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Examining the Regulation of Trade Secrets in India and The United States of America: A Comparative Analysis

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ABSTRACT

The 21st century is grappling with issues like technology, innovation, privacy, and a horizon of intellectual artistries. In light of this, a specialized branch of law known as Intellectual Property Rights has stepped in to safeguard the contemporary world of creativity and ingenuity. All its elements - from trademarks and copyrights to patents - lie under the protected radar of these rights. One of the crucial aspects of said rights is trade secrets, also known as the hidden gems that give companies a competitive edge. These are the secrets that are commercially valuable intellectual property rights on confidential information which may be sold or licensed. They exist in different forms like, formulas, practice, design, algorithms, and patterns. The problem with this aspect is that companies aim to keep their trade secrets independent from intellectual property protection in light of exercising an economic advantage over their competitors. In this regard, India lags behind because of the absence of statutory provisions and legislation, not just to address the problem it brings forth but also to address Trade Secrets as a conceptualized aspect of Intellectual Property Rights. Due to this, India has to rely copiously on Judicial precedents to tackle the issue, unlike the United States of America, which has shown exemplary contribution in this field by coming forward with Trade Secrets specified laws. In this article, the authors have explored qualitative research in the form of doctrinal backing, judicial precedents, and writings of research scholars to discourse said aspect elaborately. By looking into the case studies of different corporations and enterprises that aim to prioritize other Intellectual property rights over trade secrets to protect their competitive spirit in the market, the authors have addressed the need for legal backing for the same. While there are advantages in the economic and legal fields to the non-protection of trade secrets, the future of innovation and the problem of insider trading can trump said benefits and put different enterprises in a spiral on their conquest of market dominance. By analyzing these facets, the paper has accentuated the approach India should incorporate into its legal framework with Trade Secrets as its subject matter.

Keywords: *Intellectual Property Rights, Trade Secrets, Patents, India, United States of America, Innovation.*

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I. INTRODUCTION

(A) Research Questions:

1. What role does the continual exchange of intellectual property activities play for trade secrets?
2. Is a law governing the protection of trade secrets necessary in India?

(B) Research Objective/ Claim Statement:

1. To comprehend the need of having explicit trade secret laws in India for the sake of international trade and other intellectual property operations.
2. Analysing the concept of trade secrets due to the existing situation between India and the United States of America.

(C) Research Methodology:

The study of trade secrets and the information in this paper are based on the authors' doctrinal research, which they conducted using secondary resources such case law, articles, books, and journals that are accessible both online and offline.

II. RESEARCH ANALYSIS

In today's furiously competitive era of modernization and industrialization, the industrial market is leading the country's capital gains and contributing to the nation's Gross Domestic Product. Amidst this lies the diverse intellect of multifarious individuals whose ideas and designs make a product, nay an organization reach the pinnacle of success. However, these asset-bearing suggestions - that end up carrying the business forward - require protection and safeguarding, and this is where intellectual property rights come into play. According to the World Trade Organization(WTO), "Intellectual property rights are the rights given to persons over the creations of their minds. They usually give the creator an exclusive right over the use of his/her creation for a certain period."² These Intellectual property rights (IPR) act as armor to shield the creation/innovations from getting utilized and misappropriated by the world constituent of various competitors and covetous agents looking for an opportunity to make a profit out of someone else's pocket. IPR is an umbrella term that includes different facets like patents, trademarks, copyrights, and trade secrets.

Patents are defined as an exclusive right granted for an invention, which is a product or a process

² World Trade Organisation, *Intellectual Property Rights* https://www.wto.org/english/tratop_e/trips_e/intel1_e.htm

that provides, in general, a new way of doing activities or offers a new technical solution to a problem. The technical information about the invention must be disclosed, to the public in an application to receive a patent.³ Copyrights, on the other hand, refer to “the rights that creators have over their literary and artistic works. Works that are covered by copyright range from books, music, paintings, sculpture, and films to computer programs, databases, advertisements, maps, and technical drawings.”⁴ Like Patents, the owner of a literary work is required to apply, thereby disclosing his artistic chores, to get safeguarded under copyright. Nowadays, all corporations and agencies ensure to highlight the uniqueness of their brand through logos and signs, which too has come under the radar of IPR via trademarks. “A trademark is a sign capable of distinguishing the goods or services of one enterprise from those of others.”⁵ Like Copyrights, this branch of Intellectual property rights has to undergo a registration process to warrant legal enforceability of the owner’s rights in case of infringement. While all these segments require disclosure to enforce their legal stature, trade secrets run on a deviating course. Trade secrets are also known as the hidden gems that give companies a competitive edge. These are a set of confidential information that are commercially valuable intellectual property rights that may be sold or licensed, existing in different forms like formulas, practice, design, algorithms, and patterns.⁶ However, a gap exists in seeking the protection of trade secrets. From a legal perspective, they lack firm protection under the statutory provisions because the channel of safeguard adopted by the other components of intellectual properties aims at the disclosure of said information, which cannot form the basis of trade secrets. They are referred to as ‘secrets’ for a reason, and deciphering the true meaning of said term doesn’t require delving into a comprehensive understanding. Going by its literal meaning, the term in an elementary sense - refers to maintaining confidentiality and keeping the said information within the frontiers of the enterprise, thus such secrets cannot be disclosed for protection. There are numerous examples known to the world wherein infamous brands have chosen to protect delicate information running their business, the revelation of which could massively impact their standing in the market, thereby rendering them vulnerable.

1. Coca-Cola

It has been over a century since the world was introduced to one of the leading beverage brands - Coca-Cola. Despite its addictive taste that has successfully bound consumers across all ages, one of the reasons that led to the sudden spike in its success was the unique strategy adopted by

³ The Patent Act, 1970 (Indian Legislation).

⁴ Trade Marks Act, 1999 (Indian Legislation).

⁵ Copyright, Designs and Patent Act, 1988 (USA Legislation). ⁵ *Supra* Note 3.

⁶ *Supra* Note 4.

the forerunners and later owners of the company to create intrigue around Coca-Cola's product. There are a lot of theories still going around in the consumer market about different tactics adopted by the Coke company to safeguard the formula adopted in the making of Coca-Cola. For instance, in the initial stage, the 'recipe' of the beverage was known to a limited number of employees and was subsequently passed on by word to the next generation. When the time came, Asa Chandler, founder of the company and an infamous business tycoon, purchased the beverage's recipe, thereby securing the company's rights over the formula. Eventually, in 1919, the secret recipe was put down on paper for the first time when the company was purchased as a means to act as collateral.⁷ Over the years, the immense success of the drink motivated the company heads to protect the essence of the company under the legal blanket of trade secrets - as intellectual property. The company chose to go ahead with trade secrets and not patents because the latter ensures protection for twenty years while the latter stands as a protective safeguard for a lifetime as long as the confidential information doesn't get out of the company's clutch through legal means.

The bottom line of all these theories is that Coca-Cola successfully established its presence in the market by encouraging these buzzing reports about highly guarded vaults with cameras and other alleged facts, in addition to curtailing its competitor's attempts to capture the beverage industry.

2. KFC (Kentucky Fried Chicken)

KFC or 'it's finger-licking good' Kentucky Fried Chicken has successfully captured the fast-food market chain of India in no time. Spread over one hundred and fifty countries, the company is ranked as the second largest restaurant chain in the world, and one of the reasons for its success is its most protected 'original seasoning' recipe used for its infamous fried chicken. A trade secret, the recipe was first developed by Colonel Sanders, who blended 11 herbs and spices and changed the trajectory of the fast-food restaurants that were yet to come in the future. The founders of KFC corporation made sure to safeguard the formula for the tastiest chicken from its competitors by agreeing with two separate blending companies. Both the agencies - Sexton and Strange, were given the contract of blending only one-half of the seasoning, which was later mixed to prevent either of them from knowing the recipe in its entirety in response to a confidential agreement with KFC.⁸ This marketing strategy and extreme effort created a perception in people's minds concerning the uniqueness and genuineness of the food, thereby

⁷ Deepa Varadarajan, *Trade Secret Fair Use*, 83 *FORDHAM L. REV.* 1401 (2014).

⁸ Carl Pacini & Raymond Placid, *The Importance of State Trade Secret Laws in Deterring Trade Secret Espionage*, 7 *BUFF. INTELL. PROP. L.J.* 101 (2009).

attracting crowds of chicken lovers to try one of the best fast food in the world. It was the KFC Corp. v. Marion- Kay Co., Inc.⁹ case that subsequently nudged the case of the former to victory, whereby the U.S. District Court specifically placed the original recipe of Sanders under protectable trade secret, preventing any other enterprise from supplying any seasoning to the KFC franchises.

This case represents the power of trade secrets in transforming a food corporation into a ragging success all around the world.

3. Google LLC

Occupying a market share ranging from 85% onwards, Google LLC has been leading the search engine industry since its inception. The company is also known to safeguard its algorithm as a trade secret that determines the functioning of the entire software network. In order to seek protection as a trade secret under Intellectual Property Rights, information must have a commercial value and must be protected by confidential agreements with the individuals possessing the knowledge of said data.¹⁰ One of the infamous controversies surrounding Google occurred when one of its employees practiced trade secret theft and contributed to the accumulation of gains by Uber. In the case of Waymo LLC v. Uber Techs., Inc.,¹¹ the court ordered the latter to pay Google - the parent company of Waymo a self-driving car project - in response to utilizing the trade secret-protected algorithms stolen by an ex-employee of Google who later helped Uber through his personal company. It was a debatable case that led people to question whether algorithms come under the ambit of trade secrets. However, the court's decision in its favor for it being an intellectual result of its creator put a pause to the discussion to some extent.

Over the last seventy-five years, India has witnessed many breakthroughs in industrial development and technological advancements. In response to these refinements, the legal setup of the country came up with various Intellectual property laws like Patent Act, Trademark Act, Copyright Act, Design Act, etc. However, trade secrets, a significant tool under IPR, failed to make their way through the protective statutory provisions. It doesn't mean that these secrets stand unsecured in today's marketing world, for the whole concept of trade secrets gets protection under the umbrella concept of common law, equity, and contractual obligations. In

⁹ KFC Corporation v. Marion-Kay Co., Inc., 620 F.Supp. 1160 (1985).

¹⁰ Stephen McJohn, *Top Tens in 2011: Copyright and Trade Secret Cases*, 10 Nw. J. TECH. & INTELL. PROP. 331 (2012).

¹¹ "WAYMO LLC, Plaintiff v. Uber Technologies, Inc.; OTTOMOTTO LLC; and OTTO TRUCKING LLC, Defendants." *Waymo LLC v. Uber Techs., Inc., No.c 17-00939* WHA, (N.D. Cal. Jan. 29, 2018).

the absence of specific legislation on trade secrets, the Indian Contract Act (1872)¹², the Information Technology Act (2000)¹³, and the Indian Penal Code (1860)¹⁴, among others, provide safeguards in cases of illegal disclosure of trade secrets.

A secret becomes a 'Trade Secret' based on three elements - information that has either actual or potential independent economic value by not being generally known, has value to others who cannot legitimately obtain the information, and is subject to reasonable efforts to maintain its secrecy.¹⁵ These intricacies highlight the necessity of legally binding arrangements in the form of NDA (Non-Disclosure Agreements) to safeguard such confidential data, thereby calling for stringent and definite legislation in the form of the Indian Contract Act 1872. The mentioned statute does not define the term trade secret but, under Section 27¹⁶, provides for the safeguarding of goodwill of organizations by restricting one from exercising lawful profession to ensure that outgoing employees do not share the company's trade secrets or confidential information.¹⁷ So, in spartan words, because these sorts of information must be shared with a limited number of members of an enterprise, making them a signatory to a confidential agreement with a clause for recourse in the form of liquidated/unliquidated damages to some extent might ensure protection of trade secrets.

Another concept that prevails in respect of statutory provisions in India is that illegal method of obtaining confidential data amounts to unfair trade practice, and this is where the Indian Penal Code of 1860 come in to protect such shielded trade secrets. Section 15HA of the IPC states that if someone carries out and indulges in fraudulent activities, one could face a penalty extending up to twenty-five crore rupees.¹⁸

In India, with the onset of technological advances, the protection of data stored in electronic mediums became the need of time, and hence, the Information Technology Act of 2000 provides remedies and recourse to tech-related infringements. Section 72 of the Act makes it a criminal offense to violate trust and confidentiality.¹⁹ Thus, any trade secret stored in an electronic medium, if leaked or accessed illegally, shall come under the ambit of the aforementioned provision. With respect to all such legislative provisions, one can argue that in the absence of an exhaustive and definite trade secret statute, India has done an above-average job by utilizing

¹² Indian Contract Act, 1872 (Indian Legislation).

¹³ Information Technology Act, 2000 (Indian Legislation).

¹⁴ Indian Penal Code, 1860 (Indian Legislation).

¹⁵ Economic Espionage Act of 1996, Defend Trade Secrets Act of 2016. (USA Legislation).

¹⁶ Section 27, Indian Contract Act, 1872 (Indian Legislation).

¹⁷ *Id*

¹⁸ Section 15HA of Indian Penal Code, 1860 (Indian Legislation).

¹⁹ Section 72 of the Information Technology Act, 2000 (Indian Legislation).

various provisions and incorporating all questionable possibilities of such confidential data.

The legal framework of India in this context also relies on the TRIPS Agreement ratified by the nation in the year 2005. The International provision addresses the Intellectual Property right of Trade Secret in the following form:

In the course of ensuring effective protection against unfair competition as provided in Article 10bis of the Paris Convention (1967)²⁰, Members shall protect undisclosed information in accordance with paragraph 2 and data submitted to governments or governmental agencies in accordance with paragraph 386.

Natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices so long as such information:

- i. 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 usually deal with the kind of information in question;
- ii. has commercial value because it is a secret;
- iii. has been subject to reasonable steps under the circumstances by the person who is lawfully in control of the information to keep it secret.²¹

Section 39 of the TRIPS Agreement has comprehensively compiled every facet that forms part of a trade secret to ensure no scope for any lacuna to creep in.²² As India depends on the principle of common law, judicial precedents - being one of its sources - also help the cause of protecting and safeguarding confidential contracts. TRIPS agreement has been relied upon in various judgments and statutory provisions showcasing its importance and how well put the provision is.

One of the reasons trade secrets lack specific and definite protection not just in India but all around the world is that in situations if someone discovers such secrets through legal means and/or reverse engineering, there shall be no protection available to the confidentiality information, at last, this is the ground held by the policymakers of the world.

India draws a lot of similarities with the United States of America, specifically in the industrial and competitive world arena. It is for this reason that researchers usually take the US laws as a

²⁰ Paris Convention (1967).

²¹ Section 39 of the TRIPS Agreement as provided in Article 10bis of the Paris Convention (1967).

²² *Id*

benchmark for understanding and analyzing their own *lex loci* of the land and what are the nuances that need redressal.

Like India, the United States of America does not have multitudes of laws when it comes to trade secrets but still has shown significant contributions in this arena by incorporating few comprehensible legislations. In addition to the model adopted by India by relying on contract law, tort law, and TRIPS Agreement, the United States of America has two invaluable statutes, among others, the first being the Uniform Trade Secrets Act of 1985.²³ The legislation, as adopted and implemented by 47 out of 50 states of the USA, specifies the definition of trade secrets while also addressing the remedies that one can avail in case of violation of trade secret protection.²⁴ The second legislation, the Economic Espionage Act of 1996,²⁵ makes trade theft a criminal offense by running on the similar lines of the Indian Penal Code of 1860.²⁶ It provides that Economic espionage refers to the theft of a trade secret “intending or knowing that the offense will benefit any foreign government, foreign instrumentality, or foreign agent.” The second offense under the statute — the theft of trade secrets — addresses theft “that is related to a product or service used in or intended for use in interstate or foreign commerce, to the economic benefit of anyone other than the owner thereof, and intending or knowing that the offense will, injure any owner of that trade secret.” These crimes are prosecuted by the Department of Justice and are punishable by imprisonment and/or fines.²⁷ While both countries have provided safeguards for trade secrets, the statutory provisions of the USA have established themselves to be more specific and direct, thereby enabling ease of understanding and approachability by the victims of trade secret violations.

Despite these measures in place, the players in the capitalist world choose not to guard their trade secrets by means of such protective shields, hence risking disclosure of the same. For instance, in one of the leading sports fields, Formula 1, the sporting teams do not go for trade secret protection because the game is all about promoting the spirit of sportsmanship, consequently allowing reverse engineering procedures to be utilized by competitive teams to develop and make their equipment, spares, and cars as a whole better than before and in comparison to other sporting cars.²⁸

²³ Uniform Trade Secrets Act, 1985 (USA Legislation)

²⁴ United States Patent and Trademark Office, *Trade Secrets Protection in the U.S* <https://www.nist.gov/system/files/documents/mep/marinaslides.pdf>

²⁵ *Supra* Note 15.

²⁶ *Supra* Note 14.

²⁷ *Supra* Note 15.

²⁸ Shirin Lakhani, *Trade Secrets and Industrial Espionage in Formula One Motorsports*, 46 DENV. J. INT’L L.&Pol’y 223 (2018).

While it is safe to say that from one perspective, the logic behind limited statutory provisions to protect trade secrets is justified for safeguarding the innovation and formulas that nudge a company to reach the limits of success, from another perspective, the standpoint could vary. Therefore, one should delve into different benefits that come with trade secret protection before arriving at a conclusion.

These secrets are abstract concepts, and disclosing a minute element of them in the form of such safeguards would enable future innovations while recognizing the original source that contributed to them. Going ahead with legislative provisions on trade secrets, companies can create intrigue around their product as practiced by KFC, which may result in individuals and bodies of associations developing around such captivating enigmas, thus driving the company with such secrets to enjoy a market pull-up. And lastly, the idea that if a trade secret is carefully protected, its safeguard shall last for an eternity at the lowest cost possible, which in turn highlights financial fluidity.

III. CONCLUSION

IPR, encompassing trade secrets, occupy an indispensable role in the modern industry. Trade secrets, though often eclipsed, serve as potent tools for achieving success, their protection contingent upon rigorous confidentiality, the security of legal safeguards, and the aegis of international agreements.

In the fiercely competitive global marketplace, trade secrets, akin to concealed gems of innovation, rightly demand recognition and robust safeguarding. In light of these considerations, it is imperative to recognize the manifold benefits of trade secret protection. Firstly, safeguarding trade secrets can facilitate future innovations while duly acknowledging their original source. Secondly, it can create an air of intrigue and mystique around a product or brand, captivating consumers and fostering unwavering brand loyalty. Lastly, it affords enduring protection at a modest cost, contributing to financial stability.

The value of intellectual property rights, particularly trade secret protection, cannot be emphasised in today's fast changing and fiercely competitive global environment. In the conception and development of fresh ideas, technology, and products, businesses and individuals devote significant resources. Intellectual property rights serve as the essential incentives and safeguards, encouraging such innovation and ultimately propelling economic growth and progress.

In India, the safeguarding of trade secrets finds its foundation in existing legal frameworks, including the Indian Contract Act, the Information Technology Act, and the Indian Penal Code.

The nation's commitment to the TRIPS Agreement further assures international recognition and protection for these invaluable intellectual assets. The comprehensive delineation of trade secrets' definition and prerequisites within the TRIPS Agreement furnishes a robust framework for their comprehension and enforcement. However, the United States provides precise definitions and unambiguous legal avenues for the protection of trade secrets through legislative instruments like the Uniform Trade Secrets Act and the Economic Espionage Act. Nonetheless, certain industries, consciously eschew these protective measures, opting instead to foster innovation through a spirit of novelty and the avenue of reverse engineering.

Although trade secrets may not garner the same degree of attention as patents, copyrights, and trademarks, their role in the preservation and promotion of innovation remains undeniable. As businesses continue navigating the intricate terrain of intellectual property rights, it is essential to regard trade secrets as a valuable instrument for preserving the confidentiality and competitive edge of their intellectual creations.

In a nutshell, as nations and industries continue their evolution, it becomes imperative to acknowledge the significance of trade secrets and work towards establishing comprehensive legal frameworks for their protection which should be done with the viewpoint of economic, social and societal requirements and not only from the industries perspective. By doing so, we can foster innovation, shield invaluable intellectual property, and contribute to the sustained growth and prosperity of our economies. Trade secrets, akin to the concealed gems of innovation, merit the recognition and safeguarding necessary for them to flourish in today's fiercely competitive global marketplace.
