



Industry & Invention

Topic 12 Trade Secret

Eric E. Johnson

ericejohnson.com



Konomark
Most rights sharable

Trade Secrets: Subject Matter

Topic 12-1 Trade Secret - Subject Matter

Key takeaways

- Trade secret is not merely information that a business wants to keep secret (e.g., embarrassing information).
- Trade secrets must have economic value that comes from their secrecy.
- Classic examples are: formulas, recipes, manufacturing methods, industrial processes, source code, geological survey data.
- Uniting concept: Information that a competitor could use to the same ends as the trade secret owner to obtain commercial advantage.

Topic 12-1 Trade Secret - Subject Matter

Key takeaways

- There is room to argue for a very broad conception of trade secret subject matter.
- This is because:
 - There is a lack of development of the doctrine.
 - Precedent is slippery, since a successful assertion of trade-secret status means a court decision won't say exactly what it is (otherwise, the secret would be out!).
 - Litigants are often non-adverse when courts rule on trade secret subject matter.
 - E.g., both parties to a business dispute want to keep everything away from the press, so they will stipulate to trying to treat a wide swath of discovery as trade secret.

Topic 12-1 Trade Secret - Subject Matter

Key takeaways

- Because of doctrinal confusion and a lack of an adversarial dynamic in many proceedings, businesses can sometimes successfully assert trade secret status to avoid public disclosure of things that are not classical trade secrets.
- Examples:
 - Toxic emissions (pollution).
 - Regular corporate financial data.

Trade Secrets: Gaining and Losing Protection

Topic 12-2 Trade Secret - Gaining & Losing Protection

Two requirements:

- Must be actually secret.
- Must be the subject of reasonable efforts to maintain secrecy.

Topic 12-2 Trade Secret - Gaining & Losing Protection

Must be an actual secret:

- Secret means "secret" in the ordinary sense.
- Two or even more independent parties can have the same secret.
- If a trade secret becomes generally known, it stops being a protectable trade secret.
 - Trade secret status can be lost by wrongful means
 - E.g., someone steals the secret and publishes it.
 - or non-wrongful means.
 - E.g., disclosure by mistake, or everyone else eventually figures it out independently.

Topic 12-2 Trade Secret - Gaining & Losing Protection

Must be the subject of reasonable efforts
to maintain secrecy

- What's reasonable depends on the circumstances and how valuable the secret is.
- Might include:
 - Locks, fences, security guards, password protection, firewalls
 - Limiting the number of people who know
 - Splitting up knowledge among different people
 - Employee contracts, non-disclosure agreements, non-compete agreements

Topic 12-2 Trade Secret - Gaining & Losing Protection

Problems to look at:

- "Leaving the barn door open" on p. 512.
- "Sticky situation" on p. 512-513.

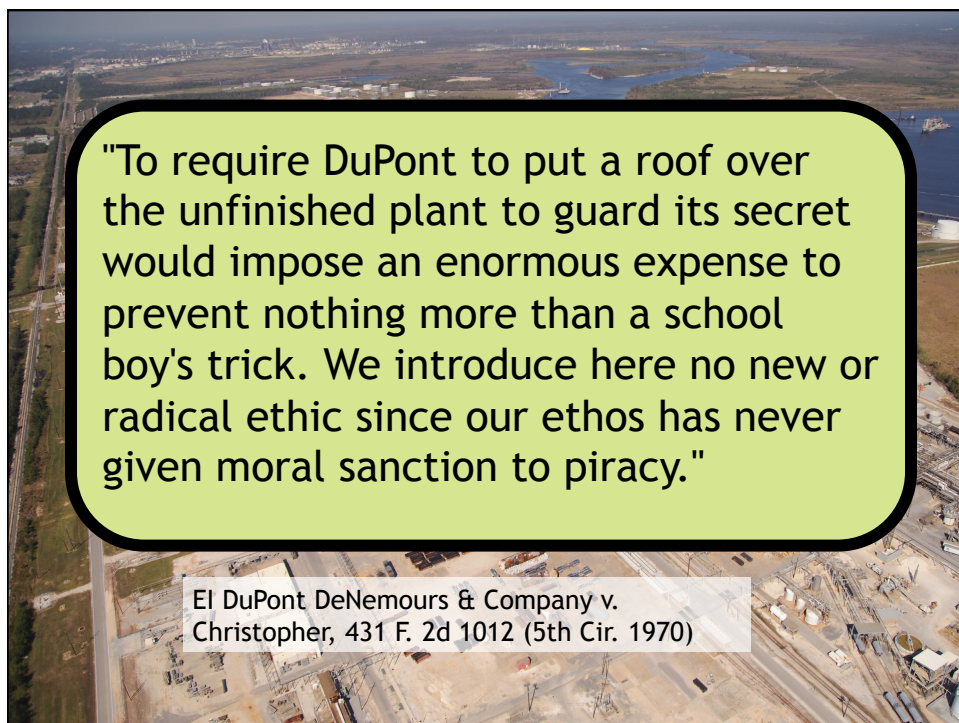
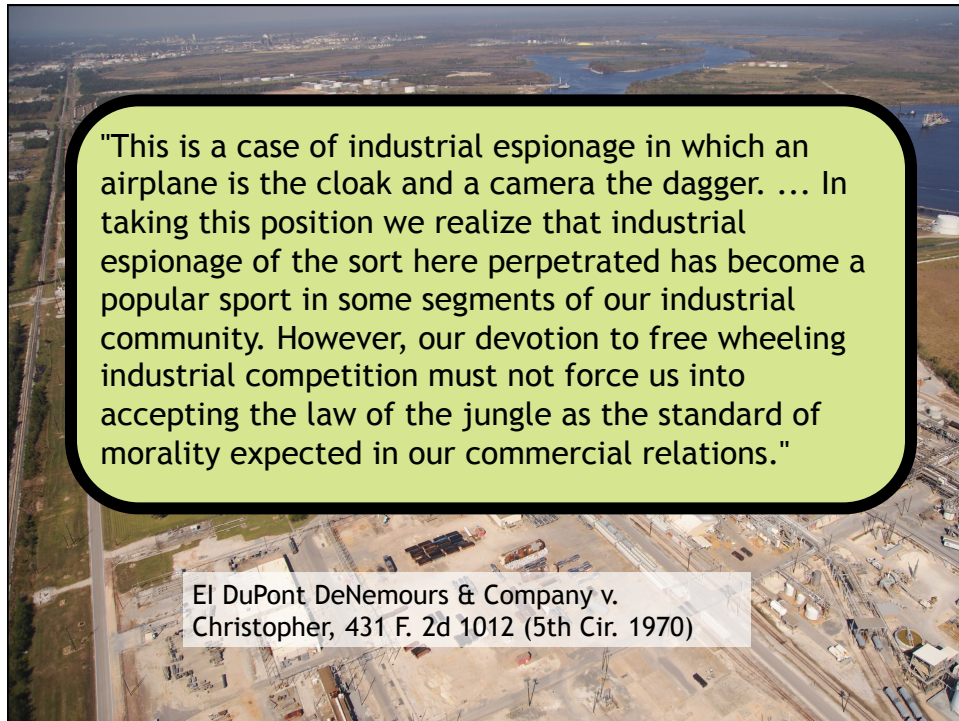
Trade Secrets: Misappropriation and Remedies

Topic 12-3 Trade Secret - Misappropriation & Remedies

Forms of misappropriation:

- Improper disclosure.
- Improper use.
- Improper acquisition.





Topic 12-3 Trade Secret - Misappropriation & Remedies

Remedies:

- Injunctions
- Can be prophylactic
- Can be against innocent third parties
- Damages
- Larger of
 - Plaintiff's losses
 - Defendant's wrongful gains
- Reasonable royalties as an alternative

Aerial view of DuPont Beaumont by The Center for Land Use Interpretation, <http://clui.org/ludb/site/dupont-beaumont>, licensed under the Creative Commons, Attribution-Noncommercial-Share Alike 3.0 Creative Commons License.