INTRODUCTION

Why Protect a Trade Secret?

Legal experts agree that trade secrets are of great and increasing importance to the U.S. economy. The estimated value of trade secret information in the United States is a staggering $5 trillion.¹ Trade secrets represent the vast majority of U.S. intellectual property.² Trade secret protection can extend beyond the coverage of federally defined statutory forms of intellectual property, such as patents, trademarks, and copyrights, to virtually all competitively sensitive and confidential information at relatively little cost.

Corporations spend billions of dollars to protect their trade secrets. In 2010, nearly half of the businesses responding to the Computer Security Institute’s 15th annual Computer Crime and Security Survey dedicated more than 5 percent of their intellectual technology budgets to protecting confidential electronic information.³ The magnitude of this undertaking is not surprising. Studies indicate that billions of dollars are lost each year as a result of trade secret theft. Indeed, in its 2002 annual report to the U.S. Congress, the Office of the National Counterintelligence Executive reported $300 billion in losses as the result of industrial espionage.⁴ Other studies have also reported losses in the billions, including studies conducted by PricewaterhouseCoopers and ASIS.⁵

At the same time, trade secret litigation is increasing at a phenomenal rate. A 2008 study revealed that the number of trade secret cases brought or removed to federal court doubled in the seven years from 1988 to 1995 and again in the nine years between
1995 and 2004. As a result of these suits, litigants have paid and juries awarded hundreds of millions—even billions—of dollars. Using this growth pattern as a guideline, trade secret cases will double again by 2017. This book is intended to help business executives and in-house counsel take control of and protect what may be their businesses’ most valuable assets—their trade secrets. In 2001, two trade secret practitioners painted a vivid “before” picture:

It’s your worst nightmare. Your company’s asset is completely unprotected. Careless or untrained employees are giving it away. Disgruntled ex-employees are stealing it outright. Your competitors are actively engaged in professional and well-directed efforts to take it. It is poorly documented; to the point that you can’t even prove it is yours. It is completely uninsured. Unaudited and untracked, you don’t know what it is worth, or where it is. Your whole corporate culture accepts this state of affairs as its normal business practice.

The authors of this book will help you avoid this scenario. The book often focuses on several large jurisdictions in which trade secret cases are heavily litigated to illustrate the concepts, but the analysis also includes other jurisdictions to demonstrate the differing approaches to the treatment of trade secrets. In addition to a broader, more academic look at trade secret law, the book also draws on current, real-life examples of trade secret nightmares and the litigation experience of its primary authors to provide practical advice to the business owner, small legal department or firm, and solo practitioner.
Introduction

PRACTICE TIP
Why Rely on Trade Secret Protection?

The protection of trade secrets is considerably different from that of other forms of intellectual property and businesses may prefer it to that offered by patent, trademark, and copyright law for a variety of reasons:

1. Whereas copyrights, patents, and trademarks require registration with the appropriate U.S. and international agencies to obtain the greatest statutory protection, trade secret protection requires no registration. The registration process for patents, trademarks, and copyright material—particularly patents—is expensive and generally requires counsel.

2. There is no expiration date on trade secret protection. So long as a trade secret remains a secret, trade secret protection can survive. The formula for Coca-Cola and the 11 herbs and spices in the recipe for Kentucky Fried Chicken are two famous examples, both having enjoyed trade secret status for decades.

3. Another benefit of trade secret protection is its breadth; so long as it meets the applicable definition, virtually any subject matter can be a trade secret. And trade secrets, unlike other forms of intellectual property, do not necessarily have to be unique. Moreover, the protection of trade secrets and patents may not be mutually exclusive.

However, a significant downside to trade secret protection as compared to other forms of intellectual property protection is that it is relatively easy to lose. A trade secret may be reverse engineered by a competitor, who may learn the secret by working with the end product to figure out its design or the process by which it is made. So long as this is done without violating statutory or contractual protections or engaging in improper conduct, reverse engineering can be done legally. Trade secret protection also requires a greater degree of vigilance by the trade secret owner, which must ensure that adequate protective measures are taken (a theme of this book). In this respect, trade secret status provides no minimum protection period as compared to those intellectual property protections that require registration.
Notes

2. Id.
6. See id. at 293.