



THE QUALTIM FAMILY OF SERVICES

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Appendix C: Intellectual Property & Trade Secrets

Benefits of Free and Fair Trade

The Federal Trade Commission and Justice Department enforce intellectual property and trade secret laws to provide incentives for innovation, its dissemination, and commercialization. The government does this by establishing enforceable property rights for the creators of new and useful products, more efficient processes, and original works of expression.

The goal of a free and fair market is to protect economic freedom and opportunity by promoting competition.¹

Benefits of Copyright Law

The US copyright laws² protect “original works of authorship” from the time the works are created in a fixed form (e.g., research reports, design drawings, etc.). Copyright protection applies to original works of authorship fixed in a tangible medium of expression.³

Registration is not required for protection.⁴ This allows the copyright owner to have the ability to recover statutory damages and attorney’s fees should copyright infringement litigation occur. In general, copyright protection is for the life of the author plus 70 years after the author’s death (or last surviving author’s death if a joint work).

Benefits of Intellectual Property (IP) and Trade Secret (TS) Law

Federal law creates a private cause of action for the misappropriation of trade secrets, called the Defend Trade Secrets Act of 2016⁵ (DTSA). Trade secret protection applies to information whose economic value depends on its not being generally known.

The DTSA provides uniform definitions for the critical terms “trade secret” and “misappropriation.”⁶ The DTSA’s definition of trade secret is broad, allowing a wide range of proprietary information to fall within the purview of trade-secret protection under the statute. Specifically, trade secret is defined as:

“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.”

Trade secret protection has no fixed term.

Most states have adopted the Uniform Trade Secret Act⁷ (UTSA) or a modified form of it.

Trade secret infringement is called “misappropriation.” It occurs when someone improperly acquires a trade secret or improperly discloses or uses a trade secret without consent. Misappropriation occurs when someone, at the time of disclosure, had reason to know that knowledge of the trade secret was:

1. Derived from someone who obtained it through improper means;
2. Obtained under circumstances that gave rise to maintain its secrecy or limit its use; or
3. Derived through a person who owed a duty of confidentiality to the trade secret owner.

Although there are clear and important differences in the purpose, extent, and duration of protection provided under the intellectual property regimes of copyrights and trade secrets, the principles are the same.

Please review Exhibit A for frequently asked questions and additional information regarding DTSA.

Government Employees

Government employees may ask for intellectual property and/or trade secret information to justify their government work, which, given the public pays taxes and the government employees work at the pleasure of the taxpayer, any taxpayer with standing can request oversight or how their taxes are being used. The [federal government](#) and each state have a [public records act](#) for this exact purpose.

Compliance with public records and trade secret legislation requires approval through the use of [Listings](#), [certified reports](#), [duly authenticated reports from approved agencies](#), [valid research reports](#)⁸ prepared by approved agencies and/or [approved sources](#), and/or [Technical Evaluation Reports](#).

Government Approvals⁹

Building codes require that the [building official](#) shall accept [duly authenticated reports](#)¹⁰ or [research reports](#)¹¹ from [approved agencies](#) and/or [approved sources](#) (i.e., licensed RDP) with respect to the quality and manner of use of new products, materials, designs, services, assemblies, or methods of construction.

1. [Acceptance](#) of an [approved agency](#), by a building official, is performed by verifying that the agency is accredited by a recognized accreditation body of the [International Accreditation Forum](#) (IAF).
2. [Acceptance](#) of a licensed RDP by a building official is performed by verifying that the RDP and/or their business entity is listed by the [licensing board](#) of the relevant [jurisdiction](#).

[Title 18 US Code Section 242](#) affirms and regulates the right of individuals and businesses to freely and fairly have alternative to code-referenced materials, products, services, designs, and/or methods of construction approved for use in commerce. Disapproval of alternative to code applications shall be based upon specific provisions of adopted legislation and shall be provided in writing [stating the reasons why the alternative was not approved](#) with reference to legislation violated.

Summary

The intellectual property, trade secret, antitrust, and antidiscrimination laws share the common purpose of promoting innovation and enhancing consumer welfare. In the absence of copyright, intellectual property, and trade secret rights, imitators could more rapidly exploit the efforts of innovators and investors without providing compensation. Rapid imitation, and illegal government employee actions due to their monopoly power, reduce the commercial value of innovation and erode incentives to invest, ultimately to the detriment of consumers. These laws promote innovation and consumer welfare by prohibiting actions that harm competition.

For more information, please review the following websites:

1. [Copyright Law of the United States](#)
2. [Copyright Notice](#)
3. [Defend Trade Secrets Act of 2016](#)
4. [Trade Secrets: What You Need to Know](#)
5. [Bureau of Competition | Federal Trade Commission](#)
6. [Antitrust Division | US Department of Justice](#)
7. [Deprivation of Rights Under Color of Law, Discrimination and Constitutional Rights](#)

Exhibit A

What Is the Federal Defend Trade Secrets Act (DTSA)?

The Defend Trade Secrets Act federalized trade secret law. The DTSA made it possible for trade secret owners to file civil lawsuits regarding trade secret misappropriation in federal court versus state court.

Any company possessing a trade secret related to goods or services intended for use in foreign or domestic interstate commerce benefits from the DTSA. How?

Before the enactment of the DTSA, states handled trade secret litigation. The problem fell where companies doing business in multiple states enjoyed varied trade secret protection from state to state. Some states offer minimal trade secret protection, while other states offer companies sufficient recourse if misappropriation occurs. The definition of “trade secrets” varies from state to state. More confusingly, different statute of limitations laws apply, and the remedies available to aggrieved parties are inconsistent.

The federal trade secrets act created a uniform body of federal trade secret misappropriation laws and established jurisdiction for these lawsuits to be heard in federal court.

What Is the Purpose of the DTSA?

Theft of trade secrets costs the United States economy between \$180 billion and \$540 billion each year. For companies prioritizing their trade secrets’ secrecy, planning for trade secret litigation increasingly became a routine part of the business.

Although the DTSA does not preempt existing state laws regarding trade secrets, it provides harmed parties the opportunity to file suit in federal court—an attractive feature for companies with a business presence in multiple states nationwide.

How Does the DTSA Define Trade Secret and Misappropriation?

The DTSA provides a uniform definition of both the terms “trade secret” and “misappropriation.”

Under the DTSA, a trade secret includes numerous types of information, such as “patterns, plans, compilations, program devices formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes” that

1. The owner has taken reasonable measures to keep secret; and
2. Have independent economic value because of their secrecy.

By uniformly yet vaguely defining a trade secret, the DTSA eliminates the variation regarding the definition of trade secret existing from state to state. Additionally, the definition is intentionally broad to protect a wide variety of proprietary information.

Additionally, the Defend Trade Secrets Act defines misappropriation as knowingly converting a trade secret, that is related to a product or service used in or intended for use in interstate or foreign commerce, to the economic benefit of anyone other than the owner thereof, where the acquisition of a trade secret is by:

1. stealing, or without authorization appropriates, takes, carries away, or conceals, or by fraud, artifice, or deception obtains such information;
2. without authorization copies, duplicates, sketches, draws, photographs, downloads, uploads, alters, destroys, photocopies, replicates, transmits, delivers, sends, mails, communicates, or conveys such information;
3. receives, buys, or possesses such information, knowing the same to have been stolen or appropriated, obtained, or converted without authorization;
4. attempts to commit any offense described in paragraphs (1) through (3); or
5. conspires with one or more other persons to commit any offense described in paragraphs (1) through (3), and one or more of such persons do any act to effect the object of the conspiracy,

This includes disclosure of a trade secret by someone who knew that the secret could be acquired through an FOIA request to acquire it.

However, misappropriation does not include reverse engineering, independent derivation, or any other lawful means of acquisition.

Why Is the DTSA Important?

While trademarks and copyrights offer registration protection, trade secrets remain somewhat vulnerable as no formal registration process exists with the government.

The only way to protect a trade secret is by keeping it secret. Without any efforts to maintain a trade secret's secrecy, your business's competitive advantage dramatically diminishes.

How Does the DTSA Protect Trade Secrets?

A provision of the DTSA behaving as a civil seizure mechanism operates as a tool for a trade secret owner to protect their secret while litigation is pending. Upon filing an application, a federal court may, "based on an affidavit or verified complaint satisfying the requirements of this paragraph, the court may, upon ex parte application, issue an order providing for the seizure of property necessary to prevent the propagation or dissemination of the trade secret that is the subject of the action."¹²

If granted, the seizure order allows a company to prevent further use and dissemination of the trade secret while litigation of the claims under the federal trade secrets act continues.

How Does the DTSA Affect Nondisclosure Agreements?

You will need to take specific steps under the DTSA to protect yourself against anyone misappropriating your trade secrets, particularly government officials suggesting that they can protect IP and TS under a non-disclosure agreement.

All nondisclosure agreements provided must include a notice of immunity provision.

Immunity. —An individual shall not be held criminally or civilly liable under any Federal or State trade secret law for the disclosure of a trade secret that—

(A) is made—

(i) in confidence to a Federal, State, or local government official, either directly or indirectly, or to an attorney; and

(ii) solely for the purpose of reporting or investigating a suspected violation of law; or

(B) is made in a complaint or other document filed in a lawsuit or other proceeding, if such filing is made under seal.

Under the DTSA, the notice's absence from a nondisclosure agreement prevents the employer from recovering exemplary damages and attorney fees from anyone where the acts are willfully malicious, violent, oppressive, fraudulent, wanton, or grossly reckless ("exemplary damages").

Therefore, it's crucial to include language in a nondisclosure agreement providing information regarding trade secrets and confidentiality.

Remedies

The DTSA offers trade secret owners traditional remedies as follows:

1. Except as provided in subsection (b), the violator shall be fined under this title or imprisoned not more than 10 years, or both.¹³
2. (b) Any organization that commits any offense described in subsection (a) shall be fined not more than the greater of \$5,000,000 or 3 times the value of the stolen trade secret to the organization, including expenses for research and design and other costs of reproducing the trade secret that the organization has thereby avoided.¹⁴

In summary, traditional remedies include injunctive relief, compensatory and exemplary damages, and attorney fees.

Compensatory damage awards provide for the actual loss and unjust enrichment caused by the trade secret's misappropriation.

Special circumstances may result in an exemplary damages award. These special circumstances include misappropriation deemed to be willful and malicious.

Exemplary damages award two times the compensatory damage award. When exemplary damages are awarded, the court also grants attorney fees requests. Attorney fee awards may also be granted in situations where a party files a misappropriation claim in bad faith.

¹ <https://www.justice.gov/atr/mission> and <https://www.ftc.gov/about-ftc/bureaus-offices/bureau-competition/about-bureau-competition>

² <https://www.copyright.gov/help/faq/>

³ https://www.law.cornell.edu/wex/fixed_in_a_tangible_medium_of_expression.

⁴ <https://www.copyright.gov/help/faq/> - See "Copyright in General" and Do I have to register with your office to be protected?

⁵ <https://www.law.cornell.edu/uscode/text/18/1836> and https://www.americanbar.org/groups/business_law/publications/blt/2016/09/03_cohen/

⁶ <https://www.congress.gov/bills/114th-congress/senate-bill/1890/text#:~:text=the%20term%20%60misappropriation%27%20means%2D%2D>

⁷ https://en.wikipedia.org/wiki/Uniform_Trade_Secrets_Act

⁸ <https://up.codes/viewer/wyoming/ibc-2021/chapter/17/special-inspections-and-tests#1703.4.2>

⁹ Approved is an adjective that modifies the noun after it. For example, Approved Agency means that the Agency is accepted officially as being suitable in a particular situation. This example conforms to IBC/IRC/IFC [Section 201.4](#) where the building code authorizes sentences to have an ordinarily accepted meaning such as the context implies.

¹⁰ <https://up.codes/viewer/wyoming/ibc-2021/chapter/17/special-inspections-and-tests#1707.1>

¹¹ <https://up.codes/viewer/wyoming/ibc-2021/chapter/17/special-inspections-and-tests#1703.4.2>

¹² <https://www.law.cornell.edu/uscode/text/18/1836>

¹³ <https://www.law.cornell.edu/uscode/text/18/1832#:~:text=be%20fined%20under%20this%20title%20or%20imprisoned%20not%20more%20than%2010%20years%2C%20or%20both>.

¹⁴ <https://www.law.cornell.edu/uscode/text/18/1832#:~:text=Any%20organization%20that,has%20thereby%20avoided>.