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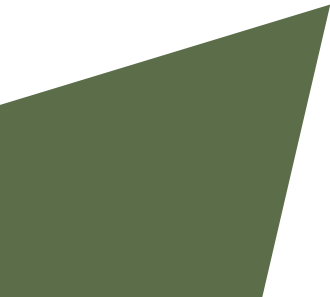
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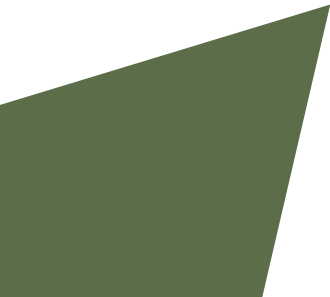
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Patent and Trade Secret Interface: A Moral Dilemma for SME's

Bikram Bhadra

Over the time, the two most common methods used to protect IP are Patents and Trade Secrets. All Patents are born as Trade Secrets. Trade Secret is the first line of defense by proceeding, accompanying and following patents. Patent provides grant of exclusive privilege to own, use or sell the method or the product patented for a limited period, stimulates new inventions of commercial use. On the other hand Trade Secrets are basically the formulas, patterns, processes, device, program, method techniques or compilation of information giving competitive edge to one's business and providing opportunities to obtain an advantage over competitors who do not know or us it, preserving its commercial value as best kept secret. The Colonel's finger-lickin' good recipe and the formula of coca cola are few examples of some best-kept secrets in the commercial marketplace.

In most legal systems, patents and trade secrets represents alternative legal mechanisms for the protection of the results of innovative technical research. Patents, which must be applied for, give the holder a term of absolute exclusivity over all use of the claimed innovation. Trade secrecy in contrasts provides a more informal means of protection, merely requiring the innovator to maintain the secrecy of invention. Although there are circumstances in which only trade secrets protection will be available, because the innovation does fall within the category of projectable subject-matter, or does no reach the relevant thresholds of patentability (novel, inventive steps, and industrial applicability), and in other cases, an invention might qualify under both regimes. If a person chooses protection by the way of patent, the possibility of using trade secrecy will no longer exist. This wasn't always the case as the requirement of disclosure by way of a specification was only introduced in the early 18th century. Before that, it seems, patent infringement action and complaints as to appropriation of trade secrets could exist side by side. However, patents and trade secrets are not always alternatives; in many cases a person will protect an invention as a trade secret in the period before the patent is published. In these circumstances, confidentiality and patenting are complementary. Yet in further situations, a person will use both trade secrecy and patent along-side one another.

THE BENEFITS OF SECRETS

The benefits of relying on trade secrets are seemingly obvious and that it provides protection informally, keeping its critical information from competitors, rather than revealing it to them and it has the potential to last longer than patent protection. According to the seminal English High Court

decision in *Coco v Clark*¹, an action for breach lies where three criteria are satisfied: (a) information having ‘necessary quality of confidence’ is (b) held by a person under an obligation of confidentiality and (c) is disclosed or used in manner inconsistent with the obligation. It is worth elaborating on these requirements to clear on how much easier it is to protect information through the law of confidentiality.

Information has the necessary quality of confidence if it is relatively secret. There is no requirement of novelty or inventiveness. Gathering information or even compiling bodies of pre-existing information will suffice. However, information that is easily accessible to interested parties would likely not be regarded as confidential. Thus, the threshold is low: anything patentable would have the necessary quality of confidence.

In the United States, trade secrets are protected primarily as a matter of State Law. Most state model their laws on the Uniform Trade Secrets Act (1979, as amended in 1985) (UTSA)², which defines “Trade Secret” as³ :

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

- i. 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
- ii. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Like the English law of confidence, the UTSA does not require that the secret be new, only relatively secret. The information is generally not regarded as a secret if relevant actors who can obtain economic benefit from the information are aware of it. In contrast with the position taken in relation to confidentiality (in England) and trade secrecy (in USA), to obtain a patent in either country, an innovator has to be much more act (and spend much more money). A formal process of application to national registries is required, and in turn the inventor needs to draw up documents in a particular form.

¹ *Coca v Clark (Engineers) Ltd* (1969) RPC 41

² 45 states have adopted the UTSA

³ UTSA, Sec 1(4)

In contrast with the position in relation to confidentiality (in England) and trade secrecy (the United States), to obtain a patent in either country, an innovator has to be much more active. A formal process of application to national registries is required, and in turn the inventor needs to draw up documents in a particular form. This typically involves the use of specialist patent agents. Moreover, consideration is needed of precisely where protection is desired, and, while international mechanisms exist to make the process easier (and offer some space to decide whether all the expense is worth making)⁴, the expense of obtaining protection in a host of national offices is considerable. A good portion of the expense lies with getting the patent documentation translated, since the group of specialist translators who understand cutting edge technology is inevitable somewhat scarce.

If formality and lack of expense is the first attraction of Trade Secret as an appropriation mechanism particularly for SMEs, the second lies in the fact that Trade Secret protection allows the innovator to keep information from his or her competitors. The advantage of secrecy over patenting is found in the potential for Trade Secret to last indefinitely, compared with the limited term of patenting (20 years from filing)⁵. The most notorious example of such a trade secret is, of course, the recipe for the drink, Coca Cola, which has been kept secret, since the 19th century⁶. Some of the early 19th century cases also bear witness to a host of secrets that remind secret for much longer than the term of a patent. *Newbery v James*⁷, was an action heard in 1817 in relation to James's powders, a supposed cure for gout, rheumatism, and other ailments, which was being exploited at least 70 years earlier.

LIMITS OF SECRECY

If the advantages of secrecy over patenting are relatively obvious, it is perhaps worth observing some of the limitations of trade secrecy. In case of As Burger CJ has observed in the US Supreme Court, 'trade secrecy law provides far weaker protection in many respects patent law.' For the most part these limitations relate to establishing infringement: 'breach of confidence' only occurs where a person uses information disclosed to him or her in confidence, and not where he or she independently creates the information (including by reverse engineering); moreover, even if a person has utilized confidential information, it will not always be easy to prove this. In addition, remedies

⁴ In particular, the Patent Co-operation Treaty (1970)

⁵ EPC, Art 63; 35 USC Sec 154(b)

⁶ *Coca-Cola Bottling Co of Sheveport, Inc v Coca-Cola Co*, 107 FRD 288, 289 (D Del 1985) (Coca-Cola's distinctive taste attributable to secret combination of ingredients known as 'Merchandise 7X')

⁷ *Newbery v James* 1817

afforded to a claimant who has suffered a breach of confidence are less generous than those offered to a patentee. These limitations raise significant doubts as to superiority of confidence over patents.

In contrast, patent law provides a patentee with the exclusive rights to perform the invention that is defined in the claims of the patent.⁸ There is no requirement of science or derivation and independent invention is no defense. In fields where independent actors likely to come up with similar break-through at similar times, an intellectual property right that covers even the acts of independent inventors offers considerably greater security.

In a breach of confidence action, a claimant must prove derivation. However, proving derivation is frequently more difficult⁹. Even if a claimant succeeds in establishing breach of confidence, the suits of remedies on offer may be weaker than if the innovation had been patented. This is particularly so in United States, where the Patent Act provides for the possibility of ‘treble damages’, that is a damages award equivalent to three times the value of the harm suffered by the patentee. In contrast, the UTSA makes provision for ‘double damages’ for cases of willful and malicious appropriation¹⁰.

Although there are a number of benefits to replying on trade secrecy, as opposed to patenting, there are also considerable risks. Probably the most obvious risk is that the secret will come out.¹¹ Should it do so, the information loses its protection, and becomes part of the public domain. There are four common ways in which the information might lose its quality of confidence:

- The controller of the information might publish it (for examples, by applying for a patent);
- the information might be independently generated and made available to such an extent that the information loses its quality of confidence;
- the information might be accessed by legitimate means, in particular through reverse engineering and thus enter the public domain;
- the information might be disclosed by a confidant in breach of confidence to such an extent that it loses its confidential character.

⁸ Patent Act, 1977 Sec 60; 35 USC 154(a)

⁹ *Kewanee Oil Co v Bicon*

¹⁰ UTSA, s 3(b)

¹¹ *Kewanee Oil Co v Bicon Corp* (1974) 94 S Ct 1879, 1890 (Burger CJ) (Where patent law acts as a barrier, trade secrets law functions relatively as a sieve)

Such position appears similar in the case of *Timely Products Corp v Arron*¹² as the plaintiff had disclosed his idea for a warming sock to the defendant, and in due course the plaintiff filed for a patent. When the defendant started to manufacture the sock, the plaintiff sued for infringement of the patent and misuse of the trade secret. The patent action failed, the patent being held invalid as obvious. The trade secret action failed too, because the patent itself had disclosed the secret.

REVERSE ENGINEERING AND ITS EFFECTS ON CONFIDENTIALITY

Not all use or disclosure of someone's secret is actionable misappropriation. Rather, as the commissioners who drafted the Uniform Trade Secrets Act noted, there are several categories of "proper means" of obtaining a trade secret. We classify these "proper means" as defenses, because they do not directly deny the existence of a trade secret or the defendant's use of that secret.

In the case of *United Technologies Corp. v. F.A.A*¹³, it was held:

"Reverse Engineering is the process by which an engineer takes the already existing product and work backward to re-create its design and/or manufacturing process."

Disassembling and examining products that are available to public are not violations of trade secret law. Trade secrets that are learned in this manner can be freely used, and the trade secret protection is lost once the information becomes publicly known.

EXAMPLE: X and Y sell competing Body products. Y creates new cologne with an odor of cigarettes and gasoline. The formula for the cologne is a trade secret. X purchases a bottle of Cologne; one of its chemists examines the product, learns its formula and publishes it on the Internet. Y will be unable to protect its formula under existing NDAs because the formula is no longer a trade secret.

However, Trade secret protection is not lost simply because a trade secret could be discovered by reverse engineering. For example, it's not enough to claim that anyone could easily reverse engineer the trade secret material.

EXAMPLE: The Food and Drug Administration (FDA) made a determination that a secret ingredient in a product was not a trade secret because it could easily be discovered by reverse

¹² 523 F 2d 288, 304.

¹³ 102 F.3d 688 n. 1 (2nd Cir.1996)

engineering. A federal court later overruled the FDA determination because despite the fact that the secret could have been discovered, no competitor had ever discovered the ingredient.¹⁴

Reverse engineering is also regarded as permissible in the United States. The Supreme Court of United States had observed in the case of *Kewanee Oil Co v Bicorn Corp*¹⁵ that ‘trade secret law does not forbid the discovery of the trade secret by fair and honest means independent creation or reverse engineering. If reverse engineering is permissible, and does not give rise to any obligation on the part of the person who does the engineering, what is the effect on the status of the information as a trade secret?’

- The answer depends precisely what the person who carries out the reverse engineering does with the information.¹⁶ If the information is widely disseminated then the secret may simply cease to exist.
- It is conceivable that someone ‘Z’ who reverse engineered ‘E’ and thereby worked out how to make it simply take advantage of that knowledge himself. If that occurred, X could not object to Z’s activities, but X might retain an enforceable secret itself. Thus X might continue to be able to enforce obligations of confidentiality against those to whom he disclosed the information about the process of making ‘E’ in confidence.¹⁷

TRADE SECRET PRIOR TO PATENTING

The important role for trade secret is complementary to patenting, that is, the use of trade secret to protect an invention prior to patenting. Patenting only comes to be considered once an exploitable invention is in sight: indeed the ‘industrial applicability’ and ‘utility’ requirements of European and US patent law respectively envisage that patenting should only be possible if a discovery has some sort of specific and substantial use. Once an industrially applicable invention is made, a patentee will often keep it secret in the period when it is deciding whether to make an application at all. The widespread use of secrecy becomes explicable on the basis that this is the form of protection used

¹⁴ *Zotos Int’l, Inc. v. Young*, 830 F.2d 350 (D.C. Cir. 1987).

¹⁵ *Kewanee Oil Co. v. Bicorn Corp.* 416 U.S. 470 (1974)

¹⁶ If reverse engineering occurs very readily, it might mean that the information is not secret or confidential at all. In the United States, this could be on the basis that the information is generally accessible or that reasonable efforts have not been made to keep the information secret: *Acuson Corp v Aloka Co Ltd*, 209 Cal App 3d 425.

¹⁷ Held as Springboard doctrine in the case of *Vestergaard Fransen S/A v Bestnet Europe Ltd* (2009) EWHC 1456 (Ch)

primarily during the pre-marketing stage, rather than as an alternative to patenting. The use of trade secrecy prior to patenting raises a number of various legal issues.

- *Secret use and patenting* – Under UK Law and the EPC, there is nothing to prevent a person from exploiting an invention secretly and later obtaining a patent for the invention. As long as the invention has not been made available to the public at any time prior to the application for the patent, then the invention will be regarded as new¹⁸. In contrast, under the Patents Act 1949, secret prior use of the invention would invalidate a patent unless it fell within one of a number of specific exceptions. Moreover, under the US law, the sale of the invention more than one year prior to the priority date might invalidate the patent. Judge Learned Hand explained the philosophy of the US Law thus,

‘It is a condition upon the Inventor’s right to patent that he shall not exploit his discovery competitively after it is ready for patenting; he must content himself with either secrecy or legal monopoly’¹⁹

Therefore, there exists less opportunity in the US as compared to Europe, to cumulate secret exploitation with patent monopoly.

- *Self-disclosure* – A potential patentee should be careful to avoid disclosure of the invention prior to making an application. In contrast with the position in US, where certain disclosures by an applicant are deemed to fall outside the state of the art, applicant for UK and Europeans are not provided with ‘grace period’. Consequently patents are frequently anticipated and thus rendered invalid for want of novelty as a result of the applicant’s own acts and disclosure²⁰. The priority date is thus important not just because it is the date at which novelty is assessed, but also because it is a date from when inventors are able to exploit their inventions without jeopardizing any potential patents.

Under the EPC and UK patents act an invention is not to be regarded as new if it forms parts of the “state of the art”²¹. The key aspect of the novelty inquiry is that the ‘state of the art’ is confined to materials which has been made available to the public. If a disclosure occurs in confidence, then the material is not to be regarded as to be falling within the state of the art. For example the prior disclosure of a chemical formula would not anticipate an

¹⁸ Merrell Dow v Norton (1996) RPC 76, HL.

¹⁹ Metallizing Engineering Co v Kenyon Bearing and Auto Parts Co, 153 F 2d 516, 520

²⁰ Fomento Industrial SA v Mentmore Manufacturing Co. Ltd (1956) RPC 87

²¹ Patents Act, S 2; EPC, Art 54.

application for the patent for the invention of the chemical if it were not possible for the person skilled in the art to make the chemical represented by the formula.

- *Disclosure in breach of confidence* – what happens if, before the priority date, invention is disclosed to the public in breach of confidence? As far as the EPO is concerned information is probably excluded from the ‘state of the concern’. Under Article 55 of the EPC, information is excluded from the state of the art where it was disclosed within six months prior to the application ‘due to, or in consequence of, the evident abuse in relation to the applicant or his legal predecessor’. In the United States, it is less of a concern because of the grace period of 12 months. But it can still be a problem if the breach of confidence occurred more than 12 months before the filing. In *Evans Cooling Systems, Inc v General Motors Corp*, a patent was held invalid on the basis of the sale of a product more than 12 months before the priority date where that sale was affected in breach of confidence.

PATENTABILITY CRITERIA IN INDIA

Patent Law’s objective is to grant of exclusive privilege to own, use or sell the method or the product patented for a limited period, stimulates new inventions of commercial utility and to encourage scientific research, new technology and industrial progress. The fundamental principle of Patentability is that a patent is granted only for an invention which must be new and useful. That is to say, it must have novelty and utility. It is basic for the legitimacy of a patent that it must be the innovator's own disclosure instead of unimportant confirmation of what was at that point known before the date of patent.²²

a. Patentability Criteria in U.S.A

- Novelty, Utility and Non-obviousness are the essential tests for patentability under the US patent laws. If an invention is not a part of the state of art and not known to the public before, the invention is considered new. Another criteria of USPTO to evaluate the patentability is utility.

²² *Bishwanath Prasad Radhey Shyam v. Hindustan Metal Industries*

- The invention should not be non-obvious in nature. The Supreme Court of US had stated that the invention cannot qualify for patent if it appears obvious having average intelligence and information on the subject matter.

b. Patentability Criteria in Europe

- There exists basically four criteria of patentability set by EPC (The European Patent Convention) : i) Article 54 EPC states invention should be novel; ii) Article 56 EPC states that the invention should involve an inventive step; iii) Article 57 EPC states the invention should be applicable to industrial use and iv) Article 52(2) and (3) EPC states non exclusion of an invention if it has no technical character or related to scientific method or mathematical method or is offensive and immoral.

c. Patentability Criteria in India

- Under the Section 3 of Indian Patent Act of 1970, to be patentable in India, an invention should satisfy patentability requirements as: i) Patentable subject matter; ii) Industrial Applicability; iii) Novelty; iv) Inventive Step and v) Specification. A patent will be granted only if an invention satisfies all the patentability requirements and non-satisfaction of even one of the requirements will make an invention ineligible for a patent grant.
- Section 3(d) of the Act was substituted by a new clause, which provided that discovery of a new form, property or use of a known substance was not patentable unless it results in enhanced efficacy. The primary objective was to prevent pharmaceutical companies from obtaining patent protection over modifications of known molecules or chemical entities.
- The constitutional validity of Sec 3(d) was challenged by *Novatis AG v. Union of India*²³, through a writ petition for patent over Imatinib Masybate, used for cancer treatment, before the Madras High Court, contending that Sec 3(d) violated Article 14 of the Indian Constitution and was not in compliance with Article 27 of the TRIPs Agreement, which provided for non-discrimination of inventions based on the field, by prohibiting patent protection for new forms of a known substance and, thereby, discriminating against such inventions. The High Court rejected its plea and held that Section 3(d) was not violative of fundamental rights and was valid, explaining that in order to get patent protection over the new form of a known substance, efficacy could be proved by showing a better therapeutic effect by the new form, which could be shown by scientific and objective evidence.

²³ Novatis AG v. Union of India (2013) 6 SCC 1

TRADE SECRET PROTECTION IN INDIA

For the protection of Trade Secret and confidential information, there does not exist any specific legislation in India. The protection of Trade Secret in India have been maintained by Indian Courts based on standards of value and on occasion, upon a precedent-based law activity of penetrate of certainty, which in actuality sums a break of legally binding commitment. The cures accessible to the proprietor of competitive advantages is to acquire an order keeping the licensee from uncovering the prized formula, return of all private and restrictive data and pay for any misfortunes endured because of exposure of prized formulas.

- In the case of *John Richard Brady and Ors v. Chemical Process Equipments P. Ltd and Anr*²⁴, the Delhi High Court invoked a wider equitable jurisdiction and awarded injunction even in the absence of a contract.
- In the case of *Mr. Anil Gupta and Anr v. Mr. Kunal Dasgupta and Ors*²⁵, the court granted an injunction and held that the concept developed and evolved by the plaintiff, was the consequence of the work done by the offended party upon the material which might be accessible in the open space. Notwithstanding, what made the idea classified was the way that the offended party had thought carefully and in this way created a one of a kind outcome applying the idea.

Trade Secrets alongside Patents

Trade Secrets and Patents may be deployed side-by-side, i.e. where patenting and trade secret is available, many SME's will use both. A patent will be obtained for some of the patentable material, and will contain the required disclosure, but tangential information relating to how the inventor would practice the process or make the product himself would be held back and disclosed to licensees through specific agreement. In Europe, such use seems to raise no concerns at all. In the US, a question might have arisen as whether 'know-how' license might suggest that the patentee has failed to comply with the requirement that it disclose the 'best mode' of 'carrying out' the invention.

²⁴ John Richard Brady and Ors v. Chemical Process Equipments P. Ltd and Anr (AIR 1987 Delhi 372)

²⁵ Mr. Anil Gupta and Anr v. Mr. Kunal Dasgupta and Ors [97(2002) DLT 257]

CONCLUSION

While patent law is more secure, trade secrets may be less expensive. Reverse engineering and the use of trade secrets gets excluded from protection under the trade secret law once they are released to the public at large. Patent law remains more difficult to be enforced. However, unlike copyrights or patents, trade secret does not have any expiry nor do they require an idea to be unique or original. SME's only have to demonstrate the values of its invention to protect its trade secret and that the information has been kept secret through reasonable steps.

There exist a choice between two regimes, and that this choice is essentially a strategic one for the inventor or SMEs. Although questions have arisen as to whether widespread use of trade secret could undermine some of the public disclosure goals of patents, those questions have tended to be answered by highlighting the very different goal of confidentiality in the preservation of certain behavioral or commercial norms. Moreover in the period before the inventor makes the decision to patent, courts tend to view the two regimes as complementing one another, a view given effect to by a willingness to recognize that most pre-patenting uses of confidentiality should not be jeopardize patenting. Indeed, international intellectual property obligations now could be saved to require states to recognize parallel roles for confidentiality and patents. Indeed, international intellectual property obligations now could be saved to require states to recognize parallel roles for confidentiality and patents. By integrating patent and trade secret protection and thereby exploiting the overlap, building an IP estate and developing a fall-back position, dual protection can be achieved with collaborative effects. Amidst renowned illustrations of collaborative amalgamations of trade secrets and patents to secure invulnerable exclusivity are GE' industrial diamond process technology, Wyneth's Permarin manufacturing process and the Pizza Hut case, explaining the merits of marrying patents and trade secrets and acquire the best of the both worlds.

However, the system of patent law consists both benefits and flaws. It provides incentives to those who're pursuing technological advancement and creativity but also conditions with invention disclosure and time limitation. But would that mean barring patent protection, there would be less incentive rolled out to invent and innovate? That seems less likely. An inventor does not invent with the desire of a patent, but to take further the realms of advance research, technology, medicine, etc. a patent only provides medium benefit from your own invention. Yet, when tie time comes to choose path, you are subjected to the conditions laid out by the patent office. Some companies like to keep their composition a secret and if as such, do not apply for a patent. When it comes to "trade

secrets”, inventors or SME’s might choose to inventions undisclosed as at the end, it depends on the inventor’s choice. The end choice is theirs to make as the proverbial ball remains in their court.