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 INTELLECTUAL PROPERTY

The Defend Trade Secrets Act of 2016: New Federal Protection for Trade Secrets

by Michael K. Friedland and Samantha Hsu, Knobbe Martens Olson & Bear LLP

On May 11, 2016, the President signed into law the Defend Trade Secrets Act (DTSA). The DTSA significantly expands protection of intellectual property rights by creating a body of trade secrets law that applies nationwide and by allowing businesses to enforce their trade secret rights in federal court. Previously, trade secrets were protected only by state laws (which varied from state to state), and trade secret claims ordinarily could be brought only in state court. The new federal law does not preempt the state laws; it provides an additional avenue for protection and enforcement.

What Qualifies

Along with patents, trademarks, and copyrights, trade secrets protect some of businesses' most valuable intellectual property. The categories of information that can constitute a trade secret are broad—all types of financial, business, scientific, technical, economic, and engineering information can qualify. Examples include customer lists, computer source code, manufacturing methods, and formulas. Claims are frequently brought against employees, contractors, and competitors.

How to Protect

Unlike patents, which require inventors to share details of inventions with the public, trade secrets must be kept secret. The trade secret's owner must take "reasonable measures" to maintain its secrecy, and the information must have value, at least in part, because it is not generally known. Also unlike patents, which expire after a fixed period of time, trade secret protection lasts as long as these conditions are met. (The recipe for Coca-Cola has been a trade secret for more than a century.) Businesses should take steps to protect their trade secrets, including requiring non-disclosure agreements, implementing confidentiality policies, having password protection for electronic files, and having physical access controls for locations where trade secret documents and information are stored.

Remedies for Misappropriation

The DTSA allows parties to bring lawsuits in federal court to obtain damages for actual loss, unjust enrichment, or a reasonable royalty, as well as an injunction. For willful and malicious misappropriation, a business may also receive an award of exemplary damages and attorneys' fees.

A court can award exemplary damages or attorneys' fees in a lawsuit against an employee only if the employer previously



provided the employee with notice of "whistleblower immunity." Thus, employers should notify employees that they cannot be held criminally or civilly liable under the DTSA for disclosing a trade secret in confidence to law enforcement or an attorney for the purpose of reporting a violation of law.

The DTSA also allows parties to move aggressively at the beginning of litigation to preserve evidence of misappropriation. The DTSA gives courts the power to seize property from defendants accused of misappropriation using law enforcement officers—without first giving any notice to the defendants. This allows parties to prevent the destruction or disclosure of misappropriated trade secrets that could occur if a defendant knew it was the target of a lawsuit—while sending a strong message regarding the seriousness of the just-filed lawsuit.

Michael Friedland

Michael Friedland is a partner at Knobbe Martens Olson & Bear LLP in Irvine. Mr. Friedland graduated from Harvard Law School in 1991 and has more than two decades of intellectual property enforcement experience. He represents plaintiffs and defendants in all types of IP disputes, including patent, trademark, trade secret, copyright, and unfair competition. He represents clients in a wide variety of industries and technologies, including consumer goods, action sports, tactical products, medical devices, computer software, internet services, apparel, and restaurant services. He can be reached at 949.760.0404 or michael.friedland@knobbe.com.



Samantha Hsu

Samantha Hsu is an associate at Knobbe Martens Olson & Bear LLP in Irvine. Ms. Hsu's intellectual property law practice focuses on patent, trademark, copyright, and trade secret litigation. She represents clients in a wide variety of industries and technologies, including electronics, apparel, medical devices, e-commerce, computer software, internet services, and food and beverages. She can be reached at 949.760.0404 or samantha.hsu@knobbe.com.

