

To Professor Daniel Gervais
From: Ulla-Maija Mylly and Sharon K. Sandeen
Re: Proposal for presentation of paper at the 37th Annual Congress of ATRIP
Date: January 11, 2018

Title of paper: Trade secrets vs. freedom of expression and whistleblowing

Abstract:

The TRIPS Agreement provides a very general provision on trade secrets. The drafting history of TRIPS illuminates that this is due to the controversial nature of trade secret protection. The limits of protection have been difficult to draw, as there is no international consensus on the protectable subject matter. Accordingly, Article 39 of TRIPS leaves considerable discretion to Members to design their respective laws. Despite this general approach at the international level, both the US and the EU have adopted rather similar limitations to trade secret protection to secure public interest and freedom of expression. These exceptions are intended to safeguard fundamental societal interests, but their application to trade secret cases is not entirely clear.

In the EU's recently adopted Trade Secret Directive, the whistleblowing provision enables disclosures, which serve the public interest, including revealing illegal activities and misconduct. Moreover, the Directive's provision concerning freedom of speech safeguards media freedom and plurality in accordance with the EU Charter. Similar to the EU, the US has adopted a whistleblowing provision as part of the Defend Trade Secrets Act of 2016 (DTSA). The US Constitution protects freedom of expression, but there are important differences e.g. in the scope and horizontality of protection when compared to the EU. We will examine the probable operation of these related exceptions – whistleblowing and freedom of speech – in the context of trade secret law.

Attention will be paid to likely sources of diversification in EU and US interpretations, such as the scope of protected expression and the extent to and ways in which rights operate between private parties. As the EU Trade Secret Directive is still being implemented, we will also address the various approaches within selected EU Member States to these provisions and respective justifications thereof.