

## **Trade Secret Fundamentals**

### **What is a trade secret?**

In general, a trade secret is any information that the owner keeps secret that has economic value because it is not known by others.

### **What law applies to trade secrets?**

Until recently, civil trade secret cases were governed by state law, not federal law. All U.S. states except Massachusetts and New York have adopted the Uniform Trade Secrets Act, an act developed to enable consistency among the various states. Some states imposed slight modifications on the UTSA, so not all state statutes are identical.

In May 2016, President Obama signed into law the Defend Trade Secrets Act, a federal civil trade secret act also based generally on the UTSA. This allows federal jurisdiction and some additional remedies not available under state law.

There are criminal statutes that govern the access or use of trade secrets, including the federal Economic Espionage Act and the Computer Fraud and Abuse Act.

### **Who benefits from the Defend Trade Secrets Act?**

"Innovators, manufacturers, and entrepreneurs of all types will benefit greatly from a civil cause of action at the federal courts— providing a more uniform way to take action and stronger resources to prevent the transit of trade secrets out of the country," according to Michelle Lee, Under Secretary of Commerce for Intellectual Property and the Director of the United States Patent and Trademark Office.

The act does not preempt state laws. Owners of trade secrets will still want to weigh the benefits of proceeding in state court.

### **How does a company or individual protect trade secrets?**

To be a trade secret, confidential information must have economic value independent from being confidential, and the owner of the information must take reasonable measures to maintain the secrecy of the information.

The secrecy of information is primarily maintained through nondisclosure and confidentiality agreements with both third parties and employees, physical and network security and company policy.

In the digital age, owners must also implement computer security and limit access. It is imperative to give careful consideration, in consultation with experienced counsel, to creating these crucial documents as well as implementing protocols designed to maintain the information's secrecy.

## **How does a trade secret owner enforce their trade secret rights?**

Once trade secrets are compromised, the owner should engage experienced counsel to construct an appropriate response based upon the severity of the theft and the value of the information. Whether the initial response is a demand letter or an application for a temporary restraining order, the owner must demonstrate that it has acted reasonably in protecting its trade secrets and take steps to mitigate the damage.

## **What remedies are available in trade secret cases?**

While there are some variations among the state and federal statutes, successful trade secret plaintiffs may generally recover the following:

- The actual damages they have suffered as a result of the misappropriation of their trade secrets
- Any unjust enrichment gained by the defendant as a result of the misappropriation, to the extent it differs from the plaintiff's actual damages
- A reasonable royalty for the use of their trade secrets, in some instances
- Exemplary damages where the infringement is willful and malicious
- Attorneys' fees where the infringement is willful and malicious
- A court order preventing future infringement

## **What differentiates criminal and civil trade secret theft?**

In addition to the civil remedies described above, federal prosecutors at the U.S. Department of Justice also pursue criminal investigations and prosecutions for the theft of trade secrets and economic espionage under the Economic Espionage Act. Penalties for such theft include up to 10 years imprisonment, or a fine of not more than \$250,000 (not more than \$5 million for organizations) or both.

Prudent corporations faced with the possibility of this kind of theft should consider self-audits and the implementation of prophylactic measures designed to protect their trade secrets. Corporations concerned that they may already have been victimized may execute internal investigations focused on identifying and scoping potential misconduct and potential law enforcement referral. Furthermore, corporations or individuals accused of criminal theft of trade secrets or economic espionage require a zealous and expert defense.

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