



Invention & Industry

Trade Secret Subject Matter

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Konomark
Most rights sharable

**What makes
something trade-
secret-eligible
subject matter?**

Requirements:

- The trade secret must actually be secret (i.e., not generally known to those who could use it).
- Trade secrets must have independent economic value.
- The economic value must be as a result of the secrecy.
- There must be reasonable efforts to keep it secret.

Examples:

- formulas
- recipes
- manufacturing methods
- industrial processes
- source code
- geological survey data
- customer lists

Examples

formulas
recipes
manufacturing
methods
industrial
processes
source code
search
algorithms
geological
survey data
customer lists

UTSA blackletter

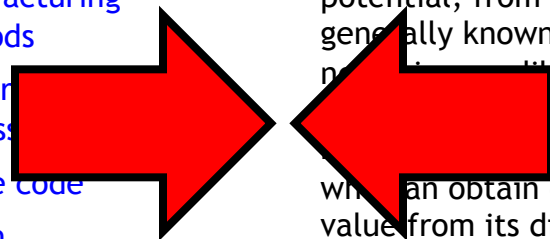
information that: (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

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DTSA definition of trade secret, 18 U.S.C. § 1839(3)

the term “trade secret” means all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if--

(A) the owner thereof has taken reasonable measures to keep such information secret; and

(B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information

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What does “independent economic value” mean?

On eligible subject matter, the current trend, exemplified by the UTSA, is to protect any valuable information as a trade secret. So long as the information is capable of adding economic value to the plaintiff, it can be protected by trade secret law.

Mark A. Lemley, *The Surprising Virtues of Treating Trade Secrets As IP Rights*, 61 STAN. L. REV. 311, 317 (2008)

FWIW, I think this is mistaken.

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This seems almost unbounded. Many courts take a narrower view, although the bounds of that narrower view are often not well articulated.

What does “independent economic value” mean?

As a general proposition, to come within the ambit of this definition, the claimant must show that the information: (1) was originally gained at the holder's expense; (2) is still of value to the holder because it provides the holder with a demonstrable, continuing competitive advantage; (3) is not generally known or readily ascertainable by third parties, especially competitors; and (4) has been kept confidential by the holder. The fourth element often proves to be the real battleground over the existence of an alleged trade secret.

§ 9.2.2 Scope of the Privilege, WIGMORE'S EVIDENCE

What does “independent economic value” mean?

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§ 9.2.2 Scope

This also seems largely unbounded. The decisions of many courts are narrower than this implies ...

What does “independent economic value” mean?

A plausible uniting concept:

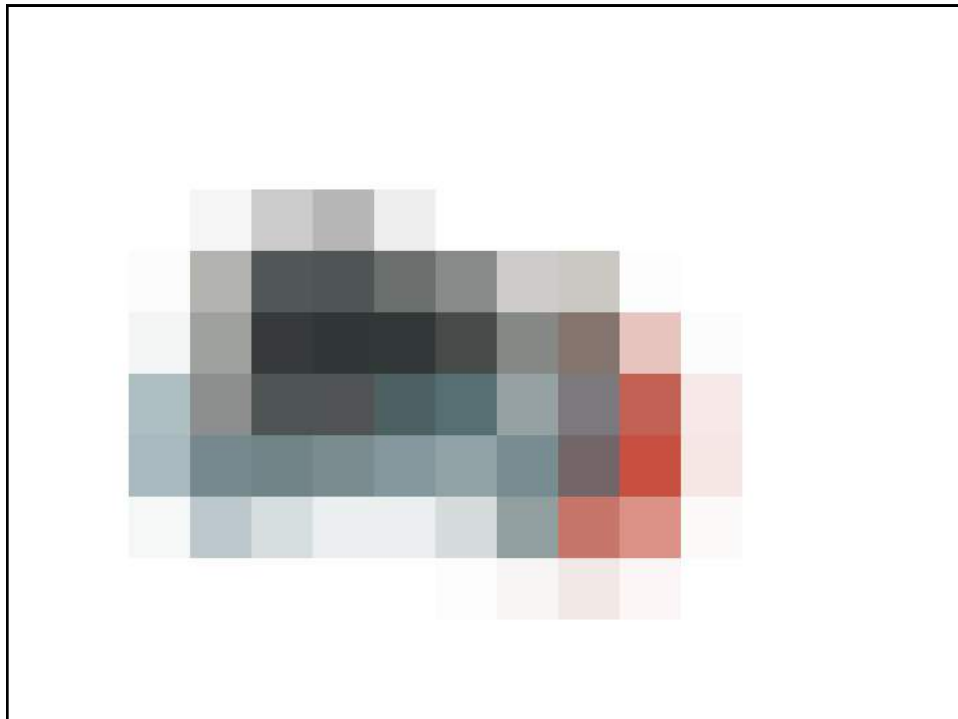
- Information that a competitor could use to the same ends as the trade secret owner to obtain commercial advantage.

EEJ's way of looking at this ...
FWIW

What makes a trade secret different from other secrets held by a business?

—

**How do we distinguish
true trade secrets from
regular confidential
information or “business
intelligence”?**



- executive salaries?
- lawsuit settlement terms?
- the identities of a firm's liability insurers?
- current cash reserves?
- past problems with quality control?
- an internal memo that says a company's growth is "de facto good" even though "maybe someone dies"?

Can it be a trade secret?

Can an embarrassing secret be a trade secret?

Examples

formulas
recipes
manufacturing
methods
industrial
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Blackletter law

information that: (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

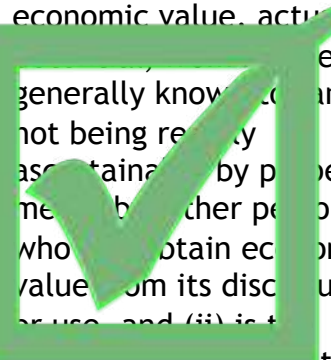
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Examples	Blackletter law
<ul style="list-style-type: none"> formulas recipes manufacturing processes inventions production methods software algorithms geological survey data customer lists 	<p>information that: (i) provides independent economic value, actual or potential, by not being generally known, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.</p>

Examples	Blackletter law
<p>My threshold test:</p> <p>Information that a competitor could use to the same ends as the trade secret owner to obtain commercial advantage in the same way.</p> <ul style="list-style-type: none"> processes source code search algorithms geological survey data customer lists 	<p>means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.</p>

Examples **Blackletter law**

My threshold test:

Information that is not generally known and is not readily ascertainable by others, and that has independent economic value because it is secret or otherwise confidential, and that is the result of substantial investment of resources.

processes
source code
search algorithms
geological survey data
customer lists

My secondary factors:

- discrete & countable
- spoilable
- emancipatable
- appropriate for royalties
- feels like IP
- worth clawing back
- worth enjoining innocent third parties
- worth putting someone in jail

Does a putative trade secret have
“independent economic value”?

Google’s search algorithms that come up with particularly relevant results for users. *Is there independent economic value?*

Yes, because Yahoo and Bing could use the search algorithms to the same ends to get a commercial advantage in the same way as Google does.

Does a putative trade secret have
“independent economic value”?

A list of local customers who use gutter-cleaner services. *Is there independent economic value?*

Yes, because competing gutter-cleaners could efficiently target marketing to these customers, the same way the owner could to get a commercial advantage.

Does a putative trade secret have
“independent economic value”?

The financial statements of Mars (candy company), including cash flow, assets, liabilities, profit & loss. *Is there independent economic value?*

No, because the financial statements help C-level officers manage Mars in a general way. Hershey could use them offensively to exploit Mars’s weaknesses.

But courts are split on whether financial statements can be trade secrets.



Home / Welcome / Information / How to Update / Help

Frac Focus
Chemical Fracturing Registry

WYOMING PRACTICES | OREGON/WA STATE | CHEMICALS | REGULATIONS | HOW TO UPDATE | FREQUENT QUESTIONS

Find a Well

Map Search

Search Options ▼ Clear All

WELL: COUNTY: WELLS IN COUNTY: OPERATOR:

JOB SUBMITTED DATE: DATE RANGE: RANGE START DATE: RANGE END DATE:

FERROUS WELL: ART WELL NUMBER: WELL NAME:

OG Number:

INFORMATION LIST

Clear Information

SEARCH RESET

Showing 20 of 201 Results

Page 1 of 10

WELL ID	WELL No.	Job Start Dt.	Job End Dt.	State	County	Operator	Well Name
33-025-01081-00-00	33-025-01081-00-00	12/9/2009	12/9/2009	North Dakota	Williams	Stanol Oil & Gas LP	Glenn 18-23 #1H
33-025-01274-00-00	33-025-01274-00-00	6/11/2010	6/11/2010	North Dakota	Williams	Stanol Oil & Gas LP	Dakota 29-32 #1H
33-025-01024-00-00	33-025-01024-00-00	12/28/2010	12/28/2010	North Dakota	Williams	XTO Energy/CooperFood	Yakon 12K-5
33-025-01024-00-00	33-025-01024-00-00	12/28/2010	12/28/2010	North Dakota	Williams	XTO Energy/CooperFood	Mohawk State #4-1
33-025-01245-00-00	33-025-01245-00-00	1/4/2011	1/4/2011	North Dakota	Williams	ODC Resources, Inc.	Round Prairie 010-1819H
33-025-01703-00-00	33-025-01703-00-00	1/6/2011	1/6/2011	North Dakota	Williams	Hess Corporation	Bergheim 2-20H
33-025-01009-00-00	33-025-01009-00-00	1/17/2011	1/17/2011	North Dakota	Williams	XTO Energy/CooperFood	Almer 214-6
33-025-01280-00-00	33-025-01280-00-00	1/17/2011	1/17/2011	North Dakota	Williams	Hess Corporation	Hoodland 10-23H
33-025-01009-00-00	33-025-01009-00-00	1/18/2011	1/18/2011	North Dakota	Williams	Hess Corporation	100-norwood 21-02H
33-025-01243-00-00	33-025-01243-00-00	2/1/2011	2/1/2011	North Dakota	Williams	Hess Corporation	OO Well 12-20H
33-025-01009-00-00	33-025-01009-00-00	2/1/2011	2/1/2011	North Dakota	Williams	Hess Corporation	St. Vrain 150-02-1819H-1
33-025-01001-00-00	33-025-01001-00-00	2/15/2011	2/15/2011	North Dakota	Williams	Hess Corporation	TI-FAC-017-06-1106H-1-2
33-025-01009-00-00	33-025-01009-00-00	2/15/2011	2/15/2011	North Dakota	Williams	Hess Corporation	Bergheim 2-27H
33-025-01009-00-00	33-025-01009-00-00	2/15/2011	2/15/2011	North Dakota	Williams	Hess Corporation	Red 3-04
33-025-01001-00-00	33-025-01001-00-00	2/16/2011	2/16/2011	North Dakota	Williams	Hess Corporation	TI-Fac 157-02-02001-1
33-025-01773-00-00	33-025-01773-00-00	2/16/2011	2/16/2011	North Dakota	Williams	ODC Resources, Inc.	Round Prairie 009-3823H
33-025-01009-00-00	33-025-01009-00-00	2/17/2011	2/17/2011	North Dakota	Williams	XTO Energy/CooperFood	Richard Dale 214-18
33-025-01261-00-00	33-025-01261-00-00	2/18/2011	2/18/2011	North Dakota	Williams	XTO Energy/CooperFood	Lula 410-02
33-025-01243-00-00	33-025-01243-00-00	2/24/2011	2/24/2011	North Dakota	Williams	Hess Corporation	Quinn Brook 2-20H
33-025-01009-00-00	33-025-01009-00-00	2/26/2011	2/26/2011	North Dakota	Williams	XTO Energy/CooperFood	Warren 240-31
33-025-01281-00-00	33-025-01281-00-00	2/27/2011	2/28/2011	North Dakota	Williams	Hess Corporation	Geopage 126-07-2101H-1

Hydraulic Fracturing Fluid Product Component Information Disclosure

Product Code	1000000
State	West Virginia
County	Wayne
API Number	21320-000
Operator Name	Continental Oil & Gas LP
Well Name and Number	21320-10-001
Longitude	-101.90714
Latitude	38.90716
Length of Production	00000
Production Type	Oil
Flow Method Depth (FTSD)	10,000
Total Water Volume (gall)	70,000

Hydraulic Fracturing Fluid Composition



Trade Name	Supplier	Purpose	Ingredients	Chemical Abstract Service Number (CAS #)	Maximum Ingredient Concentration in Aqueous (% by mass) ¹	Maximum Ingredient Concentration in HF Fluid (% by mass) ²	Comments
Water	Supplier				100.000	97.000000	Density 8.33
Surf - VESPAAN 4010	Surfactant	Proppant	Coactive waxy solids	7489-89-7	100.000	0.000000	
SEBACYL-ALF	Surfactant	Proppant	Surfactant solids	100-727	50.000	0.000000	
CL 30 00	Surfactant	Coagulant	Chitosan	100-00-0	50.000	0.000000	
CL 31	Surfactant	Coagulant	Chitosan hydroxide	1170-69-3	5.000	0.000000	
CHITOSAN-HCL			Chitosan hydroxide	1170-69-3	50.000	0.000000	
CL-32	Surfactant	Surf	Sodium hydroxide	1310-73-2	50.000	0.000000	
CL-34	Surfactant	Proppant Release	Hydroxyethyl petroleum stearate	3619-41-0	20.000	0.000000	
CL-35-000001	Surfactant	Surfactant	2,2',2''-Tris(hydroxyethyl)ethylamine	36424	0.000	0.000000	
			Chitosan	100-00-0	50.000	0.000000	
			Hydroxyethyl petroleum stearate	3619-41-0	50.000	0.000000	
			Acrylamide	79-06-1	0.000	0.000000	
			Potassium 1,2-ethanedithiolate, 99.9% minimum active hydrolyzed material	12787-61-0	10.000	0.000000	
HEXAMETHYLENE GUANIDINE	Surfactant	Proppant Release	Hexamethylenetriamine	71-43-4	100.000	0.000000	
GLYCEROL	Surfactant	Surfactant	Surfactant polyols	560-00-7	100.000	0.000000	
GLYCOL DIMETHYL SULFIDE	Surfactant	Surfactant	Surfactant polyols	112-96-3	100.000	0.000000	
GLUCOSYLING AGENT	Surfactant	Surfactant	Coactive waxy solids	7489-89-7	50.000	0.000000	
GLUCOSYLING AGENT	Surfactant	Surfactant	Surf-gel	3000-30-3	100.000	0.000000	
GLUCOSYLING AGENT	Surfactant	Surfactant	Hexamethylenetriamine	71-43-4	50.000	0.000000	

Trade Name	Supplier	Purpose	Ingredients	Chemical Abstract Service Number (CAS #)	Maximum Ingredient Concentration in Aqueous (% by mass) ¹	Maximum Ingredient Concentration in HF Fluid (% by mass) ²	Comments
			Water	7732-18-5	99.000	0.000000	
			Propane	50-09-5	0.000	0.000000	
MS-300	ACME	Scale Inhibitor	Proprietary Component	Proprietary Component	100.000	0.000000	
			Styrene Glycol	107-21-7	100.000	0.000000	
			Starch	37-09-1	100.000	0.000000	
MS-70	ACME	Oxygen Scavenger	Proprietary Component	Proprietary Component	100.000	0.000000	
			Styrene Glycol	107-21-7	100.000	0.000000	

¹ Total Water Volume includes may include fresh water, produced water, and/or recycled water.
² Information is based on the maximum potential for concentration and thus this total may be over 100%.

Ingredient information for chemicals subject to 20 CFR 1910.1205 and Appendix E was obtained from supplier Material Safety Data Sheets (MSDS).

Can a business philosophy be a trade secret?



Can a business philosophy be a trade secret?

Avery Dennison v. Kitsonas, 118 F.Supp. 2d 848 (S.D. Ohio 2000)

AVERY

Yes!

We conduct our daily business according to six core values:

- Integrity
- Service
- Teamwork
- Innovation
- Excellence
- Community

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, 118
(2000)

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.

Confusion in the doctrine ...

- 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.

The fuzzy, unchecked boundaries of trade secret subject matter

- 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, effluents, pollutants
 - Regular corporate financial data
 - Hydraulic fracturing chemicals

Credits:



Bakken / Dakota Access Oil Pipeline. The DAPL (Dakota Access Pipeline) being installed between farms, as seen from 50th Avenue in New Salem, North Dakota. by Tony Webster. (c) 2016 Tony Webster.
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People protesting the Dakota Access Pipeline stand in the street with signs and banners. Stand with Standing Rock SF Nov 2016 15.jpg by Pax Ahimsa Gethen at https://commons.wikimedia.org/wiki/Category:Dakota_Access_Pipeline_and_Keystone_XL_Pipeline_protest_photos_by_Pax_Ahimsa_Gethen#/media/File:Stand_with_Standing_Rock_SF_Nov_2016_15.jpg, licensed under CC BY-SA 4.0
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