

# *Trade secret, a perpetual monopoly asset of the businesses*

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## **Abstract**

*Intellectual Property (IP) is the commercial application of imaginative thought to solving a technical or artistic challenge. It is not the product itself, but the special idea behind it, the way the idea is expressed, and the distinctive way it is named and described. A trade secret (which is a component of IP, and sometimes either equated with, or a subset of „confidential information“) is secret, non-public information concerning the commercial practices or proprietary knowledge of a business, public disclosure of which may sometimes be illegal.*

*Trade secrets (protection) management is seen as one of the most important issues in the strategic management of the business organisations. Under this general framework, it is important for us to understand the level of importance of the trade secrets and their management (as expressed by the activities pertaining to the management of the trade secrets), in Albanian businesses. Many companies in Albania see the trade secrets as important assets, so the conduction of a research with the focus on trade secrets, in some companies of this country, adds value to their management strategies.*

*The aim of this research is to investigate the level of importance of the trade secrets in business organizations in Albania. The methodology used for the research is unfolded with its own dimensions as: specification of the research subjects, tools used for the research, sampling, implementation plan, ethical issues and presentation of the research findings. The research is based on primary and secondary data collection.*

*The research is based on the testing of the main Hypothesis, H0, and some other Sub-Hypotheses, and the results of the analysis indicate that hypothesis H0: "Trade secrets are not important assets for the business organizations in Albania", is invalidated. Some important conclusions are given at the end of this paper.*

**Key words:** *Trade secret, Trade secret as an asset, Trade secrets (protection) management, Albanian business organization*

## **Introduction**

Intellectual property (IP) is the term that describes the ideas, inventions, technologies, artworks, music and literature, that are intangible when first created, but become valuable in tangible form as products. The word „property“ is used to describe this value, because the term applies only to inventions, works and names for which a person or group of persons claims ownership. Ownership is important because experience has shown that potential economic gain provides a powerful incentive to innovate.

“Invention is available to all peoples regardless of their economic condition, race or nationality“ (George Washington Carver). Carver invented and obtained information (trade secrets) and patents on crop-rotation methods for conserving nutrients in soil and discovered hundreds of new uses for crops such as the peanut which created new markets for farmers in the United States of America. His relevance today is greater than ever as we grapple with the increasing technological divide between rich and poor countries.

„It is not the style of clothes one wears, neither the kind of automobile one drives, nor the amount of money one has in the bank, that counts. These mean nothing. It is simply service that measures success.“

We must acknowledge at the outset that for most people, IP is either an unknown, misunderstood, or mysterious term. Technology and creative arts pervade modern society, yet few actually realize that their daily lives are surrounded by IP creations, from which legal rights of all sorts, including their own, arise. Building public awareness of the role of IP is key to fostering a broad understanding of, and respect for, it and the system that promotes and protects it.

In law, intellectual property (IP) is an umbrella term for various legal entitlements which attach to certain types of information, ideas, or other intangibles in their expressed form. The holder of this legal entitlement is generally entitled to exercise various exclusive rights in relation to the subject matter of the IP. The term

*intellectual property* reflects the idea that this subject matter is the product of the mind or the intellect, and that IP rights may be protected at law in the same way as any other form of property.

Intellectual property laws confer a bundle of exclusive rights in relation to the particular form or manner in which ideas or information are expressed or manifested, and not in relation to the ideas or concepts themselves. It is therefore important to note that the term „intellectual property“ denotes the specific legal rights which authors, inventors and other IP holders may hold and exercise, and not the intellectual work itself.

Copyright may subsist in creative and artistic works (e.g., books, movies, music, paintings, photographs, and software) and give a copyright holder the exclusive right to control reproduction or adaptation of such works for a certain period of time.

A patent may be granted for a new, useful, and non-obvious invention, and gives the patent holder an exclusive right to commercially exploit the invention for a certain period of time (typically 20 years from the filing date of a patent application).

A trademark is a distinctive sign which is used to distinguish the products or services of different businesses.

An industrial design right protects the form of appearance, style or design of an industrial object (e.g., spare parts, furniture, or textiles).

A trade secret (which is sometimes either equated with, or a subset of „confidential information“) is secret, non-public information concerning the commercial practices or proprietary knowledge of a business, public disclosure of which may sometimes be illegal.

## **Trade secret**

Trade secret law is the oldest form of intellectual property protection. For the developer of useful commercial information that the developer keeps secret, trade secret law affords a tort remedy against anyone who wrongfully obtains and uses a trade secret. The rights in the trade secret bundle include the right to exclude all users of a trade secret by someone with the requisite fault (Perritt, 2009).

A trade secret is a formula, practice, process, design, instrument, pattern, or compilation of information used by a business to obtain an advantage over competitors within the same industry or profession. In some jurisdictions, such secrets are referred to as „confidential information“, while in others they are a subset or example of confidential information.

The purpose of protecting trade secrets is to prevent “theft” of trade information by unfair or commercially unreasonable means. In essence, trade secret law is a form of private intellectual property law under which creators establish contractual limitations or build legal “fences” that afford protection from misappropriation (Menell, Lemley & Merges, 2019).

A company can protect its confidential information through non-compete non-disclosure contracts with its employees. The law of protection of confidential information effectively allows a perpetual monopoly in secret information - it does not expire as would a patent. The lack of formal protection, however, means that a third party is not prevented from independently duplicating and using the secret information once it is discovered.

The sanctioned protection of such type of information from public disclosure is viewed as an important legal aspect by which a society protects its overall economic vitality. A company typically invests time and energy (work) into generating information regarding refinements of process and operation. If competitors had access to the same knowledge, the first company’s ability to survive or maintain its market dominance would be impaired. Where trade secrets are recognized, the creator of property regarded as a „trade secret“ is *entitled* to regard such „special knowledge“ as intellectual property.

The precise language by which a trade secret is defined varies by jurisdiction (as do the particular types of information that are subject to trade secret protection). However, there are three factors that (though subject to differing interpretations) are common to all such definitions: a trade secret is some sort of information that:

- is not generally known to the relevant portion of the public;
- confers some sort of economic benefit on its holder (where this benefit must derive *specifically* from its not being generally known, not just from the value of the information itself);
- is the subject of reasonable efforts to maintain its secrecy.

Trade secrets are not protected by law in the same manner as trademarks or patents. Probably one of the most significant differences is that a trade secret is protected *without* disclosure of the secret.

### *Protecting trade secrets*

Trade secrets are by definition, *not* disclosed to the world at large. Instead, owners of trade secrets seek to keep their special knowledge out of the hands of competitors through a variety of civil and commercial means, not the least of which is the employment of non-disclosure agreements (NDA) and non-compete clauses. In

exchange for the opportunity to be employed by the holder of secrets, a worker will sign an agreement not to reveal his prospective employer's proprietary information. Often, he will also sign over rights to the ownership of his own intellectual production during the course (or as a condition) of his employment. Violation of the agreement generally carries stiff financial penalties, agreed to in writing by the worker and designed to operate as a disincentive to going back on his word. Similar agreements are often signed by representatives of other companies with whom the trade secret holder is engaged, e.g., in licensing talks or other business negotiations.

Trade secret protection *can*, in principle, extend indefinitely and in this respect offers an advantage over patent protection (which lasts only for a specifically delimited period, for example twenty years in the U.S.). (One company that has no patent for its formula and has been very effective in protecting it for many more years than a patent would have is Coca Cola.) However, the „down side“ of such protection is that it is comparatively easy to lose (for example, to reverse engineering, which a patent will withstand but a trade secret will not) and comes equipped with no *minimum* guaranteed period of years.

Historically, trade secrets have been with us after a fashion since early times in the form of keeping advanced military technology from one's enemies - and in more recent times, in keeping Industrial Revolution-era technology secret.

### *Discovering trade secrets*

Companies often try to discover one another's trade secrets through lawful methods of reverse engineering on one hand and less lawful methods of industrial espionage on the other. Acts of industrial espionage are generally illegal in their own right under the relevant governing laws, of course. The importance of that illegality to trade secret law is as follows: if a trade secret is acquired by improper means (a somewhat wider concept than „illegal means“ but inclusive of such means), the secret is generally deemed to have been *misappropriated*. Thus, if a trade secret has been acquired via industrial espionage, its acquirer will probably be subject to legal liability for acquiring it improperly. (The holder of the trade secret is nevertheless obliged to protect against such espionage to some degree in order to safeguard the secret. As noted above, under most trade secret regimes, a trade secret is not deemed to exist unless its purported holder takes reasonable steps to maintain its secrecy.)

### *Legal development to protecting trade secrets*

A relatively recent development in the USA is the adoption of the UTSA, the *Uniform Trade Secrets Act*, which has been adopted by approximately 40 states as

the basis for trade secret law. It is believed that a measure of uniformity among different states' laws will strengthen business' claims on their trade secrets.

Another significant development in U.S. law is the Economic Espionage Act of 1996, which makes the theft or misappropriation of a trade secret a federal crime. This law contains two provisions criminalizing two sorts of activity. The first, 18 U.S.C. § 1831(a), criminalizes the theft of trade secrets to benefit foreign powers; the second, 18 U.S.C. § 1832, criminalizes their theft for commercial or economic purposes. (The statutory penalties are different for the two offenses.)

In Commonwealth common law jurisdictions, confidentiality and trade secrets are regarded as an equitable right rather than a property right (with the exception of Hong Kong where a judgment of the High Court indicates that confidential information may be a property right). The English Court of Appeal in the case of *Saltman Engineering Co Ltd v. Campbell Engineering Ltd*, (1948) held that the action for breach of confidence is based on a principle of preserving „good faith“.

The „quality of confidence“ highlights that trade secrets are a legal concept. With sufficient effort or through illegal acts (such as break and enter), competitors can usually obtain trade secrets. However, so long as the owner of the trade secret can prove that reasonable efforts have been made to keep the information confidential, the information remains a trade secret and generally remains legally protected as such. Conversely, trade secret owners who cannot evidence reasonable efforts at protecting confidential information, risk losing the trade secret, even if the information is obtained by competitors illegally. It is for this reason that trade secret owners shred documents and do not simply recycle them. Presumably an industrious competitor could piece together the shredded documents again. Legally the trade secret remains a trade secret because shredding the document is considered to have kept the quality of confidence of the information.

## **Methodology of the research**

Trade secrets and the rights they grant, are seen as one of the most important issues in the strategic management of the business organizations. Under this general framework, it is important for us to understand the level of importance of the trade secrets in business organizations in Albania.

*The aim of this research is: to investigate the level of importance of the trade secrets in business organizations in Albania, as well as to find out if relationships between importance of the trade secrets and other specified managerial issues related to the trade secrets, are present in such organizations.*

The objectives of the research are:

- To indicate the importance of the trade secrets as assets for the business organizations
- To indicate the level of management of the trade secrets within companies
- To indicate any presence of relationship between the “importance of the trade secrets” and “other specified variables” like: change in the attention of company management (to protect trade secrets), existence of the policy of the company to manage trade secrets, development of the strategy of the company to manage trade secrets, creation of the formal structure of the company to manage trade secrets.

The research is based on the testing of the main Hypothesis, expressed as:

*H0*: Trade secrets are not important assets for the business organizations in Albania.

*Ha*: Trade secrets are important assets for the business organizations in Albania.

.....as well as, on the testing of four other Sub-Hypotheses, trying to find out if relationships, between “trade secrets as important assets for the business” and “some other specified variables (activities pertaining to the management of the trade secrets)”, are present in such organizations.

*H1*: There is a positive correlation between the “trade secrets as important assets for the business” and “change in attention of company management”.

*H2*: There is a positive correlation between “trade secrets as important assets for the business” and “existence of policy to manage trade secrets”.

*H3*: There is a positive correlation between “trade secrets as important assets for the business” and “development of strategy to manage trade secrets”.

*H4*: There is a positive correlation between “trade secrets as important assets for the business” and “creation of formal structure to manage trade secrets”.

The methodology used for the research has its own dimensions like: specification of the research subjects, tools used for the research, sampling, implementation plan, ethical issues and presentation of the research findings. The research is based on primary and secondary data collection.

### *Specification of the research subjects*

Many companies in Albania see the trade secrets as important assets, so the conduction of such a research adds value to their management strategies. So, after defining the hypotheses, we started out the work about specification of the subjects that could be compatible to the purpose of this research. After distinguishing a number of companies of interest (businesses in the Tirana region of Albania), we started to collect the required information from the managers of these companies.

The data for the study were collected from business organizations with activity in areas like: manufacturing, service, retailing, etc. The respondents were senior managers. This category was considered to be the best to target, because these individuals have the tendency to be closely associated with the innovative processes, trade secrets' practice, and their respective managerial decision making.

### *Tools used for the research*

In order to collect the necessary information, analyze the data, and draw conclusions, a questionnaire composed of some basic questions were developed and delivered. The questionnaire was prepared to collect important data on different aspects of trade secret management practice. The analyses of the collected information would give us the necessary level of understanding about the issue in discussion. Data are analysed using SPSS program.

### *Sampling*

Our original sampling consisted of 46 managers, in 46 companies, in the Tirana region of Albania. 46 questionnaires were delivered, and the questionnaires' return rate was 86.95%, or 40 collected questionnaires. The collected data could be considered as being representative.

### *Implementation plan*

The way we were organized helped us in reducing the time and costs required to perform the interviews. Data were collected during 2019, comprising a period of five years (last five years). In order to prepare the findings and draw conclusions, collected data were processed. There were not present any difficulties in distributing and collecting the questionnaires.

### *Ethical issues*

The information collected from the respondents was very important to analyze and interpret the findings. The names of the respondents (companies' managers) due to ethical obligations were not disclosed in this paper.



## Presentation of the research findings

In this section research findings are presented.

### *Trade secrets as important assets (Univariate analysis)*

In order to test Hypothesis 0, Descriptive analysis is used.

In regard with the level of importance of the trade secrets as assets of the business, the results of the analysis are as following:

To the question “Are you aware of the concept of trade secret?“, 100% of respondents answered “yes“, (0% of respondents answered “no“, 0% of respondents answered “do not know“), clearly indicating that all companies are aware of the concept of trade secret.

To the question “Do you think that the trade secrets are important assets for your business?“, 90% of respondents answered “yes“, 5% of respondents answered “no“, and only 5% of respondents answered “do not know“, indicating that most of the companies are aware of the importance of their trade secrets as business assets. However, there are companies (managers) thinking that their trade secrets are not important.

To the question “Did the attention of company management (in regard with trade secrets mangement), change over last five years?“, 75% of respondents answered “yes“, 15% of respondents answered “no“, 10% of respondents answered “do not know“, indicating that in most companies management is continuously being focused on trade secrets mangement.

To the question “Are there any policies of your company (management) to manage its trade secrets, over the last five years?“, 40% of respondents answered “yes“, 50% of respondents answered “no“, 10% of respondents answered “do not know“, indicating that most of the companies do not own any policies to manage their trade secrets.

To the question “Did your company (management) develop any strategies to manage its trade secrets, over the last five years?“, 42.5% of respondents answered “yes“, 47.5% of respondents answered “no“, 10% of respondents answered “do not know“, indicating that in many companies trade secrets is becoming part of their business strategies.

To the question “Did your company (management) create any formal structures to manage (that is, to identify, to protect, to promote or to comercialize) its trade secrets, over the last five years?“, 47.5% of respondents answered “yes“, 50% of respondents answered “no“, 2.5% of respondents answered “do not know“, indicating that a few companies own formal structures envolved in the mangement of their trade secrets.

Examining the answers of the questions, it is clear that the weight of the percentages indicated by the respondents, is on the affirmative value of the evaluation, clearly showing the importance of the trade secret, and the importance of the activities pertaining to its management.

By using Arithmetic Mean, Standard Deviation and Variation Coefficient (CV) (as a standardized measure of dispersion of the above answers' frequency distribution, expressed as a percentage, and defined as the ratio of the standard deviation  $\{\displaystyle \sigma\}$  to the mean) of the results above, based on a scale of three values, "positive (yes)", "negative (no)" and "indifferent (do not know)", (indicating the relativity of answers above), we see that the lowest value of the CV corresponds to the scale "positive", with 65.8% of the business organizations. The results of the analysis above clearly indicate that hypothesis *H0*: Trade secrets are not important assets for the business organizations in Albania, is invalidated, that is, alternative hypothesis *Ha*: Trade secrets are important assets for the business organizations in Albania, is validated.

### *Relationship between trade secrets as important assets and other variables (Bivariate analysis)*

In order to test Hypothesis 1-5, first the Crosstabulations between the variables were computed in order to quantitatively analyze the relationship between variables, and then Pearson's chi-squared test was used in order to test the independence between variables. Correlation analyses was used to attempt rejection of the other sub-hypotheses.

**TABLE: 1.** Variables to be crossed.

No	Variable 1	Variable 2
H1	trade secrets as important assets for the business	change in attention of company management
H2	trade secrets as important assets for the business	existence of policy to manage trade secrets
H3	trade secrets as important assets for the business	development of strategy to manage trade secrets
H4	trade secrets as important assets for the business	creation of formal structure to manage trade secrets

For the crosstabulation "Do you think that the trade secrets are important assets for your business?", and "Did the attention of company management (in regard with trade secrets' management), change over last five years?", values of the table below show that the "Significance of the chi square" value is greater than (0,375 > 0.05) "Accepted error" value, indicating independence between the variables. Based on the Table 6. Correlations, values show that "Significance" value is 0.802, indicating the existence of a statistically important relationship, and the

“Pearson correlation“ value is 0.415, indicating that there is a medium, positive, linear correlation between the variables. Hence hypothesis *H1*: There is a positive correlation between “level of trade secrets as important assets for the business“ and “change in attention of company management“, is validated. That is, since trade secrets are important assets for the business, it has caused a change in the attention the company management pays on it.

**TABLE: 2.** Chi-Square test for H1.

Chi-Square Tests			
	Value	df	Asymp. Sig. (2-sided)
Pearson Chi-Square	4,333	4	,375
Likelihood Ratio	4,511	4	,341
Linear-by-Linear Association	,060	1	,807
N of Valid Cases	40		

For the crosstabulation “Do you think that the trade secrets are important assets for the business?“, and “Are there any policies of your company (management) to manage its trade secrets, over the last five years?“, values of the table below show that the “Significance of the chi square“ value is greater than (0,114 > 0.05) “Accepted error“ value, indicating independence between the variables. Based on the Table 6. Correlations, values show that “Significance“ value is 0.125, indicating the existence of a statistically important relationship, and the “Pearson correlation“ value is 0.353, indicating that there is a medium, positive, linear correlation between the variables. Hence hypothesis *H2*: There is a positive correlation between “level of trade secrets as important assets for the business“ and “existence of policy to manage trade secrets“, is validated. That is, since trade secrets are important assets for the business, it has required the existence of a policy to manage them, in the company.

**TABLE: 3.** Chi-Square test for H2.

Chi-Square Tests			
	Value	df	Asymp. Sig. (2-sided)
Pearson Chi-Square	4,058	2	,114
Likelihood Ratio	5,580	2	,061
Linear-by-Linear Association	2,391	1	,122
N of Valid Cases	40		

For the crosstabulation “Do you think that the trade secrets are important assets for the business?“, and “Did your company (management) develop any strategies to manage its trade secrets, over the last five years?“, values of the table below show that the “Significance of the chi square“ value is greater than (0,526 > 0.05) “Accepted

error“ value, indicating independence between the variables. Based on the Table 6. Correlations, values show that “Significance“ value is 0.526, indicating the existence of a statistically important relationship, and the “Pearson correlation“ value is 0.438, indicating that there is a medium, positive, linear correlation between the variables. Hence hypothesis H3: There is a positive correlation between “level of trade secrets as important assets for the business“ and “development of strategy to manage trade secrets“, is validated. That is, since trade secrets are important assets for the business, it has required the development of a strategy to manage it, in the company.

**TABLE: 4.** Chi-Square test for H3.

Chi-Square Tests			
	Value	df	Asymp. Sig. (2-sided)
Pearson Chi-Square	1,376	2	,526
Likelihood Ratio	1,760	2	,415
Linear-by-Linear Association	,477	1	,490
N of Valid Cases	40		

For the crosstabulation “Do you think that the trade secrets are important assets for the business?“, and “Did your company (management) create any formal structures to manage (that is, to identify, to protect, to promote or to comercialize) its trade secrets, over the last five years?“, values of the table below show that the “Significance of the chi square“ value is greater than  $(0,289 > 0.05)$  “Accepted error“ value, indicating independence between the variables. Based on the Table 6. Correlations, values show that “Significance“ value is 0.193, indicating the existence of a statistically important relationship, and the “Pearson correlation“ value is 0.276, indicating that there is a small, positive, linear correlation between the variables. Hence hypothesis H4: There is a positive correlation between “level of trade secrets as important assets for the business“ and “creation of formal structure to manage trade secrets“, is validated. That is, since trade secrets are important assets for the business, it has required the creation of a formal structure to manage it, in the company.

**TABLE: 5.** Chi-Square test for H4.

Chi-Square Tests			
	Value	df	Asymp. Sig. (2-sided)
Pearson Chi-Square	2,568	2	,289
Likelihood Ratio	3,683	2	,159
Linear-by-Linear Association	2,020	1	,155
N of Valid Cases	40		

Correlations between the variables are shown in the table below.

**TABLE: 6.** Correlations.

		change in attention of company management	existence of policy to manage trade secret	development of strategy to manage trade secret	creation of formal structure to manage trade secret
Trade secret as an important asset for the business	Pearson Correlation	,415	,353	,438	,276
	Sig. (2-tailed)	,802	,125	,526	,193

Some important conclusions are given below.

## Conclusions

Many companies in Albania are aware of the concept of trade secrets and they know how to protect their trade secrets.

Most companies see their trade secrets as very important for their businesses and in these companies management is continuously being focused on trade secrets and trade secrets' mangement.

Despite tha fact that many companies see their trade secrets as very important, many of them do not own any policies to manage their trade secrets.

Despite the fact that in many companies trade secret is becoming part of their business strategies, some of them own or created formal structures envolved in the mangement of their trade secrets.

As companies in Albania recognize the importance of theit trade secrets they strongly protect their trade secrets.

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