

Trade Secret Law

A trade secret is information that:

- is not generally known to the public;
- confers some sort of economic benefit on its holder;
- is the subject of reasonable efforts to maintain its secrecy.

What does trade secret protect?

- typically “information” that might be in the form of a formula, pattern, compilation, program, device, method, technique or process
e.g. *formula* for Coca Cola but also the *methods* and *processes* by which ingredients are created and combined

What might be legally constitute reasonable measures to keep the information secret?

- confidentiality and non-disclosure statements with employees and clients
- require marking by employees of all information to be kept confidential (documents, files, programs, etc) , logging of access, and regular audits of security measures

How long does trade secret last?

- indefinite period of time (e.g. perpetual monopoly possible)
... but no protection from independent discovery of the secret (e.g. reengineering is legal, chemical analysis of Coca Cola is legal)

Benefits of trade secrets

- not limited in time duration,
- no formal registration or other formalities,
- immediate effect,
- no disclosure to the public

Limitations of trade secrets

- burden to keep confidential,
- independent discovery may allow others to use,
- others may protect same secret through patent,
- more difficult to protect than through patent.

As between *trademark in their brand* or *trade secret in their product*, which is more valuable to Coca Cola?

As between *patents* and *trade secrets*, what is more valuable to most private companies in protecting their market share or in gaining market position?

Do we now look primarily to state court precedents as opposed to federal court precedents for Trade Secret law interpretations?

..... depends

Kewanee Oil Co. v. Bicron Corp (1974) – states freely develop their own trade secret laws (US Supreme Court)

Uniform Trade Secrets Act (1979)

- 47 states have adopted in large part but some variations
- states cite each other's interpretations of identical language
- State Supreme courts may still interpret exact same language differently
- Maine Supreme court interpretations still control in Maine

Economic Espionage Act (EEA) (1996)

- misappropriation of trade secret a federal crime
 - theft to benefit a foreign power
 - theft for commercial or economic purposes
- 2016 extended to allow civil actions for same acts brought previously only by U.S.

Defend Trade Secrets Act (DSTA) 2016

- creates a federal cause of action for misappropriating trade secrets
 - private right of action for damages and injunction
 - civil action of injunction by U.S. Attorney General
- does not preempt or supplant state laws
- an additional cause of action

Issue in contention involves:

(a) State incorporation or adaptation of Uniform Trade Secrets Act?

- Supreme Court rulings of individual states probably still controlling

(b) Economic Espionage Act (EEA) or Defend Trade Secrets Act (DSTA)?

- Federal court rulings probably the lead precedents
