

The Rise of Trade Secret Litigation in the Digital Age

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U.S. courts have recognized trade secret protection for more than 200 years, and companies have long relied on trade secrets to guard iconic intellectual property, such as the ingredients for Coca-Cola and the Big Mac's special sauce. Yet it was not until 2016 that Congress authorized a federal civil cause of action for trade secret misappropriation, in the form of the Defend Trade Secrets Act (DTSA). A combination of increased technological and employee mobility, compounded by reduced patent protection, prompted the need for federal trade secrets legislation after centuries of enforcement under common law and state statutes.

The availability of federal jurisdiction under the DTSA and powerful DTSA procedural tools, like *ex parte* seizure of allegedly purloined trade secrets, mean that conditions are ripe for trade secret litigation to increase.

Technological Innovation and Legal Changes Promote Trade Secret Litigation

Information and Employee Mobility Enable Technological Theft

A combination of two important trends around the turn of the 21st century spurred an increase in technology theft. First was an increase in employee mobility. Regular job changes have become de rigueur, particularly in high-tech industries. Moreover, employees often move to competitors of their prior employer. With each employee who walks out the door, valuable company information may follow — sometimes in the mind of the departing employee, but often in the form of documents and files.

Second, electronic document storage dramatically improved. The ability to fit an airplane hangar's worth of paper documents onto a single USB drive or remove reams of information from a company's premises using email and online file transfer services increases the risks associated with employee mobility. Well-intentioned email and file destruction policies may

even erase, or at least obscure, evidence of an improper information transfer. More than 85 percent of misappropriation cases are estimated to involve a trade secret owner's employee or business partner, according to a 2016 study by economic and financial consulting firm Cornerstone Research. This is happening every day, and associated litigation is on the rise.

Reduced Patent Protection Incentivizes Reliance on Trade Secrets

In 2014, the U.S. Supreme Court decided *Alice Corp. Pty. Ltd. v. CLS Bank International*, which drastically curtailed patent protection for software and business methods. As a result, many companies have lost confidence in the ability to protect their technology with patents and are instead turning to trade secrets. The comparative lack of acquisition costs for trade secrets as opposed to patents only enhances their appeal.

Likewise, patent litigation has become procedurally less attractive for some plaintiffs. In 2017, the Supreme Court decided *TC Heartland LLC v. Kraft Foods Group Brands LLC*, which narrowed the available venues for patent litigation. Whereas before, patent litigants could file a patent lawsuit anywhere infringement had occurred, now defendants may only be sued where they are incorporated or have a physical place of business.

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(See our September 2017 *Insights* article “[Interpretations of TC Heartland Add Uncertainty to Patent Litigation](#).”) This limits a patent owner’s ability to select a home court or a plaintiff-friendly venue, and may add expense by requiring enforcement in a distant jurisdiction.

Together, the reduced ability to protect technology with patents and the increased cost and unpredictability of patent litigation have made the trade secret alternative more appealing. While only available when there has been an affirmative act of misappropriation — as opposed to the strict liability nature of patent infringement — compelling arguments to opt for trade secret enforcement over patent enforcement can be made when the option exists.

The Increasing Popularity of Trade Secret Litigation

According to federal judicial caseload statistics, the rates for both federal and state trade secret litigation have skyrocketed. In fact, the number of federal trade secret cases increased by 14 percent for each year from 2001 to 2012, according to a [spring 2016 analysis by Willamette Management Associates](#). Moreover, trade secret litigation tends to concern precisely the type of newly available and easily transportable technology discussed above. Some studies indicate that from 2001 to 2015, as much as 50 percent or

more of federal and state trade secret litigation concerned technical know-how and software.

Additionally, trade secret plaintiffs have been highly successful. In the year following the 2016 enactment of the DTSA, 280 unique federal trade secret cases were identified [in a *Cybersecurity Lawyer* study](#). Of the cases that have made it to trial, the trade secret holder won 69 percent of the time and recovered money damages in the majority of instances, according to the November 14, 2017, *Law360* article “[Why Trade Secret Litigation Is on the Rise](#).” By comparison, in civil lawsuits in general, plaintiffs historically prevail less than half the time.

Only 61 out of the 280 cases identified in the study — about 22 percent — were dismissed. This is lower than the historical average dismissal rate for complex civil litigation in federal courts (27 percent, according to litigation research company Lex Machina); however, given the early stage of most of these cases, it is too soon to tell whether DTSA case dismissal rates will vary from historical ones. Data on preliminary injunctions is ripe, however, and rather surprising. Upon enactment of the DTSA, it was generally expected that courts would be more inclined to grant preliminary relief, at least in part because the urgency of action in these cases was underscored by the availability of *ex parte* injunctions — whereby U.S. marshals are

empowered to seize allegedly misappropriated goods with little or no notice to the accused. Yet only five preliminary injunctions — about 2 percent — were granted in the 280 cases, according to the *Cybersecurity Lawyer* study. This is much lower than the 10 percent general rate at which preliminary injunctions were granted for trade secret owners from 1950 until 2008, according to a 2010 paper by O’Melveny & Myers LLP. A larger sample size of cases will reveal more reliable statistics, but it is noteworthy that the general expectation of an increase in preliminary injunctive relief under the DTSA is not reflected in the data to date.

Conclusion

Patents will continue to be the dominant form of intellectual property protection in certain industries. But the realities of today’s legal and technological world suggest that trade secrets will continue to gain importance in coming years.

Companies must be cognizant of the risks associated with the movement of confidential information. The success rate and damages awarded in recent trade secret litigation indicate that defendants should take trade secret matters seriously. The data also should give heart to aggrieved parties seeking recompense for stolen and misused information, as should the unprecedented *ex parte* seizure provisions that are part of the DTSA.