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PROPOSAL FOR A THEMED SESSION TITLED: "INFORMATION OPENNESS"

Submitted by Professor Sharon K. Sandeen, Mitchell Hamline School of Law

Opening IP for a better world—particularly with respect to discovery, invention, and creativity—requires access to information and knowledge, but such access is often restricted by confidentiality and secrecy measures. These measures can take many forms, including those defined by law, by business practices, and by judicial and administrative processes. Thus, when openness of information is needed, it is not enough to consider the proper scope and limits of applicable IP laws, particularly trade secret law. Rather, a holistic approach is required that considers the legal, social, practical, and technical means by which access to, and diffusion of, information is restricted.

The proposed themed session will illustrate the need for a holistic approach to information openness starting at the macro-level and ending with specific examples. It will be chaired by Professor Tanya Aplin whose scholarship demonstrates a keen sensitivity to the need for a holistic approach to intellectual property and information law. The current panelists and topics of their presentations are as follows:

Professor Sharon Sandeen will present her "Mapping Secrecy" project (see abstract attached) which seeks to identify all the places in law and practice where assertions of secrecy and confidentiality are made. It is her contention that only by doing so can the proper balance between information protection and information openness be achieved because the limitations on the scope of information protection that exist in one area of law may be undermined by other forms of protection, including business practices. Understanding this reality is also important for economic analyses of confidentiality and secrecy as there is a potential disconnect between the information that businesses deem important and the information that is protected by law.

Professor Sandeen's overview will be followed by presentations that illustrate the need for a holistic approach within specific industry contexts. Professor Nari Lee will discuss the laws and industry practices governing confidential data. (See abstract attached.) Professor Ulla-Maija Mylly will discuss access to documents and transparency related to threats by artificial intelligence (AI), focusing on the EU's proposed Artificial Intelligence Act. (See abstract attached.)

As time permits and the submissions of others fit the theme of the panel, additional panelists may be added, particularly since the goals of this proposed session are to highlight the many ways that information openness can be undermined and to demonstrate the benefits of a holistic approach to information policy.

Keywords: Information; trade secrets; information diffusion; confidentiality; secrecy; data; artificial intelligence

ABSTRACT
Mapping Secrecy Law
Professor Sharon K. Sandeen, Mitchell Hamline School of Law, USA

Numerous articles have been written in recent years lamenting the increased assertion of rights in confidential or secret information, often focusing on trade secret law as the apparent culprit. However, as Professor Tanya Aplin and I recently observed in a book chapter on trade secrets and AI— *Trade Secrecy, Factual Secrecy and the Hype Surrounding AI*—the problem does not necessarily concern the scope and limits of trade secret law which, when properly applied, doesn't protect as much information as many people think. Rather, the problem is often one of actual secrecy; namely, the ability of individuals and companies to refuse to share or otherwise disclose information in their possession or, at least, to delay the sharing of such information. This is particularly true with respect to "Big Data."

We are, I am afraid, retreating further and further away from the age of the Enlightenment that emphasized the importance of information diffusion for knowledge development and, instead, entering an age of nescience where information lock-down is promoted. Every time we restrict the free flow of information, we risk creating information inefficiencies, increasing information asymmetries, and undermining innovation and competition. Such an environment also makes it easier for disinformation to spread.

If information sharing and diffusion—and the knowledge acquisition that flows therefrom—are important societal goals, then it is important to understand all the ways that information flows are restricted, whether by application of legal principles, judicial or regulatory processes, commercial practice, or technical limitations. Related problems concern the numerous places where claims of secrecy and confidentiality are made; the different laws and processes that are used to assess claims of secrecy and confidentiality; and the lack of an interdisciplinary approach to these issues among legal scholars.

Consider the field of intellectual property (IP) law. In theory, all IP laws balance the public interest in the free flow of information with other goals, primarily incentivizing innovation and creativity and preventing unfair competition. But if the limitations that are built into IP laws can be undermined by other laws, procedures, or business practices, then the proper balance is difficult to achieve. Previous works, such as *Intellectual Property at the Edge: The Contested Contours of IP*, have explored this problem in the context of IP-adjacent legal doctrines. My paper goes beyond legal doctrine to examine judicial and regulatory processes and business practices.

Focusing on U.S. law, my paper and presentation will discuss my list of the many (often hidden) places in business, legal, and regulatory settings where claims of secrecy and confidentiality are raised. The list of exemptions in the U.S. Freedom of Information Act (FOIA) provides a useful, initial guide. It includes, for instance, consideration of the trade secret status of information and national security issues. But issues of secrecy and confidentiality arise in other settings too, for instance, in civil litigation or pursuant to various privacy laws.

By pursuing a holistic approach to secrecy law, it is hoped that core principles and timely processes can be identified that will enable greater respect for the values of information diffusion and government transparency that all scholars who lament the ascent of trade secrecy seem to desire.

ABSTRACT
Governing confidential data in EU – Transparency as Fairness?
Nari Lee, Hanken School of Economics, Finland

As the coronavirus pandemic has taught us, accessing crucial and accurate data and information is imperative in developing an action plan and coping strategy for crisis. Data is subject to various overlapping piecemeal and fragmented regulations and some are more extensively regulated, while others less so. Even before the current pandemic, regulating data, and making them accessible has been a policy agenda of various governing bodies. FAIR principles, (Findable, Accessible, Interoperable and Reusable), highlighted that sharing valuable data has become an important policy goal. In addition to the goals of sharing, we have personal data subject to extensive regulation of GDPR and non personal data subject to Free-flow regulations. There are specific confidential data such as clinical data that are subject to the protection of data exclusivity, access and transparency regulation in addition to the Trade Secret Directive, all at the same time. There are several pending legislative proposals on the table, emphasizing commercial value of data and its connection to proprietary information. Additionally, the access and the use of data are often administrated by various agencies and authorities, creating overlap in institutional competence.

This paper takes of stock of various EU regulations in force and in discussion, to provide an overview of different overlapping data regulations on the edge of intellectual property rights. As data in and of themselves may be devoid of purposes and even legally protectable interests, this paper argues that how they should be regulated is closely related to the institutions that are entrusted to monitor their collection, and processing. This paper uses the example of how confidential data is regulated in the EU, both as a subject of exclusive right and as a subject of sharable public sector information. By comparing the institutions at peer positions (legislative, judiciary, administration, market) that manage the data flow in EU, this paper argues that they may determine the boundary of sharable and open data from those subject to exclusive right. In sum, this paper notes that the ontological question of whether the rights to data should or should not be subject of intellectual property may be misguided, as it leads to questions of access via exceptions. Rather, framing clearer, transparent and accountable set of rules for the governing the competence of the institutions may promote access to data more efficiently. In sum, fairness may be better serviced through transparency of decision-making by these institutions than devising overlapping and unclear substantive rules of exceptions to exclusive rights.

ABSTRACT

Trade secrets vs. access to documents and transparency related to threats by artificial intelligence (AI)

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Access to documents and transparency rules are highly valued in the Nordic countries and Sweden-Finland were some of the first countries to have legislation on access to documents. There are strong public interest reasons behind such legislation. Transparency in a society contributes to the well-functioning democracy and it is closely connected to the fundamental right to freedom of expression. Values of transparent governance and freedom of expression belong to the core values under the sustainable development agenda of the UN. Related legislation enables a society to tackle against corruption. Likewise, rules on transparency enable detecting other type of threats in a society.

The EU has specific secondary legislations in place to guarantee transparency, such as the Public Access to Documents Regulation (EC) No 1049/2001. However, behind these rules are also European human rights instruments: The Charter of Fundamental Rights of the European Union (the Charter) has a specific access to documents in Article 42. In addition, the Charter and European Convention of Human Rights (ECHR) by their freedom of expression provisions create a fundamental rights' framework for access to information. European Court of Human Rights (ECtHR) has its case law interpreted freedom of expression in a manner that it gives journalists an access right to documents. These European interpretations do not go beyond what has been the situation in Nordic countries based on their national legislations.

There are occasions where government offices hold information which is commercially sensitive but there is also a public interest in knowing and getting access to the information. Such situations are for example stemming from legislation requiring government offices to have an oversight over information necessary for government approval. In these cases, also the transparency legislations are applicable. Such situations require government offices to navigate between conflicting rules of transparency and trade secrecy. The question arises how such situations are dealt with as there is an interest in protecting trade secrets but also there might be a public interest in its disclosure.

The EU Commission's proposal for an Artificial Intelligence Act (COM(2021) 206 final) aims to set new rules on AI. Under these rules developers of AI technology are in certain situations required to disclose to public authorities details of their AI technology. When public authorities are given access to confidential information or source code to examine compliance with substantial obligations under the Act, they are placed under binding confidentiality obligations. Yet, such information is of paramount importance in detecting potential threats of applying AI. Consequently, knowledge over such information may likewise be in the public interest. While Finnish Parliament was discussing this proposal, special attention was paid to this confidentiality obligation. It was highlighted that further analysis is required on this in order to comply the transparency requirements under the specific legislations and constitutional principles. This paper will analyze the conflicting rules of secrecy and transparency in the context of AI regulation.