THE CONUNDRUM OF TRADE SECRETS IN THE CHANGING PARADIGMS OF EMPLOYMENT RELATIONSHIPS AND THE TECHNOLOGY INTERFACE: A CRITICAL ANALYSIS

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ABSTRACT

Almost without exception business argues intellectual property rights in collective terms. While management does deserve some return for the provision of a research infrastructure it is questionable whether it is legitimate to make the ceding of property claims a condition of employment. What happens in practice is that the fruits of scientific labor are passed to management and to owners? The rights of inventors have not been delineated; indeed, they are forced to forego them. Aside from the comparative rights of inventors versus a company's rights, the rights of a people versus a company must be considered. In this con text, developing countries consistently assert that the priority of the right of a people to their livelihood and development takes precedence over rights of private property. It is in this background that trade secrets are examined in the Indian context, to understand the best mode of its protection in its various facets.

INTRODUCTION AND RELEVANCE OF THE TOPIC

In today's technologically permeated society, intellectual property and the rights associated therein play a pivotal role. This has, in turn, resulted in a paradigm shift in the employee-employer relationship concerning information sharing, employability in rival organizations, etc.; a result of the burgeoning intellectual property era. There is a closer scrutiny of the employee in the workplace, penetrating into the disclosure made by the employee to scenarios during the course of, as well as, post-employment. The right of employee to acquire information is hence pitted against the need of companies to protect vital information.

The thesis proposes to deal with the perils of misappropriation of these trade secrets and the felt need to bring about reforms in the existing trade secret regimes and the legibility of putting absolute constraints. A need for a re-examination of the challenges and limitations of trade secrets in light of the contemporary trends of the changing dimensions of the employee-employer relationship is mooted. In short, the thesis will critically examine the modern policy justifications for trade secret law and scrutinise whether the expanding paradigms are desirable. It will be argued that trade secret law should not be parasitic and expand beyond the limits of its host theories.

LITERATURE REVIEW

Professors Gilson, Hyde, and Stone (2002) have identified the transition in labour markets and have argued correctly that this transition justifies changes in laws regulating post-employment restrictions, in particular trade secret protection and covenants not to compete. However, the changes identified have implications that go far beyond the area of postemployment restrictions, which are unexplored. Stone (2002) analyzes the shifting expectations of loyalties that create the underpinnings for employment-based trade secret law and portrays an ambitious viewpoint of how implied contract can be harnessed to improve the situation of workers. This work is criticised in Fisk (2002) as lacking empirical work wherein further areas of research

are indicated. She also treads on implied contract with skepticism, and rightly so and cautions us in providing a blanket new legal rule for everyone as not everyone can be included to belong in the new psychological contract. Subsequently, Fisk (2005) examines metaphors and their relation to the new knowledge economy and the new psychological contract. However, the article only invites the readers to think critically and carefully about metaphors to choose in adapting legal rules for the creative employee in the office and to give the story a happy ending. Gely and Bierman (2004) by way of a law and economics perspective demonstrate how in the new economy knowledge has become both the key production process component and an important object of exchange itself. Various implications of the transition towards a knowledge economy on the right of employees to exchange information about their jobs are identified.

Elizabeth A. Rowe (2007) brings into the foray misappropriation of trade secrets and the unique dilemma of extraterritoriality. However, this looks into only the USA point of view and takes into consideration only the difficulties into the Tariffs Act, 1930.

Stone (2001) urges a rethinking of legal doctrine that takes into account whether or not, expressly or implicitly, the promise of skills training was represented as a benefit of employment. Unlike Stone (2001) Wilf (2002) focuses on the importance of intellectual property law in establishing expectations and suggests that adopting equitable doctrines embedded in property law allows courts to curb an ever-growing solicitude to trade secret protection and to establish a more reasonable equilibrium between employee and employer stakes in proprietary information.

UNDERSTANDING THE DILEMMAS IN PROTECTION OF TRADE SECRETS

The Intellectual Property 'lock'smiths: Stealing from the mind

The relationship between the employer and the employee has drastically changed over the past couple of decades. From the employee looking for long-term commitment with the employer,

a drastic shift in the recent decade is observed with employee's staying with an employer for a short period of time, before moving to another employer who gives a vertical rise. In these circumstances, it is of pertinent importance to notice the role of technology and its related facets. As the employee moves from one place of employment to another, there arises issue of 'knowledge acquired through employment' and its ancillaries. For example, the data stored and worked upon by the employee. Whom does it belong to now? The employee who worked to develop it or the employer under whom the employee developed it, given suitable working conditions and accommodative infrastructure? These questions are found in all establishments and in different forms of employee-employer relationship. With the rigorous use and spread of technology, these questions have only increased manifold as technology has essentially lubricated the transfer of data instantly. Technology, hence, plays a cardinal role in the employee-employer relationship.

Cardinal Role of Technology

As is aptly put across by one observer "the twenty-first century economy is one of ever-increasing information intensity....knowledge has become what we buy, sell and do...It is the most important part of production...Knowledge assets have become more important to companies than financial and physical assets."[i] As a consequence, the employer goes to great heights (litigation and otherwise) to restrict employees from divulging what they learn in the course of employment to business rivals. One of the hallmarks of this new workplace is the increasing use of electronic technology, making it an 'electronic workplace'. The implications of this change are widespread, changes that are incomplete in which we will continue to see dramatic impacts on the workplace in future years.

LINES OF ARGUMENTS: INTERFACE BETWEEN TRADE SECRETS AND OTHER CORE ISSUES

Part I

A. In Conflict with Freedom of Speech and Expression

Enjoining publication of trade secrets is certainly restraint of speech, but is it invalid under the

constitutional guarantees? Different answers have been arrived at by different courts ranging from strict scrutiny to intermediate scrutiny.[ii] Protection of the freedom of speech and the free dissemination of information are cornerstones of any nation and have to be addressed cautiously.

B. Re-Examination of the Challenges and Limitations of Trade Secrets

Christened the 'Cinderella'[iii] of Intellectual Property law for the ugly step-sister status given to trade secrets, the renewed interest in trade secret sprouts from the desire to have a statutory framework in place. This results in the need for a re-examination of the challenges and limitations of trade secrets in light of the contemporary trends of the changing dimensions of the employee-employer relationship.

While patents and copyrights enhance (albeit in a limited sense) rather than restrict the free flow of ideas as a result of disclosure, trade secrets do not.[iv] Regrettably, protection for trade secrets encourages secrecy. The allure of trade secret law, therefore, lies in its immediate protection: as long as it is well guarded by implementing security measures to preserve it.

It must be noted here that although trade secret law does not rely on property rights 'as such', there is an ongoing debate about the exact nature of the rights underlying this body of law behind two main theories of trade secret law, generally referred to as the 'property school' and the 'confidential relationship' school.[v] Is the answer to the exclusion point is that the right is not 'good against the world'? Or that the owner's power to control the behaviour of those he stands in confidential relations to: i.e., the exclusionary power is actually just a by-product of the relational power that the owner has against those in certain types of relationships with him?[vi]

However, what is of importance is what lies ahead for trade secrets. Are trade secret rights a viable option for the workplace? Also, should / shouldn't these rights be limited in order to avoid generating social costs that exceed the benefits of exclusivity?

Another aspect for consideration is the principle of extraterritoriality and the identification of a major vulnerability for companies that choose to conduct operations or engage in other

business abroad. In such situations, the substantive and procedural laws of another country are likely to define whether the allegedly misappropriated information is protected and has been misappropriated.[vii] No specific framework exist when it comes to looking into disputes which occur in foreign soil. This void in law needs to be examined, including the concerns about whether the decision can be reconciled with existing principles of trade secret law and extraterritorial jurisdiction.

Part II

The 'Loyalty' Issue: The Changing Paradigms of the Social Relations Angle and the Resultant Stringent Measures for Trade Secret Protection. Is It Desirable?

A. 'Fruits Of Labour'

The lockanean theory postulates that what a person produces with her own intelligence, effort, and perseverance ought to belong to her and no one else, a classic formulation of the principle in his attribution of ownership to 'mixing one's labour' with un-owned material. Criticism from various quarters, for example, from Robert Nozick, who provides a compendium of problems involved in making sense of what becomes owned as a result of any such labour mixing.[viii] How much does this proposition hold well in the debate between the eternal tension of the employee and the employer in the tussle over trade secret?

B. (i) During Employment And
(ii) Post – Employment } **Employment- Based Intellectual Property (EIP)**

Bruce Tulgan postulates a 'new-psychological'[ix] contract unlike the old psychological contract of long-term employment under a single employer. Meaning thereby that the traditional obligation of 'duty of trust and confidence' and 'ethos of loyalty', ingrained in employment law conjoined with trade secret doctrine might be a passé. There is, hence, a need to analyze the shifting expectations of loyalties that create the underpinnings for employment-based trade secret law. The new psychological contract has important implications for the question of who owns trade secrets after the termination of employment.

The shift from the tangible to the intangible has made it all the more difficult for employers to

monitor activity of the employees, resulting in a closer scrutiny of the employee in the workplace, both during the course of employment as well post employment. The restraints placed, hence, might not only be on public disclosures of (certain) information but also on the research of the employee. Are these restrictions justifiable? In the case that these restrictive covenants are made stringent and successful, will it not result in an anticompetitive system and be contrary to the free enterprise system?[x] Further, will not a restricted employment opportunities based upon a covenant not to compete, be a deathblow to a former employee who seeks employment elsewhere?

The pertinent question therefore is whether equity has a power to compel a man who changes employers to wipe clean the slate of his memory? The relatable question emerges from the owner's requirement to establish control over the dissemination of information. At what point can the restraints be put? Additionally, is a blanket ban permissible? Isn't there a necessity to place the legal protection of trade secrets on a more secure constitutional footing?

To add further, trade secret laws prevent a former employee from doing work in just that field for which her training and experience have best prepared her. In such a scenario, if there are stringent covenants in effect, will it not prevent performance of another job, thereby forming a hindrance in accepting all subsequent employment in the type of work that she is best able to perform.[xi] Since the movement of skilled workers between companies is a vital mechanism in the growth and spread of technology, will stringent trade secret protection slow the dissemination and use of innovative techniques?

These situations give rise to examining restrictive covenants and their anticompetitive nature which include market monopoly by hindering employees movement laterally between companies, thereby hindering an employee's ability to earn a living.[xii] Though courts have rejected non-competes that allow employers to take advantage of superior bargaining positions to the detriment of their employees, these decisions are by far few and far in between.[xiii] The questions which further emerges relates to the role of undue influence in the case of restrictive covenants. Aren't employers, given their in-house legal resources and experience, more sophisticated bargainers and likely to induce employees into unnecessarily restrictive

covenants?[xiv] What are the repercussions of this illegal balance?

The essence of what/which will be ascertained in the thesis is the ability of current law to address some of the challenges raised by the shift towards the 'knowledge economy' and the argument that employment law doctrines should incorporate some protections regarding the ability of employees to exchange information regarding their terms and conditions of employment, both within and outside their organizations. An attempt will be made to develop the theoretical foundations for regulating information flows in the workplace and present and evaluate various regulatory approaches, and make recommendations for legislative and regulatory reform.

C. How The Labor Retaliates

Knowledge has become both the key production process component and an important object of exchange itself. The employer would seek to incorporate employee know-how into the manufacturing process and would hence find it irresistible to know the best secrets which employees use to be ahead in the race. But astonishingly, employees refuse to share the nitty-gritty's of the trade secrets (this, the employer will argue, was developed in the course of employment).[xv]

Does the 'modern reflective trust', as opposed to the 'blind trust' do enough good to the knowledge economy to prevent the wrecking of work relationships? It will be argued that repercussions of such an outlook might adversely affect and even result in 'socially optimal allocations'[xvi] thereby getting in the way of production process itself.

PART III

A. 'The Digital World Is No Friend of Trade Secrets': Problems Associated with Trade Secrets and the Internet

The maintenance of confidentiality of the proprietary information of the employer has increased manifold especially with the undisputed rise of and transition to the information age. Traditional dissemination of trade secret could be halted in many circumstances, for example, where there has been a theft of information, or where a party who is contractually bound not to

disclose threatens a disclosure. But today, proprietary information of an employer can be downloaded from a company's computer within moments, thereby creating a deficiency.

When trade secret owner(s) discovers that their trade secrets have been posted on the internet the only remedy to effectuate removal of the material is to obtain a court order, usually through a temporary restraining order or a preliminary injunction. Or even a take down order. Scholars say that it is not enough.[xvii] Is it so? The protection of trade secrets in a networked environment relies heavily on technology measures for information security, especially because after a trade secret has been stolen and posted on the internet; courts sometimes experience difficulty finding and retaining the "secrecy" element of a trade secret. [xviii]

B. Criminal Sanction: A Necessity?

On the subject of criminal sanctions, the French and German laws[xix] afford the most interesting contrast to the American law. Reading of the respective French and German statutes involved discloses that penal provisions are inherently a part of the law of trade secrets in those countries. The query that remains to be investigated is whether it would be good public policy for a nation's jurisdictions to widen to accommodate the scope of criminal law so as to protect trade secrets thereunder? It is a question in legislative policy that is at least worthy of exploration. It will be argued that criminal statutes are no panacea.

PART IV

Expanding Paradigms: Is the Direction Desirable?

Parts I, II, & III critically examine the modern policy justifications for trade secret law, including arguments about conventionally accepted norms. With the perils of the misappropriation of trade secrets looming writ large, ranging from national security concerns to small scale economic damage and the working relationship therein, there is a felt need to bring about reforms in the existing trade secret regime. What remains to be examined is whether these arguments are persuasive or not. I will content that trade secret law imposing liability without violation of an independent legal norm are misguided. What is required is an analysis for reform of trade secret law? There is no law. The pertinent paradigms of employee mobility and technology transfer need to be brought under the scanner.

AN ATTEMPT AT CONCLUSION

The words of Fortune magazine editor, Thomas Stewart, that "Information and knowledge are the thermonuclear competitive weapons of our time"[xx] haunt us when the live wire issues of the employee-employer relationship within the work place are brought to the forefront. These issues are of the nature of emerging forms of intellectual concern and workplace relations. The dilemmas are unique as it is linked to trade secrets misappropriation and as post-misappropriation, trade secrets cannot effectively be reduced to possession and holds no value on being returned to the owner. It is unsurprising then, that trade secrets are 'arguably the most important and the most heavily litigated intellectual property right'.[xxi] With a continuing shift to a knowledge-based economy, the need to religiously protect trade secrets and to make it impenetrable is the motto of many business houses, thereby creating a powerful incentive for businesses to monetize these trade secrets by raising rigorous procedures for protecting them. Lawmakers are increasingly resorting to criminal codes for protecting trade secrets.[xxii] What has to be considered, hence, is what Dalter points out: that the whole purpose of the law of trade secrets is to promote licensing and exchange of non-patented know-how between businesses and employees and not to work in a restrictive sense. The requirement in trade secret law is, understandably, not absolute secrecy but 'relative' secrecy.[xxiii]

Also, emphasis will be laid against expansion of intellectual property rights as a form of "information feudalism",[xxiv] which entrenches economic inequalities, and the need to balance out the same. Hence an analytic overview is required and an assessment needs to be made of the changing nature of crime in the burgeoning information society. Essentially, the aim will be to reassess the place of labor law in the wider area of employment relations research of intellectual property and to argue the case for labor law's importance to social scientists.

Furthermore, the conclusion will be in the direction of suggestions being made towards adopting equitable doctrines embedded in intellectual property laws so as to allow courts to curb an ever growing solicitude to trade secret protection and to establish a more reasonable equilibrium between employee and employer stakes in proprietary information.

The conclusion will be reflective of suggestions made towards adopting equitable doctrines

embedded in intellectual property laws so as to allow courts to establish a more reasonable equilibrium between employee and employer stakes in proprietary information.

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