

TRADE SECRETS AND CONFLICTS OF INTEREST

- Information is a valuable business asset
- We need to ask:
- What rights do companies have in maintaining the secrecy of valuable information? And what corresponding obligations do employees have not to disclose company trade secrets to outsiders or use them for their own advantage?
- What do we need to consider ?

- Companies have some rights with respect to trade secrets and other intellectual property, such as patents, copyrights, and trademarks.
- Employees have an obligation of confidentiality not to disclose or use information acquired during their employment.
- On the other hand, employees have the right to change jobs or to start up a business of their own using some of the skill and knowledge they have acquired while working for a former employer.
- Furthermore, companies have a right to use their own employees' skill and knowledge that have been legitimately acquired elsewhere and to gather legitimate competitor intelligence.
- The challenge for individuals and companies, as well as the law, is to balance all of these competing rights and obligations.

TRADE SECRET PROTECTION:

What is a Trade secret (*Restatement of Torts*, 757)?

- ✓ A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him/her an opportunity to obtain an advantage over competitors who do not know or use it.
- ❖ Examples: the ingredients or chemical composition of a product, the design of a machine, the details of a manufacturing process, methods of quality control, results of marketing surveys, financial projections, and lists of customers and suppliers.
- ❖ Trade secrets pose a complex set of problems about the rights and obligations of companies possessing valuable information, as well as the rights and obligations of employees and competitors.

The *Restatement* lists six factors that can be used to determine what information is protectable as a trade secret. These are:

- (1) The extent to which the information is known outside his business;
- (2) The extent to which it is known by employees and others involved in his business;
- (3) The extent of measures taken by him to guard the secrecy of the information;
- (4) The value of the information to him and his competitors;
- (5) The amount of effort or money expended by him in developing the information;
- (6) The ease or difficulty with which the information could be properly acquired or duplicated by others.

Three major arguments for trade secret protection:

- 1. Trade secret as property**
- 2. Trade secrets as principles of fair competition.**
- 3. Trade secrets as violation of confidentiality.**

1. Trade secrets as Property:

Imagine a lone inventor

- Trade secrets, along with patents, copyrights, and trademarks, are commonly regarded in the law as intellectual property that can be said to belong to an owner.
- Patents, copyrights, and trademarks, in particular, are like tangible property in that the owner has a right of exclusive use and the right to sell, license, or otherwise assign ownership to others.
- Ownership of a trade secret, by contrast, does not confer a right of exclusive use but only a right not to have the secret misappropriated or wrongfully acquired by others. Once the information is widely known, it ceases to be a protectable trade secret.
- All forms of intellectual property are unlike tangible property, however, in that they are not inherently exclusive; that is, their use by one person does not preclude their use by another.

- The question of who owns what becomes more complicated if the inventor is himself employed by a manufacturer of the product in question.
- As long as he gets his ideas while performing unrelated work - conducts the experiments on his own time using his own materials and facilities, it seems only right that he be recognized as the sole owner.
- If, on the other hand, he is hired as an inventor to develop improved methods of manufacture or if he does his creative work on his employer's time with the resources of his employer, then some or all the rights of ownership could reasonably be claimed to belong to the employer.

Property rights:

- A Lockean view – we own the results of our labour
- It may not suit well in the case of intellectual property.

BUT however, companies have certain property rights to certain kinds of information:

1. society generally benefits from the willingness of companies to innovate, but without the legal protection provided by patent and trade secret laws, companies would have less incentive to make the costly investments in research and development that innovation requires.
2. Patent and copyright laws encourage a free flow of information, which leads to additional benefits. Patent holders are granted a period of 20 years (In India) in which to capitalize on their discoveries, but even during the period of the patent, others can use the information in their research and perhaps make new discoveries.

- The existence of legal protection for trade secrets, patents, and other forms of intellectual property also has its drawbacks.
- A patent confers a legal monopoly for a fixed number of years, which raises the price that the public pays for the products of patent holders during that time.
- Trade secrets permit a monopoly to exist as long as a company succeeds in keeping key information out of the hands of the competitors.

The ownership of Ideas:

- ❖ In many cases Companies require employees to sign an agreement turning over all patent rights to the employer.
- ❖ Such agreements are morally objectionable when they give companies a claim on discoveries that are **outside** the scope of an employee's responsibilities and make **no** use of the employer's facilities and resources
- ❖ But the bureaucracy is so powerful a lone inventor may loose all claim on his/her product.

2. Trade secrets as principles of fair competition.

- Protection of trade secrets help companies to have fair competition among competitors

Non competition agreements:

- Because of the difficulty of imposing legal restraints on employees after they leave, many companies require employees to sign a noncompetition agreement when they are hired. These agreements typically restrict an employee from working for a competitor for a certain period of time

3. The Confidentiality Argument

- The third argument for trade secret protection is that employees who disclose trade secrets to others or use them themselves are guilty of violating an obligation of confidentiality.
- This argument is based on the view that employees agree as a condition of employment to become agents of an employer and be bound by the duty that agents have to preserve the confidentiality of certain information.

Confidentiality agreements:

- ✓ good for both,
- ✓ more restriction to employee's rights,
- ✓ restriction to employee mobility and other career prospects

BUT however,

- ❖ The **key** to protecting trade secrets lies in **improved employee relations**, in which both employers and employees respect the rights of the other and take their obligations seriously.
- ❖ A key element in improving employee relations is an ethical climate of fair play.
- ❖ Employers might find that treating employees fairly provides more protection for trade secrets than relying on the law.

Ethics in COMPETITOR INTELLIGENCE GATHERING

- ✓ Nowadays many companies' trade secrets and business information are open to the public.
- ✓ Competitor intelligence collection is important for a company to grow, however ethical and legal limits one should not forget.
- ✓ Computers played an important role.
- ✓ The unethical methods for gathering competitor intelligence can be grouped under four headings.

1. Theft and Receipt of Unsolicited Information.

Theft of information, either by an employee or an outsider, is obviously an improper method for acquiring information because it involves a violation of **property rights**. Examples of employee theft include freely offering information to competitors to take revenge, **selling** it for monetary reasons, and taking it to a **new job** in order to advance one's career. Companies that receive the information, for whatever reason it is offered, are receiving, in effect, **stolen property**. More controversial, however, are cases in which an employee inadvertently leaves a document where it can be seen or taken by a competitor or carelessly discloses information in casual conversation. Suppose that a competitor's bid on an important project is accidentally **enclosed** along with the specifications that are sent by the customer. Would it be ethical to use that knowledge in preparing one's own bid? Or does the information still belong to the competitor?

2. Misrepresentation.

- ✓ To gain information under false pretences is a form of deception that violates the duty to be honest in all dealings.
- ✓ Posing as a customer to obtain information from a competitor, is an act of dishonesty.
- ✓ under the guise of doing a study of the industry which might contain confidential technical information about the bidder's products.
- ✓ To get information some companies have advertised and conducted interviews for positions that do not exist, in the hope that some applicants would inadvertently reveal trade secrets of their present employer.

3. Improper Influence.

- ✓ The employment relation is built on trust, and to induce an employee to reveal information through bribery or some other means is to undermine that trust.
- ✓ An employee who accepts a bribe and turns over a company's secrets has broken a bond with the employer
- ✓ Improper influence can be exerted not only by bribery but also by promising or holding out the possibility of a job or some other opportunity.
- ✓ Offering to purchase from a supplier in return for a competitor's price list would be an example of improper influence.

4. Covert Surveillance.

- ✓ Planting hidden microphones etc.
- ✓ Virtually all of the high-tech gadgetry that government intelligence agencies use to spy on enemies is available for competitor intelligence gathering .
- ✓ Whether corporations have a right to privacy is controversial, but if covert surveillance were to become an accepted practice, companies would be forced to take costly defensive measures.
- ✓ However need to respect companies privacy.

The importance of ethics in competitor intelligence gathering has led some companies to adopt policies that give employees firm guidelines on acceptable practices and also set the tone for practices within their industries.

Conflict of Interest

➤ What Is Conflict of Interest?

- The conflict occurs when a personal interest comes into conflict with an obligation to serve the interests of another.
- More precisely, we can say that a conflict of interest is a conflict that occurs when a **personal interest interferes with a person's acting** so as to promote the interests of another when the person has an **obligation** to act in that other person's interest .
- Your intention and your action are different.

- To explain further: The **obligation** described in this definition is that which characterizes an agency relation in which one person (an agent) agrees to act on behalf of another (the principal) and to be subject to that person's control.
- Employees of business firms are also in an agency relation in that they have a general obligation to serve the interests of an employer.
- In conflict of interest: The duties of an agent are not determined solely by a list of **moral rules** but by the nature of the **interests** to be served

- **To conclude:**
- **Trade secrets and conflict of interest involve a delicate balancing of the rights and interests of employers and employees, as well as the public at large**

CORPORATE SOCIAL RESPONSIBILITY (CSR)

- ❖ **Companies have responsibilities:** to their own employees, to customers and suppliers, to the communities in which they are located, and to society at large.
- ❖ Most corporations recognize these responsibilities and make a serious effort to fulfil them.
- ❖ Often, these responsibilities are set out in formal statements of a company's principles.
- ❖ Many companies have institutionalized CSR team as an integral part of their operations.
- ❖ In addition, there are many outside groups, including nongovernmental organizations (NGOs), socially responsible investors, and consultancy firms, that monitor companies' CSR activities and provide their services.

Definitions of CSR:

- *“the responsibility of enterprises for their impacts on society”.*
- To completely meet their **social responsibility**, enterprises *“should have in place a process to integrate social, environmental, ethical human rights and consumer concerns into their business operations and core strategy in close collaboration with their stakeholders”*
- *“the continuing commitment by business to contribute to economic development while improving the quality of life of the workforce and their families as well as of the community and society at large.”*

- In developing countries, 6 million children die each year, mostly from hunger related causes.
- 2012 – India (22%) world (18%)
- Haves and have-nots
- Poverty and famine : caused by inefficient or corrupt political and business institutions
- Consider...

- Do we participate in the impoverishment of the poor? (e.g. the hotel and the gladiators)



➤ Displacement of the locals.



➤ Benefiting from the sufferings of the poor.



➤ Contributing deprivation



The Indian Context

- On the one hand, India has grown to be one of the largest economies in the world, and an increasingly important player in the emerging global order,
- on the other hand, it is still home to the largest number of people living in absolute poverty and the largest number of undernourished children.
- What emerges is a picture of uneven distribution of the benefits of growth
- Social unrest

- Many companies have been quick to sense this development, and have responded proactively while others have done so only when pushed.
- Governments as well as regulators have responded to this unrest and the CSR clause within the **Companies Act, 2013** is the step towards regularity.
- According to Indian Institute of Corporate Affairs, a minimum of 6,000 Indian companies will be required to undertake CSR projects in order to comply with the provisions of the Companies Act, 2013 with many companies undertaking these initiatives for the first time.
- Further, some estimates indicate that CSR commitments from companies can amount to as much as 20,000 crore INR.
- This combination of regulatory as well as societal pressure has meant that companies have to pursue their CSR activities more professionally.

- In India CSR still remains as a Philanthropic activity

The Companies Act, 2013

- In India, the concept of CSR is governed by clause 135 of the Companies Act, 2013.
- The CSR provisions within the Act is applicable to companies with:
 - an annual turnover of 1,000 crore INR and more,
 - or a net worth of 500 crore INR and more,
 - or a net profit of five crore INR and more.

- 2014-15 onwards, also require companies to set-up a CSR committee consisting of their board members, including at least one independent director
- The Act encourages companies to spend at least 2% of their average net profit of past three years on CSR.
- The company can implement CSR on its own or through other NGOs or agencies.
- Only CSR activities in India will be taken into consideration.
- Activities exclusively for employees and their families will not qualify.

CSR and SMEs (Small and Medium enterprises)

- ✓ Small and medium enterprises (SMEs) significantly contribute towards India's economic growth.
- ✓ These serve independently and also as ancillary to larger units and help generate employment and industrialise the rural and backward regions of India.
- ✓ They employ nearly 40% of India's workforce and contribute around 45% to India's manufacturing output
- ✓ The business activities of SMEs are performed in proximity to the locals.
- ✓ This enables them to be aware of community needs, manage expectations and develop CSR programmes appropriately.
- ✓ As per Companies Act, 2013 many micro-enterprises will not qualify, while many small and medium enterprises (SMEs) will.

The debate of CSR

- In US the concept only after 1950s
- In 60's and 70's it became prominent, as America confronted pressing social problems such as poverty, unemployment, race relations, and pollution.
- The well known economist Milton Friedman writes, in *Capitalism and Freedom*, “Few trends could so thoroughly undermine the very foundations of our free society as the acceptance by corporate officials of a social responsibility other than making as much money for their stockholders as possible”.
- Many companies have inefficient CSR teams, as it is a low priority. People who do not quality might be in the team.

Examples of social Responsibility:

- ✓ Choosing to operate on an ethical level that is higher than what the law requires
- ✓ Making contributions to civic and charitable organizations and nonprofit institutions
- ✓ Providing benefits for employees and improving the quality of life
- ✓ Taking advantage of an economic opportunity that is judged to be less profitable but more socially desirable than some alternatives (Starbucks coffee)
- ✓ Using corporate resources to operate a program that addresses some major social problem

CASE 3 Explore the Concept on mythinkinglab.com

Timberland and Community Service

*Our company is organized around values. Not out of convenience, but out of necessity.*⁶⁶

—Jeffrey Swartz, President and CEO, Timberland Company

Jeffrey Swartz, the President and CEO of Timberland Company, was the third-generation leader of a formerly family-owned business that went public in 1987.⁶⁷ In 1955, Swartz's grandfather, a Russian immigrant, bought the Abington Shoe Company, located in South Boston, Massachusetts, and brought his two sons into the business. The iconic Timberland boot was introduced in 1965 when the Swartz family developed a process for fusing rubber soles to leather uppers to form a rugged, waterproof boot that was also less expensive to produce. The success of the Timberland boot led the Swartz family to relocate in 1969 to Stratham, New Hampshire, and to change the name to Timberland Company in 1978. The growing company began to market a variety of casual and work footwear under the Timberland brand, and, later, introduced clothing and accessories for men, women, and children, as the company expanded sales to Europe, Asia, and Latin America. After graduation from Brown University and the Amos Tuck School of Business at Dartmouth, Jeffrey Swartz assumed a variety of positions at Timberland, becoming chief operating officer in 1991 at the age of 31 and president and CEO seven years later.

Under the leadership of Jeffrey Swartz, Timberland Company developed an expanding program of community service in an effort to combine “commerce and justice.” The centerpiece of this program was the trademarked Path of Service, launched in 1992, which allowed employees to devote 16 hours of company-paid time each year to community service. Path of Service was expanded to 32 hours in 1994, and to 40 hours in 1997. The purpose, as stated by Swartz, was “to engage the skills and talents of employees to create long-term solutions for critical community needs.” Although participation was optional, employees were encouraged to use the hours for their own favored causes or to participate in company-sponsored events. A new Community Enterprise Department was created to support the Path of Service program and other community service initiatives.

CSR ACTIVITIES



To conclude:

Corporate social responsiveness:

- It refers to the capacity of a corporation to respond to social pressures.
- Thus, a socially responsive corporation uses its resources to anticipate social issues and develop policies, programs, and other means of dealing with them.