

Safeguarding the Trade Secrets in Information Age



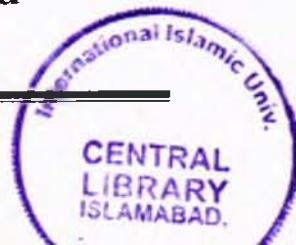
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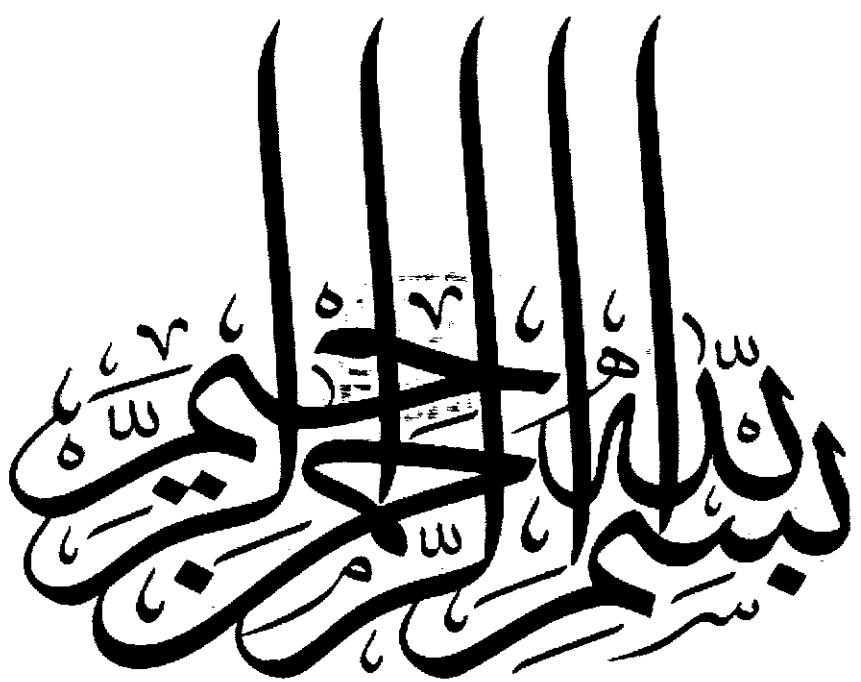
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1. Trade secrets Law
2. Public lending rights (Intellectual Property)

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**IN THE NAME OF ALMIGHTY ALLAH THE MOST
MERCIFUL AND THE MOST KIND**

International Islamic University, Islamabad

Faculty of Shariah and Law

Approval Sheet

It is certified that we have gone through the thesis titled "Safeguarding the Trade Secrets in information age" as a partial fulfillment for the award of degree of LLM (Corporate Law), submitted by Rashida Ashraf, student of LLM (Corporate Law), registration no 147-FSL/LLMCL/F06 and we have evaluated the dissertation and found it up to the requirements in its scope and quality for the award of degree.



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I hereby declare that this dissertation has not been copied from any source. It is further declared that I have done this research entirely on the basis of my personal efforts made under the sincere guidance of my supervisor. No portion of work presented in this dissertation has been submitted in support of any application for any other degree or qualification of this or any other university or institute of learning.

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DEDICATION

I have the honor to mention here that this thesis has been scribed today only all because of my loving Parents and sweet husband. I dedicate these efforts to them. They are laudable of all appreciations and without their guidance, inspiration and backing there is no way, I could accomplish my thoughts.

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PREFACE

This dissertation has been written as a requirement for LLM Corporate Law Program. This dissertation is throwing light on the issue of how to safeguarding the trade secrets in information age, which is nowadays becoming a burning issue all over the world but the legislatures in Pakistan are not ready to pay heed on it, which in return is causing many economical problems, including many legal issues as well.

Though the subject of Trade Secret as is the part of Intellectual Property regime has both economical and legal aspects. In many countries the protection afforded to Trade Secret by Law is as trade secret law which restricts the use of the trade secrets information. In this dissertation, chapter 1 attempts to define the concept of trade secret, its background and its importance. Chapter 2 gives an over view of safeguarding trade secrets in information age, its kinds, advantage, disadvantages and legal protection of trade secret. Chapters 3 discuss the requirements for information to qualify for trade secrets protection. Chapter 4 contains trade secret protection plan, its over view in various countries, recommendations and suggestions for the enforcement of steps for safeguarding the company's trade secrets in Pakistan.

THESIS STATEMENT

In the age of instantaneous communication, there are no easy solutions to the problem of protecting trade secrets in the information age. But there is need to take definite steps by the employer through specific policies which address use and monitoring of business equipment and maintenance of company trade.

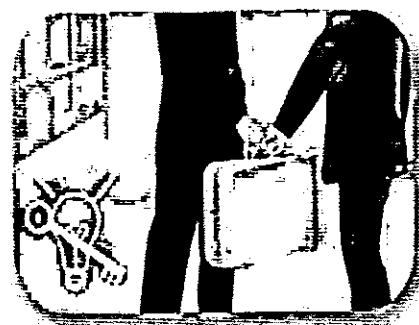
CHAPTER NO: 1 **Introduction**

We are living in the age of technological revolution. Our personal computers have changed our lives and business routine. Internet has brought change in our way of communication, our business transaction and in seeking of knowledge.¹

In this age of fast communication, it has become very hard to keep anything secret. So for running a successful business, companies are required to safe guard their seerets of business activity which need from them to make specific policies.



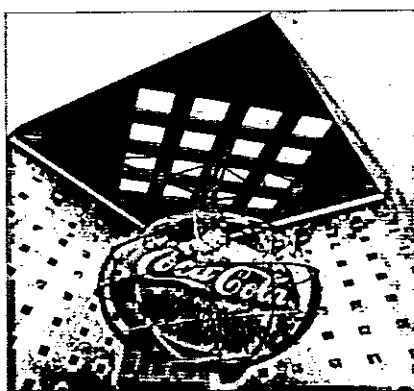
Trade Secret



¹Wilbur A. Glahn and Cameron G. Shilling of McLane, Graf, Trade Secrets FINDLAW Featured Article "The cutting Edge of Trade Secrets--How Far Should the Law Go To Prevent Misappropriation by Memory and Inevitable Disclosure" Raulerson & Middleton, P.A,
<http://corporate.findlaw.com/industry/tradesecrets/index.html>

These policies should clearly inform the company's employee about the business equipment, its monitoring, confidentiality, and their appropriate behavior in their work place.² The employer can take strong steps which includes the monitoring of business equipment and promulgation of unambiguous policies.³ Trade secrets are found in every business of the world. Some of Trade secrets owner are aware and follow the strict policies for safe guarding their trade secrets but some of them get know when their competitors get their valuable trade secrets like their research results, marketing plans or by employing the departing employees. The unauthorized use of them is the violation of trade secrets laws.⁴

It can be said that trade secrets is a formula or a pattern or a physical device or an idea or a process or a compilation of information or any other information which provides its owner the information with a competitive advantage in market place⁵ and prevent the public from learning about it except through improper acquisition or theft.⁶ So the companies keep secret to them forgetting an advantage over their competitors.⁷ Coca-Cola's formula is the



²By Sheryl Denise Johnson Willert of Williams Kastner, "Safeguarding Trade Secrets in the Information Age" with Sample Communications Policy, <http://library.findlaw.com/2003/Apr/4/132680.html>

³<http://library.findlaw.com/2003/Apr/4/132680.html>

⁴ International Trade centre UNCTAD/WTO, "secrets of intellectual property" A guide for small and medium -sized exports Geneva 2004,<http://www.sciencedirect.com/science/issue/6542-2006-999769996-638478>

⁵ Submitted to City University on 2004-9-7

⁶http://en.wikibooks.org/wiki/Legal_and_Regulatory_Issues_in_the_Information_Economy/Ideas_Trade_Secrets_and_Intellectual_Property

⁷<http://medastarner.interfree.it/directory/trade-secrets.html>

most famous example of trade secrets protection.⁸ In case of its disclosure, when the others come to know the relevant formula⁹ then they can prepare the same soft drink which can hurt the position of Coca-Cola's in the market.¹⁰

In the physical world, trade secrets and ideas are called as revealed or copied by or sold to business rivals, which leaves the owners with a diminished competitive benefit which is in fact true and probably easier to do in the Internet.¹¹

Trade secrets include the manufacturing, industrial and commercial secrets. Unauthorized use of the trade secret information is a complete violation¹² and an unfair trade practice. In legal system trade secrets protection is generally considered as a part of safeguard against unfair competition or specific provisions or case laws relating the protection of confidential information.¹³

1.1 What is Trade and what is Secret?

We can briefly explain what is trade and what is secret graphically which is as follows,

⁸USPTO Contact Center (UCC), "What is Intellectual Property?" webmaster@uspto.gov.

⁹http://www.world.bestsites2007.com/review,209196,lus_mentis.html

¹⁰Article "Legal protection of trade secrets and know how" <http://www.iusmentis.com/innovation/tradesecrets>

¹¹ Wiki books, the open-content textbooks collection

http://en.wikibooks.org/wiki/Legal_and_Regulatory_Issues_in_the_Information_Economy/Ideas_Trade_Secrets_and_Intellectual_Property http://www.unescap.org/icstd/Pubs/st_escaping_2329.pdf

¹²Ryan W. O'Donnell. "Trade Secret Protection", Intellectual Property in the Food Technology Industry, 2008

¹³ <http://www.wipo.int/sme> and

http://www.innovaccess.eu/documents/LegalprotectionofTradeSecrets_0000002422_00.xml.html

Trade	Secret
	
Which provides competitive advantage	Must be kept confidential ¹⁴
A potential to make or earn money	Only known to one person ¹⁵

1.1.1 Definition of Trade Secret

Any useful and valuable information or data which can be the subject matter of trade secret. It can be any minor improvement or change in trade activity or business. The law of trade secret is the creature of common law¹⁶ rather than statute. It is very difficult to define the exact and proper definition of trade secret but we can extract some definitions from the judicial decisions and legislations which are as follows,

Uniform Trade Secrets Act Definition

Uniform Trade Secrets Act ("UTSA") defines the trade secret as;

Information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

¹⁴<http://www.marketingtoday.com/legal/tradesec.htm>

¹⁵Lien Verbauwheide Koglin Consultant, "The Importance of Trade Secrets for Businesses", SMEs Division World Intellectual Property Organization WIPO

http://www.wipo.int/export/sites/www/sme/en/activities/meetings/india_05/topic2_verbauwheide.ppt
ORIENTATION PROGRAM ON INTELLECTUAL PROPERTY FOR MANAGEMENT STUDENTS OF INDIAN INSTITUTE OF MANAGEMENT (IIPM) Geneva, Switzerland, 2007, Lien.verbauwheide@wipo.int
www.wipo.int/sme, http://www.kipo.ke.wipo.net/meetings/en/details.jsp?meeting_id=13242

¹⁶<http://www.idea.piercelaw.edu/articles/30/p287.Hilton.pdf>

- (1) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and
- (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.¹⁷

➤ Uniform Trade Secrets Act, section 1(4). The most of U.S states have adopted the UTSA.

Definition in the Restatement (First) of Torts

The most widely quoted definition of trade secret, before the adoption of the Uniform Trade Secrets Act ("UTSA"), was that of the Restatement (First) of Torts:¹⁸

A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. Generally, it relates to the production of goods, as, for example, a machine or formula for the production of an article. It may, however, relate to the sale of goods or to other operations within the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers or a method of bookkeeping or other office management.

¹⁷ <http://library.findlaw.com/2003/Apr/4/132680.html>

¹⁸ <http://www.wkg.com/media/Safeguarding%20Trade%20Secrets.pdf>

Restatement (First) of Torts, §757, comment b (1939) (emphasis added).

The definition was adopted by a number of states and has been applied in numerous state and federal cases. The definition is illustrative of the types of information and materials that possibly qualify as trade secrets.¹⁹

Definition in the Restatement (Third) of Unfair Competition

The Restatement (Third) of Unfair Competition defines a trade secret as:

A trade secret is any information that can be used in the operation of a business or other enterprise that is sufficiently valuable and secret to afford an actual or potential economic advantage over other.²⁰

1.1.2 The Law of Confidence

The law of confidence also deals with the protection of secrets which lies in the equity and mostly based on case law. "Trade secrets are also safeguarded by the law of confidence in intellectual property which have some conditions too. In case of breach of law of confidence owner could take an action against it, but in the case of public interest, confidential or secret information can be disclosed."²¹

¹⁹ Ibid

²⁰ "TRADE SECRETS" Updated through Release 16 Law Journal Press 105 Madison Avenue New York ,New York 10016

²¹ (Wikibooks, the open-content textbooks collection)

http://en.wikibooks.org/wiki/Legal_and_Regulatory_Issues_in_the_Information_Economy/Ideas_Trade_Secrets_and_Intellectual_Property"

1.1.3 What is Secret?

Secret is that information which is neither “generally known” nor easily accessible to anyone



within its dealing circle.²²

1.1.3.1 What does “Generally Known” Means?

Following illustration can explain what “Generally known” means

- Information of the common knowledge,
- The information which can be easily get at library, on internet trade journals, patent information etc,
- Price list which is available on websites,
- The graphics and object code of software application.

1.1.4 What is an Idea?

Idea: It is most valuable information which must be kept secret. We can legally prevent the competitors from learning and using it so that they could enjoy a competitive advantage in the marketplace.

General Principles:

- ❖ The information which contains of commercial value and has been scrupulously kept confidential is legible to be considered as trade secret.²³
- ❖ The owner of secret information in business or trade is entitled to avail relief from the court against those who have stolen it or taken it in an illegal way/manner.²⁴

²²[PPT] Slide 1 - WIPO - World Intellectual Property Organization Microsoft Power point - View as HTML www.wipo.int/edocs/...del.../wipo_smes_del_07_www_76774.ppt -

²³ <http://www.marketingtoday.com/legal/tradesec.htm>

1.1.5 The “Secrecy” Requirement :

Trade secret's subject matter should be kept secret. Case “Furr'sInc.V.United States Advertising Co., 385 S. W.” However Trade secret protection is not lost if the secret information is discovered by "improper means." The Uniform Trade Secret Act of America defines “improper means” as" theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain the secrecy, or taking through electronic or any other means.²⁵

1.1.6 Subject Matter of Trade Secrets

It includes the methods of sale, consumer's profiles, strategies of advertisement, lists of suppliers and client and the manufacturing processes. Trade secrets will always be determined on case to case basis while unfair trade practice of secret information clearly includes the following,

- Industrial or commercial espionage,
- Breach of the contract and
- Breach of the confidence.²⁶

1.1.7 Is Information a Property Right?

There are different views that information is an individual property right or not. Some says that any use of it without informing the owner is equivalent to “identify theft”. One of the school of thought views that data or information (specifically personal information) be

²⁴ Ibid

²⁵ Sheryl Denise Johnson Willert of Williams Kastner, “Safeguarding Trade Secrets in the Information Age” (with Sample Communications Policy)<http://pview.findlaw.com/view>,<http://articles.corporate.findlaw.com/articles/file/00355/008787>

²⁶ <http://www.wipo.int/sme>

accorded as a corresponding property right and protected so that its use could be awarded as appropriate monetary value. Presently, privacy is safe guarded by set of liability rules. If anyone invades any other's privacy, it can be sued in the eyes of law. Though contentious, a property regime has become more appealing and has given the rampant from the misuse of personal information in the web. Treating data as a property right and give it proper safeguard which may help to solve the problem of abuse. How-ever, it may become problematic in the future.²⁷

1.2 What are Trade Secrets?

A trade secret is any confidential information that has the following conditions;

1. By virtue of being kept as secret,
2. Having commercial value,
3. By taking reasonable steps have to be kept secret or confidential.²⁸

1.2.1 When Secret Information could be known?

Secret information is not required to be known only by one person when we

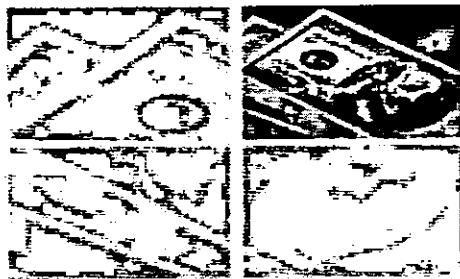
- Need to share it,
- If we license the technology which has limited distribution.

But we must protect confidential information through contractual means.

²⁷ Sheryl Denise Johnson Willert of Williams Kastner, "Safeguarding Trade Secrets in the Information Age" (with Sample Communications Policy) <http://pview.findlaw.com/view>

²⁸ Lien Verbauwhede Koglin Consultant, "The Importance of Trade Secrets for Businesses", SMEs Division World Intellectual Property Organization (WIPO) ORIENTATION PROGRAM ON INTELLECTUAL PROPERTY FOR MANAGEMENT STUDENTS OF INDIAN INSTITUTE OF MANAGEMENT (IIPM) Geneva, Switzerland, 2007, Lien.verbauwhede@wipo.int www.wipo.int/sme, http://www.kipo.ke.wipo.net/meetings/en/details.jsp?meeting_id=13242

1.2.2 Commercial Value



- The required information must confer some economic benefits on the owner in trade.
- Specifically this benefit should be derived from the fact that it is not commonly known ,
- How commercial value could be demonstrated:
 - ➔ Those benefits which are derived from its use in trade sector
 - ➔ The costs of Trade Secrets development
 - ➔ Licensing offers of Trade Secrets
 - ➔ Trade Secrets must be actual or potential²⁹

1.2.3 Reasonable Steps

Under most of the Trade Secrets regimes, we could not have Trade Secrets unless we have taken reasonable precautionary steps to keep the information confidential or secret.³⁰

- ‘Reasonable’ → depends on case to case

²⁹Lien Verbauwhede Koglin Consultant, “The Importance of Trade Secrets for Businesses”, SMEs Division World Intellectual Property Organization (WIPO) ORIENTATION PROGRAM ON INTELLECTUAL PROPERTY FOR MANAGEMENT STUDENTS OF INDIAN INSTITUTE OF MANAGEMENT (IIPM) Geneva, Switzerland, 2007, Lien.verbauwhede@wipo.int www.wipo.int/sme, http://www.wipo.int/meetings/en/details.jsp?meeting_id=13242

³⁰<http://www.roselawfirm.com/publications/publications.asp?id=39&page=1&articleType=article>

- Reasonable security procedures should be followed,



- Non-Disclosure Agreements (NDA) must be properly signed,
- That the secret information can be obtained by others only through improper means.

➤ Proper Trade Secrets management program should be developed³¹

1.2.4 Should the Secrecy of Information be Absolute?

The information which is the subject of trade secrets should be confidential. It does not mean that it should be known only to the holder but its confidential disclosure could be made to employees or others if it is required and bound them that the status of the trade secret should not be destroyed.³²

³¹Lien Verbauwede Koglin Consultant, "The Importance of Trade Secrets for Businesses", SMEs Division World Intellectual Property Organization (WIPO) ORIENTATION PROGRAM ON INTELLECTUAL PROPERTY FOR MANAGEMENT STUDENTS OF INDIAN INSTITUTE OF MANAGEMENT (IIPM) Geneva, Switzerland, 2007, Lien.verbauwede@wipo.int, www.wipo.int/sme, http://www.wipo.int/meetings/en/details.jsp?meeting_id=13242

³²IPR-Helpdesk website <http://www.ipr-helpdesk.org>

1.2.5 Trade Secrets Background

Trade secret is simply can be said as a formula or a device or a technique or any information which is not known outside of the business concerns and which provides³³ an opportunity to get benefit over the competitors who do not possess it. Generally trade secrets are neither patented nor copyrighted, but they are still having some significant safe guard through legislations.³⁴

The idea of protection of valuable trade secrets is taken from “theft”. Roman courts have created a cause of action³⁵ which is called “**Actio Servi Corrupti**” which means an action which is taken against corrupting a slave.³⁶ According to Schiller, third parties were corrupting the slaves for disclosing the secrets of the kings or owners. Then the law was made in which third party was liable of damages in case of disclosure was made by the slaves due to them. Later on due to Industrial Revolution more statutes were enacted for giving the legal protection to” “Industrial secrets”. “They tried to keep their intellectual property within their hand, they started to reward those who will invent any idea or protect it but resultantly it has reduced the employer’s mobility. In this way, Private regulations were adopted further for protection of intellectual property. They increased the product quality and kept the information in secret from the praying eyes. But it was the need of the time to have proper legal system and trade secret law. In order to increase employee mobility European

³³[http://www.smartagreements.com/cgi-\(11/18/05\)local/SoftCart.exe/bltopics/Bltopi37.html?L+scstore+vtkj8300ff68cf68+1056869437](http://www.smartagreements.com/cgi-(11/18/05)local/SoftCart.exe/bltopics/Bltopi37.html?L+scstore+vtkj8300ff68cf68+1056869437)

³⁴ “TRADE SECRETS” Updated through Release 16 Law Journal Press 105 Madison Avenue New York ,New York 10016

³⁵<http://www.allbusiness.com/legal/intellectual-property-law-trade-secrets/11798454-1.html>

³⁶Lemley, Mark A.. "The surprising virtues of treating trade secrets as IP rights.", Stanford Law Review, Nov 2008 Issue

Countries developed their trade secrets laws very early. In 1939, principal document setting forth the law of trade secrets was the “**Restatement of torts**”³⁷

Trade secret had been recognized from long time ago under the common law and now it has developed so quickly due to the dawn of the information age in the world. As in many cases, patent became invalidated by the courts then trade secret protection gets more valued through proper legislation. At last in 1970’s **Uniform Trade Secret Act (UTSA)** was legislated for trade secrets protection. **Minnesota** enacted UTSA and enforced it on 1st, January, 1981 as the first American state and now 38 states and District of Columbia have enacted it.³⁸ Trade secret first assertions are reported in 16th century in England and United States and the first United States case was in Massachusetts in 1868.³⁹

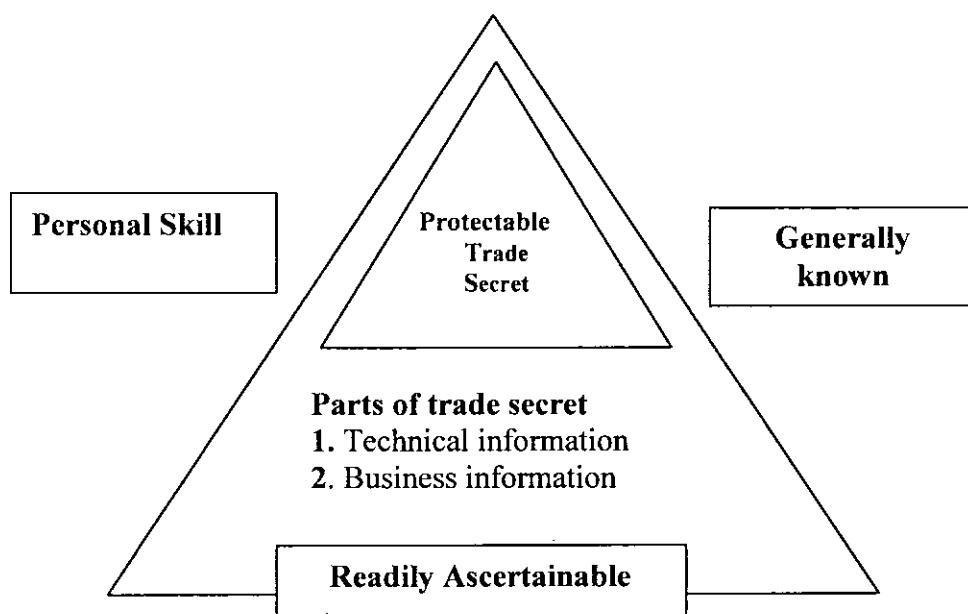
³⁷ Robert P. Merges, Peter S. Menell, “Intellectual Property in the New Technological Age” third edition, Mark A. Lemley SPEN Publishers 11EIGHTH Avenue, New York, NY 1001 www.aspenpublishers.com, http://www.kentlaw.iit.edu/7cr/v3-2/SeventhCircuitReview_v3-2.pdf(11/6/09)

³⁸ “TRADE SECRETS” Updated through Release 16 Law Journal Press 105 Madison Avenue New York, New York 10016

³⁹ Judith A. Silver, “Source article what is intellectual property: Trade secret law?” Coollawyer.com

1.3 Scope of Trade Secret

We can graphically represent the scope of trade secret as follows,⁴⁰



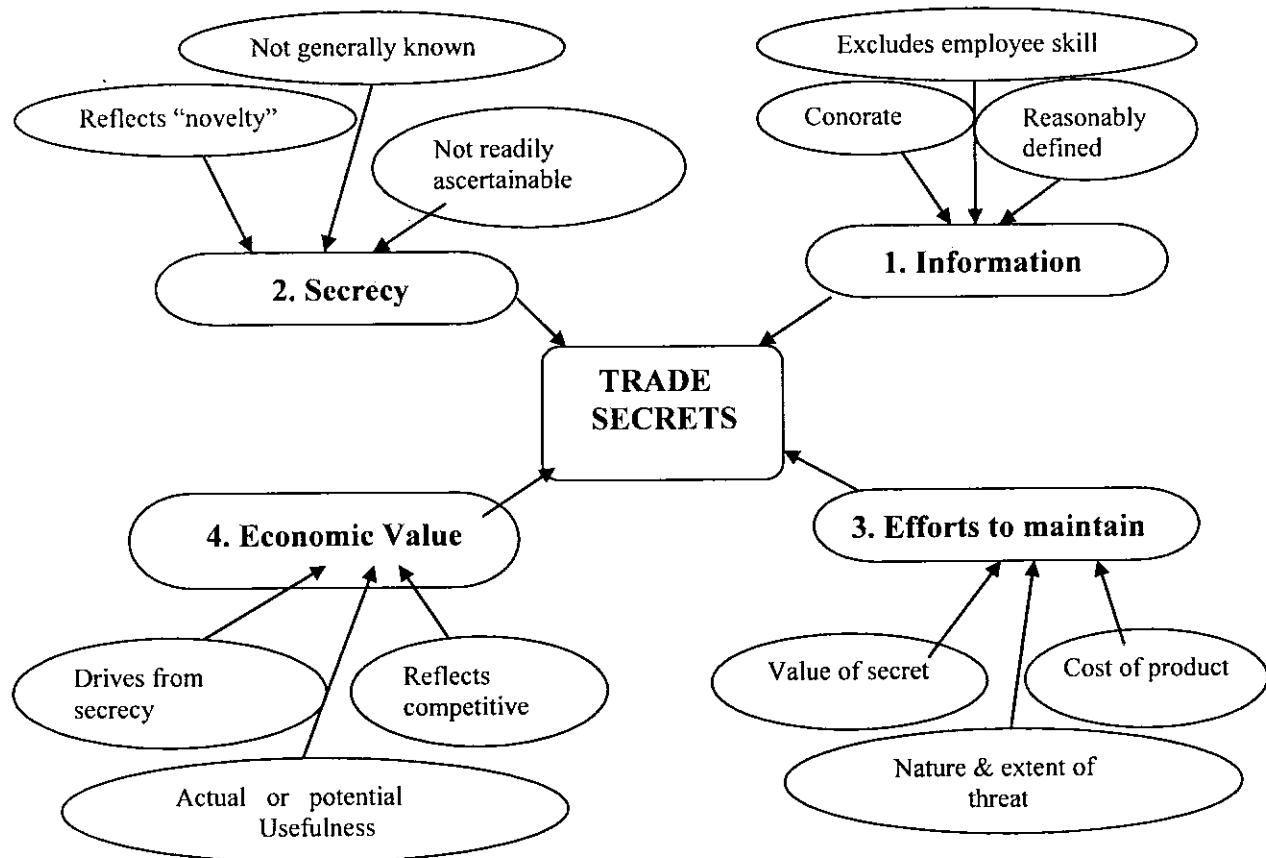
1.3.1 Conditions of Trade Secrets

Definitions and judicial decisions suggests the following conditions are qualifying for trade secret,

1. Distinguish from general or common knowledge.
2. Should not be well known.
3. Reasonable efforts made by the owner to maintain its secrecy or protection.

⁴⁰Law Journal Press 105 Madison Avenue New York ,New York, <http://members.aol.com/travellaw/index.html>

4. Secret information must be having economic value.⁴¹



1.3.2 What can be the Trade Secrets?

Trade secrets are not a common knowledge in business industry. Following are the few categories of what can be the trade secret.

- Process of manufacturing, technique and know how,
- Data compilation ,
- Drawings, designs, maps, blue prints,
- Financial information

⁴¹“TRADE SECRETS” Updated through Release 16 Law Journal Press 105 Madison Avenue New York ,New York 10016, <http://members.aol.com/travellaw/index.html>

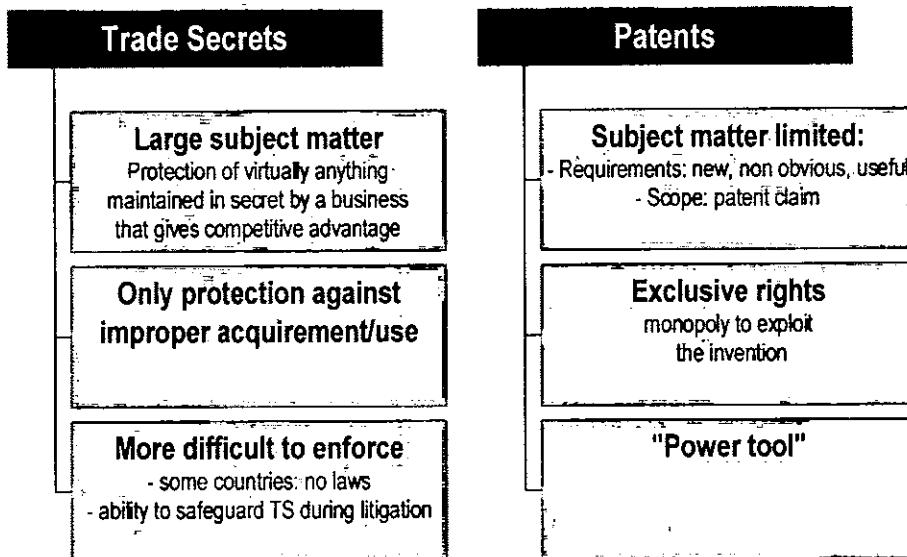
- Formulas relating to the production of products,
- Personal records,
- Ingredients,
- Manuals,
- Business plans, strategies, exports and marketing plans,
- Research information, activities of development,
- Algorithms, computer programs and their process,⁴²
- Engineering,
- Distribution techniques /documents,
- Recipes,
- Business formats,
- Operation manuals,
- Pricing techniques⁴³

1.3.3 What is Difference between Trade Secrets and Patent?

Trade Secrets	Patents
no registration <ul style="list-style-type: none">- less costs (but: costs to keep secret)- immediately available	registration <ul style="list-style-type: none">- fees (registration + maintenance)- takes time to get patent
can last longer <ul style="list-style-type: none">- but: limited to economic life- uncertain lifespan: leak out is irremediable	limited in time <ul style="list-style-type: none">- generally: max 20y- but: can be invalidated
no public disclosure <ul style="list-style-type: none">- but: practical need to disclose- if leak out: TS lost	public disclosure <ul style="list-style-type: none">- publication 18m after filing- if P not allowed: no TS

⁴² International Trade centre UNCTAD/WTO “secrets of intellectual property” A guide for small and medium – sized exports Geneva 2004, <http://www.sciencedirect.com/science/issue/6542-2006-999769996-638478>

⁴³ “TRADE SECRETS” Updated through Release 16 Law Journal Press 105 Madison Avenue New York ,New York 10016



1.4 General Factors of Trade Secret:

The criteria which is adopted in America by the **Restatement (First) of Torts** for determines whether a trade secret exists:

- To what extent the which the information is known outside of the business;⁴⁴
- To what extent it is known by the employees and others involved in the business;
- To what extent measures are taken for safeguarding the secrccy of the information;
- What is value of the secret information for the business and to competitors?
- How much effort or money is expended in developing the secret information?

⁴⁴<http://library.findlaw.com/2003/Apr/4/132680.html>

- How much easy or difficult would it be for others to acquire or collect for duplication of it?⁴⁵

1.4.1 What Kind of Information Qualifies as a Trade Secret?

Trade secrets includes the information

1. That provides competitive benefit to the owner in the market place
2. That prevent the competitors and public from its learning which includes,
 - biological inventions (unpatented)
 - chemical inventions (unpatented)
 - computer hardware
 - computer software
 - cosmetics
 - electrical inventions (unpatented)
 - electronic inventions (unpatented)
 - fabric
 - food inventions
 - formulas--chemical
 - formulas--cosmetic
 - formulas—food machines
 - machines--internal parts
 - magic tricks or techniques

⁴⁵Sheryl Denise Johnson Willert of Williams Kastner ,“Safeguarding Trade Secrets in the Information Age (with Sample Communications Policy) and can also view in Gurqbal Singh Jaiya, Director, SMEs Division, WIPO,(www.wipo.int/sme)”<http://articles.corporate.findlaw.com/articles/file/00355/008787>

- manufacturing processes
- mechanical inventions
- medical devices--mechanical
- movie plots (not written)
- movies--script
- movies--treatment
- musical composition
- odors/processes
- photographic processes, and
- project designs

If these items are kept secret then they could have potential to earn money for their owners.⁴⁶

1.4.2 Benefits of Trade Secrets in Information Age:

Trade secrets are having significant value. There is no time limitation for their protection and no need for filing application. If Trade secret is improperly obtained then immediately one must contact their attorney/legal counsel for taking swift action for safe guarding their trade secrets within legal means. Like Trade mark and patent, trade secrets are also not protected in intellectual property laws in the world. Trade secrets are safeguarded through nondisclosure agreements in which company's employees have to sign on that.⁴⁷

⁴⁶ Attorney Stepher Elias , "Trade Secret Law: Overview" Copyright © Nolo Press 1998

⁴⁷ By Sheryl Denise Johnson Willert of Williams Kastner , "Safeguarding Trade Secrets in the Information Age"(with Sample Communications Policy),<http://library.findlaw.com/2003/Apr/4/132680.html>

1.4.3 Increasing the Value of Trade Secrets

Employer must get advancement in technology. Trade secrets are a good deal of valuable information which makes an excellent place in the market for competition. If any employee is going to leave the job from employer business then the employer can enjoy as stronger competitor if their trade secrets are well protected.⁴⁸

1.5 Who Owns the Trade Secrets?

Trade Secrets (e.g. new technology, brand, etc) are owned and developed,

- ❖ by the employee
- ❖ by external contractor

To avoid from disputes, all trade secrets are developed in advance through written agreements.⁴⁹

1.5.1 Who is Responsible for Safeguarding the Trade Secrets?

It is not the responsibility of a single person but it lays on both employer and employee to safe guard the trade secrets of their business by adopting precautionary measures but for that company must give a comprehensive frame work. Responsibility of safe guarding trade secrets is found different.

⁴⁸Guriqbal Singh Jaiya, Director, SMEs Division, WIPO,(www.wipo.int/sme)

⁴⁹Lien Verbauwhede Koglin Consultant, "The Importance of Trade Secrets for Businesses", SMEs Division World Intellectual Property Organization (WIPO) ORIENTATION PROGRAM ON INTELLECTUAL PROPERTY FOR MANAGEMENT STUDENTS OF INDIAN INSTITUTE OF MANAGEMENT (IIPM) Geneva, Switzerland, 2007, Lien.verbauwhede@wipo.int, www.wipo.int/sme, <http://www.wipo.int/sme>, http://www.kipo.ke.wipo.net/meetings/en/details.jsp?meeting_id=13242

- Some says that if we divide responsibility to all then it will help to resolve the problems in future at every ones level.
- Some says that if we divide responsibility to all that will open a window towards the problems because it will become no one responsibility and it will lead the trade towards the disaster and loss.⁵⁰

1.5.2 Importance of Education for Safe Guarding Trade Secrets



Education is the most important tool for safe guarding the trade secrets, so the employer should educate their employees that what type of information is confidential and needs to be protected so that employee should know it before when they are dealing with trade secrets.⁵¹

1.5.3 How Ownership of a Trade Secret is Proven?

Trade secrets ownership infringement is proved in the following ways;

- The alleged information should be confidential,
- Confidential agreement had been made for its protection,

⁵⁰ Gurqbal Singh Jaiya, Director, SMEs Division, WIPO, (www.wipo.int/sme)

⁵¹ Ibid

- The alleged information should show that it is improperly gained by the defendant or disclosed or likely to do so by the defendant.

In fact, trade secrets are the most valuable and tangible asset of trade. They can only resist with the proper application of due care by the trade secret owner or employer. On the failure of meeting this standard of reasonable timely care can result the company in great loss. Trade Secret Asset Management is the only source which provides the knowledge and understanding which is required to avail the maximum benefit from the corporation's most valuable property that is it's trade secrets.⁵²

1.5.4 Need for a Comprehensive Frame Work for Safe Guarding Trade Secrets

Trade secrets can be disclosed in many ways, so in order to safe guard it many European countries have followed US and enacted specific legislation for unauthorized disclosure of it. Some time employer provides technical operating manuals. It is the responsibility to protect their trade secrets at all levels. Employer should make policies related to the use and disclosure of trade secrets. There must be a well drafted agreement of employment which may educate and constitute the provision for the protection of trade secret of that business and also strictly prevent from the use and adverse result of trade secrets by the competitors and third parties. The employer must be very careful about its trade secrets protection.⁵³

⁵² Helen Nissenbaum (1)-University Center for Human Values, 5 Ivy Lane Princeton University, Princeton, NJ 08544 Law and Philosophy, 17: 559-596, 1998, "Trade Secrets Drive the Competitive Advantage and Shareholder Value of Todays Corporations.", Business Wire, Sept 26 2006 Issue

⁵³ Gurubal Singh Jaiya, Director, SMEs Division, WIPO,(www.wipo.int/sme),
http://www.wipo.int/edocs/mdocs/sme/en/wipo_smes_lhe_2_07/wipo_smes_lhe_2_07_topic04.ppt

1.5.5 Reasonable Efforts to Maintain Trade Secrets in Information Age:

The owner of trade secrets should see proper steps for maintaining the trade secrets in information age. Sometimes companies adopt very careful policy for the protection of their trade secrets.⁵⁴ If the formula of any product or invention is obtained through proper means then someone else could be able to make that product or thing and could sale it which gives an idea that genuine trade secrets should be safe guarded very closely. It should only disclose to those employee who are required to know them. Company's owner must be sure of that their employee came under obligations to obliged them through contract not to disclose and deploy it in market place through which others could obtained it in proper means.⁵⁵

Plaintiff should take reasonable steps or measures for safe guarding the trade secrets in the information age and prevent the previous employees from use of them through obeying employment contract and confidential agreement that they will not disclose too. Reasonable efforts for maintaining the trade secrets have evidentiary and remedial importance although they are two different concepts for the safe guard of trade secrets. Owner takes reasonable measures for maintaining the trade secrets because it gives costs and benefits differently from ease to case basis and on the other hand trade secrets have more value which deserve legal protection. Safe guarding the trade secrets in information age is a vital part of intellectual property because it is a type of property that improves the competitiveness of any company or industry's business.⁵⁶ If any information is within the public approach or is

⁵⁴ Michael J. Garrison. "The Evolving Law of Employee Noncompete Agreements: Recent Trends and an Alternative Policy Approach", American Business Law Journal, 3/2008

⁵⁵ Ditto

⁵⁶ http://www.buildingipvalue.com/05_NA/128_130.htm

known by them that information cannot be considered as a trade secret because trade secrets should not be known in public.⁵⁷

“ If the value and secrecy of information are clear , evidence of specific pre cautions taken by the trade secret owner may be unnecessary” **{Restatement(third) of Unfair Competition 39,Comment,at 435-436}.**

There must be meaningful security provisions for the legal protection of trade secrets in information age. The best way to safe guard the trade secrets is not to tell anyone but in this modern commercial world it is not possible. Companies have to tell their trade secrets to its employees, business partner, customers, and distributors. There will the risk of disclosure more which can be covered through different ways for example,

- To get sign on non-disclosure agreement of trade secrets from the employees, customers, distributors, licenses.
- Through invest in physical security measures against theft.
- By designing the goods by themselves so that they will not reveal the trade secret in the casual or in detailed inspection.⁵⁸

1.5.6 “What if the Secret is disclosed Within Legal Means”?

If the trade secrets are disclosed by any one independently, without using illegal means then no one can stopped from using that information although which is safe guarded under trade secret law. For example: It will not be considered as violation of trade secret law

⁵⁷http://www.orrick.com/lawyers/articles/weiss/Weiss_Trade_Secrets_AELC_Conference.pdf

⁵⁸ Intellectual Property in the New Technological Age third edition Robert P. Merges, Peter S. Menell, Mark A. Lemley SPEN Publishers,

[http://www.source4book.com/SearchResult.aspx?SearchType=Node&BrowseNodeId=491506&SearchContent=Law%20%20Business%20\(Textbook\)11EIGHTH Avenue,New York,NY 1001 www.aspenpublishers.com](http://www.source4book.com/SearchResult.aspx?SearchType=Node&BrowseNodeId=491506&SearchContent=Law%20%20Business%20(Textbook)11EIGHTH Avenue,New York,NY 1001 www.aspenpublishers.com)

to analyze any product and to determine its trade secrets⁵⁹ which are lawfully availed. Some of the software companies also reveal their trade secrets for offering solution for their flaws. For example, **Netscape** had published its source code then discovered that the program had some security flaws which can be exploited by hackers or crackers. Netscape developers felt that through revealing and posting of their source code, other software developers could scrutinize it, find out the glitch and then provide patches that Netscape users could then download for free.⁶⁰

⁵⁹http://en.wikibooks.org/wiki/Legal_and_Regulatory_Issues_in_the_Information_Economy/Ideas_Trade_Secrets_and_Intellectual_Property

⁶⁰http://en.wikibooks.org/wiki/Legal_and_Regulatory_Issues_in_the_Information_Economy/Ideas_Trade_Secrets_and_Intellectual_Property

CHAPTER NO: 2

Safe Guarding Trade Secrets in Information Age

Trade secret protection is a very important part of intellectual property which is like type of a property⁶¹ which is having growing importance or significance day by day for the competitiveness of business in industry. The future of a nation depends on the efficient working/performance of an industry which depends on the protection or safe guard of intellectual property.⁶²

2.1 Rights of Trade Secrets Owner

Unfortunately, sometimes trade secrets owners do not realise about their rights unless their ex-employee or any other competitor gets their trade secrets. Trade secrets always protect the intangible assets of a company which very important part of strategy of intellectual property. For example list of customer, marketing plans, methods of manufacturing and source code are very valuable assets for the company. For maintaining of trade secrets protection, one must be having wisest choice and fundamental understanding of the key issues which are involved in it.⁶³

⁶¹STUTLER, THOMAS R.. "Stealing Secrets Solved.(economic espionage investigations by the FBI)", The FBI Law Enforcement Bulletin, Nov 2000 Issue

⁶² AN appellate court in Rockwell Graphics Systems Inc v DEV Industries et al (925 F 2d 174, 180 (7th Cir 1991)

⁶³ Michael O Warnecke and Michael A Molano Mayer, "Key issues in trade secret protection" Brown, Rowe & Maw LLP, Chicago, IL and Palo Alto, CA

2.1.1 “Setting Up a Trade Secret Programme”

The purpose of Trade Secrets programme is to satisfy the requirements of its protection. Following are the steps for setting up a trade secrets protection programme:⁶⁴

(1) Employment Agreements:

It must be sure that all the company employees have signed on the employment contract which should clearly state that if any type of information related to the company is confidential or secret then it should not be disclosed to anyone.

(2) Trade Secret Policy:

There should be a trade secrets policy written in employee's manual in which they have to be given briefing on the security measures.

(3) Security Measures:

Reasonable efforts for maintaining the secrecy can be made by taking the following security measures;

- To set the video cameras for monitoring the public areas;
- Labelling of computers for identification of the company's computers;
- To keep software passwords on certain computer information from being accessed;
- To set the visitors log and badges;
- To set a policy that requires to cleared all desks from papers at night;

⁶⁴http://www.buildingipvalue.com/05_NA/128_130.htm

- To mark or stamp some information as confidential or proprietary to the company;
- Sign-in and sign-out requirements regarding certain papers or computers containing trade secrets and
- To conduct exit interviews for the ex-employees in order to remind them of their continuing obligation regarding confidentiality.

2.1.2 Cases in Which Small and Medium Sized Enterprises (SME) May benefit from Trade Secret Protection

Trade secret protection cases are decided on case to case basis and it also depends on the existing statutory mechanisms and case laws of every country. Following circumstances can be advisable for the better use of trade secret protection.

- When the trade secrets are not patentable.⁶⁵
- When trade secrets are related to the manufacturing process
- When it is applied and waiting for patent grant.⁶⁶

2.1.3 Legal Protection of Trade Secrets and Know-How

The most common type of knowledge of trade secrets protection is know-how. Know-how is a general term for any unique and valuable trade secret knowledge or skills related to

⁶⁵ http://wwwOMPI.int/sme/en/ip_business/pdf/ip_business.pdf

⁶⁶ Michael O Warnecke and Michael A Molano Mayer, "Key issues in trade secret protection" Brown, Rowe & Maw LLP, Chicago, IL and Palo Alto, CA

manufacturing, products and services and so on, because it is specifically tried to a particular process of production or type of product.⁶⁷

2.1.4 Requirement to Keep Secret

For qualifying the trade secret protection, the owner should adopt reasonable precautionary measures. It is not necessary to take strong and hard steps like the information may be surrounded by the armed guards but the owner is required to prove that necessary precautionary measures are taken. Following practices could be helpful in this regard.

1. By Marking The Confidential Information as Confidential

Trade secret can be kept secret when its owner or holder marks the secret information as “confidential information” which will clearly indicate that access towards that data is restricted or not allowed and shows the confidentiality of trade secret. It only depends upon that owner of trade secret who is well aware of its status and value of secret information for running a successful business.

2. To Sign on Nondisclosure Agreements

Signing on the Non-disclosure Agreements means that the party or that person agrees on keeping the confidentiality of the information at work place in trade and will not disclose it to any other person for whom it is forbidden. The party who signs on Non-disclosure Agreements cannot claim later on that it was public information in case of violation of agreement and it will be also a valid prove in case of misappropriation of trade secret.

⁶⁷ “Legal protection of trade secrets and know-how” <http://www.iusmentis.com/innovation/tradesecrets>

3. To Apply Restrictions on Distribution of Secret Information

The owner of company must make it sure that trade secrets are only known to those who are in need to know that information for successful running of business activity.

Paper documents or colored papers can also be used for indicating the strict access towards secret data while for electronic documents some soft ware should be installed which itself will indicate that secret information or document could not be open, copied or printed or forwarded without specific code but these types of obstacles or indicators can intentionally be removed for damaging the status or importance of trade secret protection.⁶⁸

2.2 Trade Secrets and Patents

Trade secret and patent law both are not the same but they are used for safe guarding an invention. The requirement of patent is to publish the invention while trade secret law safeguards it only against its misappropriation. Safeguarding Trade secrets policy is an alternative for the protection of patent. The owner of patent stops other from use of his intellectual property right while trade secret owner can re-act against those who would illegally use the information. An invention can only be protected by two ways, either by patent or trade secret. If anyone is maintaining have trade secret on an invention and later on any another person independently re-invent that and apply for the patent, then this patent holder can stop to the earlier inventor so that earlier inventor may not infringe his patent right because earlier inventor has kept that information and its use was not an prior art.⁶⁹

⁶⁸ Article “Legal protection of trade secrets and know-how” <http://www.iusmentis.com/innovation/tradesecrets/>

⁶⁹ Hutchison and Mason PLLC, “Trade secret” Knowledge Level: Novice, Keywords: trade, secretsIPR-Helpdesk website <http://www.ipr-helpdesk.org>

2.2.1 Kinds of Trade Secrets

Trade secret is essentially of two kinds.

1st kind of Trade secrets are those which are concerned with manufacturing process or inventions and do not fall on the specified criteria of patent protection they are only protected as trade secret for example lists of customers or manufacturing processes which are not sufficient to be give patent protection.

In **2nd kind** of trade secret is the information which fulfills the protection criteria of patent and can be protected under the patent laws. Small and medium enterprises have the choice to get patent their invention or keep it as trade secret.⁷⁰

2.2.2 Advantages of Trade Secrets Protection

- Generally Trade secret is safeguarded for the indefinite period of time until and unless it is not revealed to public itself.
- It does not involve the cost of registration although it becomes highly costly for maintaining it confidential.
- It becomes immediately effective,
- Its protection does require any compliance along with the formalities like the disclosure of secret information to the Government authority.⁷¹

2.2.3 Disadvantages of Trade Secrets Protection

However when trade secrets fall under the criteria of patent protection there are some concrete disadvantages for their protection:

⁷⁰“Patents or Trade Secrets?” www.wipo.int/sme/en/ip.../trade_secrets/patent_trade.htm -

⁷¹Ibid

- If the secret information is embodied in the shape of an innovative product, anyone can inspect and analyze it and then after discovering the secret by themselves, they become entitled for its utilization.
- If the trade secret comes in public then anyone can get access to use it.
- Trade secret is more difficult to be enforced than a patent because trade secret protection is different from country to country but generally it is weak if it is compared with the patent protection.
- Trade secret can be patented by any one if they develop the relevant secret information through legal means.⁷²

2.3 How Trade Secrets are Protected?

Trade secrets as intellectual property are not subject to registration. The trade secret holder/owner does not need to apply for any official authority for its safeguard in order to utilize the rights of confidential information when they get their legal possession. Grant for the protection of trade secrets does not mean to fulfill any type of formal requirements or procedures but it can be protected for an unlimited period of time. Its protection will remain alive as long as the condition of its confidentiality exists. The trade secret owner/holder has to bear all the costs which is connected with the implementation of the safety and information protection policy, for its control, its surveillance and also have to adopt all the measures which are against the infringement of trade secret. The trade secret protection conditions and scope is different from country to country which is provided in unfair competition laws or rules for the protection of secret information.⁷³

⁷²“Patents or Trade Secrets?” http://www.wipo.int/sme/en/ip_business/trade_secrets/patent_trade.htm

⁷³Hutchison and Mason PLLC, “Trade secret” IPR-Helpdesk website Knowledge Level: Novice, Keywords: trade, secrets <http://www.ipr-helpdesk.org>

2.3.1 How Should Relations between the Employer and his Employees be Setup?

Trade secrets are mostly violated by the employees of company. Therefore the employer should implement a safe and secret protection policy by informing his employees about the obligation to safe guard the secret information or data and return the company's confidential documents when their employment⁷⁴ would be terminated also would be liable for the breach of its secrecy. The employer can protect trade secrets by getting sign on special confidentiality agreements with his employees in which he must set the detailed limits of time and also indicate about the secrecy of the information. "These types of agreements are not always necessary to follow because in governing law of many countries, the employee-employer relations ask the employee for maintenance of the confidential agreement."⁷⁵

2.3.2 In What Situations is it Advisable to Take Steps to Protect Trade Secrets?

It is advisable to take steps for the protection of trade secrets:

- When reasonable efforts are not adopted/taken for the maintaining the secrecy of trade.
- When trade secret data or information is generally known to public or easily ascertainable.
- When trade secret is learnt by the independent discoveries or

⁷⁴http://www.ipr-helpdesk.org/documents/ES_tradesecret_UJ_en_final_0000006449_00.xml.html

⁷⁵ Hutchison and Mason PLLC, "Trade secret" Knowledge Level: Novice, Keywords: trade, secrets IPR-Helpdesk website <http://www.ipr-helpdesk.org>, <http://www.zeromillion.com/entrepreneurship/trade-secrets.html>

- When trade secret is lawfully acquired by reverse engineering.⁷⁶
- When the trade secret is not safeguarded through any other intellectual property right.
- It may be possible that the confidentiality of information could be observed for a considerable period of time,
- When the owner/holder of trade secret is not commercializing the trade secrets while using them.⁷⁷

2.3.3 Steps for Trade Secret Protection:

The Company should determine confidential information, processes or other things which gives the company an advantage over its competitors and constitute trade secrets.⁷⁸

First step: First of all, identify the potential trade secrets of his business and conditions for its protection to the employee clearly.

Second step: Employer should identify the trade secret is licensed so that the reasonable steps may take for its protection.⁷⁹

When we identify and protect trade secrets it could save us from any loss in future and we could also produce valid prove in the court about value and protection of trade secrets information.⁸⁰

⁷⁶ <http://www.ndasforfree.com/whatisatradesecret.html>

⁷⁷ IPR-Helpdesk website <http://www.ipr-helpdesk.org>, http://www.ipr-helpdesk.org/documents/ES_tradesecret_UJ_en_final_0000006449_00.xml.html

⁷⁸ THOITS, LOVE, HERSHBERGER & McLEAN, A PROFESSIONAL CORPORATION ATTORNEYS AT LAW 245 Lytton Avenue, Suite 300 Palo Alto, California © 2003-2004 Thoits, Love, Hershberger & McLean, P.C. http://www.thoits.com/resources/gfx/trade_sppc.pdf

⁷⁹ Gurubal Singh Jaiya, Director, SMEs Division, WIPO, (www.wipo.int/sme) MANAGING TRADE SECRETS IN A FRANCHISING ARRANGEMENT" SMEs Division, IPO, (www.wipo.int/sme)

⁸⁰ Ibid

2.3.3.1 Identification of Trade Secrets:

First of all the employer must identify and make list of information which data is to be considered to keep as trade secrets e.g.

- Technical and Scientific information
- Financial, legal and HR information
- Commercial information

And also note down the date of creation of trade secrets, place of storing or use of it and also mention any other information relevant to it.

➤ Technical and Scientific Information

1. Information of Product

It is consist of information related to the technical composition of any product like, medicine, paint, recipe or data about performance of the product and information of its design.

2. Manufacturing Information

It includes the secret information which is related to

- the methods and process of manufacturing, like weaving technique, process of any device etc
- the cost of production,
- Refinery process,
- Raw material and
- Machinery.

➤ **Financial, Legal and HR Information**

1. Financial Information

It includes the following,

- Pricing information
- Salary information and the compensation plan
- Information related to the evaluation of employee etc

2. Legal Information

Legal information includes all the relevant secret legal data e.g. provisions of trade agreements and non-disclosure agreements of employees which is valuable to be kept as trade secret.

➤ **Other Protected Information in Decided Cases**

Some other information which are protected on certain decided cases which are as follows, Information of project, Financial matters, Pricing or sales forecasts, Source code of the computer, Customer business, Access card control information, Engineering plans and diagrams, Formulas, Research, Diagrams, Blue prints, Soft ware, Implementation of methodology, Technical records, Biomedical research and sales forecasts.

3. Human Resource (HR) Information for Employees

Employer should also safe guard the trade secrets through company's Human Resource policy because sometimes information is lost from the company. They should also adopt strict security procedures for the documentation of secret papers, electronic data and tangible material. They should also acknowledge their employees clearly about trade secrets protection and enforcement of their agreements. The provisions of confidential agreements

should strictly bind the employees to abide by the agreements for the protection of trade secrets. The staff manual should also clearly describe about safeguard of trade secrets.

HR Information for Ex-Employees

Several interviews should be conducted from the ex-employees that they will not disclose the trade secrets and under Human Resource Policy. Ex-employees should be bound for the interest of the employer under non-compete agreements. These types of the agreements are enforced where there is need of time, scope and its geographical limitation so that employer interest will not unfairly be competed in the same type of business and also in the same place.

Commercial Information

It includes the following information,

- Information relating to marketing strategy or research,
- Information which are relevant to the customer's buying preferences and their requirements,
- Information of consumer profiles,
- Information relating to sales methods.⁸¹

2.3.3.2 Reasonable Measures for Safe Guarding the Trade Secrets

There are so many other ways to protect the trade secrets like, we can safe guard them through signing on the non-disclosure agreements, by specific legislation, rules and making policies which may explain well that to what extent that information can be disclosed and to

⁸¹Guriqbal Singh Jaiya,Director,“MANAGING TRADE SECRETS IN A FRANCHISING ARRANGEMENT”SMEs Division, IPO,(www.wipo.int/sme) (Guriqbal.jaiya@wipo.int)

prevent others from the adverse results of their use by other parties and competitors. For specific or limited boundary a company should design a computer soft ware for its protection where the required data can be kept confidential. If the real owner is not careful then his all confidential information can be copied easily and competitive business will be started against his business.

2.3.3.3 Other Safe Guarding Trade Secrets Measures

There are many ways to safe guard the trade secrets like, Generally we can safe guard them through making the non-disclosure agreement ,specific legislation and policies which may describe that to what extent the information can be disclosed and to prevent from the adverse results of their use by the competitors and other parties. In specific or limited boundary of a company, a company should design a computer soft ware for its protection where the required data can be kept confidential. If the owner is not careful then his all confidential information can be copied and competitive business will be started against his business.

Employer should review the advertisement and all release reports or news and progressing material. It should also be monitor through trade news that is there anyone who is using their trade secrets unfairly?

2.3.4 “List of Subjects Covered in Trade Secrets”

1. Making the decision to export
2. Export planning
3. To identifying Country markets
4. Customer targeting

5. Buyer search through internet
6. Cultural issues
7. Agents & Distributors
8. Contract documents
9. The Quality
10. Pricing
11. Financing & Payments
12. Packaging & Labeling
13. Transportation & documentation
14. Clearing & forwarding Agents
15. Importing Inputs for Exports
16. Environmental Issues
17. Human Resource development
18. Ministries, CBR & Customs (Government Departments)
19. WTO
20. Sector Specific Issues⁸²

2.3.5 Imposition of Duty of confidentiality of Trade secrets

We can deal the matter of imposition of duty of confidentiality of Trade secrets through different ways like,

- By explicit contract,
- Through implicit contract,

⁸²Book name “Trade Secrets-“ “Trade Secrets- The export answer book for small and medium sized exporters” is a joint publication of SMEA and the ITC (International Trade Center).”, http://www.smeda.org/publications/trade_secrets.php

- By fiduciary duty,
- By practical approach in the trade.

2.4 Internal Security of Trade Secrets

Internal security of trade secrets can be maintained through following ways like,

- Data of trade secrets should be kept under lock and key,⁸³
- Password should be protected in computer,
- Trade secrets can be disclosed at the time of need or where it is necessary to know that,
- Confidential information or documents of trade secrets should be marked clearly as “confidential”,
- There must be process of registration at the reception, visitor places, escorts,
- Different types of internal security signs should be used for trade secret like “keep out” and “authorized personal only” etc,
- There must be strict and controlled access photocopies, scanning and use of computers,
- There should not be anything downloaded on the internet regarding trade secrets.

The word “confidential” means that we do not have the right to disclose, reproduce, sell or manufacture anything of trade secrets.

Presently, privacy is safe guarded through a set of liability rules. If anyone invades any other's privacy, can be sued. Though contentious, a property regime has become nowadays more and more appealing which gave the rampant misuse of personal information

⁸³<http://www.goodwinprocter.com/~/media/D2B4615ADE4844878B5E37DFEAF11A7D.ashx>

in the web. Treating data as a property right and giving it proper safe guard can help to solve the problem of its abuse. However it will become a source of problems in the future.⁸⁴

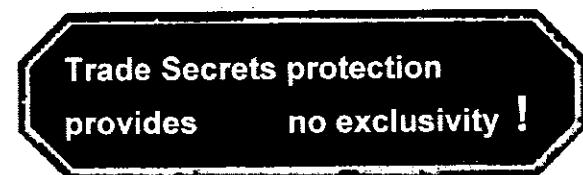
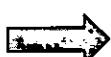
➤ Period of Protection

Trade secret protection is perpetual one which does not expire after a specific length of time, as a patent does.⁸⁵

➤ Proper Means

→ If the secret is discovered by fair, honest and proper means, it will be lawful

1. By Independent Creation



- Through legal means or without violation of its agreements or laws
- Through Patent

2. By Reverse Engineering

- By taking a product in parts and observe its functioning or see how does it work.
- Through the common practice of the software companies: by studying the competitors' products
- To make or create a software which can inter-operate with other software which is being studied.
- To make a product which could compete it.

⁸⁴ Guriqbal Singh Jaiya, Director, "MANAGING TRADE SECRETS IN A FRANCHISING ARRANGEMENT" SMEs Division, IPO, (www.wipo.int/sme) (Guriqbal.jaiya@wipo.int)

⁸⁵ New World Encyclopedia Jump to: navigation, search Previous (Tractor) Next (Traditional Chinese medicine), http://www.newworldencyclopedia.org/entry/Trade_secret

For example: decompile the object's code for revealing its structure and also figure out the interface specifications for the purpose of interoperability For example see at any program's input and outputs.⁸⁶

Improper Means

1. Breach of Duty of Trust

➤ It will be wrongful to breach the duty of trust which is imposed either impliedly or imposed by the law on the company's employees, directors and lawyers etc who are required to know the trade secrets of the company.

2. Breach of Confidentiality Agreement or Non Disclosure Agreements

➤ Breach of Confidentiality agreement or Non Disclosure Agreements for getting trade secrets is an improper means which are made between the trade secret holder/owner and the employees, suppliers, their consultants, financial advisors and also with those who are required to know the trade secrets for the efficient and smooth working of their business activity.

3. Industrial Espionage, Theft, Bribery, Hacking, Eavesdropping

The industrial espionage, theft, bribery, hacking and eavesdropping are also being considered as improper source of knowing trade secrets of any company.⁸⁷

2.5 How to Get Relief from Court?

Courts can only give/grant relief if someone has improperly acquired, disclosed or used the secret information or data.⁸⁸

⁸⁶ Lien.verbauwhede@wipo.intwww.wipo.int/sme

⁸⁷ Ibid

⁸⁸ Ibid

2.6 Trade Secrets Protection Strategy or Ensuring Compliance

Employer or the owner of company should gradually review their technical and creative staff/employees for the identification of their existing trade secrets and make them bound the not to disclose them to anyone. So, the employer must take the following measures for ensuring the compliance.

1. By adopting the proper building security measures e.g.

- To restrict everyone access towards the highly sensitive areas like⁸⁹
- put fences or gates for protection of premises,
- control the visitors login procedures,
- fix alarm system and
- Locked the desks, files and vaults for proprietary documents.
- To post the specific signs and notices on all the appropriate areas,
- Must establish an appropriate controlling system/procedures for the distribution and circulation of trade related valuable and secret documents,
- To use a paper –shredder before discarding documents,
- Keep restriction on the photocopy of secret documents,
- To use marvel/legends and maintain the log books on the whereabouts of originals,
- To give proper guide lines to employees for the use of secret documents,
- Secret data should not be left unattended in the office, airplanes, hotels, cars, trade shows, conventions, seminars, meetings or conferences etc

2. To stamp on trade secrets documents and restrict its photocopy.

⁸⁹"Chapter 18: protecting, leveraging and auditing your company's intellectual capital.", Fast Track Business Growth, Annual 2001 Issue

3. Appoint a trade secret compliance officer who should be in charge of its monitoring and protection
4. Restrict the employee access towards trade secrets.
5. Always review carefully the company trade related advertisements, the promotional materials and press release.
 - To restrict the access to journalists and media members.
 - Be careful about wondering reporters.
6. To prepare a reasonable non-disclosure agreement and get signed by all the key employees and all those who are in-need of access to the trade secrets of the company or business.
7. Inquire about all the activities of departing employees.
8. To use passwords and data encryption for safeguarding the trade secrets or electronic data saved in the computers.
9. To review and monitor the trade press and business journals for any news which can exploit the trade secrets of business.
10. To conduct the exit interviews from all employees who are having access to trade secrets of company and remind them not to disclose any confidential data and in case of violation they could be penalized.
11. To notify the future employer in writing about these obligations, if they are directly or indirectly coming in the competition.
12. To explain and remind the new employees that they have been hired for their skills and knowledge not for the knowledge of a former employer's trade secrets. In this way the company can avoid from further litigation.

Presently, trade/business privacy is safe guarded/protected by a set of liability rules. If anyone occupies any other's privacy then he can be sued. Though contentious, a intellectual property regime has become more appealing which has given the rampant misuse of personal information in the web/internet. Treating data as a property right and giving it proper safe guard can help the trade secret owner to solve the problem of its abuse. However, it can become a source of many problems in the future.

2.6.1 What do we have when we have Trade Secret and are there Any Risk?

Acquiring a trade secret means that we have a right to take legal cause of action for the damages or to file for an injunction to stop its use, if anyone steals copies or uses our trade secret without our prior permission. There is a risk of maintaining trade secret protection because we do not have advantage of other forms of intellectual property protection like patent and copy right which require their registration and disclosure. Patent is granted when we apply for that and requires full disclosure of the information which is patented. While copyright registration recognizes some trade secret protection and allow abbreviated registrations for some items like computer programs. In this way their registration process gives a valid proof of the ownership of the material from their date of registration. In most of the intellectual property cases any other party can claim that he or she in fact has created or used the item or the information first time and the use of other is unauthorized. Therefore, it will be necessary for the real owner to prove that he has originally created and owned the trade secret. It is important for the owner to maintain proof of creation of trade secret. He can do this cheaply by mailing the secret information/data to himself and retain the postmarked

and sealed envelope. Alternatively, he can deposit a copy of the information with a source code company that would maintain copy of the secret information in storage.⁹⁰

2.7 How Trade Secrets are Lost or Stolen?

Trade secrets are valuable property of a company when they are kept secret and get legal protection as trade secrets but for that the owner must preserve it by taking reasonable steps. In case the owner has not diligently protected the trade secrets then the court cannot help in this regard. The court can give judicial relief on theft or disclosure of trade secret to others by providing damages or issuing an order for prevention of its further use.

- When disclosures is done by the key employees either current or former managers, scientists and others occupying positions of trust and violated their duty of trust with their employer/owner,
- When disclosures is made by employees either the current or former by violating the agreement of confidentiality in which they entered with their employer/owner,
- When disclosures is done by the suppliers, consultants, financial advisors or any other who have signed on nondisclosure agreements with the trade secret owner with the promise of not to disclose the information to anyone else.
- By industrial espionage and
- When disclosures is done by any person owing an implied duty to the employer not to make such disclosure such as directors, corporate offices and other high-level salaried employees.⁹¹

⁹⁰ Judith A. Silver, Source article “what is intellectual property: Trade secret law?” Coollawyer.com

2.7.1 Why does it Occur?

- Nowadays the way we are doing business have increased the use of contractors, temporary workers and out-sourcing,
- When there is decline of employee's loyalty or change of job,
- If it is an organized crime by discovering of the money which is to be paid in stealing high tech Intellectual Property.
- Through different storage facilities like DVD, external memories and keys.
- By increasing the use of wireless technology. Trade secrets are stolen through devices used for interception of communication without consent.

Examples

- By Reverse engineering which is an independent discovery,
- If it is improperly licensed,
- By the professional criminals who can target specific technology,
- Through network attacks or hacking,
- Theft of laptop computer,⁹¹
- Inducing the employees to reveal Trade Secrets. Commonly 80% of trade secret is lost from the company employees, contractors and trusted insiders,
- From the departing employees,
- Intentionally (malicious),
- By inevitable (knowledge acquired),
- Through self ignorance.

⁹¹ Attorney Stepher Elias, "Trade Secret Law: Overview" Copyright © Nolo Press 1998

⁹²http://nocal.org/calendararchive/2010/SIMyers_TradeSecrets.pdf

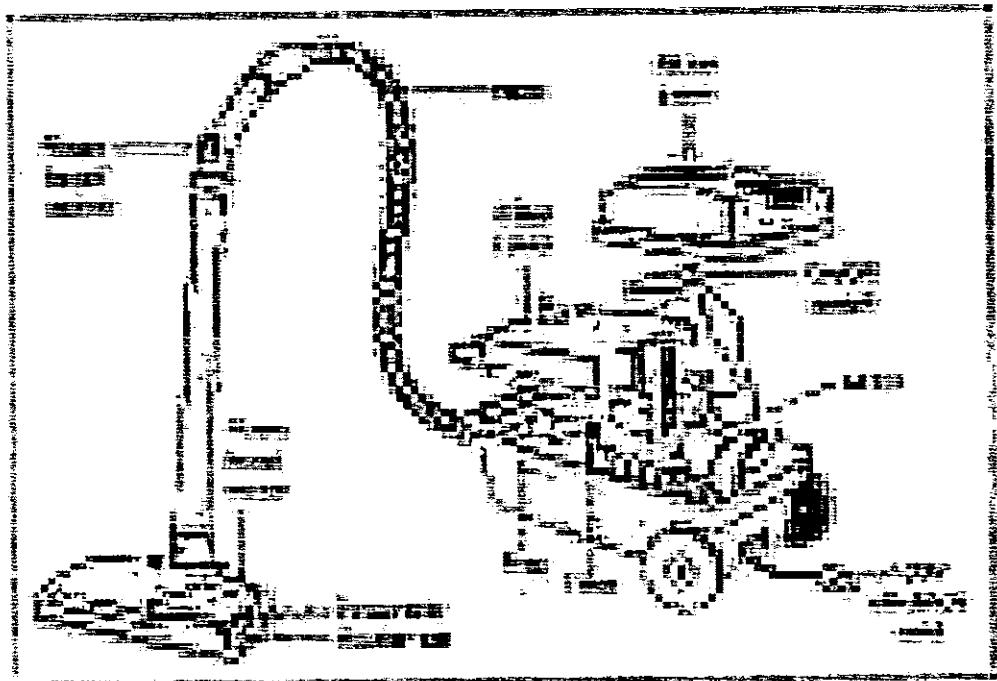
Decided Case: *Trial of Coca-Cola Trade Secret case*⁹³

Prosecutors says that a former secretary of Coca-Cola took the confidential/secret documents from the beverage giant and samples of products which were not launched with the aim to sell them for rival Pepsi.

- Faces up to 10 years in prison if convicted in conspiracy. AP Business, January 15, 2006

Decided Case: *Company accused of misappropriating Trade Secret from an inventor*

The inventor of new design of vacuum cleaner gave a design to the manufacturer of vacuum cleaner through signing on Non Disclosure Agreement covering the design. Manufacturer got patent on that design after the inventor had disclosed the design to them one year and estimated sale profits of \$100,000,000. In 2004 lawsuit settled. Company had paid \$30,000,000 to the inventor.⁹⁴



⁹³http://ictt.by/Library/SemIP2007/The_Importance_of_Trade_Secrets_for_Software_Companies.ppt

⁹⁴ Lien.verbauwhede@wipo.intwww.wipo.int/sme

Decided Case: *High-Tech Company VS Employee*

A technical manager who was the employee of the high-tech company X gave resign and went to work for another high-tech company Y. The departing employee used and disclosed Trade Secrets. Company X filed the suit against departing employee.

- **Court order:** Departing employee was prevented by the court from performing work for his new employer Y which was in connection with any product that competes with the products of X.⁹⁵

2.7.2 Can Trade Secrets be sold?

Like other types of property e.g. goods, accounts receivable, patents and trademarks, trade secrets can also be sold by one business to another. Mostly trade secret sales occur as a part of the sale of the business that owns the trade secret but that is always not mandatory.⁹⁶

2.8 How Trade Secret Protection is Enforced?

Whenever theft of trade secrets has occurred the court issues an order /injunction⁹⁷ to refrain from using or disclosing it. Court can also grant monetary compensation to the trade secret owner/holder. As a result of theft court can award punitive punishment. In extreme cases of trade secrets theft can also be subject to criminal prosecution.⁹⁸

⁹⁵ Ibid

⁹⁶ Attorney Stepher Elias , "Trade Secret Law: Overview" Copyright © Nolo Press 1998

⁹⁷(publications)Saulino, Jennifer L.. "Locating inevitable disclosure's place in trade secret analysis.", Michigan Law Review, March 2002 Issue

⁹⁸Ibid

2.8.1 Legal Protection of Trade Secrets

In the legal system the trade secrets protection against unfair competition is based on specific provisions or laws which protect confidential information in the country. Typically a company invests the money, time and labor in refining its processes, operations, and marketing strategies.⁹⁹ Company's survival and maintenance ability in the market dominance or market share could be impaired if the competitors get access of same secret information, especially if they get that secret information directly from the company by illegal ways. Trade secret protection is perpetual one which does not expire after a specific length of time, as a patent does. The lack of formal protection of trade secrets shows that third party was not stopped from independent duplication and use of secret data once it is discovered.¹⁰⁰

2.9 Trade Secrets in United States

In the United States, trade secrets are not safeguarded by the law in the same manner like as trademarks or patents.¹⁰¹ Trademarks and patents are protected under Federal statutes, the Lanham Act (1947) and Patent Act (1790, 1793, 1836, 1952, 2007) while trade secrets are defined and protected by state laws. Most of the states have adopted the Uniform Trade Secrets Act (UTSA), as a role model law drafted by the National Conference of Commissioners on Uniform State Laws which defines rights and remedies of trade secret. Uniform Trade Secrets Act (UTSA) has been adopted by the 46 states while the District of Columbia and the Virgin Islands of U.S, Massachusetts, New Jersey, New York, and Texas have not adopted the UTSA until yet. Some of these states are applying common law for

⁹⁹http://www.ewinstle-law.com/law_firm/legal-assistance/a-practical-guide.htm

¹⁰⁰ New World Encyclopedia Jump to: navigation, search Previous (Tractor) Next (Traditional Chinese medicine) http://www.newworldencyclopedia.org/entry/Trade_secret

¹⁰¹http://www.newworldencyclopedia.org/entry/Trade_secret

trade secrets protection and some of them have adopted their own separate state statutes. In 2007 Uniform Trade Secrets Act (UTSA) was introduced in both the New York and New Jersey legislatures. In the jurisdictions of Commonwealth common law, confidentiality and trade secrets are considered as equitable right rather than a property right with the exception of Hong Kong where High Court judgment indicates that confidential information can be a property right. The Court of Appeal of England and Wales in the case of *Saltman Engineering Co Ltd v. Campbell Engineering Ltd*, (1948) 65 P.R.C. 203 it was held that the action for the breach of confidence is based on the principle of preserving the "good faith."¹⁰²

2.10 Discovering Trade Secrets

Sometimes companies try to discover the trade secrets of one another's by lawful means like as reverse engineering and also try for unlawful methods which include industrial espionage. If a trade secret is obtained through improper/unlawful means, the secret will be deemed that it had been misappropriated and its acquirer would be liable for punishment in a court of law. In such cases, the owner/holder of the trade secret must have to be taken reasonable measures or steps for maintenance of its secrecy.¹⁰³

The Economic Espionage Act of 1996 (18 U.S.C. § 1831) had declared the theft or misappropriation of a trade secret as a federal crime in the United States. This law keeps two following provisions,

- ❖ criminalizing the theft of trade secrets to benefit foreign powers 18 U.S.C. § 1831(a) and

¹⁰³ New World Encyclopedia Jump to: navigation, search Previous (Tractor) Next (Traditional Chinese medicine) http://www.newworldencyclopedia.org/entry/Trade_secret

- ❖ Criminalizing their theft for commercial or economic purposes 18 U.S.C. § 1832. The statutory penalties are different for the two offenses.

2.11 Safe Guard of Trade Secrets

Trade secrets holder tries to use different types of legal and commercial means for keeping their special knowledge not to go in the hands of market competitors. In this regard non-disclosure agreements (NDA) and non-compete clauses are mostly applied for the terms and condition of employment. New employees have to get sign on an agreement for not to reveal the employer's secrets information related to business. Some time an employee will also sign over rights of the ownership of intellectual works which they have invented or produced during their course of his or her employment. Violation of the agreement will typically lead towards stiff financial penalties. Similarly when confidential agreements are signed by the other companies with whom the holder/owner of a trade secret is working as vendors or third party in licensing talks or in other business negotiations.

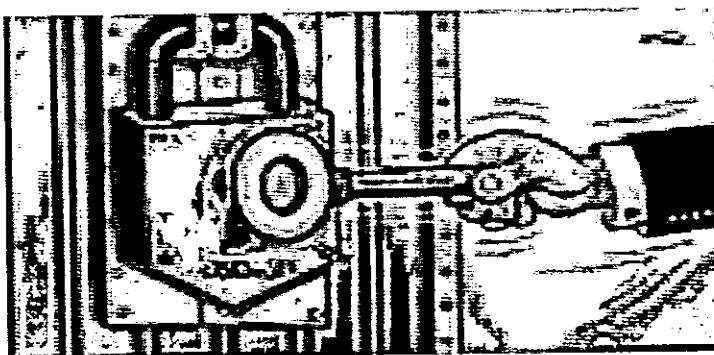
Companies also implement a wide range of internal security measures/steps for safeguarding their trade secrets from public. Many of the firms and individuals who regularly deal with trade secret information take notice in their emails and fax covered sheets which can advertise the confidential nature of the contents or information. Sometime documents are also destroyed rather than to simply being thrown in a trash can or in the recycling bin. Computer files are also encrypted and its elaborated systems need the permission¹⁰⁴ and password for safeguarding the sensitive and valuable information from the approach of

¹⁰⁴http://www.newworldencyclopedia.org/entry/Trade_secret

computer hackers or from the unscrupulous employees. These precautionary steps/measures are very important if the trade secrets owner wants to legally challenge in court.

Colonel Harland Sanders' handwritten Original Recipe(R) for **Kentucky Fried Chicken** (KFC) is ranked among American's most valuable trade secrets. It was kept locked for 68 years in a protection at KFC corporate headquarters. In 2008 they upgraded security and resultantly the recipe was transported towards the undisclosed location in a locked briefcase handcuffed to a national corporate security expert who rode it in an armored car escorted by the Louisville Metro Police Department. Only two of KFC executives know the recipe of 11 herbs and spices. A third executive know the combination to the safe where the handwritten recipe is kept. These three executives are not allowed that they may travel together on the same airplane or car and very few of KFC employees know their identities too. Multiple suppliers were bound by the strict secrecy agreements and involved in the process of making/producing and blending these herbs but none of the individual suppliers know the complete formula. KFC does not publicly identify their suppliers to be involved in producing and blending of the recipe.¹⁰⁵

2.12 How to Protect our Trade Secrets?



¹⁰⁵ New World Encyclopedia Jump to: navigation, search Previous (Tractor) Next (Traditional Chinese medicine)

1. To Identify Trade Secrets

For the protection of trade secrets it is necessary first of all to identify the trade secrets¹⁰⁶ then maintain accurate record for its identification.

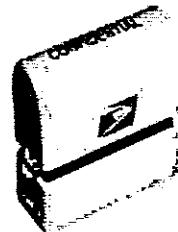
2. To Develop a Protection Policy

Owner/holder of the trade secret must constitute a written policy which could benefit him in the following manner:

- It will clarify that how to identify and protect their trade secrets,
- It will indicate that how to reveal trade secrets in-house or to the outsiders,¹⁰⁷
- It also demonstrates the commitment for its protection which is very important in litigation process.
- It educate and train in the following situations:
- Clarifies the communication and repetition,
- Keep copy of protection policy, periodic training & audit etc.
- Make it known to everyone that disclosure of Trade Secrets may result in termination from employment or can lead towards legal action.¹⁰⁸
 - To monitor compliance and the prosecute violators.¹⁰⁹

3. To Restrict the Access

For restricting the access, allow only those persons who are required to know the secret information and also develop a computerized system which could restrict and give limited access to each employee towards secret data actually utilized or needed for a transaction.



¹⁰⁶http://www.williamskastner.com/uploadedFiles/Our_Work/Practice_Areas/Labor_and_Employment_FAQ/FeiderSorensenTips-TrapsEmploymentContracts.pdf

¹⁰⁷http://www.wipo.int/edocs/mdocs/sme/en/wipo_ip_bis_ge_03/wipo_ip_bis_ge_03_1

¹⁰⁸[Ibid](#)

¹⁰⁹http://nocall.org/calendararchive/2010/SIMyers_TradeSecrets.pdf

4. Mark the Documents

Marking the documents will helps employees to recognize the trade secrets and also prevents from further inadvertent disclosure.



Uniform system of marking documents must be adopted for following kinds of documents:

- paper based documents
- electronic documents e.g 'confidential' button on email screen

5. Physical Isolation and Protection of Trade Secrets

- To separately keep the locked depository data
- To authorize some one
- To have complete access control
- On log of person access and examination of document
- On biometric palm readers
- Investigation of depository data and company premises
- Through their guards and surveillance cameras
- Shredding and
- Over sighting through audit trail

6. To Restrict Public Access to Facilities

- On log and visitor's pass

- On accompany visitors
- Sometimes on non-disclosure agreements/confidential agreements
- May have to be visible who walk through the company's premises
- The type of machinery, its layout and physical handling of work in progress, etc
- To overhear/record the conversations
- On the documents kept in plain view
- On unattended waste baskets

7. To Maintain the Computer Secrecy

- By securing the online transactions on internet or websites
- Complete access control of password
- To mark document as confidential or secret one
- To physically isolate and lock computer tapes, discs, other storage media
- Not to use external drives and USB ports
- To completely monitor the remote access to servers
- To install the firewalls, anti-virus software or encryption¹¹⁰

8. Take Measures for the Employees

1. For New/Fresh Employees

- Give brief instruction on protection expectations
- Their obligations with former employer
- To assign all rights for inventions developed during the employment
- To get sign on Non-disclosure Agreements or on Confidential Agreements
- Also explain the Non-compete provision

¹¹⁰<http://www.scribd.com/doc/22190796/Business-Plans-Handbook-Vol-6-1999>

2. For Current Employees

- to prevent them from inadvertent disclosure (ignorance)
- By giving training and education to them
- To keep Non Disclosure Agreement for particular task

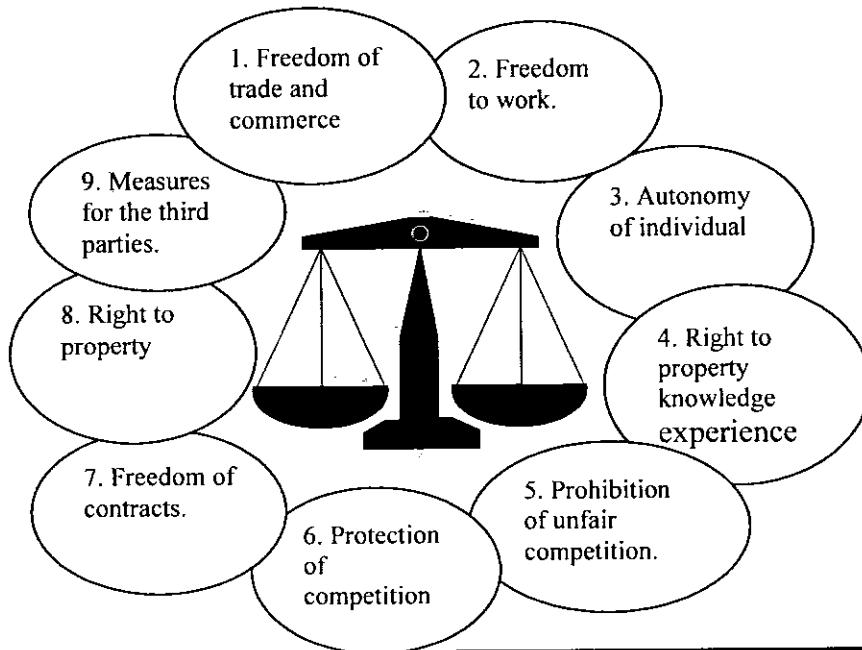
3. For Departing Employees

- In future provide Limited access towards data
- To conduct exit interview from the departing employees
- Write a letter to the new employer
- To fairly treat and reasonably compensate for patent work

Non-Competition-Clauses (covenants not to compete) in Labor Contracts

After Employee Leaves Prior Employer:

- Can he work for competitor?
- Can he work in related job?
- Can he open a competing business?
- Can a covenant not to compete enforceable?



Right to Property

- **Non-Competition Covenant can be Binding if is Reasonable One**
 - It must indicate limitation of time, area, type of industry and
 - Some special compensation has to be paid to the employees for his obligation not to compete.

Measures for Third Parties

- To share for exploitation with the consultants, financial advisors, website host, computer programmers, subcontractors, designers and joint ventures etc.
- Get sign on confidentiality agreement and on Non Disclosure Agreement
- Give limited access only on need-to-know basis¹¹¹



2.12.1 Can Trade Secrets be Sold or Licensed?

- **In Sale of Trade Secrets** Mostly Trade Secrets sales occurred as part of the sale of trade business.
- **In License of Trade Secrets** Trade secrets are licensed in the following conditions:
 - If it is combined with patent license
 - Software licensed for the highly specialized program¹¹²

Advantage of Trade Secrets License: It gives additional revenues

Disadvantage of License: There is a risk of disclosure (potential loss)

2.12.2 Licensing of Trade Secrets

Trade secrets can only be licensed when following conditions are cleared

- **Definition of the Trade Secret Subject Matter**
 - What should be kept confidential

¹¹¹ Lien.verbauwhede@wipo.intwww.wipo.int/sme

¹¹² http://ictt.by/Library/SemIP2007/The_Importance_of_Trade_Secrets_for_Software_Companies.ppt

- Marked trade secrets as broad clause
- Permitted use
 - Disclosure for the company employees and its professional advisors
 - “Modification of technology
- Precautions should have to be adopted
- Exclusions
- Time duration of secrecy obligations
- Royalties
- Sanctions¹¹³
- It should not be subject to alternative dispute resolution”¹¹⁴

2.12.3 How Trade Secret Protection can be Enforced?

What trade secrets owner can do if anyone improperly discloses or steals his Trade Secrets?

Trade Secrets protection is based on following:



1. By Contract Law

Trade secrets protection policy can be enforced by contract law e.g.

- When there is an agreement for safe guard of Trade Secrets e.g. Non Disclosure Agreement and Confidentiality Agreement which can include clause of anti-reverse engineering.
- Where there is confidential relationship between Attorney, employee and independent contractors.

¹¹³Ibid

¹¹⁴Lien.verbauwhede@wipo.intwww.wipo.int/sme

2. With the Principle of Tort or Unfair Competition

Trade secrets protection could also be enforceable by the principle of tort or unfair competition e.g.

- Misappropriation by the competitors who do not have contractual relationship of theft, espionage and subversion of the employees.

3. By the Criminal laws

Criminal laws are also having important part in the enforcement of trade secrets protection e.g.

- For the employee who steal trade secrets from the company.
- Who gets unauthorized access towards computers.
- By theft, electronic espionage and invasion of privacy etc.
- Circumvention of the technical protection systems.

4. Through Specific Trade Secret Laws of The State/Country

- Any state or country where specific trade secrets laws are legislated for the protection of trade secrets is considered a very reliable source for the enforcement of trade secrets protection of trade secrets.¹¹⁵

Legal Remedies

1. Court Order for stopping the misuse of trade secrets
2. To compensate with the monetary damages

- Actual damages like lost of profits which are caused in the result of the misuse of trade secrets.
- The amount by which defendant unjustly gets benefit from the misappropriation¹¹⁶

¹¹⁵ Lien.verbauwhede@wipo.intwww.wipo.int/sme

3. By Seizure order

- It can be obtained in civil actions to search the defendant's premises in order to obtain the evidence for establishing the theft of Trade Secrets at trial¹¹⁷

4. Precautionary impoundment

- Of the articles that include misuse of Trade Secrets or the products that resulted of misusing

The trade secret owner must show the following for establishing the trade secrets violation,¹¹⁸

- Infringement leads towards competitive benefit
- To take reasonable steps for the maintenance of trade secret
- Secret information obtained, used or disclosed in violation of the commercial practices¹¹⁹

2.13 Trade Secrets for Business

→ Trade Secrets Safe Guard For Financial, Commercial & (Secret) Technical Information:

1. Must have to develop effective internal Trade Secrets program to maintain its status
2. To restrict access and
3. To impose duty of obligation of confidentiality/secrecy to anyone who has access

¹¹⁶ <http://www.iplawky.com/wcsb/trade.htm>

¹¹⁷ <http://my.execpc.com/~mhallign/intern.html>

¹¹⁸ <http://lawreview.law.wfu.edu/documents/issue.42.1.pdf>

¹¹⁹ Ibid

→ **Some Aspects of Business or its Products cannot be Maintained as a Trade Secret**

- The information or technology which should be disclosed to the public in order to market the products.
- The information or technology which is part of any product sold to the public and can be easily reverse-engineered.
- Mass-marketed technology or products.
- Where competition is so intense or strict which could independently developed by others in short time.
- If there is great deal of personnel movement between competitors.

→ **Alternative or Additional Safe Guards for Trade Secrets**

- To make reverse engineering more difficult.
- Adopt technological safe guarding measures.
- Patents
- Copyright protection

One must be careful for signing confidential agreements and non-compete covenants.¹²⁰

¹²⁰ Lien.verbauwhede@wipo.intwww.wipo.int/sme

CHAPTER NO: 3

Requirements for Information to Qualify for Trade Secret Protection

Generally three requirements are set forth by the Courts for the information to qualify for trade secret protection/safe guard:

- (1) The information which is having commercial value.
- (2) The information which is not generally known or easily ascertainable by the others.
- (3) The owner of the information has to take all reasonable steps under the circumstances for maintaining its confidentiality and secrecy.¹²¹

Examples of Trade Secrets

It includes business plans, research, testing data, customer lists, manufacturing processes, pricing methods, distribution and marketing techniques. Company must have to follow a reasonable and consistent program for maintaining status of the trade-secret. The courts also considered other factors like

- To what extent the information is known outside the company,¹²²

¹²¹<http://www.entrepreneurship.org/the-legal-aspects-of-protecting-ideas-and-creativity.html>

- Value of information,
- Nature of the relationships between the alleged infringer and the owner/holder of the trade secret.¹²³

3.1 Practical Considerations to Protect Trade Secrets

It is a general rule that the trade secret owner should make sure that its secret/confidential information is accessible only to with those who are "need to know" it. An employer should have to ensure the following.

1. Employees have get sign on employment contracts or not.¹²⁴ **Case Surgidev Corp. v. Eye Technology, Inc., 828 F.2d 452 (8th Cir. 1987)**
2. a. A nondisclosure agreement for protection of employer's trade secrets.
- b. To consider including a covenant for not to compete
- c. To consider a non-solicitation covenant.
- d. To consider a non-recruitment covenant.
- e. Include a covenant in which the employee makes promise to return all trade secret and confidential information at the end of his employment from that company.¹²⁵

¹²² http://www.pmdlaw.com/trade_secrets_primer.htm

¹²³ Scottish Parliament, Justice 1 Committee, 28 February 2002, Freedom of Information (Scotland) Bill, col. 3255-6 <http://www.itspublicknowledge.info/legislation/briefings/section33.htm>. "Chapter 18: protecting, leveraging and auditing your company's intellectual capital.", Fast Track Business Growth, Annual 2001 Issue

¹²⁴ <http://www.wkg.com/media/Safeguarding%20Trade%20Secrets.pdf>

¹²⁵ <http://www.thefreelibrary.com/Safeguarding+Trade+Secrets+In+The+Information+Age.-a0109771640>

3. Limited access towards trade secrets for only those employees who are "need to know" ¹²⁶them and keep the detail records of those who are having access towards the trade secrets,
4. To use security measures by computer to protect electronic confidential/secret information.
5. a To implement strict security codes a password.¹²⁷
 - b. To have limited remote access towards the information stored in computer folders/files.
 - c. To consider the installing auto-callback functions.
 - d. To maintain the firewalls between the computer system and Internet.
 - e. To completely examine the computer hard drives and systems of any leaving employee specially look for deleted information or copied information.
6. Keep systems or computers in place to retain control over documents that contain trade secret data.
7. a. To keep document control logs to protect sensitive secret documents.
 - b. Where there is multiple copies of a document that contains trade secrets, count those copies and prohibit from any further copying of that document.

¹²⁶<http://practice.findlaw.com/tooltalk-0804.html>

¹²⁷<http://www.thefreelibrary.com/Safeguarding+Trade+Secrets+In+The+Information+Age.-a0109771640>

- c. To keep consistent document control policies that considers which document have to be retained or need to destroy.¹²⁸

8. To clearly identify company's trade secrets.

9. a. To stamp the trade secret documents as "Confidential" or "Trade Secret."

 b. Label visible areas of the workplace which are containing the Trade Secrets

10. To physically lock the areas of the company in Trade Secrets are exist.

11. To implement written policies of the non-disclosure of the company's trade secrets

12 a. To create and circulate a trade secret policies and procedures manual to the company employees.

 b. To ensure it that employees have read and understand the company's trade secret policies and procedures.

 c. To circulate periodically the refresher memoranda for reminding the employees about the policies and procedures in order to safe guard the company's trade secrets.

13. To consider the building security measures for protection of trade secrets.

14. a. To require personnel for carrying identification badges.

 b. Allow only limited access towards the sensitive areas.

¹²⁸Ibid

c. To monitor the sensitive areas with closed circuit television.

d. To hire the security guards.

e. To post a fence around the company's premises.

15. To follow the proper discharge procedures when employees are leaving the company

16. a. To always conduct exit interviews from the departing employees.

b. To remind the exiting employees that which information is kept as trade secret information in the company.

c. To collect from the departing employees all the confidential valued documents, security passes, keys and any other property of the employer in connection with it, the employee have to get sign on a certificate that all confidential and trade secret data or material has been returned.

d. To remind exiting employees about their contractual obligations to hold the company's trade secret information secret.

e. To keep complete records of items which are returned by the departing employees and matters/cases discussed with them.

f. To get details about the departing employees and new employment.¹²⁹

¹²⁹"Safeguarding Trade Secrets In The Information Age.", Mondaq Business Briefing, Nov 5 2003 Issue

- g. To determine about a departing employee's responsibilities about his or her new position which can be so similar to his or her responsibilities with the company that the new position may threat the inevitable or probable disclosure of trade secrets of the company.
- h. To require from the departing employees to execute an exit letter or affidavit in which the employees should acknowledge about their obligation of nondisclosures of company's trade secrets.
- i. To execute confidentiality agreements from third parties before they receive confidential information of trade.¹³⁰

3.2 Are there any Ways for Protecting the Trade Secrets?

It has become customary in most high tech companies to require from employees to sign on a confidentiality agreement for emphasizing the need for the confidentiality and ensure the proof of the existence of such an obligation. A trade secret owner/holder can enforce rights against the one who steals confidential/secret information by filing a suit in the court to issue an order to prevent from further disclosure. It can also collect the damages for any economic injury which is suffered in result of the trade secret's improper acquisition and use.

An example of a trade secret violation suit involved Wal-Mart and Amazon.com. In October 1998 Wal-Mart filed a suit in Arkansas against Amazon.com. The cases were not resolved by

¹³⁰Williams, Kastner & Gibbs PLLC,
http://www.williamskastner.com/uploadedFiles/Our_Work/Practice_Areas/Labor_and_Employment_FAQ/FeiderSorensenTips-TrapsEmploymentContracts.pdf

the courts as the parties reached a settlement agreement in April 1999.¹³¹ Security issues include trade secrets protection against insider and outsider theft and the often neglected issue of inbound security.¹³²

3.3 Comparison of States Laws in Safe Guarding the Trade Secrets in Information Age

3.3.1 Uniform Trade Secrets Act of America

National Conference of Commissioners has drafted a role model law Uniform Trade Secrets Act of America on uniform states laws for the rights and remedies of trade secrets.¹³³ Out of 50 states of America 46 states has adopted UTSA. Few of the states are applying common laws in trade secrets and few of them are applying separate statutes for their states. UTSA is introduced in 2007 in the states of America "New York and New Jersey" which have not adopted it before.

3.3.2 UTSA Trade Secrets Definition

UTSA defines trade secrets that it could be any information, any formula, any pattern, any compilation, any program, any device, any method, any technique or any process which:¹³⁴

¹³¹http://en.wikibooks.org/wiki/Legal_and_Regulatory_Issues_in_the_Information_Economy/Ideas_Trade_Secrets_and_Intellectual_Property

¹³²[http://en.wikibooks.org/wiki/Legal_and_Regulatory_Issues_in_the_Information_Economy/Ideas_Trade_Secrets_and_Intellectual_Property"\)](http://en.wikibooks.org/wiki/Legal_and_Regulatory_Issues_in_the_Information_Economy/Ideas_Trade_Secrets_and_Intellectual_Property) From Wiki books, the open-content textbooks collection.... (publications)"Trade Secrets Drive the Competitive Advantage and Shareholder Value of Todays Corporations.", Business Wire, Sept 26 2006 Issue

¹³³<http://www.courts.state.me.us/opinions/documents/01me17be.htm>

¹³⁴<http://www.okpatents.com/pdf/tradesecretlaw.pdf>

- (1) describes its economic value independently either actual or potential one which should not be known and ascertained by proper means by any other person who will get economic value through disclosure or use and
- (2) It is the subject of efforts which are reasonable under the circumstances for maintaining its secrecy.

3.3.3 Misappropriation

Misappropriation is defined when the secret information is acquired through improper or unlawful means or from another person knowing that they acquired the secret by improper ways or disclosing or using the secret information without the consent of its owner when there is duty of strict compliance of nondisclosure or use of it. It also occurs when a secret is acquired by accidentally or mistakenly for example by a misdirected email or facsimile transmission. If before using or disclosing the trade secret that person acquiring it and learns that it is a trade secret.

The UTSA imposes civil liability rather than criminal liability in case of misappropriation of trade secrets and also creates a private cause of action against that victim. A successful plaintiff is provided various forms of judicial relief including injunctions, including "exemplary" punitive damages. The Act also permits courts to grant/announce protective orders for maintaining the secrecy of a trade secret when similar nature of case is pending in the court and also prevent its disclosure by witnesses.¹³⁵

If the trade secret is having a patentable device or process the court will ordinarily prevent from it's the further use and also order for accounting of any profits derived from it

¹³⁵ Ibid

by someone who had misappropriated the trade secret. On the other hand, if the trade secret consists of improvements or information that could be arrived at by any skilled professional, then the liability may be limited to damages and in future, it will not be an appropriate order to issue an injunction against the use of the trade secret.¹³⁶ So misappropriation is a wrongful acquisition or disclosure or use of trade secrets which can be defined as follows:

- a) Trade secrets obtaining the by illegal means or from any other person who knows that they have got trade secrets through improper ways¹³⁷ or
- b) If it is disclosed or used the trade secrets without the consent of its owner and it was obligatory not to do that. According to the UTSA this situation exist when trade secrets have been obtained:
 1. Not properly or
 2. With a condition not to disclose or use it or
 3. By any other person who is bound not to disclose it or
 4. Through mistake or by an accident, if the person gets know before using or disclosing it that it is a trade secret. That is why many firms and individuals having an advice about the secret nature of the information through a notice in their email and fax cover sheets.

¹³⁶ New World Encyclopedia Jump to: navigation, search Previous (Tractor) Next (Traditional Chinese medicine)

¹³⁷http://en.wikipedia.org/wiki/Uniform_Trade_Secrets_Act

3.3.4 Remedies of Misappropriation in Trade Secrets

In case of misappropriation of trade secrets USTA imposes civil liability rather than criminal and makes a private cause of action for the victim. Under the USTA remedies for the misappropriation of trade secrets are injunctions, damages including punitive damages and in bad faith or willful and malicious misappropriation cases reasonable attorney's fees. When trade secrets are wrongfully obtained that is called as misappropriation of trade secrets¹³⁸. The remedies available for that are as follows,

- Injunctions;
- Actual damages;
- Fees of Attorneys or lawyers,
- Punitive damages and
- Possible Federal criminal prosecution.¹³⁹



3.3.5 Defenses

Uniformed Trade Secret Act does not define defenses which are recognized in common law of trade secrets like disclosure through the trade secret owner, independent development and reverse engineering etc.¹⁴⁰

¹³⁸ Rustad, Michael L.. "The negligent enablement of trade secret misappropriation.", Santa Clara Computer & High Technology L, March 2006 Issue

¹³⁹ Michael O Warnecke and Michael A Molano Mayer, "Key issues in trade secret protection" Brown, Rowe & Maw LLP, Chicago, IL and Palo Alto, CA AN appellate court in Rockwell Graphics Systems Inc v DEV Industries et al (925 F 2d 174, 180 (7th Cir 1991))

¹⁴⁰http://en.wikipedia.org/wiki/Uniform_Trade_Secrets_Act

3.3.6 Secrecy Preservation

UTSA also allows the relevant courts for granting safe guard orders for ensuring the secrecy of trade at the time of discovery and could prevent from the disclosure through the witnesses. Furthermore this Act authorizes to take testimony in camera hearing. Trade secrets are preserved so that owner of the business could get advantage over customers or competitors.

3.3.7 General Definition of Trade Secret

There are three main factors which defines trade secret as following

1. It should not be known to the general public,
2. It gives some economic benefits to its holder,
3. It should be the subject of reasonable efforts for maintaining the trade secrecy.

3.3.8 Protection of Trade Secrets

Any company can safe guard its trade secrets by making non-disclosure agreements with its employees. Legislation related to safe guarding trade secrets permits for perpetual monopoly like patents it would not expire. If it is not protected then any other person can get it without permission of the owner.

This type of safe guard gives the owner protection from public disclosure and its economic vitality. Every company invest its money, time, work energy for getting secret information related to the refinements of processes and operations. In a case if the competitors obtained the secrets of trade without prior knowledge of the owner that would impaired the market value and share of the owner company. It is the duty of company who created trade secret to safe guard its secrecy which is entitled to them as intellectual property right.

In United States of America, trade secrets are not given due safe guard like patent and trade mark through legislation. Patent and trade mark are given protection under the Federal statutes in United States while trade secrets have been raised from state laws and they are only protected when trade secrets are not disclosed.

3.3.8.1 Comparison of Trade Secrets with Trade Marks

In U.S Trade Marks are registered at state and federal level both so that in case of infringement law suit can be filed. For getting the trade mark rights we only need to use any type of mark for running the business activities but it does not need to acquire any protection. Trade mark gives some protection so that consumers should not be confused about the nature of goods once a specific mark have been associated with the particular supplier.¹⁴¹

3.3.8.2 Comparison of Trade Secrets with Patent

For getting the patent right we have to see that all information about method or the goods produced should be provided to the patent office and after the expiry of patent right other competitors can copy the method and legality of the product. This temporary protection is said as “**quid pro quo**” then it will be disclosed to the public.

There is a misconception found that the protection of trade secrets is incompatible with the patent protection and it is also said that if we apply for patent then we cannot maintain the secrecy of trade on invention but it is an over simplification. Infact for getting the patent every one must have to disclose the invention so that others could be able to make and use that invention for obtaining the patent in United States.

¹⁴¹ http://www.kosmix.com/topic/Trade_secrets

Some times after filing the application of patent improvements will be occurred then additional information should be learned too. So this additional information should not be disclosed and they could be kept as trade secret.¹⁴²

It is the requirement of patent license to disclose their trade secrets which they have. If this secret information is not disclosed in the patent that becomes the most commercially viable. In case of selling or licensing the patent rights the owner must have to make sure by taking steps for the maintenance of trade secrets as secrets, on the other hand it could be lost. So it is necessary to get signed on non-disclosure agreement before the disclosure of any secrets which are not protected.

¹⁴² Ibid

CHAPTER NO: 4

Trade Secret Protection Plan

A trade secret may have economic value and advantage over a competitor.¹⁴³ However, a trade secret owner must adopt reasonable steps to protect the secrecy or confidentiality of the information¹⁴⁴ of trade for which the owner wants to claim it as a trade secret. If a trade secret is not kept secret then the legal protections afforded to them will be lost ever.

1. Trade Secret Protection Plan:

Identification of Trade Secrets

(A) The company should determine confidential information, processes or other things which gives the company an advantage over its competitors and constitute trade secrets.¹⁴⁵

(B) The following questions can help us to identify Trade Secrets of a company:

- Is the information or the process secret?
- Is the information or the process valuable one?
- Is the information or the process known in the business industry?
- Is the information or the process obvious to others?

2. To Conduct an Initial Trade Secret Audit.

For ensuring the protection of trade secret protection trade secret owner must routinely conduct an audit.

1. What measures are there in place to safe guard the trade secrets?
2. Whether these measures are effective one or not?

¹⁴³http://www.thoits.com/resources/gfx/trade_sppc.pdf

¹⁴⁴<http://www.attorneyservicesetc.com/Violation-of-Trade-Secret.html>

¹⁴⁵Ibid

3. What additional measures can be taken if there is need to be put them in place?

The following questions can assist us to organize a trade secret audit:

- Is there any other procedure in place for identification of trade secrets?
- Is there any other measure currently in place for protection of trade secrets?
- What are trade secrets?
- Where the trade secrets are located?
- Who is having access towards them?
- Are there any written policies for protection of trade secrets in place?
- Who gets sign on nondisclosure agreements? And why?
- What can be done further to safeguarding the trade secrets?¹⁴⁶

3. To Develop a Trade Secret Protection Plan.

A trade secret protection plan should be kept in writing and must reflect reasonable efforts for safeguarding the company's trade secrets. Efforts to safeguard trade secret status should include the following:

1. Segregate the Trade Secrets from Non-Trade Secrets,
2. Label the documents, items and software which are having the trade secrets,
3. To execute the Non-disclosure Agreements,
4. To use employee manuals for stressing upon the trade secret protection,
5. To conduct employee or contractor orientation and education,
6. To use notice measures,
7. To use physical security barriers,
8. To take additional steps for keeping confidential information secret,
9. To prevent from inadvertent disclose of trade secrets to others,

¹⁴⁶http://www.thoits.com/resources/gfx/trade_sppc.pdf

10. To conduct exit interviews from the departing personnel/employees,
11. Limited access for visitors
12. To conduct routine trade secret audits

4. To Separate the Trade Secrets.

By keeping the trade secret items or information separate from the non-trade secret items or information so that company could claim trade secret status has a much better chance of being preserved,

5. To Label the Documents, Items and Software which are Containing the Trade Secrets.

Trade secret materials labeled by using the following or similar legends:

- "TRADE SECRET," "SECRET," "CONFIDENTIAL," or "CONFIDENTIAL INFORMATION."
- TRADE SECRET. This document contains confidential and proprietary information of __ [company name] __. Do not copy or circulate.
- CONFIDENTIAL INFORMATION. __ [company name] __ (Unpublished) All rights reserved.
- PROPRIETARY INFORMATION. __ [company name] __ (Unpublished) All rights reserved.

To create the headers or footers on the secret documents and software as follows:

- This document contains confidential and proprietary information of __ [company name] __ and is protected by copyright, trade secret and other State and Federal laws. Its receipt or possession does not convey any rights to reproduce, disclose its contents, or to manufacture, use or sell anything it may describe. Reproduction, disclosure, or use without specific written authorization of __ [company name] __ is strictly forbidden.

6. Nondisclosure Agreements.

- All Employees, independent contractors, consultants, vendors, suppliers, licensees, and others who may have access or before the trade secret information or items and documents are seen, discussed or revealed or before the first day of work they should sign on nondisclosure agreements.

7. Employee Manual.

An employee manual should include:

- A section which should discuss the company's Trade Secret protection plan and obligation of employees under their Nondisclosure Agreements.
- Employees must have to sign on a memorandum on the 1st day of their employment that they have read the employee manual and understand the Plan of company for Trade Secret protection.
- To keep the memorandum in personnel file of the employee.

8. Employee/Contractor Orientation and Education.

Employees or Contractors should understand the elements and ramifications of their company's Trade Secret Protection Plan from the first day of their work.

- a. Mandate that new employees or contractors not to disclose the trade secrets of others.
- b. To explain that trade secrets and confidential information of company cannot be disclosed from outside the company.
- c. To make it clear that the disclosure of trade secrets and confidential information are grounds for the termination.
- d. All employees or contractors have signed on Nondisclosure Agreements.

- e. To remind the employees at their reviews of Trade Secret safeguard plan and their duty under the Nondisclosure Agreement on which they have signed.
- f. To discuss the Trade Secret Protection Plan of company in employee meetings.
- g. To educate the employees about industrial espionage and help them to identify and report about those who might attempt trade secret theft.

9. Notice Measures. Notice measures should have to be promulgated like:

- a. To remind all the persons about their obligations under the Non-disclosure Agreements.
- b. To routinely remind all employees of the company about Trade Secret Protection Plan from Employee Manual.
- c. Trade secret owner or key personnel should demonstrate by actions about the procedures which are set forth in the company's Trade Secret Protection Plan.
- d. To distribute the newsletter or memoranda which discuss the company's Trade Secret Protection Plan.
- e. To place the relevant posters at the work place like in the employee lounge, kitchen or rest area.

10. Physical Security Barriers. All trade secrets should be kept secret from unauthorized persons as follows:

- a. To block the access for the persons who do not need to know.
- b. To keep trade secrets in a locked room with "Private," "Authorized Personnel Only" or "No Admittance" should be posted on the door.
- c. To keep trade secrets under lock and key in the appropriate file cabinets.
- d. To use a log to enlist who has access for the confidential information.

- e. To use access codes for entering in the building. To encode or encrypt the trade secret information.
- f. To encode or encrypt the trade secret information.
- g. To lock laptops and storage materials in proper safes or filing cabinets.
- h. Computers should have kept appropriate access codes, passwords and security software.
- i. To change access codes or passwords when an employee or contractor leaves the company.
- j. To create an environment of confidentiality.
- k. To implement a clean desk policy.
- l. To maintain all confidential information out of public sight.

11. Additional Steps for Keeping Confidential Documents as Secret.

- 1. Serialize and log the trade secret documents and materials.
- 2. To safeguard the faxed and photocopied documents from getting into the wrong hands.
- 3. Trade secret documents should not be faxed. If a trade secret document is need to be faxed then use a secured line and mark the materials with the appropriate trade secret legends.
- 4. Trade secret documentation should not be e-mailed. If a trade secret document is required to be e-mailed then use proper encryption technology or security keys.
- 5. If trade secret document or software is duplicated by any means then a log should be kept to show, who had copied the document or software and from where it is duplicated.
- 6. Shred all confidential documents which are duplicated and are not in need of longer use.

12. Prevent from Dissemination of Trade Secrets or Confidential Information to others.

1. All presentations, public speeches, web site information, press releases and all information which are distributed to others should be scrutinized by the appropriate manager so no more trade secret is leaked or disclosed.
2. Company's employees, contractors, consultants and others should be required to obtain permission if they desire to disclose or use information or items that may be confidential, proprietary or trade secrets.

13. To Conduct Exit Interview with Departing Personnel. While conducting the employee or contractor exit interview must have,

1. To review the terms of the nondisclosure agreement with the departing personnel or employee and ask him or her to contact the company if they have any questions with regard to the nondisclosure agreement.
2. To remind the employee or contractor about their duty not to use or disclose the company's trade secrets
3. To require that the employee have signed on a termination certificate and acknowledge the employee's or contractor's understanding and duty not to disclose trade secrets or confidential information.
4. To obtain the trade secret materials and documents in the employee's possession or control including without limitation, hard copies, diskettes, home computer files, home office files, laptops, cell phones, etc.
5. To require that keys and access cards should be returned.

14. Visitors. Do not allow the visitors including the repair or service persons to wander freely in the building and also incorporate the following procedures:

1. To use a visitor's log book.
2. To escort the visitors.
3. All trade secret or confidential information should be maintained out of sight at all times.
4. To use nondisclosure agreements.
5. To prohibit photography.
6. To drape machinery that does need not be seen.
7. To maintain files out of public sight.
8. To restrict the trade secret areas from access.

15. Conduct Routine Trade Secret Audits.

- On a routine basis trade secret owner must establish a program to identify new trade secrets.
- To review the existing Trade Secret Protection Plan and update the plan.¹⁴⁷

4.1 Legal Development for Protecting the Trade Secrets

After the adoption of UTSA and Economic Espionage Act of 1996(18 U.S.C. & 1831-1839) which is considering trade secrets theft and misappropriation as a federal crime. It has two provisions which criminalize two types of activities,

First: If trade secrets are obtained for the benefits of foreign powers and

Second: For commercial or economic purposes.

Trade Secrets have been considered as an equitable right rather than property right in common law jurisdiction. The Court of Appeal of England and Wales in the **case** of Saltman Engineering Co Ltd v. Campbell Engineering Ltd,(1948) 65 P.R.C.203 held that the action for breach of confidence is based on a principle of preserving “**good faith**”.

¹⁴⁷THOITS, LOVE, HERSHBERGER & McLEAN A PROFESSIONAL CORPORATION ATTORNEYS AT LAW, 245 Lytton Avenue, Suite 300 Palo Alto, California © 2003-2004 Thoits, Love, Hershberger & McLean, P.C.. http://www.thoits.com/resources/gfx/trade_sppc.pdf

A test have been adopted for a cause of action in case of breach of confidence in common law world of Coco v. A.N Clark(Engineers)Ltd,(1969)R.P.C.41 at 47:

- The information should have quality of confidence about it-self;
- That information must be imparted an obligation of confidence;
- There should be illegal use of that secret information;

The term “**quality of confidence**” gives due importance to the trade secrets as a legal concept. Sometimes competitors also try to get trade secrets through illegal means. The owner of the trade secrets can prove the quality of confidential information that it is having trade secrets and legally it is protected. If a plaintiff is successful then he can claim different kinds of judicial relief which are as follows;

- An injunction,
- an account of profits or an award of damages,
- a declaration

4.1.1 What is the Nature of Trade Secret Protection and where does it come from?

Trade secret is protected from the common law from 1800's. Most of the trade secrets are protected through the adoption of Uniform Trade Secrets Act which helped them to create their own uniform body of laws. Trade secrets originate and protected through state laws.

4.1.2 Should Trade Secret be get registered?

There is no specified process for application or registration of trade secrets. Infact if we publish trade secrets to any third party that could destroy its confidentiality. As we are living in the age of technological revolution. Our personal computers have changed our lives and business

routine of life. Internet has brought change in our way of communication, our business transaction and in seeking the knowledge.

4.2 Protecting Trade Secrets

In a broad sense Trade secrets are those information which are kept out of the reach the competitors in the world by various civil and commercial means like non disclosure agreements or non-compete clauses in which the employee have to sign that he will not disclose his employer's proprietary information. Sometimes the employee claims the right of ownership of information which he has produced during that employment. If anyone violates any trade secrets agreements then there will be the liability of financial penalties which is a disincentive for revealing the trade secrets. Sometimes same type of agreements are signed by some other companies who have engaged e.g. the trade secrets holder's vendors or third parties in licensing talks or involved in any other business negotiations.

Trade Secrets enjoy protection for a long time period which also gives benefit for safe guarding patent longer. As we can see the example of Coca-Cola has no patent for its formula but enjoying the most famous trade secret protection.

4.3 Brief over View of Trade Secrets Protection in Various Countries

Depending on the legal system, trade secrets safeguard prevents from unfair competition and is based on specific provisions or case law for the protection of secret/confidential information.¹⁴⁸ There was a noticeable movement towards increase of trade secret protection in many countries of the world during the 1990's.¹⁴⁹ Trade secret theft now has become a crime in many countries.¹⁵⁰

¹⁴⁸ http://www.innovaccess.eu/documents/LegalprotectionofTradeSecrets_0000002422_00.xml.html

¹⁴⁹ Ibid

¹⁵⁰ Ibid http://www.innovaccess.eu/documents/LegalprotectionofTradeSecrets_0000002422_00.xml.pdf

France: French law recognizes three types of the trade secrets:

1. Manufacturing the trade secrets,¹⁵¹
2. Know-how and
3. Confidential business information.

French law provides penal sanctions against theft of manufacturing trade secrets

Article L621-1 Code de la Propriété Intellectuelle and Article L152-7 of the Code du Travail.

Companies who are victims of manufacturing secret theft can file a complaint before the civil courts. The same applies also when the wrongful acts have not been committed by the employee but by third party because of using fraudulent devices. In this case the complaint is to be filed on the basis of unfair competition pursuant to the Article 1382 et seq of the French Civil Code. Injunctive relief, damages and third-party liability is also available for the private litigant.

Germany: Germany provides strongly safeguard the trade secrets. The new German Act against unfair competition (Gesetz gegen den unlauteren Wettbewerb – UWG) which came into force on 8th July, 2004 and penalizes in Chapter 4 about duplicity of trade or industrial secrets (Section 17 UWG) duplicity of documents or instructions of a technical nature (Section 18 UWG) and seeking to induce another person to duplicity (Section 19 UWG). Private litigants can also obtain injunctive relief and damages (§§ 823, 1004 Bürgerliches Gesetzbuch–BGB). There is third-party liability.

Italy: Italy provides strong protection for trade secrets. Trade secret theft is a crime (Article 513, 623 Codice Penale). The full panoply of remedies for trade secret misappropriation is available in Article 2598(3), 2600 Codice Civile. There is also third-party liability. The new Italian Code of Industrial Property (“Codice della proprietà industriale”) which consolidates all previous Intellectual Property laws which came into force on 19th March, 2005 and provides legal

¹⁵¹ Ibid .

protection for the corporate secret information. The Code provides that anyone who gets or receives corporate secret information become bound not to use or reveal the company's secret information and the commercial or techno-industrial experience to the third parties (Article 98 and 99).

Japan: In Japan if business interests of anyone is infringed by the misappropriation of trade secrets is entitled to get an injunction at a disposal of the objects created by the act of misappropriation and damages against the person who infringes such business interests¹⁵² (Article 2, 3 and 4 the Unfair Competition Prevention Act). The amendment to the Act, which came into force on November 1st 2005, enhances criminal penalties against infringement of trade secrets. In general this amendment newly penalizes

- 1) If the trade secrets is used or disclosed outside the Japan which has been managed in Japan?
- 2) Violation of court's secrecy order outside the Japan,
- 3) To use or disclose the trade secrets by retired employees and
- 4) Trade secrets improper acquisition to use or disclose for the purpose of unfair competition.

Poland: Poland provides strong safeguard for trade secrets. The provisions of the Unfair Competition Law of April 16, 1993 as amended cover disclosure, unfair acquisition and unfair use of the trade secrets. The Poland Law provides the injunction and other equitable remedies for the infringement of trade secrets *inter alia*, damages and monetary relief (Article 18) and penal remedies in the form of a fine, restriction of liberty or imprisonment for up 2 years (Article 23).¹⁵³

Spain: By enacting a new Criminal Code, effective as from 24th May 1996, the imposition of fines and imprisonment for various terms (max. 5 years) is provided for a number of new crimes

¹⁵²http://www.innovaccess.eu/documents/LegalprotectionofTradeSecrets_0000002422_00.xml.html

¹⁵³http://www.innovaccess.eu/documents/LegalprotectionofTradeSecrets_0000002422_00.xml.html

which relates to the trade secrets including the taking of data in order to discover a secret, the divulgation of stolen trade secrets by the person stealing them, breach of non-disclosure agreements and divulgation of stolen trade secrets by a third party (Article 278 and 279).

¹⁵⁴Under Law on Unfair Competition (Law 3/1991 of January 10, 1991) practices of unfair competition which includes the infringement of industrial and commercial secrets (Article 13).

The legal actions envisaged in Article 18 may be instituted against these practices.

United Kingdom: The United Kingdom provides broad and effective safeguard for the trade secrets. Search and seizure orders may be issued for protecting trade secrets and preserve the evidence. There exists in United Kingdom law the full panoply of remedies for a "breach of confidence" including injunctive relief, damages and third-party liability.

USA: Many aspects of trade secrets doctrinal development of the law in the United States came from England.¹⁵⁵The Trade secret laws are state granted rights. Nearly all states have adopted the Uniform Trade Secret Act (UTSA). The UTSA allows recovery of plaintiff's actual losses and the amount by which the defendant has unjustly benefited from misappropriation of confidential information. Damages may include lost of profits and the costs associated with repairing the damage to anyone's business. Exemplary e.g. punitive damages can be recovered in exceptional cases. Injunctions are also available. Under the Economic Espionage Act of 1996 (codified in part at 18 U.S.C. § 1831, et seq.) the theft of trade secrets is now a federal criminal offence.¹⁵⁶

¹⁵⁴Ibid

¹⁵⁵http://www.innovaccess.eu/documents/LegalprotectionofTradeSecrets_0000002422_00.xml.html

¹⁵⁶ "The legal protection of trade secrets"http://www.ipr-helpdesk.org/docs/docs.EN/invencionesTenicas_BP.html

4.4 Recommendations and Suggestions for the Enforcement of Steps for Safeguarding the Company's Trade Secrets in Pakistan

Pakistan provides a wide range of protection for intellectual property through the federal registration of trademarks and service marks through federal patent protection and copyright protection under state laws, through protection of trade secrets and marks. Federal protections extend only throughout Pakistan. Pakistan IPR laws confer little or no protection in other countries. To secure full patent rights in another country, we must apply for a patent in that country.

Some advantages and minimum standards for the protection and enforcement of intellectual property do exist under treaties or other international agreements. For example, copyright protection is automatic in all WTO countries without any formality (such as registration, copyright notice, etc.), and is extended on the basis of national treatment—that is, a Pakistan author suing in France under French copyright law is entitled to the same protection as a French author suing in France under French copyright law. The World Trade Organization (WTO) agreement on trade-related aspects of intellectual property rights (TRIPs) upgraded standards of protection for a full range of IPR. The agreement also provides for the effective enforcement of those standards both internally and at the border. The TRIPs Agreement is the first multilateral intellectual property agreement that is enforceable between governments. The agreement has a strong dispute settlement mechanism to resolve disputes. The question of whether to pursue international protection for your IPR is not always particularly defined for example , there may be cases when it is advisable to forego patent protection to safeguard trade secrets and sensitive information that may need to be published in the patent process. In any case, the first step in

determining if IPR protection is right for our company is to secure the services of specialized legal counsel. It is important to note that in addition to obtaining patent protection, we should also protect our trade secrets through appropriate confidentiality provisions in employment, licensing, marketing, financing, distribution, and joint venture agreements. But it requires the public awareness about the value of their trade secret at national and international level. Furthermore following are the suggestions for the trade secret owner to protect their trade secret in Pakistan.

1. Specifically identify each information which needs to protect as a trade secret and establish an ongoing system for identifying the new trade secrets.¹⁵⁷
2. One should not be overly broad and inclusive in choosing the information to be protected as this will undermine protection of true trade secrets.
3. To label all the confidential documents which reflect trade secret information as CONFIDENTIAL one, get limit copies of that document and require the return of such information either when the task is completed or on demand.
4. Limited access towards the secret information for only those employees who are in need to know.¹⁵⁸
5. Give instructions to all employees who work with company information as to which information/data is considered as trade secret and how they should treat it confidentially.¹⁵⁹

¹⁵⁷ http://www.mansfieldtanick.com/law_04.htm

¹⁵⁸ http://knowledgebase.pub.fndlaw.com/scripts/getfile.pl?FILE=articles/mtcpa/mtcpa00001&TITLE=Subject&TOPIC=Intellectual%20Property%20Law_Trade%20Secrets&FILENAME=intellectualpropertylaw_1_238

¹⁵⁹ http://www.mansfieldtanick.com/law_04.htm

6. All the employees who will be exposed to or use the confidential information must sign on confidential agreements and, if appropriate covenants not to compete but make sure those agreements are:
 - (a) Backed up by the adequate consideration;
 - (b) They are reasonable in scope and nature and
 - (c) They also require the departed employee to advise his/her new company of these restrictions.
7. Implement security measures over there; such as, badges, security guards, passwords, secure zones and locked cabinets. Limit access towards the company's facilities through tours or other public disclosures. Maintain a visitors sign in and out register or record, wear badges. Moreover, sign confidentiality agreements (e.g., any consultant, prospective purchaser and joint venture). Prohibit fixing cameras, tape recorders or similar items. Always monitor computer notebooks.
8. Be very vigilant about information on computer disks or hard drives. Information should only be available by inserting a password that is given only to appropriate personnel and is changed frequently. Create "fire walls" and block the access to computer espionage and theft.
9. The agreement(s) should contain a confidentiality provision with outside entities, including, distributors, temporary workers, joint venture partners, vendors, licenses and customers, etc.

10. Be very careful that information to be protected is not unintentionally disclosed in advertising or marketing information. Be careful about training materials, professional publications and presentations at trade shows or conferences.
11. To maintain the periodic trade secret audits to check out for leaks.
12. If company outsource it's any part or all of product/technology assembly then it must require strict vendor confidentiality agreements, use different vendors for different components and also do not disclose either any part relates or any final product information.
13. It must be aware that outside the state or country trade secret protection/safeguard varies widely from some to none. In some countries espionage to customarily used is totally legal and culturally it is accepted.
14. To establish and update the written policies and manuals for protecting the intellectual property including the trade secrets. Employers must be required to read, understand and comply with these policies.
15. To hold periodic training sessions for company employees to remind them about the rules and to publicly note and correct the sloppy practice.
16. To correct, censure, reprimand or discipline the employees in case of violating these policies.
17. To hold the exit audits from the departing the employees to obtain the return of all secret information and an acknowledgment from the employee of compliance with non-compete, non-disclosure or other obligations.¹⁶⁰

¹⁶⁰http://www.mansfieldtanick.com/law_04.htm

- If all above mentioned steps are discuss with company's employees and practically ensured and implemented then the trade secrets of a company will less likely to be stolen and will be protected for longer time.¹⁶¹

CONCLUSION

Although there is no guarantee that trade secret won't be revealed, there are precautionary steps the employer should take to make it less likely to happen. The information technology has changed the circumstances which have increased the risk of trade secret misappropriation for which trade secret owners should be mindful to take adequate security measures which includes both technical and process based in order to deal with these enhanced risks. We can approach this problem from two angles.

First, it aims to guide in a more consistent fashion, the way in which courts analyze these cases where trade secrets that have been stored electronically are misappropriated.

Second, it aims to encourage greater awareness and vigilance by trade secret owners/holder before the misappropriation occurs by illegal means.

The Trade Secret owner should monitor the equipments and adopt communications policies which will put employees on notice that the employer is serious about protecting its proprietary information. Additionally, these policies will help to position the employer to vindicate its right in the event of unauthorized disclosure. Furthermore the Courts and practitioners should proceed cautiously when asked to decide whether trade secret law protects against the use of a former employee's knowledge and skills or an inevitable disclosure. These doctrines jeopardize the mobility of employees and freedom of competition that are vital to trade industry of a country and are fueling the current technological revolution. A former employee's use of advance knowledge and skills should be enjoyed only where the knowledge and skills are

¹⁶¹<http://library.findlaw.com/1999/Nov/1/127332.html>

neither generally known nor readily ascertainable by competitors in the industry. An injunction against inevitable disclosure should be issued only where it is inevitable that former employer will use a specific trade secret in the course of performing an identified job responsibility inherent in the person's new position. These are narrow standards. They strike a careful balance between severely confliction policy interests and therefore should result in the imposition of an injunction only in rare circumstances. Trade secret protection cannot be an afterthought. Rather, in order to be reasonable, it requires a more conscious, risk assessment approach that better anticipates and ultimately stems the inappropriate dissemination or disclosure of the trade secrets.

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