Trade secrets – today and in the future

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On 3 March 2000 '*Trade secrets – today and in the future*' (Affärshemligheter i samtid och framtid) was defended at Stockholm University.[1] Looking back from today, it was at its core a view on a new, digital reality.

The provisional title of the project was "Trade Secrets in a New Technological Reality"[2], which was inspired by the dawn of the internet era, by the talk of information superhighways.[3] It intended to answer the main question back in the days: What would the information superhighway mean for the protection of trade secrets?[4]

In general, such kinds of questions can be approached through very different methodological approaches.

For example, historical studies of law often only consider how something was regulated or handled within a specific timeframe. However, the aim of this part of the study was to examine the developments and needs that led to the development of protection for trade secrets. The next step was to consider how the new technical reality of digitalisation calls for legislative changes.

Comparative studies between legislation in different jurisdictions are often limited to two or three jurisdictions. This study took a broader approach, conducting a comparative study that covered French, Dutch, German and Swedish law. Such a broad approach was adopted in the belief that it would contribute to a greater understanding of the topic.[5] My ultimate decision was to approach it through a comparative study in terms of both time and place.

Today, the Trade-Secret Directive, adopted in 2016, totally changed the legislation in the Member States.[6] In hindsight, this does affect the potential impact of the thesis.

1. KEY FINDINGS

1.1 The importance of a broad legal analysis

Although the method used in this thesis was unconventional, it was necessary to achieve the goal of a greater understanding of how the protection of trade secrets is linked to societal needs, technical development, and economic factors.

The chosen methodological approach was a legal dogmatic method, but from a comparative perspective. Protecting trade secrets requires striking a balance between protecting information and other interests. This is crucial for comprehending the choices that different legislators have made over time.[7]

For example, very strong information protection measures could impact employees' individual freedom. Strong protection could interfere with their ability to change their employer or move to a different place. These conflicts of interest show why it was necessary to choose this broad methodological approach.

1.2 The importance of comparative studies

Although the protection of trade secrets is recognised in numerous jurisdictions, this research found that such protections vary considerably. The analysis covered four neighbouring European Union countries. Despite their geographical proximity and shared membership, I identified substantial disparities in the legal frameworks governing protection, including the underlying legal structures, definitions and associated liabilities.

For example, when looking at the question if information can be considered an object that can be stolen or be the subject of handling stolen goods, EU jurisdictions come to very different outcomes.[8]

In Sweden, the legislation at the time was in a specific act, the Act on Protection of Trade Secrets.[9] This act covered both penal and civil liability. In France, penal liabil-

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1 Helgesson, C, *Affärshemligheter i samtid och framtid* (Jure 2000) (Helgesson n. 1).

2 The research project was funded by Riksbankens Jubileumsfond. They no longer fund research projects performed by doctorate candidates.

3 One of the first launching the concept of information superhighway was then senator Al Gore. It was later also set out as an important topic for President Bill Clinton. See Campbell-Kelly, M, and Aspray, W, *Computer, A history of the information machine* (Harper Collins 2013).

4 The questions asked are described in Helgesson n. 1 on pp. 49–50.

5 The motives for the selection, see Helgesson n. 1 pp. 108–109.

6 DIRECTIVE (EU) 2016/943 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, referred to as the Directive.

7 Helgesson n. 1, pp. 376–378.

8 This also led to a discovery that the jurisdictions in question have different views on electricity. In France and the Netherlands, electricity can be stolen. Under German and Swedish law, electricity cannot be stolen. There is a penal liability for those using electricity without permission, but it is not considered as a theft. In Sweden this penal liability is called unlawful use of energy Chapter 8 section 2 in the Swedish Criminal Code. This was further elaborated in Wainikka, C, *Information som självständigt objekt* (Information as an independent object), Svensk Juristtidning 2003 pp. 577–586.

9 SFS 1990:409.

ity for revealing trade secrets was found in Article 152-7 *Code du Travail* and in Article L 621-1 *Code de la Propriété Intellectuelle*. Civil liability was based on the legal institute of *concurrence déloyale* (unfair competition). The protection in Sweden had a common ground, no matter the kind of liability that was tried. The protection in France had more or less no common ground, there were just different sets of liabilities.

The definitions of what could be protected in the studied jurisdictions varied.[10] For example, all but three legislations stated that trade secrets consist of information. Liabilities also varied between the jurisdictions. For example, actions that had penal liability in Germany, the Netherlands and France had no liability whatsoever in Sweden.[11] Using comparative legal methods helped to identify these differences in trade secret protection in the EU.

1.3 Technology and law

One major research goal was to examine how the protection of trade secrets was challenged by the ongoing global wave of digitalisation. In order to address this aspect of the study, it was necessary to analyse the relationship between technological advancements and legal frameworks.

There are various perspectives on this interplay. The famous Swedish entrepreneur Jan Stenbeck used to say that 'technology beats politics'.

Chapters 3 and 8 of the dissertation investigated how technological and economic developments over time had changed views on intangible assets in the jurisdictions under study. Technology can influence human behaviour. Legislators often aim to find incentives to promote desirable behaviour and to prohibit or hinder undesirable behaviour.

A key finding is that legislative changes have occurred over time in response to various aspects of technological development. It is significant, as it sheds light on the need to develop legislation in response to the challenges posed by technologies such as AI.

1.4 Loopholes and misconceptions

While working on the thesis, I discovered that there were loopholes in the Swedish legislation. This especially included the limitations in liability.[12] As for misconceptions, some of them still exist in the current legislation.[13] This includes how value is described.[14] The characterisation of value is inaccurately directed, suggesting that value is established if the disclosure of a trade secret is intended to cause harm from a competitive standpoint. This is a misconception, particularly given that liability also arises in cases of industrial espionage, even when the trade secret is not disseminated to a wider audience.[15]

2. RELEVANCE TODAY

The subject of the dissertation is closely linked with digitalisation, a prominent topic back in the days. Some could argue that the topic lacks relevance today. However, significant developments have occurred since then, particularly in terms of the progress made along the digitalisation path. In 2000, using the internet was already common but social media was still an unknown term. Google existed as a company but had not yet turned into a verb.

Another development that certainly has affected the relevance of the dissertation is the fact that since 2016 there exists an EU-Directive on trade secrets. Since one key element in the dissertation was the comparison between Swedish, German, French and Dutch legislation on trade secrets, the EU-directive makes large parts of the dissertation obsolete.

However, there are some parts that are still relevant; some from a legal standpoint, some from a more methodological standpoint.

While the analysis of legislation in the four countries is to a large extent obsolete, to some extent it may have become more relevant than before as it facilitates finding some issues in the Directive. There are many examples of them that are not handled in the Directive, nor in the preamble, yet are quite important for actual protection.[16]

The situation before the Directive was complex and imposed some questions about the term 'protection'. What is protected? What are the prerequisites for protection? What acts lead to liability? All those questions were answered in different ways, discovered through use of comparative legal studies. As the silence of the Directive on some key issues leads to uncertainty, historical analysis is necessary to minimise those uncertainties.

Legislation is frequently intended to be technologically neutral, and this is often the perspective adopted by legal scholars when examining the relationship between law and technological advancement. In the dissertation, I argued that legislation may be perceived as technologically neutral; however, this constitutes an abstraction that warrants further scrutiny.

10 In fact, there were also differences between different legislation within the same jurisdiction, see Helgesson, C, *Skyddet för affärshemligheter och de olika begreppen* (The protection of business secrets and the different notions). (Svensk Juristtidning 1997 s. 28–40) (Helgesson n. 2).

11 As clearly demonstrated in Svea Hovrätts case B 5221-03, Ericsson. This is described in SOU 2008:63, *Förstärkt skydd för företagshemligheter*, p. 55.

12 As will be described, the Parliament in Sweden has adopted changes to the current legislation covering two of these loopholes.

13 The current legislation implemented the Directive, see Act on Trade Secrets SFS 2018:558.

14 Value is described in section 2 of the Swedish Act on Trade Secrets.

15 This can be put in contrast with Article 39 in the TRIPS agreement, claiming that one prerequisite for information to be a trade secret is that it has a value because it is secret. It also does not follow the definition given in Article 2 of the Directive.

16 Below some examples are given, like the notion of data, definition of information and whether the information has to be in actual use.

When technology changes behaviour, that will call for legislative changes. For example, copyright protection is to a large extent technology-neutral. Therefore, it could be seen as if there is no need for legislative changes due to digitalisation. A copy is a copy, whether it is digital or not.

However, digitalisation led to e.g. social media and to a platform economy, hence the need for legislation to include rules on responsibilities for platforms.[17] Such an approach to technology is even more relevant today, for example in relation to AI.[18]

3. EVOLVEMENT ON THE PROTECTION OF TRADE SECRETS

3.1 The view on the legal framework

Trade secrets were, and to some extent still are, a strange legal figure. This is of course evident when comparing how different jurisdictions have legislated and viewed trade secrets. However, it is also evident when looking at it within the same jurisdiction.

At the time of writing the dissertation, the approach in Sweden was that protection of trade secrets was to a large extent a question of labour law. Several of the other researchers involved in research on the legal protection of trade secrets were predominantly researchers within labour law.[19]

At the time, few considered it as a part of intellectual property law. Indeed, protection of trade secrets is not a genuine intellectual property issue. The different intellectual property rights constitute exclusive rights, whereas the protection of trade secrets never constitutes exclusive rights. It merely protects against certain behaviour, like industrial espionage.

In many jurisdictions, protection of trade secrets has been a part of rules against unfair competition. This legal instrument has been circumvented in many jurisdictions by a development through jurisprudence, as for example in France and the Netherlands.

Today, reference is more often given to the fact that intellectual property rights and trade secrets are all intangible assets. As late as in 2015 it was still disputed that a person doing research on trade secrets could in fact be considered as a researcher in the field of intellectual property, even in official documents.[20]

This development could be linked to the fact that more and more researchers in the field of intellectual property understand the link between intellectual property rights and trade secrets.[21] For example, it is common today to write on trade secrets in close connection to patent law.[22] Trade secrets are seen as a complement as well as an alternative to patent protection. It is also common to write on trade secrets in relation to trademark protection, since strategies linked to that protection are often kept as trade secrets.

3.2 Increasing importance

The significance of trade secrets appears to be increasing. This is exemplified by a study conducted by Baker McKenzie some years ago, in which 48% of respondents indicated that they considered trade secrets to be more important than patents and trademarks.[23]

Another example of the increasing importance of trade secrets is the number of court cases that have flooded the courts, at least in Sweden, in recent years. By 2000, the Act on Protection of Trade Secrets had been subject to just a few court cases in the ten-year period since it came into force. Nowadays, the same number of court cases can come in one year alone.

Another reason for the increasing importance of trade secrets is the ever-growing complexity of innovation. Many have a conception that innovation is entailed in one product, covered by one intellectual protection. This can be typically heard when people ask questions like "who invented?" and "he invented this or that and then became rich". Of course this may still happen, but today innovation is often even more complex.

The level of complexity of innovation is the fact that many products include many different patented inventions, as well as it may market several different trade-

17 This aims at Article 17 in the Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

18 See for example EUIPO's report *The development of Generative Artificial Intelligence from a Copyright perspective* (EUIPO 2025) and OECD's report *Intellectual Property issues in Artificial Intelligence trained on scraped data* (OECD 2025).

19 For example, Professor Reinhold Fahlbeck at Lund University.

20 See for example Schovsbo, J, in an expert opinion from 2015 regarding a position at Stockholm University "*...men disputatsen angår dog samtidig et emne (erhvervshemmeligheder) som ikke traditionelt i Norden henregnes til det immaterialretlige område*".

21 One example is Schovsbo et al, *The harmonization and protection of trade secrets in the EU: – An Appraisal of the EU Directive* (Edward Elgar Publishing 2020).

22 See for example Domeij, B, *Patent och företagshemligheter* (Patents and Trade Secrets), Third edition, (Iustus 2023).

23 Report from Baker McKensie (2017), *The Board Ultimatum: Protect and preserve – The rising importance of safeguarding trade secrets*.

marks. Trade secrets can often be seen as the glue holding complex innovation together. They may include the overarching strategic plans; they may include how to use trademark protection to overarch obstacles due to an expiring patent.

3.3 New Swedish legislation

The Directive on Trade Secrets was implemented in Sweden by a new act on trade secrets. This legislation kept some of the structures from the old one but also incorporated those parts from the Directive that were not covered by the former Swedish legislation. For example, Article 12 had to be incorporated in the new act due to the fact that it covered new liabilities.

One concern regarding the implementation in Sweden is that the legislator, and to some extent the doctrine, did not fully grasp what the consequences of the Directive are. To give one example, penal liability is not covered by the Directive. However, it covers liability in the Swedish Act in relation to Trade Secrets as defined in Article 2 of the Directive. Therefore, even cases on penal liability will have to consider unitary legislation.

This relates to another concern: namely, that the Swedish courts still seem to be following case law developed under the old legislation. Consequently, they do not refer cases to the European Court of Justice as often as they should.

The concept of penal liability under the old Swedish legislation has been the subject of much debate.[24] The fact was that there was penal liability only for industrial espionage and for those receiving information that had been subject to industrial espionage. Employees or contractors having received the information in a lawful way did not have a penal liability, unlike the situation in most other countries in the world.[25]

In November 2025, the Swedish Parliament voted to impose criminal liability for acts committed by individuals with lawful access to information. However, this does not apply to all types of information, only technical trade secrets. This marks a departure from the Swedish tradition of treating commercial and administrative information in the same way as technical information.[26]

3.4 Coming legislation at EU-level

At the EU level, a reopening and revision of the Trade Secrets Directive is expected. This is not the only area of interest for the EU legislator when it comes to the protection of trade secrets. Several other legislative files currently have an impact on the protection of trade secrets.

In 2023, the EU Commission presented its Patent Package. One of the proposals concerned compulsory licensing in times of crisis. Reading Articles 8 and 13 of the proposal, it seemed as if trade secrets were also supposed to be part of the compulsory licences. This caused quite a stir, and the final legislation does not include trade secrets in these licences.

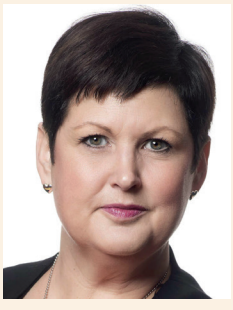
There are still some concerns regarding trade secrets in relation to upcoming legislation. The discussion surrounding the transparency rules in the AI Act is ongoing, as is the debate about what information should be included in digital product passports. The transparency rules in the DSM Directive on copyright have been implemented in different ways. In Sweden, trade secrets must be shared under the Copyright Act, but liability exists for how these trade secrets are used.[27]

Given the growing importance of information, the legislator has probably only just begun. We must continue to ensure that they at least aim to strike a balance between transparency and the protection of trade secrets.

4. FINAL REFLECTION

A doctoral dissertation is often a researcher's most significant piece of work. They are usually written early in a lawyer's career. There will inevitably be flaws that cannot be detected in later research. However, this is also a time when researchers have the greatest freedom to investigate complex questions. The habits that will later become cemented have not yet had the opportunity to develop.

Upon re-reading the thesis, it was astonishing to find that much of it was still relevant. Legislation has changed; the EU Directive eliminates the need for such comparative studies within the EU. The main areas that remain relevant are the relationship between technology and law, and the treatment of trade secrets as an intangible asset closely linked to innovation and intellectual property rights, such as patents and trademarks.



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24 See for example SOU 2008:63 and SOU 2017:45, that both entailed proposals for altering the limited penal liability. There the debate is summarized.

25 In SOU 2017:45 the debate and the previous proposals are described, see pp. 346–351.

26 Swedish Government proposition 2024/25:208, *Ett mer heltäckande straffansvar vid angrepp på företagshemligheter* (A more comprehensive penal liability for unlawful acts against trade secrets).

27 In section 29 c of the Swedish Copyright Act.