

## CONFIDENTIALITY – PROTECTING YOUR TRADE SECRETS

---

**Introduction:** There is no copyright on ideas or information; hence, sharing any confidential information and preserving such information presents complex issues, especially at the time of breach of confidence.

Often, without taking adequate safeguards, companies and individuals share technical know-how, trade secrets, drawings, designs and concepts etc. In case of individuals or employees, generally the information is shared through emails or oral communication. In this background, the article discusses some of the issues concerning confidentiality on the basis of the rulings of the courts in India (**Court(s)**): requisites of trade secrets and classifying information as confidential; breach of confidence and remedies; and measures to preserve trade secrets and confidential information.

**Confidential Information and Trade Secrets:** For information to be classified as confidential, the Courts have adopted and applied the test laid down in the English judgment in the case of **Saltman Engineering Co. Ltd Vs Campbell Engineering**. As per the *Saltman's* judgment for an idea or information to be confidential, it should meet the following requirements:

- The idea or information should be something which is not in public domain or is public knowledge.
- From the idea or information, it should be clear that the maker of the confidential information has used his brain (implying the creative process) and thus produced a result (being the idea or information) which can only be produced by somebody who goes through the same process.

Thus, on the fulfilment of the aforesaid requirements, any idea or information will qualify as confidential, for Courts, in a case of breach of confidence. The idea or information can be a confidential document, a

formula, a plan, a sketch, or anything which is similar to such examples.

While dealing with trade secrets, a similar test applies. Recently, in the case of **Trivitron Healthcare Pvt. Ltd. Vs. Shivram Iyer & Ors (2018 (1) CTC 430)**, the Madras High Court observed that a trade secret has an element of uniqueness or exclusivity with sufficiently developed technical intricacies, not in the realm of public knowledge. A trade secret may be based on a single factor or on an idea, or combination of many factors or ideas, and thus a trade secret cannot be defined or restricted to a set of activities or ideas. It was further observed that a trade secret can exist independent of and without protection available under the Copyright Act, Trade Mark Act, Designs Act and Patent Act. In other words, a set of activities, ideas or information, not in public knowledge, which are unique and exclusive to a business, developed for the purpose of the business, will qualify as a trade secret.

**Breach of Confidence and Spring-Board:** The Courts have recognised the confidential information and ideas as a form of property. In **Zee Telefilms Ltd. and Anr. Vs Sundial Communication Pvt Ltd. (2003 (5) BomCR 404)** the Bombay High Court expounded that the law of breach of confidence is different from the law of copyright. The law of breach of confidence is a breach of trust or confidence – “is a broader right” than the proprietary right of copyright. In other words, the Bombay High Court has held that the right to maintain the secrecy of confidential information or an idea is a wider spectrum of rights, which may also include intellectual property rights, recognized by the statutes.

Accordingly, on breach of confidence, the Court would entertain an application of the aggrieved party, for an injunction (that is restraint against further diffusion of information in the public domain or use by the recipient) and damages (that is

compensation for the loss caused to the owner/maker due to such a breach). Such an action would be entertained by the Courts, based on the principles of equity; that is to say on the principles of fairness, in case the information or idea was shared by the maker/owner in confidence, orally or by written communication, without execution of a formal contract. Whereas, in a situation where there is formal contract then a common-law action for breach of contract would lie before the Courts.

To constitute a breach, it has to be established that the unauthorized use of confidential information or an idea provided a spring-board because of which the infringer obtained an unfair advantage over its competitors or against the maker/owner of the confidential information or idea. In *Zee telefilms'* case, the Bombay High Court reiterated the principles set out in ***CMI Centre for Medical Innovation GMBH and Anr. Vs Phytopharm PLC (1999) FSR 235***, as to what the maker/owner, in a breach of confidence action must address:

- The information or idea relied on by the infringer, in order to obtain an unfair advantage, must be clearly identified;
- The information or idea was handed over to the infringer, in the circumstance of confidence;
- The information or idea can be classified as confidential; and
- The information or idea was used, or threatened to be used without authorization.

On the breach of confidence, the owner/maker of the confidential information can approach the Court, by way of a suit. Alternatively, in case the information or idea is transferred through a contract containing an arbitration clause, then the maker/owner can approach the Court by way of an interim application for an injunction under Section 9 of the Arbitration &

Conciliation Act, 1996. Notably, the obligation of confidentiality also extends to the person who has received the information under *bonafide* believes without notice.

**A word of caution:** Currently, the law in India concerning the breach of confidence and protection of confidential information and ideas is based on the rulings of the Courts. Therefore, it is necessary to take note of the position of law set out above while dealing with the confidential information or ideas.

Broadly speaking, while dealing with employees and individuals following points will aid in maintenance of secrecy of the confidential information or ideas:

- In all communications with employees, expressly mention the information as "Confidential" if such information is being shared.
- Execution of Non-Disclosure agreement is also an effective measure.
- Password protecting the servers and other similar IT measures, may also aid in the maintenance of secrecy.

Whilst executing a contract such as technical know-how agreements or exclusive manufacturing agreements the points may be kept in mind:

- The confidentiality obligation should expressly specify the information or trade secret as "secret" or "confidential". Therefore, one should avoid the use of general clauses classifying all the information transferred under the agreement as "secret" or "confidential".
- The contract should set out the effect of disclosure of information or the trade secret by the recipient on the validity of the contract, including termination, and liability to compensate for the damages so caused.

---

*(The content of this article is intended to provide a general guide to the subject matter and should not be construed as legal advice.)*