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Trade Secrets Definition in the New Iranian Act on Industrial Property with a Comparison to American Law and the TRIPS Agreement

Sayyed Mohammad Hadi Ghabooli Dorafshan[1] | Mostafa Fateminia (Bakhtiarvand)[2]

1 Corresponding author, Associate Professor, Department of Islamic Jurisprudence and Principles of Islamic Law, Faculty of Theology and Islamic Studies, Ferdowsi University of Mashhad, Mashhad, Iran. | h.ghaboli@um.ac.ir
2 Associate Professor, Department of Private Law and Intellectual Property Law, Faculty of Law, University of Qom, Qom, Iran. m.fateminia@qom.ac.ir

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ABSTRACT

Trade secrets have gained unprecedented importance in all fields of industry and have emerged as a critical component of many firms' intangible assets following the big changes seen during the past decades. Achieving and preserving a competitive advantage over competitors is vital for many enterprises and trade secrets are an essential means for fulfilling this goal. Nevertheless, the mere possession of valuable trade secrets is not enough. There must be adequate safeguards by trade secrets holder, and more importantly, effective legislative measures are necessary to ensure the secrecy of such information. In an attempt to accomplish this task, the Iranian legislator has provided for protection of trade secrets in a specific chapter of the new Act on Industrial Property. This paper, employing a descriptive-analytical method, examines the definition of trade secrets articulated by the Iranian legislator and compares it with the definitions enshrined in two main American statues and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The analysis concludes that while the Iranian definition is an appropriate step forward, when compared to the U.S. and TRIPS counterparts, it remains imperfect in certain material respects and consequently requires amendment.

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Table of Contents

Introduction.
1. Definition of Trade Secrets
2. Analysis of the Elements of Trade Secret Definition under the APIP
Conclusion

Introduction

Trade secrets play an important role in today's business environment. They are used in diverse sectors ranging from manufacturing and technology enterprises that market products to service-oriented entities such as restaurants (with respect to their recipes) and retail establishments (customized advertising methods). Given the importance of trade secrets in the innovation cycle, from research and development to commercialization, even universities and research institutions need to develop trade secrets protection strategies.[1]

If trade secrets are not protected sufficiently, firms may be faced with information leakage which, in turn, may precipitate the loss of their competitive advantage and cause significant losses. Consequently, it is imperative for all firms to ensure protection of their trade secrets.[2] However, such personal protections are, by themselves, inadequate. Unlike other intellectual property rights, since there are no private rights given by governments as to trade secrets, in case they are disclosed, even unintentionally, the original possessor cannot prevent subsequent utilization by others.[3]

It follows, therefore, that governments have a duty to provide adequate safeguards to protect trade secrets possessed by firms. As a result, the Iranian legislator has attempted to do so through a set of rules constituting a part of the new law on industrial property titled: the Act on the Protection of Industrial Property of 2024 (APIP). A similar legislative approach has been adopted by the American legislator, that has enacted important laws in this area, which will be referred to in this article as a guiding source to evaluate the definition of trade secrets in the APIP.

At the international level, the Paris Convention for the Protection of Industrial Property, as the main international convention governing this field, does not explicitly reference trade secrets. It merely stipulates in Article 10*bis*, titled unfair competition, that members shall take effective measures against acts of competition contrary to honest practices in industrial and commercial matters which according to this article, constitute acts of unfair competition. The article, then, provides a non-exhaustive list of such acts. In contrast, the Agreement on Trade-

1 World Intellectual Property Organization, *WIPO Guide to Trade Secrets and Innovation* (2024) 18.

2 O Yaroshenko and others, 'Protection of Trade Secrets in Global Markets' in *Global Markets and International Business: Implications for Labor Relations* (2024) 1.

3 Benjamin Chahkar Mian Poshteh, 'L'étude du secret commercial et industriel : approche comparatiste en droit civil par l'exemple de sa relation avec la propriété intellectuelle (France et Québec)' (DPhil thesis, Université de Strasbourg 2018).

Related Aspects of Intellectual Property Rights (TRIPS Agreement) addresses trade secrets in Article 39. The TRIPS Agreement is the first multilateral agreement that addresses the issue of trade secrets.[1] While it does not contain an express definition of the term 'undisclosed information,' it specifies the conditions of their protection in paragraph 2 of Article 39.[2] The first paragraph of that article refers to Article 10*bis* of the Paris Convention (1976) concerning unfair competition. Therefore, the TRIPS Agreement categorizes the issue of trade secrets protection as a part of unfair competition law in the Paris Convention.

It has been reported that there were substantial differences between the representatives of the Anglo-American and the continental European law traditions on this matter. Finally, the TRIPS Agreement followed the latter approach that protects trade secrets under the discipline of unfair competition, as established in Article 10*bis* of the Paris Convention.[3] Although a detailed discussion on this issue is beyond the scope of this paper, it should be noted that since the protection of trade secrets is deemed to be a part of unfair competition law, no exclusive rights are granted to the trade secrets holder.

In comparison to the TRIPS Agreement, the Iranian legislator, in his latest attempt, has acted differently. In fact, the APIP has distinguished between unfair competition and trade secrets and respectively dealt with the former in chapter 6 and trade secrets in an independent chapter (chapter 5) consisting of 7 articles. The enactment of this Act in 2024, which contains specific articles about trade secrets protection, is a milestone in Iranian industrial property law, since before that date, Iranian law lacked a comprehensive statutory regime specifically allocated to trade secrets protection. Even the Act on the Registration of Inventions, Trademarks, and Industrial Designs of 2007 (replaced by the APIP) didn't address the issue of trade secrets. Indeed, Article 64 of the Electronic Commerce Act (ECA) of 2003 protected electronic trade secrets as a means to protect fair and just competition in the context of electronic transaction. Although this legislative action deserves appreciation, the scope of protection provided thereby is limited to electronic trade secrets and the article is not applicable to traditional trade secrets. In addition, there were some articles in other laws that protected certain types of secrets including trade secrets. For instance, Article 648 of the Islamic Penal Code (as amended in 2024), criminalizes the illegal disclosure of personal secrets by those who by reason of their job or profession receive such secrets from clients. Clearly, this Article is of a general scope and was not enacted to exclusively protect trade secrets. Therefore, the Iranian legal system needed a reform in this field which was relatively achieved with the enactment of the APIP. This law has defined trade secrets in Article 122.

Despite being an up-to-date definition, the definition of trade secrets in the APIP is not precise and requires amendment. In order to do so, the definitions given in the United States laws and the TRIPS Agreement would be reliable sources. Based on the above, in the first section of this paper, to get acquainted with trade secrets, they will be defined in Iranian and American laws and the TRIPS Agreement. Then, in the second section, the elements of

1 UNCTAD, *Training Module on the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)* (2010) 25.

2 M Burri and I Meitinger, 'The Protection of Undisclosed Information: Commentary of Article 39 TRIPS' (2014) 2 https://ssrn.com/abstract=2439180 accessed 26 April 2025.

3 UNCTAD (n 4) 39.

the definition of trade secrets in Iran will be explained and compared to their counterparts in American law and the TRIPS Agreement with a view to analyze them and identify the strengths and weaknesses of the Iranian definition and to find solutions to improve it.

1. Definition of Trade Secrets

This section will sequentially present the definition of of trade secrets under Iranian law, U.S. federal law, and the TRIPS Agreement.

1.1. Iranian Law

There are two definitions of trade secrets in Iranian positive law. First, a general definition mentioned in the APIP. Second, a specific definition in the ECA.

1.1.1. Definition of Trade Secret in the APIP.

Article 122 of the APIP defines a trade secret as follows:

> *"Any type of commercial information which has independent actual or potential economic value or competitive advantage and due to being unknown to the public and not being accessible or identifiable easily by legitimate methods, its legitimate owner has adopted reasonable measures to preserve its secrecy".*

The same article provides a non-exhaustive list of trade secrets:

> *"Information such as all types and forms of engineering, economic, technical, commercial or financial information including patterns, maps, collections, programs and rules (formulas), plans and methods, means, techniques, processes, software, identifiers, customer lists, business methods, manufacturing secrets, unregistered inventions and designs and any other type of information".*

1.1.2. Definition of Trade Secret in the ECA

Article 65 of the ECA defines electronic trade secrets as:

> *"...data messages ... that have independent economic value and are not publicly accessible and reasonable attempts have been made to protect them".*

This act also provides a non-exhaustive list of examples, as the text itself indicates:

> *"Information, formulas, patterns, software and programs, means and methods, techniques and processes, unpublished works, business methods, procedures, maps and derivations, financial information, customer lists, commercial plans".*

1.2. United States Law

Two main statutes applicable to trade secrets protection will be analyzed in this paper: The Uniform Trade Secrets Act (UTSA) of 1979 and the Defend Trade Secrets Act (DTSA) of 2016.

1.2.1. Definition of Trade Secret in the UTSA

The following is the definition of trade secret in section 1(4) of the UTSA:

> *"Information, including a formula, pattern, compilation, program, device, method, technique, or process, that:*
>
> 1. *derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and*
> 2. *is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."*

1.2.2. Definition of Trade Secret in the DTSA.

The DTSA defines a trade secret as:

> *"All forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if*
>
> (A) the owner thereof has taken reasonable measures to keep such information secret; and
>
> (B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information."[1]

1.3. Definition of Trade Secret in the TRIPS Agreement

Article 39 of the TRIPS Agreement allows both natural and legal persons to protect the information satisfying the requirements listed therein against certain acts which are contrary to honest commercial practices. Paragraph 1 of this article is in fact a means to tie the protection of undisclosed information to the protection against unfair competition dealt with in Article 10*bis* of the Paris Convention and has been described as enlarging the list of prohibited acts under Article 10*bis* (3) of the Paris Convention.[2]

The TRIPS Agreement does not apply the term trade secrets. Instead, it uses the term "undisclosed information." This term is generally understood to encompass various terms including "trade secrets" or "business secrets" that are used by national legislators.[3] The commentators to the TRIPS Agreement consider the terms undisclosed information and trade secrets to be the same.[4]

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1 18 USC § 1839(3).
2 Burri and Meitinger (n 5) 114.
3 World Intellectual Property Organization (n 1) 20.
4 A Taubman, H Wager and J Watal (eds), *A Handbook on The WTO TRIPS Agreement* (CUP 2020) 137.

Article 39 of the TRIPS Agreement regards information as trade secrets where it has the characteristics:

(a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;
(b) has commercial value because it is secret; and
(c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

For a better understanding of the definition of trade secrets in Iranian law, its elements which are in fact the conditions of protection will be analyzed in detail and where necessary, compared to the definitions mentioned in the American statues and the TRIPS Agreement.

2. Analysis of the Elements of Trade Secret Definition under the APIP

According to the APIP, trade secrets protection is afforded to information when the following conditions are present:

2.1. Commercial Nature of the Information.

Article 122 of the APIP stipulates that only "commercial information" may be regarded as trade secrets. In contrast, the ECA omits the qualifier 'commercial' from its definition. Since the APIP merely protects commercial information, other types of information a fall outside its protective scope. For example, information about one's personal life irrespective of their importance and secrecy is not covered by the definition and subsequently this Act does not protect it. Instead, such information may be protected by other legal frameworks, such as the privacy rules codified in Articles 58 to 61 of the ECA.

Article 122 does not define the term "commercial," nor is a definition provided in other laws. Therefore, the courts may encounter difficulties in handling cases involving this kind of information. A solution to this problem may be the reference to the Iranian Commercial Code that despite not having defined the exact word commercial, has enumerated commercial transactions in Article 2. As a consequence, any information related to those transactions is commercial. Nevertheless, the Iranian Commercial Code of 1932 dates back to almost a century ago and during this long period of time many developments concerning commercial transactions have occurred and a lot of new transactions and fields have appeared in the Iranian market which make it nonsensical to restrict the scope of commercial information to the information concerning transactions mentioned in such an old statute. If this solution is adopted, a large amount of information would be outside the realm of trade secrets and consequently not protected. A good example of new transactions is information technology transactions which did not exist at the time the Code's enactment. Today, such transactions such as software development contracts or administration of websites or virtual accounts are widespread and no one may deny their commercial nature. Intellectual property transactions are another example that came into existence in Iran many years after the introduction of the

said Act. Again, such transactions are of a commercial nature. Accordingly, a better method should be found which is adapted to the circumstances of the society and is capable of meeting its needs. The authors believe that the best source to understand the concept of commercial information is the custom. It has the advantage of taking into consideration the rapid changes of the market and recognizing the newly emerging types of information that are considered by businesses as valuable assets and treated as trade secrets. In fact, custom is a source of law in Iran[1] and in certain instances the law has made specific reference thereto. As an example, Article 224 of the Iranian Civil Code states as follows:

> *"The words used in a contract are understood according to their conventional meanings".*

Therefore, in cases of disputes about the parties' intention with regard to the concept of a word and where no evidence exists in the contract to interpret it, the courts should identify their intention by reference to the conventional meaning of the term in question, i.e., how a reasonable person understands the term. Indeed, this is an example of a general rule that applies to the interpretation of the provisions of a statute as well. In fact, the legislator is the representative of the society as a whole and the laws are enacted to be implemented therein not in vacuum. Thus, the term 'commercial information' must be interpreted in accordance with its contemporary meaning which encompasses a variety of different types of information considered by members of each industrial sector to be commercial.

In contrast, the U.S law does not employ the qualifier 'commercial' in the statutory definitions of trade secrets. Instead, as stated by the UTSA, the information concerned must have economic value. "A variety of evidence suggests that the drafters perceived the terms 'economic' and 'commercial' value to be virtually identical in substance."[2] Some scholars have suggested that the economic value implies the requirement that the alleged trade secret be valuable to others as a result of its potential commercial use.[3]

2.2. Having Independent Actual or Potential Economic Value.

According to this element, the commercial nature of information is n is a necessary but insufficient condition for protection; the information must also have economic value to qualify as trade secret. Having economic value in Iranian law means to be property (māl). In fact, property is defined in Iranian law to be something that has economic value to people and they are ready to pay money for acquiring it.[4] The stipulation of this condition is reasonable due to the fact that protection of worthless information is not necessary and this type of information plays no role in the economic development of the country. An example of such information is a piece of information consisting of insignificant changes to an existing invention. Indeed, this type of information is not important to others and no one would attempt to acquire it.

1 N Katouzian, *Introduction to Law Science and a Study of Iranian Legal System* (2023) 168 et seq.

2 C Hrdy, 'The Value in Secrecy' (2022) 73 Hastings LJ 570.

3 S K Sandeen, 'The Evolution of Trade Secret Law and Why Courts Commit Error When They Do Not Follow the Uniform Trade Secrets Act' (2010) 61 SC L Rev 526.

4 S H Safaei, *Preliminary Course of Civil Law-v.1, Persons and Property* (2017) 141; N Katouzian, *Preliminary Course of Civil Law: Properties and Ownership* (2016) 10; M J Jafari Langroudi, *Terminology of Law* (2016) 595.

Similarly, a list of customers without their detailed contact information and their preferences and habits may not meet the economic value requirement. Another example is interesting information someone knows about a company's history that others do not know.

If that information lacks the economic usefulness and could be easily known by others through a simple search, it has no economic value and therefore fall outside of the ambit of the trade secrets.[1]

A similar condition exists in the American law. As mentioned above, the UTSA requires that the information have economic value. The same requirement is provided in the DTSA.[2] Therefore, a relationship between the information and economic activity, wealth creation, profit-seeking, industry or trade must be established. Otherwise, the information may not qualify as having economic value. A good example is a recipe for cookies a person keeps secret and uses it to make cookies at home without any commercial intentions.[3]

The economic value requirement originated in U.S. common law.[4] According to Restatement (First) of Torts, for information to qualify as trade secret, it had to be continuously used in one's business and give its holder "an opportunity to obtain an advantage over competitors who do not know or use it".[5] Nevertheless, after common law was replaced by the UTSA, the first requirement of continuous use in a business was removed. Instead, the UTSA required the claimant to prove that the information has independent actual or potential value. As a result, the scope of trade secrets protection was expanded to include certain types of information such as search results or prototypes that despite not being practically used in business were economically valuable. However, the common law requirement that the holder of information must show possessing an economic advantage over competitors as a result of its secrecy was retained.[6]

The economic value may be proven by circumstantial evidence in the U.S courts. Such evidence may consist of investment in research and development, extent of security measures adopted, use of information by competitors, and the fact that the claimant's competitors have been ready to pay for access to the information.[7]

According to the U.S. statues, the information concerned must derive economic value from not being generally known and not being readily ascertainable by others. As some commentators have explained, the economic value must be the result of secrecy and such secrecy must make the information valuable to competitors.[8] Consequently, the secrecy requirement is relative not absolute. In other words, the general public knowledge is not taken into consideration when a court attempts to determine secrecy. Instead, the knowledge of those active within a specific industry is of relevance.[9] An example of information deserving trade secrets protection is the Kentucky Fried Chicken which is globally known for a formula blending eleven herbs and spices. In spite of the fact that using one or more herbs and spices to flavor a piece of fried chicken is known to those working in the food industry,

1 G Perdue, 'Trade Secret Economics and Value' (2023) 25 Vand J Ent & Tech L 40.
2 USC § 1839(3).
3 Hrdy, 'The Value in Secrecy' (n 12) 571.
4 C Hrdy, 'Independent Economic Value' (2025) 108 Iowa L Rev 1.
5 American Law Institute, *Restatement (First) of Torts* (1939) s 757, comment b.
6 Hrdy, 'Independent Economic Value' (n 18) 1.
7 P Menell and others, *Trade Secret Case Management Judicial Guide* (Federal Judicial Center 2023) 212-.
8 Sandeen (n 13) 524.
9 S Nashkova, 'Defining Trade Secrets in the United States: Past and Present Challenges - A Way Forward?' (2023) 25 NC JL & Tech 652.

the combination and mixture of those eleven herbs and spices leading to a specific taste are not generally known nor readily ascertainable, even through reverse engineering.[1]

In addition, the amount of economic value must be more than trivial;[2] the rationale behind requiring a claimant to prove the economic value of information is to exclude illusory or unimportant information form the scope of protection.[3] In case a claimant fails to adequately demonstrate the economic value of information, the court may reject his claim that information has value based on the information's *de minimis* utility.[4] This principle was affirmed in a case[5] that minor software code segments lacked sufficient value to be regarded as trade secrets. In this case, the claimant only submitted ambiguous evidence that the routines were helpful in writing new codes, failed to prove that skilled engineers could not have written the same code and failed to provide evidence of the relative value of the code segments as a proportion of defendant's software. The court found that the code was not of value to competitors. Similarly, in *24 Seven, LLC v. Martinez*,[6] the court rejected the claim that outdated information qualified as trade secrets. The court argued that the claimant failed to explain how the old information at issue retained economic value over competitors. In the court's opinion, the economic edge that the claimant's reports would give to its competitors was marginal and would dissipate rapidly as the information aged.

However, it is noteworthy that the economic value need not be substantial. A claimant is not, for instance, obligated to prove an enormous investment in research and development.[7]

According to the TRIPS Agreement, the information must have commercial value due to its secrecy[8] which is the result of not being "known among or readily accessible to persons within the circles that normally deal with the kind of information in question".[9]

In Iranian law, the wording of Article 122 of the APIP that defines trade secrets is in a way that on the face of it, the definition does not require the economic value to be the result of the secrecy of information. More precisely, the definition of trade secret consists of two elements: the information must be commercial; it must have economic value without mentioning the origin of such value. However, as the term trade secret signifies, the economic value must derive from secrecy. Otherwise, a piece of information may not be considered as a trade secret. In other words, it is not reasonable to provide trade secret protection for information that has no relation to confidentiality. The APIP has not specified those to whom the information must be secret and not easily ascertainable. However, the U.S statues and the TRIPS Agreement have made it clear that the general public is not intended and only those acting in the related sector must be taken into consideration.

The APIP also stipulates that the economic value must be 'independent.' Neither the

1 J Peterson, 'The Metes and Bounds of Federal Trade Secret Protections: Deriving Cohesive Damages Principles Under the Defend Trade Secrets Act' (2025) 97 NYU L Rev 710.
2 Menell and others (n 21) 2-12.
3 Sandeen (n 13) 526.
4 Menell and others (n 21) 2-13.
5 *Yield Dynamics, Inc v TEA Systems, Inc* 154 Cal App 4th 547 (2007).
6 *24 Seven, LLC v Martinez* No 1:2019cv07320 (SDNY, 2021).
7 Menell and others (n 21) 2-12.
8 Agreement on Trade-Related Aspects of Intellectual Property Rights (adopted 15 April 1994, entered into force 1 January 1995) 1869 UNTS 299 (TRIPS Agreement) art 39(2)(b).
9 TRIPS Agreement (n 31) art 39(2)(a).

Iranian Act, nor the UTSA, DTSA, or TRIPS Agreement elaborates on the meaning of this component, despite its significant function in limiting the subject matter eligible for protection. Considerable confusion surrounds its interpretation.[1] For example, it has been said that trade secrets have independent economic value when they are valuable in themselves and their value does not depend on other information.[2] In other words, "the value derived from the secret must be independent of the value that is intrinsic to the good or service, or that derived from other factors".[3] As a result, trade secret protection for a password has been denied by a U.S. court relying on the argument that its value originates from information it protects.[4] In a similar case[5] involving the hack of a credit card data, the court did not consider such data as trade secret reasoning that it had no economic value absent its connection with the underlying bank account. However, this view has been criticized as it excludes a large amount of information from the scope of trade secret protection. In effect, to be economically valuable, almost the majority of trade secrets are dependent on other information. Therefore, another view is that the economic value must come from the mere fact that the information is secret.[6] As the plain text of the UTSA illustrates, the independent economic value of trade secrets must come from not being generally known to the public or readily ascertained through methods like reverse engineering.[7]

It is important to note that the confidential information may lose its economic value due to the changes of market conditions and business strategies and orientations. In such a situation, the trade secrets holder would be faced with the problem of non-protection of his information that despite being secret is no longer valuable to competitors. For example, software code that cannot be executed in a working system due to technological advances and is of no other value to its holder may not be regarded as a trade secret and therefore would not enjoy trade secret protection.[8]

Under article 39(2)(b) of the TRIPS Agreement, information which has commercial value as a result of being secret may qualify as trade secret. Therefore, if the value of undisclosed information is lost or impaired in case it ceases to be secret, such information meets the commercial value due to being secret.[9]

The APIP has distinguished between the information having economic value and the information that involves a 'competitive advantage' for its owner. As was observed, the UTSA and the DTSA do not contain such a distinction nor does the TRIPS Agreement which enumerates in Article 39 the conditions of trade secrets. In fact, in the U.S., the said statues require that the information have independent potential or actual economic value in order to be qualified as a trade secret. This condition reflects the common law requirement of competitive advantage as reflected in Restatement Third of Unfair Competition.[10] Historically,

1 P Johnson, 'The Secret Subject Matter' (2010) 1 IPQ 554.
2 Hrdy, 'The Value in Secrecy' (n 12) 575.
3 Menell and others (n 21) 2-12.
4 *State Analysis, Inc v American Financial Services Ass'n* 621 F Supp 2d 309 (ED Va 2009).
5 *Bellwether Community Credit Union v Chipotle Mexican Grill* No 18-cv-00629 (DNH, 2018).
6 Hrdy, 'The Value in Secrecy' (n 12) 575.
7 Peterson (n 24) 709.
8 World Intellectual Property Organization (n 1) 23.
9 Taubman, Wager and Watal (n 10) 138.
10 Menell and others (n 21) 2-12.

trade secrets law was protected by common law[1] and specifically, has constituted a part of unfair competition law.[2] Restatement Third of Unfair Competition defines a trade secret as "any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret *to afford an actual or potential economic advantage over others*." The Supreme Court of the United States has stated in a case[3] that the economic value of a trade secret lies in the competitive advantage the owner enjoys over competitors as a result of his exclusive access to the data and if the data is disclosed or used by others, the competitive advantage would be destroyed.

As a general rule, businesses "need to seek out and develop competitive advantages that make it difficult for rivals to take market share".[4] Competitive advantage stems from many discrete activities of a firm in different fields of designing, producing, marketing, delivering and supporting its products.[5] Among other mechanisms, trade secrets are suitable legal tools for a firm to preserve competitive advantages over its competitors.[6] In fact, "a trade secret can give one side a competitive advantage, which can lead to increased production efficiency, lower prices, and increased innovation".[7] Such advantages would disappear if trade secrets are disclosed due to espionage, theft, the misconduct of a former employee, passage of time, etc. Trade secrets are elected by some firms instead of patents due to their unwillingness to disclose their valuable information in exchange for acquiring patent rights or because the information lacks the requirement of patentability.[8] Not surprisingly, firms with inventions that may not be copied or reverse-engineered easily may prefer the trade secrets protection to keep their leadership in the market.[9]

Considering the aforementioned, the Iranian legislator is recommended to correct the definition of trade secrets in Article 122 of the APIP in such a way that competitive advantage is merged in the economic value component. Even if the historical background of economic value in common law is disregarded, the economic value itself implies the competitive advantage; since, as mentioned earlier, economic value is another way of saying that something is a property. Indeed, competitive advantage over competitors constitutes a property because others would pay money in return for it. Therefore, competitive advantage is merely an example of what may have economic value, i.e., property in Iranian law, and it cannot be separated from other examples of property. Indeed, "this advantage must derive from the 'secrecy' of the information and not from other reasons, such as quality, completeness, or relevance of the information".[10]

1 L Oswald, 'The Role of "Commercial Morality" in Trade Secret Doctrine' (2020) 72 Fla L Rev 152.
2 Hrdy, 'The Value in Secrecy' (n 12) 566.
3 *Ruckelshaus v Monsanto Co* 467 US 986 (1984).
4 V Crittenden, W Crittenden and R Pierpont, 'Trade secrets' (2015) 18 JABR 2.
5 M Porter, *Competitive Advantage, Creating and Sustaining Superior Performance* (Free Press 1998) 33.
6 Hrdy, 'The Value in Secrecy' (n 12) 567.
7 Yaroshenko and others (n 2) 12.
8 Hrdy, 'The Value in Secrecy' (n 12) 567.
9 K Strandburg, 'What Does the Public Get? Experimental Use and the Patent Bargain' (2004) Wisconsin Law Review 81, 31 https://ssrn.com/abstract=438023 accessed 26 April 2025.
10 World Intellectual Property Organization (n 1) 22.

2.3. Actual or Potential Economic Value

As was observed, the APIP considers information to be trade secret when it has actual or potential economic value. Evidently, information has *actual* economic value when it is used practically by the owner in business. However, the meaning of *potential* economic value is not sufficiently clear and necessitating interpretation by the legislator. Potential as an adjective is defined as being "able to develop into something in the future when the necessary conditions exist"[1] or "a hidden effect in something which has not yet appeared". Therefore, information which has the capability to produce economic value may be treated as trade secrets.

This formulation, however, raises a significant interpretive question: does the inclusion of "potential" value excessively broaden the scope of protectable subject matter to encompass virtually any piece of commercial information, given that almost any such information could conceivably become a valuable asset in the future?

A similar question has been raised in the United States because under its law, trade secrets may have potential value. In response, some commentators have referred to the commentary to the UTSA which indicates that the purpose behind applying this modifier is to clarify that trade secrets need not be practically used in business and they may consist of information such as research results, prototypes, etc. which have not been used in business. Indeed, the drafters of the Act have intended to extend protection to information that despite not being used by owners, are of economic value.[2] In other words, "the modern statutes of the United States explicitly eliminated the common law's "used in one's business" requirement"[3] and added the modifier potential to the actual economic value. The reason for adding the qualifier "potential" economic value to the definition of trade secrets was to emphasize that even if the information is not currently valuable to business but has only the potential to be so, it may qualify as a trade secret. The result of this change was ensuring more reliable protection for information consisting of prototypes, research and projects in an early stage.

Therefore, under the current trade secrets law of the United States, the independent value of a trade secret can be prospective and it need not be practically used, i.e., have actual economic value,[4] and it may be said that if the information can be used to obtain economic benefits it satisfies the economic value requirement.[5] To prove this feature, i.e., the potential economic value, the claimant must prove the existence of some reasonable expectation of such value in the future as a result of secrecy. Consequently, it has been asserted that in practice, where a firm acquires information during a research and development process, it may succeed in protecting this information as trade secrets due to the potential value it may possess, even if the future success of such information is uncertain.[6]

The TRIPS Agreement employs the absolute term of 'commercial value' without dealing with actual or potential nature of the economic value the information may possess.

1 *Cambridge Dictionary* 'Potential' https://dictionary.cambridge.org/dictionary/english/potentialaccessed 26 April 2025.
2 Hrdy, 'The Value in Secrecy' (n 12) 572.
3 Hrdy, 'The Value in Secrecy' (n 12) 569.
4 C Hrdy and M Lemley, 'Abandoning Trade Secrets' (2021) 21 Stan Tech L Rev 30.
5 Yaroshenko and others (n 2) 5.
6 World Intellectual Property Organization (n 1) 23.

2.4. Adoption of Reasonable Measures by the Owner

Under both U.S. law and the TRIPS Agreement, confidential information is considered as trade secrets when its owner has taken reasonable measures to preserve its secrecy.

> *"A trade secret owner's duty to be vigilant in protecting its secrets is built into the most frequently applied definition of a 'trade secret' ".*[1] *The owner, in this way, shows his desire for secrecy particularly towards his employees which is a matter of fact and must be proven.*[2]

The APIP is no exception. The final clause of Article 122 of this act requires, as a condition to protect trade secrets, that the owner adopt reasonable measures to protect the secret information. Here again, the wording of Article 122 is in a way that differs from the UTSA and the TRIPS Agreement. The following is the exact text: "... and due to being unknown to the public and not being accessible or identifiable easily by legitimate methods its legitimate owner has adopted reasonable measures to preserve their secrecy". Scholars believe that such wording is unnecessary. Since the legislator has stated in the first part of the same article that commercial information having economic value may be considered as a trade secret, it is better to state that the economic value must derive from the secrecy and as a third condition, the owner must take reasonable measures to safeguard such secrecy. Accordingly, the scholars recommend that the Iranian legislator modify the text of Article 122 of APIP to remove the problem existing therein.

The Act has not defined reasonable measures; therefore, a question arises: what is meant by reasonable measures? Clearly, the courts have to determine the examples thereof. Such determination must be the result of the efforts by courts on a case-by-case basis; i.e., the circumstances surrounding each separate case must be taken into consideration. For instance, as far as digital trade secrets are concerned, special measures compatible with the digital environment must be adopted. For example, restricting the access by off-site users, use of adequate encryption, implementing software to supervise the employees' computer activities and automatically shutting off employees' access after leaving the firm.[3] Conversely, where trade secrets are posted on those portions of Internet generally accessible by all users, the owner cannot establish that he has taken reasonable measures to safeguard his trade secrets and this is in fact a kind of self-destruction of such assets.[4]

The reasonableness itself has no fixed and clear definition in Iranian law, and custom and usage play an essential role in handling a case involving the issue of reasonable measures. Despite the use of the terms 'reasonable measures' and 'reasonable efforts' in the main laws concerning trade secrets protection in the United States, such words have not been defined by those laws and there is no obvious test about the amount and type of safeguards which are reasonable to protect the secrecy of information possessed by an owner.[5] Hence, there

1 V Cundiff, 'Reasonable Measures to Protect Trade Secrets in a Digital Environment' (2009) 21 IPTOS 362.
2 F Dessemontet, *Protection of Trade Secrets and Confidential Information* (Schulthess 2008) 13.
3 M Hussain, 'Standards in Assessing Notice of Reasonable Security Measures in Trade Secret Law' (2024) 25 NC JL & Tech 132.
4 Cundiff (n 60) 409.
5 Menell and others (n 21) 2-13.

are different interpretations in the American courts concerning these terms.[1] In fact, no clear standards have been established by the American courts to illustrate the exact meaning of reasonable 'efforts' and 'measures' under the concerning statues.[2] However, certain factors appear in many cases which may be summarized as follows: physical marking of documents, employee access to trade secrets, sharing trade secrets with non-employees, secure storage of the information, employee access to information after termination.[3] In addition, the reasonable measures, efforts or steps may consist of "warning, video controls, restrictions of access to the place where the trade secrets are put to use, division of work, codes, safes and black box agreements with contractors".[4] Some commentators have proposed a cost-benefit analysis to determine the reasonable efforts. Based on this analysis, three elements must be taken into consideration by a trade secrets owner: the value of secret information, the nature of the disclosure threat and the cost of any specific security mechanism.[5] In line with this analysis, it has been stated in some cases that in every particular case, the court must consider the efforts taken by the owner, the costs, benefits and the particularities of the surrounding circumstances.[6]

It should be noted that establishing that the claimant has taken 'reasonable precautions' to keep the secrecy of his information while failing to prove how it gave him an economic advantage is not enough to succeed in a trade secrets infringement case.[7] In other words, making reasonable efforts to preserve confidentiality is not in itself evidence of the economic value of a person's information. Another important point is that despite the statutory reasonableness requirement, the measures taken need not be perfect or heroic.[8] Applying this rule, the court in *E.I. DuPont de Nemours & Co. v. Christopher,*[9] held that a trade secret owner is not required to watch out for the unanticipated, the undetectable, or the unpreventable methods of espionage now available... To require DuPont to put a roof over the unfinished plant to guard its secret would impose an enormous expense to prevent nothing more than a school boy's trick.

Conclusion

Constant changes and developments in the business world present new challenges with which governments must contend. Trade secrets protection is among such issues. The absence of exhaustive and appropriate rules to protect trade secrets as a key component of any firm's intangible assets will undoubtedly lead to widespread infringement of the possessors' rights. Being aware of this fact, the Iranian legislator has enacted specific provisions within an

1 R Brown, 'Rethinking "Reasonableness": Implementation of a National Board to Clarify the Trade Secret Standard now that the Work-From-Home Culture has Changed the Rules' (2023) 24 Chi-Kent J Intell Prop 280.
2 Hussain (n 62) 133.
3 Brown (n 65) 280-286.
4 Dessemontet (n 61) 13.
5 Menell and others (n 21) 2-14.
6 *DM Trans, LLC v Scott* 38 F4th 608 (7th Cir 2022).
7 *ATS Group, LLC v Legacy Tank & Industrial Services, LLC* 407 F Supp 3d 1186 (WD Okla 2019).
8 Menell and others (n 21) 2-14.
9 *E.I. DuPont de Nemours & Co v Christopher* 431 F2d 1012 (5th Cir 1970).

independent chapter of the new Act on the Protection of Industrial Property (APIP) to define and protect trade secrets.

This definition, like the TRIPS definition, covers 'commercial' information, while the U.S main statues have used the identifier 'economic' that has been declared to be the same as commercial. Therefore, other kinds of information fall outside the scope of trade secrets. In order to qualify as trade secrets, the APIP requires that the commercial information have independent economic value which is equal to being property in Iranian Civil Code. The source of such value has not been stipulated. On the contrary, under U.S. law and the TRIPS Agreement, the economic value must derive from the secrecy of information. In addition, the APIP has separated information having 'economic value' from information involving a 'competitive advantage' while in U.S. law and the TRIPS, such a distinction is not observed and in fact, in U.S. law competitive advantage leads to economic value.

The economic value may be actual or potential. As a consequence, information consisting of research results that are not yet in use may enjoy trade secrets protection. According to the definition of trade secrets in the APIP, a condition of trade secrets is the adoption of reasonable measures by the holder of information due to their not being publicly known or easily ascertainable. This condition needs to be amended and like U.S. law and the TRIPS Agreement, the state of not being publicly known or easily ascertainable must be declared as a feature of trade secrets and taking reasonable measures as a necessary condition for protection. The Iranian act has not specified the concept of 'public' while in U.S. law and the TRIPS Agreement, merely those acting in the sector concerned are intended. Given the above said, it is clear that the Iranian statutory definition of trade secrets is from many aspects similar to those in U.S. law and the TRIPS Agreement. However, it must be amended to be more accurate. Therefore, the authors propose the following revised formulation for Article 122 of the APIP, which synthesizes the core elements from American law and the TRIPS Agreement into a more robust and legally sound definition:

> *"A trade secret is commercial information that: (a) has actual or potential independent economic value derived from not being generally known to or readily accessible by persons within the circles that normally deal with that kind of information, through legitimate means; and (b) is the subject of reasonable measures under the circumstances by its legitimate owner to maintain its secrecy."*

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