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Trade Secret and Consumer Protection in Nigeria

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Introduction

Trade secrets have become a major part of Intellectual Property, especially with the several revolutions in trade and commercial competition. Entities strive towards the protection of the details of their products in terms of the process of production and ingredients used. This rationale for the protection is to keep some essentials as secrets and prevent competitors from 'learning their tricks'. Trade secrets come in an endless array of types including; R & D information, software algorithms, inventions, designs, ingredients, devices, methods, formula, process, device, or any other business information kept confidential to maintain an advantage over competitors.

A trade secret (i) 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 (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. Renowned examples of trade secrets include *Col. Sander's* handwritten original recipe of 11 herbs and spices for *KFC* in 1940, *WD-40's* formula for rust-prevention solvent and degreaser for the aerospace industry since 1953, the *Google* search algorithm, *Lena Blackburn's* baseball rubbing mud, *Listerine*, *McDonald's* Big Mac Special Sauce and the 1886 Coca Cola recipe.¹

The legal issues resulting from trade secrets are multidimensional. These issues include; breach of consumers right, corporate espionage, trade secrets theft and criminal concealment, among others, for instance, in July 2020, the automobiles giant, *Tesla* sued *Rivian* in the Superior Court of California for deliberate theft of *Tesla's* trade secrets through active recruitment of former *Tesla* employees.²

This piece focuses on the conflict between consumers' protection rights and trade secret. There is a long existent seeming tussle between consumers' protection rights and trade secret. In Nigeria (like a host of other countries), there is no regulation that defines what may/may not be classified as trade secrets. This lack of regulation allows the (i) exploitation of trade secrets by producers to such extent that threatens the enjoyment of consumers' protection rights and (ii) multiplicity of action by consumers for products information which also threatens the continued optimal recognition or reverence for trade secret.

Legal Framework of Trade Secrets

Article 39 of TRIPS³ classified trade secret as undisclosed information that needs to be protected as long as such information: (i) is secret in the sense that it is not, as a body or

¹ WIPO, "In Confidence" – Putting In Place A Trade Secret Protection Program, https://www.wipo.int/edocs/mdocs/sme/en/wipo_smes_bwn_13/wipo_smes_bwn_13_7_greif.pdf accessed October 27, 2021.

² *Tesla, Inc. v. Rivian Automotive, Inc.* (20CV368472)

³ The Agreement on Trade-Related Aspects of Intellectual Property Rights 1995

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; (ii) has commercial value because it is secret; and (iii) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

According to the World Intellectual Property Organisation (WIPO), protecting Trade secret will help to: (a) maintain and promote standards of commercial ethics and fair dealing; (b) provide an incentive for businesses to innovate by safeguarding the substantial time and capital invested to develop competitively advantageous innovations, both technical and commercial, and especially those that are not patentable or do not merit the cost of patenting; and (c) prevent competitors from using these innovations without having to shoulder the burden of costs or risks faced in developing the innovations.

The major difference between trade secret and other IP rights like patent is its non-disclosure and lack of registration, timeline and periodic renewals. Trade secrets is the most concealed type of IP, yet vulnerable. Trade secret owners may claim that (a) the plaintiff's information qualifies for trade secret protection; (b) the conduct of the acquirer of the trade secret is wrongful (thus amounting to misappropriation) and (c) the plaintiff's conduct in protecting the trade has been reasonable under the circumstances.

Trade secret is difficult to regulate and protect because of its secrecy and non-disclosure. Trade secret is a critical asset that is delicate, not as much for of its use against unfair competition as the ensuing tension between it and consumers' rights and protection.

In Nigeria like some other Common Law countries, trade secrets are recognized and used but there is no legislation regulating them. In other jurisdictions there are specific legislations such as sthe Uganda Trade Secret Protection Act 2009, the United States of America's Uniform Trade Secrets Protection Act 1985, the Defend Trade Secrets Act 2016 and Article 39 of TRIPS. The implication of the lack of legislation on trade secrets in Nigeria is the absence of any delineated contour on what can be classified as trade secret and the absence of any official retaliation for trade secrets theft or breaches.

One major way through which entities have ensured the protection of their trade secrets in Nigeria is by entering non-compete and/or non-disclosure agreements with their employees and partners. Although, the protection that is offered by the agreements is slim compared the proper regime that legislation could have put in place. In *Koumoulis v. Leventis Motors Ltd*⁴ the Appellant who was in the employment of the Respondent and in the know of the Respondent's trade secret resigned and started working with the Respondent's competitor, Nigerian Technical Company Limited. After the Appellant left the Respondent, the Respondent found out that the business plan which constitutes their trade secret had been divulged and explored by, the Appellant's new employer, thereby leading to loss of business opportunities. The undertaking in the Appellant's agreement

⁴ (1973) LPELR-1710(SC)

with the Respondent provides that he will not for "a period of one year undertake to carry on either alone or in partnership nor be employed or interested directly or indirectly in any capacity whatever in the business of Merchants Engineers or any other business carried on by the Company within a radius of fifty miles from any Trading Station in West Africa" was held to be valid. Accordingly, the Appellant was liable to the damages imposed by the Court for a breach of the Noncompete Clause and disclosure of the trade secret.

Trade Secret v. Competition and Consumers Protection

This tension between trade secrets and consumers protection springs from the commercial need of trade secret to producers and the need for consumers to have a complete or sufficient knowledge of the ingredients and process of what they are consuming or using in other to be assured of their safety. This tension has surfaced in different cases over time, such as the (i) Covid'19 vaccine fuss⁵ when the few vaccine manufacturing companies refused to give clues on the vaccine making process or approval for the use of their patents, (ii) Coca cola situation and class actions of consumers claiming heavy damages for the allegedly misrepresenting their products to customers, and (iii) the Volkswagen emission scandal case.⁶

The deployment of trade secrets by producers to hide ingredients and information that consumers may consider germane may overreach the rights of consumers to protection and lead to payment of huge fines by the producers. Consumers have been resorting to courts on allegation of ingredients concealment and judging by the cases existent on the subject, trade secrets do not absorb producers of liabilities. A typical case is the class actions against Blue Buffalo Ltd, a pet food maker; the crux of case was the "concealment of truth/information about the ingredients in its products". See *Rachel D. Stone, et al. v. The Blue Buffalo Company Ltd.* (No. 14-cv-00520)

Producers have claimed strongly that the essence of trade secret is not to confuse consumers but to prevent competitors from aping. The strong claim is faulted on the ground that trade secrets mostly affect the consumers who use products and ultimately bears the dangers (that may be) caused by the concealed ingredients, and not the competitors who may be well equipped to unravel the content of a product in spite of concealment by trade secret.

In essence, the outrage is that the public is being denied a clear picture of the composition and safety of products. For instance: (i) in 2004, the National Environmental Trust tested 40 common consumer products and in more than half of them they found toxic substances not listed on the product label⁷ and (ii) In September 2015, the Environmental Protection Agency (EPA) found that many VolksWagen cars being sold in America had a

⁵ Henrique Zeferino de Menezes, The TRIPS waiver proposal: an urgent measure to expand access to the COVID-19 vaccines, <https://www.southcentre.int/wp-content/uploads/2021/03/RP-129.pdf> accessed October 28, 2021.

⁶ Volkswagen Emission Evasion, <https://ethicsunwrapped.utexas.edu/wp-content/uploads/2018/07/Volkswagen%E2%80%99s-Emissions-Evasion.pdf> accessed October 26, 2021

⁷ Product Labelling information, https://www.citizensinformation.ie/en/consumer/consumer_laws/product_labelling.html accessed October 28, 2021

"defeat device" - or software - in diesel engines that could detect when they were being tested, and the German car giant has since admitted cheating Carbon Dioxide emissions tests through their softwares, which been long unknown being trade secrets.⁸

The right of consumers to be protected and understand the details of products is paramount and has lingered since the popular 'negligence-ginger beer decision' in *Donoghue v Stevenson*⁹ and following Nigerian authorities such as *Fijabi Adebo Holdings Limited v. Nigeria Bottling Co. Plc.*¹⁰ Unless, legislation is made to properly define the regulatory regime for trade secret with clearly delineated contours it remains a lacuna in our IP law and the unending tussle between Trade Secret and Consumers Protection continues.

Recommendations and Conclusion

The need to protect and regulate Trade Secret in Nigeria is gaining traction daily, most especially with the rising tension in relation to it and the impacts of technological innovations on trade. The Court has at some point helped to preserve Trade Secret on one hand and consumer protection on the other, the fuss will be better salvaged by the enactment of specific IP laws on Trade secrets.

There is need for the contours of trade secret to be delineated. In essence there is a dire need for a clear legislation that stipulates what may be classed as trade secrets. This will allow (i) producers to leverage their business secret for commercial value and (ii) protection of consumers from undue concealment of information.

⁸ Volkswagen Emission Evasion, SUPRA.

⁹ (1932) UKHL 100.

¹⁰ (2017) All FWLR (Pt. 882) 1222



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