department of Science and Technology in their draft as it implemented a three step approach to protect confidential information, Trade Secrets and innovation. It aims to encourage innovation through a public-private partnership. Further a National report with evolved Trade Secret Provisions in India. Lastly there is an ongoing work toward codifying and consolidating the law of confidentiality in protecting Trade Secrets, information and innovation. Further India approved the National IP Rights Policy with seven objectives and one of the objectives was to ensure an effective framework for the protection of Trade Secrets. With an effective framework, a common law approach and a commitment to the strong protection of Trade Secrets a toolkit would be granted for small to medium enterprises

⁶Re Providian Credit Card 96 Cal.App.4th 292, 304 (2002).

⁷The 1989 General Agreement on Tariffs and Trade discussion paper on India

to highlight laws and policies that could help them protect their Trade Secret in India. Along with adding Trade Secrets in the module for legal studies in India ⁸.

We are in a constant rut on how legislation is needed in respect to Trade Secrets, how the codified law show first have a definite definition of the word 'Trade Secrets' with a bulk of combination of information as subject matter. Protection should be of all sought of information in combinations the business would like to keep away from public eye. It would be necessary to state that the information should not be knowledge known in the public domain. It is important that the codified law should mention to take a specific body in deciding cases and proceedings by who specializes in IPR. Additionally Tort of misappropriation should be considered which is committed through breach of confidence or when the cause of action is in conflict with the trade secrets. Also the principle of vicarious liability, third person liability should be should be codified in case of off-shoring keeping in mind the exception by the common law courts.

The TRIPs agreement mandates its member states to continuously change its laws and update to new legislation to fulfill the criteria of the TRIPs agreement, it is now time that India brings in the robust law to not only protect trade secrets but also confidentiality along with certain changes in the Competition Act against misappropriation and regulation of confidential information. In the IPC, 1860 for providing criminal liability for breach of confidence and keeping such activities at bay. In the Companies Act, 1956 for companies to take due diligence with their information and protect trade secrets while building a strong protection system for an easy safeguarding of Trade Secrets.

Conclusion

Though India is a developing country, its position should not be misguided in respect to its inception on finding the perfect fit for Trade secrets in our legislation even though it sits perfectly in the existing framework of law of torts, law of contracts and competition law. Besides its quandary in the field of IPR a separate legislation will end the disparity. Trade secrets being in its inchoate stage would make a great difference to the business environment

⁸discussion Paper on IP rights at the subsequent US-India Trade Policy Forum held on October 20 2016 in New Delhi.

in India along with a pool of opportunities for off-shoring companies as well as budding entrepreneurs that a looking for a merciless business competition without being afraid of being cheated on of their Trade secrets.



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