



## **INCREASING TRENDS OF TRADE SECRETS, ARTIFICIAL INTELLIGENCE AND PRIVACY LAWS IN INDIA: A BIRD'S EYE VIEW**

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### **ABSTRACT**

*Trade Secrets are considered to be the backbone of any business. The economic value of such information can never be quantified owing to its confidential nature which carries efficacy of enhancing the business not only financially but even organizationally. Indian Laws on Trade Secrets are jurisprudentially developing with the decisions of different courts. The privacy that needs to be maintained to confer the status of 'trade secret' to any information is governed by the developing law of the nation ensuring privacy to its subjects. A threat may be caused to privacy of trade secret by the advancement of Artificial Intelligence, which though may not have the identical capabilities as of human intelligence, which may be utilized as an instrument to achieve the know-how of the competing business. This Paper attempts to identify the protection accorded to trade secrets in India, the implications of advanced privacy laws and the advent of artificial intelligence on the trade secrets.*

**Keywords:** Trade Secrets, Privacy Laws, Artificial Intelligence etc

### **INTRODUCTION**

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1P a g e

Introduction: Trade Secrets are the ‘undisclosed information’<sup>1</sup> possessing ‘commercial value’<sup>2</sup> related to a trade which is subjected to reasonable measures to maintain its secrecy. The information is confidential in nature and that provides an enterprise a ‘competitive edge’<sup>3</sup> over others in similar business. Since these secrets are outcome of ‘human intellect’<sup>4</sup> or human intelligence they are considered to be a part of Intellectual Property Law regime. Unauthorized disclosure, usage or acquisition of such information by any individual other than its holder is regarded as ‘unfair practice’<sup>5</sup> which needs to be remedied in consonance with the protections ensured by a specific legal system. The requirement of protection of trade secret is simply with an intention of guarding the ‘profitableness’<sup>6</sup> of business conceived by the trader while maintaining its secrecy. Trade Secrets, unlike other forms of Intellectual Property, are protected without being registered or without any procedural formalities owing to its confidential nature.<sup>7</sup> This leads to demand of a ‘limited disclosure’<sup>8</sup> of such secrets while exercising the right of excluding others from its disclosure, usage or acquisition while maintaining its secrecy with all reasonable efforts.

The notion of ‘limited disclosure’<sup>10</sup> may contradict with the fundamental right of privacy, as considered by hon’ble Supreme Court of India in its well-known decision called Justice Puttaswamy Judgment<sup>11</sup> wherein the court recognized existence of right to privacy with the corresponding duty of maintaining the legitimate aims of the state and its nature of being proportionate to the objective sought to achieve, which can practically result into exercise of dominance by the state over its subjects. As such trade secrets are regarded as incentive to

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<sup>1</sup> Article 39, Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994). [hereinafter referred as TRIPS Agreement]

<sup>2</sup> *supra* note 2.

<sup>3</sup> *What is Trade Secret*, World Intellectual Property Organization (October 01, 2019, 02:00 PM), [https://www.wipo.int/sme/en/ip\\_business/trade\\_secrets/trade\\_secrets.htm](https://www.wipo.int/sme/en/ip_business/trade_secrets/trade_secrets.htm)

<sup>4</sup> Richard Aching, *Revisiting the “Human Intellect” part of Intellectual Property*, IPO Trinidad and Tobago (October 01, 2019, 02:10 PM), <http://www.ipo.gov.tt/ipo-news/revisiting-the-human-intellect-part-of-intellectual-property/>

<sup>5</sup> *supra* note 3.

<sup>6</sup> Bernard C. Steiner, *Trade Secrets*, 14 YALE L.J. 374, 374-76 (1905).

<sup>7</sup> *How are Trade Secret Protected*, World Intellectual property Organization (October 01, 2019, 2:30 PM), [https://www.wipo.int/sme/en/ip\\_business/trade\\_secrets/protection.htm](https://www.wipo.int/sme/en/ip_business/trade_secrets/protection.htm)

<sup>8</sup> Chiara Gaido, *The Trade Secrets Protection in U.S. and in Europe: A Comparative Study*, 24 Revista La Propiedad Inmaterial 129, 131 (2017).

<sup>9</sup> Glenn Perdue, *Understanding the economic value of trade secrets*, ABAJ. (2014) ISSN: 0002-7596.

<sup>10</sup> Chiara Gaido, *supra* note 10, at 131.

<sup>11</sup> Justice K.S. Puttaswamy v. Union of India, (2017) 10 SCC 1 (India).

incremental innovation in technology.<sup>12</sup> It may be ruined if the right to privacy is not absolutely conferred to the enterprises or those holding a trade secret in such business forums.

Artificial Intelligence is the ability of machines to perform the cognitive tasks like thinking, perceiving, learning, problem solving and decision making.<sup>13</sup> Originally conceived at utilization of the same to reduce burden of human beings which turned out to be the factor increasing the burden of human beings post its incredible advancement. Artificial Intelligence can be used to deploy several tasks of humans but the same may result into encroachment on the rights of human beings. The capabilities of Artificial Intelligence, which have dramatically expanded in last one decade, may threaten the data protection. That is simply due to enhanced technology and powers possessed by the Artificial Intelligence to drive through the memories and data of big enterprises with the help of clouds connecting them all. This may be misused by its developers or users by pursuance of tasks leading to stealing of others data. Such actions definitely threaten the privacy guaranteed to the enterprises whose data is being misappropriated. Unfortunately such actions may not be controlled due to inefficient legal mechanism. In absence of any effective laws controlling Artificial Intelligence, the protection of trade secret remains at uncertain. The trade secrets in form of data may be stolen with the help of Artificial Intelligence and that results into loss of not only the trade so concerned but even the economy of the country.

‘Trade Secret’ as a form of Intellectual Property Law: Trade Secrets, by virtue of being outcome of human intelligence, are considered a form of Intellectual Property Laws. The capability of adding value to a business accords importance to Trade Secrets; however it remained in shadows as ‘less well-known form of Intellectual Property’<sup>14</sup> may be due to non awareness about its essentialness amongst the enterprises. Non recognition of Trade Secrets could be an attribute of its confidential nature as its holder, to maintain its characteristics, may remain silent even on misappropriation.

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<sup>12</sup> Md Zafar Mahfooz Nomani & Faizanur Rahman, *Intellection of Trade Secret and Innovation Laws in India*, 16JIPR 341, 342 (2011).

<sup>13</sup> Arnab Kumar, et. al., *National Strategy for Artificial Strategy Intelligence #AIFORALL*, NITI Ayog (October 02, 2019, 02:00 PM), [https://niti.gov.in/writereaddata/files/document\\_publication/NationalStrategy-for-AI-Discussion- Paper.pdf](https://niti.gov.in/writereaddata/files/document_publication/NationalStrategy-for-AI-Discussion- Paper.pdf)

<sup>14</sup> Prajwal Nirwan, *Trade Secrets: the hidden IP right*, *WIPO Magazine* (October 03, 2019; 10:00 PM), [https://www.wipo.int/wipo\\_magazine/en/2017/06/article\\_0006.html](https://www.wipo.int/wipo_magazine/en/2017/06/article_0006.html)

The TRIPS Agreement<sup>15</sup> enjoys the status of being ‘first international agreement’<sup>16</sup> to explicitly protect trade secrets as a form of Intellectual Property. The notion, in the TRIPS Agreement is to confer protection against unfair competition with inclusion of protection of ‘undisclosed information’<sup>17,18</sup> The Agreement further references the protection accorded to trade secrets by the Paris Convention<sup>19</sup> under Article 1 and 10bis, 1967.

Trade Secrets, unlike other forms of Intellectual Property, possess the characteristic of right in personam and lack the exclusive rights for its holder. The absence of such right may remain confusing as to the nature of trade secrets as a form of Intellectual Property however as the same is protected under international regimes as a property it shall be deemed to be so.

Unlike patents, trade secrets are not exclusive rights and hence may not be enforced against anyone who independently discovers the secret.<sup>20</sup> This even reflects on the legal protections accorded to trade secrets across the globe. Trade Secrets, like other forms of Intellectual Property, are governed by the Domestic laws of different jurisdictions. Unlawful acquisition, misuse or usage of trade secret is actionable as it amounts to breach of confidence or theft. It attracts civil as well as criminal remedy in some jurisdictions such as California<sup>21</sup>, China<sup>22</sup>, France<sup>23</sup>, Germany<sup>24</sup>, India<sup>25</sup> etc.

Registration of the trade secrets has not been considered as a requisite across the considering its confidential nature and majority of jurisdictions deal with the misappropriation,

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<sup>15</sup> *supra* note 2.

<sup>16</sup> *ENQUIRIES INTO INTELLECTUAL PROPERTY'S ECONOMIC IMPACT*, OECD (2015), (October 05, 2019; 5:00 PM) <https://www.oecd.org/sti/ieconomy/Chapter3-KBC2-IP.pdf>

<sup>17</sup> *supra* note 2.

<sup>18</sup> OECD, *supra* note 26.

<sup>19</sup> Paris Convention for the Protection of Industrial Property, 1979; G. H. C. BODENHAUSEN, *Guide to the Application of Paris Convention for the protection of Industrial Property*, World Intellectual Property Organization (October 05, 2019; 1:10 PM).

<sup>20</sup> Nirwan, *supra* note 15.

<sup>21</sup> Jessica K. Nall & Janice W. Reicher, *3 trends in Criminal Trade Secret Prosecution*, FARELA BRAUN + MARTEL, (October 05, 2019; 2:30 PM) <https://www.fbm.com/publications/3-trends-in-criminal-trade-secret-prosecution/>

<sup>22</sup> Hogan Lovells, *Trade Secrets Global Guide 2018* (October 05, 2019; 2:50 PM) <https://www.limegreenipnews.com/files/2018/06/Global-Trade-Secrets-Guide.pdf>

<sup>23</sup> Hogan Lovells, *Supra* note 23.

<sup>24</sup> *Id.* at 15.

<sup>25</sup> Chandni Raina, *Trade Secret Protection in India: The Policy Debate*, WTO Centre (October 04, 2019; 10:00AM) [http://wtocentre.iift.ac.in/workingpaper/Trade%20Secret%20Protection%20in%20India-](http://wtocentre.iift.ac.in/workingpaper/Trade%20Secret%20Protection%20in%20India-%20The%20policy%20debate.pdf)

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acquisition, disclosure and usage of trade secrets under different laws. In United Kingdom the law dealing with trade secrets is drawn from various case laws.<sup>26</sup> The protection of Trade Secrets, with the advent of which companies will be able to 'effectively protect their own trade secrets'<sup>27</sup>, in United States is ensured by a federal law called The Defend Trade Secrets Act, 2016 which deals with civil cause of action for trade secret misappropriation.<sup>28</sup> The European Union recognizes and protects trade secrets by adopting a Directive which governs and harmonizes trade secret protections across the European Union.<sup>29</sup> India lacks a specific legislation protecting the trade secrets however the concept is being jurisprudentially developing through different decisions of various courts. There have been few technological changes under the Information Technology Act, 2000 and its amendments covering confidential information through the electronic route and mandates stiff penalties, damages and imprisonment; even criminal sanctions are granted in serious offenses under The Criminal Procedure Code, 1973 under sections 405-409.<sup>30</sup>

**Artificial Intelligence and Privacy Laws:** The Constitution of India does not patently grant the fundamental right to privacy. Indian courts have read the right to privacy into the other existing fundamental rights, i.e. freedom of speech and expression under Art 19(1) (a) and right to life and personal liberty under Article 21 of the Constitution of India. However, these Fundamental Rights under the Constitution of India are subject to reasonable restrictions enshrined under Article 19 (2) of the Constitution that may be imposed by the State. Recently, in the Puttaswamy Judgment<sup>31</sup>, the constitution bench of the Hon'ble Supreme Court has held Right to Privacy as a fundamental right, subject to certain reasonable restrictions.<sup>32</sup>

The Information Technology Act, 2000 was firstly enacted to deal with the issues related to cybercrime and electronic commerce in India. The Act lacked provisions for protection and the procedure to be followed to ensure the safety and security of sensitive personal information of an individual.<sup>33</sup> This led to several other amendments and bills being passed

<sup>26</sup> Nirwan, *supra* note 15.

<sup>27</sup> Chiara Gaido, *supra* note 10, at 129.

<sup>28</sup> Elizabeth E. Atlee, et. al., *Harmonize your Trade Secret Protection to Protect Your Assets*, Association of Corporate Counsel (October 05, 2019; 3:30 PM) [http://www.klgates.com/files/Publication/b5c2b924-1544-466c-941a-f5df5eb213f3/Presentation/PublicationAttachment/3cbcf54b-e50d-4b43-970a-003c741e3414/Harmonize\\_Your\\_Trade\\_Secret\\_Protection.pdf](http://www.klgates.com/files/Publication/b5c2b924-1544-466c-941a-f5df5eb213f3/Presentation/PublicationAttachment/3cbcf54b-e50d-4b43-970a-003c741e3414/Harmonize_Your_Trade_Secret_Protection.pdf)

<sup>29</sup> Atlee, *supra* note 29, at 34.

<sup>30</sup> Raina, *supra* note 26.

<sup>31</sup> *supra* note 12.

<sup>32</sup> Vijay Pal Dalmia, *Data Protection Laws in India –Everything You must Know*, Mondaq (October 07, 2019; 2:00PM) <http://www.mondaq.com/india/x/655034/data+protection/Data+Protection+Laws+in+India>

<sup>33</sup> *Indian Data Privacy laws and EU GDPR*, Rodl & Partner (October 07, 2019; 2:30 PM) <https://www.roedl.com/insights/india-eu-gdpr-data-privacy-law>



and finally The Information Technology (Amendment) Act, 2008 inserted Section 43A in the IT Act which notified the Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011. Section 43A of the IT Act and the 2011 Rules do provide few provisions applicable only for residents of India. It means most companies have a privacy policy in place which can now be further developed and extended to include and encompass the stricter regulations so that they do not face any penalties for breaches under International regime.

In India Artificial Intelligence is considered to help furthering social causes and enable human beings to live more fulfilling lives. These include stimulating economic growth, enhancing global health and well-being, improving cyber security and improving efficiencies in imparting education.<sup>34</sup> Artificial Intelligence is emerging as a new factor of production, augmenting the traditional factors of production viz. labor, capital and innovation and technological changes captured in total factor productivity. It has the potential to overcome the physical limitations of capital and labour, and open up new sources of value and growth. From an economic impact perspective, AI has the potential to drive growth through enabling: (a) intelligent automation i.e. ability to automate complex physical world tasks that require adaptability and agility across industries, (b) labour and capital augmentation: enabling humans to focus on parts of their role that add the most value, complementing human capabilities and improving capital efficiency, and (c) innovation diffusion i.e. propelling innovations as it diffuses through the economy. Artificial Intelligence innovations in one sector will have positive consequences in another, as industry sectors are interdependent based on value chain. Economic value is expected to be created from the new goods, services and innovations that Artificial Intelligence will enable.<sup>35</sup>

Conclusion: There exists interface between trade secrets, privacy laws and artificial intelligence. The protection of trade secrets, which can impact the economy of the country at the best, may be ensured at fullest if the reasonable restrictions on privacy laws are not made applicable on the trade secret regime. Further, the conflict between privacy law and advancement of artificial intelligence can be addressed only by enactment of holistic laws and policies which may cover both the aspects of right to privacy and advancement of technology that may aid artificial intelligence to meet with the human needs. The jurisprudential development of the concept of trade secret, privacy and artificial intelligence is indeed notable in India. The increasing demand of the technology and its further implications are being considered by Indian courts in various recent decisions. It is pertinent to mention here that any development needs better understanding of the connected issues and

<sup>34</sup> *Artificial intelligence in India - hype or reality*, PWC India, (October 09, 2019; 9:00 PM)  
<https://www.pwc.in/consulting/technology/data-and-analytics/artificial-intelligence-in-india-hype-or-reality.html>

<sup>35</sup> Arnab Kumar, *supra* note 14, at 18.

such issues remain unsettled until such law is not passed and may be combated by strengthening the laws and policies concerned with such subjects in India. This is required not only in case of Trade Secrets which are governed by the provisions of contract laws of the country but even the privacy laws and policies on Artificial Intelligence.

The conflicts faced by trade secrets can best be addressed if the advancing laws on artificial intelligence and privacy are structured to synthesis them all. It indeed raises the possibility of the enactment of separate legislation protecting trade secrets in India alike other developed jurisdictions including United States, European Union etc. This may not only address the contemporary challenges faced by the trio but even boost economy of the country. The growth of artificial intelligence and appropriate regulation of the same can be beneficial to enterprises of the nation. The mechanism that may best balance the emerging need of development of artificial intelligence and protection of trade secrets be achieved through stringently systematic privacy laws. Appropriate privacy laws can prevent encroachment of one over the others' property. India, indeed alike other developing countries, modernizing the concepts and boundaries of its legal arena as per the demands posed by contemporarily developments witnessed within the country.

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