UNC SCHOOL OF LAW

NORTH CAROLINA JOURNAL OF LAW & TECHNOLOGY

Volume 21 | Issue 3 Article 2

3-1-2020

Trade Secrets and the Right to Information: A Comparative Analysis of E.U. and U.S. Approaches to Freedom of Expression and Whistleblowing

Sharon K. Sandeen

Ulla-Maija Mylly

NORTH CAROLINA JOURNAL OF LAW & TECHNOLOGY
VOLUME 21, ISSUE 3: MARCH 2020

TRADE SECRETS AND THE RIGHT TO INFORMATION: A COMPARATIVE ANALYSIS OF E.U. AND U.S. APPROACHES TO FREEDOM OF EXPRESSION AND WHISTLEBLOWING

Sharon K. Sandeen [*] ***and Ulla-Maija Mylly*** [+]

In this so-called "information age," when numerous companies are collecting and creating more and more data and information, it is important to consider how the interests of these companies can (and should) be reconciled with the public's interests in information, or what the Universal Declaration of Human Rights labels the "right to information." Having expended money to create their stores of information, these companies often claim the need to protect it from all "unauthorized" uses, but our laws have never gone so far. To the contrary, information is not protected unless the law says it is, and when it is protected the scope of protection is usually limited. Thus, there is an information dichotomy that courts should consider; on one hand various laws seek to protect certain types of information, while other laws and legal principles are designed to promote the expression and diffusion of information.

Sometimes the information dichotomy is reflected in the laws themselves which often limit the scope of protectable information and explicitly allow certain uses of information. Other times, or in addition, the dichotomy is reflected in the application of ancillary principles of law which, in effect, serve as additional limitations on

[*] Professor of Law and Director of the IP Institute at Mitchell Hamline School of Law; Fulbright-Hanken Distinguished Chair in Business and Economics 2019–2020. Professor Sandeen is grateful for the research support provided to her by the Fulbright U.S. Scholar Program, Fulbright-Finland, and Hanken School of Economics which enabled her to complete this paper and for the excellent research assistance of Lukas Bellflower, Elizabeth Jacobsen, Kyle Staunton, and Samantha Zuehlke.

[+] LL.D., Senior Research Fellow, University of Turku, Faculty of Law and Senior Project Researcher, Hanken School of Economics. This article has been written in the framework of the Constitutional Hedges of Intellectual Property, a four-year research project funded by the Academy of Finland.

the scope of protection. This article examines the information dichotomy of trade secret law in the United States and the European Union, focusing on two ancillary principles of law: freedom of expression and whistleblowing. The central premise of the article is that the public policy favoring information diffusion is the rule and trade secret protection is an exception. Seen through this prism, it is important for courts to consider the public's interest in free expression and whistleblowing in all trade secret cases.

I. INTRODUCTION 3
II. THE LIMITATIONS BUILT INTO U.S. AND E.U. TRADE SECRET LAW 6
III. THE INTERNATIONAL DEVELOPMENT OF RIGHT TO INFORMATION AND ITS OPERATION IN THE U.S. AND E.U. ..9
A. The Right to Information in the E.U. 12
B. The Right to Information in the U.S. 14
C. The Need to Balance Fundamental Rights Against Trade Secret Protection 19
IV. FREEDOM OF EXPRESSION AND WHISTLEBLOWING PRINCIPLES IN THE E.U. AND U.S. 21
A. Freedom of Expression and Media Under the ECHR and the E.U. Charter 21
B. Freedom of Expression and Press Under the First Amendment to the U.S. Constitution 33
V. FREEDOM OF EXPRESSION AND WHISTLEBLOWING AS 'EXCEPTIONS' FOR TRADE SECRETS IN THE E.U. AND THE U.S. 43
A. How E.U. Trade Secret Directive Addresses These 'Exceptions' 43
B. Specific Protection for Whistleblowers in the E.U. 48
C. How the U.S. has Reconciled Freedom of Expression and Trade Secret Protection 53
E. Whistleblowing as Specific Exceptions for Trade Secrets in the U.S. 56
VI. CONCLUSION 59

I. INTRODUCTION

There is an information dichotomy that exists in law, particularly with respect to trade secret laws, including the European Union's (E.U.) *directive on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure* (the "Trade Secret Directive").[1] The dichotomy is between: (1) the strong public policy in the United States (U.S.), the E.U., and elsewhere that favors and encourages the creation and dissemination of information and knowledge; and (2) laws, such as the Trade Secret Directive, that enable individuals and businesses to protect certain categories of information from acquisition, use, or disclosure by others. As with intellectual property (IP) laws more generally, the theory underlying trade secret protection is that society gets something that is of greater benefit than the advantages that flow from information diffusion and free competition. In the case of trade secrets, this includes the prevention of unfair competition and additional incentives for invention and creation over and above what is provided by patent and copyright laws.

Much has been written about trade secret law and policy from the protection side of the information dichotomy, with those who favor strong trade secret protection touting the economic benefits that they believe follow from the protection of trade secrets. Much less has been written about the information diffusion side of the dichotomy,[2] particularly as it relates to the human right (and need)

---

[1] Directive 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure, 2016 O.J. (L 157) 1 [hereinafter "Trade Secret Directive"].

[2] Previous works that have explored the tension between trade secret law and the U.S. First Amendment include: Pamela Samuelson, *Principles for Resolving Conflicts Between Trade Secrets and the First Amendment*, 58 HASTINGS L.J. 777 (2007) and Adam W. Johnson, *Injunctive Relief in the Internet Age: The Battle Between Free Speech and Trade Secrets,* 54 FED. COMM. L.J. 517 (2002), which heavily relied upon and cited Ryan Lambrecht, *Trade Secrets and the Internet: What Remedies Exist for Disclosure in the Information Age?*, 18 REV. LITIG. 317 (1999). For an examination of freedom of expression issues with respect to other types of information law, see, e.g, Tun-Jen Chiang, *Patents and Free Speech*, 107 GEO. L.J. 309, 311 (2019); Dan L. Burk, *Patents and the First*

to "seek, receive and impart information."[3] Yet information law principles in both the U.S. and E.U. are replete with statements of the critical role that information diffusion plays in the advancement of important social values, including democracy, innovation, and creativity. With respect to innovation, Justice Sandra Day O'Connor explained that "[t]he efficient operation of the [U.S.] federal patent system depends upon substantially free trade in publicly known, unpatented design and utilitarian conceptions."[4]

Trade secret law is not insensitive to information diffusion concerns; both the U.S. and the E.U. have adopted rather similar limitations to trade secret protection that are designed to strike a balance between information protection and information diffusion. Additionally, in the Trade Secret Directive, the whistleblowing provision enables disclosures[5] that serve the public interest, including revealing illegal activities and misconduct.[6] Moreover, the Directive's provision concerning freedom of speech safeguards

---

Amendment, 96 WASH. U. L. REV. 197 (2018); Lisa P. Ramsey, *Increasing First Amendment Scrutiny of Trademark Law*, 61 SMU L. REV. 381 (2008); Jacqueline Lipton, *Information Property: Rights and Responsibilities*, 56 FLA. L. REV. 135, 138 (2004); Eric B. Easton, *Public Importance: Balancing Proprietary Interests and the Right to Know*, 21 CARDOZO ARTS & ENT. L.J. 139 (2003); Yochai Benkler, *Free as Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999); Mark A. Lemley & Eugene Volkh, *Freedom of Speech and Injunction in Intellectual Property Cases*, 48 DUKE L.J. 147 (1998).

[3] *See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) ("Everyone has the right to freedom of opinion and expression; this right includes the freedom to hold opinions without interference and *to seek, receive and impart information* and ideas through any media and regardless of frontiers.") (emphasis added).

[4] Bonito Boats v. Thunder Craft Boats, 489 U.S. 141, 156 (1989).

[5] A word about the use of the word "disclosure" when talking about trade secrets: The word "disclosure" in the trade secret context can have multiple meanings and effects, one of which is the act of making information known in a way that results in the loss of trade secrecy. Another is a synonym for sharing information, which does not necessarily result in the loss of trade secrecy. Unless otherwise indicated, we use the word "disclosure" throughout this article to mean the act of sharing information without making any claim as to the legal effect of such disclosure.

[6] Trade Secret Directive, *supra* note 1, at Art. 5 (b).

media freedom and plurality in accordance with the E.U. Charter of Fundamental Rights (Charter).[7] Quite similarly to the E.U., the U.S. has adopted a whistleblowing provision as part of the Defend Trade Secret Act of 2016 (DTSA) which, together with the U.S. Constitution, protects freedom of expression with impacts on trade secret protection in some contexts. However, what is missing from both U.S. law as expressed in the DTSA (and its state-analogue the Uniform Trade Secrets Act (UTSA)) and E.U. law as expressed in the Trade Secret Directive is a clear statement of the purposes behind such limitations and exceptions and an explanation of how they are to be applied. Absent legislative direction, these are matters for courts to consider.

The main objective of this article is to explore how the freedom of expression and whistleblower provisions of E.U. and U.S. law should be applied to further the right to information in the trade secret context, demonstrating the similarities and differences in E.U. and U.S. approaches in the process. It begins in Part II with a brief discussion of trade secret law and how E.U. and U.S. trade secret doctrine, when properly applied, promote information diffusion and reduce potential conflicts between the desire to protect trade secrets and the public's interest in information. Next, Part III explains the right to information as expressed in the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the legal principles of the E.U. and U.S., including the values and interests that underlie such right.

Finally, Parts IV and V get to the heart of the analysis by examining the meaning and application of the right to information in two contexts that are addressed in both U.S. and E.U. trade secret law: freedom of expression and whistleblowing, respectively. Among other things, it explains how conflicts

[7] *See id*. Art. 5 (a). The Charter belongs to the E.U.'s primary law having the same legal value as the E.U. Treaties. However, the Charter does not extend the competences of the European Union. *See* Consolidated Version of the Treaty on European Union, 2012 O.J. (C 326) 13. For case law on the applicability of the Charter to E.U. Member State laws and measures, see in particular Case C-617/10, Åklagaren v. Hans Åkerberg Fransson, 2013 EUR-Lex CELEX LEXIS 62010CJ0617 (Feb. 26, 2013).

between trade secret protection and the right to information can arise and identifies circumstances that should favor information diffusion over information lock-down; an inquiry that is becoming of greater importance as more and more information is digitized and put behind paywalls. The article concludes by summarizing the similarities and differences between E.U. and U.S. approaches to freedom of expression and whistleblowing, issues that are of great importance for democratic societies.

In the E.U., the Trade Secret Directive's national implementation period ended in summer 2018, whilst the Whistleblower Directive's implementation period has not yet ended. Consequently, there is no case law on the interpretation of these specific provisions. Similarly, while the DTSA went into effect immediately when it was signed by President Obama on May 11, 2016, there is no significant post-DTSA case law on the topic of this article. Nonetheless, this article proposes how these provisions should be interpreted when taking into account the relevant human rights doctrine and explains how and why such an interpretation would differ from the interpretation that the Court of Justice of the European Union (CJEU) has favored under the E.U.'s copyright regime. The discussion that follows not only covers the explicit rules under the trade secret laws, it also provides an outline of how these principles have been developed under applicable constitutional law doctrine.

II. THE LIMITATIONS BUILT INTO U.S. AND E.U. TRADE SECRET LAW

While trade secret principles have developed and evolved over decades,[8] trade secret law in the E.U. and the U.S. is now primarily reflected in two sets of largely uniform and harmonized laws. In the U.S., this law is set forth in both the UTSA,[9] which has now

[8] *See* Sharon K. Sandeen, *The Evolution of Trade Secret Law and Why Courts Commit Error When They Do Not Follow the Uniform Trade Secrets Act*, 33 HAMLINE L. REV. 493 (2010).

[9] Uniform Trade Secrets Act, 14 U.L.A. § 539–40 (1980) and 14 U.L.A. § 433 (1985) [hereinafter the "UTSA"].

been adopted by 48 states, and the DTSA,[10] which created a federal civil cause of action for trade secret misappropriation that is modeled after the UTSA. In the E.U., the governing law is the Trade Secret Directive, which has been adopted by and is now reflected in the written laws of most E.U.-member states.[11] As with intellectual property laws, the theory underlying trade secret protection is that society gets something that is of greater benefit than the advantages that flow from information diffusion and free competition. In the case of trade secrets, this includes the prevention of unfair competition and additional incentives for invention and creation over and above what is provided by patent and copyright laws.

Importantly, for information diffusion, freedom of expression, and whistleblowing purposes, none of the cited laws protect all business information, or even all confidential information. Rather, U.S. and E.U. trade secret law only protect information that meets the three requirements of trade secrecy; namely, information that (1) is not generally known or readily ascertainable (accessible); (2) derives economic (commercial) value from not being known to others; and (3) has been the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[12] Thus, no trade secret misappropriation claim can prevail for information that is already available to the public at the time of the alleged misappropriation and few, if any, conflicts with free expression should arise.

For information that does not meet the definition of a trade secret, the overarching principle is that the information should be free to acquire, disclose, and use by the public, the press, and whistleblowers alike, provided that some other law or legal

---

[10] Pub.L. 114–53, 130 Stat. 376 (enacted May 11, 2016, codified at 18 U.S.C. § 1836, et seq.) [hereinafter the "DTSA"].

[11] Although all E.U.-member states were required to conform their laws to the Trade Secret Directive by the transposition date of June, 9, 2018, according to Eur-Lex 32016L0943, as of the date of the publication of this article, some E.U.-member state have yet to fully comply with the Directive.

[12] *See* UTSA, *supra* note 9, at § 1(4); DTSA, *supra* note 10, at 18 U.S.C. § 1839(3); Trade Secret Directive, *supra* note 1, at Art. 2(1).

principle does not constrict such usage.[13] Moreover, even where some theory of protection for information (including trade secrecy) exists, other explicit and ancillary limitations, including those that are the focus of the remainder of this article, often apply to require that the desire to protect information be balanced against other interests. For instance, in both the E.U. and U.S., preliminary and permanent injunctive relief ordinarily will not be granted without consideration of the public interest[14] which is considered in conjunction with a request for a protective order. [15]

Although all of the limitations and exceptions to trade secret protection are also designed to preserve free competition and employee mobility, because we believe the rights of listeners and receivers of information are also at stake in many trade secret cases, we contend that more consideration should be given to whether a third party (including government regulators and the public) has an interest in the putative trade secrets. By paying more attention to the human right to information, the trade secret misappropriation analysis should not assume that the protection of information is a positive without: (1) first making certain that the information qualifies as trade secrets; and (2) carefully considering if the protection of those trade secrets in specific factual contexts will unduly interfere with the public's and the press' fundamental right to information.

---

[13] In both the E.U. and the U.S., there are laws, in addition to the trade secret laws, that may prohibit the use or disclosure of specified information in certain settings. For example, the General Data Protection Regulation (GDPR) in the E.U. and the federal Trade Secrets Act, 18 U.S.C. § 1905, in the U.S., but often a need to balance information protection against the public interest arises in those settings as well.

[14] In the U.S., see Fed. R. Civ. P. 65. In the E.U., see Trade Secret Directive, *supra* note 1, 2. *See also,* Elizabeth A. Rowe, *Trade Secret Litigation and Free Speech: Is It Time to Restrain the Plaintiffs*, 50 B.C. L. REV. 1425, 1425 (2009) (detailing how and when First Amendment issues typically arise in trade secret litigation in the U.S. and the standards for the grant of preliminary injunctions).

[15] *See* Fed. R. Civ. P. 26(c); Trade Secret Directive, *supra* note 1, at Art. 9 (setting rules for Preservation of confidentiality of trade secrets in the course of legal proceedings).

III. THE INTERNATIONAL DEVELOPMENT OF RIGHT TO INFORMATION AND ITS OPERATION IN THE U.S. AND E.U.

An ancillary principle of law that exists and that we contend must be considered in trade secret cases is the human right to information that is reflected in the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the legal principles of the E.U. and U.S., including the values and interests that underlie such right. Obviously, this right is strongest when the subject information is already available to the public because to restrict access to such information risks removing it from the public sphere. But we also believe that the human right to information can be implicated in cases involving legitimate trade secrets and other confidential information. The reason for our concern is simple: humans need information to be productive, innovative, and engaged members of their communities and the more information that is effectively locked-down, the less the public will be informed.

Humans have a long history of seeking, receiving, and imparting information, hampered only by the availability of information, the means to record and convey it, and laws and norms that restrict its dissemination. While by no means a linear progression, the history of humankind includes numerous technological advances that have improved its ability to create, collect, and share information, thereby increasing the store of information and improving and expanding the availability and distribution of information. Law and government institutions have played central roles in this history, sometimes limiting the creation and distribution of information in unfortunate and troubling ways, but more often by encouraging and promoting the creation and distribution of information. The public's interest in the dissemination of information was particularly acute in the aftermath of WWII when "the practices of European fascism fueled the reaction against library censorship"[16] and a lack of government transparency.[17] Thus, it is not surprising that when the

[16] United States v. Am. Library Ass'n, 539 U.S. 194, 238 (2003) (citing M. HARRIS, HISTORY OF LIBRARIES IN THE WESTERN WORLD 248 (4th ed. 1995)).

[17] *Infra* note 22.

delegates gathered after World War II to draft the UDHR, provisions were included that addressed the human need for information and learning.[18]

Unfortunately, while the principles of freedom of speech and press (collectively, freedom of expression) are well known, the right to information is not;[19] but you cannot have freedom of expression without some information to impart. As one commentator explained:

> [The] relationship [between freedom of expression and information] is contiguous and complicated; logical and paradoxical. It is characterized by mutual dependencies . . . . [I]nformation can be seen as antecedent to expression. However, expression can also produce and disseminate information, which suggests a more complex and symbiotic relationship.[20]

It follows then that the same theoretical justifications for the protection of freedom of expression apply to the right to information. These rationales include: "self-fulfillment/individual autonomy; the advancement of knowledge/discovery of truth/avoidance of error; effective participation in democratic society; self-government; distrust of government/slippery slope arguments."[21] Other justifications, particularly with respect to information held by governments, include: the instrumental justification noted above (namely, that free expression cannot occur without information); a proprietary justification that

---

[18] Universal Declaration of Human Rights, Art. 19*; See also Communications Concerning Freedom of Information and Freedom of the Press* (United States Delegation to the General Assembly of the United Nations) (April 23, 1946), http://www.un.org/en/ga/search/view_doc.asp?symbol=E/HR/2 [https://perma.cc/XAW4-5Y6P].

[19] *See* TARLACH MCGONAGLE, THE DEVELOPMENT OF FREEDOM OF EXPRESSION AND INFORMATION WITHIN THE UN: LEAPS AND BOUNDS OR FITS AND STARTS?, IN THE UNITED NATIONS AND FREEDOM OF EXPRESSION AND INFORMATION (McGonagle & Donders eds., Cambridge Univ. Press 2015) (discussing the right to information under international law); Easton, *supra* note 2, at 139 (discussing the "right to know" under U.S. law and the applicable jurisprudence of the U.S. Supreme Court).

[20] McGonagle, *supra* note 19, at 5.

[21] *Id.*; *see also*, Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939, 940 (2009) (setting forth the traditional justifications for freedom of expression).

government information belongs to the public; and a government oversight justification.[22]

In the pantheon of human rights, at least as expressed in international agreements, the right to information is a relative newcomer.[23] This is likely because there is often no need to affirmatively express and protect a right until it is restricted in some manner and because, before the invention of the printing press and the wide-spread availability of printed information, the quest for information and knowledge was more individualistic. However, the right to information has antecedents in the Swedish Freedom of Printing Press Act of 1766 (which was written by a Finn, Anders Chydenius) and in 18th Century administrative codes and government practices.[24] More recently, it was the difficulty of the press and media to gain access to information about various aspects of World War II that led members of the U.S. delegation, among others, to advocate for the inclusion of Article 19 in the UDHR and for a special United Nations Conference on Freedom of Information, which was convened in Geneva, Switzerland in the spring of 1948.[25] The work at this conference ultimately led to Article 19 of the ICCPR.[26]

ICCPR, Article 19 has 3 parts, which read:

> 1. Everyone shall have the right to hold opinions without interference.
>
> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas

---

[22] Roy Peled & Yoram Rabin, *The Constitutional Right to Information*, 42 COLUM. HUM. RTS. L. REV. 357, 365–68 (2011).

[23] *See* United States v. Am. Library Ass'n, 539 U.S. 194, 238 (2003) (Souter, J., dissenting) (providing a history of public libraries in the U.S. and noting that the events of World War II prompted greater calls for "freedom of access" to the printed word).

[24] HELEN DARBISHIRE, TEN CHALLENGES FOR THE RIGHT TO INFORMATION IN THE AGE OF MEGA-LEAKS, THE UNITED NATIONS AND FREEDOM OF EXPRESSION AND INFORMATION (McGonagle & Donders eds., Cambridge Univ. Press 2015) (providing an overview of the history of the right to information and noting that it was a product of enlightenment thinking).

[25] G.A. Res. 59 (I), at 95 (Dec. 14, 1946).

[26] International Covenant on Civil and Political Rights, G.A. Res. 2200, at 52 (Dec. 19, 1966) [hereinafter the ICCPR].

> of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (ordre public), or of public health or morals. (Emphasis added.) [27]

A. The Right to Information in the E.U.

All E.U. Member States have ratified the ICCPR.[28] Consequently, freedom of expression, including an explicit right to information, is a human right that all E.U. Member States are bound to recognize, with only the limited exceptions that are allowed pursuant to the italicized portions of ICCPR Article 19.3, above. Additionally, these same rights are enshrined in the European Convention of Human Rights (ECHR), Article 10,[29] thereby giving the European Court of Human Rights (ECtHR) jurisdiction to enforce the right to information.

Significantly, Article 19 of the ICCPR first expresses the rights and then sets forth some limitations; rights that we contend should serve as a direct counterbalance to the protection of trade secrets and other confidential information. While the limitations that are contained in Article 19.3 help define when it is appropriate to favor

---

[27] *Id.*, Art. 19.

[28] *See* STATUS OF RATIFICATION INTERACTIVE DASHBOARD, UNITED NATIONS HUMAN RIGHTS: OFFICE OF THE HIGH COMMISSIONER, https://indicators.ohchr.org/. [https://perma.cc/4FYU-G4F9].

[29] The ECHR came in force in Finland in 23th of May 1990 through Act 18.5.1990/439 (SopS 19/1990). The ECHR is not a legislative instrument of the E.U. and it has as its Members also non-E.U. Member States. However, all E.U. Member States are also Members to the ECHR and Article 52(3) of the Charter links the interpretation of the Charter provisions to the ECHR. Article 52(3) of the Charter provides: "*In so far as this Convention contains rights which correspond to the rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and the scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection*." In this article, the application area for the ECHR will be referred to as Europe and the application area for the Charter will be referred to as the E.U.

trade secret protection over the right to information, they do not suggest that the right to information should be ignored if the listed circumstances appear to be applicable. Rather, Article 19.3 directs that the necessity for any limitations on the right to information must be fully considered.

The ECHR is very similarly worded with the ICCPR. Article 10 of the ECHR provides: "[e]veryone has the right to freedom of expression. This right shall include freedom to hold opinions and *to receive and impart information* and ideas without interference by public authority and regardless of frontiers."[30] Gathering information and access to information has been highlighted by the ECtHR as an important preliminary part of the protection of press freedoms. Therefore, in Europe, there has to be effective enforcement mechanisms available to ensure press access to public documents. If a journalist's intention is to impart relevant information of public concern to the public and contribute to the public debate, but access to information is denied, the right to impart information is violated.[31]

Even though earlier interpretation of the ECHR did not recognize a separate right to access information, the ECtHR has broadened its interpretation so that the right to *receive* information now also includes the right to *access* information and government documents in some situations. This expanded right is given not only to journalists, but also to non-governmental organizations (NGOs), which likewise serve a watchdog role in society.[32] Similarly, the ECtHR extended the right of access to researchers in a case where access to original documents concerning the

[30] Article 10 will be discussed in a more detailed manner, including the justified limitations to freedom of expression, in Part III.

[31] Roşiianu v. Romania, 2014 Eur. Ct. H.R. App. No. 27329/06.

[32] Youth Initiative for Human Rights v. Serbia, 2013 Eur. Ct. H.R. App. No. 48135/06; Erhaltung v. Austria, 2013 Eur. Ct. H.R. App. No. 39534/07. The approach where the access right is only given to a specific type of groups, having watchdog role, has been criticized from the perspective that at present also others than press and similar type of groups can initiate public discourse on matters of general interest through use of social media. *See* LORNA WOODS, DIGITAL FREEDOM OF EXPRESSION IN THE EU, *in* RESEARCH HANDBOOK ON EU LAW AND HUMAN RIGHTS 397 (Sionaidh Douglas-Scott & Nicolas Hatzis eds., 2017).

Hungarian secret service was sought for legitimate historical research, finding that such access was part of the historian's freedom of expression.[33] It is also noteworthy that the Charter provides in Article 42 for a right of access to E.U. Parliament, Council, and Commission documents. This right belongs to E.U. citizens and residents, including also legal entities having a registered office in any E.U. Member State.[34] Yet, the access right is not an absolute one, as occasionally there might be legitimate reasons to limit the right to information.[35]

B. The Right to Information in the U.S.

In the U.S., the source of the right to information is more difficult to see and understand, in part, because it is an ancillary (or penumbral) aspect of the First Amendment to the U.S. Constitution's prohibition on government restrictions on free speech and freedom of the press,[36] but also because state constitutions, the common law, and both federal and state laws must be considered. The source and scope of the right to information in the U.S. is also obscured by the fact that neither the UDHR or the ICCPR[37] are self-executing in the U.S., meaning that they are not themselves binding law in the U.S. but only a "statement of principles" with "moral authority."[38] As the U.S. Supreme Court explained in *Sosa v. Alvarez-Machain*:

> But the [UDHR] does not of its own force impose obligations as a matter of international law . . . . And, although the [ICCPR] does bind

[33] Kenedi v. Hungary, 2009 Eur. Ct. H.R. App. no. 31475/05.

[34] This right is also recognized under Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, 2001 O.J. (L145) 43; and Treaty on the Functioning of the European Union, Art. 15.3., 2003 O.J. (C 115) 54, 55.

[35] DOMINIKA BYCHAWSKA-SINIARSKA, PROTECTING THE RIGHT TO FREEDOM OF EXPRESSION UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS – A HANDBOOK FOR LEGAL PRACTITIONERS 17 (2017) (explaining Matky v. Czech Republic, 2006 Eur. Ct. H.R. App. No. 19101/03).

[36] *See* Easton, *supra* note 2.

[37] Although the ICCPR was adopted by the United Nations General Assembly on 19 December 1966 and entered into force 23 March 1976, the United States did not ratify the ICCPR (with reservations) until September 8, 1992.

[38] Sosa v. Alvarez-Machain, 542 U.S. 692, 735 (2004).

> the United States as a matter of international law, the United States ratified the Covenant on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the [US] federal courts.[39]

Further complicating an understanding of the right to information in the U.S. is the confusing, multi-layered, and highly contextual jurisprudence of the U.S. Supreme Court concerning such right.[40] Moreover, the U.S. and each of the fifty individual states have adopted freedom of information laws which are generally designed to assure that both the public and the press have access to government-held information, but with variations and exceptions, including the so-called "trade secret exception."[41]

The seeds of a U.S. constitutional right to information first began to be recognized by the U.S. Supreme Court in 1923 in *Meyer v. Nebraska*[42] and was reaffirmed in 1943 in *Martin v. City of Struthers* when the Court explained the instrumental nature of the right:

> The right of freedom of speech and press has broad scope. The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance. This freedom embraces the right to distribute literature, . . . and necessarily protects the right to receive it.[43]

---

[39] *Id.* at 734–35.

[40] *See,* David L. Hudson, Jr., *Right to Receive Information*, 10 U. ST. THOMAS J.L. & PUB. POL'Y 89 (2010); 74 UMKC L. REV. 799 (2006); Jamie Kennedy, *The Right to Receive Information: The Current State of the Doctrine and The Best Application for the Future*, 35 SETON HALL L. REV. 789 (2005); Barry P. McDonald, *The First Amendment and the Free Flow of Information: Towards A Realistic Right to Gather Information in the Information Age*, 65 OHIO ST. L.J. 249 (2004); Easton, *supra* note 2.

[41] Under the federal Freedom of Information Act, see 5 U.S.C. § 552(b)(4) (2018).

[42] Meyer v. Nebraska, 262 U.S. 390, 401 (1923) (finding a state statute which forbade any teaching except in English unconstitutional).

[43] Martin v. City of Struthers, Ohio, 319 U.S. 141, 143 (1943); *see also* Kleindienst v. Mandel, 408 U.S. 753, 762 (1972); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here.

From this, it has long been recognized that the First Amendment protects both the speaker and the listener from inappropriate government restrictions on speech and the press, which in trade secret cases can come in the form of injunctive relief.[44] This includes the "important corollary right" to receive information and ideas.[45] What is less clear, and more limited under U.S. jurisprudence, is another arguably corollary right: the right to collect and access information.[46] The U.S. Supreme Court has noted the special role of information gathering, particularly by the press, in ensuring the benefits of the First Amendment.[47] Thus, given a specific restriction and a particular context, a right of access to information has been recognized in some cases.[48] For

---

That right may not constitutionally be abridged either by Congress or by the FCC."); Stanley v. Georgia, 394 U.S. 557, 564 (1969); Lamont v. Postmaster Gen. of U. S., 381 U.S. 301, 307–08 (1965) (concurrence of Brennan and Goldberg) ("It is true that the First Amendment contains no specific guarantee of access to publications. However, the protection of the Bill of Rights goes beyond the specific guarantees to protect from congressional abridgment those equally fundamental personal rights necessary to make the express guarantees fully meaningful."); Thomas v. Collins, 323 U.S. 516 (1945).

[44] *See* Sandvig v. Sessions, 315 F. Supp. 3d 1, 17 (D.D.C. 2018), citing e.g., New York Times Co. v. Sullivan, 376 U.S. 254, 265 (1964) (noting that "private speech prohibitions can still implicate the First Amendment when given the imprimatur of state protection through civil or criminal law").

[45] Stanley v. Georgia, 394 U.S. 557, 564 (1969); Kleindienst v. Mandel, 408 U.S. 753, 762-763 (1972) (citing cases); Bd. of Educ. v. Pico, 457 U.S. 853, 867 (1982).

[46] *See* Branzburg v. Hayes, 408 U.S. 665, 726–28 (1972) (Stewart, J., dissenting) ("A corollary of the right to publish must be the right to gather news. The full flow of information to the public protected by the free-press guarantee would be severely curtailed if no protection whatever were afforded to the process by which news is assembled and disseminated.").

[47] Branzburg v. Hayes, 408 U.S. 665, 681 (1972) ("[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated."); First National Bank of Boston v. Belotti, 435 U.S. 765, 783 (1978) ("The First Amendment goes beyond protection of the press and self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.").

[48] *See, e.g.*, Fusaro v. Logan, 930 F. 3d 241, 253 (4th Cir. 2019) (noting that "the Supreme Court has strongly signaled that certain types of conditions on access to government information may be subject to First Amendment scrutiny").

instance, there is rich jurisprudence that recognizes the right of individuals and the press to access information concerning criminal proceedings.[49] This right has been extended by various courts to civil trials and various administrative proceedings.[50] Additionally, in cases that have challenged restrictions placed on libraries, the courts have noted the need of library patrons to have access to a diversity of information.[51]

Despite the obvious and practical connection between the ability to gather and access information and free expression, the constitutional right to gather and access information in the U.S. is limited. However, a statutory right to access information may exist at both the state and federal levels, particularly pursuant to so-called "freedom of information acts" and "sunshine laws." In this regard, while the U.S. Supreme Court has stated that there is, at best, a limited constitutional or common law right to access certain government information (the right of access principally being a matter of policy to be determined by the legislative branch through the adoption of freedom of information and similar laws),[52] the

---

[49] *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) and its progeny; *see also*, Raleigh Hannah Levine, *Toward a New Public Access Doctrine*, 27 CARDOZO L. REV. 1739 (2006) (describing the confused state of this jurisprudence, particularly at the trial court level).

[50] *See, e.g.*, Phillips v. DeWine, 841 F.3d 405, 418 (6th Cir. 2016) (citing Brown & Williamson Tobacco Corp. v. F.T.C., 710 F.2d 1165, 1178 (6th Cir. 1983)); United States v. DeJournett, 817 F.3d 479, 484–85 (6th Cir. 2016); In re Search of Fair Fin., 692 F.3d 424 (6th Cir. 2012); United States v. Miami Univ., 294 F.3d 797 (6th Cir. 2002); Detroit Free Press v. Ashcroft, 303 F.3d 681 (6th Cir. 2002).

[51] *See, e.g.*, Kreimer v. Bureau of Police for Town of Morristown, 958 F.2d 1242, 1255 (3d Cir. 1992) ("Our review of the Supreme Court's decisions confirms that the First Amendment does not merely prohibit the government from enacting laws that censor information, but additionally encompasses the positive right of public access to information and ideas."); *see also*, Anne Klinefelter, *First Amendment Limits on Library Collection Management*, 102 LAW LIBRARY J. 343, 344 (2010).

[52] *See, e.g.*, McBurney v. Young, 569 U.S. 221, 222 (2013) (holding that there is no fundamental right to access public information); Houchins v. KQED, Inc., 438 U.S. 1, 14–15 (1978) ("The Constitution itself is neither a Freedom of Information Act nor an Official Secrets Act," and "[n]either the First Amendment nor the Fourteenth Amendment mandates a right of access to

Court has also stated that the federal Freedom of Information Act (FOIA) was "designed to create a broad right of access to official information."[53]

Although the U.S. Supreme Court has been slow to define the sources and scope of the right to information, particularly with respect to government held information and the right to gather or access information as opposed to receive it,[54] it has developed an important corollary principle of law; namely, the strong public policy of the U.S. that favors the unfettered collection, use, and distribution of publicly disclosed information.[55] As was famously expressed by Justice Brandeis in his dissent in *International News Serv. v. Associated Press*: "[t]he general rule of law is, that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use."[56] This principle has found expression in numerous information law cases decided by the U.S. Supreme Court since *INS*. In *Kewanee Oil Co. v. Bicron Corp.*, for instance, the Court explained: "that which is in the public domain cannot be removed therefrom by action of the States" and that "all ideas in general circulation [are] dedicated to the common good unless they are protected by a valid patent."[57] It

---

government information or sources of information within the government's control.").

[53] EPA v. Mink, 410 U.S. 73, 80 (1973).

[54] *See, e.g.*, McBurney v. Young, 569 U.S. 221, 222 (2013) (holding that there is no fundamental right to access government information).

[55] *See* Griswold v. Connecticut, 381 U.S. 479, 482 (1965) ("the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge"). Note: The word "public" is used here to refer to publicly available information, not as a synonym for government information. A variety of U.S. laws and case decisions define publicly available information, including U.S. patent law and its definition of "prior art" and U.S. copyright law and its definition of the "public domain."

[56] Int'l News Serv. v. Associated Press, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting).

[57] 416 U.S. 470, 481 (1974) (quoting Lear, Inc. v. Adkins, 395 U.S. 653, 668 (1969) and citing Goldstein v. California, 412 U.S. 546, 570–571 (1973)); Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 229 (1964); Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234, 237–238 (1964); Int'l News Serv. v. Associated Press, 248 U.S. 215, 250 (1918) (Brandeis, J., dissenting).

is also reflected in cases that involved tort claims related to published information.[58] Most recently, in a case centered on the meaning of Exemption 4 of FOIA, the U.S. Supreme Court reiterated this core principle when it stated that, at a minimum, the definition of "confidential" under FOIA does not include information that was freely shared.[59]

C. The Need to Balance Fundamental Rights Against Trade Secret Protection

Although the source and the scope of the right to information may be inconsistent between the E.U. and U.S., the foregoing establishes that the right to information (particularly with respect to government information and information that has been made public) is an important value both in the U.S. and E.U. This is buttressed by the fact that while limitations on the right to information are allowed pursuant to Article 19.3 of the ICCPR, they must be limited in scope and "necessary" to further specified purposes. Thus, while the "rights of others" language of Article 19.3 of the ICCPR, and similar U.S. jurisprudence will undoubtedly be cited by trade secret owners as the reason why trade secret protection can co-exist with the right to information, a critical question is how the right to information and the rights of trade secret owners can be properly balanced, particularly when the subject trade secrets are of great public interest. In this context, it is noteworthy that in some instances trade secrets may be in the possession of governmental agencies, leading to a situation where freedom of information laws would be applicable to such information. Accordingly, the Trade Secret Directive in its preamble explicitly mentions some of the E.U.'s freedom of

[58] *See* Snyder v. Phelps, 562 U.S. 443 (2011) (intentional infliction of emotional distress); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988) (libel, invasion of privacy); Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) (public disclosure of private facts); Time, Inc. v. Hill, 385 U.S. 374 (1967) (false light privacy); and New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (defamation).

[59] Food Mktg. Inst. v. Argus Leader Media, 139 S. Ct. 2356, 2363 (2019).

information laws, which remain applicable notwithstanding introduction of the Trade Secret Directive.[60]

We think that acknowledging and understanding the human right to information means that the starting point for the analysis should place the burden on the trade secret owner to establish why an exception to the right to information applies, not the other way around as is often the case.

We further submit that a primary purpose behind the limitations and exceptions of trade secret law are to protect and preserve the right to information (sometimes referred to as the "right to know") and, accordingly, that the interpretation and application of trade secret law should always balance the value and benefits of information diffusion, including the right of free expression in all its forms, against the asserted rights of the trade secret owner. This approach is consistent with most freedom of information laws that state a default rule of public access with respect to information held by governments[61] and with many case

---

[60] Trade Secret Directive, *supra* note 1, at preamble 11 ("This Directive should not affect the application of Union or national rules that require the disclosure of information, including trade secrets, to the public or to public authorities. Nor should it affect the application of rules that allow public authorities to collect information for the performance of their duties, or rules that allow or require any subsequent disclosure by those public authorities of relevant information to the public. Such rules include, in particular, rules on the disclosure by the Union's institutions and bodies or national public authorities of business- related information they hold pursuant to Regulation (EC) No 1049/2001 of the European Parliament and of the Council (4), Regulation (EC) No 1367/2006 of the European Parliament and of the Council (5) and Directive 2003/4/EC of the European Parliament and of the Council (6), or pursuant to other rules on public access to documents or on the transparency obligations of national public authorities.").

[61] *See, e.g.*, Freedom of Information Act, 5 U.S.C. § 552 (2018); E.U. Charter of Fundamental Rights art. 42; Regulation (EC) No 1049/2001, of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, 2001 O.J. (L 145) 31; Treaty on the Functioning of the European Union, 2008 O.J. (C 115) 1 ("Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph.").

decisions in the E.U. and U.S. that balance principles of free expression against demands that certain information be kept confidential. Often, the starting point of the analysis in these cases is not the protection of information but the default rule of public accessibility.[62]

IV. FREEDOM OF EXPRESSION AND WHISTLEBLOWING PRINCIPLES IN THE E.U. AND US

In the following parts of this article, we address two specific public (or third-party) interests—freedom of expression and whistleblowing—and discuss how the change in focus we advocate should be implemented in those contexts. Although often framed as defenses to information misappropriation claims, including in cases where trade secret misappropriation is alleged, we believe that the status of the right to information as a human right requires that it receive greater and earlier attention.[63] The same approach can be undertaken in other contexts as well, for instance with respect to trade secret information that is held by governments, is needed by government regulators, or is needed as a matter of public safety.

A. Freedom of Expression and Media Under the ECHR and the E.U. Charter

Under Article 10 of ECHR: "[e]veryone has the right to freedom of expression. This right shall include freedom to hold

[62] The public access to information under these rules is the default, but the interpretation and application of these rules is occasionally controversial. Even though protection of commercial interests, including intellectual property, is an exception to the default of public access, it sometimes seems that companies have been given too much power to prevent access to the commercial information they have submitted to the public authorities in the process of receiving, for example, marketing authorization to their products. *See* Emilia Korkea-aho & Päivi Leino, *Who Owns the Information Held by EU Agencies? Weed Killers, Commercially Sensitive Information and Transparent and Participatory Governance*, 54 COMMON MARKET L. REV. 1059, 1092 (2017).

[63] *See* Lydia Loren, *Fair Use: An Affirmative Defense*?, 90 WASH. L. REV. 685, 685 (2015) (arguing with respect to fair use in copyright that: "Fair use should not be seen as an affirmative defense, but should instead be treated as a defense that shapes the scope of a copyright owner's rights.").

opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."[64] As has often been stated, freedom of expression forms a cornerstone of democratic society and enables self-fulfillment of each individual.[65] Thus, in the E.U., the starting point is that the scope of this right is broad, as the freedom of expression extends to all expressions, groups, or individuals and to all media.[66] However, this right is not without exception in either the E.U. or the U.S. In fact, the ECtHR has utilized Article 17 of the ECHR, which prevents abuse of rights, to hold that freedom of expression may not be used to lead to the destruction of the rights and freedoms of others as granted by the ECHR. Thus, based on Article 17 some content has not been protectable through freedom of expression in the E.U. For example, the ECtHR has made such exclusions in respect to the content that has promoted racism and Nazi ideology and incitement to hatred and racial discrimination. This type of content would violate other fundamental values protectable under the Convention, namely non-discrimination and social peace, and therefore this type of expression cannot receive protection in Europe. [67]

The ECHR conception of freedom of expression has three components: 1) freedom to hold opinions; 2) freedom to receive information and ideas; and 3) freedom to impart information and ideas. These components are very much intertwined with each other. For example, freedom to impart information contains a possibility to criticize government.[68] Here, one can see the link between freedom to impart information and hold opinions. Under the ECHR, freedom of the media is considered to form part of the

---

[64] This is in accordance with Article 19 of the 1948 Universal Declaration of Human Rights (UDHR). Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

[65] *See, e.g.,* Dichand et al. v. Austria, App. No. 29271/95, Eur. Ct. H.R. (2002).

[66] BYCHAWSKA-SINIARSKA, *supra* note 36, at 12.

[67] *See generally* COUNCIL OF EUR., *Guide on Article 17 of the European Convention on Human Rights, Prohibition of Abuse of Rights* (Aug. 31, 2019), https://www.echr.coe.int/Documents/Guide_Art_17_ENG.pdf [https://perma.cc/N4X5-B8DT] [hereinafter "Guide on Article 17"].

[68] BYCHAWSKA-SINIARSKA, *supra* note 35, at 13.

freedom of expression, as one can derive from the three components of freedom of expression together the freedom of the press and the freedom of the media.[69] In the case law of the ECtHR the freedom of the media is considered often as a part of the public's right to receive information, which further is considered to form a foundation for any democratic society. There is a vast amount of case law from the ECtHR considering the freedom of the media. [70] For instance, it has been highlighted that "the press plays a pre-eminent role in a State governed by the rule of law."[71]

The freedom of the media in the E.U. is further guaranteed through protection of journalistic activities. The press is entitled to serve a function as social watchdogs and may reveal confidential information even if it has been illegally received.[72] In the case of *Dupuis and Others v. France* it was held that even though journalists had received information due to breach of secrecy, they were contributing to the important public debate and the press was serving the watchdog role in a democratic society.[73] However, when journalists enjoy the protection under Article 10 of the ECHR they are obliged to follow the ethics of journalism.[74] The professional press is vital for the quality of public debate due to these journalistic ethics that generally demand that the press verify the information it reports and put the discussion in context so that all relevant perspectives are objectively reflected.[75] Consequently,

---

[69] WOLFGANG BENEDEK & MATTHIAS C. KETTEMANN, FREEDOM OF EXPRESSION AND THE INTERNET 23 (Council of Europe 2013).

[70] *Id.* at 30–32.

[71] Castells v. Spain, App. No. 11798/85, Eur. Ct. H.R. (1992); Prager & Oberschlick v. Austria, App. No. 15974/90, Eur. Ct. H.R. (1995).

[72] Trine Baumbach, *Chilling Effect as a European Court of Human Rights' Concept in Media Law Cases*, 6 BERGEN J. CRIM. L. & CRIM. JUST. 92, 93–94 (2018). For instance, in the case of *Haldimann v. Switzerland*, journalists used hidden cameras in collecting information. Later the material was broadcasted, but in a manner that the recorded person's identity was disguised. The Court found that the method used in collecting and imparting information was acceptable.

[73] Dupuis et al. v. France, App. No. 1914/02, Eur. Ct. H.R., 46–47 (2007).

[74] BENEDEK & KETTEMANN, *supra* note 69, at 30–32.

[75] Baumbach, *supra* note 72, at 93.

information often cannot be published without further investigation and vetting.[76]

The protection of journalistic sources is also an important part of media freedom in Europe. A fear of a disclosure of an information source has the potential of creating a chilling effect to journalistic activities, as media would in the end be deprived from receiving information on issues of public concern.[77] Relatedly, whistleblowers are likewise protected under freedom of speech. The Council of Europe Recommendation on protection of whistleblowers defines whistleblowers to "mean any person who reports or discloses information on a threat or harm to the public interest in the context of their work-based relationship, whether it be in the public or private sector."[78] The recommendation further suggests that members establish a framework to protect whistleblowers against retaliation among others.[79]

Despite the foregoing, but similar to the ICCPR provision quoted above, there are some legitimate reasons to restrict freedom of expression, and Article 10(2) of the ECHR describes possibilities for taking legislative measures for such purposes.[80] But in the framework of ICCPR, the freedom to hold opinions is an absolute right and cannot be limited.[81] However, the ECHR seems to be different from the ICCPR as the structure of Article 10

---

[76] A discussion of adherence to journalistic ethics, particularly in First Amendment cases, is not prevalent in the United States. However, the need to understand and follow principles of journalistic ethics has long been taught in journalism schools throughout the U.S. and is a stated policy of many media outlets in the U.S. *See, e.g.*, N.Y. TIMES, *Ethical Journalism: A Handbook of Values and Practices for the News and Editorial Departments*, https://www.nytimes.com/editorial-standards/ethical-journalism.html (last visited Mar. 18, 2020) [https://perma.cc/8ND8-E7KM].

[77] *Id.*

[78] COUNCIL OF EUR., *Protection of Whistleblowers*, Recommendation CM/Rec(2014)(7), 1, 6 (Oct. 2014) http://assembly.coe.int [https://perma.cc/5RXF-CWCR].

[79] *Id*.

[80] EUROPEAN CONVENTION ON HUMAN RIGHTS, Convention for the Protection of Human Rights and Fundamental Freedoms, 1, 12 (Oct. 2013) http://assembly.coe.int [https://perma.cc/5RXF-CWCR].

[81] International Covenant on Civil and Political Rights, G.A. Res. 2200 at 52 (Dec. 19, 1966) (Article 19).

indicates that all aspects of freedom of expression could be subject to limitations.[82] Article 10 of ECHR provides, in relevant part:

> The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.[83]

Thus, freedom of expression may only be limited if the restriction is one of the legitimate reasons described in the Article and other requirements are also met.

Related to the focus of this article on trade secrets, one recognized legitimate purpose is to protect "confidentiality."[84] However, even though protection of confidentiality is a justified reason to restrict freedom of expression, if freedom of expression is limited, the limitation must be "necessary" in a democratic society.[85] The ECtHR has interpreted this to mean a "pressing social need."[86] Therefore, not all confidential information can be regarded as a justified exception to the freedom of expression. The objective of the expression has an impact on the analysis as well. Commercial speech is not given the same value and therefore European countries generally have more latitude to limit such speech.[87] For example, it was justified to limit publication of firm-related confidential information in a trade magazine.[88]

Yet, even though the nature of the speech has an impact on the margin of appreciation of the member states, the ECtHR has emphasized that work-related speech without a link to the public

---

[82] *See* BENEDEK & KETTEMANN, *supra* note 69, at 27.

[83] EUROPEAN CONVENTION ON HUMAN RIGHTS, *supra* note 80.

[84] Article 10(2) ECHR.

[85] *Yildirim v. Turkey,* App. No. 3111/10, Eur. Ct. H.R., ¶¶ 66–68 (2012).

[86] Observer & Guardian v. the United Kingdom, 1991 Eur. Ct. H.R. App. No. 13585/88, ¶ 59.

[87] Markt intern Verlag GmbH & Klaus Beermann v. Germany, 1989 Eur. Ct. H.R. App. No. 10572/83, ¶¶ 33, 36.

[88] *Id*. at ¶ 35.

interest is protectable by freedom of expression.[89] In these situations, authorities need to conduct an appropriate balancing between employees' right to freedom of expression against employer's business interest, including the potential damage caused by the speech.[90] And this assessment cannot be based purely on contractual analysis.[91] This proportionality analysis requirement on freedom of expression limitations is important when it comes to employees' contract-based confidentiality obligations.

Additionally, under Article 10, the limitations must be prescribed by law, although in specific cases common law principles have been accepted as sufficiently clear and precise to fulfill this requirement.[92] Also, when analyzing the legitimacy of the restriction, the ECtHR considers whether the restriction is proportionate to the aim pursued.[93] If it is disproportionate it will violate freedom of expression under Article 10, but it is noteworthy, that the allowed limitations are interpreted in a narrow manner.[94] Thus, under Article 10 of the ECHR, freedom of expression is the default rule and the derogations are only allowed when all the criteria are met. No other criteria can qualify for derogation and the interpretation of a limitation cannot go beyond the normal language utilized in Article 10(2).[95]

Three cases from the ECtHR help to illustrate European law concerning whistleblowing activity and how freedom of expression is evaluated and balanced within this context. Even though these cases do not directly relate to trade secrets, they illustrate the ECtHR's balancing between various interests at stake, particularly the importance of the freedom of speech in a democratic society. Thus, these cases provide some guidance on how the E.U.'s new

---

[89] *Id.* at ¶¶ 26, 33; Herbai v. Hungary, 2019 Eur. Ct. H.R. App. No. 11608/15, ¶¶ 41–43.

[90] *Herbai v. Hungary* at ¶¶ 45–48, 50.

[91] *Id.* at ¶50.

[92] *See, e.g.,* The Sunday Times v. The United Kingdom, 1979 Eur. Ct. H.R. App. No. 6538/74, ¶¶ 46–53.

[93] *Id.* at ¶ 62.

[94] *Id.* at ¶ 65.

[95] BYCHAWSKA-SINIARSKA, *supra* note 36, at 35.

whistleblowing provisions (discussed in more detail in Part V. B. below) are to be interpreted under the Trade Secret Directive.

In *Guja v. Moldova,* a civil servant was allowed to reveal information concerning wrongdoings in the Public Prosecutor's Office because it was more important in a democratic society to receive the information on wrongdoings and have open discussion on that than to maintain the public's confidence in the Office.[96] The dismissal of the civil servant was considered to violate freedom of speech.[97] By way of contrast, in *Bathellier v. France*, a head of the human resources department of a state electric company reported about issues in the company, which he deemed to be a danger for public security.[98] As a result, he was forced to retire from the company.[99] The ECtHR considered that the person who reported the facts was not sufficiently capable of evaluating the matter, even though he had a high position in the company and that he exaggerated the situation.[100] The ECtHR also emphasized that the public disclosure is the last resort after reporting the issues internally in the company and informing the superiors. In this case, the person had not even sent a copy of the letter to his company but only to a representative of public authorities.[101] Thus, the ECtHR dismissed the application because the applicant had gone beyond the limit of protected freedom of expression.[102]

Similarly, in *Heinisch v. Germany*, a geriatric nurse reported poor quality of care in a private nursing home.[103] The proportionality test was used to weigh the employee's right to signal illegal conduct or wrongdoing on the part of his or her employer against the employer's right to protection of its reputation and commercial interests.[104] The ECtHR concluded that there was a *public interest in knowing the information* when taking

---

[96] Guja v. Moldova, 2008 Eur. Ct. H.R. App. No. 14277/04 ¶ 91.
[97] *Id*. at ¶ 97.
[98] Bathellier v. France, 2010 Eur. Ct. H.R. App. No. 49001/07.
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] Heinisch v. Germany, 2011 Eur. Ct. H.R. App. No. 28274/08 ¶ 3.
[104] *Id*. at ¶ 66.

into account the vulnerable situation of elderly people and the need to prevent abuse.[105] However, each employee has a duty of loyalty and discretion. Therefore, the disclosure should be first made to their superior or to other competent authorities.[106] Only in cases when these alternative means are "clearly impracticable" should the information "as a last resort, be disclosed to the public."[107] Because the ECtHR found that the nurse had used *alternative ways* of disclosing the information to her superiors, the employee was found to have acted in good faith.[108] The public interest outweighed the employer's right to protect its business reputation and the employee's dismissal was too severe a sanction, resulting in a violation of the employee's freedom of expression.[109]

The case law of the ECtHR is also important when interpreting the relevant Charter provisions, which include Articles 11(1) and 11(2).[110] Article 11 of the Charter is understood to follow the Article 10 of the ECHR and pursuant to Article 52(3) of the Charter, the meaning and scope of this right are the same as those guaranteed by the ECHR.[111]

There is some IP-related case law from the CJEU where the Charter Article on freedom of expression has been applied and which illuminates the importance of freedom of expression in the context of IP protection. But these cases also show the requirement of balancing between different fundamental rights and different interests. These cases support our assertion that trade secret rights should be balanced against other rights, most notably the right to information, freedom of expression, and the related interest to protect whistleblowing. More particularly, the following copyright

---

[105] *Id*. at ¶ 71.
[106] *Id*. at ¶ 65.
[107] *Id*.
[108] *Id*. at ¶ 72.
[109] *Id*. at ¶ 73.
[110] EUROPEAN CONVENTION ON HUMAN RIGHTS, *supra* note 80. Article 11(1) ("Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."); and Article 11(2) ("The freedom and pluralism of the media shall be respected.").
[111] Explanations relating to the Charter of Fundamental Rights, 2007 O.J. (C 303), 17–35.

cases show the margin of appreciation left for the Member States' courts in the balancing exercise.

The *Deckmyn* case is one important demonstration of these aspects.[112] The case was about interpretation of the parody-exception provided by Article 5(3)(k) of the Information Society Directive 2001/29.[113] The CJEU understood parody as a way to express one's opinion and therefore it was connected to freedom of expression.[114] Moreover, the CJEU noted that the parody-exception must be interpreted in a manner which efficiently serves the purpose of the exception.[115] This meant, among other things, that the parody-exception must not comply with specific requirements listed by the national court.[116] The CJEU's approach in this case has been understood in a manner that the parody-exception was interpreted more broadly than the traditional approach to copyright exceptions that the E.U. would have allowed.[117] Significantly, this was done in order to ensure compatibility with the requirements on freedom of expression under Article 11(1) of the Charter.[118] Thus, in the *Deckmyn* case the CJEU guided courts to strike a fair balance between the interests and rights of authors and the freedom of expression of the user of a protected work who is relying on the exception for parody.[119] Consequently, there has to be balancing between protection of intellectual property and freedom of expression.

---

[112] Case C‑201/13, Deckmyn v. Vandersteen & Others, EUR-Lex CELEX 62013CJ0201 (Sept. 3, 2014).

[113] *Id*. at ¶ 13.

[114] *Id*. at ¶ 25.

[115] *Id*. at ¶ 27.

[116] *Id.* at ¶¶ 20–25. The CJEU held that, among others, the parody does not need to display an original character of its own, nor mention the source of a parodied work. *Id.* at ¶ 33.

[117] *Id*. at ¶ 24.

[118] Christophe Geiger et. al, *Limitations and Exceptions as Key Elements of the Legal Framework for Copyright in the European Union – Opinion of the European Copyright Society on the Judgment of the CJEU in Case C-201/13 Deckmyn*, 46 INT'L REV. INTELL. PROP. & COMPETITION L. 93, 97–99 (2015).

[119] Case C‑201/13, Deckmyn v. Vandersteen & Others, EUR-Lex CELEX 62013CJ0201 (Sept. 3, 2014).at ¶ 26.

However, in the *Deckmyn* case the issue was also whether an author can prevent a user who is relying on the parody-exception to use the original work in a context where the message conveyed is discriminatory.[120] From the perspective of fundamental rights discourse, it is noteworthy that some content is not protectable under freedom of expression in Europe.[121] As explained earlier, racial discrimination belongs to non-protectable content.[122] Consequently, in some instances, discriminatory messages could go beyond what is acceptable in a democratic society and this type of message cannot benefit from freedom of expression, leading to a potential situation that it cannot be protected through the parody-exception either. In fact, the CJEU also referred in the case to the non-discrimination principle under Article 21(1) of the Charter.[123]

In the *GS Media* case, which relates to hyperlinks to copyrighted material, the CJEU highlighted that the Internet is important to freedom of expression and information.[124] Hyperlinks are necessary to internet's operation and to the exchange of information and opinions. The CJEU also referred to the balancing between various fundamental rights under the Information Society Directive.[125] It was especially stressed by reference to recitals 3 and 31 of the Directive 2001/29 that the fair balance between the protection of intellectual property rights (authors' rights) and freedom of expression (users' rights) must be maintained in the electronic environment.[126] What is interesting in this case, is that freedom of expression was taken into account even without the

---

[120] *Id.* at ¶ 12.

[121] *See generally* Guide on Article 17, *supra* note 67.

[122] *Id.*

[123] Deckmyn v. Vandersteen at ¶¶ 29–30. The CJEU's approach in the case has been criticized on the basis that the E.U. has not harmonized moral rights as part of the copyright regime. Giving power to an author to prevent the use of his/her work in a parody context that is discriminatory has been understood as a step towards harmonizing moral rights in the European Union. Geiger et. al, *supra* note 73, at 99.

[124] Case C-160/15, GS Media BV v Sanoma Media Netherlands BV, Playboy Enterprises International Inc., Britt Geertruida Dekker, EUR-Lex CELEX 62015CA0160 (2016), ¶ 45.

[125] *Id.* at ¶ 31.

[126] *Id.* at ¶ 31.

support of an explicit exception linked to this freedom. Rather, it was considered applicable due to its relevance to the internet context more generally. It was linked to the users' right to access information, more particularly, to the exchange of information and opinions. This part of the decision seems to be in line with the understanding of how the internet can be regulated in a manner that serves as an infrastructure for freedom of speech.[127] However, the end result of the *GS Media* case can be criticized as it created different kinds of duties for different types of users in the internet environment, which complicated the evaluation whether hyperlinking is allowed or not.[128] In fact, in this case the CJEU modified its approach to hyperlinks and started to apply a more restrictive approach when compared to its previous case law on hyperlinks.[129] However, the valuable part of the CJEU's reasoning on the importance of the internet to freedom of expression has been referred to in the CJEU's subsequent case law.[130]

The CJEU has just recently given three decisions on the balancing between copyright protection and freedom of expression.[131] In two of these cases, the question was about interpretation of explicit exceptions under the Information Society Directive.[132] More particularly, it was asked if national courts could

---

[127] See discussion about Internet as a freedom of speech architecture, Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427 (2008–2009).

[128] *See, e.g.*, Eleanora Rosati, *GS Media and its implications for the construction of the right of communication to the public within EU copyright architecture*, COMMON MARKET L. REV. 1221 (2017).

[129] Tuomas Mylly, *Proportionality in the CJEU's Internet Copyright Case Law: Invasive or Resilient?*, 279–82, *in* GENERAL PRINCIPLES OF EU LAW AND THE EU DIGITAL ORDER, Kluwer Law International (Ulf Bernitz, Xavier Groussot, Jaan Paju & Sube de Vries eds., 2020).

[130] Case C‑516/17, Spiegel Online GmbH v. Volker Beck, EUR-Lex CELEX 62017CC0516, ¶ 81 (Jan. 10, 2019).

[131] *Id.*; Case C-476/17 Pelham & Others v. Hütter, EUR-Lex CELEX 62017CC0476 (Dec. 12, 2018); Case C-469/17 Funke Medien NRW GmbH v. Bundesrepublik Deutschland, EUR-Lex CELEX 62017CC0469 (Oct. 25, 2018).

[132] Council Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [hereinafter "the Information Society Directive"].

depart from the restrictive interpretation of the exceptions in order to give full respect to freedom of expression.[133] First, the CJEU held in all three cases that Member States are not allowed to implement exceptions beyond those listed in the Information Society Directive.[134] Second, in two of these cases, the CJEU held that as a general rule, derogations from the main rule are to be interpreted narrowly, the main rule being the exclusive rights given to the rightsholders. The national courts must apply an interpretation which is consistent with the wording used in the specific exception and in addition adhere to the strict requirements of the three-step test under Article 5(5) of the Information Society Directive which requires: (1) a special case; (2) no conflict with the normal exploitation of the work; and (3) which does not unreasonably prejudice the legitimate interests of the rightsholder.[135]

On the surface, the foregoing means that there is no possibility for national courts to go beyond what the wording of the copyright exception and the three-step test enable, even where freedom of expression concerns would otherwise speak in favor of permitting the use of the copyrighted work in question. Yet, the CJEU continued that even though Article 5 provides "exceptions and limitations," they give rights to users and the aim of this Article is to ensure a fair balance between rights and interests of rightsholders and rights and interests of users of protectable subject matter. Therefore, a national court must apply an interpretation of these exceptions in a manner that ensures their effectiveness and the observance of fundamental rights. The CJEU also highlighted that even though intellectual property is protected under the Charter, there is nothing to suggest that it would be an absolute right.[136]

---

[133] *Spiegel Online GmbH*, EUR-Lex CELEX 62017CC0516; *Funke Medien NRW GmbH*, EUR-Lex CELEX 62017CC0469.

[134] *Spiegel Online GmbH* at ¶¶ 41, 48; *Pelham & Others* at ¶¶ 58, 64; *Funke Medien NRW GmbH* at ¶¶ 56, 63.

[135] *Spiegel Online GmbH* at ¶¶ 37, 53, 59; *Funke Medien NRW GmbH* at ¶¶ 48, 52, 69, 76.

[136] *Spiegel Online GmbH* at ¶¶ 46, 51–56, 59; *Funke Medien NRW GmbH* at ¶¶ 52, 67–72, 76.

These copyright cases may provide some guidance on how the freedom of expression exception would be treated under the Trade Secret Directive, leading to constitutional balancing between various fundamental rights and interests within the E.U. However, a balancing requirement is arguably greater under the Trade Secret Directive due to various provisions that are more direct and intentional in ensuring freedom of expression and whistleblowing. For instance, in the Trade Secret Directive, there is an explicit and generally worded freedom of expression provision that is more clearly communicated when compared to the situation under the Information Society Directive, where freedom of expression is merely to be taken into account when interpreting the particularly worded exceptions.[137] Further, as indicated above, the interpretation under the Information Society Directive is curtailed by a number of factors, as the interpretation must be consistent with the wording of an explicit exception as well as with the three-step test, even when the specific exception and the situation at hand are tightly connected to fundamental rights.[138] No such requirements exist in the Trade Secret Directive. Therefore, it seems likely that the scope of the freedom of expression provision under the Trade Secret Directive will be applied more liberally than under the Information Society Directive, as further discussed below.

B. Freedom of Expression and Press Under the First Amendment to the U.S. Constitution

Freedom of expression is defined in the U.S. by the U.S. Constitution and the constitutions of each state, as well as by related federal and state laws. In this article, we focus on the First Amendment to the U.S. Constitution which states, in pertinent part, that: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people . . . to petition the Government for redress of grievances."[139] It is a restriction on the actions of government (a so-called negative right) that requires some form of recognized "state action" and, unlike its E.U.

[137] Discussed *infra*, notes 186–91.
[138] *Spiegel Online GmbH* at ¶ 59; *Funke Medien NRW GmbH* at ¶ 76.
[139] U.S. Const. amend I.

counterpart, is not stated as a positive right. However, although limited in this manner, the First Amendment has broad reach as it has been held applicable to many types of government actions, both at the state and federal level.[140] Thus, free speech and freedom of the press concerns can arise in the U.S. whenever the application or enforcement of law risks quelling freedom of expression.

The required "state action" can take many forms; the most obvious are the adoption and enforcement of laws or regulations that restrict speech. Less obvious are court orders. Any court order or remedy in the U.S., whether issued by a federal or state tribunal and including the grant of preliminary relief, can constitute a restriction on freedom of speech or the press, and even if it involves the enforcement of private covenants.[141] Additionally, the U.S. Supreme Court has held that the First Amendment can be the basis for a defense in cases where the alleged wrongful behavior involves speech.[142] Thus, issues related to freedom of speech and press and the right to petition the government can arise in information related lawsuits when the activities of the defendant involve the rights guaranteed by the First Amendment and when the remedies sought would restrain the exercise of those rights. For example, a First Amendment defense has been successfully asserted with respect to invasion of privacy claims[143] and trade secret misappropriation claims.[144] In copyright cases in the U.S., the issue is part of the fair use analysis, with the U.S. Supreme Court noting that U.S. copyright law is saved from First

---

[140] Fusaro v. Cogan, 930 F.3d 241, 246 (4th Cir. 2019) ("That short but forceful phrase has given rise to a complex array of legal protections for free expression which the courts have flexibly applied to a variety of circumstances.").

[141] *See* Shelly v. Kramer, 334 U.S. 1 (1948).

[142] *See, e.g.*, Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 50–51 (1988) (finding that a First Amendment defense could be asserted against an intentional infliction of emotional distress claim).

[143] *See, e.g.*, Ross v. Midwest Communications, Inc., 870 F.2d 271 (5th Cir. 1989); Machleder v. Diaz, 801 F.2d 46, 53 (2d Cir. 1986).

[144] *See, e.g.*, CBS, Inc. v. Davis, 510 U.S. 1315 (1994); Procter & Gamble Co. v. Bankers Trust Co., 78 F.3d 219 (6th Cir. 1996).

Amendment scrutiny due to the existence of the fair use limitation on copyright protection.[145]

Like E.U. law, described above, there are many different aspects to U.S. First Amendment jurisprudence and the analysis is highly contextual. From the text of the First Amendment, it is clear it was designed to preclude government restrictions on those who wish to speak orally, in print, or through the use of the press. But the First Amendment has also been interpreted to protect: the rights of listeners[146] and readers;[147] the ability to distribute literature;[148] the anonymity of speakers;[149] and whistleblowers (discussed in more detail in Part V). Also, as previously noted, it is the basis for a right of access to judicial proceedings.[150]

A central premise of the First Amendment is that the dissemination of more information is an essential feature of a

---

[145] *See* Eldred v. Ashcroft, 537 U.S. 186, 221 (2003); Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 560 (1985).

[146] Martin v. City of Struthers, Ohio, 319 U.S. 141, 143 (1943); Va. St. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 756 (1976) ("[T]he protection afforded is to the communication, to its source and to its recipients both.").

[147] Stanley v. Georgia, 394 U.S. 557, 565 (1969) ("If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds."). *Contra*, United States v. Am. Library Assn., Inc., 539 U.S. 194 (2003) (holding that Congress can direct federal funds to direct a policy for libraries to protect against Internet access to pornographic or obscene materials, as Congress was not regulating private conduct, but conditioning the receipt of federal funds).

[148] Lovell v. Griffin, 303 U.S. 444, 452 (1938) ("The liberty of the press is not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets.").

[149] McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 358 (1995) (Thomas, J., concurring) ("Founding-era Americans opposed attempts to require that anonymous authors reveal their identities on the ground that forced disclosure violated the 'freedom of the press.'"); *see also* Victoria Smith Ekstrand & Cassandra Imfeld Jeyaram, *Our Founding Anonymity: Anonymous Speech During the Constitutional Debate*, 28 AM. JOURNALISM 35, 53 (2011) (stating that anonymous speech is "inextricably linked" to the revolution and founding of the US).

[150] *See supra* notes 48–52 and accompanying text.

democracy, the best cure for undesirable speech, and is necessary to create a "marketplace of ideas." The first reference in a U.S. Supreme Court case to the "free trade in ideas" within "the competition of the market" appears in Justice Oliver Wendell Holmes Jr.'s dissent in *Abrams v. United States*,[151] but it has since been adopted by the Supreme Court and restated in numerous cases.[152] This core principle has been held applicable to many laws, even those that were aimed at curbing what many deem to be hateful speech, such as that of the Ku Klux Klan[153] and cross burning.[154] Thus, this approach is different from the approach under the ECHR, as under the ECHR regime hate speech would not be protectable under freedom of speech principles due to the fact that it conflicts with other stated fundamental rights.[155] But despite its breadth, the First Amendment is not without limits; restraints on speech and the press are allowed in some limited situations which often require courts to consider and balance competing interests.

Whether restrictions on speech and of the press are allowed under the First Amendment depends upon a number of factors, including the category of speech involved (for instance, political, religious, and commercial) and, consequently, the level of scrutiny

---

[151] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *see also* Whitney v. Cal., 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

[152] *See, e.g.*, Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) (citing Associated Press v. United States, 326 U.S. 1, 20 (1945) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee."); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[153] *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969); NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) ("This Court has made clear, however, that mere advocacy of the use of force or violence does not remove speech from the protection of the First Amendment.").

[154] *See, e.g.,* Virginia v. Black, 538 U.S. 343 (2003).

[155] *See also* Oreste Pollicino & Marco Bassini, *Free Speech, Defamation and the Limits to Freedom of Expression in the EU: A Comparative Analysis, in* RESEARCH HANDBOOK ON EU INTERNET LAW 508 (A. Savin & J. Trzaskowski eds., 2014).

that is applied to the challenged government restriction.[156] For instance, "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech."[157] This is similar to the European approach discussed above. However, the type of speech is not all that is considered. The wording of the challenged laws is also critical, with restrictions that are content-based being more suspect than those that are content-neutral. The U.S. Supreme Court recently explained in *National Institute of Family & Life Advocates v. Becerra*: "[a]s a general matter, such laws 'are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.'"[158] Governments can always attempt to justify the challenged restriction(s), but if the court is required to engage in "strict scrutiny," or even "heightened scrutiny," it is often difficult for state and federal governments to establish that the regulation or restriction at issue is necessary and narrowly tailored to serve the required substantial or compelling state interest.

A related principle of U.S. First Amendment jurisprudence concerns the imposition of so-called "prior restraints," which are highly disfavored;[159] a principle which is often invoked in cases involving anticipated press coverage that will disclose otherwise confidential information. The Supreme Court explained in *New York Times Co. v. United States*: "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption

---

[156] Victoria L Killion, CONG. RESEARCH SERV., IF11072 THE FIRST AMENDMENT: CATEGORIES OF SPEECH (2019).

[157] Sorrell v. IMS Health Inc., 564 U.S. 552, 567 (2011). The standard for defining the constitutionality of an incidental restriction "in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions." Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298 (1984).

[158] 138 S. Ct. 2361, 2371 (2018) (quoting Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015)).

[159] *See generally* Near v. State of Minnesota *ex rel.* Olson, 283 U.S. 697 (1931).

against its constitutional validity."[160] This rule has been applied to invalidate restrictions on speech even in cases where the source illegally or improperly obtained the subject information. In such cases, the rights of the press and the interests of the public in the information can override any interest in privacy or secrecy, even if the information was wrongfully acquired by others. The U.S. Supreme Court explained:

> [T]his Court upheld the press' right to publish information of great public concern obtained from documents stolen by a third party. In so doing, this Court focused on the stolen documents' character and the consequences of public disclosure, not on the fact that the documents were stolen.[161]

Thus, "publication of truthful information of public concern," however the source acquired it, cannot be sanctioned without giving rise to First Amendment concerns. This approach is similar to the case law under the ECHR that was previously discussed where the press was allowed to impart information even though the subject information was obtained due to a breach of secrecy.[162] But whether free expression concerns will prevail depends upon the specific facts of each case, particularly with respect to the importance of the information to be revealed.

One area of U.S. First Amendment jurisprudence that is not as protective as the E.U. principles governing freedom of expression concerns the ability of members of the press to protect the identities of confidential sources through the exercise of what is known in the U.S. as the "reporter's privilege." As previously discussed above, in *Branzburg v. Hayes*[163] four members of the U.S. Supreme Court refused to recognize a reporter's privilege in a case where a reporter refused to testify before grand juries concerning stories he had written about illegal drugs. However, since that decision in 1972, the reporter's privilege has been successfully asserted in numerous state and federal cases in the

---

[160] New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) (the "Pentagon Papers" case)).

[161] Bartnicki v. Vopper, 532 U.S. 514, 515 (2001).

[162] *See* Dupuis & Others v. France, 2007 Eur. Ct. H.R. App. No. 1914/02.

[163] 408 U.S. 665 (1972).

U.S., in part due to the suggestion of Justice Powell in his concurrence in *Branzburg* that a balancing approach is needed,[164] but also because forty-nine U.S. states and the District of Columbia have adopted state laws (known as shield laws) which recognize a qualified reporter's privilege.[165]

In the U.S., the First Amendment has been raised in a number of IP cases, including in trade secret cases.[166] Often, the trade secret cases involve the rights of the press with respect to the publication of information of public concern where the defendant member of the press or media organization had nothing to do with the initial (allegedly wrongful) acquisition of the information. Indeed, in the U.S., the Constitutional interest in freedom of the press is often directly protected by the fact that the defendant did not have the requisite "knowledge or reason to know" that the information was a trade secret that had been misappropriated.[167] Thus, as a practical matter, freedom of expression is protected by the limited definition of "misappropriation" under the UTSA and DTSA. The harder cases are when the defendant member of the press (or other third party) either knew about the trade secret misappropriation at the time of its publication of the information, or actively encouraged it.

Often the outcome in cases involving the alleged misappropriation of information by the press is a matter of timing and remedy sought, particularly where the plaintiff and putative trade secret owner seeks preliminary relief, a form of prior

---

[164] *Id.* at 709–10 ("The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.").

[165] *See* Laura R. Handman, *Protection of Confidential Sources: A Moral, Legal, and Civic Duty*, 19 NOTRE DAME J.L. ETHICS & PUB. POL'Y 573 (2005). Wyoming remains the only state without legislation or judicial precedent to protect reporter's privilege. *State-by-State Guide to the Reporters Privilege for Student Media (Alabama – Illinois)*, Student Press L. Ctr. (Sept. 15, 2010), https://splc.org/2010/09/state-by-state-guide-to-the-reporters-privilege-for-student-media-alabama-illinois/ [https://perma.cc/C2AD-2NJC].

[166] *See generally*, *supra* notes 44–45.

[167] Samuelson, *supra* note 2, at 786 (referring to U.S. trade secret law's "rules on secondary liability").

restraint. In *CBS, Inc. v. Davis*, for instance, Justice Brennan, sitting as the Circuit Justice, granted an emergency stay of a preliminary injunction that would have prevented the airing of a television show concerning the meat processing practices of a meat packing company, even though CBS was involved in the initial (and alleged improper) acquisition of the subject information.[168] Justice Brennan explained: "[e]ven where questions of allegedly urgent national security, or competing constitutional interests, are concerned, we have imposed this 'most extraordinary remed[y]' only where the evil that would result from the reportage is both great and certain and cannot be mitigated by less intrusive measures."[169] Similarly, in *Ford Motor Co. v. Lane*,[170] a federal district court in Michigan rejected Ford's request for a preliminary injunction in conjunction with its trade secret misappropriation claims because the requested order constituted an unjustified prior restraint.

Similar principles apply to whistleblowers in the U.S. where their rights to express themselves and petition the government have both a Constitutional and statutory dimension; Constitutional because of the First Amendment values of free expression discussed above and statutory because there are numerous federal and state statutes that provide varying types and degrees of protection for different categories of whistleblowers.[171] For instance, the first federal whistleblower law was adopted by the U.S. Congress in 1863 in response to substandard supplies provided to the Union Army during the Civil War, and recent legislation has sought to strengthen such laws.[172] More recently, the federal Whistleblower Protection Act of 1989 was enacted to protect certain federal government employees from retaliation for disclosing information, under specified conditions, concerning

---

[168] 510 U.S. 1315 (1994).

[169] *Id.* at 1317 (internal citations omitted).

[170] 67 F. Supp. 2d. 745 (E.D. Mich. 1999).

[171] *See, e.g.*, The Whistleblower Protection Act of 1989, 5 U.S.C. 2302(b)(8)–(9), Pub.L. 101–12 as amended.

[172] *See* The False Claims Act of 1863, 31 U.S.C. §§ 3729–33; The Whistleblower Protection Enhancement Act of 2012, 5 U.S.C. 2302(b)(8)–(9), Pub. L. 112–199.

"any violation of any law, rule, or regulation" or "gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety."[173]

The Constitutional origins of whistleblower rights in the U.S. is often traced to the U.S. Supreme Court's 1968 decision in *Pickering v. Board of Education of Township High School District 205*, which involved the dismissal of a teacher for publicly criticizing the Board's handling of previous tax increases.[174] Noting that public employment did not require employees to give up their First Amendment rights, but that there may be legitimate reasons for government employers to curtail such speech, the Court stated that: "[t]he problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[175] It then proceeded to outline the interests that are relevant to the analysis, ultimately holding that "absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."[176] The Supreme Court later explained in *San Diego v. Roe*: "[w]ere [public employees] not able to speak on [the operation of their employers], the community would be deprived of informed opinions on important public issues. The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it."[177]

The ruling in *Pickering* has never been overruled, but it has been limited such that it is not as robust as some would like.[178] This is due, in part, to the state action requirement of the First Amendment which means that the *Pickering* doctrine only applies

---

[173] 5 U.S.C. 2302(b)(8)–(9) (2018).
[174] Pickering v. Board of Education, 391 U.S. 563, 564 (1968).
[175] *Id.* at 568.
[176] *Id.* at 574.
[177] 543 U.S. 77, 82 (2004) *(per curiam)*.
[178] *See, e.g.*, J. Michael McGuiness, *Whistleblowing and Free Speech: Garcetti's Early Progeny and Shrinking Constitutional Rights of Public Employees*, 24 TOURO L. REV. 529 (2008).

to public employees who are subjected to adverse employment consequences due to the exercise of their First Amendment rights. Additionally, it is clear from *Pickering* and its progeny that not all speech by public employees is protected by the First Amendment; the speech must deal with matters of "public concern," and must be engaged in by a public employee in his capacity as a citizen.[179] As the Court noted in the case establishing the latter limitation, *Garcetti v. Ceballos*: "the fact that Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case—distinguishes Ceballos' case from those in which the First Amendment provides protection against discipline."[180]

Since *Pickering* and *Garcetti*, federal courts have developed jurisprudence to define matters of public concern and when a public employee is acting in his capacity as a citizen.[181] For instance, in *Lane v. Franks* the Supreme Court explained that: "[t]he critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties."[182] Thus, testimony that was given by a public employee in response to a subpoena in a criminal corruption trial was held to be protected by the First Amendment. Additionally, as previously noted, numerous state and federal whistleblower statutes have been adopted that provide greater protection for whistleblowers than the U.S. Constitution requires, including a new law that applies specifically to trade secrets, as further described in Part V below. However, these laws often include special limitations or procedural rules related to information that is deemed to concern issues of national security. For instance, the federal Whistleblower Protection Act of 1989 does not extend to employees of U.S. agencies that are a part of the intelligence community, as defined;[183] the more limited

---

[179] Garcetti v. Ceballos, 547 U.S. 410 (2006).

[180] *Id*. at 421.

[181] *See* Tyler Wiese, *Seeing Through the Smoke: "Official Duties" in the Wake of Garcetti v. Caballos*, 25 ABA J. OF LAB. & EMP. L. 509 (Spring 2010) (describing the jurisprudence through 2010).

[182] Lane v. Franks, 573 U.S. 228, 240 (2014).

[183] 5 USC § 2302(b)(9)(c)(ii) (2018).

Intelligence Community Whistleblower Act of 1998[184] applies to those employees.

V. FREEDOM OF EXPRESSION AND WHISTLEBLOWING AS 'EXCEPTIONS' FOR TRADE SECRETS IN THE E.U. AND THE US

While the foregoing demonstrates the concerns of the E.U. and U.S. with respect to the right to information, freedom of expression, and whistleblowing, how these concerns are manifested in the respective trade secret laws differ noticeably. This is due in part to the fact that most E.U.-member states follow the civil law tradition. Thus, exceptions and limitations to trade secret protection in the E.U. are written directly into the Trade Secret Directive, whereas in the U.S. many of the applicable exceptions and limitations can only be found in ancillary laws and legal principles. The following sub-parts detail these differences.

A. How E.U. Trade Secret Directive Addresses These 'Exceptions'

Article 5 of the Trade Secret Directive sets forth four exceptions for trade secret protection, the following two of which relate directly to the present discussion:

> Member States shall ensure that an application for the measures, procedures and remedies provided for in this Directive is dismissed where the alleged acquisition, use or disclosure of the trade secret was carried out in any of the following cases:
>
> (a) for exercising the right to freedom of expression and information as set out in the Charter, including respect for the freedom and pluralism of the media;
>
> (b) for revealing misconduct, wrongdoing or illegal activity, provided that the respondent acted *for the purpose of protecting the general public interest*; . . .[185]

The preamble to the Trade Secret Directive further clarifies the meaning of Article 5. It states that: "it is essential that the exercise of the right to freedom of expression and information which encompasses media freedom and pluralism, as reflected in Article

---

[184] Intelligence Community Whistleblower Protection Act of 1998, 105 Pub. L. 272, 112 Stat. 2396, 2414.

[185] Trade Secret Directive, *supra* note 1, at Article 5.

11 of the Charter of Fundamental Rights of the European Union ('the Charter'), not be restricted, *in particular with regard to investigative journalism and the protection of journalistic sources*."[186] Furthermore, preamble 20 provides: "The measures, procedures and remedies provided for in this Directive should not restrict whistleblowing activity. Therefore, the protection of trade secrets should not extend to cases in which disclosure of a trade secret serves the public interest, insofar as directly relevant misconduct, wrongdoing or illegal activity is revealed."[187]

The final wording of the whistleblowing provision is different to the one proposed by the Commission. In the initial version it was further required that the disclosure of the trade secret should be "necessary" for revealing the misconduct. The initial proposal was interpreted to mean that even though some disclosures would be in the public interest, they might not always be necessary.[188] The final wording seems to set a somewhat more lenient requirement for disclosures.[189] However, when read together with preamble 20, "insofar as directly relevant misconduct [] is revealed," the end result of the interpretation comes very close to the initial wording of Article 5 (b).[190]

Some have been concerned that whistleblowers may still be in a vulnerable situation because they have the burden of proof that their disclosure activities are in the public interest.[191] However, it should be recognized that in accordance with preamble 20, national authorities are allowed to apply the whistleblower exception also in cases where "the respondent had every reason to believe in good faith that his or her conduct satisfied the appropriate criteria set out

---

[186] Trade Secret Directive, *supra* note 1, at preamble 19.

[187] Trade Secret Directive, *supra* note 1, at preamble 20.

[188] Tanya Aplin, *A Critical Evaluation of the Proposed EU Trade Secrets Directive*, 4 INTELL. PROP. Q. 257, 272–73 (2014).

[189] *See also* Vigjilenca Abazi, *Trade Secrets and Whistleblower Protection in the European Union*, 1 EUR. PAPERS 1061, 1069 (2016).

[190] Trade Secret Directive, *supra* note 1, at preamble 20. At least in Finland, when implementing the Trade Secret Directive into national legislation, the provision has been understood in a manner that trade secrets can be disclosed only to the extent that is necessary for the purpose of revealing misconduct etc. Finnish Government Bill 49/2018, p. 93.

[191] Abazi, *supra* note 189, at 1068.

in this Directive." Consequently, it seems that the burden of proof is not overly heavy, at least if this flexibility is utilized. Moreover, the personal scope of the applicability is not limited in any way. Therefore, it is applicable beyond work-related situations and extends both to private and public sectors.

As previously noted, when analyzing the Trade Secret Directive and comparing it with the Information Society Directive, one might be puzzled that freedom of expression is provided as a direct exception to trade secret protection. Article 5(a) exempts remedies when acquisition, use or disclosure of the trade secret was carried out "*for exercising the right to freedom of expression and information as set out in the Charter, including respect for the freedom and pluralism of the media.*"[192] This is very different from the exceptions provided in the Information Society Directive for copyright protection. One could, for example, find a freedom of expression fundamental right behind the parody exception for copyright (as the *Deckmyn* case discussed above illustrates), but none of the exceptions in the Information Society Directive implicate fundamental rights as directly as under the Trade Secret Directive.

The case law of the CJEU on freedom of expression and copyright suggests that even though some legal provision under copyright legislation (or trade secret legislation) may be understood as an exception, it still has to be interpreted in a manner to give full effect to the rule and which would at the same fully adhere to the fundamental rights under the Charter, interpreted in the light of the ECtHR case law.[193] Yet, the most recent case law from the CJEU in fact limits the room of interpretation in the copyright context in two important ways, as already discussed above. Firstly, the interpretation has to be in compliance with the wording of the specific exception. Secondly, the Member States need to apply the three-step test in accordance

[192] Trade Secret Directive, *supra* note 1, at Article 5(a).

[193] The question whether trade secrets are intellectual property is outside the scope of this article. But on the analysis of such question see for example, Lionel Bently, *Trade Secrets: Intellectual property but not property?*, in CONCEPTS OF PROPERTY IN INTELLECTUAL PROPERTY LAW (Ruth Howe & Jonathan Griffiths eds., 2013).

with Article 5(5) of the Information Society Directive when implementing and interpreting copyright exceptions.

In the Trade Secret Directive, there is no three-step test.[194] The non-existence of the three-step test means that such an extra requirement in implementing and interpreting exceptions in the trade secret context is missing, allowing broader room for the exceptions. Moreover, Article 5(a) refers directly to the freedom of expression and information under the Charter. The provision itself does not have any other defining vocabulary. Rather, the provision seems to bring the freedom of expression and information fundamental right as such into the center of the Trade Secret Directive. This opens up the possibility to give the right to information in the trade secret context an effect that flows from the freedom of expression doctrine under the human rights instruments. The interpretations under the Trade Secret Directive may therefore develop more freely than what has been possible under the Information Society Directive.

Consequently, the case law of the ECtHR becomes highly relevant when analyzing the operation of Article 5(a), even though the ECHR is not a legislative instrument of the E.U. As explained earlier, Article 11 of the Charter on freedom of expression is to be interpreted in compliance with Article 10 of the ECHR. Of particular importance is the ECtHR's case law concerning journalistic activities and the cases where journalists have been entitled to reveal even confidential information. It is noteworthy that even the preamble text of the Trade Secret Directive highlights the importance of investigative journalism.

The cases of the ECtHR concerning whistleblowing are likewise relevant when interpreting Article 5(b) of the Trade Secret Directive. Yet, Article 5(b) contains a more explicitly-worded exception, which sets some contours for implementation and interpretation. Some of these potential interpretations have been addressed above. Even though under the Trade Secret Directive these provisions, freedom of expression and whistleblowing, are mentioned as exceptions to trade secret protection, one should bear

[194] Such test is not applicable to trade secrets even under the TRIPS Agreement, the Trade Secret Directive, the DTSA, or the UTSA.

in mind that under the ECHR, confidentiality is one of the legitimate reasons to limit freedom of expression, but the other requirements for such limitations discussed above need to be met too. Most importantly, the limitation must be "necessary in a democratic society[.]"

The case law of the CJEU on copyrights highlights the need to seek a fair balance between different interests and between different fundamental rights, namely between protection of intellectual property and freedom of expression. Trade secrets are also protected under the protection of property ownership and limitations for property protection are also subject to certain rules under the ECHR. The notion of *public interest* becomes a decisive norm when considering what kinds of actions are deemed to be appropriate in limiting property rights. In some cases, it might be in the public interest to keep information confidential, and in some cases it would be more appropriate to disclose the information. For example, a threat to public health or environment would qualify as a legitimate reason for whistleblowing and freedom of expression. Yet the disclosure may only cover trade secrets to the extent that is necessary to the disclosure of the wrongdoing.[195] Consequently, the Trade Secret Directive likewise seeks a balance between various interests and different fundamental rights.

Some have argued that the open manner in which these exceptions are drafted would provide some flexibility for Members to design how to implement these provisions. This could potentially lead to discrepancies between various national level implementations.[196] However, one should recognize that even though the Member States are allowed to provide more protection to trade secrets, the Directive generally specifies only a minimum harmonization of trade secret protection, and pursuant to Article 5 Member States do not have discretion. Protection must be implemented as such under Article 1(1) of the Trade Secret

---

[195] This interpretation has been suggested in the Finnish Government Bill 49/2018, p. 61.

[196] FABIAN JUNGE, THE NECESSITY OF EUROPEAN HARMONIZATION IN THE AREA OF TRADE SECRETS 70–71, (Maastricht Fac. L. Eur. Priv. L. Inst. Working Paper No. 2016/04, 2016), https://ssrn.com/abstract=2839693 [https://perma.cc/62R9-UCME].

Directive. Furthermore, Members are bound to follow the case law of the ECtHR. Therefore, Members are not allowed to narrow down these provisions.

Sections (c) and (d) of Article 5 of the Trade Secret Directive provide specific circumstances when disclosure is allowed under specific national or Union rules. These provisions seem to resemble more closely the detailed exception of whistleblowing as regulated in the U.S. All these exceptions are also connected to Article 1(2) of the Trade Secret Directive which sets the scope of protection and defines what is not protectable. Most importantly, Article 1(2) of the Trade Secret Directive provides *"[t]his Directive shall not affect: (a) the exercise of the right to freedom of expression and information as set out in the Charter, including respect for the freedom and pluralism of the media."*[197] This provision could likewise be interpreted as highlighting the importance of freedom of expression over the trade secret protection.[198] Like U.S. trade secret law, the Trade Secret Directive includes many other rules which are designed to ensure the dissemination of information and the right to information.

B. Specific Protection for Whistleblowers in the E.U.

The E.U. adopted a Directive for the protection of whistleblowers ("Whistleblower Directive") in April 2019.[199] The objective of the Directive is to give further protection to whistleblowers to prevent breaches of law which are harmful to the public interest (Recital 1). The material scope of the Whistleblower Directive covers among others the following areas of E.U. law: food and feed safety, transport safety, consumer protection, nuclear safety, public health, environmental protection, public

---

[197] Trade Secret Directive, *supra* note 1, at Article 1(2).

[198] However, another way of understanding this provision is to give it a "without prejudice" type of meaning. We thank Professor Tanya Aplin for pointing out the connection between Article 5(a) and 1(2) of the Trade Secret Directive and potential ways of interpreting the provision. *See also,* Aplin, *supra* note 188, at 272–73.

[199] Directive 2019/1937, of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law, 2019 O.J. (L 305) 17 [hereinafter "Whistleblower Directive"].

procurement, financial services and protection of privacy (Article 2). Thus, even though the Whistleblower Directive covers many areas of E.U. law, the approach is still sector specific, which is similar to the U.S. approach albeit in the U.S. there are different laws for different situations and sectors.

Before the introduction of the Whistleblower Directive, some urged a need for a horizontal approach. But the E.U. does not have a power to legislate in all areas of law, which ruled out a horizontal approach.[200] Moreover, the material scope of the Whistleblower Directive does not cover all breaches of Union law, but only breaches in the areas of Union law which are explicitly mentioned under Article 2. From the recitals of the Whistleblower Directive, one can learn that areas selected are the ones where breaches may cause serious harm to public interest and welfare of society.[201] However, E.U. Member States are allowed to extend the application of the Directive to other areas of law. Moreover, the Whistleblower Directive does not have an impact on legislation already at place in the Member States for reporting wrongdoings in some specific areas of law.

Under Article 21(7) of the Whistleblower Directive, if there is a need to disclose trade secrets, when reporting or disclosing information, which falls within the scope of the Whistleblower Directive, such disclosures are considered to be lawful disclosures under Article 3(2) of the Trade Secret Directive. Consequently, the Whistleblower Directive is a *lex specialis* within the scope of the Whistleblower Directive. However, these two Directives are understood as complementing each other and it is clearly highlighted that when cases do not belong to the scope of the Whistleblower Directive, the exceptions provided in the Trade Secret Directive remain applicable (Recital 100); for instance, freedom of expression exceptions may apply. However, the introduction of the Whistleblower Directive may have an impact on interpretations of the Trade Secret Directive. For example, the

---

[200] Simone White, *A Matter of Life & Death: Whistleblowing Legislation in the EU*, EUCRIM (Jan. 22, 2019), https://eucrim.eu/articles/matter-life-death-whistleblowing-legislation-eu/ [https://perma.cc/4FAM-2S24].

[201] *See, e.g.,* Whistleblower Directive, *supra* note 199, Recitals 3, 5(iii) and 110.

material scope of the Whistleblower Directive can provide some guidance when analyzing when there is a public interest in disclosing misconduct, wrongdoing or illegal activity under the Trade Secret Directive. But the interpretation of the exceptions in the Trade Secret Directive should not become more limited, even though there might be less need to rely on provisions of the Trade Secret Directive, as the material and the personal scopes of the Whistleblower Directive are very broad.

The personal scope of the Whistleblower Directive is quite all-encompassing. Even though the provision refers to the persons who learn the information in work-related situations, the definitions applied also cover job-applicants, trainees, freelancers, sub-contractors and different type of collaborators who could face some harmful consequences due to disclosures. In addition, it is applicable both to public and private sectors (Article 4). Also, in the Trade Secret Directive the personal scope of the whistleblowing provision is wide, but it has been reached through defining the exception to cover the disclosure activity without making any reference to the personal scope of the exception.

In accordance with the Whistleblower Directive, Member States are obligated to set up procedures for internal and external reporting. The Whistleblower Directive clearly refers to and draws upon the ECtHR's practice on this issue (Recital 32). Under the Trade Secret Directive, the recitals only referred to the Charter provisions, but in the Whistleblower Directive there is a direct reference also to the ECHR. Moreover, one can see the impact of the ECtHR's case law in the structuring of the internal and external reporting channels. How an entity's internal reporting channels and relevant public authorities should be preferred before disclosing the wrongdoing to the general public seems to stem from the case law of the ECtHR. This preference is also illustrated in the cases discussed above. The disclosure to the public should always be the last resort. However, the Directive also provides some flexibility for cases when these preferred reporting channels are deemed to be impractical. In such cases the wrongdoings could be reported directly to the public.

Article 15 sets up specific conditions when public disclosures are allowed. First, one is allowed to disclose information to the public, if they first have used internal and/or external reporting channels, but there has been no action taken within the timeframes set in the Whistleblower Directive. Moreover, one is allowed to disclose information to the public when one has reasonable grounds to believe that there is an imminent or manifest danger to the public interest. Likewise, public disclosure is allowed in cases of external reporting if one believes that because of the specific circumstances of the case there is a risk of retaliation or low prospect of the case being addressed, such as that evidence may be concealed or destroyed or that an authority is in collusion with the perpetrator of the breach or involved in the breach. This provision defines the conditions in a quite detailed manner.

Under the case law of the ECtHR, one is entitled to public disclosures in cases where alternative ways of disclosure are considered "clearly impractical."[202] The requirements under the Whistleblower Directive seem to be in compliance with this case law and in any case the requirements need to be interpreted and implemented in such a manner. These more detailed provisions of the Whistleblower Directive can also provide some guidance on interpretations for the Trade Secret Directive.

In addition to the aforementioned rules of priority, there is a possibility to disclose directly to the press in accordance with the specific national rules that set up a system protecting freedom of expression and information.[203] In Recital 46 it is highlighted that whistleblowers are especially important for investigative journalism and therefore providing protection for whistleblowers also facilitates disclosures to the media.[204] This way, the watchdog role of the media is protected. Article 15(2) of direct disclosure to the press was not part of the initial proposal for the Whistleblower Directive, but was included at a very late stage in the legislative procedure.[205] This addition is laudable as otherwise the

[202] Heinisch v. Germany, 2011 Eur. Ct. H.R. App. No. 28274/08.

[203] Whistleblower Directive, *supra* note 199, at Article 15(2).

[204] Whistleblower Directive, *supra* note 199, at Recital 46.

[205] This amendment was not even part of Article 13 of the Committee report tabled for plenary 27, 1st reading/single reading, Report A8-0398/2018

Whistleblower Directive would have potentially narrowed media's possibilities to receive information and enable public discourse over important issues, having a clear impact on freedom of expression.[206] Now the distinction is drawn between disclosure to general public and disclosure to the press. Disclosure to the public is the last resort after the order of priority described above is followed and subject to the specific conditions. But disclosure to the press can take place without such specific conditions.

In Finland, the Act on the Exercise of Freedom of Expression in Mass Media (460/2003) provides rules on editorial responsibility and confidentiality of information sources. It seems likely that this type of legislation qualifies as specific national rules mentioned in Article 15(2) of the Whistleblower Directive. As the press needs to follow their specific rules and journalistic ethics before publishing some information, the reputation of business entities is not unduly risked through this information flow.[207] The confidentiality of information sources also protects whistleblowers.[208] Consequently, disclosure to the press under this

---

(27.11.2018) on the proposal for a directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law (COM(2018)0218 – C8-0159/2018 – 2018/0106(COD)), http://www.europarl.europa.eu/doceo/document/A-8-2018-0398_EN.html?redirect [https://perma.cc/55R3-DCJN]. However, it was included to text, which was finally adopted by the European Parliament in Article 15.2. P8_TA-PROV(2019)0366 Protection of persons reporting on breaches of Union law European Parliament legislative resolution of 16 April 2019 on the proposal for a directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law (COM(2018)0218 – C8-0159/2018 – 2018/0106(COD)), http://www.europarl.europa.eu/doceo/document/TA-8-2019-0366_EN.pdf [https://perma.cc/M9VW-7RY5].

[206] This line of argumentation was also provided among others by European Federation of Journalist in their open letter to the European Parliament, where they requested the type of amendment that was finally adopted in Article 15.2. Nikola Frank *et al.*, *Open Letter to European Institutions: Public Reporting Must be a Safe Option for Whistleblowers*, EUR. FED. JOURNALISTS (Jan. 17, 2019), https://europeanjournalists.org/blog/2019/01/17/open-letter-to-european-institutions-public-reporting-must-be-a-safe-option-for-whistleblowers-2/ [https://perma.cc/U8ZC-YRLT].

[207] *Id.*

[208] Recommendation of the Committee of Ministers to Member States on the Protection of Whistleblowers, COUNCIL EUR. (Apr. 30, 2014),

type of national rules can be argued to reach the same objective as the other detailed priority rules on disclosure under the Whistleblower Directive. Moreover, this provision ensures that the Whistleblower Directive respects fully the freedom of expression and information under the ECHR Article 10.[209] The flexibility between different reporting channels is also in line with the Council of Europe's recommendation on the protection of whistleblowers.[210]

C. How the U.S. has Reconciled Freedom of Expression and Trade Secret Protection

While some of the interpretations of the U.S. Constitution's right of free speech resemble the end results that have been reached under the ECHR, as elaborated previously in this article, the possibility of relying on these rules (as well as other ancillary limiting doctrines) may not be very obvious to the parties to a case. Unlike the Trade Secret Directive, no provision of the DTSA or the UTSA specifically mentions freedom of expression as an issue to be considered in trade secret cases. Nonetheless, as discussed above, it is clear under U.S. law that where the assertion of trade secret rights would restrain free speech or freedom of the press, a First Amendment argument (often framed as a "defense") may be asserted.[211] Additionally, both the DTSA and UTSA (as adopted in each state) may be challenged as unconstitutional on First Amendment grounds, particularly as applied. However, although information diffusion through free speech and freedom of the press, particularly on matters of public interest, are important

---

https://wcd.coe.int/ViewDoc.jsp?Ref=CM/Rec(2014)7&Language=lanEnglish&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383 [https://perma.cc/75S4-4S63].

[209] Nikola Frank et al., *Open Letter to European Institutions: Public Reporting Must be a Safe Option for Whistleblowers*, EUR. FED. JOURNALISTS (Jan. 17, 2019), https://europeanjournalists.org/blog/2019/01/17/open-letter-to-european-institutions-public-reporting-must-be-a-safe-option-for-whistleblowers-2/ [https://perma.cc/U8ZC-YRLT].

[210] Recommendation of the Committee of Ministers to Member States on the Protection of Whistleblowers, *supra* note 208.

[211] *See* Ford Motor Company v. Lane, 67 F. Supp. 2d. 745, 752 (E.D. Mich. 1999).

values in the U.S., whether a First Amendment argument will succeed in a trade secret misappropriation case depends upon a number of factors, including the wrongfulness of the defendant's behavior and the public importance of the information to be conveyed.

The most obvious reason why a First Amendment defense does not always work in trade secret cases in the U.S. is because not all acts that constitute trade secret misappropriation have a communicative aspect. Under both the UTSA and the DTSA, trade secret information may be wrongfully acquired and used without there ever being any communication of the trade secrets to others, particularly publicly. For instance, although a competitor may wrongfully acquire trade secret information, it may only use it internally and never disclose it outside the confines of its own business. For this reason, the trade secret cases in the U.S. where a First Amendment defense has been asserted are rare, and they usually involve speech by the press on a matter of public concern in situations where the involved journalist was not involved in the initial misappropriation of the subject information.[212] It is much more rare for the person who directly misappropriated alleged trade secrets to assert a First Amendment defense, but the First Amendment should be raised whenever the remedy sought would quell speech, particularly if the information at issue concerns a matter of great public concern.

When a journalist is more directly involved in the alleged trade secret misappropriation, then a clearer conflict arises between freedom of the press and the goals of tort law. As summarized by Richard Epstein, historically the goals of tort law often prevailed over First Amendment concerns:

> For most of [U.S.] constitutional history it was difficult to detect any real tension between the common law principle of defamation (and, one may add, privacy) and the First Amendment. The usual reconciliation of the two principles was that the law of defamation was concerned with false speech to the discredit of the plaintiff, which, being wrongful, received no constitutional protection at all.[213]

---

[212] *See* Samuelson, *supra* note 2.

[213] Richard A. Epstein, *Privacy, Publication, and the First Amendment: The Dangers of First Amendment Exceptionalism*, 52 STAN. L. REV. 1003, 1008

But part of the reason is because there are numerous free speech and free press safety-valves built into U.S. trade secret law (and IP law more generally) that serve to balance information protection against the U.S. policy of information diffusion. Professor Pamela Samuelson identified the following trade secret principles: (1) reverse engineering; (2) preemption as a check on trade secret law; (3) accidental disclosure; (4) limits on third party liability; and (5) trade secret interests may be overridden by other societal interests.[214] This list can be supplemented by: (6) the limited definition of a trade secret, including the principle that general skill and knowledge is not protected and the requirement of "independent economic value"; (7) the principle of independent development; (8) the knowledge or reason of know standard of misappropriation; (9) the role of equitable considerations is the decision to grant injunctive relief; and (10) the applicable whistleblower immunity principles and statutes.

As an apparent consequence of the free speech and free press safety-valves (and other limitations on coverage) that are built into U.S. trade secret law, a public interest exception to trade secret protection is not well-developed. It is briefly mentioned in the commentary to the UTSA and the *Restatement (Third) of Unfair Competition*, but without much explication.[215] Often, where a public interest limitation is discussed is with respect to requests for injunctive relief or protective orders when courts must consider common law equitable principles and where a rich body of jurisprudence that considers the public interest exists.[216] Indeed, the case cited in the UTSA commentary for the proposition that there

---

(2000) (commenting on U.S. law prior to the Supreme Court's decision in New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

[214] Samuelson, *supra* note 2, at 782–89.

[215] *See* Uniform Trade Secrets Act § 1, cmt. and Rest. (Third) of Unfair Competition, § 40, cmt. c.

[216] *See, e.g.*, Lyft, Inc. v. City of Seattle, 418 P.3d 102 (Wash. 2018) (reversed and remanded, stating the lower court did not sufficiently weigh the public's interest in disclosure); Medspring Grp., Inc. v. Feng, 368 F. Supp. 2d 1270, 1280 (D. Utah 2005) ("This goal [of developing new technologies by authorizing injunctive protection of trade secrets], however, must be balanced against the public's interest in encouraging competition and supporting an individual's right to exploit his own skill and knowledge.").

is a public interest exception to trade secret law, *Republic Aviation v. Schenk*, involved the request for a permanent injunction in a trade secret case that was brought during the Vietnam War. The court noted: "In determining the advisability of granting the plaintiff the sweeping injunctive relief sought in the action, factors extrinsic of the record must be considered. Those factors are the interests of the public, the armed services and national security."[217]

As a result of the foregoing, it is not that U.S. courts are not charged with considering the public interest in trade secret cases. Rather, what is missing in U.S. law that is explicit in the Trade Secret Directive is a list of specific (but not necessarily, exclusive) matters of public interest that should be considered as part of trade secret litigation in the U.S., including: (1) free speech and freedom of the press; (2) free competition; (3) employee mobility; (4) regulatory oversight; (5) the rights of collective organizations (unions); and (6) personal privacy interests. As a practical matter, defendants in trade secret cases must raise these issues for them to be considered, and many courts in the U.S. have been receptive to these interests when raised. Indeed, as previously noted, some of these issues have been raised in trade secret cases in the U.S. to limit the scope (if not deny the grant of) both preliminary and permanent injunctive relief.

E. Whistleblowing as Specific Exceptions for Trade Secrets in the U.S.

Given the limited scope of the First Amendment free speech rights of public employees, as described above, statutory protections for such employees and other whistleblowers (usually the employees of public contractors) is important and exists at both the state and federal level in the U.S. pursuant to various common law principles, statutes, and regulations.[218] While each whistleblower law and regulation in the U.S. is different in scope, focus, and specifics, the general purpose of these laws is to

---

[217] Republic Aviation Corp. v. Schenk, 1967 WL 7717, at *7, 152 USPQ 830 (N.Y. Sup. Ct. Jan. 13, 1967).

[218] For an overview of the federal laws, *see* JON O. SHIMABUKURO & L. PAIGE WHITAKER, CONG. RES. SERV., R42727, WHISTLEBLOWER PROTECTIONS UNDER FEDERAL LAW: AN OVERVIEW (2012).

encourage employees of government agencies and government contractors to provide information about suspected wrongdoing and illegal behavior, often by specifying the means of disclosure and providing protection from retaliation. Generally, alleged wrongdoing is a proper subject for whistleblowing behavior if it: (1) concerns a financial loss to the government; (2) constitutes a violation of law, or (3) causes harm to employees or the general public. However, the disclosure of information alleged to constitute classified information may subject the person disclosing the information to prosecution under the federal Espionage Act, making a decision to engage in whistleblowing particularly difficult for employees of the intelligence community, as defined.

The applicability of U.S. whistleblowing rules principally to public employees and employees of public contractors is different from the European approach, as the European approach makes no distinction between employees in the public and private sector. For example, in the case *Heinisch v. Germany,* explained earlier, misconduct was taking place in a private enterprise.[219] However, under U.S. law, there is nothing to prevent private citizens from reporting government wrongdoing provided their actions in doing so are not illegal or tortious.[220] Indeed, as noted previously, the First Amendment to the U.S. Constitution includes the right to petition the government. Additionally, U.S. First Amendment jurisprudence offers protection to private citizens charged with defamation if the plaintiffs are public officials, public figures, or the matters discussed are of public concern[221] and some U.S. whistleblower statutes apply to private citizens, for example the whistleblower provisions of the UTSA.

---

[219] Heinisch v. Germany, 2011 Eur. Ct. H.R. App. No. 28274/08.

[220] New York Times Co. v. Sullivan, 376 U.S. 254, 275 (1964) ("The right of free public discussion of the stewardship of public officials was thus, in Madison's view, a fundamental principle of the American form of government.") (quoting 4 ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 570 (1876)); Sweeney v. Patterson, 128 F.2d 457, 458 (1942), *cert. denied,* 317 U.S. 678. ("The protection of the public requires not merely discussion, but information. Political conduct and views which some respectable people approve, and others condemn, are constantly imputed to Congressmen.").

[221] *Sullivan*, 376 U.S. at 270; Gertz v. Robert Welch, 418 U.S. 323, 348–49 (1974).

More directly, the new DTSA whistleblower provisions create an immunity for trade secret misappropriation which is applicable in both civil and criminal cases whether brought in state or federal court. Known as the "whistleblower defense" or the "whistleblower immunity," it is based upon the public's interest in learning about illegal behavior. However, the DTSA whistleblower provision is very specific, as its three parts, which are revealed in the amended Section 1833 of Title 18 of the U.S. Code.

The first part of the DTSA whistleblower provision details the immunity that individuals enjoy under the statute, as follows:

> (b) Immunity from liability for confidential disclosure of a trade secret to the government or in a court filing.
>
> (1) Immunity. An individual shall not be held criminally or civilly liable under any Federal or State trade secret law for the disclosure of a trade secret that—
>
> (A) is made—
>
> (i) in confidence to a Federal, State, or local government official, either directly or indirectly, or to an attorney; and
>
> (ii) solely for the purpose of reporting or investigating a suspected violation of law; or
>
> (B) is made in a complaint or other document filed in a lawsuit or other proceeding, if such filing is made under seal.[222]

As so worded, it only allows for the information to be disclosed to specified individuals "in confidence" and, if made in a document filed in a lawsuit, it must be made "under seal."[223] The DTSA does not define what the two quoted terms mean, but the rules of many federal and state courts specify the procedures for filing a document under seal.

The second part of the DTSA's whistleblower provision concerns disclosures within the context of retaliation lawsuits. These are often brought by whistleblowers when they are terminated by their employers for disclosing information to government officials, often based upon state or federal statutes that allow such lawsuits. It provides:

> (2) USE OF TRADE SECRET INFORMATION IN ANTI-RETALIATION LAWSUIT. An individual who files a lawsuit for

---

[222] 18 U.S.C. § 1833(b)(1) (2018).
[223] 18 U.S.C. §§ 1833(b)(1)(A)(i)–(B) (2018).

> retaliation by an employer for reporting a suspected violation of law may disclose the trade secret to the attorney of the individual and use the trade secret information in the court proceeding, if the individual—
>
> (A) files any document containing the trade secret under seal; and
>
> (B) does not disclose the trade secret, except pursuant to court order.[224]

As already noted, a separate body of state and federal law, usually in the form of court rules, defines what it means to file information "under seal."

The third part of the DTSA's whistleblower provision is a penalty, of sorts, and is of particular import to employers because it requires that employees be given notice of the whistleblower immunity. Prior to the adoption of this aspect of the DTSA, some U.S. whistleblower laws require employers to be give notice to their employees of whistleblowing rights, but others did not. With respect to trade secret information, this provision fills those loopholes and provides that failure to give the required notice will adversely affect the availability of remedies in trade secret actions against employees.

While helpful as an explicit limitation on liability for trade secret misappropriation under U.S. law, the DTSA whistleblowing provision is limited in scope when compared to the European rules as it only allows disclosures to government or to the courts in specified situations and does not cover disclosures to the general public or to the press. Other legal principles for the protection of freedom of expression and whistleblowing, where they exist, must be resorted to in such situations. So, it seems that E.U. rules, both under the Trade Secret Directive and the Whistleblower Directive, provide more security and clarity to whistleblowers and consequently ensure more efficient public access to information.

VI. CONCLUSION

Although the United States and European Union approach issues of freedom of expression and whistleblowing differently, they have a lot to learn from one another. Looking through the lens of U.S. trade secret law, upon which the Trade Secret Directive is based, many of the public interest concerns that animated the

[224] 18 U.S.C. § 1833(b)(2) (2018).

debates that led to the enactment of the Directive can be ameliorated if E.U. countries properly and fully apply the limitations on the scope of trade secret rights that are a part of a prima facie claim of trade secret misappropriation. From an E.U. perspective, the U.S. could do a much better job of articulating the sorts of public interest concerns that should limit liability or the grant of injunctive relief in trade secret cases, perhaps even amending the UTSA and DTSA to expressly list exceptions to protection.

In essence, it seems that E.U. rules under the Trade Secret Directive on freedom of expression and whistleblowing provide broader and more explicit access to information of public concern when compared to the situation under U.S. law. First, the whistleblowing provisions of the Trade Secret and Whistleblower Directives are not as detailed and restricted as their counterparts in the United States. Second, the non-existence of an express freedom of expression provision in U.S. trade secret law may limit the application of this fundamental right in trade secret cases for the simple and practical reason that it is not seen as a critical limitation. In contrast, the E.U. counterpart has an explicit rule highlighting freedom of expression and information as fundamental rights in the trade secret context; a rule that is even stronger than its counterpart under E.U. copyright law. Additionally, the preamble text of the Directive also refers to the fundamental rights under the Charter, which further emphasize the need to balance the right to information, and fundamental rights more generally, against trade secret protection.

Moreover, when considering the public interest in information, courts need not make a binary choice to either protect trade secrets or not. There is a middle ground that courts can utilize to ensure that disclosed (or shared) information does not result in the waiver of trade secrecy. In fact, this middle ground is used frequently in trade secret litigation when courts issue protective orders designed to limit the use and disclosure of trade secret information in such contexts and is an explicit part of the Trade Secret Directive. Thus, for instance, if the circumstances indicate that the public's interest in certain information outweighs the trade secret owner's interests in secrecy, the subject information might be shared with a few

individuals, such as government regulators, pursuant to an order that they keep the information confidential. Government officials often receive information from individuals and businesses that they promise to keep confidential. Also, both U.S. and E.U. law allow for so-called "royalty injunctions" in lieu of injunctive relief that would preclude the disclosure and use of information. This type of middle ground approach is also a feature of the whistleblowing provisions both in the United States and European Union.

This article discussed the significance the freedom of expression and whistleblowing rules have in enabling the human right to access information, which is a cornerstone of a democratic society. The article elaborated their specific role in the human rights context but also in the trade secret context, notwithstanding the apparent conflict between the two principles and the trade secret protection. From the foregoing, one could learn a number of important factors that emerge for consideration when balancing freedom of expression and the right to information against trade secret rights. These include: the nature of the information (in particular, whether it actually qualifies for trade secret protection); how the defendant in a trade secret case acquired and plans to use the information, if at all; and the public's interest (and by extension, the interest of the press) in the subject information.

Most importantly under the balancing approach advocated in this article, one should bear in mind that the starting point should *not* be to value trade secrets over freedom of expression, but to value the human right to information over information lock-down. The flourishing of individuals, society, and democracy depend upon it.