

# Evolution And Protection Of Trade Secrets In India

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In today's competitive market, companies rely on innovation to gain an edge over competitors. Such innovation may involve unique manufacturing processes, proprietary know-how, and/or confidential information. Coca-Cola's secret formula for its cola drink or KFC's special recipe of 11 herbs and spices are great examples of the importance of confidential information – or 'trade secrets' in legal parlance - in maintaining a distinct market position and fostering overall growth. Safeguarding trade secrets is crucial, as their loss can jeopardise an organisation's competitive advantage and ex-employees who have had access to trade secrets often pose one of the most significant risks in this regard.



## Definition and Characteristics of Trade Secrets

Broadly defined, a trade secret encompasses any confidential information not publicly known, for which reasonable steps are taken to maintain confidentiality. Unlike other forms of intellectual property, such as patents or trademarks, trade secrets do not require registration. Various international agreements, such as those outlined by WIPO and TRIPS, emphasise the importance of safeguarding undisclosed information against unfair competition practices.

## Evolution of Trade Secret Protection in India

In India, the legal protection of trade secrets primarily relies on common law principles, as there is no specific statute dedicated to their protection. Despite several attempts to enact legislation, such as the proposed National Innovation Act, 2008, none have materialised into law. Consequently, the Indian protection framework largely depends on provisions within existing statutes. For contractual matters particularly involving employer-employee disputes, provisions of the Indian Contract Act, 1872, and the Specific Relief Act, 1963, are key. Criminal liability in cases of theft of trade secrets, criminal breach of trust or cheating, may arise under the provisions of India's criminal law statute - Bharatiya Nyaya Sanhita, 2023. Where theft or removal of electronic records is involved, the Information Technology Act, 2000, may also come into play. Further, the Securities and Exchange Board of India Act, 1992, makes insider use and publication of sensitive information a punishable act.

Cause of action under the Contract Act often arises in connection with enforcement of restrictive clauses as it amounts to trade restraint. Typically, when employees sign non-disclosure agreements, it includes non-compete clauses, which prevent them from joining a competitor /otherwise engaging in commercial activities (to avoid/ stop proprietary information from being divulged). Barring the obligation of maintaining secrecy of confidential information (which can be imposed in perpetuity), such negative covenants have been held to be permissible during the course of employment but usually not post termination. The underlying logic for not entertaining such restraints is that an employee cannot be restrained from utilising the business acumen acquired during the course of previous employment.

## Judicial Pronouncements

Indian courts recognise the significance of trade secrets and have provided guidelines for their protection. Court rulings, such as those in *Bombay Dyeing v. Mehar Karan Singh* and *Niranjan Shankar Golikari v. Century Spinning and Mfg Co Ltd* specify criteria for identifying and enforcing trade secret rights. These include:

1. the information should be kept confidential;

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2. there should be a commercial utility attached to such information; and
  3. the owner should have taken specific steps to protect the information and maintain its confidentiality.

An analysis of recent jurisprudence on the subject matter suggests that while courts are reluctant to enforce agreements that unreasonably restrain trade, they uphold the principle of protecting confidential information through equitable means until perpetuity.

### **Recent Developments**

In contrast with India, countries like the United States (US) and the United Kingdom (UK) have specific legislation for trade secret protection - the Uniform Trade Secrets Act and the Defend Trade Secrets Act in the US, and The Trade Secrets (Enforcement, etc.) Regulations, 2018 in the UK. These laws provide guidelines and mechanisms for safeguarding trade secrets and pursuing legal recourse against misappropriation.

Recently, the 22nd Law Commission of India issued a report titled 'Trade Secrets and Economic Espionage' (along with a draft bill) on March 5, 2024, to recommend a *sui generis* legal framework to adjudicate claims related to trade secret disclosure. Commentators observe that such a law would offer companies clarity on protection of confidential information; increase industry confidence as well as enable technology transfer to India; and facilitate negotiation of free trade agreements, where the absence of a clear law on trade secret is often a point of concern. Notably, special exceptions are envisaged to protect whistleblowers.

### **Best Practices and Security Tools**

It is advisable to introduce measures to safeguard trade secrets, including executing Non-Disclosure Agreements (NDAs), conducting trainings and awareness programs, and employing robust data protection measures. Such efforts minimise the risk of unauthorised access and misuse of confidential information. Of course, introduction of a robust trade secrets legislation in India would further serve as a valuable tool to protect proprietary information.