Trade secrets legal protection: From a comparative analysis of us and eu law to a new model of understanding

Despite their economic relevance, the magnitude of the policy concerns raised by their legal protection, and the absence of certainty regarding the way they should be legally apprehended, trade secrets have so far received only little attention by the scientific legal literature. Facing the absence of a robust theoretical corpus, this study investigates the foundations of this legal area by assessing the justifications for legal protection and aims at defining how the legal apprehension of trade secrets should be organised.

The study starts with a comparative analysis of the US and the EU legal frameworks. This analysis demonstrates the link, or rather “parentship”, existing between the two systems of protection. Their core elements indeed first emerged incrementally within US case-law, before influencing, at the international level, the definition provided in Art. 39 TRIPS. This definition constituted the point of departure identified by the European legislator for the drafting of Directive 2016/943 on the protection of trade secrets. Once this choice was made, relying on other key elements of the US normative framework was a natural step. The recognition of this link between the two systems is valuable for the European legal order, in which this new framework needs to be implemented. Since Europeans will be confronted in the future with issues that have already appeared under US law, European courts will have the possibility to build on the experience of their US counterparts.

The comparative analysis also highlighted that the incremental structuring of trade secrets protection has led to legal systems lacking broad-based conceptual foundations. The study shows that trade secrets rely on blurred protection, formally anchored in unfair competition, the strength of which, however, comes closer to that offered by intellectual property law. To avoid overprotection as a result this convoluted architecture, judges are required to play a decisive role at the enforcement stage. This central role ascribed to the judiciary is, however, coupled with an absence of clarity concerning the telos of trade secrets protection, leading to legal uncertainty, potentially incoherent enforcement, and, all in all, to inefficient outcomes from a welfare perspective. The uncertainty of courts becomes particularly perceivable when an attempt is made to fit trade secrets protection within the fundamental rights framework.

Facing the fact that no theory, neither of an economic nor ethics nature, offers a solid foundation for trade secrets, we suggest that this impossibility of delivering a convincing theory results from the persistent attempts to provide a unique ratio encompassing the entirety of the issues covered under the current scope of trade secrets law. We therefore step back from this single theory approach to present a model of understanding based on a distinction between two legal objects requiring distinctive protection: the undertakings’ secret sphere and secret pieces of information.

The undertakings' secret sphere is defined as an area within which information must freely circulate without outside interference, for undertakings to be active on the market as economic units. If certain authors already perceived the necessity of recognising such an informational area in undertakings, the present study strengthens the theoretical justification for its legal protection by linking this it to the Austrian economics school of entrepreneurial theories. Accordingly, the real-world economy is operating under structural uncertainty, hence obliging market players to behave in an entrepreneurial way and justifying the existence of undertakings as nodes of coordination necessary to pursue market opportunities. This internal coordination needs to remain concealed from competitors if undertakings are to fulfil this entrepreneurial function while remaining single market units engaged in a game of competition. The elucidation of this structural role clarifies that security surrounding secret spheres should be operated through objective regulations enforced by the public authorities. The proposed model highlights that the protection of the secret sphere deals only with safeguarding an informational area, irrespective of the nature or content of the pieces of information that are circulating within it.

The legal apprehension of 'secret pieces of information' constitutes the second branch of the proposed model. Secrecy is not a particular characteristic enjoyed only by certain pieces, but the original condition for any information. As long as they remain secret, these immaterial goods are excludable and hence tradable. However, they suffer from a marketability deficit, due precisely to the fact that any transaction involving them requires disclosure of their content. This deficit, known as the 'Arrow paradox', is a well-known justification for intellectual property rights.

Understanding the role that the law could play in this context brings forth a new layer in intellectual property theory. Indeed, if the reliance on subjective rights is the most suitable instrument to solve the Arrow paradox in inter partes disclosure, nothing justifies their personal scope to enjoy an erga omnes breadth. The scope could and should on the contrary be relative, i.e. be limited precisely to the inter partes relationship at stake. This relative subjective right, hence, presents a new instrument, less impacting than classical erga omnes intellectual property rights, which can solve market failure related to immaterial goods.
Beyond this specific advantage, dissociating secret pieces of information from the secret sphere and relying on a subjective right approach allows to elicit that the definition of the scope of these rights (i.e. the identification of the information worthy of protection, the extent of the use prohibited, and the duration of its term of protection) should obey the same policy trade-off and should benefit from the same legislative care as any other intellectual property rights.