AUTOMOTIVE TRADE SECRETS AND WHY IS IT DIFFERENT FROM PATENTS

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ABSTRACT

The automotive industry is such an industry which ever since its evolution has seen the days of advancement, and till date this sector is in consistent surge of evolution. Every single day new research and development is taking place in order to manufacture a class leading vehicle from their competitors. If you talk to any automobile enthusiast, they will describe how building a new car is a work of art. All around the globe, there are class leading manufacturers who build the best vehicles which are always way ahead of their time. So, what makes those vehicles way ahead of their time?

It is the features those cars they possess, and those features are not only to be understood in terms of just luxury features. Such features also include the mechanism to protect the occupants during an accident, the mechanical features which are related to power trains which give life to cars etc. all these are some of the things which helps automobile manufacturers stand away from the main stream mass producing vehicles. This is where the concept of Intellectual Property Rights arises in this sector. Usually what we generally see is that companies are always patenting new technologies. But, what we are not able to see is the trade secrets in automobile industry. In this research article, the author will emphasize on the difference between patent and a trade secret and will further narrowing it down to the automobile sector. The automobile industry is considered to be best example to understand about trade secret and the technicalities related to it. There had been many cases related to trade secret infringement also which the author has discussed in this article in a structured manner. Therefore, there is a noticeable number of difference which lies between patent and trade secret and this article would help in understanding the difference.

Keywords: IPR, patent, trade secret, TRIPS Agreement, automobile industry, F1 controversy.

INTRODUCTION

The human mind is constantly evolving, with a constant desire to discover and invent something new, something different from the norm. All of this would necessitate a significant amount of human effort, research, intellect, and energy. And if everything goes according to plan, that one person will be able to successfully create something new for the masses. It is at this stage that the concept of Intellectual Property enters the picture. To put it another way, intellectual property refers to a mind-made creation such as an invention, literary or artistic works, design and symbols, names and pictures that are employed in commerce.[1] Intellectual Property refers to the products or other creations that result from such human endeavour. As a result, the laws safeguard this Intellectual Property. These are protected by patents, trademarks, copyrights, geographical indications, and other laws that grant protection to them. As a result of these laws, people can obtain recognition and financial rewards from the items that they invent or innovate. By striking the right balance between innovators' interests and the greater public interest, the IP system aims to create an atmosphere conducive to creativity and innovation. As an inventor, you can gain exclusive control over your creation by filling out or registering for the relevant Intellectual Property Rights. If you have produced something amazing, something unique that has never been invented before, you can apply for a patent, which is a type of Intellectual Property Right or IPR.

The first thing that comes to mind when we hear the term "intellectual property rights" is patents. Because patents are such a commonly used instrument for securing one's intellectual property rights, this is the case. A patent is extremely important in terms of both innovation and economic performance. To put it another way, the reason why patents are so important is that with each new innovation, an inventor comes up with a new idea and a new approach to doing any activity or doing things in a way that is different from the traditional techniques. A patent is a government-issued exclusive right granted to an invention, which is a product or procedure that gives a new technical solution to a problem or a new way of doing something in general. To protect valuable intellectual property, details on how to get patents will be provided.[2] Newness is present in those innovations, and it is this newness that is referred to as novelty, and the efforts and resources expended by the inventor to come up with such a novelty are to be protected under patent rules. It is to ensure that no other person adopts the same

[1] *What is Intellectual Property?*, https://www.wipo.int/about-ip/en/
[2] Module 03, *Inventions and Patents*, WIPO, https://www.wipo.int/export/sites/www/sme/en/documents/pdf/ip_panorama_3_learning_points.pdf

process and claims it as their own invention, because doing so would infringe on the efforts of the product's true inventor, rendering his efforts and energy useless. Between 1992 and 2002, the number of patent applications filed in Europe, Japan, and the United States increased by more than 40%.[3] Recent developments in innovation processes, the economy, and patent regimes are all linked to the rising use of patents by corporations and public research organisations to protect inventions. As a result of scientific and technological advancements, particularly in information and communication technology (ICT) and biotechnology, new waves of innovation have emerged, and innovation processes have become more reliant on interactions among global networks of public and private sector actors. Patent regimes have evolved to cover increasingly expansive areas of patentable subject matter (many countries' patent regimes now include biotechnology and software), as well as more robust and lucrative patents. Every day, thousands of people go to the patent office to file patents for their discoveries, but only a small percentage of them are considered patentable. On the other hand, every new innovation has the potential to better our lives and make them more comfortable than before. According to a KPMG study conducted in 2018, India is the world's third largest inventor, notably in the sector of technology.[4] However, every new innovation and creation is the result of someone's imagination. The individual or entity that is responsible for the idea or innovation should be given credit for it. Intellectual Property Rights, or IPRs, play a role in this. Many individuals, however, mix up IPR with patents. A patent is an intellectual property right that protects new innovations and discoveries that aren't obvious. When you invent anything, you can apply for a patent to gain exclusive rights to your creation. After determining whether the innovation is new, the Patent Office issues you the patent in about 2-3 years after following the proper procedures. The patent is protected by an IPR law, which you may use to utilise your innovation however you choose - whether you want to start a business or licence it. IPR legislation protects the patent, which you can use to use your innovation in any way you desire, whether you want to start a business or licence it.[5] The Indian government issues the applicant with a certificate that serves as a legal document protecting the inventor's innovation rights. When an inventor files for a patent, he gives himself the legal right to sue anyone who replaces or reproduces his inventions for profit without first obtaining his permission. In India, patents are currently only given for innovative designs.

[3] *Patents and Innovation: Trends and Policy Challenges*, OECD, https://www.oecd.org/science/inno/24508541.pdf
[4] *Difference between IPR and Patent*, IPTSE, https://iptse.com/difference-between-ipr-and-patent/
[5] *Ibid.* 4

PATENTS AND TRADE SECRETS- A GENERAL PERSPECTIVE

Patents:

We were able to get a quick overview of patents in the preceding section of the paper, including what they mean and who is protected under the law. We'll delve a little more into patents and trade secrets in this section of the article. The term "patent" is not defined clearly in the TRIPS Agreement. A patent is the term used to describe an intellectual property right (IPR) that is granted to protect new inventions. A patent, which is granted by the government in a specified jurisdiction, gives the owner the exclusive right to prevent anyone from using the patented invention in that jurisdiction without his or her permission for a set period of time, subject to certain restrictions.

The term "invention" is not defined in the TRIPS Agreement. According to one informal definition, an invention is a novel solution to a technical problem. National laws use a number of methods to define the term "innovation." Several country laws restrict scientific theories, aesthetic creations, systems, and rules and procedures for conducting mental acts. Rather than striving for a concrete technological outcome, these objectives are abstract and philosophical in nature. Unlike copyright, which does not require any prior conditions, a patent is not instantly available for qualified inventions. To obtain a patent, an inventor or other eligible individual must submit an application for each jurisdiction in which he or she desires protection, as well as meet certain substantive and procedural requirements. Patents in each country are distinct from one another, i.e., a patent application, award, or cancellation in one jurisdiction has no automatic effect on the same invention in another, as stated in ***Article 4*** of the *Paris Convention*. Patent protection, on the other hand, serves a societal function by promoting technical progress, particularly greater investment in research and development (R&D) to inspire new ideas, according to ***Article 7*** of the *TRIPS Agreement*. As a requirement of getting protection, patent applicants must divulge particular details about the innovation contained in the application. This would make it easy for others to investigate the concept and build on the technology it provides, for example. As a result, the patent system aims to encourage technological innovation as well as the transmission and dissemination of knowledge. However, as previously noted, the patent system allows the patent owner to limit how others can utilise the claimed innovation throughout the duration of the patent's protection period. As a result, in the patent system, striking the correct balance between these goals is crucial. This balance can be accomplished, for example, by establishing and organising

commercial agreements as well as other means for the development, transfer, and diffusion of technology, such as various licencing and R&D contracts.[6] There are three most important criteria by the virtue of which an invention gets protection under the Patent law. The three important criteria are as follows:

- *Usefulness:* Anyone who invents or discovers a new and useful technique, machine, production, composition of matter, or any new and useful improvement of one of these can be given a utility patent.[7] In order to be protected, the invention must also be capable of industrial application. Except for the TRIPS Agreement, which stipulates that "capable of industrial application" may be regarded as equivalent with "useful,"[8] there is no further definition for this phrase. It should also be noted that in certain other nations, the phrase 'useful' is also referred to as 'utility. ' Many governments interpret these requirements to suggest that the innovation can be applied to any industry, including agriculture. Patents are frequently denied for activities that are abstract and philosophical in nature and do not aim for a clear technological outcome. This criterion of 'industrial applicability' or 'utility' is typically viewed as reserving patents for technology that actually achieves a practical aim rather than being merely an abstract idea or hypothetical concept.
- *Novelty:* Naturally, the patent must be one-of-a-kind. That is, if the invention was known about or described in a printed book before you invented it, or if it was patented or described more than one year prior to your patent application, you will not be granted a patent. You've essentially barred your own patent application if you invent something, start marketing it, and apply for a patent more than a year after you've made your innovation public. Although the term "new" is not defined in the TRIPS Agreement, it is widely understood in many jurisdictions to mean that the claimed invention contains a novel feature that has not been previously disclosed to the public in the body of existing knowledge in its technical field before the relevant date. The ingredients of an invention may not all be unique, but the technique of putting them together must be: for example, a novel innovation may be a new type of electrical battery that contains materials not before used for this purpose. This criterion of 'novelty' is routinely used

[6] *Patents,* WTO, https://www.wto.org/english/tratop_e/trips_e/ta_docs_e/modules5_e.pdf
[7] *Introduction to Understanding Patents,* MLIBRARY (Apr. 20, 2021, 10:14 AM), https://guides.lib.umich.edu/c.php?g=282903&p=1888136
[8] *Ibid.* 6

to avoid the patenting of technologies that are already widely available, and to ensure that a patented invention is a genuine contribution to existing knowledge.

- *Non-obviousness:* Another criterion for uniqueness is that it be obvious. Even if you've invented something that differs in one or more ways from the most nearly related object known, the Patent & Trademark Office may deny your claims if the differences aren't obvious. This particular criterion of 'inventive step' or 'non-obviousness' is very commonly understood to prevent such patents from being granted that while strictly new in the sense of not having been disclosed before, only represent a trivial or routine advance on existing knowledge, instead reserving patents for inventions that represent a clear and non-obvious advance on the state of art.

Trade Secret:

Another crucial part of this section is the trade secret. This trading practise is frequently acknowledged by major economic actors who are known for their history, which could include anything from a secret recipe to a secret technology used by any manufacturing company. Any business action or approach that is not widely known outside of the company is considered a trade secret. Internal research and development often results in trade secrets, which provide a firm a competitive advantage over its competitors.[9] To be proclaimed a trade secret in the United States, a firm must make a reasonable effort to keep the knowledge hidden from the public; the secret must have inherent economic value; and the trade secret must contain information. A firm/company possesses trade secrets, which are a sort of intellectual property. Unlike a patent, a trade secret is not disclosed to the general public. Anything from a proprietary process, instrument, pattern, design, formula, recipe, method, or practise that is not widely known and may be used to establish a business that has a competitive edge or provides value to clients is considered a trade secret. The term 'Trade Secret' could be defined in different ways depending on its jurisdiction, but amongst all the definitions we will find out certain similarities, those of which are as follows:

- The information which is considered to be as a secret, shall not be present in public domain in what so ever ways.
- The information which is considered to be secret must provide economic benefit to the entity claiming it.

[9] *What is a Trade Secret?*, INVESOPEDIA, https://www.investopedia.com/terms/t/trade-secret.asp

- Reasonable efforts need to be made to protect that secret information.

Trade secrets are the corporate world's "classified documents," just as top-secret documents are closely kept as private information by government agencies. Because the cost of creating some products and processes is far higher than the cost of competitive intelligence, companies have an incentive to learn what makes their competitors successful. Employees with access to a company's trade secrets can be protected by asking them to sign non-compete or Non-Disclosure Agreements (NDA) when they are hired.

Trade secrets are defined and protected in the United States by the Economic Espionage Act of 1996, and they are also subject to state law. As a result of a 1974 ruling, each state can implement its own trade secret legislation. However, there is no formal legislation protecting trade secrets and confidential information in India, which is a concern. Nonetheless, Indian courts have upheld trade secret protection on the basis of equity and, in some situations, a common law breach of confidence action, which functionally corresponds to a violation of contract. An injunction can be sought to prevent the licensee from releasing the trade secret, as well as the return of all confidential and proprietary information and compensation for any losses sustained as a result of the trade secret's disclosure.[10] Like other intellectual property rights, trade secrets can be extremely valuable to a company's growth and, in some situations, survival. Businesses must ensure that their business operations, technical know-how, and confidential information are well-protected from competition. A trade secret is a business technique, process, design, instrument, or collection of data or information that is not commonly known and is kept hidden and confidential by the owner. The owner of such data or information may also have a financial incentive to obtain a competitive advantage. A person can be contractually compelled in India not to expose any confidential information entrusted to him or her. A negative covenant in a technology transfer agreement has been upheld by Indian courts, requiring the licensee not to divulge or use the knowledge received under the agreement for any reason other than that stated in the agreement.

Despite the lack of a contract, the Delhi High Court applied its larger equitable jurisdiction and granted an injunction in **John Richard Brady and Ors v. Chemical Process Equipments P. Ltd. and Anr**.[11] The plaintiff created a "Fodder Production Unit" (FPU) and asked the

[10] Kamakhya Srivastava, *India: Trade Secrets in Indian Courts*, MONDAQ (Nov. 3, 2012), https://www.mondaq.com/india/trade-secrets/204598/trade-secrets-in-indian-courts
[11] AIR 1987 Delhi 372

defendant for thermal panels so that it could make it in-house. The defendant also acquired technical documentation, thorough know-how, drawings, and specifications relating to the FPU as part of the process. After learning about the defendant's FPU, the plaintiffs preferred to file a complaint alleging misappropriation of know-how information, drawings, designs, and specifications provided to defendants. Even though there is no written confidentiality agreement in the contract, the Court concluded that the defendant is responsible for breaching the confidentiality obligations.[12] Protective measures include physical security, digital or network security, and legal safeguards such as confidentiality, non-compete, and non-disclosure agreements (NDAs).[13] Physical security measures could include storing the secret information in a secure area and allowing only those who have been pre-authorized access. Coca-vault Cola's is an example of physical security. Other companies protect their secrets by restricting access to specific portions of their physical plant, using key cards to monitor entry to specific rooms, and limiting access to just those who need it. Digital security measures include firewalls, secure passwords, and restrictions on employee access to specific networks or websites. Portable flash drives may be encrypted, restricted in usage, or prohibited outright within a firm because they are one of the easiest ways for an unhappy employee to flee with information. To prevent the transfer of confidential information, such as customer contact information, a company may choose to give its employees with specialised cell phones and portable computers for business usage. Confidentially agreements, non-compete agreements, and non-disclosure agreements all guarantee information confidentiality, but so do solid operational procedures that protect both the secret information and the organisation as a whole.

For example, businesses should ensure that any trade secrets are labelled "Confidential." One of the key reasons for trade secret law's appeal is the flexibility and scope of protection it provides. Trade secret legislation can cover a wide range of subject matter that does not fall under traditional intellectual property regimes. Patent law, for example, covers subject matter such as a composition, manufacturing technique, equipment, tool, new plant species, or enhancement to an existing innovation. Many of the most fundamental ideas of this age are difficult to patent, such as algorithms, correlations, and the systems and procedures that rely on them.[14]

[12] *Ibid.* 11
[13] Michael J. Kasdan, *Trade Secrets: What You Need to Know*, THE NATIONAL LAW REVIEW (Dec. 12, 2019), https://www.natlawreview.com/article/trade-secrets-what-you-need-to-know
[14] *Ibid.* 13

TRADE SECRET IN THE AUTOMOBILE INDUSTRY

Trade secret litigation is quickly becoming a key new battleground in the automotive industry. This new trend coincides with a rise in trade secret cases filed in federal courts across the United States. Since the Defend Trade Secrets Act was passed in 2016, the number of trade secret cases has increased by 30%. Furthermore, throughout the preceding 30 years, trade secret litigation in federal courts in the United States has expanded rapidly, almost tripling every ten years. These trends are particularly important for the automobile industry, which is witnessing significant technological advancements and may result in more trade secret disputes. The convergence of many new technologies onto the automotive platform, the entry of new technology companies into the automotive market, the increased mobility of employees jumping to new automotive technology companies, and an increasing number of partnerships between automotive and technology companies are all driving the increased importance of trade secret litigation in the automotive industry. This expanding network of new commercial collaborations for developing new automotive technologies such as autonomous driving and electric motors enhances the possibility of trade secrets being shared or taken without authorization, perhaps leading to greater trade secret litigation.[15]

The usage of trade secrets has expanded in relevance with the introduction of new technologies and innovation, such as networked autonomous automobiles and electric vehicles, due to the immediacy of the protection trade secrets law gives and its flexibility to cover all types of information (EVs). Unlike other intellectual property ("IP") rights, trade secret protection can be invoked and adjusted as needed as long as internal right policies are in place. As a result, trade secret laws are well-suited to protecting fast-paced innovation, as well as the knowledge and data generated in such a setting. In fact, when other IP rights are not enforced, firms can often rely on trade secret protection as a backstop. It is now common for a small group of key employees to possess significant know-how that would be highly appealing to any competition. One of the most popular defences used to prevent the dissemination of such knowledge is trade secret provisions. While these types of individuals are engaged by a company, practical and technical constraints should be established on how they can convey essential data and expertise, as well as restrictions on how that knowledge can be used once the employee has left the organisation. In light of the increased prominence of trade secrets in the automotive industry,

[15] Michael Summersgill & Arthur Coviello, *Insight: The Future of Automotive Trade Secret Litigation*, BLOOMBERG LAW (Feb. 22, 2019, 6:31 PM), https://news.bloomberglaw.com/ip-law/insight-the-future-of-automotive-trade-secret-litigation

this article in our series "Views on an evolving automotive industry" provides an overview of key issues relating to the use of trade secrets to protect innovation, including defining what constitutes a trade secret in the United Kingdom, Germany (EU), Australia, and China, discussing employee risks, and advising on how to establish a trade secrets protection strategy to reduce and police trade secrets theft.[16]

To understand this in much better manner, we take into consideration a case wherein the plaintiff in **Eagle Harbor Holdings LLC et al. v. Ford Motor Co.** claimed $750 million in damages for alleged infringement of eleven patents related to collision avoidance and infotainment technology. During discovery, Ford discovered that the plaintiff had received secret Ford technical documents from one of Ford's suppliers and used that information to file patent claims against the company. Based on this disclosure, Ford filed counterclaims for misappropriation of trade secrets. Ford won all of the plaintiffs' patent claims, as well as the trade secret misappropriation claim, at trial. WilmerHale represented Ford in this matter. This tale depicts the risks that automakers face as a result of the complex supply chain that goes into making the numerous technical components included in automobiles—a network that is becoming more complex as the number of technologies and technology partners expands. In order for suppliers to make the essential components, they are usually forced to share secret information and technical requirements with automobile manufacturers, subject to confidentiality restrictions. On the other side, this raises the risk of compromise of the automaker's trade secrets, such as those found in Ford's technical specifications. As a result, selecting the right trade secret method is critical for protecting automakers while also allowing them to efficiently procure automotive components from suppliers all over the world. In this case, Ford used trade secret protections as a critical part of its overall trial strategy, transforming a defensive patent case with hundreds of millions of dollars in damages exposure into a decisive offensive win.

THE CONTROVERSY: 2020 FORMULA 1 (F1)

A recent legal dispute over intellectual property (IP) rights dominated the news during last year's Formula One season, and it may have resulted in a substantial late-stage shift of position near the top of the driver and team leaderboards. The use of 'trade secrets' as a form of IP

[16] *Views in an Evolving Automotive Industry- Using Trade Secrets to Protect Innovation*, HERBERT SMITH FREEHLLS, https://www.herbertsmithfreehills.com/lang-zh-hans/insight/views-on-an-evolving-automotive-industry-using-trade-secrets-to-protect-innovation

protection by Formula One was at the centre of the debate. Racing Point's RP20 car, which the team stated was based on the Mercedes W10 that won the 2019 season, was the source of contention. According to FIA guidelines, "reverse engineering" automotive parts based on their outward appearance, which may be clearly proven, is not illegal. Certain features that are thought to have a major aerodynamic effect, on the other hand, are 'listed,' which means the car maker must prove they were created and developed for their own exclusive use and are not available for purchase from competitors or third parties. Rivals, on the other hand, can sell 'unlisted' parts, and Mercedes had properly provided Racing Point with CAD data relating to their front brakes. Renault raised issue with Racing Point's use of rear brake ducts, which were marked as a "listed" element for the start of 2020 but appeared to be quite similar to those on the Mercedes 2019 car, following the Styrian Grand Prix. Other F1 teams complained about the lack of awareness of these parts and the supply connection between Racing Point and Mercedes, claiming that Racing Point was not the primary designer. The FIA sanctioned the Racing Point team with a 15-point penalty and a 400,000-euro fine for breaking the rules. The FIA also 'reprimanded' the team for continuing to race their car in consecutive Grand Prix events. Racing Point then said that it will appeal the FIA's decision, saying that it had behaved in accordance with the rules.[17]

Renault, on the other hand, has withdrawn from the competition, stating that progress has been made in preventing teams from stealing parts from rivals. The FIA has also announced that rules would be changed ahead of next year's season to prevent teams from copying a competitor's car design. Other Formula One teams were also queued up to complain about Racing Point's car, highlighting both the benefits and potential drawbacks of a trade secret-based IP approach. In fast-paced sectors of invention, trade secrets are commonly exploited because they allow the owner to instantly capitalise on the competitive advantage that the technology gives. Importantly, exclusive or non-exclusive licence arrangements may be used in the future to selectively share this IP with other organisations. The claim in this case was that the Mercedes Formula One team chose to share some of its ideas with Racing Point before the start of the 2020 season, despite having strict IP protection rules in place. Their goal may have been commercial, but because of the relationship between the two teams, the success of Racing Point's car has won them extra credit. F1 trade secrets have been connected to a large list of developments, many of which have since been widely used in the design of road vehicles.

[17] Diego Black, *F1 IP Demonstrates Value of Trade Secrets*, THE ENGINEER (Aug. 27, 2020, 11:18 AM), https://www.theengineer.co.uk/f1-ip-dispute-trade-secrets/

In the automotive sector, paddle-shift gearboxes, adaptive suspension, and traction control, for example, are now standard. Carbon-fibre chassis are commonly used in modern automotive manufacture because of their lightness and better fuel efficiency. KERS technology started as an F1 development and is now widely used to boost the performance of cars and passenger vehicles by converting kinetic energy to electrical energy to assist in the motoring of their motors. The problem with 'trade secrets' is that they might be misplaced or stolen, particularly when R&D employees move from one company to another. The owner's trade secrets would also not shield him from reverse engineering. It's also important thinking about how to make them commercially viable in the long run.

CONCLUSION

There is no doubt that patents continue to play a vital role in the development of innovative products. Patents are extensively recognised and employed in numerous business sectors, not just in the automobile industry. The reason for this is obvious: the objective of a patent is to safeguard the rights of the inventor who has developed a new innovation. Every now and again, we hear in the automobile industry that XYZ business has applied for a patent for their breakthrough technology. It is because this industry is constantly changing, and some form of research and development is carried out on a daily basis in order to stay ahead of their competition and to provide the finest service to their clients so that they continue to choose them. However, granting patents takes some time because it is a lengthy process that spends the most of the time evaluating the novelty and other eligibility conditions of the patent that is going to be issued. As a result, they maintain all of that knowledge as a trade secret in order to save time and safeguard their innovations, which are extremely valuable to vehicle manufacturers. It is via the use of trade secrets that they can get an advantage over their competitors in the automotive industry. And that is the entire aim of a trade secret: to provide you an advantage over your competition. The distinction between a patent and a trade secret is that a patent does not enter the public domain until it is granted protection, which in India is for 20 years, but this is not the case with trade secrets. There is no time limit on how long they could keep their innovation a secret. However, there is a problem, in that we do not have any dedicated legislation to deal with conflicts emerging from trade secrets; consequently, it is critical that we have dedicated legislation to deal with trade secret concerns.

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