ANTITRUST REGULATION AND THE PARADOX OF TRADE SECRETS: BALANCING INNOVATION, MARKET POWER, AND COMPETITIVE FAIRNESS (FOCUSED ON NATIONAL AND INTERNATIONAL PERSPECTIVES WITH EMPHASIS ON THE ROLE OF CCI, INDIAN MARKETS, AND REAL-LIFE CASE LAWS)

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ABSTRACT

Trade secrets are crucial to maintaining a competitive edge in the global economy, encompassing confidential information that provides economic benefits due to its secrecy. They include formulas, business strategies, and technical processes, and their protection is essential for business growth and innovation. The protection of trade secrets is indefinite as long as confidentiality is maintained, but common law provides limited safeguards, necessitating robust legislative intervention. The TRIPS Agreement and Article 39 set the framework for protecting undisclosed information, promoting fair competition, and enabling businesses to prevent unauthorized use of proprietary knowledge. My paper will reflect the integration of trade secret protection is vital across industries, including manufacturing, research, and service sectors, fostering innovation and securing business value. However, the dichotomy between intellectual property rights (IPR) and competition law creates tensions, as IPR can potentially stifle competition. To resolve this, clear trade secret laws, such as those in the United States under the DTSA, are crucial for ensuring fair practices while protecting business interests. India, in the era of globalization, must strengthen its trade secret laws to stay competitive and encourage innovation.

Keywords: Trade secrets, intellectual property rights, TRIPS Agreement, competition law, business innovation, legislative protection, globalization, United States, Defend Trade Secrets Act, India.

Overview of Trade Secrets and Their Role in Market Dynamics[1]

A trade secret is legally characterized as any proprietary information that remains undisclosed within the pertinent business sector or the public domain, confers a tangible economic advantage upon its holder solely due to its confidentiality rather than its inherent worth, and is subject to diligent efforts to safeguard its secrecy. The protection of a trade secret extends indefinitely, contingent upon the continued maintenance of its confidentiality. The ambit of trade secret protection is expansive, encompassing a wide array of confidential business information, including but not limited to formulas, patterns, devices, or intricate compilations of data that are instrumental to business operations over a sustained period. Frequently, trade secrets pertain to technical knowledge pivotal to manufacturing processes, commercial strategies encompassing marketing methodologies, export mechanisms, sales tactics, bookkeeping procedures, proprietary business management systems, and specialized software designed to facilitate operational efficiencies. Additionally, trade secrets may extend to scientific, technical, and financial data, including business plans, operational frameworks, customer databases, preferred supplier networks, product specifications, proprietary recipes, pricing structures for critical raw materials, test reports, engineering designs, and proprietary formulas. Essentially, a trade secret is a commercially valuable asset safeguarded by an entity as confidential information, affording a competitive edge within the industry. Whether derived through exhaustive and capital-intensive research, decades of industry experience, or an extraordinary innovation, trade secrets constitute a repository of knowledge that enables enterprises to optimize performance, enhance efficiency, and reduce costs. Such proprietary knowledge may manifest in novel manufacturing techniques, refined formulations, or strategic intelligence regarding key supply chains and distribution channels. The strategic utility of trade secrets may endure over an extended period, as exemplified by proprietary recipes and chemical formulations, or be transient, as in the case of marketing research findings, pricing structures, and bidding strategies. While common law affords a degree of protection to trade secrets, its efficacy remains inadequate, necessitating legislative intervention for robust protection. The TRIPS Agreement[2], under Part II, Section 7,

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[1] WIPO - World Intellectual Property Organization, available at: https://www.wipo.int/documents/d/trade-secrets/docs-overview-country-sheets-india-final.pdf

[2] WIPO - World Intellectual Property Organization, available at: https://www.wipo.int/edocs/pubdocs/en/wipo_pub_464.pdf (4th Feb 2025)

elucidates the framework for trade secret protection, wherein Article 39 mandates Member States to ensure the safeguarding of undisclosed information against unfair competition pursuant to Article 10 of the Paris Convention (1967)[3]. It further stipulates that individuals and corporate entities shall possess the right to prevent unauthorized disclosure, acquisition, or utilization of confidential information under their lawful control, provided that such information is not widely known within the relevant industry, derives economic value from its secrecy, and has been preserved through reasonable security measures. Moreover, in instances where regulatory approval necessitates the submission of undisclosed scientific data, particularly concerning pharmaceutical and agricultural chemical products incorporating novel chemical entities, Member States are obligated to shield such data from unfair commercial exploitation and unauthorized disclosure, barring circumstances wherein disclosure is imperative for public welfare or subject to safeguards against commercial misuse. Unlike jurisdictions such as the United States, Western Europe, Singapore, and Jordan, India has yet to promulgate a dedicated statute governing trade secret protection, relying instead on common law principles rooted in contractual jurisprudence. The legal framework in India does not prescribe a formal registration requirement for trade secrets, emphasizing instead the necessity of confidentiality, commercial viability, and the implementation of reasonable protective measures such as restricted access, confidentiality agreements, and non-disclosure or non-compete clauses. The scope of protection afforded to trade secrets is inherently narrower than that conferred by patents or copyrights, as the unauthorized replication of publicly available information does not constitute an infringement under trade secret jurisprudence. Fundamentally, trade secrets encapsulate a diverse spectrum of proprietary knowledge, ranging from technical methodologies and innovative processes to strategic business insights and operational frameworks, all of which are indispensable assets in an increasingly competitive and knowledge-driven economic landscape.

[4]Objectives of Trade Secrets in a Competitive Economy

Practically speaking, any form of information may be safeguarded under the ambit of trade secret protection, provided it satisfies three fundamental criteria: it must remain undisclosed within the

[3] Paris Convention (1967), art 10.

[4] Trade secret protection and product market dynamics available at: https://www.sciencedirect.com/science/article/abs/pii/S0929119923001190 (14th Feb 2025)

relevant industry, possess intrinsic commercial value as a direct consequence of its confidentiality, and be subject to reasonable precautionary measures to preserve its secrecy. A trade secret may also consist of a composite assembly of individual elements, each of which, in isolation, may be publicly known, but whose unique combination—maintained in secrecy—confers a distinct competitive advantage, such as an undisclosed manufacturing technique for synthesizing a specific formulation of widely recognized chemical compounds. Consequently, trade secrets transcend sectoral boundaries, finding application not only in industrial and technological enterprises engaged in the production of goods but also within service-oriented domains, including but not limited to the hospitality industry (e.g., proprietary culinary recipes), automobile maintenance services (e.g., exclusive polishing techniques), and retail establishments (e.g., customized advertising methodologies designed to enhance customer retention). As an invaluable instrument for securing and sustaining a competitive edge, trade secret protection is indispensable to businesses of all magnitudes. Confidential information need not always be documented in tangible form; it can reside within an individual's mental repository and be verbally conveyed as necessary. In modern commerce, valuable information manifests as texts, data, schematics, codes, and multimedia, often stored tangibly. Digital storage's rise complicates trade secret protection, demanding sophisticated cybersecurity measures. Intriguingly, ostensibly trivial data—like failed pharmaceutical trials, ineffective marketing strategies, or unsuccessful product enhancements—may paradoxically hold immense strategic value, underscoring the nuanced complexities of safeguarding digital trade secrets. Such "negative information" holds significant strategic value, as knowledge of prior failures enables competitors to circumvent redundant efforts, thereby conserving substantial time, capital, and resources.

Unlike patent law, which necessitates formal registration and examination, trade secret protection operates without procedural formalities, akin to copyright law. Consequently, trade secrets enjoy immediate and automatic protection in jurisdictions where they fulfill the requisite conditions, without the need for statutory registration or governmental oversight. While most nations adhere to the fundamental triad of requirements—secrecy, commercial value, and proactive safeguarding measures—whether a specific piece of information qualifies as a trade secret is ultimately contingent upon the governing national legislation of the respective jurisdiction. At the domestic level, trade secrets may be safeguarded through common law principles, statutory enactments, or a combination thereof. In certain legal systems, trade secrets are primarily protected under the doctrine of confidentiality, whereas other jurisdictions regulate them within the framework of unfair competition statutes or dedicated trade secret legislations. The United States exemplifies a dual-tiered system wherein each state administers its own trade secret laws, supplemented by a federal statute that enables aggrieved parties to initiate legal action for misappropriation in federal courts.

Contractual instruments—such as confidentiality agreements, non-disclosure agreements (NDAs), and restrictive covenants—serve as indispensable safeguards for preserving trade secret integrity, underscoring contract law's centrality within trade secret jurisprudence. Internationally, trade secret protection advanced significantly with the adoption of the TRIPS Agreement, obligating WTO member states to implement minimum standards for safeguarding undisclosed information. Although TRIPS does not exhaustively codify trade secret law, it establishes foundational principles widely integrated into national legal regimes. To warrant protection, trade secrets must embody secrecy, derive economic value from confidentiality, and be preserved through reasonable protective measures. Perpetual in duration, this protection endures unless public disclosure occurs. In today's competitive economy, information and innovation are paramount; while large corporations leverage expansive IP portfolios, resource-limited SMEs depend heavily on trade secrets to cost-effectively secure proprietary knowledge and sustain market advantage.

Overview of Antitrust laws in a Market-Driven Economy[5]

The Competition Act, 2002 (as amended) embodies the principles of contemporary competition law, striving to cultivate a competitive marketplace while safeguarding Indian markets from anti-competitive conduct by enterprises. It categorically prohibits anti-competitive agreements, the misuse of dominant market positions, and regulates mergers, amalgamations, and acquisitions to prevent any potential distortion of market competition in India. The Act nullifies any agreement that has, or is likely to have, a significant adverse impact on market competition. Such agreements may take the form of horizontal arrangements, involving enterprises, individuals, or associations engaged in identical or comparable trade or service activities, or

[5] Antitrust laws ,available at: Competition Commission of India, Government of India (14th Feb,2025)

vertical arrangements, where entities operate at distinct stages within the production or supply chain across different market levels. A prime example of a horizontal agreement is cartelization, which is deemed to have a substantial negative effect on competition, as per Section 3 of the Act. The legislation recognizes agreements as encompassing any form of arrangement, understanding, or coordinated conduct, whether documented or otherwise. Anti-competitive agreements are primarily bifurcated into horizontal and vertical agreements. Horizontal agreements, as outlined in Section 3(3)[6], pertain to collusion among enterprises engaged in identical or similar trades, where such concerted actions are presumed to distort market dynamics detrimentally and are thus rendered void. These agreements, however, are open to rebuttal. Meanwhile, vertical agreements, as enumerated in Section 3(4), occur between enterprises operating at different echelons of the production and distribution network, encompassing practices such as tie-in arrangements, exclusive supply and distribution agreements, refusal to deal, and resale price maintenance. While the imposition of reasonable conditions for the protection of intellectual property rights, as provided under Section 3(5), is generally not considered a contravention of the Act, such conditions remain subject to scrutiny by the Competition Commission to assess their necessity and reasonableness in safeguarding intellectual property. Furthermore, the Act addresses the abuse of dominant market positions under Section 4, where dominance signifies an enterprise's ability to operate autonomously, undeterred by competitive forces, or to influence its competitors and consumers in its favor.

The Dichotomy: Innovation Protection vs. Competitive Fairness[7]

Competition law and Intellectual Property Rights (IPR), though distinct, intertwine in pursuit of consumer welfare and resource efficiency. While IPR bestows exclusivity to incentivize innovation, competition law dismantles market barriers. This inherent tension emerges when IPR is exploited to stifle competition, disrupting market equilibrium and subverting free-market principles. One such instance arises in the licensing of intellectual property to generic manufacturers, wherein license holders impose restrictive conditions that inadvertently stifle competition rather than fostering innovation. Territorial exclusivity, a contentious licensing practice, exemplifies this conflict. In instances where patents necessitate significant capital

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[6] The Competition Act, 2002 (Act No. 12 of 2003)

[7] Nipun Kumar, The Dichotomy Between Competition Law and IPR,By CBCL 2021

investment, licensees may demand competitive insulation as a safeguard against market risks. To accommodate this, licensors often grant exclusive rights within a defined geographic territory, refraining from licensing other entities within that jurisdiction. This effectively bestows monopolistic control over a market segment, curtailing competition and potentially contravening antitrust principles. The Court deemed open exclusive licenses permissible while holding that absolute territorial protection artificially fragments markets and violates competition law. Subsequent jurisprudence, including cases such as Coditel v. CinéVog Films and Pronuptia de Paris v. Schillgalis[8], has nuanced this stance, recognizing circumstances where territorial exclusivity is justified. The permissibility of such licenses depends on a nuanced factual analysis of their potential to adversely affect competition. A pivotal intersection of IPR and antitrust law arises with technology pools, where multiple entities amalgamate technological assets into a unified licensing mechanism accessible to contributors and third parties. While these pools enhance efficiency by simplifying licensing and curbing transactional costs, they risk anti-competitive outcomes by creating de facto industry standards that hinder technological innovation. The European Commission's Technology Transfer Guidelines highlight that while complementary technology pools generally promote competition, substitute technology pools may induce price-fixing collusion through inflated royalty rates.

Crucially, IPR cannot shield entities from antitrust scrutiny, ensuring innovation aligns with fair market principles. In this context, the interplay between trade secrets and antitrust law assumes significant relevance, as both impact market dynamics, innovation trajectories, and competitive equilibriums. The nuanced methodology for assessing this intersection necessitates an integrated evaluation of legal doctrines, economic ramifications, and policy considerations to ensure a harmonious coexistence of trade secret protections with the imperatives of competition law.

Research Scope and Methodology

The research delves into the intricate intersection of intellectual property rights and competition law, analyzing their impact on market dynamics, innovation, and fair competition. The scope encompasses global antitrust frameworks, judicial interpretations, and policy developments, with a particular focus on territorial exclusivity, technology pools, and trade secret protections. A

[8] CinéVog Films & Anr. v. Pronuptia de Paris, [1988] 1 All ER 59 (HL)

doctrinal methodology is employed, drawing upon statutes, case law, scholarly articles, and competition commission reports to critically evaluate legal conflicts and synergies. Comparative analysis is undertaken to examine international best practices and judicial trends. The study also incorporates an economic perspective, assessing the practical implications of IPR restrictions on market competition. Ultimately, the research aims to provide a comprehensive framework for harmonizing intellectual property protections with antitrust regulations.

Protection of Proprietary Confidentiality in Trade Secrets: Digital and Economy[9]

Trade secrets have emerged as the preferred method of intellectual property (IP) protection for innovative firms, with global legal and economic trends indicating that their use is surpassing that of patents, as nations like the EU, US, and Japan implement significant trade secret policy reforms. The economic impact of trade secret theft or misappropriation is substantial, estimated at 1-3% of GDP in advanced industrial economies (Passman, 2014). Rooted in the broader framework of IP law, the primary economic rationale for intellectual property rights (IPRs) lies in their ability to incentivize innovation—granting exclusive rights to innovators allows them to recover their investments and drive continuous technological advancement. While patents and copyrights adhere to this incentive model through mandatory disclosure and finite protection periods, trade secrets diverge in two key aspects: the absence of disclosure and an indefinite duration of protection, leading to concerns regarding restricted knowledge dissemination, hindered labor mobility, and potential constraints on competition (Hettinger, 1989). Despite these concerns, trade secrets generally offer weaker legal protection compared to patents, as they do not shield against reverse engineering or independent discovery, thereby striking a balance between safeguarding innovation and fostering competitive market dynamics. Interestingly, contemporary economic research suggests that firms increasingly favor trade secrets over patents, particularly in manufacturing, as evidenced by Cohen, Nelson & Walsh's (2000)[10] study

[9] Trade secrets and digital objects, available at:WIPO Guide to Trade Secrets and Innovation - Part VII: Trade secrets and digital objects (16th February 2025)

[10] Cohen, W. M., Nelson, R. R., Walsh, J. P., Protecting their intellectual assets: Appropriability conditions and why U.S. manufacturing firms patent(or not),Working Paper No.7552 (2000)

of US firms, which highlighted that secrecy and lead-time advantages were preferred over formal patent protections. This paradigm shift underscores the growing prominence of trade secrets in modern innovation policies and corporate strategies. Moreover, in the digital age, where proprietary knowledge is often encapsulated in electronic formats, trade secret protection has become particularly vital for securing valuable "digital objects"—ranging from algorithms and programming code to confidential technical methodologies stored in digital files. The evolving landscape of intellectual property underscores the necessity for robust IT security measures, ensuring that sensitive digital trade secrets remain safeguarded against unauthorized access and misappropriation, thereby reinforcing their role as a cornerstone of contemporary intellectual property protection.

While digital formats amplify efficiency in storage, replication, computation, and transmission, they concurrently heighten risks of unauthorized disclosure, theft, and misuse due to effortless copying and sharing. For trade secret protection, digital objects must possess commercial value through secrecy, be confined to a select group, and be shielded by reasonable safeguards like confidentiality agreements. The challenges surrounding trade secret claims intensify when data collection occurs outside contractual privity, particularly in consumer transactions involving multiple intermediaries. For example, within the payment processing ecosystem, a consumer may hold a contractual relationship with the issuing bank, but not necessarily with merchants, point-of-sale vendors, or processors like VISA. In such cases, multiple entities may stake a claim to trade secret protection over discrete data components, but without clearly defined ownership or exclusive-use rights, the data may fail to meet the criteria for trade secret classification.

Example of trade secret algorithm and sharing certain data with limited access[11]

In the ever-evolving digital economy, trade secrets have emerged as a cornerstone of competitive advantage, particularly for start-ups striving to establish their foothold in the industry. A quintessential example is Organization A, a pioneering entity offering cutting-edge energy optimization software. The nucleus of its software is a proprietary algorithm—an invaluable trade secret that encapsulates years of research, refinement, and innovation. Organization A

[11] Trade Secret Protection in E-Commerce and Digital Platforms in India: Learning from Big Brands for Start-ups,India available at : Trade Secret Protection in E-Commerce and Digital Platforms in India: Learning from Big Brands for Start-ups - Blog | Sonisvision

enforces rigorous confidentiality protocols to safeguard its algorithm, granting access exclusively to a select team of trusted engineers bound by stringent non-disclosure agreements (NDAs). The source code is securely stored on encrypted servers, ensuring that no external collaborators or partners can access the complete algorithm. This meticulous approach to trade secret protection exemplifies the strategic imperative for start-ups to fortify their intellectual property assets.

As India witnesses an unprecedented surge in digital entrepreneurship, start-ups are becoming epicenters of innovation, yet simultaneously, prime targets for trade secret misappropriation. This research explores the pivotal role of trade secrets in start-up success, the unique challenges posed by the digital landscape, and how emerging businesses can draw inspiration from established industry giants to fortify their intellectual property.

1. The Significance of Trade Secrets for Start-Ups

Trade secrets encompass a wide array of proprietary information vital to a business's market standing, including unique formulas, methodologies, processes, and technological innovations. For start-ups, these confidential assets constitute the lifeblood of innovation, affording them a distinctive competitive edge and positioning them as formidable contenders in their respective industries.

2. Deciphering Trade Secrets

Trade secrets refer to confidential and proprietary information that grants a business a strategic advantage. Within the start-up ecosystem, trade secrets may include business models, customer databases, algorithms, manufacturing techniques, and other undisclosed elements crucial to business growth. The preservation of such information is integral to sustaining a competitive stance in a rapidly evolving marketplace.

The preservation of trade secrets has gained paramount significance in the wake of rapid technological advancements and an increasingly interconnected global economy. The advent of digitalization has exponentially heightened the risk of inadvertent or deliberate leaks of confidential information, posing unprecedented challenges to businesses striving to maintain their competitive edge. Indian courts, in alignment with the TRIPS Agreement, have consistently upheld the necessity of ensuring stringent confidentiality measures to safeguard proprietary information. In the landmark case of *Burlington Home Shopping Pvt v. Rajnish Chibber*,[12] the Delhi High Court unequivocally established that a trade secret encompasses any commercially valuable information not in the public domain, the unauthorized disclosure of which would inflict significant harm upon its rightful owner. Similarly, in *Emergent Genetics India Pvt Ltd v. Shailendra Shivam & Ors.*[13], the court underscored that the legal sanctity of a trade secret is contingent upon the owner's demonstrable efforts to uphold its confidentiality. The judicial approach to determining "reasonable efforts" varies across jurisdictions, with courts interpreting protective measures in diverse ways. In *Kewanee Oil Co v. Bicron Corp*,[14] the U.S. Supreme Court maintained that absolute secrecy is imperative for information to qualify as a trade secret, while rulings in cases such as *Superchips Inc v. Street & Performance Electronics Inc* [15]and *Progressive Prod Inc v. Swartz*[16] illustrate the flexible nature of "reasonable efforts," ranging from sophisticated encryption mechanisms to mere verbal confidentiality directives.

The intricate, interdisciplinary realm of technological innovation, notably in biotechnology, exacerbates trade secret protection challenges. Biological materials, easily replicable, heighten misappropriation risks, as exemplified by the American Cyanamid case, where illicit employee actions precipitated profound losses. In today's digital epoch, cyber-enabled trade secret theft—an insidious "silent crime"—necessitates comprehensive safeguards: rigorous contracts, fortified cybersecurity, meticulous compliance audits, and an ingrained corporate culture of confidentiality.

Trips Agreement on Limiting of licenses

The TRIPS Agreement mandates protection for undisclosed information—encompassing trade secrets and proprietary information provided it meets specific criteria outlined in Article 39.2. To qualify for protection, the information must remain confidential, derive commercial value from its secrecy, and be safeguarded through reasonable protective measures. While the Agreement does not necessitate treating such undisclosed information as a form of property, it unequivocally grants lawful custodians the right to prevent unauthorized disclosure, acquisition, or utilization

[12] Burlington Home Shopping Pvt. Ltd. v. Rajnish Chibber,995 IVAD (Delhi) 732
[13] Emergent Genetics India Pvt. Ltd. v. Shailendra Shivam & Ors.2011 SCC OnLine Del 3188
[14] Kewanee Oil Co. v. Bicron Corp,volume 416, page 470 (1974)
[15] Superchips, Inc. v. Street Performance Electronics, Inc,Case No. 6:00-CV-896-ORL-31KRS (M.D. Fla. Dec. 6, 2001)
[16] Progressive Products, Inc. v. Swartz, 292 Kan. 947, 258 P.3d 969 (2011).

by third parties in a manner that contravenes principles of fair commercial conduct. Such misconduct encompasses breaches of contract, breaches of confidentiality, inducements to violate confidentiality obligations, and the procurement of undisclosed information by entities that either knowingly, or through gross negligence, engaged in or benefited from illicit means. Furthermore, the Agreement extends its protective scope to undisclosed test data and regulatory submissions required for pharmaceutical and agrochemical approvals, mandating their safeguarding against unfair commercial exploitation and unauthorized disclosure, except where necessary for public welfare or under strict protective measures. Additionally, Article 40 acknowledges that certain licensing arrangements related to intellectual property rights may have anti-competitive implications, thereby justifying regulatory intervention. Member states retain the prerogative to implement suitable measures to counteract exploitative licensing practices that hinder trade and technological diffusion. The Agreement also establishes a consultative framework enabling affected nations to seek redress by engaging in discussions with the relevant Member State, facilitating the exchange of non-confidential and legally permissible information, while upholding stringent confidentiality safeguards in accordance with domestic laws and mutually agreed provisions.

Intersection of Trade Secrets and Antitrust Regulation[17] Trade Secrets as a Tool for Abuse of Dominance

An NDA embodies a recipient's formal pledge to uphold information confidentiality, legally restricting dissemination or exploitation of proprietary data. Beyond fostering innovation, trade secrets raise antitrust concerns when used strategically to entrench market dominance. Their pro- and anti-competitive implications warrant scrutiny, aligning trade secret protections with broader public policy objectives This segment delves into the antitrust implications of trade secrets, situating them within the broader dialogue surrounding NDAs, before advancing key recommendations. The confluence of trade secret protection and antitrust regulation represents a critical area of legal inquiry, wherein the equilibrium between fostering innovation and preserving a competitive marketplace must be meticulously maintained. While trade secrets

[17] Aurelien Portuese,From Non-Disclosure Agreements to Trade Secrets: Antitrust Implications,*European Competition Law Review, Forthcoming*

empower businesses to safeguard valuable proprietary data, antitrust laws function as a bulwark against market distortions resulting from excessive control over such information. The United States and India, two distinct yet influential jurisdictions, provide compelling insights into this legal intersection.

Trade Secrets and Antitrust in the United States

[18]In the United States, trade secrets receive statutory protection under the Defend Trade Secrets Act, 2016 (DTSA) alongside various state-level enactments, most of which are derived from the Uniform Trade Secrets Act (UTSA). The primary objective of trade secret protection is to incentivize innovation by affording businesses the means to shield commercially sensitive information from unauthorized access or exploitation. However, this protection is not absolute and is subject to scrutiny under federal antitrust statutes, including the Sherman Act, 1890, the Clayton Act, 1914, and the Federal Trade Commission Act, 1914—each of which collectively seeks to preclude monopolistic behavior and sustain market competition.

A quintessential illustration of this dynamic is found in the landmark United States v. Microsoft Corp. litigation, where Microsoft was accused of leveraging its proprietary software to entrench its monopoly in the operating systems sector. Although the litigation primarily concerned monopolistic conduct, it underscored the potential for proprietary protections to be weaponized in ways that subdue competition. Similarly, in FTC v. Qualcomm Inc[19]The Federal Trade Commission scrutinized Qualcomm's licensing model for trade secrets and patents in the semiconductor industry, alleging that its practices were exclusionary. While the appellate court ultimately ruled in favor of Qualcomm, the case reinforced the fundamental role of antitrust jurisprudence in regulating the misuse of intellectual property protections, including trade secrets, to ensure market equilibrium and fair competition.

Trade Secrets and Antitrust in India

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[18] Robert Pitofsky ,Donna Patterson, Jonathan Hooks, "The Essential Facilities Doctrine Under United States Antitrust Law", 443-462 (2002)

[19] Federal Trade Commission v. Qualcomm Incorporated, 969 F.3d 974 (9th Cir. 2020)

[20]In the Indian legal landscape, trade secrets do not fall under a distinct statutory regime but derive protection through well-established common law principles. Judicial precedents have played a pivotal role in shaping the jurisprudence surrounding trade secret protection, as exemplified in Burlington Home Shopping Pvt. Ltd. v. Rajnish Chibber[21], where trade secrets were characterized as confidential information that confers a competitive edge. Nevertheless, such protections must operate within the overarching framework of the Competition Act, 2002, which seeks to curb anti-competitive practices and the abuse of market dominance.

Sections 3 and 4 of the Competition Act, 2002, act as pivotal guardians of market integrity, targeting anti-competitive agreements and the exploitative conduct of dominant firms. The Competition Commission of India (CCI), alongside the judiciary, meticulously examines whether trade secret protections reflect legitimate business imperatives or serve monopolistic ambitions. Unlike the United States' codified framework, India's approach is jurisprudentially evolving. Notably, *Telefonaktiebolaget LM Ericsson v. CCI* spotlighted concerns over leveraging proprietary technologies, including trade secrets, to potentially subvert fair competition.

Key Considerations at the Intersection Balancing Innovation and Competition[22]

Trade secrets act as a catalyst for innovation by safeguarding proprietary business knowledge, thereby fostering economic advancement. However, an over-reliance on trade secret protections may culminate in market consolidation, inhibit competitive dynamics, and establish formidable entry barriers for emerging enterprises. Antitrust law plays a crucial role in ensuring that these protections do not evolve into instruments that distort market equilibrium or suppress competition.

Essential Facilities Doctrine

The Essential Facilities Doctrine serves as a significant mechanism in both jurisdictions, ensuring that proprietary information does not become an insurmountable barrier to market

[20] Chandni Raina,"Trade Secret Protection in India: The Policy Debate",2022
[21] Burlington Home Shopping Pvt. Ltd. v. Rajnish Chibber, 61 (1995) DLT 6.
[22] Poorvi Bansal,"TRADE SECRETS: INDIA'S DIMENSION" Volume 1 Issue 1 2022

participation. If a trade secret is deemed indispensable for enabling competitors to operate effectively within a given industry, regulatory intervention may mandate its compulsory licensing under fair, reasonable, and non-discriminatory (FRAND) terms. This approach strikes a delicate balance, mitigating potential anti-competitive repercussions while simultaneously preserving the incentives that drive innovation.

Licensing Practices

The realm of trade secret licensing frequently emerges as a point of contention within the antitrust discourse. Licensing arrangements that impose exorbitant fees or incorporate excessively restrictive terms may be perceived as a means to suppress competition rather than foster genuine technological collaboration. Regulatory authorities in both the United States and India meticulously assess licensing agreements to ascertain whether they constitute an abuse of dominance or an unreasonable restraint of trade, thereby ensuring that such arrangements remain consistent with the principles of fair competition.

Judicial and Regulatory Oversight

Both jurisdictions entrust their judicial and regulatory bodies with the formidable task of reconciling trade secret protection with competitive market principles. While U.S. courts adjudicate such matters through an extensive statutory framework supplemented by well-established jurisprudence, Indian courts and the Competition Commission of India (CCI) adopt a more fluid and common law-based approach, guided by the overarching tenets of the Competition Act, 2002. This divergence underscores the necessity for a jurisdiction-specific analysis to tailor regulatory interventions effectively while safeguarding the dual imperatives of market competition and intellectual property rights.

Comparative Analysis

The regulatory framework in the United States is considerably more robust, characterized by meticulously codified statutes and a wealth of jurisprudence governing both trade secrets and antitrust regulations. The Defend Trade Secrets Act ensures comprehensive protection, while federal antitrust laws delineate a structured framework for mitigating anti-competitive practices, fostering predictability and consistency in the adjudication of disputes at the intersection of these legal domains. Conversely, India's legal framework is predominantly reliant on common law principles and judicial precedents, offering flexibility yet simultaneously contributing to a degree of unpredictability. The absence of dedicated trade secret legislation necessitates case-by-case judicial interpretation, leading to variance in judicial outcomes. However, the Competition Act, 2002, establishes a robust foundation for addressing anti-competitive conduct, including trade secret misappropriation. Integral to this discourse is the Essential Facilities Doctrine, a long-standing principle within U.S. antitrust law, its origins tracing back to the Supreme Court's 1912 decision in United States v. Terminal Railroad Ass'n[23]. This doctrine, consistently applied by the Supreme Court and lower courts, recognizes that while firms generally retain the right to refuse dealings, this right is subject to limitations when it results in the exclusion of competitors. While antitrust law does not inherently mandate one competitor to accommodate another in the interest of fair play, the Supreme Court has clarified that the right to refuse dealings is not absolute. The doctrine functions as a subset of the "refusal to deal" cases, imposing restrictions on a monopolist's ability to foreclose access to essential resources. The Ninth Circuit in Alaska Airlines, Inc. v. United Airlines[24], Inc. elucidated that a firm wielding control over an essential facility must provide reasonable access to competitors, a position reinforced by other courts of appeal asserting that monopolists controlling scarce infrastructure must permit access on equitable terms to prevent illegal restraint of trade. The Supreme Court first formally enunciated this principle in United States v. Terminal Railroad Ass'n[25], where a cartel of railroads monopolized railway bridges and switching yards in St. Louis, hindering competing services—a practice deemed an illegal restraint of trade and attempted monopolization. Subsequent cases have reaffirmed this doctrine: in Associated Press v. United States[26]restrictive bylaws that curtailed membership and access to copyrighted news were found to violate the Sherman Act; in Lorain Journal Co. v. United States, a monopoly newspaper's refusal to accept advertisements from businesses also advertising on a radio station was similarly struck down; and in Otter Tail Power Co. v. United States, an electrical utility was found liable for monopolizing the market by refusing wholesale electricity supply to municipalities to retain retail control. These precedents firmly establish that the Essential Facilities Doctrine imposes liability for unilateral refusals to

[23] United States v. Terminal Railroad Association of St. Louis, 224 U.S. 383 (1912).
[24] Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536 (9th Cir. 1991).
[25] United States v. Terminal Railroad Association of St. Louis, 224 U.S. 383 (1912).
[26] Associated Press v. United States, 326 U.S. 1 (1945)

deal, classifying such refusals under Section 2 of the Sherman Act as monopolization violations. While not an independent cause of action, the doctrine functions as a crucial monopolization claim subset, ensuring that firms do not exploit control over indispensable assets to eliminate market competition. Following this Supreme Court jurisprudence, lower courts have extended the doctrine's applicability to instances where a firm exercises bottleneck control to impede actual or potential competitors. In MCI Communications v. AT&T Co[27]., the Seventh Circuit Court of Appeals mandated the dominant telecommunications provider to grant competitors access to its local service network, preventing monopolistic control over infrastructure. Courts have applied the doctrine to ensure access to essential facilities, as seen in *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*[28], where refusal to join a multi-area ski ticket system was deemed monopolistic, reinforcing that monopolists cannot impose exclusionary barriers.

Case Study: Microsoft Corp. v. Commission (EU, 2004)[29]

The Microsoft cases were primarily based on Article 82 of the European Commission Treaty (EC Treaty), which deals with abuse of dominance. Prosecution under this provision requires the twin requirements of a dominant position in the market as well as the abuse of that position to the detriment of consumers to be fulfilled.

Microsoft held over a 90% share in the global PC operating systems market, with Apple trailing at 2.9%. In workgroup server operating systems, Microsoft's 60-75% share implied presumed dominance per the Hilti case. The 2004 EC case and 2007 CFI appeal were not Microsoft's first antitrust encounters. In 1998, the US Department of Justice sued Microsoft over bundling Internet Explorer with Windows. Initially ordered to split, Microsoft's appeal vacated this remedy, culminating in a settlement mandating technology disclosures and fair contracts. Critics deemed these remedies inadequate, contending they insufficiently curbed Microsoft's anti-competitive conduct and future product tying.

[27] MCI Communications Corp. v. American Telephone & Telegraph Co., 708 F.2d 1081 (7th Cir. 1983).
[28] *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*738 F.2d 1509 (10th Cir. 1984)
[29] Abuse Of Dominance: The Microsoft Cases available at :Abuse Of Dominance: The Microsoft Cases - Academike (20th February 8:30pm)

The investigation in this regard was triggered by a complaint filed by Sun Microsystems in 1998, alleging that Microsoft had refused to supply necessary interoperability information which is necessary for Sun to develop products that could operate in a compatible manner with the computers functioning on Windows operating system. As a result they were not able to compete on an equal footing in the market for Work Group Server Operating Systems. Gradually, in the year 2000,The Commission expanded its inquiry to Microsoft's tying of Windows Media Player (WMP) with Windows 2000. Microsoft contended that supplying interoperability information infringed its intellectual property rights. However, given Microsoft's dominant market position, the Commission deemed piercing this veil justified. Rejecting Microsoft's consumer-benefit defense, it held that bundling WMP suppressed competition, deterring innovation by shielding Microsoft from rival media player developers' potentially superior technologies and market entry.

As such, Microsoft was held to have abused its dominant position by refusing to supply competitors with certain interoperability information for the purpose of developing and distributing competing products on the market for work group server operating systems. Microsoft was also held to have infringed Article102 of the Treaty on the Functioning of the European Union (TFEU) by making the supply of its client PC operating system Windows conditional on the simultaneous acquisition of its Windows Media Player. The broad remedies issued by the commission in this case were directing Microsoft to disclose within 120 days complete and accurate documentation so as to allow non-Microsoft Group Servers to achieve full interoperability. It has also been directed to develop a PC Operating System without WMP within 90 days. Additionally, a fine of about EUR 497,196,304 was also imposed.

The second EU Microsoft case stemmed from Microsoft's application seeking annulment of the 2004 decision, which was heard by the Grand Chamber of the Court of First Instance (CFI). The court emphasized the limited scope of its review, noting that its role was confined to verifying whether the facts were accurately presented and whether there was any manifest error of assessment or abuse of power. This principle was consistently reflected throughout the judgment, as the court dismissed Microsoft's objections, holding that the company had failed to establish any clear error on the part of the European Commission.

In addressing the refusal to supply issue, the Court of First Instance (CFI) applied the four-pronged test from the *IMS Health* case to ascertain whether denying an intellectual property license constitutes abuse of dominance. The conditions require that

(1) the copyright-protected product is indispensable for conducting a particular business

(2) the refusal hinders developing a new product with consumer demand

(3) the refusal lacks objective justification;

(4) it effectively eliminates competition in the secondary market. The court found all four criteria satisfied. Microsoft contended that consumers preferred integrated media players and that Windows functioned as a single product.

However, the CFI rejected this, emphasizing consumer freedom to select separate products and citing *Hilti* and *Tetra Pak II*, thereby dismissing Microsoft's annulment plea.

Significance of the Microsoft Cases

The Microsoft cases mark pivotal milestones in competition law. The CFI ruling expanded the Commission's reach, enabling intervention against the elimination of "effective competition," not just total competition removal. Applying the IMS Health test, the court embraced a broader approach while respecting precedent. Unlike the US settlement, the European trial garnered economic praise. Yet, remedies like the WMP-free Windows XP N proved ineffective, prompting innovations like browser choice screens. Future measures are anticipated to better balance consumer and market interests.

Global Framework for Trade Secrets Protection

[30]The intersection of international trade and competition policy has been a subject of significant discourse since the inception of the modern global trading system. The 1940s negotiations

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[30] UNCTAD Perspective on Competition Law and Policy 2013

leading to the Havana Charter originally sought to address restrictive business practices; however, the Charter never came into effect. Consequently, the GATT, which was established in 1947, became the primary instrument governing international trade but lacked a dedicated section on anti-competitive business practices. Nonetheless, the GATT incorporated provisions addressing competition concerns, including its national treatment principle, rules on state trading enterprises, and quantitative restrictions on exports. Over time, the WTO further acknowledged the role of competition policy through agreements such as the GATS, TRIPS, TRIMs, and GPA, with the WTO Working Group on Trade and Competition Policy conducting studies between 1997 and 2003. Since its establishment, the WTO has consistently integrated competition policy into accession packages, trade policy reviews, and discussions in the TRIPS Council. In services, monopolies and restrictive practices have historically hindered trade, prompting GATS Articles VIII and IX to mandate non-discriminatory treatment and consultations to eliminate anti-competitive practices. The Intergovernmental Group of Experts on Competition Law and Policy annually reviews its application, while quinquennial Review Conferences foster dialogue and capacity-building among nations.

Trade Secret Protection in China[31]

1. Sources of Law

China's primary trade secret law is the *Anti-Unfair Competition Law of the People's Republic of China (AUCL)*. Other relevant legal frameworks include the *Criminal Law*, *Civil Code*, *Labor Law*, *Labor Contract Law*, and *Corporate Law*. Additionally, judicial interpretations issued by the Supreme People's Court and the Supreme People's Procuratorate provide guidance on trade secret protection. Notable interpretations include:

- *Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Civil Cases Involving Trade Secret Infringement*, effective from September 12, 2020.

[31] OVERVIEW OF NATIONAL AND REGIONAL TRADE SECRET SYSTEMS, available at: https://www.wipo.int/documents/d/trade-secrets/docs-overview-country-sheets-china-final.pdf (20th February 2025)

- *Interpretation (III) of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues Concerning Specific Application of Law in Handling Criminal Cases of Intellectual Property Infringement*, effective from September 14, 2020.

Moreover, the *State Administration for Market Regulation (SAMR)*, which oversees administrative enforcement of intellectual property rights, released draft *Provisions on the Protection of Trade Secrets* for public consultation on September 4, 2020. A revised version was circulated in November 2022.

2. Definition of a Trade Secret

Under Article 9 of the AUCL, a trade secret is defined as:

- Commercial information, including technical and business information, that is not publicly known.
- Information that possesses commercial value.
- Information for which the lawful holder has taken appropriate confidentiality measures.

3. Scope of Trade Secret Protection

Article 9 of the AUCL outlines actions that constitute trade secret misappropriation, including:

- Acquiring trade secrets through theft, bribery, fraud, coercion, hacking, or other unlawful means.
- Disclosing, using, or allowing others to use trade secrets obtained through illicit means.
- Breaching confidentiality agreements or obligations and disclosing, using, or allowing others to use the obtained trade secrets.
- Encouraging or assisting others to violate confidentiality obligations to disclose or use trade secrets.

Additionally, third parties who knowingly or negligently acquire, disclose, or use misappropriated trade secrets are also deemed to have infringed upon them.

4. Exceptions

The AUCL does not explicitly provide for exceptions to trade secret protection.

5. Civil Remedies

Under Article 179 of the Civil Code, remedies for trade secret infringement include orders to cease the infringement. Article 21 of the AUCL empowers regulatory authorities to stop the illegal activity, confiscate unlawful gains, and impose fines.

According to Article 17 of the AUCL, an infringer must compensate for damages, which are calculated based on actual losses suffered by the trade secret holder or the illicit gains of the infringer. If these figures cannot be determined, courts may award damages up to RMB 5 million. In cases of malicious infringement with severe consequences, courts can impose damages ranging from one to five times the determined amount, including reasonable expenses incurred by the trade secret holder in enforcing their rights.

6. Criminal Sanctions

Article 219 of the Criminal Law stipulates criminal penalties for misappropriating trade secrets when substantial losses are caused. Criminal acts include:

- Obtaining trade secrets through theft, coercion, fraud, or other unlawful means.
- Disclosing, using, or allowing others to use trade secrets acquired through these means.
- Breaching confidentiality obligations to disclose, use, or allow others to use trade secrets.

Violators may face imprisonment of up to three years and fines. In cases of "especially serious" consequences, the sentence may range from three to seven years, accompanied by a fine.

7. Trade Secret Protection in Judicial Proceedings

According to Article 27 of the *Interpretation of the Supreme People's Court on Civil Trade Secret Cases*, courts must take confidentiality measures to protect trade secrets in legal proceedings, including during evidence exchange, cross-examination, and court hearings.

8. Procedural Provisions

Articles 28 and 29 of the *Interpretation of the Supreme People's Court on Civil Trade Secret Cases* set guidelines for competent courts and jurisdiction over trade secret disputes.

Article 32 of the AUCL establishes the burden of proof in trade secret cases:

- The claimant must provide prima facie evidence proving that confidentiality measures were in place and that an infringement occurred.
- The alleged infringer must prove that the information does not qualify as a trade secret.
- If the claimant presents evidence suggesting infringement, the burden shifts to the alleged infringer to prove otherwise. Such evidence may include:
    1. Proof that the alleged infringer had access to the trade secret and used substantially the same information.
    2. Proof that the trade secret has been disclosed, used, or is at risk of disclosure or use.
    3. Other relevant evidence indicating infringement.

Trade Secret Protection in the European Union[32]

1. Legal Framework

The Directive (EU) 2016/943 governs trade secret protection across the European Union. This directive, formally known as the Directive on the Protection of Undisclosed Know-How and Business Information, was adopted on June 8, 2016, and EU Member States were required to incorporate it into national legislation by June 9, 2018.

Under Article 1, Member States have the discretion to implement stricter protections beyond those required by the Directive, provided they respect the interests of third parties outlined in the legislation.

2. Definition of a Trade Secret

According to Article 2, a trade secret must meet the following criteria:

[32] EUROPEAN UNION (PROTECTION OF TRADE SECRETS) REGULATIONS 2018

- The information is not publicly known or readily accessible within the relevant industry.
- It holds commercial value due to its secrecy.
- The holder has taken reasonable steps to maintain confidentiality.

This definition aligns with Article 39.2 of the TRIPS Agreement.

3. Scope of Protection

Under Article 3, certain practices are considered lawful ways of acquiring trade secrets, including:

- Independent discovery or development of the information.
- Reverse engineering by analyzing a publicly available or lawfully obtained product.
- Any other method in line with honest commercial practices.

In contrast, Article 4 prohibits unlawful acquisition, use, and disclosure of trade secrets, including:

- Unauthorized access, copying, or appropriation of confidential materials.
- Breach of a confidentiality agreement or legal duty not to disclose.
- Any conduct deemed contrary to fair commercial practices.

While the Directive does not classify trade secrets as intellectual property rights, it grants trade secret holders legal remedies against misappropriation.

4. Exceptions and Limitations

Article 5 lists certain exceptions where the acquisition, use, or disclosure of trade secrets is not considered unlawful. These include:

- Freedom of expression and journalistic activities.
- Whistleblowing (disclosure to reveal illegal activities or misconduct).
- Protecting legitimate public interests, as recognized under EU or national law.

5. Civil Remedies

Article 6 mandates that Member States establish legal measures to prevent and address trade secret violations. These procedures must be fair, effective, and not excessively complex or costly.

Under Article 7, enforcement should be proportionate, ensuring it does not hinder legitimate trade or create barriers in the EU market.

Articles 10 and 11 grant courts the power to issue interim injunctions to prevent further misuse of trade secrets.

Articles 12 to 15 outline corrective actions that courts can impose, such as:

- Ceasing use or disclosure of the trade secret.
- Recalling, modifying, or destroying infringing goods.
- Assessing damages based on the harm caused.

Article 14 establishes compensation for damages when the infringer knew or should have known that their actions were unlawful.

6. Criminal Penalties

The Directive does not mandate criminal sanctions for trade secret violations, leaving this to the discretion of Member States.

7. Trade Secret Protection in Court Proceedings

Under Articles 9 and 15, judicial proceedings involving trade secrets must include confidentiality safeguards, such as:

- Restricting access to sensitive documents and hearings.
- Publishing only redacted court decisions to protect confidential details.

This duty to maintain confidentiality remains in force even after the conclusion of legal proceedings.

8. Procedural Rules

The Directive does not dictate which courts handle trade secret cases; this is left to individual Member States.

Regarding burden of proof, national procedural laws apply.

Article 8 regulates the statute of limitations, requiring Member States to set clear rules on:

- The starting point of limitation periods.
- The maximum period, which cannot exceed six years.
- The conditions under which the limitation period may be paused or reset.

United States of America: Trade Secret Law[33]

1. Sources of Law

The legal framework governing trade secrets in the United States is a composite of common law principles and statutory enactments. At the heart of common law jurisprudence lies Chapter 4 of the Restatement (Third) of Unfair Competition, which distills judicial doctrines on trade secret protection. Complementing this foundation are the Uniform Trade Secrets Act (UTSA)—adopted in varying forms across multiple states—and the Defend Trade Secrets Act (DTSA), a federal statute that empowers private litigants to seek redress for misappropriation of trade secrets under federal jurisdiction.

2. Definition of a Trade Secret

The legal definition of a trade secret is encapsulated in various statutory and common law sources:

- Under 18 U.S.C. § 1839(3), a "trade secret" encompasses an extensive range of financial, business, scientific, technical, economic, and engineering information—including but not limited to patterns, formulas, designs, methods, processes, and codes—irrespective of the medium in which they are stored, compiled, or recorded. To qualify as a trade secret, such information must:

[33] OVERVIEW OF NATIONAL AND REGIONAL TRADE SECRET SYSTEM available at: https://www.wipo.int/documents/d/trade-secrets/docs-overview-country-sheets-usa-final.pdf (20th February)

(A) be subject to reasonable efforts by its owner to maintain its secrecy; and

(B) derive actual or potential independent economic value from not being publicly known or easily ascertainable by legitimate means.

- The UTSA (Section 1(4)) defines a trade secret as information—such as a formula, pattern, compilation, program, device, method, or process—that:

  (i) holds independent economic value by virtue of its secrecy; and

  (ii) is protected through reasonable efforts to maintain confidentiality.

3. Scope of Trade Secret Protection

The extent of trade secret protection is delineated by statutory provisions, with contractual obligations further shaping the boundaries of confidentiality. In particular, non-disclosure and non-use agreements may extend beyond statutory trade secret definitions, ensuring broader protection through contractual enforcement rather than trade secret law.

Under the DTSA, the act of misappropriation is legally construed as:

(A) The acquisition of a trade secret by an individual who knows—or has reason to know—that it was obtained through improper means; or

(B) The unauthorized disclosure or use of a trade secret by an individual who:

- (i) Procured the information through improper means;
- (ii) Knew or had reason to know that the trade secret was acquired under circumstances imposing a duty of secrecy; or
- (iii) Became aware, prior to any significant change in position, that the information was indeed a trade secret and had been acquired by accident or mistake.

Pursuant to 18 U.S.C. § 1839(6), "improper means" encompasses theft, bribery, fraud, breach of confidentiality, or espionage (whether electronic or otherwise) but explicitly excludes lawful practices such as reverse engineering and independent derivation.

This framework ensures that trade secrets remain shielded from illicit appropriation while permitting legitimate avenues of discovery and innovation.

In Federal Trade Commission v. Qualcomm[34] Incorporated, the district court ruled in favor of the FTC on May 21, 2019, finding Qualcomm guilty of antitrust violations under Section 2 of the Sherman Act. Qualcomm held monopoly power in CDMA and LTE chip markets, leveraging it through anticompetitive licensing practices that inflated royalties and restricted competition. The court found Qualcomm's refusal to license patents fully to competitors and its exclusive agreements with Apple (2011–2013), incentivizing chip purchases and imposing volume targets, unlawfully coerced market dominance.

Competition policy in the WTO[35]

The intersection of international trade and competition policy has been a subject of considerable interest since the inception of the modern global trading system. Notably, during the 1940s, restrictive business practices were central to negotiations surrounding the Havana Charter, though it ultimately failed to take effect. Consequently, the General Agreement on Tariffs and Trade (GATT) of 1947 emerged as the primary multilateral framework governing international trade from 1948 until the World Trade Organization (WTO) succeeded it in 1995. Unlike the Havana Charter, GATT lacked a dedicated section addressing anti-competitive business practices, yet it incorporated provisions reflecting concerns over competition-related issues. In its early years, the GATT convened a Group of Experts, leading to the 1960 Decision on Arrangements for Consultations on Restrictive Business Practices, which acknowledged the detrimental impact of such practices on global trade and economic development but refrained from establishing binding rules, opting instead for an ad-hoc notification framework. Similarly, the creation of the WTO did not introduce an exhaustive legal framework to counter anti-competitive behavior in international trade; however, its agreements—including the General Agreement on Trade in Services (GATS)—underscore the importance of fostering competitive market conditions within the multilateral trading system.

UNCTAD Perspective on Competition and Consumer Policy[36]

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[34] Federal Trade Commission v. Qualcomm Incorporated, 411 F. Supp. 3d 658 (N.D. Cal. 2019),

[35] Basics of trade secret protection,available at: WIPO Guide to Trade Secrets and Innovation - Part III: Basics of trade secret protection

[36] UNCTAD Perspective on Competition Law and Policy 2013

The UNCTAD Perspective on Competition and Consumer Policy offers a comprehensive overview of the Competition and Consumer Policies Branch's publications and reports since 2005, enabling readers to explore these works by thematic areas while providing summaries and direct access to full texts via web links. Encompassing competition and consumer protection, this initiative annually aids the Intergovernmental Group of Experts (IGE), conducts peer reviews, and publishes the UNCTAD Model Law on Competition to promote fair markets. Convened every five years, the United Nations Conference oversees these reforms, fostering open markets, private investment, and consumer welfare. Competition drives growth, employment, and SME opportunities while curbing corruption. Robust consumer policies ensure safe products and informed choices. Yet, anticompetitive practices—like cartels or restrictive licensing—persist, especially in developing economies. Globalized trade demands international cooperation, making competition policy vital for dismantling barriers and ensuring fair market operations.

India and Trade secrets[37]

India lacks a dedicated statute governing trade secret protection, instead relying on contract law (Indian Contract Act, 1872), principles of equity, and common law actions for breach of confidence to enforce rights in confidential business information. The Delhi High Court, in *John Richard Brady & Ors v Chemical Process Equipment P Ltd & Anr*[38], emphasized that such protection may stem from equitable principles—demanding conscientious conduct—or a common law breach of confidence claim, akin to contractual violations. As a signatory to the TRIPs Agreement, India adheres to Article 39(2), allowing legal frameworks to prevent unauthorized disclosure and use of information, provided it remains secret, commercially valuable, and safeguarded through reasonable security measures. The Calcutta High Court, in *Tata Motors Limited & Anr v State of Bengal* [39], defined a trade secret as any formula, process, or confidential business data that confers a competitive advantage. Meanwhile, the Bombay High Court, in *Bombay Dyeing and Manufacturing Co Ltd v Mehar Karan Singh* (2010 (112) BomLR

37 “Nandan Pendsey Akriti Kapoor Kalra” Trade Secrets: India” Feb 18, 2021,”

38 *Richard Brady & Ors v Chemical Process Equipment P Ltd & Anr* (AIR 1987 Delhi 372

39 *Tata Motors Limited & Anr v State of Bengal* (GA No. 3876 of 2008 in WP No. 1773 of 2008),

375)[40], established criteria for determining trade secrets, including the extent of public and internal awareness, protective measures taken, economic value, development costs, and the difficulty of replication. Courts have debated the interchangeability of “trade secrets” and “confidential information,” with some distinguishing that routine business knowledge, widely known among employees or competitors, does not qualify as a trade secret.

How is ownership of a trade secret established?

If a trade secret is the subject matter of an action, the proprietor, in order to establish his or her rights must provide at the very least, the nature of the information believed to be a trade secret and how it came to be in the possession of the proprietor (even if the details of the trade secret are not disclosed in the suit). In the absence of such information, the courts have denied relief to plaintiffs per *Ambiance India Pvt Ltd v Shri Naveen Jain*, [41]. The courts will draw a distinction between general knowledge regarding the business of an □rganization or the general skill and expertise of employees acquired through their employment in an □rganization, and trade secrets that are protectable. Therefore, it is critical that proprietors can specify the information that may constitute a trade secret. In some cases, this trade-secret information may consist of works created and developed by the proprietor that are the subject matter of copyright protection, for example client lists in the case of *Diljeet Titus and Ors v Alfred A Adebare and Ors* [42]or technical drawings in the case of *John Richard Brady and Ors v Chemical Process Equipments Pvt Limited & Anr*[43]. Therefore, the principles of authorship and ownership applicable to copyright would apply. In other cases, the trade-secret information may have been acquired and the proprietor must demonstrate that he or she has acquired proper title to such information. This means that such information will not be protected as a trade secret if it is derived or created independently by any person (not having access to the trade secret), using information that is available in the public domain.

Secrecy

Trade secrets must be information used in trade or business whose dissemination is limited,

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[40] *Manufacturing Co Ltd v Mehar Karan Singh* (2010 (112) BomLR 375),

[41] *Ambiance India Pvt Ltd v Shri Naveen Jain*, (122 (2005) DLT 421)

[42] *Diljeet Titus and Ors v Alfred A Adebare and Ors* (2006))PTC609(Del)

[43] *Richard Brady and Ors v Chemical Process Equipments Pvt Limited & Anr* (AIR 1987 DEL 372)

discouraged or prohibited, and therefore the measures implemented by a company to do so are a good metric to establish the state of secrecy.Information that is accessed by any person by virtue of their relationship to the proprietor of such information (such as employees or vendors) may bear with it an implied obligation of confidentiality or secrecy, whether or not expressly provided, either in a contract or by way of any other communication (especially if it is not otherwise available through other sources or in the public domain). In such cases, it must be shown that: (1) this information was not available to any person to whom it was not delivered by the proprietor him or herself; and (2) the implied obligation is supported by the facts and circumstances surrounding the correspondence, other conduct of the parties, etc (provided it meets the other criteria for trade secrets.

How is the commercial value of a trade secret established?

The commercial value of a trade secret arises from its secrecy and the competitive edge it grants its owner. As established in the *Bombay Dyeing* case, this value is assessed through factors such as cost savings and strategic advantage over competitors, the investment of time, effort, and capital in its development, and the difficulty and expense a third party would face in acquiring or replicating it. Additionally, depending on the nature and business relevance of the trade secret, standard valuation methods applicable to intangible assets may also be utilized to determine its worth.

The intrinsic value of a trade secret lies in its secrecy, prompting judicial scrutiny of the protective measures employed by its custodian—ranging from confidentiality pacts with employees and vendors to sophisticated technological safeguards and meticulously crafted corporate protocols. Even absent elaborate defenses, explicit designations like "confidential" may suffice. Indian jurisprudence, drawing from English common law, underscores that proprietary information must be derived from intellectual ingenuity rather than reside in the public domain, as elucidated in *Saltman Engineering Co. v. Campbell Engineering Co. Ltd.* Indian courts extend protection to technical know-how, client databases, and pricing strategies, provided they retain commercial value through active safeguarding. While confidentiality and non-compete clauses serve as prevalent tools, their enforceability under Section 27 of the Indian Contract Act, 1872, is circumscribed. Notably, *Niranjan Shankar Golikari v. Century Spinning & Mfg Co. Ltd.* upheld reasonable employment-era restraints, reflecting a nuanced balance between business imperatives and individual freedoms.

New legislation proposal

On 5 March 2024 the 22nd Law Commission of India issued a report titled "Trade Secrets and Economic Espionage" along with a draft bill, which recommends a *sui generis* legal framework to adjudicate claims related to trade secret disclosure. This would offer companies clarity on the protection of confidential information, increase industry confidence, enable technology transfer to India and facilitate negotiation of free trade agreements, where the absence of a clear trade secret law is often a point of concern. Crucially, special exceptions are envisaged to protect whistleblowers.

Best practices and security tools

In the meantime, companies should introduce measures to safeguard trade secrets, including NDAs, conduct training and awareness programmes and employ robust data protection measures. These efforts aim to minimise the risk of unauthorised access and misuse of confidential information. Introduction of robust trade secret legislation would further bolster the protection of proprietary information in India.

Need for Trade Secrets Law in India in the Era of Globalization

In the age of globalization, as businesses expand their operations beyond borders, safeguarding proprietary strategies and trade secrets has become a formidable challenge. The risk of unauthorized disclosure or imitation by competitors necessitates robust legal protection. On the international front, frameworks such as TRIPS, GATT, and NAFTA provide a degree of security, yet India lacks a comprehensive legal regime exclusively dedicated to trade secret protection. Instead, businesses must rely on fragmented legal provisions, primarily contract law and torts, leading to judicial ambiguity and interpretational complexities. Existing statutory provisions offer limited safeguards, such as Section 27 of the Indian Contract Act, which restricts unauthorized disclosures; Section 72 of the IT Act, which criminalizes unlawful access to electronic data; and Section 43A of the IT Act, which provides compensation for breaches involving sensitive personal information like passwords and biometric data. Legal recourse for trade secret violations in India generally arises under three circumstances: when an employee wrongfully discloses confidential information in the course of employment, when an external party induces such disclosure, and when a licensee breaches contractual obligations of confidentiality. However, in instances that fall outside these predefined scenarios, judicial remedies often prove inadequate. Given the critical role of trade secrets in intellectual property law, it is imperative for India to enact a dedicated statute addressing their protection. The current legal lacuna creates vulnerabilities, and a comprehensive legislative framework would eliminate ambiguities, streamline judicial interpretations, and establish clear repercussions for breaches. Furthermore, legislative reforms should incorporate criminal liabilities for violations, ensuring stringent deterrents against unauthorized disclosures. Establishing a specific statute on trade secrets would not only fortify businesses against economic espionage but also bolster India's intellectual property landscape, fostering greater innovation and economic security in an increasingly competitive global market.

Protection Put to the Test: Evaluating Patents vs. Trade Secrets through a Case Study

Life Spine sued Aegis Spine over alleged trade secret theft and breach of contract concerning the ProLift System, an inflatable spinal implant. Under a distribution agreement, Aegis pledged confidentiality and abstention from reverse engineering. However, Aegis disclosed proprietary information to its parent company, which launched a rival device. While Aegis contended that public disclosures via patents and marketing nullified trade secret claims, the district court issued a preliminary injunction against Aegis's competing product promotion. Upholding this, the Seventh Circuit ruled limited public disclosures did not forfeit Life Spine's protected knowledge, preserved through binding confidentiality agreements.

The Role of the Competition Commission of India (CCI) in Balancing Trade Secrets and Fair Market Competition[44]

[44] Competition Commission of India,available at: https://www.cci.gov.in/about-us (25 February)

The Competition Commission of India (CCI) serves as a pivotal regulatory body, ensuring a dynamic and equitable marketplace while simultaneously safeguarding trade secrets—confidential business information that grants enterprises a strategic advantage. At the heart of competition law lies the prevention of anti-competitive malpractices, including abuse of dominance, cartelization, and restrictive trade practices. However, a delicate equilibrium must be maintained to shield proprietary information without enabling its misuse to suppress competition. Instituted under the Competition Act, 2002, the CCI functions as the watchdog overseeing such intricate conflicts, fostering an efficient business ecosystem while upholding consumer welfare. This paper delves into how the CCI orchestrates this intricate balance through legislative mandates, judicial precedents, and enforcement frameworks.

Legal Framework Governing Trade Secrets and Competition in India

India lacks an exclusive statute dedicated to trade secret protection. Instead, businesses must navigate a patchwork of legal principles derived from contract law, common law doctrines, and judicial pronouncements. The Indian Contract Act, 1872, empowers enterprises to enforce confidentiality agreements, while Section 27 curbs unreasonable restraints on trade. Meanwhile, the Competition Act, 2002, is the cornerstone of India's antitrust framework, prohibiting anti-competitive agreements, abuse of dominant position, and monopolistic mergers. Although the Act does not explicitly codify trade secrets, it prevents their exploitation as instruments of anti-competitive conduct, ensuring a level playing field.

Abuse of Dominant Position and Trade Secrets

Pursuant to Section 4 of the Competition Act, 2002, an enterprise is deemed to be in abuse of its dominant position when it imposes unfair terms on consumers or obstructs market accessibility for competitors. Dominant firms often leverage trade secrets to coerce suppliers or rivals into inequitable arrangements, thereby distorting competition. The CCI has actively intervened in cases where proprietary information was weaponized to establish market supremacy. A prime example is the Telefonaktiebolaget LM Ericsson v. CCI case[45], where Ericsson was accused of

[45] Telefonaktiebolaget LM Ericsson (Publ) v. Competition Commission of India and Another is W.P.(C) 464/2014 & CM Nos.911/2014

abusing its dominance by imposing onerous licensing terms on its standard-essential patents (SEPs), effectively compelling businesses to disclose trade secrets under coercive conditions.

Anti-Competitive Agreements and the Misuse of Trade Secrets[46]

Under Section 3 of the Competition Act, agreements that induce an appreciable adverse effect on competition (AAEC) fall under the CCI's scrutiny. The improper exchange of sensitive business information can facilitate collusion, bid-rigging, and price-fixing, disrupting market equilibrium. The CCI has penalized enterprises for engaging in such illicit agreements, exemplified in Fx Enterprise Solutions India Pvt. Ltd. v. Hyundai Motor India Limited[47], where Hyundai was accused of imposing resale price maintenance and misusing trade secrets to enforce compliance with pricing mandates, thereby violating competition norms.

Investigatory and Enforcement Powers of the CCI

The CCI exercises investigative authority under Section 19, allowing it to probe into anti-competitive conduct through complaints filed by businesses, consumers, or suo motu action. The Director General (DG) spearheads investigations involving trade secrets, and the CCI is empowered to impose penalties, issue cease-and-desist orders, or mandate modifications in anti-competitive agreements. Additionally, leniency programs under Section 46 incentivize cartel members to disclose trade secrets that were unlawfully used for market manipulation, granting them immunity or reduced penalties in exchange.

Competition (Amendment) Act, 2023: Implications for Trade Secrets

The Competition (Amendment) Act, 2023, though passed in April 2023, awaits government notification for full enforcement. Notably, the proposed exemption of dominant IP owners from abuse of dominance charges was excluded from the final version of the Act, preserving India's deviation from EU and US antitrust jurisprudence. The CCI has historically exercised restraint in extending such exemptions, as reflected in the OPPO Mobiles case, where it ruled that IP ownership alone does not justify exclusivity restrictions. However, non-compete clauses imposed

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[46] Shivika Narang,"Promoting Competition, Empowering Consumers: The CCI Game-changing Contribution to the Marketplace" MAY 2023

[47] Fx Enterprise Solutions India Pvt. Ltd. v. Hyundai Motor India Limited is Case No. 36/2014,

to prevent IP leakage to direct competitors—as seen in the Vivo case—were deemed reasonable restrictions.

Judicial Precedents: IP Rights and CCI's Jurisdiction

The Delhi High Court's ruling in Monsanto Holdings Private Limited & Ors. v. CCI & Ors[48]. affirmed that the CCI retains jurisdiction over cases involving intellectual property rights, reinforcing its oversight on IP-related anti-competitive practices. Furthermore, the Air Works-GMR case underscored that not all refusals to deal qualify as anti-competitive conduct. However, the CCI established three pivotal conditions to determine when a refusal constitutes an anti-competitive act:

1. The denied access must be essential for effective competition in the market.
2. There should be no objective justification for the refusal.
3. The denial must lead to an appreciable adverse effect on competition.

Similarly, in November 2018, the CCI also directed investigation into Intel Corporation for its refusal to provide access to its reference design files to the complainant. These files were allegedly required to manufacture server boards that had been built on Intel's designs. The CCI ultimately dismissed the allegations against Intel and, among other things, observed that:

1. the resources that were required for designing a server model could be easily downloaded from Intel's publicly accessible 'resource data centre';
2. in the cases of the other products that Intel developed, it did not develop any reference designs and therefore, could not have denied any access for these files; and
3. there was no deliberate denial of any requisite file (reference design file or simulation file) by Intel to the informant.

In November 2021, the CCI released its key findings and observations of its market study on the pharmaceutical sector in India. In this market study, the CCI, among other things, observed that patented and originator drugs are insulated from competition for the life of the patent to yield an

[48] Monsanto Holdings Pvt. Ltd. & Ors. v. Competition Commission of India & Ors. is W.P.(C) 1776/2016 & W.P.(C) 3556/2017

assured return on research and development investments, after expiry of the patent protection, price competition from generic substitutes can generate significant cost savings for consumers, and generic drugs play an important part in creating competitive pressures the keep prescription drug prices low, thereby reducing healthcare costs and improving access to it treatments. To ensure that there exists price competition in the generics drugs market, the CCI has identified the need to homogenise the quality of drugs and has committed to use its advocacy programme to push for a multi-pronged and harmonised regulatory response.

Licensing and Antitrust

The Competition Commission of India (CCI), in its pursuit of fostering fair market conditions, has exhibited increasing scrutiny over licensing terms that may potentially hinder competition. The task of balancing intellectual property (IP) rights with public interest remains an ongoing challenge, as exemplified by the following analyses.

I. Anticompetitive Restraints in Licensing Agreements

Restrictive provisions within licensing arrangements are examined under Section 3(4) of the Competition Act, 2002 as vertical restraints. In the absence of a distinct framework within the Act to specifically assess IP licensing arrangements, the CCI tends to analyze such restrictions under the same principles governing the sale of goods or the provision of services. Essentially, if the accompanying restrictions within an IP licensing agreement have the potential to result in an Appreciable Adverse Effect on Competition (AAEC), they may be deemed anti-competitive and, thus, impermissible under the Act.

However, the CCI is unlikely to conclude the presence of an AAEC unless the IP licensor possesses substantial market power. For instance, a licensor dictating the pricing terms of the licensed IP could be examined as a potential case of resale price maintenance, thereby potentially infringing competition principles.

Similarly, territorial or customer-specific restrictions imposed by IP licensors (for instance, limiting the broadcasting of licensed content to a specified territory or exclusive audience) may be subject to scrutiny for exclusive distribution or refusal to deal concerns. Furthermore, if an IP licensor limits its licensee's dealings with competing licensors, such conduct could raise antitrust alarms under exclusive supply arrangements. Likewise, tie-in arrangements, where the grant of an IP license is conditioned on purchasing additional products or services from the licensor, may be regarded as anti-competitive conduct.

Importantly, the Competition Act provides a limited statutory exemption allowing IP holders to enforce restrictions that are both reasonable and necessary to safeguard their existing IP rights. Such restrictions can be invoked when deemed essential to protect domestically registered IP in a manner that is not unduly restrictive. The CCI has cautiously granted this exemption in cases where it finds that the restriction is justified and proportional.

For example, in K Sera Sera Digital Cinema Private Limited v. Pen India Limited & Ors, the CCI dismissed a complaint by a digital cinema service provider, ruling that the producers had valid reasons to refuse distribution via the complainant's service due to concerns over piracy. The producers were deemed to have legitimately exercised their rights to protect their IP from potential losses associated with piracy.

Thus, the CCI's decisions reveal a careful weighing of the necessity and reasonableness of IP restrictions, ensuring that legitimate IP protection does not unduly impede competition.

Recently, the appellate tribunal (NCLAT) reversed a direction of the CCI mandating Google to provide access to its proprietary APIs (for functionality of mobile applications (Apps)) to developers of competing operating systems (OS). The NCLAT while reversing the CCI's direction held that: (1) the APIs in question are proprietary items of Google and cannot be given in through unhindered access to Google's existing and potential competitors; and (2) proprietary software such as APIs, which are developed through scientific and technical innovation should fetch value to Google and, therefore, remain an incentive for a technological company or Google to further carry out such development and monetise it through its commercial use.

The CCI and NCLAT's recent decisional practice appears to suggest that it is looking to strike a balance between the legitimate exercise of IP with consumer interest. Where there appear to be reasonable justifications for withholding a licence, the CCI and NCLAT will examine those carefully in their antitrust analysis.

Conclusion

In today's rapidly evolving global economy, protecting trade secrets is crucial for enterprises that rely on proprietary knowledge to maintain their competitive advantage. Unlike patents, which require public disclosure in exchange for protection, trade secrets offer indefinite security, provided confidentiality is maintained. This unique characteristic makes them indispensable for industries such as information technology, pharmaceuticals, biotechnology, and advanced manufacturing. However, the legal frameworks governing trade secrets vary significantly across jurisdictions, creating challenges for multinational businesses operating in multiple markets.

Internationally, trade secret protection has gained prominence through agreements like the TRIPS Agreement (Article 39), which mandates member states to prevent the unauthorized use of confidential business information. Many advanced economies, including the United States, the European Union, Japan, and China, have established robust legal frameworks to safeguard trade secrets. The United States' Defend Trade Secrets Act (DTSA) of 2016, for example, provides a federal cause of action for trade secret misappropriation, ensuring businesses can seek remedies across state lines. Similarly, the EU Trade Secrets Directive (2016/943) harmonizes protection standards across European nations, reinforcing legal certainty for businesses. Meanwhile, China has strengthened its trade secret laws in response to global concerns, demonstrating a growing recognition of their economic significance.

India, despite its rapid economic growth and innovation potential, lacks a dedicated trade secret law. This gap leaves businesses vulnerable to intellectual property theft, discourages foreign investment, and hampers research collaborations. In contrast, a well-defined legal regime would enhance investor confidence, stimulate innovation, and align India with international best practices.

As India deepens its integration into the global economy, adopting a comprehensive, enforceable trade secrets framework is no longer optional—it is essential. Strengthening trade secret laws will not only safeguard proprietary knowledge but also foster sustainable economic growth, ensuring Indian enterprises remain competitive in an increasingly knowledge-driven world.