

STUDY ON WHETHER TRADE SECRETS AND INDIAN START-UPS HAVE AN AMICABLE RELATIONSHIP

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ABSTRACT

India is an emerging hub for start-ups and innovation. This article will try to find out if Trade secret is an option to protect the innovations of young minds of the country. A patent is indeed very safe and reliable IP protection however; this article will prove why new start-ups opt for a trade secret to protect their innovation. Lastly, such innovations and licensing of IP services bring great revenue to the country and also recognition in the International market.

INTRODUCTION

Every entity wishes to protect its unique innovation to maintain its originality in the market and bring in some commercial value to it. For example, WhatsApp and Meta want to protect their Chat system's algorithm. A fact that the recipe of Coca-Cola is still a secret in the market is all possible due to Trade-secrets. Legal measures are taken to protect innovation from maintaining its secrecy to not disclosing its formulae to its competitors. Information that is critical for an entity's survival is its confidential information and must be protected under trade secrets. Once the information is regarded as a trade secret it will remain a secret forever unless it has been decoded by an individual or an entity, or perhaps disclosed or leaked by the owner of the secret or its employee. India faces some difficulties in protecting trade secrets during legal proceedings due to insufficient mechanisms. However, India has joined hands with the US in bilateral agreements to enhance the protection of innovation and IP in India.¹ According to Startup Blink's Global Start-up Ecosystem Index, 2021, India Ranks 20th among the top 100 countries. India's ranking has also improved from 81 to 48 in the Global Innovation Index 2020.² India is home to a total of 82 unicorns like Unacademy, Paytm, etc. It calls itself the World's fastest-growing Start-up Ecosystem. During the course of this paper, we shall see how Trade-secrets protect unique inventions and help in the growth of the national economy.

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¹ Katherine Linton, *The Importance of Trade Secrets: New Directions in International Trade Policy Making and Empirical Research*, J. Int. Commer. Econ. Policy, 9 (2016)

https://www.usitc.gov/publications/332/journals/katherine_linton_importance_of_trade_secrets_0.pdf.

² MyGov, <https://blog.mygov.in/editorial/startup-india-what-it-means-for-the-youth/> (last visited May 25, 2022).

DEFINITION OF TRADE SECRETS

India is a signatory to the Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement and Article 39 (2) of the said agreement permits member states to frame laws to protect an individual's information lawfully from being used without their consent. Provided the information must be as the following:

- Is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question.
- Has commercial value because it is secret; and
- Has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.³

According to the High Court of Kolkata, in the case of *Tata Motors Limited & Anr v State of Bengal*⁴, the definition of 'trade secret' was observed as "A formula, process, device, or other business information that is kept confidential to maintain an advantage over competitors; information including a formula, pattern, compilation, program, device, method, technique, or process-that (1) derives independent economic value, actual or potential, from not being generally known or readily ascertainable by others who can obtain economic value from its disclosure or use, and (2) is the subject of reasonable efforts, under the circumstances, to maintain its secrecy".⁵

In other words, the innovation or information of the business needs to be kept a secret from its competitive businesses for the growth of the former. This information may include recipes, software, algorithm, a list of customers, etc. However, to avail, of this secrecy such information must not be readily available in the said industry, must hold a certain monetary value to pay in exchange and the proprietor must invest a reasonable amount of effort to create the information.

PROTECTIVE MEASURES TO PREVENT DISCLOSURE AND MISAPPROPRIATION OF TRADE SECRETS

³ TRIPS, 1995, Section 7, Article 39.

⁴ *Tata Motors Limited & Anr vs State of West Bengal & Ors*, GA No. 3876 of 2008.

⁵ *Tata supra* note 4.

The TRIPS agreement recognises that such secrets must be 'undisclosed information' but does not provide any mechanism and modalities. Some of the methods used by companies to protect their trade secrets from third parties are as follows:

Non- disclosure Agreements (NDA)

Businesses enter into NDA's and work together. In such discussions, intricate information is bound to be shared with third parties. In this way, third parties could be precluded from divulging any trade secrets.

Non-compete clause (NCC)

Employees of the company get into an NCC agreement. They are restricted to disclose confidential information even after their termination. However, in **Sandhya Organic Chemicals P. Ltd. vs United Phosphorous Ltd. And Anr.**⁶ the Supreme Court was of the view that an employee cannot be restrained at all times to come from using his knowledge and experience gained by him in the course of his employment especially when he was not in the service of the employer i.e., after the termination of service.

In the case of **Gopal Paper Mills Ltd v Surendra K Ganeshdas Malhotra**⁷, the Calcutta High Court upheld the restrictive clause in an employment contract, imposing constraints on the employee preventing him from misusing or revealing the confidential information and trade secrets acquired during the tenure of his employment.

CONFIDENTIAL AGREEMENT FOR LITIGATION

Indian courts permit litigation in matters of trade- secrets. In this process, the confidential clause from other litigants and third parties should be maintained. While hearing such matters confidential information is handed over only to the judge. To maintain secrecy, the hearing takes place on camera in the absence of other third parties. A judge must be able to identify the trade secret without improperly disclosing it to third parties and order appropriate discovery, subject to confidentiality restrictions; determine if there has been a misappropriation; and, if there has, must be able to impose and enforce appropriate remedies.

⁶ Sandhya Organic Chemicals Pvt Ltd v United Phosphorous Ltd, AIR 1997 Guj 177.

⁷ Gopal Paper Mills Ltd v Surendra K Ganeshdas Malhotra, AIR 1962 Cal 61.

WHETHER THE INDIAN GOVERNMENT SUPPORTS THE GROWING START-UP CULTURE

The Indian Government has recently begun to recognize the start-up culture in the country. In order to improve and encourage new business ideas in the country, the GoI launched the Start-up India scheme in 2016. In package with this initiative, the government provided a helping hand to the start-ups in setting up incubation centres, IPR filing, tax grants, faster exits for start-ups, relaxed norms of public procurement for start-ups, and the launch of innovation core programs for students, etc.⁸

Small Industries Development Bank of India (SIDBI) was introduced to provide funding support of Rs.10,000 crore for start-ups.⁹ Initiatives like Atal Innovation Mission, Atal Tinkering Labs, and Atal Incubation Centres offer labs, incubation centres, innovation centres, mentor networks, and strategic public-private and country-to-country partnerships to create a culture of entrepreneurship in the country.¹⁰

WHETHER START-UPS SHOULD PROTECT THEIR INNOVATION UNDER TRADE SECRETS OR PATENTS

When a start-up enters the market with some new information that is advantageous for its business, it captures a dominant market share to be the first mover with that product or service.¹¹ During this period, the incumbent enjoys maximum profits from their customers due to a lack of competition in the market. Since start-ups are naïve with limited investors, they tend to protect their innovation through a process that demands a small fee and has limited barriers to its protection, unlike copyrights, patents, etc.

Registering an IP as a Patent might take a couple of years with a high registration fee providing an exclusive right to the proprietor for 20 years whereas, a trade secret does not need a registration process, no registration fee and it is immediately effective. However, the right to the trade secret is not exclusive, a legal remedy will be granted only in the case of misappropriation of its secrecy which will deal with India's common law. One of the surveys,

⁸ Garima Sodhi, Akriti Jain & Rinki Singh, Linkages between IP Protection and Start-ups in India, (CUTS Institute for Regulation and Competition, 2019).

⁹ Government of India Ministry and Commerce, <https://dipp.gov.in/sites/default/files/ru2402.pdf> (last visited, May 16, 2022).

¹⁰ MyGov, *supra* note 2.

¹¹ Nathan Wajzman, Francisco Gracia. Union Intellectual Prop. Office, Protecting innovation through trade secrets and patents: Determinants for European Union Firms 11 (207).

conducted in Poland from the year 2015 to 2018 with almost 1000 start-ups responding to it, proves that business analytics do not register patents due to the non-patentability of their products or lack of financial resources.¹² The scope of a trade secret is larger than that of Patents. Trade secret covers an entity's commercial information as well as its products and processes whereas, a patent will only protect new products and processes. For example, a compiled list of customers is not patentable. Such inventions whose utility is very less; it is not economically viable to have patent protection for them.

SCOPE OF TRADE SECRETS IN THE NEAR FUTURE

According to the TRIPS agreement, a stronger and highly harmonized global IP system would improve incentives for technology transfer and contribute to economic development through trade in high-technology goods, and foreign direct investment (FDI).¹³ Trade Secret Protection Index (TSPI) measures the level of trade secret protections in 37 countries every 5 years from 1985 to 2010. TSPI includes five elements that reflect the scope of trade secret protections and remedies that correspond well with TRIPS and TPP requirements. The elements are

1. definitions and coverage
2. specific duties and misappropriation
3. remedies and restrictions on liability
4. enforcement, investigation and discovery, and test data exclusivity
5. system functioning and related regulation.¹⁴

Douglas Lippoldt and Mark Schultz use this index to test the hypothesis that increasing the protection of trade secrets promotes expanded small domestic innovative activities, as measured by R&D expenditures and intensity, and expanded international activities, including more goods and services imports, imports of IP services, and FDI inflows. They find a positive relationship between the stringency of trade secret protection and domestic and international innovation indicators, particularly FDI inflows and imports of IP services. Their research offers a basis for further quantitative analysis of trade secrets protection.¹⁵

¹² Garima Sodhi, *supra* note 8.

¹³ Andre Barbe and Katherine Linton, Trade Secrets: International Trade Policy and Empirical Research, (2016) <https://www.oecd.org/sti/144%20-%20OECD%20Trade%20Secrets%202016-8-5.pdf>

¹⁴ Lippoldt and Schultz, "Uncovering Trade Secrets," 2014, 11-12, 23.

¹⁵ Lippoldt, *supra* note 14.

CONCLUSION

Governments worldwide recognise the value of trade secrets. Significant policy changes in recent years say that trade secrets will be in constant competition and progress. India needs special legislation codifying all provisions related to trade secrets. While trade secrets are very important in practice, economic understanding of their use, the impact on innovation, and other aspects are relatively underdeveloped. Predicting the future of India as far as start-ups are concerned, we can say that with the help of government incentives India is going to be the hub of start-ups and innovations. This will give scope to the R&D industry to study and change legal standards. On the basis of which International policies can be formed to further boost and trade and IP services with countries developed countries like US.

