TICKING THE HOHFELDIAN BOX – AGAINST WHOM AND FOR WHOM IS TRADE SECRET PROTECTION?

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The famous box-ticking device known as the Hohfeldian scheme has been used to analyse various types of legal phenomena and stating the schemes usability is almost a platitude. However, this article presents how advantageous the scheme is within the ever-growing legal regime related to information rights. Using trade secrets and their regulation by the European Union's Trade Secret Directive as a relatively established example, this article depicts how the Hohfeldian scheme assists in defining the subject matter of trade secret protection and the parties' rights and obligations with precision, thus offering an example of how there is not only one right holder within the trade secret right context, but actually the trade secret remedy structure distributes several Hohfeldian basic positions to various subjects. However, when applying the scheme, the sui generis definition of trade secrets and their nature as an information right requires the scheme to be applied meticulously.

1 INTRODUCTION

Although in daily discussions people tend to refer insouciantly to owning trade secrets, trade secrets are considered a private property right neither in the analytical bundle of rights-sense implicit in the common law system, nor in the holistic view of the civil law tradition.[1] Nor are they categorised as private property rights in their international regulation attempts. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), a compulsory agreement for the members of the World Trade Organization (WTO),[2] placed undisclosed information within the unfair competition discipline as contrary to the possibility to grant exclusive rights. Similarly, the European Union's Directive on Trade Secrets (the Trade Secret Directive, TSD)[3] stipulates unambiguously that 'in the interest of innovation and to foster competition', the directive should not create any exclusive right to know-how

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[1] On the different property systems, see Yun-chien Chang and Henry E Smith, 'An Economic Analysis of Civil versus Common Law Property' (2012) 88 Notre Dame Law Review 1, 7.

[2] Agreement on Trade-Related Aspects of Intellectual Property Rights, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C (opened for signature 15 April 1994, entered into force 1 January 1995) 1869 UNTS 299. International protection for trade secrets can be traced to the TRIPS agreement, which contains Article 39 on the effective protection of trade secrets against unfair competition as provided in Article 10bis of the Paris Convention (1967). According to the Paris Convention, member states must provide effective protection against unfair competition. As an expression of this choice the TRIPS refers to a person 'in control' of undisclosed information, not to ownership.

[3] Directive (EU) 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] OJ L157/1 (Trade Secret Directive). The Directive entered into force by the 5th of July 2016, with member states having an obligation to implement it by the 9th of June 2018.

or information protected as trade secrets,[4] and states that trade secrets are 'a complement' or 'an alternative to intellectual property rights'.[5] The question is further confused as trade secrets are in fact safeguarded as a constitutionally protected property right in some jurisdictions.[6] Perhaps as a repercussion of the uniquely defined subject matter, the legal categorisation of the trade secret right as a legal right is still under debate among legal scholars.[7] Categorisation of a legal entitlement is significant, because in our system with multiple, customary categories of rights, different conceptualisations of a right lead to different effects and remedies, and thus categorisations have substantial practical consequences.[8]

In today's information era data and knowledge are increasing their value as assets.[9] Information has been called the most important primary good in the society allocating power and affecting development of knowledge.[10] Trade secrets are not immune to the challenge of the modern era, where a wider group of assets and resources are fit under the term 'property'.[11] A recent study has revealed that albeit the introduction of a legal definition of the 'trade secret' in the TSD, a considerable uncertainty of what constitutes a trade secret remains within the industry.[12] Presumably the confusion results partly from the term 'trade secret' referring to two concepts: both the piece of information that the holder wants to protect, and the enforceable legal rights the holder gains against others from holding the piece of information.[13] This paper addresses the second concept as a part of the on-going debate on what kind of legal rights trade secrets are. The target is not to distinguish which genus trade secrets should be classified to, but to analyse trade secret regulation through analytical methods to gain detailed information on which and whose enforceable legal rights does the current European Union trade secret protection's remedy structure represent in practice. The assumption is that treating trade secrets as belonging to a certain genus would

[4] Trade Secret Directive, recital 16.

[5] Trade Secret Directive, recital 2.

[6] Nari Lee, 'Hedging (into) Property? Invisible Trade Secrets and International Trade in Goods' in Jonathan Griffiths and Tuomas Mylly (eds), *Global Intellectual Property Protection and New Constitutionalism - Hedging Exclusive Rights* (Oxford University Press 2021) 108.

[7] William M Landes and Richard A Posner, *The Economic Structure of Intellectual Property Law* (Belknap Press 2003) 355; Mark A Lemley, 'The Surprising Virtues of Treating Trade Secrets as IP Rights' in Rochelle C Dreyfuss and Katherine J Strandburg (eds), *The Law and Theory of Trade Secrecy: A Handbook of Contemporary Research* (Edward Elgar Publishing 2011) 109; Lee 'Hedging (into) Property?' (n 6) 106–107. See generally Lionel Bently, 'Trade Secrets: "Intellectual Property" but Not "Property"?' in Helena Howe and Jonathan Griffiths (eds), *Concepts of Property in Intellectual Property Law* (Cambridge University Press 2012).

[8] Henry E Smith, 'Emergent Property', *Philosophical Foundations of Property Law* (Oxford University Press 2013) 320–321; Lee, 'Hedging (into) Property?' (n 6) 106–107.

[9] Henrik Udsen, Jens Schovsbo & Berdien van der Donk, 'Trade Secrets Law as Part of Information Law' in Jens Schovsbo & Thomas Riis (eds), *The Harmonization and Protection of Trade Secrets in the EU - An Appraisal of the EU Directive* (Edward Elgar Publishing 2020) 25.

[10] Peter Drahos, *A Philosophy of Intellectual Property* (ANU Press Textbooks 2016) 199.

[11] Kevin Gray, 'Property in Thin Air' (1991) 50 The Cambridge Law Journal 252, 298. See also Ulla-Maija Mylly, 'Preserving the Public Domain: Limits on Overlapping Copyright and Trade Secret Protection of Software' (2021) 52 IIC 1314, 1315.

[12] European Commission, European Innovation Council and SMEs Executive Agency, Alfred Radauer, Martin Bader, Tanya Aplin, Ute Konopka, Nicola Searle, Reinhard Altenburger, Christine Bachner, 'Study on the legal protection of trade secrets in the context of the data economy: final report' (Publications Office of the European Union 2022) 75. The European Court of Justice has not yet addressed the TSD in its case law.

[13] Jorge L Contreras, 'Ownership and Assignment of Intellectual Property' in *Intellectual Property Licensing and Transactions: Theory and Practice* (Cambridge University Press 2022) 41. Contreras argues that 'the assignment of trade secrets is perhaps the least developed and understood among IP types'.

advance our understanding limitedly if we do not comprehend the normative functions of the right.[14]

The mantra-like repeated premise of the trade secret jurisprudence – both in legislative documents and in scholarly articles – is the principle that trade secret protection does not grant exclusive rights over information, as the same information can be lawfully held by multiple actors simultaneously. Currently, trade secret protection has been understood as a liability rules regime, where 'protection seems to be a form of compensation for broken promises, or a punishment for wrongdoing or causing harm'.[15] In this article, the classical Hohfeldian scheme is used as an analytical device capable of describing the trade secret holder's relation to various others[16] and vice versa, as well as how are these relations affected by the remedy structure provided via the TSD. Hohfeldian evaluations of the trade secret right have been committed before in legal literature, for example Michael Risch has listed rights and duties abstracted from the (United States) trade secret right.[17] However, no detailed analysis of how are legal entitlements formed within existing trade secret remedy structure have been found by the author. The aim of this article is partly to present how a remedy structure concerning trade secrets creates and distributes several Hohfeldian basic positions to various subjects in a manner that when recognised aids in understanding how the interests of several actors are balanced within the remedy system.

After this introduction, the article proceeds to introducing the basics of Hohfeld's scheme, its relation to property rights and the choice of the directive for the subject matter of the analysis. In the subsequent sections the scheme is applied to the trade secret right as it is construed by the TSD. The subsections are titled based on whose entitlements or disabilities constitute the focus, although the Hohfeldian incidents of other parties are also on some occasions studied in the same subsection. Due to spatial limitations and for the purpose of this article, it is sufficient to focus on Article 10 of TSD containing provisional and precautionary measures, and Article 12 containing injunctions and corrective measures once a case has been decided on the merits. A short summary will be presented lastly. The findings indicate that not only does the Hohfeldian scheme offer a precise way to define what the trade secret right entails in theory as well as in practice, but the scheme also aids in distinguishing when the trade secret 'thing' exists as well as to whom does the remedy structure distribute rights.[18]

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[14] Jerome H Reichman, 'How Trade Secrecy Law Generates a Natural Semicommons of Innovative Know-How' in Rochelle C Dreyfuss and Katherine J Strandburg (eds), *The Law and Theory of Trade Secrecy - A Handbook of Contemporary Research* (Edward Elgar Publishing 2011) 187.

[15] Nari Lee, 'Open Yet Secret – Trading of Tangible Goods and Trade Secrets' in Niklas Bruun, Graeme B Dinwoodie, Marianne Levin, Ansgar Ohly (eds), *Transition and Coherence in Intellectual Property Law: Essays in Honour of Annette Kur* (Cambridge University Press, 2020) 242, 244.

[16] Henry E Smith, *Property as the Law of Things* (2012) 125 Harvard Law Review 1691, 1696. For example Honoré has criticised Hohfeld for not noticing or not minding that Hohfelds axioms render impossible many of the uses of 'a right to which lawyers and laymen are accustomed'. Honoré does have a point, and it is worth to state that in this article, the Hohfeldian scheme is used as a tool, not as all-encompassing definition of reality. Anthony Maurice Honoré, *Rights of Exclusion and Immunities Against Divesting* (1960) 34 Tulane Law Review 453, 456.

[17] Michael Risch, 'Why Do We Have Trade Secrets?' (2007) 11(1) Marquette Intellectual Property Law Review 3, 24–25 In the article Risch is using the terms 'right' and 'duty' without distinguishing which Hohfeldian deontic position he refers to, but it becomes apparent that in the list 'right' must denote at least claim-rights and privileges.

[18] In this article, the term right is used to refer to all the Hohfeldian entitlements defined below.

2 METHOD: THE HOHFELDIAN SCHEME

2.1 THE SCHEME AND ITS NUANCES

Hohfelds influence has been momentous (his article from 1917 has over 7000 citations according to Google Scholar[19] and to celebrate his centennial impact a novel publication collecting commentaries on his work by notable scholars has recently been issued).[20] Thus, explaining the most-influential piece of his work, the well-known scheme of deontic positions, is a task where one easily tumbles in to either truisms or nuances. However, as the basics of his scheme are vital for understanding the following analysis and suggestions made in this article (and as I perceive the scheme having a lot to offer within information law jurisprudence), a brief explanation shall now ensue.

Wesley Newcombe Hohfeld was a United States legal scholar who claimed in his two articles from 1913[21] and 1917[22] that legal practitioners used ambiguous concepts, such as the term 'right', without defining these concepts properly, which lead to error in reasoning. To demonstrate, he dissected the term 'right', and created his often-cited table of eight different basic positions, which he called 'the lowest common denominators of the law'.[23] In his scheme, the basic positions contain no inherent value, but four of these eight attributes have been called entitlements (the claim-right, privilege/liberty, power, and immunity), and four disablements (duty, no-right, liability, and disability).[24] Each entitlement and disability have an unique correlation and the relationship between the holder of the entitlement and the holder of the correlative forms what Hohfeld called a jural relation.[25] Although Hohfeld was not the first to acknowledge and name different subcategories contained in the concept of a legal right,[26] instead of merely listing the subgroups, he organised them in relation to each other and thus created a scheme which has induced legal scholars to be used as a legal analytical tool while studying almost any kind of legal conundrums. His scheme is often presented as a table:[27]

Jural Opposites	right no-right	privilege duty	power disability	immunity liability
Jural Correlatives	right duty	privilege no-right	power liability	immunity disability

Table 1

[19] On the 15th of January 2023 the number of citations was 7502.
[20] Shyamkrishna Balganesh, Ted M Sichelman and Henry E Smith, *Wesley Hohfeld A Century Later: Edited Work, Select Personal Papers, and Original Commentaries* (Cambridge University Press 2022).
[21] Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23(1) The Yale Law Journal 16.
[22] Wesley Newcomb Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26(8) The Yale Law Journal 710.
[23] Hohfeld 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (n 21) 58.
[24] Hohfeld did not himself use the words entitlement or disablement, but as they are descriptive for the two categories, they are used here.
[25] As he wanted to include both legal and equity-based relations, therefore the term jural.
[26] John W Salmond, *Jurisprudence or The Theory of the Law* (Stevens & Haynes 1902). See especially chapter X 'Legal Rights'. As Finnis has noted, all the Hohfeldian types of rights where already spoken of by Aquinas. See John Finnis, 'Natural Law: The Classical Tradition' in Jules L Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press 2004) 24.
[27] Hohfeld 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (n 21) 30.

By 'right' Hohfeld meant the term to be understood in the 'strict sense', for which a synonym 'claim' could be used.[28] Many today speak of the claim-rights, as will also this article. The correlate of the claim-right is a duty, and thus the jural relation may be expressed as if I have a *claim-right* that you pay me 100 dollars, you have a *duty* to pay me 100 dollars. A holder of a claim-right, in the Hohfeldian sense, has an entitlement that *someone else* either commits an action or refrains from committing an action. Thus, the Hohfeldian claim-right does include negative rights, that is for example the property owners the right to prevent others from interfering with the property. One example of a negative right would be a copyright holder's right that others do not commercially exploit their book.[29] In the Hohfeldian system this 'right' would be classified as the holders claim-right that outsiders not exploit the book, which would correlate with a duty of an outsider to refrain from exploiting the book.

A claim-right therefore does not depict what the holder of the claim-right may or may not do themselves – as if the deed in question is to be done or not done by the holder of the entitlement, the entitlement is labelled in the Hohfeldian system as a privilege. Thus, the privilege concerns something that its holder 'has a right to' do or not do. The correlate of the privilege is the no-right (that is – no claim-right) held by another subject that the holder of the privilege does (or not) commit a certain action. To illustrate the definition, it may be stated that when I hold a legal privilege to roam around my garden, my neighbour has a legal no-right that I do not roam there (that is – they cannot legally use remedies to not to have me roam around my garden). The no-right is probably the most controversial of the positions, and it will be further addressed below. One aspect of the scheme is that a particular jural relation – the deed and the parties – will not reveal anything about other jural relations. The claim-right of A that B stay off A's property correlates with B's duty to stay off A's property, but signals nothing on other jural relations: for example, of A's liberty to use their property themselves. Of course, both may be found as atomic elements under an umbrella idea of A's right to their property. As Drahos has noted, for Hohfeld property rights are 'a kind of institutionalized open-ended contractual relation into which an indefinite number of people can enter with the property owner, but which remains a relation between the right holder and the duty bearer'.[30] It might also surprise a reader not familiar with the scheme that a person may have both a privilege and a duty simultaneously, as if X would make a contract with Y that X enters his own land (for example to be available should Y need them), then X has both the privilege held by him as an owner of property to enter their own land, but simultaneously X would have towards Y the duty to enter the property.[31]

The elements of the two first columns are called first-order positions, and the remaining four higher- or second order positions. The latter describe whether a person can change a jural relation, or whether or not person is bound by such change by someone else. If I hold a power towards you and a certain jural relation between us, I have volitional control to alter a legal relation among us concerning a certain action. Returning to the example concerning debt, the holder of the debt usually has a power to discharge the debt and simultaneously the correlating duty. Power is also something a property holder has when they *have a right* to transfer the title to an object by selling it: thus, the person acquiring the

[28] Hohfeld 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (n 21) 30, 32.
[29] Drahos (n 10) 248.
[30] Drahos (n 10) 175.
[31] Hohfeld 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (n 21) 32.

object will gain all the rights relating to the object simultaneously as the rights (the claim-rights, privileges, powers, and immunities) of the seller will be extinguished. Liability on the other hand is the correlative of power: to be bound by alterations the power holder does regarding certain legal relations. Immunity is the correlative of disability ('no-power') and the negation of disability. If I hold a property, I have various immunities against others – and simultaneously others have a corresponding number of disabilities. As an example, others have 'no-power' to sell my property or grant others privileges to roam around by property – I would be immune to such attempts.

Lastly, an important detail regarding the following analysis on trade secrets is Kramer's division between general (or abstract) and concrete (or specific) entitlements:

> A general entitlement comprises an indefinite number of specific entitlements that instantiate it or develop it. A right against being assaulted, for example, encompasses any number of rights against being assaulted in specific ways. Of course, because generality and concreteness are matters of degree, an entitlement E can be general in relation to an entitlement F and concrete in relation to an entitlement G. For example, while the right against being assaulted is abstract vis-a-vis the rights against being assaulted in specific ways, it is specific vis-à-vis the abstract right to security.
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> An important aspect of the relationship between general and specific entitlements is that a general entitlement can lead to new specific entitlements as circumstances evolve.[32]

Hohfelds scheme is seemingly uncomplicated, but its simplicity is partly a misnomer. As Finnis has stated, 'a superficial familiarity with the terms of the scheme spreads darkness rather widely'.[33] Exemplified by recent contributions by academics, the debate concerning the scheme is still ongoing.[34]

In this article, the scheme is chosen as a tool because albeit the fascinating and high-level legal discussion on criticism and counter-criticism the scheme has received, it has been continuously employed by different scholars in describing different areas of legal practice.[35] Kit Barker has suggested that

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[32] Matthew H Kramer, 'Rights Without Trimmings' in Matthew H Kramer (ed), *A Debate Over Rights. Philosophical Enquirie.* (Oxford University Press 1998) 42.

[33] John Finnis, 'Some Professorial Fallacies about Rights' (1972) 4 Adelaide Law Review 377, 382.

[34] Heidi M Hurd and Michael S Moore, 'The Hohfeldian Analysis of Rights' (2018) 63(2) American Journal of Jurisprudence 295; Matthew H. Kramer, 'On No-Rights and No Rights' (2019) 64(2) American Journal of Jurisprudence 213, 214; Andrew Halpin, 'No-Right and Its Correlative' (2020) 65(2) American Journal of Jurisprudence 147; Heidi M Hurd and Michael S Moore, 'Replying to Halpin and Kramer: Agreements, Disagreements and No-Agreements' (2019) 64(2) The American Journal of Jurisprudence 259; Mark McBride, 'The Dual Reality of No-Rights' (2021) 66(1) The American Journal of Jurisprudence 39.

[35] Kit Barker, '"Damages without Loss": Can Hohfeld Help?' (2014) 34 Oxford Journal of Legal Studies 631; Christopher M Newman, 'Vested Use-Privileges in Property and Copyright' (2017) 30 Harvard Journal of Law & Technology 75; Samia A Hurst and Alex Mauron, 'Assisted Suicide in Switzerland: Clarifying Liberties and Claims' (2017) 31(3) Bioethics 199; Andrew C Michaels, 'Patent Transfer and the Bundle of Rights' (2018) 83(3) Brooklyn Law Review 933; Adam Reilly, 'Is the "Mere Equity" to Rescind a Legal Power? Unpacking Hohfeld's Concept of "Volitional Control"' (2019) 39(4) Oxford Journal of Legal Studies 779; Itamar Mann, 'The Right to Perform Rescue at Sea: Jurisprudence and Drowning' (2020) 21(3) German Law Journal 598.

> Hohfeld's modern relevance is in part a facet of the durable, scientific objectivity of his analytical technique and, in part, of its disciplining nature and utility at a point in time in which rights have become highly politically charged and the set of legal relationships existing between the state and its citizens is more intricate than ever.[36]

This article does not seek to contribute anything new to the discussion on the essence of the Hohfeldian incidents but aims to present what may be done with the scheme regarding the legal protection of a non-exclusive information related right that trade secrets right is. Hohfeldian scheme offers a way to overcome conceptual ambiguity concerning the 'object' of the trade secret right and it assists in governing trade secrets not as 'things' existing in the legal practice, but more as something that the owner's relative rights attach to. The lack of a protected thing distinguishes trade secrets from property rights, which are understood to relate to 'things', to be rights in rem, contrasted to rights in personam related to obligations. It was partly Hohfelds understanding of the actual similarities between rights in rem and rights in personam, that led to challenging the rem/personam distinction.[37]

Since partly this article addresses the Hohfeldian no-right, the perhaps most unknown of his eight positions, it must be stated how the writer understands the no-right. The term no right has recently received attention from respectable scholars, whose recent contributions present how the deontic position of the no-right still raises a debate.[38] In this article, the deontic position of the no-right is used in a manner consistent with Hohfelds formulation of the no-right:

> Passing now to the question of 'correlatives,' it will be remembered, of course, that a duty is the invariable correlative of that legal relation which is most properly called a right or claim. That being so, if further evidence be needed as to the fundamental and important difference between a right (or claim) and privilege, surely it is found in the fact that the correlative of the latter relation is a 'no-right', there being no single term available the express the latter conception. Thus, the correlative of X's right that Y shall not enter on the land is Y's duty not to enter; but the correlative of X's privilege of entering himself is manifestly Y's 'no-right' that X shall not enter.[39]

Albeit Mathew Kramer, well-known academic, has challenged Hohfelds own perception on the no-right as mistaken and offered workable definition of the deontic position,[40] this article does not depart from Hohfelds own description, which despite Kramer's criticism has been maintained as such within the academic discussion.[41]

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[36] Kit Barker, 'Private Law, Analytical Philosophy and the Modern Value of Wesley Newcomb Hohfeld: A Centennial Appraisal' (2018) 38 Oxford Journal of Legal Studies 585, 586.
[37] Ole-Andreas Rognstad, *Property Aspects of Intellectual Property* (Cambridge University Press 2018) 43–44.
[38] Hurd and Moore 'The Hohfeldian Analysis of Rights' (n 34); Kramer 'On No-Rights and No Rights' (n 34); Halpin 'No-Right and Its Correlative' (n 34); Hurd and Moore 'Replying to Halpin and Kramer: Agreements, Disagreements and No-Agreements' (n 34); McBride (n 34).
[39] Hohfeld 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (n 21) 33.
[40] Kramer 'On No-Rights and No Rights' (n 34).
[41] Hurd and Moore 'Replying to Halpin and Kramer: Agreements, Disagreements and No-Agreements' (n 34).

2.2 THE SCHEME AND REALITY – A CASE FOR TRADE SECRET ANALYSIS

The supposition of this article is that Hohfeld's scheme is useful for trade secret analysis because the legal trade secret right and the actual thing, the trade secret information, are uniquely entangled for two reasons: the lack of publicly known depiction of the protected artefact and the sui generis legal definition. Therefore, differentiating the 'thing', that is the legal thing, in trade secret cases is especially difficult, although vital, as the legal thing defines the scope of legal protection.

Hohfeld diligently differentiated purely legal relations from the physical and mental facts. The legal and the non-legal quantities are so often confused and blended,[42] in Hohfeld's view, firstly because of their close association, and secondly because of ambiguity and looseness of legal terminology. As an example of the first reason, the term 'property' may be used to denote the subject of property, the physical object, but as frequently it refers to the legal interest or legal relations belonging to a physical object.[43] The second reason, the difficulty of mixing the legal concept with the physical entity, originates from history as many words were initially applicable to physical things.[44] Continuing with the example of property right, distinguishing the physical entity from the legal, intangible relations of owning a property is central. Concerning trade secret regulation, where no publicly known artefact is distinguishable from the legally protected entity, applying Hohfeld's approach invites accuracy.

Hohfeld's notion of physical and legal aspects resonates with Henry E. Smith's division between 'actual things in the world and legal things', and the involvement of these two kinds of 'things' in property.[45] Although the distinction of 'legal' and 'real' things is traditional, the two things are ever more blended in today's information society. For example, copyrights and patents are increasingly seen as things.[46] Legally, a trade secret right is not a right over any tangible thing,[47] but a 'thing' made by law – by what Madison calls thing-by-policy,[48] and hence the separation of the legally created and regulated (and secret) 'thing' from the 'real thing' is, as this article will later show, more delicate compared to things that are independent of the legal system or created by either publicly accessible or documented declarations.

The entanglement of things, words and legal rights is meaningful. Cohen described already in the 1930s 'thingification' as an occurrence in the field of unfair competition where courts examine commercial words and find inhering in them property rights, as the rights would be something pre-existent and the courts merely recognise them. When a property right is discovered, it entitles the plaintiff to an injunction or an award on damages, and thus

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[42] Hohfeld 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (n 21) 20.
[43] ibid 21.
[44] ibid 24.
[45] Henry E Smith, 'Semicommons in Fluid Resources' (2016) 20(2) Marquette intellectual property law review 195, 200.
[46] Michael J Madison, 'Law as design: objects, concepts, and digital things' (2005) 56(2) Case Western Reserve Law Review 381, 383–384. Madison gives an example of copyrights thingness the way we call copyright infringements 'stealing' (385).
[47] Julie E Cohen, 'Overcoming Property: Does Copyright Trump Privacy?' [2002] Journal of Law, Technology & Policy 375, 815. Julie Cohen has noted that although copyright law gives copyright owners right in works, not things, it is not correct to say that copyright owners could have no rights in the things embodying their works as copyright law does give the owners rights in things as proxies for rights in works.
[48] Madison (n 46) 386.

in the course of the proceedings in unfair competition cases the courts actually create and distribute a new source of economic wealth or power.[49] Trade secrets, indeed a member of the unfair competition regime, function similarly as property rights in Cohen's example as when a trade secret is found present, its holder is acknowledged to hold rights to certain remedies. A trade secret right does not grant exclusivity (and exclusion is controversial in property in general)[50] and the limitations are restricted contrasted to the limitations entailed within property rights.[51] Yet, as holder of a trade secret right does gain the possibility to prohibit others from using the trade secret, it will – following Cohen's example – signal obtaining wealth and power.

In a legal system, the elements of the Hohfeldian scheme, including all that are understood to count as legal rights, are created by the legislator by rules and by the offered remedies. Although in European Union law a Directive is not a directly applicable legal instrument as it requires action by Member States' legal authorities to be implemented in national law,[52] it serves as an example of how trade secrets are created as a legal thing by a legislative text.[53]

The TSD aimed to ensure sufficient and consistent level of civil redress in the internal market in the event of unlawful acquisition, use or disclosure of a trade secret.[54] The increase of dishonest practices aimed at trade secret misappropriation was seen as discouraging creativity and diminishing investment, thus affecting the smooth functioning of the internal market and undermining its growth-enhancing potential.[55] Recital 3, which begins with the term 'open innovation', is a manifestation of the seemingly contradictory but generally accepted basis behind the trade secret regulation: to promote idea exchange by offering functional legal redress for breaches of secrecy. The Directive's preamble accepts the important role of trade secrecy in protecting knowledge exchange between businesses and research institutions in R&D and innovation contexts.[56] Although all EU member states were

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[49] Felix S Cohen, 'Transcendental Nonsense and the Functional Approach' (1935) 35(6) Columbia Law Review 809, 815–6.

[50] Smith 'Semicommons in Fluid Resources' (n 45) 196.

[51] Trade secrets are set apart from property rights because they do not offer exclusive rights, although nothing in property theory requires unlimited rights for property to be considered property. Robert A Heverley, 'The Information Semicommons' (2003) 18 Berkeley Technology Law Journal 1127, 1157.

[52] Julie Dickson, 'Directives in EU Legal Systems: Whose Norms Are They Anyway?' (2011) 17 European Law Journal 190, 194–195.

[53] The fact that EU directives do not address private entities directly does not hinder an analysis on how a norm affects legal relations of private entities, because all legal norms – including those on competence – are ultimately directed towards the courts and other authorities. This is because eventually it is the courts' reactions to the conduct by legal subjects what the norms adjust, even in cases where the norms would direct private individuals. Norms affect private individuals, but the effect is indirect as legal subjects edit their behaviour based on their expectations on courts' reactions. Alf Ross, *Om Ret Og Retfærdighed : En Indførelse i Den Analytiske Retsfilosofi* (2. opl., Nyt nordisk forlag 1966) 45 It might not surprise the reader that reference to scandinavian realism surfaces at some point of this article, as Alf Ross is famous for his Article 'tu-tu', where he addresses the use of legal terms. He notes, regarding property, that the word is not a real thing – 'it is nothing at all, merely a word, an empty word devoid of all semantic reference'. Could we say the same thing about trade secrets?; Alf Ross, 'Tû-Tû' (1957) 70(5) The Harvard Law Review 812. Already Axel Hägerström and Wilhelm Lundstedt wieved that the term 'right' cannot be used to express a concept since it does not refer to any natural facts. Ross viewed that a term 'right' can be used technically, as a tool of representation of various legal positions among people. Jes Bjarup, 'The Philosophy of Scandinavian Legal Realism' (2005) 18 Ratio Juris 1, 12–13.

[54] Trade Secret Directive, recital 10.

[55] ibid recital 4.

[56] ibid recital 3.

bound by the TRIPs agreement at the time of enacting the TSD,[57] there were important differences in the member states' legislation as regards trade secrets – beginning from basics such as the definition of the trade secret.[58] Thus, the Directive is set to harmonise trade secret protection. Regarding the legal nature of the right, the Directive's statement that it does not aim to reform or harmonise the law on unfair competition in general[59] implies that trade secrets would belong to the unfair competition regime.[60] The Directive covers both substantive (Articles 2 to 5) and procedural (Articles 6 to 15) law regarding trade secrets.[61]

3 HOHFELDIAN WAY TO EXPRESS THE TRADE SECRET RIGHT

The focus of this and the two following chapters is on the application of the Hohfeldian scheme on the trade secret right as defined by the TSD. From another angle, the focus is on how the trade secret right defined in the TSD conforms with the Hohfeldian definitions. This article will not consider the distribution of the Hohfeldian incidents between the EU and the Member States but concentrates on how the TSD allocates the incidents among the relevant legal persons affected by a trade secret dispute.

The Hohfeldian scheme requires the content of the jural relation to be accurately specified, and thus forming, what I call, Hohfeldian sentences from the Directive requires a careful review of the Directive as a whole. As the purpose of this study is foremost theoretical, it is sufficient to follow the legislative text despite the occasionally manifold orders, although when applied to an existing trade secret case, an ad hoc assessment on practical details would provide the base for analysis.

The aim of the Directive is to lay down rules on the protection against the unlawful acquisition, use and disclosure of trade secrets (Art 1, point 1). Although not implicitly stated, it becomes clear from the TSD that it is the trade secret holder who is protected.[62] According to Art 2, point 2, a trade secret holder is someone who lawfully controls a trade secret, which in turn is, according to point 1, information that (a) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question; (b) it has commercial value because it is secret; (c) it has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret. Art 3 defines lawful acquisition, use and disclosure of trade

[57] Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) [1994] OJ L336/1.
[58] For example, not all member states had adopted national definitions of a trade secret of the unlawful acquisition, use or disclosure of a trade secret, and there was no consistency as regards their civil law remedies. Trade Secret Directive, recital 6. More on the differences between the trade secret legislations of the member states, see Hogan Lovells International LLP, 'Report on Trade Secrets for the European Commission' (23 September 2011) <https://ec.europa.eu/docsroom/documents/38002> accessed 27 January 2023.
[59] Trade Secret Directive, recital 17.
[60] Unfair competition is generally accepted to be one of the disciplines of industrial property. See WIPO, 'Intellectual property reading material' (Geneva 1998) 124, and UNCTAD-ICTSD, 'Resource Book on TRIPS and Development' (Cambridge 2005) 527.
[61] Tanya Aplin, 'The Limits of Trade Secret Protection in the EU' in Sharon K Sandeen, Christoph Rademacher and Ansgar Ohly (eds), *Research Handbook on Information Law and Governance* (Edward Elgar Publishing 2021) 174.
[62] For example, recitals 4, 6 and 7 refer to trade secret *holders* when discussing remedies for trade secrets.

secrets, whereas Art 4 stipulates on the unlawful equivalents in point 2 (unlawful acquisition), point 3 (unlawful use and disclosure) and points 4-5 (third party liability).

In the Hohfeldian sense, following the definition of a trade secret and referring to the holders as A and the possible infringer as B, A's abstract trade secret right would be A's (claim-)right vis-à-vis B that B not unlawfully acquire, use or disclose A's trade secret.[63] All of the elements must be present: A's claim-right encompasses solely unlawful actions as described in Art 4 points 2–5 and applies exclusively to trade secrets as they are defined in Art 2 point 1 (albeit seemingly obvious, the distinction between a trade secret and 'mere information' is worth emphasising). A's trade secret right could also be stated as a claim-right vis-à-vis B that B does not commit actions defined in Art 4.

Contrasted to the general use of the phrase 'to have a right to' a certain liberty, the TSD does not imply anything about A's liberty to actually use the trade secret (apart from the scope of the Directive). Phrase 'to have the right to free speech' exemplifies: the phrase is often used to signal both the liberty-right (to speak) and the related claim-rights,[64] especially to the claim-right that the state shall refrain from ex-ante actions preventing speech. But 'to have a trade secret right' does not similarly indicate a liberty-right to use the trade secret.[65] A's use of their trade secret right might be prohibited due to various other regulations – such as data protection or patent regulation, and so forth. Yet it would be perfectly valid to state that according to the Hohfeldian scheme B has a no-right vis-à-vis A that A not acquire, use, or disclose the trade secret. In this sense, due to the correlative axiom, A would be perceived to be the holder of a liberty – the jural relation is just specifically within the context of the TSD.

The Hohfeldian formation of the trade secret right, as stated above, is abstract (or general).[66] The abstract right itself connotes nothing on enforceability, as the enforceability will occur according to the stipulations of the TSD. When A reckons that its abstract trade secret right is infringed, the norms rooted in the TSD grant A power and liberty to seek redress by issuing a remedy at the court. On the ground of A's requests and based on the details of each actual case, the court will generate more concrete Hohfeldian jural relations based on the original abstract rights between not only the parties, but when necessary, the parties and outsiders as well. Thus, the abstract right-duty -relation is the foundation or a bundle of multiple different and more specific ad hoc duties such as the duty to stop producing an infringing good.[67]

The next chapters will focus on the enforcement mechanisms of the TSD, concentrating on scenarios according to Arts 10 and 12. The analysis is done based on a

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[63] I do not suggest this would be the only way to construe the holders trade secret right, but for the purpose of this article, this is sufficient.

[64] Thomas D Perry, 'Reply in Defense of Hohfeld' (1980) 37(2) Philosophical Studies: An International Journal for Philosophy in the Analyte Tradition 203, 204.

[65] Generally property rights are understood to signal both the liberty to use and the claim-right that others not use, although neither are without exceptions as most of the laws restricting certain types of conduct have an effect on what we may do with our property. See Newman (n 35) 76–77. See generally on the relationship between right to exclude and Hohfeldian liberties Henry E. Smith, *Intellectual Property as Property: Delineating Entitlements in Information* (2007) 116(8) Yale Law Journal 1742.

[66] Kramer 'Rights Without Trimmings' (n 32) 41. Kramer distinguishes between abstract (general) and concrete (specific) rights.

[67] ibid 41. Kramer notes that an abstract entitlement comprises an indefinite number of specific entitlements that instantiate it or develop it.

hypothetical situation where an (alleged) infringement incites the (alleged) trade secret holder to request for remedies. The Articles define the possible legal outcome and include general provisions on the cause of the proceedings. Following the Hohfeldian definition of the trade secret right as described before in this chapter, and the stipulations of the Directive, the aim in the next two chapters is to define which Hohfeldian incidents can be distinguished, and how do the proceedings affect the original trade secret right. Arts 11 and 13, which include circumstances which must be considered when assessing the remedies and thus are significant when balancing the interests of parties outside the dispute (such as the general public), are only addressed limitedly due to space limitations.

4 TRADE SECRET RIGHT IN A STATE OF UNCERTAINTIES: PRECAUTIONARY MEASURES

4.1 GENERAL ASSESSMENTS

Obviously, courts typically assess civil law matters because the parties hold opposing views on rights, duties and other jural relations which they cannot themselves settle, and thus they hand the matter to a public authority. Within the trade secret context, due to the multielement definition of the trade secret right itself, the uncertainty is more profound in the preliminary state before a legal action and covers more aspects than in most property or intellectual property court cases. The uncertainty factor of trade secret cases is linked to there being no material limitations to trade secret subject matter, and the uncertainty surfaces during the proceedings because there has been ex ante no official verification of the existence of the right or substantive communication of the protected intangible object or delineation of a secret's scope by law,[68] and neither has there been any public acceptance on the trade secret right.[69] A judgement on the merits is the first 'official' declaration that there is a trade secret, signalling the existence of A's claim-right that others not unlawfully acquire, use or disclose it. Nevertheless, the existence of a trade secret does not yet state anything regarding the thing B is holding or whether B has acted unlawfully. Although a comparison between what B has acquired and A's trade secret shall be done, identicality of B's and A's objects will not signal a trade secret infringement.

If A charges B for breaking his duty not to infringe A's trade secret right (the claim-right defined above), A can resort to the remedies offered by the TSD. Before the case is decided on its merits, A has the possibility to resort to the provisional and precautionary measures of Art 10. The measures are applicable in a situation of uncertainty: it is uncertain whether B has infringed A's claim-right, and no binding legal proclamation whether A actually is a trade secret holder exists. Of course, uncertainty is a general characteristic of precautionary measures., and different factors are to be considered to proportionality of such a remedy.[70] After the plaintiff has initiated the action with a sincere belief of their trade secret related rights, a possibility that the information does not fulfil the trade secret criteria exists

[68] Lee, 'Hedging (into) Property?' (n 6) 118.
[69] Even after the proceedings there will be no public assessment on whether or not there is a trade secret – not only axiomatically because of the secretive nature of the right but also with regard to Art 9 and 15, which state that the trade secret must remain confidential during the use of remedies.
[70] Trade Secret Directive, art 11.

in a similar manner as there are rejected patent applications and copyright cases where the object of the dispute is found to belong either to someone else than the plaintiff or even to the public sphere. Precautionary measures are meant to be fast, but as stated in Recital 26, the right for a defense and principle of proportionality should still be respected. The requirements for speed and diligence are discordant, which Art 11 addresses by guiding authorities to both request reasonable evidence from the plaintiff, and on what to assess.[71] According to Art 11, it is enough for the court to reach a 'sufficient degree of certainty' that A has a trade secret right and that B has committed an unlawful act regarding the trade secret.[72] Art 11 states multiple circumstances to be taken into account before granting the measures, and as the Article is not subject to minimum harmonisation, the list should be, albeit the wording, interpreted as exhaustive, or at minimum so that the member states cannot maintain or introduce other circumstances in national law to be taken into account if it would strengthen the grounds for awarding an injunction.[73]

Turning to the Hohfeldian assessment of Art 10, the use of remedies creates a new stage on rights – a more concrete stage, where the right and the correlative again hold a similar degree of specificity.[74] A's *general* claim-right that B does not unlawfully acquire, use and disclose A's trade secret could, according to Art 10, lead to concrete entitlements as stipulated in points (a) - (c), which will signal the concrete derivative right-duty relations between A and B.[75] A's claim-right concerning the trade secret may produce via court a concrete entitlement – for example – *the claim-right to have B stop producing the infringing goods* (point b).

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[71] Rafal Sikorski, '*Towards a More Orderly Application of Proportionality to Patent Injunctions in the European Union*' (2022) 53 IIC - International Review of Intellectual Property and Competition Law 31. Sikorski notes that similar factors as provided in Art 13 [similar to that of Art 11] could be considered when granting patent injunctions.

[72] The uncertainty of the occurrence of an infringement seems to be acknowledged within Art 10 as it refers to the alleged infringer. The following Art 11 on conditions of application and safeguards might explain why it is not contained within Art 10, as Art 11 sets three conditions of which the judicial authorities must be recently certain before ordering the measures: a) a trade secret exists, b) the applicant is the trade secret holder, and c) the trade secret has been acquired unlawfully. But as the unlawful conduct is also mentioned in Art 11, it does not satisfactorily explain why the Art 10 refers to the alleged infringer and not to the alleged trade secret holder, a question which is left unresolved for now.

[73] These circumstances are set to balance the interests of the parties other than the trade secret holder. Thomas Riis, 'Enforcement of rights in trade secrets' in Jens Schovsbo, Timo Minssen, & Thomas Riis (eds) *The Harmonization and Protection of Trade Secrets in the EU - An Appraisal of the EU Directive* (Edward Elgar Publishing 2020) 227–228.

[74] 'Suppose, once again, that A is owner of Blackacre, and that B drives his automobile over A's lawn and shrubbery. A's primary right in rem is thereby violated, and a secondary right in personam arises in favor of A and against B, -an "obligatio", to use the term of Mr. Justice Holmes'. A may sue B at law for damages and get, as a result of the "primary stage" of the proceeding, an ordinary legal judgment in personam for (say) $500. Such judgment would "merge" or extinguish A's secondary right in personal together with B's secondary duty, and would create a (new) judgment obligation-right in personam and correlative duty-for the payment of $500. Such judgment would be binding even though the judgment debtor, B, had no assets whatever. Thus, if B's judgment duty is not performed or discharged, a new action can, in most jurisdictions, be based thereon; though in some of the latter costs are denied to the plaintiff if the new action be brought without special reasons'. Hohfeld 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (n 22) 760.

[75] Kramer 'Rights Without Trimmings' (n 32) 42.

4.2 HOHFELDIAN INCIDENTS DURING TRADE SECRET PROCEEDINGS

4.2[a] A's Power

Point 1 of Art 10 states that the competent judicial authorities may order the remedies *at the request of the trade secret holder,* signalling A's power to create new, concrete entitlements – albeit it happens via enforceable decision by a court. Hohfeld viewed the use of power broadly as any act by which a person volitionally changes the existing jural relations.[76] Therefore, however obscure it might intuitively sound, Hohfelds analytical tool does, by definition, consider that one exercises power when changing existing jural relations by hitting another person in the face.[77] An abstract power encompasses many more concrete power–liability -relations. A would have the power to decide not to seek a remedy through legal proceedings, and after a judgement, they may have the power to decide whether the judgement is enforced against B.[78]

Hohfeld did not himself consider the aspect that in the modern society, A's and B's concrete duties are often imposed by a court order, and not directly by power exercised by the parties themselves.[79] If A's right is infringed upon, A could arguably have a claim-right towards the state that the state provides a means to remedy, but related to power, it would thus be the court, not A, that holds real power to bring about legal alterations to jural relations. Barker has proposed that A could be seen to hold a power to create a power in the court to impose new public duties on B, as the court's power is contingent on A's decision of applying for injunctive relief. If the court could issue an injunctive relief automatically due to A's application, then A could be seen to control B's new duties, but as injunctive relief is technically discretionary, the matter is less clear.[80] Kramer notes that to be 'authorized' by legal or moral norms to demand or waive the enforcement of a claim is formally equivalent to holding a power (conferred by legal or moral norms) which enables one to choose between the demand and the waiver.[81]

Kramer's view is agreeable, although I suggest that the question of who holds power may be understood in the following way: once A issues a request in court, the court becomes under a duty to deal with A's request. Court has a duty towards A in the sense that if the court does not handle A's request, A could appeal to an authority responsible for court supervision. A would have a similar power to appeal should the court act unlawfully, for example by exceed the limits of its discretion. It is under A's volitional control to request a court to issue an injunction, thus bringing about a new claim-right-duty -relation between themselves and the court. Issuing a decision on B regarding duties related to the injunction should not be seen under a volitional control of the court, as the court is bound to decide the case – even if the court would dismiss A's case on procedural grounds. A's power to grant the court power does not mean that A would have to control how the court uses its

[76] On the broad and narrow concept of power, see Reilly (n 35).
[77] Kramer 'Rights Without Trimmings' (n 32) 103–104.
[78] ibid 63.
[79] On the analysis of legal power, see generally Andrew Halpin, 'The Concept of a Legal Power' (1996) 16 Oxford Journal of Legal Studies 129.
[80] Barker "'Damages without Loss": Can Hohfeld Help?' (n 35) 651. A would also impose a power in the court that the court imposes powers among the enforcement authorities.
[81] Kramer 'Rights Without Trimmings' (n 32) 63.

power. Therefore, in this paper the plaintiff A is seen to hold the power in relation to the issuance of injunctions by the court. A's power entails the possibility to outline the subject of the procedure and the injunctions which the court may impose. Thus, in Hohfeldian sense, the point 1 stands for A's power – the right to get alterations to the first-order rights, which here means to give birth to new claim-right-duty-relations between A and B. As is required by the correlative axiom, A's power would correlate with (first of court but ultimately) B's liability.

4.2[b] A's Ostensible Liberty

Simultaneously with the power, A holds a liberty to resort to the remedies (vis-à-vis B – as B would have a no-right that A does not resort to the remedies) and A may withdraw their request any time (although depending on the stage of the proceedings by withdrawing A might impose new duties on themselves, for example the duty to reimburse the defendants costs). Regarding trade secrets, A's liberty to resort to remedies is ostensible as they might not have the possibility to stay passive.[82] A trade secret ceases to be a trade secret once it enters the public sphere and is no longer secret, and the trade secret protection requires its holder to commit to 'reasonable efforts' to maintain secrecy. Therefore, the reason why the trade secret holder needs the court procedure to keep the infringer from disclosing the information does not only derive from preventing the infringer's unjust enrichment from the trade secret, but correspondingly from the aspiration to maintain the (still only supposed) trade secret status of the information. This compulsory element in trade secret injunction cases should be considered when balancing the interests of the parties, as a lack of injunction could lead to the total termination of the trade secret. Interestingly, as volitional control is decisional control over the exercise or non-exercise of the power,[83] the compulsory element of trade secret proceedings also questions whether A has 'volitional control' – a requirement for Hohfeldian power – over the use of the remedies.

4.2[c] B's Immunity or Liability

If the court requests a rejoinder from B (which is not self-evident in precautionary measures that should be fast, though diligent), the possibility to prevent A's request with objections and counterevidence do not signal B's power, because by successfully defending and preventing A's request B would not change any existing jural relation, but only retain the status quo that existed before the procedure. Instead, a successful defense would signal B's immunity vis-à-vis A concerning A's request for alterations to jural relations based on the trade secret right and Art 10. And consequently, B's immunity would signal A's correlating disability. B would maintain against A the liberty to use the intangible 'thing' A would have considered to be their trade secret.

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[82] This is partly acknowledged in recital 26. Robert P. Merges has addressed the issue of limited liberties of intellectual property owners, though he suggests that the existence of a liberty right concerning certain behaviour would entail that third parties could not prevent the behaviour. See Robert P Merges, 'What Kind of Rights Are Intellectual Property Rights?' in Rochelle C Dreyfuss and Justine Pila (eds), *The Oxford Handbook of Intellectual Property Law* (1st edn, Oxford University Press 2018) 68.
[83] Reilly (n 35) 790–791.

Then again, B's defense can be seen as applying power over court – as it would impose the court with a duty vis-à-vis B to take B's statement into consideration and thus limit the discretion of the court. It is not meaningful to go deep into the nuances of procedural rights as the purpose of this paper was to offer a preliminary appraisal of the usability of the Hohfelds scheme on the TSD, especially relating to those among private entities.

A legal trade secret proceeding might, because of B's rejoinder and court discretion, end up declaring that A holds no trade secret, but only mere information, and thus has no rights related to a trade secret. Such a declaration would indeed be remarkable for A and seemingly alter the reality as A had perceived it, but in legal reality no jural relations would have been changed. In such a case neither A nor B should be seen to have exercised a Hohfeldian power, as A's trade secret would then have either never existed or seized to exist independently of B's requests, and therefore no alterations to legal relations are made once the court merely declares the inexistence of trade secrecy as a fact.

The distinction between trade secrets and 'mere information' is problematic as information is not only intangible, non-rival, and non-exclusive, but also substitutable as a piece of information can be 'replaced' by another similar one.[84] As the trade secret right only protects the holder from certain unlawful deeds related to the trade secret, deeds which are related to substitute information should not be always considered infringing. If a third-party reverse engineers information identical to a protected trade secret, the original trade secret status of the information is not affected.[85] Art 3 stipulates on the scenario when the third party has lawfully acquired the trade secret. The articles headline reads 'Lawful acquisition, use and disclosure of trade secrets', and Paragraph 3 lists four means which are considered as lawful acquisition of trade secrets, including as independent discovery and creation or reverse engineering. The headline stipulates on 'trade secrets', which naturally refers to the trade secret holder *A's* perception of the information (or the perception that the information is a trade secret of the trade secret holder A). Naturally for the information to constitute *B's* trade secret, B would have to independently commit to the reasonable steps to keep the information secret in order for B to hold a trade secret right over the information. Before an overall assessment of whether B has committed the reasonable steps to maintain the secrecy of the information, B should be considered to hold only 'mere information'. Thus, although B might have immunity against A's attempts to have new claim-right-duty -relations instituted because B would have not breached their duty not to lawfully acquire, use or disclose the trade secret – as B would have had the liberty to lawfully acquire, use or disclose A's trade secret (and A the correlating no-right that B not acquire, use or disclose A's trade secret). But – and this is a distinctive feature of the trade secret object – B would have had the liberty to acquire, use or disclose 'mere' *information*, as B might have been oblivious that the information B had acquired is regarded as a trade secret by A. In such a situation it would seem nonsensical to speak *from B's point of view* that they have acquired, used, or disclosed anyone's *trade secret* – since in the hands of B the information is not automatically B's trade secret. Even if the information would be identical to what A considers their trade secret, if B would lawfully have the information without any obligations to A, to label the information *A's trade secret* would signify nothing to B, who is also lawfully holding the information.

[84] Heverley (n 51) 1140.
[85] Lee 'Hedging (into) Property?' (n 6) 120–121.

Trade secret subject matter is information, as has already been emphasised, but mere information never constitutes a trade secret as the trade secret always requires more: it requires certain conduct from its holder and also a certain degree of knowledge from persons usually dealing with such information. This distinction is made in Arts 11(3) and Art 13(2), which refer to a situation where remedial measures are revoked (emphasis added) 'if the *information* in question no longer meets the requirements of point (1) of Article 2 for reasons that cannot be attributed directly or indirectly to the respondent'. The distinction of mere information and trade secrets, and protection only of the latter, is substantial because the scope of protection is rooted in the purpose and justification of trade secrecy.

4.2[d] B's Power

The Directive's definition of what constitutes unlawful use is wide and extends the liability to those who gain the trade secret from the original infringer. Therefore, the alleged infringers are also those who have not known that their actions were unlawful (though they should have known from the circumstances). Similar requirement for extending trade secret protection is found in the TRIPS agreement which requires member states to extend liability to third parties.[86] Thus, A's request of remedies will link to the procedure to those who are connected to B through a 'chain of knowledge.'[87] As the Directive allows the occurrence of situations where the alleged infringer began their disputed conduct in good faith, placing an injunction on them – especially in a situation where the existence of the trade secret is uncertain – might cause unreasonable harm, and thus Paragraph 2 balances the interests of A and B.[88]

According to Art 10, Paragraph 2, B may lodge guarantees to avoid the use of the remedies otherwise issued according to Paragraph 1. Contrasted to Paragraph 1, Paragraph 2 does not explicitly state who may request the measure. An alleged infringer B would resort to it presumably when they feel justified to defend against A's primary claim-right, that is in a situation where B believes that A does not have a trade secret claim-right vis-à-vis B or when they trust they have a right to use the information. Contrasted to successfully defending against the requests made by A, where the capability to defend did not signal power, Paragraph 2 does grant its initiator the possibility to get the court issue and enforce new jural relations. B's existing liberty to use the object of dispute, the trade secret, would be made contingent to B lodging guarantees, after which A could not intervene with B's continuous use of the 'alleged' trade secret. A would be liable when B places the guarantees.

In Hohfeldian terms, B holds power to get the court under a duty to impose B with a liberty to lodge guarantees and thereafter become temporarily immune to the possibility of remedial measures they would be otherwise targeted with B according to Paragraph 1. Stating that the alternative measure is B's right, even power, has similar rhetorical force as has the

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[86] Agreement on Trade-Related Aspects of Intellectual Property Rights (Marrakesh, Morocco, 15 April 1994). The footnote 10 of Art 39(2) states that '[f]or the purpose of this provision, "a manner contrary to honest commercial practices" shall mean at least practices such as breach of contract, breach of confidence and inducement to breach, and includes the acquisition of undisclosed information by third parties who knew, or were grossly negligent in failing to know, that such practices were involved in the acquisition'.

[87] Lee 'Hedging (into) Property?' (n 6) 108.

[88] Recitals 29 and 30 address these situations.

statement of 'copyright user rights',[89] that is, holding a legally enforceable right is usually a sign of society's approval.

If B would be willing to continue the trade secret infringing action, they would have no alternative but to lodge the guarantees – thus the requirement for guarantees could be seen as a duty. But because continuing the allegedly infringing action is B's choice, they should be seen to be under no duty to lodge the guarantees – and the lack of duty implies a privilege. Contrastingly, in such a case A would hold a no-right that B not lodge guarantees.

Once B resorts to the alternative remedy thus continuing the allegedly illicit conduct, who would hold a claim-right to the guarantees? According to the Paragraph, the guarantees are intended to compensate the trade secret holder, obviously should A's claims later succeed. Therefore, A holds a contingent claim-right described by Andrew Halpin in relation to the guarantees, because A's right to be reimbursed by the guarantees may or may not arise depending on future circumstances of the case,[90] that is, especially of a declaration of B's infringement. But here the question of acquiring the guarantees must be separated from B lodging them, as the lodging and acquiring obviously are different deeds. The holder of the correlative for B's duty may be found by applying the two mutually exclusive and rivalrous theories on right, the interest and will theories. As A could be seen to have an interest to the claim-right regarding the guarantees, as the guarantees are to compensate A's losses, a promoter of the interest theory of rights would argue that A has the claim-right. A promoter of the will theory would come to a similar conclusion, as A would be the one who would hold enforcement power should B break their duty to lodge the guarantees.[91] Thus A should be seen to hold the claim-right that B lodges guarantees, would B use their power in relation to Paragraph 2.

Paragraph 2 offers an example of how the Hohfeldian basic positions do not hold intrinsic values, as one cannot state duties or no-rights to be automatically undesirable. After lodging the guarantees, B would have a claim-right against A that A does not interfere with them using the object of dispute – the 'thing' A alleges to be their trade secret, and A would have a duty not to interfere.

Regarding the alternative measure, B's request would alter the jural relations between A and B, but it will not affect the original trade secret (claim-)right of A which will remain intact,[92] because A would continue to have a right that B not use their trade secret *unlawfully* – nevertheless, when preliminary measures are applied, B may contest the trade secret right and acquire liberty to continue to use the alleged trade secret backed with a claim-right that A not interfere with B's usage, as long as B fulfils the duty to pay guarantees.

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[89] See generally Tito Rendas, 'Are Copyright-Permitted Uses "Exceptions", "limitations" or "User Rights"? The Special Case of Article 17 CDSM Directive' (2022) 17(1) Journal of Intellectual Property Law and Practice 54.

[90] Andrew Halpin, 'Rights, Duties, Liabilities, and Hohfeld' (2007) 13(1) Legal Theory 23, 31. Halpin gives the example of trespassing. Even though there would exist a liberty to use reasonable force to eject a trespasser, one might not have to resort to this liberty if no-one trespasses.

[91] For an account of the two rival and mutually exclusive theories on rights debate, see generally David Frydrych, 'The theories of rights debate' (2018) 9 Jurisprudence 566.

[92] Kit Barker arrives to a similar conclusion related to infringements of property - Barker '"Damages without Loss": Can Hohfeld Help?' (n 35) 640.

5 INJUNCTIONS AND CORRECTIVE MEASURES ON THE MERITS

5.1 A'S CLAIM-RIGHT AFTER A DECLARATION OF A TRADE SECRET RIGHT

The straight-forward Art 12 provides a suitable point of further reference to illustrate how the Hohfeldian incidents and their correlatives may be used to make trade secret protection comprehensible. The prerequisite for Art 12 is a judicial decision declaring that A has a trade secret right vis-à-vis B, that is that there exists a trade secret, A is its holder, and that B has committed unlawful action against A.

Once the information A holds has been verified as a trade secret, there may exist a reasonable conjecture that A could derive concrete entitlements against not only B, but also others based on that trade secret. But as A's trade secret (claim-)right only covers unlawful actions, the factor of unlawfulness must be separately examined in all future incidents. If C would lawfully use or acquire A's trade secret (for example because of the applicability of Art 3 of the Directive), C would not break their duty concerning A's trade secret claim-right. As C holds a liberty vis-à-vis A regarding the *lawful* acquiring, use or disclosure of *A's trade secret*, A would have a correlating no-right that C not lawfully acquire, use or disclose A's trade secret. The no-right and liberty must be precisely defined to refer to *A's trade secret*, since only A's trade secret right and trade secret status has been assessed. The same information that constitutes A's trade secret may in the hands of third parties be 'mere information', as they might not have fulfilled the reasonable steps to maintain secrecy. This precision comes afore when the Hohfeldian scheme is applied: the correlating positions must have the precise, same content – just from the opposite directions.

Instead of traditional property law right bundles or clusters, where the existence of a something labelled as a property right signals the plausible existence of certain Hohfeldian basic positions against each member of the rest of the world, trade secrets should be more fundamentally understood as ad hoc. This ad hoc element is linked to the 'peculiar' aspect of trade secrets (contrasted to intellectual properties) where there exists no publicly accessible artefact which could disclose the relevant information, but instead the holder must present and prove in each individual case that the defendant has committed unlawful action in violation of trade secrecy rules. Manifestations of the secret are perceived individually and thus an abstract IP object cannot be found.[93] This does not purport that trade secret cases would not have a general aspect as I will describe below.

But are not all rights in our legal realm similarly ad hoc? An example of my house serves as an example of how Hohfeldian positions exist on a property right.[94] While the

[93] Alexander Peukert, *A Critique of the Ontology of Intellectual Property Law* (Cambridge University Press 2021) 60. Peukert argues this being the reason why trade secret protection would still be viewed as a tort or delict instead of a fungible exclusive property right in an abstract object.

[94] Karl Olivecrona, discussing the thoughts of Axel Hägerström makes an example of house ownership and points out that a right of the owner of a certain house cannot consist of the fact of protection offered by the state to the owner, as the right to protection is the prerequisite of the protection. Karl Olivecrona, 'The Legal Theories of Axel Hägerström and Wilhelm Lundstedt' (1959) 3 Scandinavian Studies in Law 125, 128. Olivecrona proposes another example on page 143, describing the vagueness of stating to have a 'right to a house'.

property right would generally include that I have a claim-right that you do not enter my house, there are several situations where you actually would not have a duty not to enter my home (but you could even have a legal duty to enter). In Hohfeldian terms, the lack of a duty not to enter impels that I do not have a claim-right towards you not to enter my house, and thus you would have the liberty to enter, as the liberty to do something is the opposite of a duty to refrain from doing X. Property rights are never absolute in terms that the owner's claim-rights or privileges would be consistent, or perpetually enforceable by state coercion. In civil law judicial systems, jural relations are crafted by the legislator, who also regulates the possible limitations and exceptions.[95]

When Art 12 is applicable, the situation is fundamentally different from the preliminary measures of Art 10, where the existence of a trade secret was only a supposition by A.[96] A judgement on the merits is the first 'official' declaration that there is a trade secret, signalling A's claim-right that others not unlawfully acquire, use, or disclose it. Nevertheless, the existence of a trade secret does not yet state anything regarding B or the element of unlawfulness. Following a classification by Parchomovsky and Stein, who specify intellectual property defenses to three categories, trade secret cases always include a general and an individual component. Parchomovsky and Stein depict *class* and *general* defenses as those that do not only serve the parties part-taking in the trial but extend their impact on third parties. By contrast, *individualised* defenses are limited to the case at bar, creating 'a limited immunity zone'.[97] In trade secret cases, an example of individualised defense is reverse engineering, where a trade secret exists but the defendant has lawfully acquired it. Reverse engineering based defense would only benefit the defendant in question,[98] but if a court accepts a general defense such as that the information is of 'public interest', it would end up annulling the trade secrecy protection altogether.[99] Put in Hohfeldian terms, an individualised defense would only affect the jural relation between the parties A and B, but a successful general defense would affect A's relation to all possible opponents, because it extinguishes A's claim-right altogether. The components of the trade secret right – the claim-right of A that others not unlawfully acquire, use or disclose their trade secret – are placed under scrutiny at the proceedings, and thus, a trade secrecy dispute will always include a general and an individualised component, the first one being the existence of the trade secret and the latter meaning whether there has been an unlawful action.

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[95] On the five notions of a right, and of right to property, see Hugh Breakey, 'Who's Afraid of Property Rights? Rights as Core Concepts, Coherent, Prima Facie, Situated and Specified' (2014) 33 Law and Philosophy 573, 579–584, 591–593.

[96] As set in Article 11 and discussed afore, there should be 'sufficient' evidence of trade secret infringement before the injunctions. But it has been shown that injunctions are granted almost automatically with little or no discretion. Sikorski (n 71) 4. Sikorski is referring to Jorge L. Contreras & Martin Husovec, 'Issuing and Tailoring Patent Injunctions – A Cross-Jurisdictional Comparison and Synthesis', in Jorge L. Contreras (ed), *Injunctions in Patent Law: A Trans-Atlantic Dialogue on Flexibility and Tailoring* (Cambridge University Press 2022) 8–10.

[97] Gideon Parchomovsky and Alex Stein, 'Intellectual Property Defences' (2013) 113(6) Columbia Law Review 1483, 1484–1486.

[98] ibid 1509.

[99] ibid 1510.

5.2 A'S POWER TO REQUEST NEW CLAIM-RIGHTS

Once the court declares that A has a trade secret right, A has the access to the measures provided in Art 12. A's possibility is limited by Art 5, which lists four cases where the measures, procedures and remedies may be dismissed. As with court proceedings generally, the respondent has the right to argue against the plaintiff in order to get the charges discarded or altered. A detailed account of defenses, the powers imbedded in them and how the defenses operate in practice are not discussed here.

Art 12 Paragraph 1 is a list of possible measures which A, the plaintiff, may request from the court. Because of the nature of trade secrets as information, the unlimited scope of their subject matter, and the use of them as a form of protection in any branch of industry, the possible measures vary greatly dependent on the case. All the measures are obviously targeted 'against' the infringer. To exemplify, A may claim the court to order that B stop disclosing the trade secret. Court's ruling would set B with a duty to stop the disclosure of the trade secret. The holder of the correlative claim-right would be A, who might use a government proxy to monitor or coercively ensure that B fulfils the duty. Another example could be a duty of B to destroy materials containing the trade secret, which would correlate with A's claim-right that B does so.

Do these new concrete jural relations emerge only once the court issues decision regarding them, or have they existed included within the trade secret right, and the court just makes them enforceable? As trade secrets do not require registration to enter into force, the existence of a trade secret right commences when a trade secret fills the requirements (set out in the Directive). In this sense, a trade secret right comprises of an indefinite number of specific entitlements already from the moment they exist, but it is the defendants unlawful conduct that then leads to enforcement of the entitlement imbedded within the abstract right.

5.3 THIRD PARTY INCIDENTS

5.3[a] Contractual Partners as Infringers

It is apparent from Art 12 that although the measures are directed 'against the infringer', they will not concern only the original infringer, but possible contractual parties as well. The contractual parties might themselves be infringers by the definition of the TSD, as an infringer is defined as any person who has unlawfully acquired, used or disclosed a trade secret,[100] and because the unlawful acquisition, use and disclosure of the trade secret includes deeds done by those who 'ought, under the circumstances, to have known that the trade secret had been obtained directly or indirectly from another person who was using or disclosing the trade secret unlawfully'. The effects of the remedies against certain contractual parties are mitigated with the possibility to resort to alternative measures, monetary compensations, provided by Art 13. Art 13 provides a list similar to what is found in Art 11 of circumstances which have to be considered when issuing remedies.

[100] Article 2.

5.3[b] Charitable Organisations

According to Paragraph 3, if the trade secret holder requests, the court may impose a duty on the infringer to deliver the goods to either themselves, or to charitable organisations. Thus, A is granted a power to have the court impose the infringer-defendant with a new duty, but vis-à-vis whom would this duty be? After a court has issued a decision with such an ordinance, the charitable organisation would have the possibility to reclaim enforcement from an executive authority (a will theory view of a right holder) and they would be the one having an interest to receive the goods (an interest theory view of a right holder), the charitable organisation would be holding the claim-right. The jural relation between the charitable organisation and the infringer arises from the court decision, issued by an exercise of power by the trade secret holder. The ones who hold the correlating liability would be the infringer and the charitable organisation, both having their own secondary level jural relation with A.

5.4 COURT DISCRETION AS POWER

Paragraph 4 allocates financial responsibility, or in Hohfeldian terms a duty, on the respondent, as the judicial authorities are granted the power to institute the infringer, the respondent, a duty to economically compensate the referred measures. The stipulations concerning the expenses and economic hindrances underlines the economic quality of trade secrets and seem to be independent of the applicant request for the instituted remedial measures. As the measures of paragraph 1 and Paragraph 3 are ordered 'at the request of the applicant', Paragraph 4 does not include such a requirement, thus signalling that the discretion – and power – is left for the court to specifically order the respondent compensate the measures. The ones liable for the court's orders would be both of the parties. A duty to compensate for the measures is a general duty, which would be a base for following and more concrete duties to reimburse the relevant costs at insistence.

6 SUMMARY

Arguably any rights protection regimes would benefit from a deeper understanding on the limitations in the scope of protection currently entailed within the regimes. The Hohfeldian scheme is a refined analytical tool and applying it to a concrete legislative instrument quickly leaves one breathless. As is visible from the analysis above, applying the scheme on trade secret right requires that one stays loyal to the precise definition of both the tool and the right, as specified by law, without omitting any features. Hohfeld himself used the scheme in presenting case analyses of how judges had gone astray when using words such as right, duty or privilege without understanding alterations in the content of the terms.

Concerning findings related to trade secrets, this Articles main findings can be summarised two.

First, the found Hohfeldian sub-elements emphasise that the trade secret right remedy structure of the TSD does allocate rights – claim-rights, liberties, powers, and immunities – to parties other than the original holder. These rights include the defendants' power to resort to alternative measures and their possibility get the 'alleged' trade secret declared void on the

course of the proceedings. The plaintiffs right to the protection of a trade secret by precautionary measures consist of a power and a liberty to get the court issue relevant injunctions, although the liberty is ostensible, thus causing suspicion on whether they hold a power in relation to the overall use of remedies. When the court grants the defendant the right to continue the allegedly infringing action, the holder of the trade secret gains a claim-right that the defendant lodges guarantees to ensure possible compensation. The defendant holds power and a liberty regarding the issuance of the alternative measure according to Art 10, to which the defendant could resort to should they believe they have reasonable cause to defend against A's trade secret right. The alternative measure would be that the defendant would gain a liberty to use the alleged trade secret temporarily, if they would fulfil their duty (towards the plaintiff) that they lodge the guarantees.

Second, this article suggests that the scheme does assist in defining what the trade secret right entails in practice as well as defining where the trade secret 'thing' exists, and where the entity is only mere information. Especially when referring to a third-party B who acquires A's 'trade secret' lawfully, for example via reverse engineering. A's trade secret right includes a no-right that B lawfully acquire A's trade secret, which correlates with B's liberty to acquire A's trade secret. Using the Hohfeldian scheme with precision, the nominator 'A's' must be included, as although after the acquiring B is holding information identical to A's trade secret (that is, A's trade secret), the information might not in the hands of B constitute B's trade secret, but only be 'mere information' that B lawfully holds.

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