

Trade Secrets and the Right to Information

ABSTRACT

Background:

December 2018 marks the 70th Anniversary of the Universal Declaration of Human Rights (UDHR), nearly 25 years since the TRIPS Agreement was approved, and more than two years since the United States (US) and European Union (EU) adopted legislation with the stated purpose of improving and harmonizing the protection of trade secrets within their jurisdictions. While seemingly unrelated developments, there are potential conflicts between increased trade secret protection and Article 19 of the UDHR which have implications for intellectual property (IP) governance and openness in Europe and beyond.

The TRIPS Agreement provides a very general provision on trade secrets (undisclosed information). Its drafting history reveals that this was due to: the controversial nature of trade secret protection; a reluctance to label trade secrets as IP; and the resulting failure of negotiators to fully consider the parameters of trade secret protection. Accordingly, Article 39 of TRIPS leaves considerable discretion to Members to design their respective laws. Despite this general approach at the international level, both the EU and the US have adopted similar limitations to trade secret protection. While these limitations are intended to safeguard fundamental societal interests, including freedom of expression and the right to information, their application to trade secret cases is not entirely clear.

Research Question/Objective:

To explore how freedom of expression and the right to information is addressed in EU and US trade secret law and determine whether the applicable limitations on trade secret protection are sufficient to protect those interests.

Research methodology:

The research methodology used is comparative law. This paper will examine the probable operation of the limitations on the scope of trade secret protection that are a part of EU and US law, with a focus on the provisions concerning whistleblowing and freedom of expression. In the EU's recently adopted Trade Secret Directive, the whistleblowing provision enables disclosures which serve the public interest, including revealing illegal activities and misconduct. Moreover, the Directive's provision concerning freedom of speech safeguards media freedom and plurality in accordance with the EU Charter. Similarly, the US has adopted a whistleblowing provision as part of the Defend Trade Secrets Act of 2016 and the US Constitution protects freedom of expression. However, there are important differences between the approaches, for instance, in the scope and horizontality of protection in the EU when compared to the US.

Attention will be paid to likely sources of diversification in EU and US interpretations, such as the scope of protected expression, the extent to and ways in which rights operate between private parties, and the definitions of “the public interest.” The paper will also explore the history, purpose, and meaning of Article 19 of the UDHR, how it finds expression in the laws and legal principles of the EU and the US, and how it may limit the scope of trade secret protection. As the EU Trade Secret Directive is still being implemented, it will also address the various approaches within selected EU Member States to these provisions and respective justifications thereof.

PARTIAL LIST OF REFERENCES

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