

The role of trade secret laws

A company with valuable technology can choose to protect it by patents (costly legal monopoly for twenty years granted after lengthy checking of the inventive step, in exchange for publicly revealing the technology), copyright (expression in written form) or trade secrets (business secrets which can be protected as long as they remain secret). Each regime has merits.

Trade secrets play an important role in preventing unfair imitation of industrial products. They are more flexible, less formal and less costly than patents. Innovations in the dynamic business environment associated with new technologies are often protected as trade secrets. They can be used to protect proprietary information where protection under copyright or patent laws is unavailable or impracticable. Patent protection may not be appropriate for manufacturing methods and other secret internal processes, where infringement would be difficult or even impossible to detect.

Trade secret definition

The notion of trade secrets refers to a range of institutional creativity and skills ranging from strategic commercial information to successful product formulae and valuable know-how relating to manufacturing processes that have taken years to perfect. Trade secrets often protect innovations that are the fruit of laborious trial-and-error in setting up complex manufacturing or processing operations and algorithms. Modern, sophisticated production processes are constantly being refined, improved and simplified. Even a minor change in the settings may mean that the final product will not work or will not have the qualities that make it acceptable to consumers. Identifying precisely the right parameters, such as the ideal temperature, pH level, timing, atmospheric conditions, ingredients or pressure can be the fruit of years of minute adaptations. In a large scale industrial development, millions of Euros may depend on following the best processes.

Trade secrets are valuable because they are secret

Trade secrets can be protected where a piece of information is kept secret from the world. Information that is completely disclosed when the final product is marketed does not qualify for protection under trade secret laws. Information that is public or general knowledge in an industry is also not protectable. If the information is not kept secret, its legal protection can be lost. An innocent third party to whom trade secrets are divulged is free to use what he has learnt.

Secrets are being stolen

Trade secrets are often difficult to protect from theft. Manufacturers of cars, chemicals, tyres, vaccines, protective clothing, and semiconductors have seen their manufacturing technology stolen and rival plants built using the fruits of the theft. A concealed informant may copy a new formula; an employee may be bribed by a competitor to leave with the company's confidential engineering drawings or details of the manufacturing process; a computer hacker may break into a hedge fund computer system and steal a proprietary trading code. The ease of information sharing associated with new communication technologies, a more mobile workforce, increased use of outsourcing and contractors all create opportunities to steal confidential business information. Indeed, there is evidence that

trade secret theft and industrial espionage are on the rise. German authorities recorded a 40 per cent increase in industrial espionage cases between 2009 and 2010.

Trade secrets do not confer a monopoly

Protection under trade secret laws is limited by contrast to that offered by copyrights, patents or other forms of intellectual property. The trade secret owner cannot prevent independent development, reverse engineering or legitimate gathering of competitive intelligence. Trade secrets are only protected against unauthorised disclosure, and acquisition or use that is contrary to honest commercial practices. Unauthorised use includes such practices as industrial or commercial espionage, breach of contract, and breach of confidence. It does not extend to the use of protected information by third parties who obtained it in accordance with honest commercial practices.

The problem: no EU legislation on trade secrets

Misappropriation of valuable proprietary information is illicit, immoral and unethical. It harms large multinational companies and small businesses in the European Union. It may harm consumers too, as the products made using stolen technologies may be tainted, or of inferior quality, or may present a danger to public health and environment. The trade secrets regime has been neglected in European law and the Commission is trying to upgrade its status.

The means to protect trade secrets and to prosecute the theft of trade secrets in the European Union are inadequate. There is currently no legislation harmonising trade secret laws in the European Union. It is undisputed that trade secrets require protection, but they are protected based on different theories associated with different legal concepts across the European Union. There is no agreement as to the means to prevent and prosecute trade secrets theft. A victim of trade secret theft will discover that in certain Member States the problems caused by trade secret theft are recognised and appropriate remedies are available, but that in other Member States there is little recognition of the problem and thus effective remedies may be lacking. These differences in national trade secret laws create obstacles to trade between Member States and make it difficult to prosecute cross-border trade secret theft. The perpetrators of trade secret thefts may therefore enter the European Union market and unfairly undercut local businesses. In an age when the capacity to innovate determines survival, it is critical that European companies enjoy effective means to protect their confidential proprietary information.

The measures proposed by the Commission should not create a new species of legal right, but should facilitate the vindication of existing rights, a process which is currently inconsistent and procedurally risky.

International recognition of the need to protect trade secrets

The lack of action in the field of trade secrets in the European Union is in sharp contrast to a growing recognition of trade secrets by other developed economies (such as the United States and Japan) and at an international level. Both the WIPO and the WTO have made significant efforts to promote strong measures for trade secret protection and launched a number of initiatives to educate businesses – specifically small and medium size enterprises – on how to protect their trade secrets.