

THE INSTITUTE OF TRADE SECRETS IN ENGLISH AND FRENCH LAW IN THE 19TH AND EARLY 20TH CENTURIES: DOCTRINE AND JURISPRUDENCE

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Abstract. This article examines the emergence of trade secrets law as a specific sub-branch of civil and industrial law which protects a trade secret regardless of whether or not it has been patented. In English law, this protection has been afforded by courts of equity since the judgment of *Yovatt v. Winyard* in 1820, whereas the development of French case law on trade secrets in the 19th and early 20th centuries was based upon Art. 418 of the Criminal Code of 1810, which pronounced the divulgence of a trade secret to be a misdemeanour. Thus, French case law was developed by correctional courts, as well as some cases that reached appellate courts and the Court of Cassation. The discussion of the history of trade secrets law will enable the institute of trade secrets to be more thoroughly understood, and will facilitate the examination of the legal grounds for courts affording protection to trade secrets.

Keywords: trade secrets, industrial law, property rights, breach of confidence.

Introduction

The development of the legal protection of trade secrets lies within almost the same time period as the protection of patents, trademarks and copyright, although the history of their protection is not very clear. For instance, Morison (1956, pp. 53–55) recalled examples of 17th-century cases which were prototypes of the tort of passing off. Vandeveldt recognized trade secrets to be a creation of 19th-century law, since initially only patents received legal protection, whereas trade secrets did not. Despite their recognition in later decades, trade secrets did not become a subject of property rights (Vandeveldt, 1980, pp. 340–341, 348–350). In the judgment of *Robb v. Green* (1895, pp. 16–17), the Court of Appeal of England found that regardless of the legal theory on which the lawsuit is grounded – i.e., whether it is a breach of contract or a breach of faith and confidence – an injunction should be imposed on the wrongdoer. According to the view of H. T. B. (1961, pp. 146–148), the recognition of the protection of trade secrets in law actually owes to the industrialization and competitiveness of the economy and the comprehension of the fact that the inability of the inventor to profit from the created product would cause a loss to the society of creativity and talent. According to Vickery (1982, p. 1451), the duty of confidentiality arises from societal norms and public policy upon a certain issue, and it is not necessary for this duty of confidentiality to be prescribed in a certain agreement or contract.

The Protection of Trade Secrets (1973, p. 7) report of the New Zealand Tort and General Law Reform Committee held that an employer may imply that a trade secret learned by an employee in the course of work must remain undisclosed for an indefinite time period, and this is an implied clause of a contract with said employee. In the American case of *Peabody v. Norfolk*, adjudicated by the Supreme Judicial Court of Massachusetts in 1868, one of the first American legal precedents on trade secrets was observed. Here the reasoning was substantially influenced by English law, as the court held that there is property in a trade secret which the court will protect (*Peabody v. Norfolk*, 1868, pp. 457–458). To return to *Robb v. Green* (1895, pp. 15–17), the court agreed that there was an implied trust placed in the employee that they would not use information obtained in the course of their employment with the plaintiff, which derives from the trust-based relationships between the master and servant, implying that the employee would behave honestly with their employer. In the contemporaneous case

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of *Portal v. Hine* (1891, pp. 330–331), there was an express customary rule previously agreed between the plaintiff and defendant: that the latter would not disclose anything connected to the business of the plaintiff.

In the history of common law, these societal norms can be demonstrated by the Scottish case of *AB v. CD*, adjudicated by the Court of Session in 1851. In this case, a physician revealed a birth certificate to a church meeting where the plaintiff was an elder, indicating that his child was conceived before his marriage. The court held that the relationship between client and medical attendant bore the characteristics of confidential relations, despite the fact that the doctor did not find so himself and there were no specific agreements between the physician and the plaintiff in relation to the confidentiality of the disputed certificate (*AB v. CD*, 1851, pp. 177–180). In a leading English case relating to banking confidentiality, *Tournier v. National Provincial and Union Bank of England* (1924, pp. 480–481), the court held that the duty of a bank employee (referred to as an implied term of a contract) not to disclose information on the bank account and transactions of a customer is similar to other confidential relations, such as those between solicitor and client, or doctor and a patient.

Some early trade secrets cases involved a specific obligation not to disclose a trade secret which was sold together with a business. This can be observed in cases in the United States such as *Vickery v. Welch* (1837, pp. 523–528), which was the first trade secrets case in the country decided based on a breach of bond, upon which the court held that the bond of promise not to disclose a secret chocolate recipe was permissible even if it could be considered a restraint of trade. To the same effect was the earlier English case of *Bryson v. Whitehead* (1822), where the plaintiff, about to retire, sold a business related to dyeing goods to the defendant together with a trade secret, executing a bond according to which, the defendant would not engage in the dyeing business within a distance of 50 miles from the locality in which he had acquired the business and would not disclose the secret for 20 years. The defendant thought that this bond was not sufficiently restrictive, finding that the plaintiff and his son-in-law could continue their business and demanded a more restrictive deed of covenant. The vice-chancellor held that, despite the law being against the restraint of trade in general terms, the trader may sell a trade secret and may restrain themselves from the use of it, and ruled that a specific performance may be decreed in this case (*Bryson v. Whitehead*, 1822, pp. 74–77). In common law jurisdictions, courts of equity restrain the defendant(s) from the use of trade secrets by means of an injunction that is based upon a breach of contract or confidence (Protection of Trade Secrets, 1973, pp. 7–10). In Canadian law, it was decided at an early stage that if an ex-employee uses their memory to apply to the same customers as they used to during the time that they were in the employment of the plaintiff without taking their list of customers, no injunction will be incurred (*Ice Delivery Co., Ltd. v. Peers & Campbell*, 1926, pp. 1177–1179).

This article is dedicated to a study of trade secrets law and its emergence in England and France. Hence, its foremost aims are to explore the development of trade secrets law in the 19th and early 20th centuries, to define trade secrets from the view of this legal institute, and to illustrate their protection by relevant jurisprudence originating from the above-mentioned time period. For the needs of the article, the author uses the comparative legal method (a comparison of French and English trade secrets law) and the historical-legal method, since the article is dedicated to the historical development of trade secrets law in England and France. The method of the interpretation of legal norms is also applied to Art. 418 of the 1810 Criminal Code of France.

Defining a trade secret is a fairly complicated task, and the scope of trade secrets is also quite broad. For instance, Barton (1939, pp. 124–125), after having examined the body of American case law on the subject from the early 20th century, found that a trade secret may be any secret which has some value to its owner and is not limited to the secrets of industrial processes, outlining that a considerable number of cases also concern lists of customers. From the French perspective, Rendu (1858), in his treatise on trademarks, commerce and competition, outlined that trade secrets do not necessarily include all of the manufacturing processes which are kept secret, but only those which explicitly belong to the industrialist, possess certain novelty, and are patentable. At the same time, a trade secret cannot be described as such after having been patented, regardless of its novelty (Rendu, 1858, p. 370). Poulliet (1875, pp. 626–627) seemed to disagree with this definition, finding that trade secrets should encompass all of the details of manufacturers, including sleight of hand (not being an actual invention) which was utilized in the manufacturing process and of which competing factories had no knowledge. According to C.C. (anonymous author), in a note to a judgment of the Paris Court of Appeals in 1908, it is impossible to give a precise and full definition of what is a trade secret. However, according to the position of the Paris Court of Appeals expressed in this judgment, a trade secret should be viewed as a part of the soul of a

factory, to be kept secret from third parties and viewed only by those who use it necessarily for the life and prosperity of the factory (Cour d'Appel Paris, 1908, pp. 323–325).

Regarding other civil law jurisdictions, in Belgian law, where the provisions of the Criminal Code (Art. 309) provide punishment for a wrongdoer who has disclosed a trade secret during current or past employment, a trade secret is considered to be a property right. Criminal law sanctions relate only to people once they are employed at a certain enterprise and have learned a certain trade secret therein. When a person has learned and disclosed a trade secret while not being an employee, such an act is considered a civil wrong – *unfair trade*, as was established by the Commercial Court of Liege in its 1914 judgment (Trib. comm. de Liege, 1914, pp. 255–256). In its 1987 judgment, the Supreme Court of Austria remarked that a trade secret exists: when the facts and the manufacturing processes are important for its competitiveness; if such facts are known only to a narrow group of people; if the craftsman desires to keep these facts secret, in which case they have to be kept so; and if there is a legitimate economic interest in retaining the trade secret (Oberster Gerichtshof, 1987).

1. Trade secrets in English law

Trade secrets have twofold legal protection in England – by a statute (The Trade Secrets (Enforcement, etc.) Regulations 2018) and common law, and resting upon the theory of breach of confidence or a breach of contract. In this article, we will examine the development of trade secrets theory in common law. While the first case in England in which an injunction to restrain a defendant from the use of confidentially obtained information in the course of their employment with a plaintiff was adjudicated on in 1820 (*Yovatt v. Winyard*, 1820, pp. 394–395), English courts have also imposed injunctions for: the unauthorized use of a list of agents (*Baker v. Gibbons and Others*, 1972, pp. 700–703); restraining the defendant's use of secret formulas and manufacturing processes (*Caribonum Company Limited v. Le Couch*, 1913, pp. 385–389); the secrets of preparing medicines, which were kept confidential within subsequent generations of the plaintiff's and defendant's families (*Morison v. Moat*, 1851, pp. 241–257); engine schematics (*Merryweather & Sons v. Moore*, 1892, p. 505–508); lists of customers (*Robb v. Green*, 1895, pp. 15–17); as well as copying client address directories as a breach of copyright (*Kelly v. Morris*, 1866, pp. 222–224; *Lamb v. Evans*, 1893, pp. 131–138).

Since a trade secret is itself *information*, it must be outlined here that English law recognizes the common law right to information as a property right. The legal precedent recognizing it as such is *Exchange Telegraph Company (Limited) v. Gregory & Co.*, adjudicated on in 1895. In this case, the plaintiffs contracted with the Stock Exchange committee to be furnished with information relating to the prices of stocks and shares, which was furnished to the plaintiffs by telegraph using Morse code, and then later telegraphed to subscribers. This information was simultaneously gathered by a clerk, who printed the sheets and later converted it to a newspaper. Later, the information was also given to the defendant, a legal entity which had subscribed to the plaintiff until 1894, and with whom the contract had come to an end. Later, the defendant continued to obtain the information from the plaintiff's other subscribers and use it on boards in his office, even though it was agreed that the obtained information should not be sold or given to entities which were not subscribers. The first instance granted an injunction against which the defendants appealed, claiming that they did not obtain the information from the newspaper and hence there was no copyright infringement, and holding that this printed list could not amount to what could constitute a “literary composition”, noting that the plaintiff company did not sustain any damages because of such a use of information. The plaintiffs (the respondents in the case) argued that they held the copyright to the printed lists and that they had common law property in this unpublished information. The Court of Appeal of England ruled to dismiss the appeal. Lord Esher, M. R., held the following: “Now the information is a thing which can be sold. It is property, and, being sold to the plaintiffs, it was their property. The defendant has, therefore, wilfully invaded the plaintiffs' right of property in a very mean way”. The defendant undoubtedly obtained the information for commercial use, and the defendant paid for the information to another subscriber, hence inducing said subscriber to commit a breach of faith and honour with regards to the plaintiff. It was also found that the damages were at large, the acts of the defendant were likely to cause damages to the plaintiff, and there was a concrete breach of copyright in the fact that the defendant used the information by writing it on a board in their office, some of which was taken from the plaintiff's newspaper. Kay, L. J., and Rigby, L. J., joined the reasoning of Lord Esher, M. R. (*Exchange Telegraph Company (Limited) v. Gregory & Co.*, 1895, pp. 262–266). Hence, in such a view, there may be a proprietary interest in information which constitutes a trade secret from the side of the person or the legal entity which produced it.

In English law, *Yovatt v. Winyard* (1820) was the first recorded legal case in which the court issued an injunction to restrain the defendant from using confidential information in their own trade. This case is also famous for being cited as a prototype for the formation of the right to privacy (Elson, 1929, p. 307; Fague, 1967, p. 242; Dworkin, 1967, pp. 419–420; Seipp, 1983, pp. 358–359), even though it was a trade secrets case. Interestingly, *Pollard v. Photographic Company*, a distinctly privacy-based case adjudicated on in 1888, did not create a new tort, having being adjudicated on regarding a breach of implied contract and confidence. The facts of the *Yovatt v. Winyard* case were as follows: the defendant went into the employment of the plaintiff, a proprietor of veterinary medicines, as an assistant and a journeyman, who, according to an agreement, was not to be taught any of the manufacturing processes of the medicines used (that is, the trade secrets). Some time passed and the defendant then left the employment of the plaintiff, who later learned that during the course of their employment, the defendant had surreptitiously obtained access to the recipes recorded in his books, and had then begun selling them accompanied by the papers for administering said medicines, which were nearly identical to the plaintiff's. When the case was heard before the Court of Chancery, the vice-chancellor ruled to impose an injunction on the defendant on the basis of a breach of trust and confidence. The case was also distinguished from two earlier trade secrets cases – namely *Newberry v. James* (1817) and *Williams v. Williams* (1818), to which we will turn below – in that it was not the same as the first situation, in which the proprietor of the secret communicated it to the employee, or the second situation, in which the secret was surreptitiously obtained, as shown by the case circumstances of *Yovatt v. Winyard* (*Yovatt v. Winyard*, 1820, pp. 394–395), or later cases, such as *Robb v. Green* (1895, pp. 15–17) or *Exchange Telegraph Company (Limited) v. Gregory & Co.* (1895, pp. 262–266).

The case of *Williams v. Williams* (1818) was somewhat different in its circumstances as the plaintiff and defendant were father and son, with the former being engaged in the business of preparing and selling medicines for the treatment of eye diseases for several years. When his young son grew up, the plaintiff gave him the management of his dispensary and proposed that he engage in a partnership, which he accepted. Then, the defendant allowed him to control the stock of medicines and communicated the secret of their production to him. The defendant (as the plaintiff claimed) then took over the dominion of the property and communicated the secret to his wife and to another man, the co-defendant (who afterwards claimed he had been told nothing). The defendant later removed various articles from the plaintiff's custody, sold medicines, threatened to prepare and sell the same medicines, and divulged the secrets of their production. The plaintiff pleaded that the items removed should be returned and an injunction be enforced. The defendant and his wife, in their respective affidavits, denied that the plaintiff was the inventor of the secret, claiming that the defendant had learned it at an early age from his mother who learned it elsewhere, and that the defendant did not take over dominion of the property that the plaintiff entrusted to him and sold only what the plaintiff asked him to. The vice-chancellor granted an injunction, but the lord-chancellor of the High Court of Chancery ruled to dissolve it in part. Concerning the first part of the case (that the defendant took over dominion of the articles and began vending), the court found that the defendant acted in breach of the agreement that he and his father concluded and the injunction was properly imposed. However, regarding the trade secret, the court refused to protect it, finding that patents are already protected by law and if the secret had already been disclosed, then the injunction would be of no use. Moreover, the court also noted that, according to the defendant's affidavit, the secret was no secret at all. Under these considerations, the injunction was dissolved (*Williams v. Williams*, 1818, pp. 157–160).

Another case from the same era, *Newberry v. James and others* (1817), also published in Merivale's Reports alongside *Williams v. Williams*, featured a dispute relating to an ancient agreement regarding producing and vending medicines. The plaintiff and defendant were the sons of an artisan and a physician, and the defendant's father invented pills for gout, rheumatism and other diseases and engaged in an agreement to sell and deliver them to the plaintiff's father many years before the lawsuit – in 1747. The agreement was concluded for 21 years, but was extended to an indefinite period in 1755. In his will, the plaintiff's father bequeathed all interests and shares in the preparation and dissemination of medicines to him, and a similar agreement relating to an unpatented medicine called "Analeptic Pills" (the first medicine was patented) was concluded between the plaintiff and the defendant's father. They worked together for some time until the latter's demise, and the plaintiff and defendant later worked together for some time before the plaintiff lodged a lawsuit. The complaint was that the defendant and the other defendants (the defendant's co-workers) did not supply the plaintiff with the medicine as agreed, and the defendant threatened to communicate the secret of producing the medicine and insisted that the agreement (which the defendant claimed was obsolete) should be carried out indefinitely, pleading for specific performance and an injunction to prevent the defendants from disclosing the secret of preparing said medicines except to those designated for this purpose. The defendants claimed that it was the

plaintiff who abstained from fulfilling the agreement, and thus they thought that they were not bound to said agreement anymore. In this case, the court ruled that it would not impose an injunction so as to avert the violation of the covenant between the parties of the dispute, of which, according to the nature of the subject, there could be no specific performance. According to the court, the old patent, referred to above, had expired, and the agreement between the parties did not actually relate to the patent; independently of it, the parties agreed not to sell the subject of said patent, except to each other. The court continued that in order to support the patent, its specification had to be clear enough to let the world make use of this invention when the patent's term finished. The case record also suggested that it was seemingly not properly proved that the secret of producing medicines was really a secret or that it was disclosed to unauthorized persons. The injunction was thus not imposed (*Newberry v. James*, 1817, pp. 446–451). A further question then arises: Could the plaintiff have prevailed in an action for damages had such an action been commenced?

In *Morison v. Moat and Others* (1851), which became the central case for the formation of trade secrets law, the plaintiff and defendant were the sons of two men who engaged into a partnership in 1830, wherein one was the inventor of a medicine and the other was its distributor and seller. They conducted business under the name Morison, Moat, & Co, Hygeists, which lasted for over 20 years and was continued by their sons. When the two signed the partnership deed, two bonds were executed. Inter alia, the inventor communicated the secret of producing the medicines to his partner, and the condition of said bond was that the partner should never communicate it to anybody, and the same related to the inventor. Then, the two introduced their sons into the partnership, whom they supposed would continue the business. The partnership, having been arranged to last until 25 March 1851, expired, and the defendant began selling the medicines under another name and publicly advertising the medicine. The plaintiff discovered that the medicine was sold with the name of the plaintiff's family on the boxes of medicine, the medicines were made according to the recipe created by the plaintiff's father, and the medicine was sold as Morison's Universal Medicine, which the plaintiff found to be a fraud against him. Moreover, the plaintiff discovered that the defendant's father had disclosed the secret of producing the medicine to the defendant in 1835. In his bill, the plaintiff mentioned that the secret was never communicated to the defendant, and the defendant was not permitted to be present within the process of creating the medicine. The defendant held that he learned the ingredients while he was working with his father, admitted that the recipe was told to him by his father in view of him being a succeeding partner, and said that the plaintiff knew that defendant had learned the recipe, and the medicine was not patented. The plaintiff denied that the defendant was an active partner and that he had an opportunity to learn the process of creating and producing said medicine. The action was filed upon a breach of faith and a breach of contract. The vice-chancellor noted that there were several precedent cases resolved upon different theories, but all successful actions lead towards an injunction towards the tortfeasor. The court concluded that the defendant's father had indeed communicated the secret to the defendant in a breach of faith and contract, and said that the plaintiff was entitled to an injunction, but not to the extent that the defendant was prohibited from any use of the name of the plaintiff's family in the pills. The court underlined that this would depend on the mode in which the name of the plaintiff's family was used, and restrained the defendant from the production or creation of any medicines which derived from the secret of their preparation. It also prohibited the defendant from using the method of producing the medicine in accordance with the secret, and that the sale of two medicines which contained the plaintiff's family name in their titles be discontinued (*Morison v. Moat and Others*, 1851, p. 241–257).

The case of *Robb v. Green* (1895) is a classic of 19th-century trade secrets law in England, and also concerns the issue of the list of customers. According to the facts, the defendant entered the plaintiff's employment in 1890 as a farm manager and worked for him until 1893. During the course of his employment, the defendant had access to the plaintiff's business books, from which he managed to copy the names and addresses of the plaintiff's customers. Soon after leaving the employment of the plaintiff, the defendant started his own business as a game and egg dealer, using the information he had obtained from the books of the plaintiff. The Court of Queen's Bench ruled in favour of the plaintiff, estimating damages at £150, ordering the defendant to deliver to the plaintiff the list of names and addresses of customers that he had copied from the plaintiff's books, and imposing an injunction restraining the defendant from any further use of the documents mentioned above. The defendant's counsel argued that there was no specific clause in the defendant's contract in terms of inhibiting him from using the customers' names and addresses, against which the plaintiff's counsel argued that every contract for service would imply that the servant would act faithfully. Lord Esher, M. R., having stated the facts of the case, established that the defendant apparently copied the list of the plaintiff's customers to persuade them to deal with him rather than the plaintiff. This position agreed with that of Hawkins, L. J., who adjudicated the

case at the Queen's Bench Division and found that the acts of the defendant should be viewed as a *breach of the trust* which was imposed on him. Lord Esher, M. R., went on to interrogate whether there had been a *breach of contract* in the case. The contract between the plaintiff and defendant was a written one, but contained no actual clause in terms of the obligation of the defendant to act honestly towards the plaintiff, nor an obligation not to take and copy materials from his books. According to the view of Lord Esher, M. R., it should be implied that the servant will act honestly towards the master, and *faithful service* should be implied in any contract for service, holding that a master cannot employ a servant if they are not assured that the servant will act faithfully. Moreover, the servant should consider that the master relies on their faithful performance of their duties, which arise from the *confidential* legal relationships between said master and servant. Thus Lord Esher, M. R., came to the conclusion that there was both a breach of confidence and a breach of contract by the defendant, which caused damages to the plaintiff, and the plaintiff was entitled to an injunction which would restrain the defendant from further breaches of contract.

Kay, L. J., observed that an injunction in cases of this type is an old remedy, mentioning *Yovatt v. Winyard* and *Morison v. Moat*, both of which were adjudicated on upon the legal foundation of a breach of trust and confidence in similar trade secrets cases. Kay also found that, regardless of the legal foundation (property rights, breach of contract, breach of confidence), the court would exercise its jurisdiction and impose an injunction on the wrongdoer. In the case at stake, in the opinion of Kay, L. J., there was a breach of confidence, since the defendant copied the entries from the plaintiff's books surreptitiously. In terms of a breach of contract, Kay observed that there was an implied contract to act honestly and hence there was such breach, considering the defendant's acts. Smith, L. J., agreed that there was a *breach of contract*, agreeing that there is an implied term of a contract in that the servant has to act faithfully with regard to their master. Regarding whether the defendant acted faithfully, Smith mentioned that the defendant created the copies when nobody saw him and his aim was to use the information for himself. Moreover, the defendant confessed that he did not act faithfully, thinking that he would be fired had his master seen him copy the information from the books. Therefore, the appeal was dismissed (judgment for plaintiff) (*Robb v. Green*, 1895, pp. 15–17).

2. Trade secrets in French law

The legal protection of trade secrets in French law was anchored by Art. 418 of the Criminal Code of Napoleon in 1810–1995. This norm provided punishment in three different (originally two, until 1863) variants of a misdemeanour. The first provision held that a director, servant or worker of a factory who divulged, or attempted to divulge, information containing a trade secret to foreign citizens or to French citizens who are living abroad would be punished with a 2- to 5-year imprisonment sentence and a monetary fine totalling from 500 to 20,000 francs, and may be deprived of their rights for a term of 5 to 10 years as provided by Art. 42 of the Criminal Code. The second provision imposed a lighter punishment in cases where trade secrets were divulged to French citizens living in France – imprisonment from 3 months to 2 years and a fine from 16 to 200 francs (Bourguignon-Dumolard, 1811, p. 290; Rendu, 1858, p. 370). The third provision, enacted by the law of May 13, 1863 (*Loi portant modification de plusieurs dispositions du code penal*, 1863, p. 475), related to the trade secrets of arms manufacturers and military factories belonging to the state, imposing the highest sanction anchored in points 1 and 3 of Art. 418 of the Criminal Code (Code Napoleon, 1810). According to the judgment of the Court of Cassation of France of 1903, it is enough for the tortfeasor to commit a single act revealing a trade secret in France so that French courts can exercise jurisdiction to procure the matter against the defendant (Cour de Cassation (France), 1903, pp. 105–108).

Chauveau and Helie (1864) observed that according to the explanatory note of the 1810 Criminal Code, the norm of Art. 418 derived from times in which patriotism was especially relevant in matters relating to trade secrets. The situation changed with the novel character of international relations, new modes of competition in trade, and new conditions under which inventors had to work. To constitute a criminal misdemeanour, held Chauveau and Helie (1864, pp. 535–536), the divulged secrets should be truly secret; that is, solely attached to a certain manufacturer, invented or elaborated for them, and used especially at said factory. There is very little legacy regarding the existence of the institute of trade secrets in the Ancien Régime era. Mayer (1900, pp. 6–7) held that the roots of business secrets predominantly lie in the secrecy of trade books, since tradesmen were required by law to possess such books and said trade books contained all information regarding the affairs of the tradesperson, such as contracts, correspondence, expenditures, information relating to clients, creditors, debtors and many other details. Thus, tradesmen retained a property right and a right to maintain these books,

and this right, as Mayer outlined, was so great that in previous eras merchants would allow themselves to lose lawsuits rather allow their trade records to be published.

Such was the state of affairs until the Edict of King Louis XIV of 23 March 1673 (*Edit du Roy, servant de reglement pour le commerce des negocians & marchands, tant en gros qu'en detail*), which provided the regulation of trade for tradesmen and merchants. On the one hand, Title III Art. 1 of the Edict obliged tradesmen to maintain trade books (in fact, this was frequently done by tradesmen even without the official obligation); on the other hand, the court could not order or demand the production of trade books, except from in cases of succession, unification or the division of a company in cases of bankruptcy (Title III, Art. 9) (Bornier, 1744, p. 462). The comment to Title III, Art. 9 by Bornier (1744) provides that the reasons for adopting this provision were the disturbances which could arise, since by ruling otherwise, not only could secrets relating to the condition of affairs of merchants and tradesmen be unveiled, but also the affairs of the other families which had relationships with said tradespersons. In terms of the exception of succession, Bornier explained it through the joint interest of the parties (pp. 462–463).

The Correctional Court of Mulhouse, in its notable judgment of 1865, mentioned that Art. 418 of the Criminal Code was adopted with a high moral intention to impose the workers and employees of industrial enterprises a kind of professional secret akin to that [established] by Art. 378 of the same Code imposes to doctors, surgeons and others, and to guarantee them by the fear of severe penalties against their own weaknesses [...] (Trib. corr. de Mulhouse, 1865, p. 643).

The case law indicates that it does not matter who reveals a trade secret in relation to the trade secret itself: for instance, even if a trade secret was co-invented and developed by the person who revealed the secret, this person nevertheless committed a misdemeanour (Cour d'Appel de Lyon, 1863, pp. 316–318). A tortfeasor who induces an employee to communicate a trade secret to them, for instance, by means of monetary benefit, also becomes complicit in the misdemeanour, punishable under Art. 418 of the Criminal Code (Cour d'Appel de Paris, 1856, pp. 90–96). The same could be said about an industrialist who induces the employees of another manufacturer to visit their home in order to benefit from trade secrets (Trib. corr. de la Seine, 7 juin 1872; Cour d'Appel de Paris, 31 juillet 1872 / Trib. corr. de la Seine, 28 avril 1876; Cour d'Appel de Paris, 30 juin 1876). According to the note to the judgment of the Paris Court of Appeals of 1856 and the Correctional Court of Lyon of 1925, there are three elements of the misdemeanour of divulging a trade secret, namely: 1) when the misdemeanour is committed by a director, employee or a servant of a certain enterprise; 2) when a trade secret is communicated; and 3) when a trade secret is communicated with a fraudulent intention (J.P. in Cour d'Appel de Paris, 1856, p. 96; anonymous author in Trib. corr. de Lyon, 1925, pp. 30–31).

French jurisprudence shows that aggrieved parties brought complaints by means of a private prosecution; that is, at the same time, it was also possible to institute civil proceedings against the tortfeasor under Art. 1382 of the Civil Code, which would be an ordinary civil lawsuit for damages, as clearly shown by the judgment of the Grenoble Court of Appeals in 1872 (Cour d'Appel de Grenoble, 1872, pp. 44–45). Rogron (1833) outlined that in case of the divulging of a trade secret by the tortfeasor to a foreign citizen, not only is a private interest violated, but a public interest as well, since by these illegal acts the tortfeasor would prevent the development of trade in France. However, if the trade secret is revealed in France and to French citizens, then only the interest of a private party is violated (Rogron, 1833, p. 316). Chauveau and Helie (1864, pp. 535–536) agreed with such a position, finding that if the tortfeasor reveals a trade secret in France to French citizens, only the private interest is violated, but in other cases outlined in the Criminal Code, both private and public interests are violated. The existence of a trade secret – which, according to Poulliet, has its novelty as its distinct feature – should presuppose the existence of an industry for its application, and thus the sphere of trade secrets lies only in industrial law. Poulliet provided an example, observing that if one scientist were to make a discovery and communicate it to another scientist who then applied it for his own purposes, this would not amount to a breach of a trade secret, despite being an indiscreet act. Thus, he concluded that a trade secret should belong to a factory and relate to manufacturing processes (Poulliet, 1875, pp. 626–630).

The definition of a trade secret and its features is fairly complicated in French law. Regarding definitions, Thaller (1910, p. 77) concluded that a trade secret is a means of manufacturing which the manufacturer secretly uses to obtain either a product or a result, and the institute of trade secrets should apply not only to manufacturing, but to every merchant. The courts, however, did not find that any detail an employee had learned while working for

an employer could constitute a trade secret. Indeed, in a distinct judgment of the Correctional Court of Seine (Paris) in 1869, an employee, the defendant, learned of plans detailing a table designed to resemble a Chinese chalet while working with his initial employer, the complainant, in September 1868. The defendant soon left for the employment of another craftsman, where they recreated the same table. However, the court found that the defendant was innocent, highlighting that Art. 418 of the Criminal Code imposed punishment for the divulging of manufacturing processes – that is, processes that are used in manufacture. Thus, this does not relate to the divulging of operations, even though this is indiscreet behaviour, and hence no violation of a trade secret took place (Trib. corr. de la Seine, 1869, pp. 316–318).

At the same time, means of manufacturing, being an important secret of a factory which could give an advantage to a manufacturer, regardless of not being an actual invention, were stringently considered to be a trade secret according to the judgment of the Paris Court of Appeals in 1861, which was affirmed by the Court of Cassation of France a year later (Cour d'Appel de Paris, 1861, pp. 221–223; Cour de Cassation (France), 1862, pp. 224–225). In its 1861 judgment, the Paris Court of Appeals noted that in order for a process to be considered a trade secret, it is enough to prove that the manufacturing process is concealed (Cour d'Appel de Paris, 1861, pp. 221–223). A. L. (anonymous author), in his note to the judgment of the Correctional Court of Seine, discussed the application of Art. 418 of the Criminal Code in cases when the employee who revealed the trade secret was already out of the employment of the factory where the trade secret was learned. In the view of A. L., it is enough for the tortfeasor to have had employee status when the trade secret was revealed. However, when said employee leaves the factory, they “turn into common law”, which in the sense of industrial law means that they are free to use any manufacturing process not protected by a patent; hence, A. L. found that the manufacturer should undertake various measures in order to patent trade secrets so that they would not be available to third parties (Trib. corr. de la Seine, 1915, pp. 47–48). Roux, in his comment to the judgment of the Court of Cassation of France of 1903, held that the revelation of a trade secret is a compound criminal misdemeanour, since it encompasses not only the communication of the secret, but also the act of searching for it and transporting it abroad (if this occurs), and that the revelation of a trade secret is a form of a breach of trust which the employee commits in relation to the director. Roux outlined that prosecution for revealing trade secrets abroad began in 1866, 3 years after the latest amendments to the Criminal Code were enacted (Roux in Cour de Cassation, 1903, pp. 105–108). An anonymous author to the case note to the judgment of the Correctional Court of Lyon in 1925 argued that a trade secret may be any manufacturing process which is used in a certain branch of industry and which other manufacturers have no knowledge of, and this is not necessarily a new manufacturing process, but a process which is not used by other manufacturers (anonymous author in Trib. corr. de Lyon, 1925, p. 30). It is also notable that in French law, a violation of a trade secret does not always presuppose that a trade secret is divulged by one person to another: in the judgment of the Paris Court of Appeals of 1908, the court held that if a former employee leaves their employment and starts up a rival business and uses patents, manufacturing process reports and trade secrets, they are also guilty of a misdemeanour under Art. 418 of the Criminal Code (Cour d'Appel de Paris, 1908, p. 322). Notably, the Correctional Court of Lyon, in its 1925 judgment, held that a trade secret exists from the same moment as it begins to be applied in the manufacturing process, and is not equally available to all (Trib. corr. de Lyon, 1925, pp. 30–31). The same court held that it is not necessary for a manufacturer to use new methods which were completely unknown before them, and to constitute a trade secret it is enough that the manufacturer uses a more elaborate and practical process, even if its methods are generally known but are not available to others who are engaged in the same profession (Trib. corr. de Lyon, 1925, p. 31).

The Paris Court of Appeals provided an explanation of proving a trade secret and considered the question of complicity in the trade secret violation misdemeanour in an 1861 judgment. The facts of the case were related to the manufacturing of oil. The complainant owned a plant manufacturing oil extracted from resinous substances in Saint-Denis, while the defendants had a similar enterprise in the town of Bercy. One day, the director of the plant in Bercy, finding that the rival factory made better and clearer oil than they manufactured, asked an employee to find out which caustic lye the complainants used at their factory and to bring him an example of it. The employee accepted the task and travelled to Saint-Denis, where a man helped him to contact an employee of the complainant's factory, one of defendants in the case. They met at a local cabaret, and said employee, not without hesitation, agreed to deliver up two bottles of lye for a monetary reward. Due to the inaccuracy of the accomplices, the violation became known to the complainants, who brought a criminal complaint. The Correctional Court (the court report did not clarify what type of trial court it was), speaking of the defendants' liability, held that the method by which the complainant's factory manufactured the oil was a trade secret of high importance since it was an advantage over other enterprises. The defendant's employee acted

in the interests of his director, and the court underlined that Art. 418 of the Criminal Code did not distinguish regarding how the defendants intended to use the means of manufacture. The defendant's employee, by the means of presents and promises, provoked the complainant's employee to divulge the secret and hence commit the misdemeanour. The man who served as an intermediary between the complainant and defendant's employees knowingly made contact between the two men, who had also discussed the trade secrets of the complainant's factory. He also gave money to the complainant's employee, and thus convinced him to break the trade secret. Hence, the court found the defendants guilty: the defendant director (under Art. 418 and 463) for complicity; the defendant's employee for complicity (Art. 418); the intermediary for complicity (Art. 418); and the complainant's employee for a breach of a trade secret (Art. 418). The four defendants were ordered to pay the complainant 200 francs in damages jointly. Said judgment was appealed by the defendant's employee to the Paris Court of Appeals, but the appeal was rejected. The court held that in order to find the defendant (appellant in the case) guilty, the elements of the misdemeanour had to be clarified, which was performed by the trial court. The appellant clearly provoked the complainant's factory worker to divulge the secret, and the process was clearly a trade secret. Though the fraudulent intention of the appellant was not directly mentioned in the judgment, the court held that the acts of the defendant – or “manoeuvres”, as wittily observed by the court of appeals – presupposed a fraudulent intention in the court's assessment. Thus, all elements of the misdemeanour were established, and the court rejected the appeal (Cour d'Appel Paris, 1862, pp. 222–226). The Court of Cassation, hearing this case on January 10, 1862, affirmed the judgment of the Paris Court of Appeals, rejecting the cassation complaint (Cour de Cassation (France), 1862, pp. 225–226).

The Correctional Court of Mulhouse, in an 1865 judgment, formulated the essence of what is a trade secret and what should be understood under this concept. The facts were as follows. One day in 1865, a master of an industrial enterprise told his director that he had previously worked at a plant where the looms (sewing machines) worked much better by means of a certain device, which was applied to tighten and relax the harnesses. The director then asked the master to obtain such a device. Later, said master managed to obtain the device, which was presented to him by a colleague and which was subsequently taken to the foundry to serve as a model. Later, a similar device was also obtained by another master of the factory. The director of the factory and the two masters were prosecuted: the first master was charged with theft, while the other was charged with complicity by proxy or by concealment, and all the three defendants were accused of a violation of a trade secret. The court dropped the charges, except from Art. 418; that is, a trade secret violation, which the court found to be clearly visible from the circumstances of the case. The counsel for the defendants stated two arguments: firstly, they argued that a manufacturing process belongs only to the inventor, and can be protected only within the framework of it being patented. Secondly, the manufacturing process needed to be a “real secret”, so that, argued the counsel, even the workers would know nothing of it, which in fact was not so, since all weavers knew the system and were acquainted with it.

The court did not agree with these statements. First, held the court, a trade secret may exist independently from the patent of an invention, and in fact, a patent would guarantee its disclosure after a certain time and inhibit it from being used by anyone other than the owner of the patent, but in these terms, a trade secret belongs to the enterprise which used it first. The patent, said the court, guarantees that all industrial invention, regardless of whether it is a secret or not, is kept for the owner, whereas the trade secret institute protects the manufacturer from the negligence of the worker as long as it remains a trade secret. A violation of a trade secret presupposes that the information disclosed *contains* a trade secret. The court held that a trade secret lies in the explicit and secret use of a certain instrument (i.e., device) not known to the community, not how it is manufactured, regardless of whether the workers know about it and of the complexity of its manufacture. Hence, the law which protects trade secrets protects said trade secret until it is explicitly used at a certain enterprise and is not known to others. Moreover, the court emphasized that the easier it is to make such a device and the more it is accessible to workers, the stronger the necessity of legal protection. The court concluded that there is a trade secret when an enterprise uses these devices exclusively; the devices were invented at the enterprise and were earlier unknown to the trade. Based upon such arguments, the court ruled that there was a violation of a trade secret (Trib. corr. du Mulhouse, 1865, p. 643).

The Correctional Court of Seine dealt with the issue of disclosing a trade secret to a foreign enterprise in its 1873 judgment. The complainant was the owner of a factory in Saint-Denis which was manufacturing dye products, and the defendants were his former employees: the first defendant was a chemist at the factory engaged in the manufacturing of Rosaline, whereas the second defendant was a brigadier at said factory. The plant

manufactured the colour *Violet de Paris*, which rival factories were unable to reproduce. In late 1870, the first defendant left the employment of the complainant and travelled to Basel, Switzerland, where he engaged in business with a local chemical manufacturer which soon produced an identical product to *Violet de Paris* (seemingly, the chemist disclosed the chemical formula required to produce the colour); the brigadier was suspected of having revealed the trade secret. Soon after, chemists from the complainant's factory managed to produce a new colour, calling it light green, and many precautionary measures were enacted so as to avert any leak of the manufacturing process. Before long, the enterprise where the first defendant was working reproduced the same colour (and according to later expertise, the manufacturing process was identical in both cases). How could this happen again?

The owner of the factory lodged a complaint against the two defendants, and the brigadier was liable for the transfer of orders and the control for the work – a peculiar situation given that he was a disciplinary supervisor who was not engaged with nor given any precise knowledge of the manufacturing processes. However, the search indicated that even if he was not supposed to have such knowledge, he definitely had an interest, since notebooks found at his home contained considerable information relating to manufacturing processes, especially concerning the production of violet and light-green colours. The investigation showed that the second defendant had taken products containing the colour either from the closed store or from a chemical laboratory, to which he had the key. The two defendants were known to work together and lived close to one another; after the first defendant had moved abroad, the defendants maintained frequent letter correspondence, and the second defendant tried to invite several employees from the complainant's factory to leave and to produce *Violet de Paris* abroad. Charges were filed against the two defendants, as well as the first defendant's employer at the foreign factory, where the brigadier was charged with divulging a trade secret abroad and for an illegitimate misappropriation of some of the products of the complainant's factory, and the two other defendants were charged with complicity.

In its judgment, the court outlined that despite the complainant having received two patents for the aforementioned colours, the means of application of the manufacturing processes could not be in the public domain: when the matter concerns the dyeing process, it is not enough to know all of the necessary ingredients and their nature – the combination and mixing of the colours and their handling and the skill applied to it in production are, as the court observed, “important parts of the success and remain without any description”. The manufacturing processes were upgraded after patenting, and hence the court deduced that patenting the colours did not deprive the complainant of the ability to maintain his trade secret. As the court reports continued, the investigation showed that the brigadier had repeatedly disclosed the trade secrets of the complainant's factory both to French and foreign citizens, and he had taken chemicals from the complainant's factory surreptitiously. Thus, the court ruled to condemn the brigadier to an 8-month imprisonment term and the first and third defendant to 6 months, ordering all of the defendants to repay a fine of 800 francs severally, as well as an additional fine to repay the damages for the civil party of the case (Trib. corr. de la Seine, 1873, pp. 181–186).

A judgment of the Paris Court of Appeals in 1908 considered the question of a violation of trade secrets not only by divulging trade secrets to other manufacturers or employees of these manufacturers, but also involving the wrongful use of information containing trade secrets for the defendant's own purposes. The facts were the following: the defendant, who had previously worked with the Bliss company in Brooklyn in 1902 as a designer and constructor, went to work in its French subsidiary at Saint-Ouen named *Société Bliss et Cie*, which was established in 1905, where he worked until early 1907; he then left to create his own business in France with a partner. While engaged in his own business, the defendant used hundreds of figures, drawings and special devices taken from the Bliss factory which were kept secret, never having been published elsewhere. Later, in 1907, a search was conducted at the defendant's enterprise, where 400 figures were seized and numerous figures and technical documents were found, including figures of manufacturing different stages of goods. All of these documents were considered to be trade secrets by the Correctional Court of Seine, which heard the case at first instance and ruled to condemn the defendant. The appellate court considered that the technical documentation given from Brooklyn to the French subsidiary, including trade secrets, should be considered its property, and that the intention of the defendant was trivial: he and his partner were both previous employees of Bliss, and intended to manufacture machines similar to those in the factory that they both used to work for, and the defendant managed to obtain the trade secrets for the purpose of the benefit of his own enterprise. Thus, the Paris Court of Appeals found the defendant to be guilty of violating Art. 418 of the Criminal Code by divulging

a trade secret to a French citizen (his partner) and condemned him to pay a 200-franc fine, as well as to repay damages to *Société Bliss et Cie* amounting to 3,000 francs (Cour d'Appel de Paris, 1908, pp. 322–325).

Conclusions

In summing up the material discussed above, it should be noted that the institute of protection of a trade secret is a relatively young institute in industrial law. This institute has similarities with the protection of patents, representing a certain protected manufacturing process which is unknown to other manufacturers and hence grants a certain advantage to its inventor over rival enterprises.

Deriving from a number of definitions in academic literature and case law, a trade secret should be understood as a means or process of manufacturing which is used at a certain factory or plant for producing specific goods and which is not known or used by other enterprises which specialize in a similar business. For the necessity of protecting the success of the manufacturing of goods, such means and processes are kept secret by their inventors, and all people who are engaged in the manufacturing process and are acquainted with this secret are bound to not disclose it elsewhere.

The legal regulation of protecting trade secrets in England has historically been based on common law, where the courts have imposed an injunction on wrongdoers to restrain them from the further use of the trade secrets they have learned – whether surreptitiously or during the course of employment at a certain enterprise. The courts have underlined that although there could be a number of legal grounds for bringing an action against a defendant (breach of contract, breach of faith and breach of trust and confidence), the outcome would be an injunction, accompanied by the repayment of damages in certain cases.

In French law, the roots of protecting trade secrets lie first in the use of specific merchant books and registers which traders have been obliged to maintain since the Royal Ordinance of 1673. This was then supplemented in the early 19th century when the Criminal Code of Napoleon was supplied with Art. 418, which prohibited any disclosure of trade secrets by factory employees, servants and directors, especially prohibiting divulging the trade secrets to foreign citizens. The impetus behind imposing this penal provision punishing the disclosure of trade secrets was the influence of changing societal relations and rules of competition in industry, and developing and protecting business and industry in France.

This article discussed the theory and practice of applying judicial mechanisms for protecting trade secrets, which included the comments accompanying a number of outstanding cases relating to the disclosure of trade secrets in English and French law. Both of these countries had already developed a considerable body of jurisprudence upon this subject in the 19th and early 20th centuries.

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