## **Trade Secret**







For years, Colonel Harland Sanders arried the secret formula for his Kentucky Fried Chicken in his head and the spice mixture in his car. Today, the recipe is locked away in a safe in Louisville, Ky. Only a handful of people know that multi-million tollar recipe (and they've signed trict confidentiality contracts)."

#### Trade Secret

- · What is protected?
- · How do you get protection?
- · What rights does it convey?
- · What infringes?
- · What defenses are available?
- · What is the source of law?
- · What is the policy behind it?

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## Sources of Law

- · State Law
  - Common law: First Restatement of Torts, §§ 757-758
  - Statute: 45 states (but not Massachusetts) have adopted variations of the Uniform Trade Secrets Act; Mass. has its own statutory protection.
- · Federal courts applying state law
- · Economic Espionage Act of 1996

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# Restatement (First) of Torts

- A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers.
- · Restatement (First) of Torts, 757 cmt. b (1939)

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## Uniform Trade Secrets Act

- §1(4) "Trade secret" means information, including a formula, pattern, compilation, program device, method, technique, or process, 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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## Is it a trade secret?

- Secret. Not generally known to the public, or readily ascertainable
- 2. Derives economic value from its secrecy
- 3. Reasonable precautions to keep the information secret

#### Theories of protection

- · Lockean labor-desert
- Utilitarian incentive to innovate
- · Business ethics / cultural planning theory

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# Which may be trade secret?

- · Ingredients list for Coca Cola?
- · Patented process for making nylon?
- Client list for a big law firm?
- Car manufacturer's list of unsuccessful attempts to improve fuel efficiency?
- · Circuit schematics of TiVo video recorder?
- Computer code operating state of California's electronic voting machines?

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# Restatement: Six factors to determine existence of trade secret

- (1) the extent to which the information is known outside of the business;
- (2) the extent to which it is known by employees and others involved in the business;
- (3) the extent of measures taken to guard the secrecy of the information;
- (4) the value of the information to the business and to its competitors;
- (5) the amount of effort or money expended by the business in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

# What's "reasonable" precaution?

- Cost-effective in relation to the value of the secret information
  - Cost-benefit analysis: not a sky-high wall, but one to the point where added height costs more than its added benefit

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