

Protecting Innovation: Choosing between Trade Secrets and Patents

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Abstract:

Intellectual Property Rights (IPR) have become a cornerstone of the global economy, flourishing innovation, creativity and technology. The landscape of IPR confines diverse safeguard like, Patents, Trademarks, Copyrights, Design and Trade Secrets. The significance of IPR is to fortify the rights of creators and inventors by galvanizing their new technologies, artistic works and creativity. In the extending landscape of IPR, Trade Secrets have become a key element. This concept is comparatively newer than the traditional Patent system. This paper underscores the importance of increasing benefits of Trade Secrets and scrutinizing its role in protecting the innovation and competition. This study also indulges the comparative analysis of Trade Secrets and Patents, its usage and relevance.

Keywords: Intellectual Property Rights (IPR), Trade Secrets, Patents

Introduction:

‘Intellectual Property’ the name itself propounds its meaning i.e. property of intellect or human mind. Here intellect can be synonymous to creation, innovation, invention and human mind. And in the contemporary world, ideas, information, and knowledge makeup the maximum of the society. This knowledge, idea or information can be of various categories, like for instance, a logo, a piece of art or painting, an invention, new technology or music etc. The WIPO (World Intellectual Property Organization) defines Intellectual Property (IP) as “IP refers to creation of mind- everything from work of art to inventions, computer programs to trademarks and other commercial signs.”¹ All the intellectual properties are intangible which means it cannot be seen or touched. Therefore the Intellectual Property Rights (IPR) helps the owner of the exclusive

¹ What is IP, WIPO, *available at:* <https://www.wipo.int> (last visited on Sept 16 2022)

intellectual property to protect and prevent others from imitating property and ownership. The World Trade Organization defines IPR as “IPR are the rights given to persons over the creation of their minds. They usually give the creator an exclusive right over the use of his/her creation for a certain period of time.”² These Intellectual Property Rights are identified in Article 27 of The Universal Declaration of Human Rights. In nutshell IPR are the legal rights for the intellect, knowledge, ideas and skills of an individual. These rights are absolutely exclusive to the person who owns the particular intellectual property, these rights are non-transferable. IPR when given to the owner it benefits him/her by giving recognition and financial benefits. Historically it has been aimed that IPR has its origin dating back to 500 BCE to Greeks.³ Then in 1421 the world’s first modern patent was issued to the development in England in 17th and 18th century. IPR has come a long way through evolution and modification. Some of the chief objectives of IPR are:

1. Safeguarding Intellectual Property: it bonafides the intellectual property and secures it from illegal use and authorization.
2. Foster Innovation: it encourages people for creation of new ideas and innovation in numerous fields.
3. Encouraging Economic Growth: IPR creates new job opportunities, industrialization and technology excels the quality of life.
4. Payback to Creators: it profits them financially, gain recognition and cluster appreciation.

Some of the common IPR practiced are: Patent, Copyright, Trademark, Trade Secrets, Industrial Design and Geographical Indication, Plant varieties and Digital Assets.

Trade Secrets:

Trade Secrets are speedily becoming one of the IP choices in the market due to its high potential advantage in economy. The Information Technology has made Trade Secrets exceptionally precious. Trade Secrets law was developed in the courts of England. A trade secret is any practice or process of a company that is generally not known outside of the company. Information considered a trade secret gives the company a competitive advantage over its competitors and is often a product of internal research and development.⁴ In general, Trade

² What are intellectual property rights, WTO, *available at*: <https://www.wto.org> (last visited on Sept 16 2024)

³ History of IP, *available at*: <https://plato.stanford.edu> (last visited on Sept 16 2022)

⁴ What is a Trade Secret, *available at*: <https://www.investopedia.com/terms/t/trade-secret.asp> (last visited on Sept 16 2024)

Secrets are the IPR which are found on confidential information of the company which is not to be divulged in the market. In the 'information age', trade secret protection is better suited to the fast-moving and unpatentable confidential information, which is essential to run companies.⁵ There are certain essentials of Trade Secrets that are need to be acknowledged, that are:

1. It must have a commercial value.
2. It is known to a limited group of people.
3. The owner of such a secret has taken reasonable steps to keep such information secret.⁶

There are no such specific laws in India that regulate the protection of Trade Secrets. Nevertheless, the Trade Secret laws are protected under The Indian Contract Act, 1872, The Copyright Act, 1957 and The IT Act, 2000. The following are the statutory provisions which recognize the protection of trade secrets in India: Sec 27 of contract law bars any person from disclosing any information, sec 72 of IT Act provides for criminal remedy and punishes a person with imprisonment or fine in case of access to any electronic media and Sec 43A of IT Act, provides for compensation for the protection of sensitive personal data which includes passwords, biometrics and another personal record.⁷ In the case of, *Suhner v. Transradio Ltd.* 1967⁸; the court held that the information of the business-related products should be kept confidential and if any such information has been provided to the defendant to do a particular business so then the defendant will not be entitled to use that particular information for any other purpose. In the case of *Krishan Murugai v. Superintendence Co. of India Pvt. Ltd.*⁹ case, in which the plaintiff carried on the business of inspecting merchandise to assess quality. The plaintiff developed its own techniques for quality testing and control and claimed that such techniques, as well as its clientele, were its trade secrets. The defendant was employed as a manager under a contract which stipulated that he would not join or run a competitive business for two years in the vicinity of his employment by the plaintiff. It was further stipulated that he

⁵ Abhik Guha Roy, "Protection of Intellectual Property in the Form of Trade Secrets" 11 Journal of Intellectual Property Rights 193 (May, 2006).

⁶What are trade secrets: a brief overview, *available at*: <https://blog.ipleaders.in/ipr> (last visited on Sept 16 2024)

⁷ Trade Secrets: India's Dimension, Poorvi Bansal, *available at*: <https://law.dypvp.edu.in/plr/Publication/Long-Articles/Poorvi-Bansal/Trade-Secrets-India's-Dimension.pdf> (last visited on Sept 16 2024)

⁸ *Suhner v. Transradio*, AIR 1967, RPC 329

⁹ *Krishna Murugai v. Superintendence Co. of India Pvt. Ltd.*, AIR1976, Delhi 232

would not reveal the secrets of the plaintiff to other parties. After termination of his service, the defendant started a business identical to the plaintiffs under a similar name. He joined with the plaintiff's competitors, solicited the plaintiff's clientele, and employed the same techniques learned during his employment with the plaintiff. The plaintiff brought a suit for an injunction entirely based upon the employment contract. The defendant alleged that the contract, being in restraint of trade, was void by virtue of Section 27 of the Contract Act. The court held:

1. Under the old Contract Act (i.e., prior to 1932), a reasonable restraint of trade was valid but the amended Section 27 of the Act provides for otherwise. It only provides for one exception, namely, the seller of goodwill of a business may agree to a reasonable restriction of his trade. There is no exception in the case of a master and servant relationship.
2. A restraint to operate a competitive business during employment is valid but if the restraint operates after the expiry of employment, it is illegal and void.¹⁰

These were some key case laws where the Indian Judiciary recognized Trade Secrets in IPR and gave its significance that how functional they can be proven in today's market competition. Some of the widely known examples are: Google's search algorithm, the Coke Syrup Formula by Coca-Cola, KFC's original recipe, Big Mac Special Sauce by McDonald's. Globally, the protection of Trade Secrets is shielded by TRIPS (Trade-Related Aspects of Intellectual Property Right), GATT (General Agreement on Tariffs & Trade), and NAFTA (North American Free-Trade Agreement). In the era of advancement of innovation, technology and creation, it becomes imperative to guard them and the inventor or creator's creditability. Even so, India is marking time for specific laws for the protection of Trade Secrets. In India Trade Secrets are been sheltered under Contract Act or IT Act, it is a wider subject-matter which cannot be dealt with these narrow irregular laws, consequently there is a need of specific legislation on Trade Secrets in India for smooth and better regulation.

Patents in brief:

We all have heard the word 'Patent' repeatedly in our lives. Patent is one of the most popular and universal kind of IPR. The term Patent has derived from the Latin phrase "patene" which means 'to open'. According to World Intellectual Property Organization (WIPO), it is defined as an exclusive right granted for an invention, which is a product or a process which provides

¹⁰ Trade Secrets as an Intellectual Property Right Under Indian Law, *available at*: https://www.legalservicesindia.com/article/620/Trade-Secrets-as-an-Intellectual-Property-Right-Under-Indian-Law.html#google_vignette (last visited on Sept 16 2024)

a new way of doing something, or offers a new technical solution to a problem. As per Indian Law, The Patents Act, 1970 defines patent as 'it is an exclusive right guaranteed by the Government for an invention and process or newer process of existing inventions.' It simply means it gives recognition and creditability to the owner of the invention or creation and protects it from foul use in the market. In India, The Indian Patent and Design Act, 1911 was the first exclusive legislation to govern patents in country, prior to it since 1856 the patent system started and evolved. Later it was replaced by The Patents Act, 1970 which is still enforced in India. The major amendment in the Patent Act was in 2005, when product patents were extended to all fields of technology like food, drugs, chemicals and microorganisms. The Rules under Patent Act were also amended in 2012, 2013, 2014.¹¹ The first patent in Indian was granted in 1856, to George Alfred DePenning, a civil engineer from Calcutta, for his invention, "An Efficient Punkah Pulling Machine". Some of the basic characteristics of Patents which are: 1. Not just the invention but also the process can be patented. 2. The creation made should be useful and out of ordinary. 3. It should be unique and not obvious. In case there is an infringement of a Patent then there are specific remedies under the Patents Act. Some of the well-known patents in India are: Patent-Pending Satellite Technology of ISRO, Patanjali Ayurveda Product, Bharat Biotech's Covaxin and many more.

Trade Secrets vs. Patents:

As we are acquainted with both Trade Secrets and Patents, now we must look forward to draw a comparison between them and how Trade Secret is a rational choice in today's world. In the rapidly evolving innovation and creativity, the choice between Trade Secrets and Patents often hinges on strategic thought. Trade secrets are different from other forms of IP since their protection requires establishment and maintenance. Although information technology age has made trade secrets immensely valuable, it has also made them more likely to be stolen.¹² So why should we consider Trade Secrets over Patents. Patents, have a limited lifespan, usually 20 years, Trade Secrets can present unfading protection for longer period of time. Patents publicly disclose innovation, which can potentially reveal valuable information to competitors. Trade secrets on the other hand are entirely confidential. Trade secrets can protect a wider range

¹¹ What is a patent, *available at*: <https://byjus.com/free-ias-prep/indian-patents-act/#:~:text=What%20is%20a%20patent%3F,technical%20solution%20to%20a%20problem>. (last visited on Sept 16 2024)

¹² Abhik Guha Roy, "Protection of Intellectual Property in the Form of Trade Secrets" 11 Journal of Intellectual Property Rights 193 (May, 2006).

of information than patents, including formulas, processes, customer lists, and business plans. Trade secrets offer greater flexibility in terms of how they are used and exploited. They can be licensed, sold, or kept entirely in-house without the restrictions imposed by patents. While choosing between Trade Secrets and Patents there are some key factors that should be taken under consideration like, nature of information, desired level of protection, competition, cost and time. Consequently, considering the advantages of Trade Secrets it is greatly functional, efficient and presently applicable.

Conclusion:

In conclusion to the above research, Trade Secrets swear by on their nature of secrecy. They have become an indispensable IP in today's scenario. They play a pivotal role in the interest of the creators and inventors around the world. This will briskly increase the economic growth of the nation. As a rising nation it is necessary for India to adopt a powerful and comprehensive legislation to protect Trade Secrets. Encourage and spread awareness to use Trade Secrets for superior protection of the innovation.