
FROM COMMON LAW TO CODIFICATION: THE FUTURE OF TRADE SECRETS IN INDIA

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ABSTRACT:

Trade Secrets also can be termed as the intellectual capital of the rapidly expanding and innovation-driven Indian as well as Global economy. Despite India's status as a signatory to the TRIPS Agreement, there is a want for a dedicated legal framework for trade secret protection. Using secondary research methodology, this paper critically examines the current legal landscape, primarily the judicial precedents, and the limitations of the existing protection available via contract law, criminal law, equity-based jurisprudence, etc. It highlights upon the obligations under Article 39 of the TRIPS Agreement and gives a nuanced overview of the Law Commission's 289th Report concerning Trade Secrets. The Paper reiterates upon the imminent need for comprehensive legislation for the protection of sensitive commercial information given the rising digital threats and international competition.

From Common Law to Codification: The Future of Trade Secrets in India

Introduction:

“[A] separate statute or framework for trade secret protection in India is imperative in wake of rising frauds and misappropriation in digital world. In this regard, the Committee recommends the Department to consider enacting a separate legislation or a framework for protection of trade secrets. It further recommends the Department to examine the relevant and best practices being followed in statutes of various countries for their implementation in India”¹

The emerging Indian Economy recently surpassed the 4 trillion dollar² mark as of 2025. This rising trend prompts the creation of substantial intellectual capital which is an asset for the Indian Economy. This necessitates a robust protective apparatus to safeguard this economic and intellectual capital from misappropriation and other anti-competitive elements.

India is a signatory to the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”)³, and Article 39 deals with the concept of “undisclosed information” which should be protected.

TRIPS and Article 39:

Article 39 of section 7 of the TRIPS Agreement (Part II) deals with the concept of ‘undisclosed information’ where paragraph 1 focuses on the principle of undisclosed information, paragraph 2 on the criteria to be fulfilled for getting protection, and paragraph 3 deals, especially with the data and the Government.

¹ 161st Report on Review of the Intellectual Property Rights Regime in India. Department Related Parliamentary Standing Committee on Commerce. (July 2021) Available at https://files.lbr.cloud/public/2021-07/161_2021_7_15.pdf?VersionId=S01fCQEC5DzDqKNyMsGgxa16YXmJbUwM (last accessed on May 17th 2025)

² At \$4.3 Trillion, India's GDP Doubles In 10 Years, Outpaces World With 105% Rise. (March 26, 2025) available at <https://www.ndtv.com/world-news/at-4-3-trillion-indias-gdp-doubles-in-10-years-outpaces-world-with-105-rise-8010530>

³ TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) [hereinafter TRIPS Agreement]

Paragraph 1⁴ ordains a nominal obligation on the signatories to protect ‘undisclosed information’, without necessitating any specific measure to be taken for the protection of ‘undisclosed information’, the nature of protection is left to the volition of the States. But it yields a slight insight into the question of whether to treat ‘undisclosed information’ as intellectual property or not, by stipulating that effective protection against unfair competition be ensured; thereby protection demands not an intellectual property-like treatment.⁵

Paragraph 2⁶ envisages protection for both natural and legal persons so long as they are the legitimate holders of the undisclosed information. It doesn’t employ the word “owner” unlike Article 16.1 for Trademark⁷, and Article 28.1 for Patent⁸, instead it employs the phrase, “*information lawfully within their control*”. Therefore, the natural or legal person need not be the owner but should lawfully have control over the undisclosed information, otherwise, it would be a misappropriation of information.

The act constituting misappropriation should be contrary to honest commercial practices, mere absence of consent would not entitle the lawful holder with the protection.⁹ Hence, the article does not provide for any absolute protection, but only against the condemnable acts.¹⁰

⁴ “*In the course of ensuring effective protection against unfair competition as provided in Article 10bis of the Paris Convention (1967), Members shall protect undisclosed information in accordance with paragraph 2 and data submitted to governments or governmental agencies in accordance with paragraph 3.*”

⁵ Markus Peter and Martin Michaelis, "Section 7: Protection of Undisclosed Information" in Peter-Tobias Stoll, Jan Busche & Katrin Arend (eds), *WTO—Trade-Related Aspects of Intellectual Property Rights* 636 (Martinus Nijhoff Publishers, 2009).

⁶ “*2. 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: (a) 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; (b) has commercial value because it is secret; and (c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret*”

⁷ “*The owner of a registered trademark shall have the exclusive right to prevent all third parties not having the owner’s consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion. In case of the use of an identical sign for identical goods or services, a likelihood of confusion shall be presumed. The rights described above shall not prejudice any existing prior rights, nor shall they affect the possibility of Members making rights available on the basis of use.*”

⁸ “*A patent shall confer on its owner the following exclusive rights: (a) where the subject matter of a patent is a product, to prevent third parties not having the owner’s consent from the acts of: making, using, offering for sale, selling, or importing for these purposes that product; (b) where the subject matter of a patent is a process, to prevent third parties not having the owner’s consent from the act of using the process, and from the acts of: using, offering for sale, selling, or importing for these purposes at least the product obtained directly by that process.*”

⁹ Markus Peter and Martin Michaelis, "Section 7: Protection of Undisclosed Information" in Peter-Tobias Stoll, Jan Busche & Katrin Arend (eds), *WTO—Trade-Related Aspects of Intellectual Property Rights* 635 (Martinus Nijhoff Publishers, 2009).

¹⁰ UNCTAD-ICTSD, *Resource Book on TRIPS and Development* 527, 528 (Cambridge University Press, 2005)

Therefore if any third party, discovers the ‘undisclosed information’ by way of reverse engineering¹¹, or independent creation/discovery, would avail no remedy to the holder of ‘undisclosed information’ as per Article 39.¹²

To preclude divergent views pertaining to what constitutes honest commercial practices, the Article is adjoined with a footnote guiding construction. The footnote provides an inclusive definition stating that, for the purpose of, this provision the manner contrary to honest commercial practices shall include practices such as breach of contract, breach of confidence and inducement to breach or acquisition of undisclosed information by third parties who knew or were grossly negligent in failing to know that such practices were employed in the acquisition of such information.¹³

Paragraph 2 delineates the three essential criteria to which any given information must conform, to get the benefit of the protection as envisaged under Article 39. The essential factors are

1. secrecy,
2. commercial value, and
3. reasonable steps for maintaining secrecy.

The secrecy imagined in this Article is relative¹⁴ and thus ‘undisclosed information’ must not normally be known or readily available. Even if another competitor possesses the undisclosed information and also safeguards it as confidential, it will still be protected provided that it is not readily available to most of the competitors in the market.¹⁵

¹¹ “Reverse engineering” is the study of a product to understand its functional aspects and underlying ideas. It starts with the known product and works backwards to analyze how the product operates or was made. [UNCTAD-ICTSD, Resource Book on TRIPS and Development 529 (Cambridge University Press, 2005)]

¹² Protection against unfair competition in the WTO TRIPS Agreement: the scope and prospects of Article 10bis of the Paris Convention for the Protection of Industrial Property / by Christian Riffel. 25 (Brill ; Boston : Nijhoff, 2016.)

¹³ Justin Malbon, Charles Lawson & Mark Davison, The WTO Agreement on Trade-Related Aspects of Intellectual Property Rights: A Commentary (Edward Elgar Publishing 2014), <https://www.elgaronline.com/display/9781845424435.00065.xml> (last accessed 26 May 2025).

¹⁴ UNCTAD-ICTSD, Resource Book on TRIPS and Development 527, 528 (Cambridge University Press, 2005)

¹⁵ *Ibid*

There should be a causal relationship between secrecy and commercial value, i.e. the holder of such information must reap some commercial advantage over others by virtue of secrecy¹⁶. The beneficiary must take reasonable steps to maintain secrecy. No need for employing costly countermeasures even steps like encryption of data, keys giving access to computerized information, and restricted access laboratories would suffice.¹⁷

Further, paragraph 3¹⁸ deals with situations where countries before granting approvals for the marketing of pharmaceuticals or agrochemical products require the applicant to submit evidence *vis-à-vis* the efficacy and safety of their products. This includes the submission of pre-clinical trial reports, clinical trial reports, and any other required information, for example, the Drugs and Cosmetics Act, of 1940 in India requires certain information for approvals.

To ensure data protection of this confidential information, and preclude any information leakage, countries implement Data Exclusivity mechanisms. But in developing countries there is a want of data exclusivity mechanisms, i.e. they allow the generic manufacturer to bank on the information of the first applicant provided that there is no patent.¹⁹

Paragraph 3 devises an obligation on the Signatories. It necessitates protection, of this highly confidential information submitted for procuring marketing approvals, against unfair commercial use and disclosure because these test data are usually not protected by Patent laws.²⁰

The paragraph does not stipulate any required paradigm of novelty concerning this confidential information.²¹ Whether it purports “novelty” in the sense understood under the Patent law or if

¹⁶ *Ibid*

¹⁷ Markus Peter and Martin Michaelis, "Section 7: Protection of Undisclosed Information" in Peter-Tobias Stoll, Jan Busche & Katrin Arend (eds), *WTO—Trade-Related Aspects of Intellectual Property Rights* 641 (Martinus Nijhoff Publishers, 2009).

¹⁸ “3. Members, when requiring, as a condition of approving the marketing of pharmaceutical or of agricultural chemical products which utilize new chemical entities, the submission of undisclosed test or other data, the origination of which involves a considerable effort, shall protect such data against unfair commercial use. In addition, Members shall protect such data against disclosure, except where necessary to protect the public, or unless steps are taken to ensure that the data are protected against unfair commercial use.”

¹⁹ Markus Peter and Martin Michaelis, "Section 7: Protection of Undisclosed Information" in Peter-Tobias Stoll, Jan Busche & Katrin Arend (eds), *WTO—Trade-Related Aspects of Intellectual Property Rights* 648 (Martinus Nijhoff Publishers, 2009).

²⁰ *Ibid*

²¹ Eric M. Solovy, *Protection of Test Data Under Article 39.3 of the TRIPS Agreement: Advancements and Challenges After 25+ Years of Interpretation and Application*, 43 NW. J. INT'L L. & BUS. 55 (2022), <https://scholarlycommons.law.northwestern.edu/njilb/vol43/iss1/2>.

it means that it has not been previously approved for marketing is unclear²²; but it provides that such pharmaceutical or agricultural products should utilize new chemical and not merely demonstrate a new usage. Given the fundamentally different objective of the Patent law, the novelty in the paragraph should be construed to mean that there has not been any prior application for marketing of such product.²³

Therefore, Article 39 of the TRIPS agreement imposes an obligation on the members to ensure the protection of 'undisclosed information', without stipulating any specific kind of such mechanism of protection.

Contemporary Position in India:

India had opposed the inclusion of Article 39 in the TRIPS agreement, reasoning that Trade Secrets cannot be considered to be Intellectual Property rights²⁴. This position can be traced to the British approach where 'trade secret' or 'undisclosed information' is not considered as property, whereas in the United States, it is equated with property.²⁵

The Indian Position can be understood from judicial decisions dealing with the multitude of statutes providing for either damages or penal punishments and also Judge-made law especially under the principles of equity.

Statutory Provisions:

The Indian Contract Act, of 1872 ("Contract Act") applies where there are contractual obligations in the form of non-disclosure agreements (NDA), or non-compete clauses. In India, these trade secrets disputes predominantly ensue from employer-employee conflicts,²⁶ wherein the non-compete clauses are considered void by Courts because of section 27 of the Indian

²² Markus Peter and Martin Michaelis, "Section 7: Protection of Undisclosed Information" in Peter-Tobias Stoll, Jan Busche & Katrin Arend (eds), WTO—Trade-Related Aspects of Intellectual Property Rights 648 (Martinus Nijhoff Publishers, 2009).

²³ Ibid

²⁴ Communication from India, *Standards and Principles Concerning the Availability, Scope and Use of Trade-Related Intellectual Property Rights*, GATT Doc. MTN.GNG/NG11/W/37 (July 10, 1989), https://www.wto.org/gatt_docs/english/sulpdf/92070115.pdf (last visited May 25, 2025)

²⁵ Jennifer E. Stuckey, *The Equitable Action for Breach of Confidence: Is Information Ever Property?*, 9 Sydney L. Rev. 402 (1981), <https://www.austlii.edu.au/cgi-bin/viewdoc/au/journals/SydLawRw/1981/6.html> (last visited May 25, 2025)

²⁶ Reddy, Prashant, The 'Other IP Right': Is it Time to Codify the Indian Law on Protection of Confidential Information? (August 31, 2018). 5 (1) Journal of National Law University Delhi 1-21, Available at SSRN: <https://ssrn.com/abstract=3683724>

Contract Act.²⁷ The precedents related to protection of 'trade secrets' are mostly evolved from the principles of contract law, which are discussed below.

The Bharatiya Nyay Sanhita, 2023²⁸ facilitates the protection of trade secrets with provisions connected with theft, criminal breach of trust, cheating, and dishonestly inducing delivery of property. Generally, criminal prosecution is instituted against former employees to exert pressure against joining any competitors of a former employer or with the intent to intimidate.²⁹

The Information Technology Act, of 2000 with provisions warranting prosecution for contraventions related to computer resources, systems, documents, etc enables if not totally at least minimally the protection of confidential information. Provisions for computer-related offences, for dishonestly receiving stolen computer resources or communication devices, for penalty for breach of confidentiality and privacy, and breach of lawful contract and other connected provisions facilitate the protection of trade secrets or confidential information.

Indian Judicial Approach:

Given the absence of any specific legislation on the subject of trade secrets, the Indian Judiciary has evolved principles for the protection of Trade Secrets.

In *American Express Bank Ltd v. Priya Puri*³⁰ the court has defined trade secrets by referring to Lord Staughton's words³¹ as follows:

"a trade secret is information which, if disclosed to a competitor, would be liable to cause real or significant harm to the owner of the secret. I would add first, that it must be information used in a trade or business, and secondly that the owner must limit the dissemination of it or at least not encourage or permit widespread publication."

Breach of Contract:

Majorly the employer-employee disputes result from contracts containing both, or either a non-

²⁷ *Electrosteel Castings Ltd v Saw Pipes Ltd & Ors* (2005) 1 CHN 612

²⁸ Earlier the *Indian Penal Code*, No. 45 of 1860 (India).

²⁹ Prashant Reddy, *The "Other IP Right": Is It Time to Codify the Indian Law on Protection of Confidential Information?*, 5 *Journal of National Law University Delhi* 1, 16 (2018), <https://ssrn.com/abstract=3683724>.

³⁰ (2006) 3 LLN 217; (2006) 110 FLR 1061

³¹ *Lansing Linde Ltd v. Kerr*, (1991) 1 All E.R 418

compete clause or a non-disclosure clause. Where there is no express clause, the Court have read in an implied common law duty of fidelity.³² The position of law concerning non-compete clauses is slightly inconsistent with the position of English law, and also there is inconsistency within the Indian position itself.³³

Section 27³⁴ of the Contract Act establishes the rule i.e. agreements in restraint of trade are void, except where the agreement is for sell of business goodwill. The Supreme Court in *Niranjan Shankar Golikari V. the Century Spinning & Mfg Co*,³⁵ upheld a negative covenant restricting the employee from joining the competitor on the ground that a negative covenant operating during the course of the contract will not amount to restraint of trade.

In this case, the employee was distinctly trained in the machineries of, and by, the employer and the term of employment was five years but the employee resigned within 2 years. The said contract of employment had both trade secrecy and non-compete clauses. The court restrained the employee from joining the competitor till the end of the original term of the contract. The Court made an assumption that section 27 operates only after the original term of the contract ends and not immediately on its termination.³⁶

Subsequently, the Hon'ble Supreme Court in *Superintendence Company of India v. Krishna Murgai*³⁷, distinguished the Golikari judgment. It distinguished between negative covenants operating during the term of employment and those operating after employment. It ultimately reasoned that the former is good while the latter is void in the eyes of law.

There is incongruity in the views enunciated by various High Courts while declining or granting injunctive relief restraining former employees from joining the competitors and this

³² Bombay Dyeing and Manufacturing Co Ltd v Mehar Karan Singh (2010) 7 Mah LJ 48

³³ Reddy, Prashant, The 'Other IP Right': Is it Time to Codify the Indian Law on Protection of Confidential Information? (August 31, 2018). 5 (1) Journal of National Law University Delhi 1-21, Available at SSRN: <https://ssrn.com/abstract=3683724>

³⁴ "Every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.

Exception 1. Saving of agreement not to carry on business of which good-will is sold. One who sells the good-will of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the good-will from him, carries on a like business therein, provided that such limits appear to the Court reasonable, regard being had to the nature of the business."

³⁵ 1967 AIR SC 1098.

³⁶ Reddy, Prashant, The 'Other IP Right': Is it Time to Codify the Indian Law on Protection of Confidential Information? (August 31, 2018). 5 (1) Journal of National Law University Delhi 1-21, Available at SSRN: <https://ssrn.com/abstract=3683724>

³⁷ 1980 AIR 1717.

Jurisprudential split needs to be addressed legislatively.³⁸

In *V.M Deshpande V. Arvind Mills Company Ltd*³⁹, the court instanced whether an employee can be restrained from using the skills which he gathers during the course of employment. The court referred to Lord Shaw's⁴⁰ observations where he observed that "[A] man's aptitudes, his skill, his dexterity, his manual or mental ability-all those things which in sound philosophical language are not objective, but subjective-they may and they ought not to be relinquished by a servant; they are not his master's property; they are his own property"

In the absence of a contract, courts have allowed relief based on the **equitable principle of breach of confidence**.⁴¹ The Bombay High Court had granted an interim injunction on the ground of breach of confidence and copyright infringement in the *Zee Telefilms Case*⁴² where the plaintiff had shared with the defendant a detailed script like note stating the plot, etc of the story titled "*Krish Kanhaiya*". The parties failed to reach a contract and subsequently, the defendant was about to launch a series titled "Kanhaiya" similar to the note earlier communicated by the plaintiff.

The court in *Zee Telefilms* reiterated upon the **four-fold test** for seeking equitable relief for breach of confidence, which states that the plaintiff had

- (i) to ascertain clearly what was the information he was relying on;
- (ii) to show that information was handed over in the circumstance of confidence;
- (iii) information is of the nature that could be treated as confidential; and
- (iv) such information is used without his license or there must be a threat to use it.

While differentiating between the concept of copyright and trade secrets or confidential information, the Bombay High Court in *Wadhwa's Case* opined that an 'idea' in particular

³⁸ Reddy, Prashant, The 'Other IP Right': Is it Time to Codify the Indian Law on Protection of Confidential Information? (August 31, 2018). 5 (1) Journal of National Law University Delhi 1-21, Available at SSRN: <https://ssrn.com/abstract=3683724>

³⁹ (1946)48BOMLR90

⁴⁰ *Herbert Morris Ltd. v. Saxelby*, [1916] 1 A.C. 688 (H.L.)

⁴¹ Reddy, Prashant, The 'Other IP Right': Is it Time to Codify the Indian Law on Protection of Confidential Information? (August 31, 2018). 5 (1) Journal of National Law University Delhi 1-21, Available at SSRN: <https://ssrn.com/abstract=3683724>

⁴² *Zee Telefilms Ltd & Film & Others v Sundial Communications Pvt Ltd* (2003) 3 Mah LJ 695

cannot be the subject matter of copyright infringement action, but it may be the subject matter of breach of confidentiality action and confidence law is perhaps wider than copyright law.⁴³

This duty of confidence also extends to third persons, as in the case of *Vestergaard Frandsen A/s & Ors v M Sivasamy & Ors*⁴⁴ the court issued an ex-parte interim injunction against all the defendants, as some defendants had received confidential information from other defendants who were former employees of the plaintiff.

Trade Secrets and freedom of expression:

In situations where the trade secrets are at loggerheads with freedom of speech and expression, the court has observed that the larger public interest justifies the publication of the confidential material, and thus had rejected to grant an injunction.

In *Petronet LNG Ltd v Indian Petro Group & Anr*⁴⁵, the Plaintiff was partly owned by the Public Sector Undertaking having engaged in importing and selling Liquified Natural Gas (LNG).

The defendant, a news website concerning the Oil and Gas Industry. The Plaintiff sought an injunction alleging that the defendant had published confidential information about the ongoing business negotiations, claiming that the publication of such confidential information prejudicially affects the Plaintiff's market share. Also contended that its right to privacy guaranteed under the constitution is breached.

The Court observed that granting an injunction would erode the press freedom and the right of the general public to be informed about the functioning of an entity where a 50% stake is held by the PSUs. When a corporate entity is involved, the news cannot be prevented from being published except where it pertains to information so sensitive in nature that the business or its very existence would be jeopardized.

The court rejected the right to privacy contention observing that, the plaintiff is not a natural person (though in certain instances, those rights are also available for natural persons) and that the rights under the constitution can be enforced only against the state and its instrumentalities.

⁴³ Tarun Wadhwa v. Saregama India Ltd (2021) 88 PTC 423

⁴⁴ CS (OS) No. 599 of 2007 before the High Court of Delhi.

⁴⁵ (2009) 158 DLT 759.

Trade secret and Right to Information Act, 2005 (“RTI Act”):

The RTI Act is enacted to ensure transparency in the functioning of public authority in India. While getting approvals for intellectual property, certain confidential information is required to be submitted to the regulatory authorities. Therefore, this information is at the peril of being disclosed by the channel of the RTI Act. The RTI Act also incorporates an exemption under section 8(1)(d) exempting the Public Authority from the obligation of disclosing such confidential information like commercial confidence, trade secrets or intellectual property.

Section 8(2) of the RTI Act being a non-obstante clause mandates that if public interest outweighs the protection of information, then the authority may permit access to such information. Section 8(3) provides that any information concerning any matter, event, or occurrence that has transpired twenty years before the date of application seeking information, in such cases, the authority shall provide such information. These provisions are doubtful because there is no upper limit on the period for which a trade secret shall remain secret or confidential. Therefore, clarification as to whether these provisions apply to trade secrets or not is needed.

Trade Secrets and Digital Personal Data Protection Act, 2023 (“Act of 2023”):

The scope of the Act of 2023 is narrow which is evident from the preamble of the Act. It clarifies that the Act is enacted with two primary objectives, one, to recognize the right of the individuals to protect their personal data, and second, to provide for processing of personal data for lawful purposes.

The Data is defined under section 2(h), as *“a representation of information, facts, concepts, opinions or instructions in a manner suitable for communication, interpretation or processing by human beings or by automated means.”*

Section 2(j) first defines the term “Data Principal” to mean individual to whom the personal data relates and further, it clarifies that if such an individual is a child or person with a disability then the parents or lawful guardians will be considered as the Data Principal. Therefore, the Act is solely concerned with the personal data of natural persons and not with artificial persons.

Section 2(u) defines “Personal Data Breach” as *“any unauthorized processing of personal data or accidental disclosure, acquisition, sharing, use, alteration, destruction or loss of access to*

personal data, that compromises the confidentiality, integrity or availability of personal data;”. Therefore, at the individual level, a Data Principal is empowered to protect his confidential information, from any disclosure, acquisition, sharing, use, alteration, destruction or loss and from being used without his consent.

The interplay between of Digital Personal Data Protection Act, 2023 and the subject of Trade Secrets/Confidential Information is at the nascent stage, as there is a want of judicial interpretation to elucidate upon the scope and application of this Act.

Previous Legislative Endeavour:

India had opposed⁴⁶the inclusion of Trade Secrets in the TRIPS Agreement. As India unequivocally refuted the speculations of treating Trade Secrets as a form of Intellectual Property because there is quid pro quo in Intellectual Property i.e. there is public disclosure whereas Trade Secrets inherently are based on the idea of secrecy and confidentiality. As trade secrets cannot be treated as a form of intellectual property they are beyond the realms of Agreement related to Trade Related aspects of intellectual property.

According to the TRIPS Agreement, India amended its existing laws with respect to Intellectual Property, but no specific amendments for the protection of trade secrets were made. Therefore, it continued being protected by way of equity, penal law provisions, breach of confidentiality or common law principles.

In 2008, the Department of Science and Technology released the National Innovation Bill with the objective of consolidating the law of confidentiality for safeguarding confidential information, trade secrets, and innovation.⁴⁷It was significantly influenced by the United States law primarily the definition of confidential information, whereby confidential information having actual commercial value and not negative knowledge was protected.⁴⁸

⁴⁶ Communication from India, *Standards and Principles Concerning the Availability, Scope and Use of Trade-Related Intellectual Property Rights*, GATT Doc. MTN.GNG/NG11/W/37 (July 10, 1989), https://www.wto.org/gatt_docs/english/sulpdf/92070115.pdf (last visited May 25, 2025)

⁴⁷ Patil, Gouramma, Critical Analysis of 'The National Innovation (Draft) Act, 2008' (March 26, 2013). Available at SSRN: <https://ssrn.com/abstract=2239718> or <http://dx.doi.org/10.2139/ssrn.2239718>

⁴⁸ 22nd Law Commission of India, *Trade Secrets and Economic Espionage*, Report No. 289, at 123 (Mar. 2024), <https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2024/03/202403061982318841.pdf> (last visited May 25, 2025).

Independent creation was recognized as an exception to misappropriation and no specific exception for reverse engineering was made in the Bill, but under many jurisdictions ‘reverse engineering’ is permissible and is recognized as an exception.⁴⁹ But the Bill was never tabled in Parliament.

In 2016, India released a joint statement with the United States, affirming the commitment to maintain a strong protection mechanism for trade secrets and other intellectual property rights for fostering innovation and investment, while also sustaining the public interest.⁵⁰ India has actively been on the watch list of the US Trade Representative, especially the Special 301 Reports released by the Office of US Trade Representative.

The National Intellectual Property Rights Policy⁵¹, 2016 is announced by the Department of Industrial Policy and Promotion (DIPP). This policy is laid down for having strong IP laws and it sets out a specific priority for the protection of trade secrets.⁵²

The 161st Report⁵³ of the Department Related Parliamentary Standing Committee on Commerce reiterated that the present law on the protection of trade secrets lacks clarity and it is imperative to enact separate statutes for the protection of trade secrets in the face of rising frauds and misappropriation in the digital world.

The Department of Legal Affairs and Legislative Department via letter dated October 10th 2017 forwarded the subject matter for thorough determination by the Law Commission, and to recommend the possibility of the Trade Secrets Protection Act, and the Economic Espionage Act.

⁴⁹ UNCTAD–ICTSD, *Resource Book on TRIPS and Development* 529 (Cambridge Univ. Press 2005), <https://www.cambridge.org/9780521850445>.

⁵⁰ *India and United States Joint Statement on the Trade Policy Forum*, Office of the U.S. Trade Representative (Oct. 20, 2016), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2016/october/india-and-united-states-joint>.

⁵¹ Government of India, Department of Industrial Policy & Promotion, *National Intellectual Property Rights Policy* (2016), https://dpiit.gov.in/sites/default/files/National_IPR_Policy_English.pdf (last visited May 25, 2025).

⁵² Government of India, Department of Industrial Policy & Promotion, *National Intellectual Property Rights Policy* ¶ 3.8.4 (2016), https://dpiit.gov.in/sites/default/files/National_IPR_Policy_English.pdf (last visited May 25, 2025).

⁵³ 161st Report of Department Related Parliamentary Standing Committee on Commerce, July 2021. Available at https://files.lbr.cloud/public/2021-07/161_2021_7_15.pdf?VersionId=S01fCQEC5DzDqKNymsGgxa16YXmJbUwM (Last accessed on 16th May, 2025).

Analysis of the Bill:

The Law Commission recommended the enactment of **The Protection of Trade Secrets Bill, 2024**. It contains 13 sections divided into four chapters. The commission opined that though Article 39 of the TRIPS Agreement is included under the head of intellectual property it will not ipso facto accord intellectual property-like protection, and envisaged to protect trade secrets on the principle of unfair competition.

Section 2(f) defines the concept of “Trade Secret”. It provides for a broad definition similar to Article 39 of the TRIPS Agreement, therefore leaving an expanse for Judicial Interpretation. The essential criteria of Article 39 of the TRIPS Agreement for information to become trade secrets/undisclosed information are,

1. Secrecy;
2. Commercial Value; and
3. Reasonable Steps for protection of such information.

The law commission incorporated these three along with one additional criterion under section 2(f), i.e. disclosure of such information can cause damage to the information holder.

Section 2(d) broadly defines “misappropriation” to mean the acquisition of trade secrets without the consent of the holder of trade secrets or any other conduct that is contrary to honest commercial practices. Practices like independent discovery, reverse engineering, etc are considered to be honest commercial practices.

Chapter II deals with the Acquisition, Use and Disclosure of Trade Secrets. The rights of the Holder of the Trade Secrets are enlisted under section 3, such as the right

- i. to use;
- ii. to disclose such trade secrets, including the licensing of trade secrets; and
- iii. to institute proceedings against misappropriation including prevention of further misappropriation and disclosure.

These rights are subject to section 27 of the Contract Act. Section 4 recognizes exceptions like independent discovery, reverse engineering, disassembly or testing, or acquisition by any other practice consistent with honest commercial practices. The concept of ‘honesty’ being relative considering time and society, defining it conclusively is a challenge.⁵⁴ Also the acquisition of trade secrets is lawful when permitted by law or a contract.

Section 5 is a whistle-blower protection. It provides that the act will not amount to misappropriation if such act is done for exposing professional or other misconduct, or unlawful act, or for protection of public interest.

Section 6 provides for compulsory licensing in situations of national emergency, security, health emergency⁵⁵, or extreme urgency involving public interest. The trade secret may be compulsorily licensed in favor of third parties or the Government. This section also imposes an obligation, on such parties who got access to trade secrets by virtue of compulsory licensing, of not disclosing such trade secrets and maintaining confidentiality.

Chapter III deals with legal proceedings. Section 7 enumerates the kind of orders that the court can grant, such as

- i. Injunction including *ex-parte* and interlocutory;
- ii. Damages or accounts of profits;
- iii. Order for surrender and/or destruction;
- iv. Order for recall, withdrawal, permanent removal, delivery up; and
- v. Order as to costs.

Section 8 provides for a court in which a suit for misappropriation is to be filed. The aggrieved party shall file a suit in commercial courts. Section 9 recognizes the concept of “Confidentiality

⁵⁴ UNCTAD–ICTSD, *Resource Book on TRIPS and Development* (Cambridge Univ. Press 2005), <https://www.cambridge.org/9780521850445>.

⁵⁵ *World Trade Organization*, Doha Ministerial Declaration on the TRIPS Agreement and Public Health, WT/MIN(01)/DEC/2 (Nov. 20, 2001), adopted Nov. 14, 2001, https://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_trips_e.htm (last visited May 25, 2025).

Clubs". These are generally employed in competition law or intellectual property proceedings to ensure the protection of sensitive information.⁵⁶

Section 10 provides for remedies in case there are groundless threats of legal proceedings, whereby the aggrieved person may approach courts for seeking declaratory decree that such information is not trade secret and can also seek injunction against such threats and damages if any.

Chapter IV deals with miscellaneous provisions empowering the High Court under section 11 and the Central Government under section 12 to make rules regarding the implementation of the Act. Lastly, section 13 is a 'without prejudice' provision providing that this Act shall be in addition to and not in derogation of other available remedies.

Conclusion:

Even the Law Commission of India has confirmed the imminent need to enact specific legislation for the protection of trade secrets in India. The sensitive approach of a company towards the protection of its trade secrets is evident from the fact that in 1977 *Coca-Cola* was asked by the Indian Government to hand over the concentrate formula of its famous soft drink. Instead of disclosing it to the Government, the firm decided to withdraw from the Indian Market, and only a decade later did they enter the Indian market again.⁵⁷

The existing laws considerably enable the protection of intellectual property but the need to protect trade secrets is significant having regard to the information age, where information is capital. Though, a process may be protected as a patent, but the temperature at which the process is to be carried cannot be patented but can be kept confidential with the aid of trade secrets protection.⁵⁸

The Bill proposed by the Law Commission maintains a delicate balance between individual interest and the public interest. The Bill provisions for instruments like compulsory licensing, reverse engineering, and independent creation as exceptions. Even a person getting access to trade secrets as a result of compulsory licensing is obligated with a duty to maintain

⁵⁶ *Amica Financial Technologies Pvt. Ltd v. Hip Bar Pvt. Ltd.* C.S. No 117 of 2021

⁵⁷ Sanjoy Hazarika, 'Coke Proposal Challenged in India' (New York Times, 5 February 1989) Available at <http://www.nytimes.com/1989/02/06/business/international-report-coke-proposal-challenged-in-india.html>

⁵⁸ 22nd Law Commission of India, *Trade Secrets and Economic Espionage*, Report No. 289, at 174 (Mar. 2024),

confidentiality, therefore balancing public interest but to the extent where individual interest is not absolutely extinguished.

The rise of India as a global exporter of defense⁵⁹ also calls for an enactment of trade secrets protection law, to protect the confidential information related to the production of these arms by the domestic defense public sector undertakings. Therefore, it is hoped that soon the Indian Parliament will apply its mind to the bill proposed by the law commission in its 289th Report.

⁵⁹ <https://www.internationalaffairs.org.au/australianoutlook/indias-defence-exports-and-global-power-aspirations/>