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Evolving Paradigms of Trade Secret Protection: A Comparative Study of the US, EU, and India

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Abstract: The protection of trade secrets is integral to commercial practices since the inception of trade itself. This study explores the historical evolution and current legal frameworks governing trade secrets in the United States, European Union, and India. In the United States, trade secret law transitioned from common law torts to codified statutes, culminating in the Uniform Trade Secrets Act (1979) and the Defend Trade Secrets Act (2016). Federal protection is also provided under the Economic Espionage Act (1996). In contrast, the European Union historically lacked uniformity in trade secret protection until the enactment of the EU Trade Secret Directive (2016), which harmonized standards across member states. In India, trade secrets are primarily protected under common law and contractual agreements, with no specific legislation governing their protection. This comparative analysis highlights the need for a robust legal framework for trade secrets protection in India to enhance its compliance with TRIPS obligations.

Keywords: trade secrets; uniform trade secrets act; defend trade secrets act; economic espionage act; TRIPS

1. Introduction

Protection of trade secrets and confidential information of businesses dates to the origin of trade itself. Roman law provided relief to masters when a person induced the employee of another to disclose trade secrets of the masters business to him (Schiller 1930). In the United States by the mid of 19th century, trade secrets were protected by common law. It was towards the end of the 19th century that the principal features of modern trade secrets law became well recognized. In England, the modern trade secrets law evolved during the early 19th century in a response to the industrial revolution which led to an increase in employee mobility and a growth of know-how.

Trade secrets have helped safeguard confidential business information since the earliest days of commerce. Unlike patents or copyrights, which require public disclosure, trade secrets keep proprietary information undisclosed, allowing businesses to maintain a competitive advantage. Historically, trade secrets protection can be traced to Roman law, which provided legal recourse against the unauthorized disclosure of trade secrets. Over time, the legal frameworks governing trade secrets have evolved significantly across different jurisdictions, reflecting changes in commercial practices, technological advancements, and international trade dynamics.

In the United States, trade secrets protection originated under common law torts as misappropriation and breach of confidence. It later developed into a more structured legal regime with the enactment of the Uniform Trade Secrets Act (1979) and was further strengthened by the Defend Trade Secrets Act (2016), enabling federal jurisdiction over trade secrets misappropriation. Contrarily, the European Union initially lacked a harmonized legal approach, with member states relying on national laws, including criminal sanctions, unfair competition laws, and contract principles. This fragmentation was addressed in the EU Trade Secret Directive (2016), creating a uniform framework to enhance competitive fairness across the EU.

In India, trade secrets are not protected by any specific laws but are enforced through common law principles, equitable doctrines, and contractual obligations. Indian courts have often relied on precedents from English common law to adjudicate trade secret disputes, leading to a fragmented and inconsistent legal landscape. Despite India's obligations under the TRIPS agreement to safeguard undisclosed information, legislative attempts to introduce comprehensive trade secret protection, such as the National Innovation Bill (2008), have remained unsuccessful.

This study undertakes a comparative analysis of the evolution and current status of trade secret laws in the United States, European Union, and India. By examining the historical development, legislative frameworks, and judicial interpretations in these jurisdictions, this research provides a comprehensive understanding of the global trade secrets landscape. The study also highlights the need for

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India to enact robust trade secret legislation to enhance its compliance with international standards and foster a more secure business environment.

2. United States

In 1837, American courts restrained a seller from disclosing secrets of the trade to public and held that such a practice would not amount to restrain in trade.¹ The Supreme Court of Massachusetts seems to be the foremost court in the United States to define a comprehensive view of trade secrets.² The next development which happened in United States was recognition given to trade secrets under the Restatement of Torts. 1939. It incorporated two sections which dealt with the trade secrets. Section 757 which dealt with the subject matter of trade secret law and Section 758 which dealt with the misappropriation of trade secrets. This was later dealt with under Sections 39 to 45 of the Restatement of the Unfair Trade Competition. The law related to trade secrets developed as a series of common law torts such as misappropriation, breach of confidence, unfair competition, unjust enrichment and related torts. It evolved from legal rules which were related to both common law and contract law which regulated employment relationships (Lemley 2011).

In 1979, the Uniform Trade Secrets Act, (UTSA)³ was enacted which was the first effort to comprehensively codify the law relating to trade secrets in United States. It had major principles of common law related to trade secrets and at the same time filled gaps which the courts had left while deciding cases related to trade secrets.

State Laws

In United States, it is primarily under the state law that trade secrets are given protection. A common law remedy or action through state specific statutes can be pursued by corporations or individuals in case of misappropriation of trade secrets. The UTSA was adopted by the District of Columbia and 47 states with some variations in the original text to address issues relating to trade secrets. Trade secret misappropriation is a civil offence in most states of United States. However, certain states also recognize theft of trade secrets as a criminal offence. In California anyone who “acquires, discloses, or uses trade secrets without authorization shall be punished by imprisonment of up to one year in a county jail, by a fine of up to \$5,000, or by both penalties.” In Texas, the intentional theft of a trade secret is a criminal offense that can result in a prison sentence ranging from a minimum of two years to a maximum of ten years. Additionally, offenders may face a fine of up to \$10,000.

2.1 Federal Laws

Trade Secrets Act, 1996

This 1996 federal legislation has narrow applicability. It doesn't apply to local or state government employees and the private sector. It prohibits employees and contractors of the federal government from disclosing confidential government information which includes trade secrets. The violation of this law is made a criminal offence resulting in fine or imprisonment and the removal from employment.⁴

Economic Espionage Act, 1996

The concerns of the United States Congress on the increasing domestic and international espionage against the businesses resulted in the enactment of a comprehensive federal law protecting trade secrets (Mossinghoff et al. 1997). The Economic Espionage Act, 1996 (EEA)⁵ deals with two separate offences

1. 18 U.S.C. § 1831 relates to trade secret theft for the benefit of a foreign entity.
2. 18 U.S.C. § 1832 relates to theft of trade secret which is intended to confer another party some economic benefit.

The definition of trade secret under EEA is quite vast. While Section 1831 prescribes punishment for acts, conspiracy or attempt of misappropriation with the intention or knowledge that such offence would result in benefits to a foreign government, agent or instrumentality. Section 1832 is of a general application and does not entail that the offence must benefit a foreign entity. Thus, the EEA makes the theft of trade secrets in certain cases a criminal offence.

Defend Trade Secrets Act, 2016

The Defend Trade Secrets Act, 2016 (DTSA)⁶ aims to federalize the law relating to trade secrets, and it allows individuals or companies to file private civil cases under EEA in cases concerning misappropriation of trade secrets (Cohen et al. 2018). The DTSA has expanded the trade secrets protection by defining it in a broad manner, enhancing the compensation which can be claimed for theft of trade secrets, prescribing criminal remedies, allowing for recovery of attorney's fees and well as providing for *ex-parte* seizure.

In United States, trade secrets are broadly protected with under three categories of law: under tort law or under contract law or as a part of property law.

Tort Law

During the twentieth century, a primary justification for law of trade secrets was the “duty-based theory” or “maintenance of commercial morality” (Jager 1991). The United States Supreme Court held that:

¹ Vickery v. Welch, Mass. (19 Pick.) 523, 527 (1837)

² Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 493 n.23 (1974)

³ Available online: https://www.law.cornell.edu/wex/trade_secret (accessed on 23 March 2025)

⁴ 18 U.S.C. § 1905, 2016

⁵ Available online: <https://www.justice.gov/archives/jm/criminal-resource-manual-1122-introduction-economic-espionage-act> (accessed on 23 March 2025)

⁶ Available online: <https://www.congress.gov/bill/114th-congress/senate-bill/1890> (accessed on 23 March 2025)

“The property may be denied, but the confidence cannot be. Therefore, the starting point for the present matter is not property or due process of law, but that the defendant stood in confidential relations with the plaintiffs.”⁷

This gave rise to the acceptance of trade secrets as a part of the common law of confidentiality. The enactment of the Restatement of Torts in 1939, which classified misappropriation of trade secrets as a tort further strengthened this position.⁸ This tort-based theory has been adopted by various scholars in justifying trade secrets (Paine 1991). It has been argued that such an approach would limit the protection given to trade secrets (Samuelson 2000).

Contract Law

Academicians and courts have time and again suggested that trade secret law and contract law are coextensive with each other (Robison 1983). The principal right of the owner of the trade secret is to grant access to the secret to others subject to a contractual duty not to use or disclose it.⁹ Thus, whereas the owner of a trade secret has no exclusive right as against independent discoverers (Milgrim & Bensen, 2001) he is allowed to use or disclose his secret pursuant to express contractual restrictions. This principle has been laid down clearly by the Supreme Court in the case of *Aronson v Quick Point Pencil* (1979)¹⁰ where the court stated:

“Commercial agreements traditionally are the domain of state law. State law is not displaced merely because contract relates to intellectual property which may or may not be patentable; states are free to regulate the use of such intellectual property in any manner not inconsistent federal law”

A trade secret disclosed pursuant to an implied contract or confidential relationship will receive equitable protection in the absence of express agreement.¹¹ The protection would be extended in cases where the party to be bound refuses to sign an agreement not to compete.¹² Further, in certain cases equitable protection could be extended beyond the express terms of the contract.¹³

Property Law

The most noteworthy philosophy of trade secrets protection in United States is that trade secrets are property rights of a person because they are possessed by the owner of trade secret (Deutch 1997). United States court in the case of *Peabody v Norfolk* (1868)¹⁴ had recognized trade secrets as property. This property law theory dominated the commonly held view with respect to trade secrets throughout the nineteenth century (Bone 1998). The United States Supreme Court in the case of *Ruckelshaus v. Monsanto* (1983) has held that trade secrets have characteristics which are alike the tangible form of property.¹⁵

3. European Union

The European Union previously did not have a fixed standard for trade secrets protection. Different standards and practices prevailed in various EU jurisdictions. Confidential information in the European Union is known by different names such as trade secrets, know-how, industrial secrets, confidential information, manufacturing secret etc. For example, the German Unfair Competition Act, 1909¹⁶ uses the term industrial secrets and trade secrets; France uses the terms manufacturing secrets, know-how), and commercial secret; In Poland know-how and trade secret; English courts use the term know-how, confidential information and trade secrets. It must be noted that in all these jurisdictions the terms are used interchangeably and there is no clear delineation between them.

In France, since 1844, it is the French Criminal Code¹⁷ which deals with theft of trade secrets (Czapracka 2012). Article L. 152-7 of the Labor Code is the key legislation which deals with trade secret protection in France. It imposes criminal sanctions on an employee if he divulged his employers manufacturing secrets. The provision, however, did not define manufacturing secrets and had limited scope as sanctions could only be placed on trade secret theft by employees or directors. French courts have also protected trade secrets under tort and contract law (Bouchenard 2015).

In Germany, the 1909 Law of Unfair Competition embodied the trade secret law. The new Law of Unfair Competition was passed in 2004 which overtook the 1909 law on trade secrets. As per the Law of Unfair Competition, an employee would be charged with criminal liability in case he divulges trade secrets to get personal gain, or for competition purposes or with the intention to harm the nosiness of the owner. The law under Article 17(2) also prohibits unauthorized communication or use of trade secrets by employees. Further, the unauthorized disclosure or use of models, confidential designs, drawings for competitive purposes or personal gains is also criminalized under Article 18.

In England, the earliest recognition given to trade secrets was in 1817 the case of *Newbery v. James* (1817).¹⁸ The major tool for trade secret protection in England is the common law remedy for breach of confidence. According to *Coco v. A.N. Clark* (1968)¹⁹ to prove breach of confidence, the plaintiff must prove that there existed confidential information, the existence of an obligation of confidence and its divulgence, and the use of the confidential information for the detriment of the plaintiff. There are no set standards to

⁷ E.I. du Pont de Nemours Powder Co. v. Masland, 244 U.S. 100 (1917).

⁸ Available online: <https://www.lrdc.pitt.edu/ashley/restatem.htm> (accessed on 23 March 2025)

⁹ *Miller v. Frankfort Bottle Gas Inc.*, 202 N.E.2d 395, 136 Ind. App. 456 (1964).

¹⁰ *Aronson v. Quick Point Pencil*, 440 U.S. 257 (1979).

¹¹ *Robert N. Brown Assocs. v. Fileppo*, 38 A.D.2d 515 (N.Y. App. Div. 1971).

¹² *Prince Mfg. Inc. v. Automatic Partner Inc.*, 753 F.2d 974 (11th Cir. 1985).

¹³ *Mohawk Maintenance Co. v. Kessler*, 52 N.Y.2d 276 (N.Y. 1981).

¹⁴ *Peabody v. Norfolk*, 98 Mass. 452 (1868)

¹⁵ *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1983).

¹⁶ Available online: https://www.gesetze-im-internet.de/englisch_uwg/ (accessed on 23 March 2025)

¹⁷ Available online: https://www.equalrightstrust.org/ertdocumentbank/french_penal_code_33.pdf (accessed on 23 March 2025)

¹⁸ *Newbery v. James*, 35 Eng. Rep. 1011, 10 (1817)

¹⁹ *Coco v. A.N. Clark (Eng'rs), Ltd.*, F.S.R. 415 (Ch.) (1968).

decide whether information is protectable or not and the courts decide the matter on a case-to-case basis. In the case of *Saltman Engineering Co., Ltd. v. Campbell Engineering Co., Ltd.* (1963)²⁰ it was held that

"what makes [the information] confidential is the fact that the maker of the document has used his brain and thus produced a result which can only be produced by somebody who goes through the same process."

Unlike the other continental jurisdictions, there are no criminal sanctions for the theft of trade secrets or breach of trust under English law (Hull 1998).

EU Trade Secret Directive

As seen above, there was no uniform law regulating trade secrets in the EU. In 2016, the European Parliament in order to comply with the TRIPs mandate to protect undisclosed information and to harmonize the law relating to trade secrets in EU adopted the Directive (EU) 2016/943 Directive (EU) 2016/943 of The European Parliament of 8 June 2016²¹ on The Protection of Undisclosed Know-How And Business Information (Trade Secrets) Against Their Unlawful Acquisition, Use and Disclosure) "the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure."

The Directive aims to harmonize and patch the diverse national legislations which were often outdated and had gaps. The Directive sets out common principles, protection measures and procedures to create a pan-European regime which acts as an incentive to businesses to invest in innovation and research in Europe. The Directive under Article 4 has introduced a common definition of trade secrets which has been absent until now and has ensured equivalent protection to trade secrets all over the Union. The Directive prohibits unlawful disclosure, use or acquisition of trade secrets.

Member states of the EU were given time till June 8, 2018, to amend their national laws to comply with the Directive. United Kingdom has adopted the Trade Secrets (Enforcement, etc.) Regulations 2018 (SI 2018 No. 597) (the "UK Regulations") which extends to the whole of the UK (England and Wales, Scotland and Northern Ireland). Germany and France have also adopted laws to implement the Directive.²²

4. India

In India, courts use the common law remedies and identified confidential business information as trade secrets. The earliest trade secret case in India was that of *John Richard Brady and Others v. Chemical Process Equipment's P. Ltd. and Another* (1987).²³ The remedy available to trade secret owners is injunctive relief, compensation and the return of confidential information. The Indian Courts have borrowed the principles of English common law to recognize the cause of action in case of breach of confidence.²⁴ The courts also protect trade secrets based on rules of equity. Indian courts upheld the principles of equity and confidentiality independent of any contractual obligation in cases of trade secret protection.²⁵

Apart from the common law remedy, courts have also recognized trade secrets protection under contract law. This is done by a diverse range of contracts such as the non-disclosure agreements and the non-compete agreements. Besides this, the civil remedies can be claimed under Specific Relief Act, 1963.²⁶ Section 27 of the Contract Act, which prohibits agreements which restrain trade, is invoked in most cases which relate to trade secrets. The Supreme Court has held that negative covenants in employment contracts have been upheld by the court if the intent is to protect trade secrets and not to restrain trade.²⁷

The Indian Penal Code, 1860²⁸ under deals with provisions relating to criminal breach of trust under Section 405-409 which can be invoked for the purposes of criminal prosecution in case of theft of trade secrets. The Information Technology Act, 2000 under Section 43 makes the theft of confidential information systems an offence.²⁹ The offender has to pay compensation up to Rupees 100,000/- to the person affected and under Section 66, the offender is also liable for imprisonment for up to three years.

Department of Industrial Policy and Promotion in India has declared 2010-220 as the Decade of Innovation. In 2008, the Government of India released the Draft National Innovation Act, 2008³⁰ to boost innovation and research and to provide protection to trade secrets. However, the Act fails to adequately address issues relating to trade secret protection. In the National IPR Policy, 2016, Paragraph 3.8.4, one of the areas for future protection and development, was identified as trade secrets.³¹

India being a signatory to TRIPS is under an obligation to enact legislation to provide protection to undisclosed information. India has yet not formulated a law which adequately protects trade secrets in India, and it is time that India does so to become TRIPS compliant. India does not have a specific statute governing trade secret protection. Instead, courts have relied on common law principles of equity and have interpreted Section 27 of the Indian Contract Act, 1872,³² to safeguard trade secrets through negative covenants in employment agreements. Courts have upheld confidentiality and non-compete clauses, provided they are reasonable (Raina 2015).

²⁰ *Saltman Engineering Co., Ltd. v. Campbell Engineering Co., Ltd* 3 All E.R. 413,415. (1963)

²¹ Available online: <https://www.wipo.int/wipolex/en/legislation/details/16435> (accessed on 23 March 2025)

²² Available online: <https://www.legislation.gov.uk/uk/si/2018/597/contents/made> (accessed on 23 March 2025)

²³ *John Richard Brady and Others v. Chemical Process Equipment's P. Ltd. and Another*, AIR 1987 Delhi 372

²⁴ *Emergent Genetics India Pvt. Ltd. v. Shailendra Shivam and Ors.*, para 33, 125 D.R.J. 173 (2011)

²⁵ *Escorts Construction Equipment Ltd. v. Action Construction Equipment P. Ltd.*, AIR 1999 Delhi 78

²⁶ Available online: <https://indiankanoon.org/doc/1671917/> (accessed on 23 March 2025)

²⁷ *Niranjan Shankar Golikari Vs Century Spinning and Mfg Co. Ltd* 1967 AIR 1098 (1967)

²⁸ Available online: <https://devgan.in/pc/> (accessed on 23 March 2025)

²⁹ Available online: <https://cleartax.in/s/it-act-2000> (accessed on 23 March 2025)

³⁰ Available online: <https://www.nishithdesai.com/generateHTML/5803/4> (accessed on 23 March 2025)

³¹ Available online: <https://vajiramandravi.com/upsc-exam/national-intellectual-property-rights-policy/> (accessed on 23 March 2025)

³² Available online: <https://www.indiacode.nic.in/bitstream/123456789/2187/2/A187209.pdf> (accessed on 23 March 2025)

In *Niranjan Shankar Golikari v. Century Spinning and Mfg Co. Ltd (1967)*³³, the court ruled that negative covenants restricting an individual from engaging in business, trade, or self-employment do not amount to a restraint of trade unless they are excessively harsh, unfair, or one-sided. Similarly, in *Superintendence Company of India (P) Ltd v. Sh Krishan (1980)*³⁴, the court held that restrictions imposed on employees should not exceed what is necessary to protect the employer's interests and must not be unduly burdensome or oppressive to the employee. In *Hi-Tech Systems and Services Ltd v. Suprabhat Roy & Ors (2014)*³⁵, courts granted injunctions against employees who had gained confidential information during their employment and subsequently violated confidentiality agreements. In cases such as *John Richard Brady v. Chemical Process Equipments (1999)*³⁶ where no contractual agreement existed between an employer and an employee, courts have still issued injunctions and imposed costs based on breach of confidence and equitable principles in instances of trade secret misappropriation. Furthermore, courts have provided injunctive relief in cases where trade secrets were wrongfully obtained by employees through third-party inducement or direct misappropriation.

The Supreme Court in the case of *Naresh Shridhar Mirajkar And Ors v. State of Maharashtra And Anr. (1966)*³⁷ has protected trade secrets from inevitable disclosure during litigation. It has held that public trial has to be regulated to ensure that true justice is done to the parties, and non-disclosure of trade secrets during court proceedings is not a violation of Article 19.

4.1 Draft National Innovation Act, 2008

In 2008, the Department of Science and Technology introduced the Draft National Innovation Act (Draft Act) to promote innovation through public-private partnerships. The Act addressed trade secret in Sections 8 to 14 of Chapter IV "Confidentiality and Confidential Information and Remedies and Offences". It defines "confidential information" in Section 2(3) based on Article 39 of the TRIPS Agreement. Section 8 of the Draft Act allows parties to enter into agreements that outline their rights and responsibilities regarding confidentiality and the prevention of trade secret misappropriation. Additionally, Section 9 extends protection to confidentiality obligations that arise from equitable considerations rather than contractual obligations. The Act provides various remedies under Sections 10, 12, and 13, including mandatory injunctions, in-camera proceedings, sealing of confidential information, and orders requiring disclosure of confidential data. Section 10 specifies that trade secrets are not considered misappropriated if they are publicly available, independently discovered, or if a court deems their disclosure necessary in the public interest. Furthermore, Section 14 grants immunity for actions carried out in good faith.

The Draft Act does not provide a comprehensive codification of trade secret law in India. Instead, it primarily focuses on innovation, incorporating a few provisions related to the protection of confidential information. It stipulates that rights and obligations concerning trade secrets will be determined by government-prescribed terms, leading to potential confusion due to state intervention in private contractual agreements. The Act does not protect beyond what is already available in India through contractual arrangements or equity principles. The remedies outlined in the Act are already enforced by courts, meaning it does not introduce any new legal mechanisms. Notably, the Act does not impose criminal liability for trade secret violations, restricting enforcement to civil remedies.

The Act permits trade secret disclosure in the public interest but does not define "public interest," making this provision ambiguous (Ollier 2019). It allows injunctions with conditions for royalty payments for future use, essentially introducing the concept of compulsory licensing into trade secret law. Lastly, the immunity granted for actions taken in good faith is broadly defined, creating a risk of misuse due to the absence of a clear legal definition of "good faith". Thus, the draft Act falls short of providing adequate protection to trade secrets in India and there is a need for codification of a law which protects trade secrets.

5. Conclusions

Trade secrets have existed since time immemorial, however there is still no uniform and strict protection for them in most parts of the world. United States has well defined laws for the protection of trade secrets. These laws evolved from considering trade secrets as a part of tort law to ensuring them property rights under specific federal legislations. In the EU, trade secrets were not uniformly protected by the member states. Member states protected trade secrets either under their criminal laws or as a part of law of unfair competition or under common law rules of equity or contracts. The EU Directive aims to harmonize law with respect to trade secrets in EU. United States and EU have used the TRIPs mandates given to member states legislate to protect undisclosed information in the nations. However, no such legislation exists in India and it is largely protected under contract law. There have been certain failed attempts to protect trade secrets such as the National Innovation Bill, 2008. However, the bill was not adequate to protect trade secrets. Give the large number of small and medium enterprises in India and large amount of foreign direct investment in India, it is essential that trade secrets are protected adequately to ensure the interest of businesses.

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³³ *Niranjan Shankar Golakari v. Century Spinning & Mfg. Co. Ltd.*, AIR 1967 SC 1098

³⁴ *Superintendence Company Murgai of India (P) Ltd Vs Sh Krishan* SCR (3)1278 (1980)

³⁵ *Hi-tech systems and Services Ltd Vs Suprabhat Roy & ors* G.A.No. 1738 of 2014 & C.S.No. 192 of 2014

³⁶ *John Richard Brady and Others v. Chemical Process Equipment's P. Ltd. and Another*, AIR 1987 Delhi 372

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