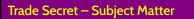


What makes something tradesecret-eligible subject matter?



Requirements:

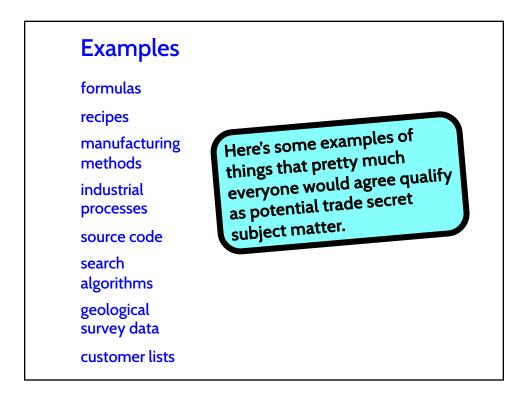
- The trade secret must actually be secret (i.e., not generally known to those who could use it).
- Trade secrets must have independent economic value.
- The economic value must be as a result of the secrecy.
- There must be reasonable efforts to keep it secret.

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



Examples

formulas

recipes

manufacturing

methods

industrial processes

source code

search

algorithms

geological survey data

· · ·

customer lists

Blackletter law

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

Here's some things to puzzle over ... 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"? Can an embarrassing secret be a trade secret?

Examples

formulas

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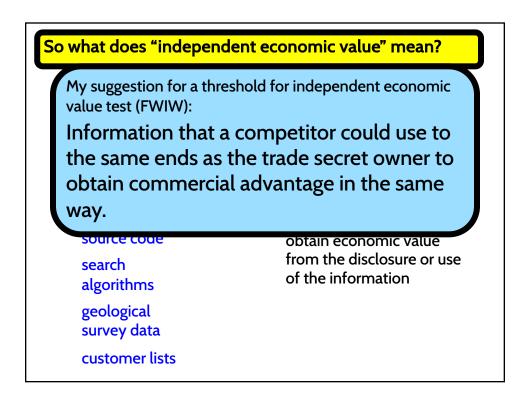
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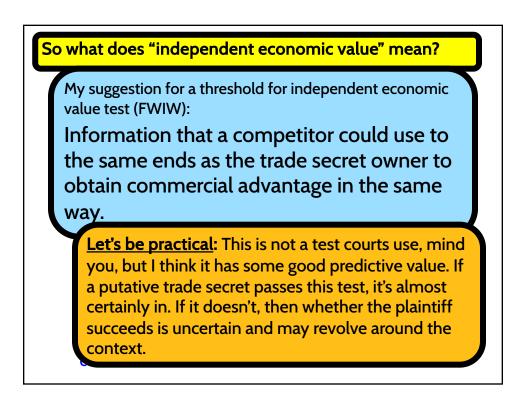
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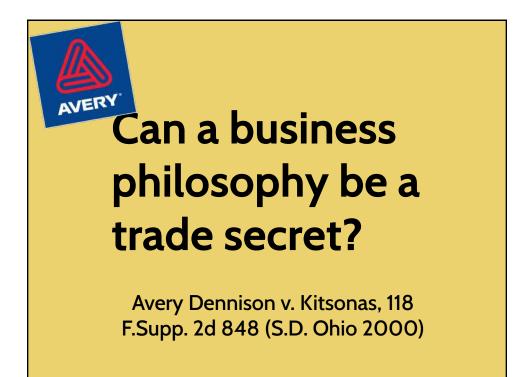


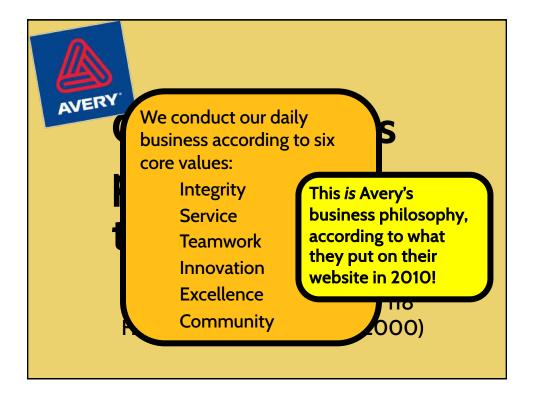
- executive salaries?
- lawsuit settlement terms?
- the identities of a firm's liability insurers?
- current cash reserves?
- past problems with quality control?
- an internal memo that says a company's growth is "de facto good" even though "maybe someone dies"?

These things don't fit with the examples of classic trade secrets, but given the unpredictable and confused nature of trade secret doctrine and precedent, it is possible that a firm could be successful in claiming these things are trade secrets.

Can these be

trade secrets?





It seems ridiculous to think *this* was the trade secret Avery was asserting Kitsonas had in 2000. So what could they have been referring to? A plausible answer is that they weren't really referring to anything at all in 2000.

The reality is that Avery didn't want Kitsonas taking away customers; they wanted to enforce the non-compete; and he's got our "business philosophy" is something they said to try to support this. The court was empathetic that the "theft" of customers was bad, and the court went along with Avery's rationale for why the non-compete was necessary and reasonable. Notice the court never even engaged with the question of "independent economic value." The court just said it was there.



Does a putative trade secret have "independent economic value"? *Examples ...*

Google's search algorithms that come up with particularly relevant results for users.

Is there independent economic value?

Does a putative trade secret have <u>"independent economic value"? Examples ...</u>

Google's search algorithms that come up with particularly relevant results for users.

Is there independent economic value?

Yes. Everyone would agree on this.

The transferability test notion, fwiw, says yes because Bing and Yahoo 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"? *Examples ...*

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

Does a putative trade secret have "independent economic value"? *Examples ...*

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

<u>Probably.</u> It might depend on some of the particulars. But if it is a good, useful list, and it's really secret, this shouldn't be a problem for IEV.

The transferability test notion, fwiw, could say yes because competing gutter-cleaners could efficiently target marketing to these customers, the same way the original list holder could, to get a commercial advantage.

Does a putative trade secret have "independent economic value"? *Examples ...*

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

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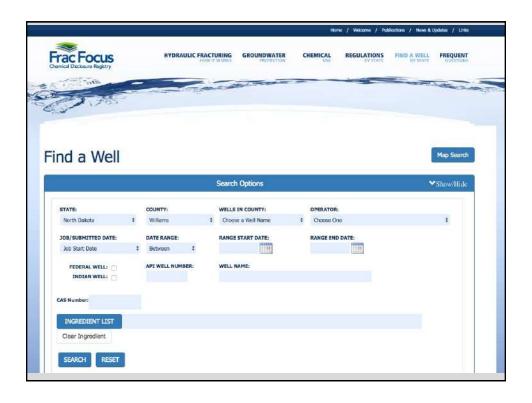
I picked Mars, btw, because they are famously huge for a privately held company, and they are known for keeping their affairs secret.

Publicly traded companies need to make their financial statements publicly available. (Hershey's financial statements, for instance, are easy to find online.) Not so with privately held companies.

Does a putative trade secret have "independent economic value"? *Examples ...*

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

Hmmm. Well not under the transferability test notion, (again, fwiw) because the financial statements help C-suite officers manage Mars in a general way. Hershey's CEO or CFO couldn't use *Mars's* financial statements to manage *Hershey*. Maybe Hershey could use them offensively to exploit Mars's weaknesses, but the value they have to Mars doesn't transfer. <u>But courts are split on whether financial statements can be trade secrets</u>. Some courts might say there is independent economic value and cite, for instance, the fact that the statements required money (accountant services) to produce. But many regard such a "sweat of the brow" theory as erroneous.



NIM	Next Page						
INEX	t Page						Page 1 of 42 Go
	API NO.	Job Start Dt	Job End Dt	State	County	Operator	WellName
1	33-105-01693-00-00	12/9/2009	12/9/2009	North Dakota	Williams	Statoll Oil & Gas LP	Olson 10-15 #1H
1	33-105-01761-00-00	6/11/2010	6/11/2010	North Dakota	Williams	Statol OII & Gas LP	Owan 29-32 #1H
	33-105-01834-00-00	12/28/2010	12/28/2010	North Dakota	Williams	XTO Energy/ExxonMobil	Helen 11X-5
1	33-105-01834-00-00	12/29/2010	12/29/2010	North Dakota	Williams	XTO Energy/ExxonMobil	Madisyn State 44x-1
	33-105-01945-00-00	1/4/2011	1/4/2011	North Dakota	Williams	EOG Resources, Inc.	Round Prairie 010-1819H
	33-105-01925-00-00	1/6/2011	1/6/2011	North Dakota	Williams	Hess Corporation	Bergstrom 2-28H
The second	33-105-01919-00-00	1/17/2011	1/17/2011	North Dakota	Williams	XTO Energy/ExxonMobil	Almer 31X-6
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T	33-105-01909-00-00	1/23/2011	1/23/2011	North Dakota	Williams	Hess Corporation	GO-Hodenfield 15-23H
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2	33-105-01628-00-00	2/7/2011	2/7/2011	North Dakota	Williams	Hess Corporation	BL-Iverson 155-95-1819H-1
1	33-105-01631-00-00	2/10/2011	2/18/2011	North Dakota	Williams	Hess Corporation	TI-IVES-157-95 0106H-1 2
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1	33-105-01929-00-00	2/13/2011	2/13/2011	North Dakota	Williams	Hess Corporation	Reid 3-3H
	33-105-01631-00-00	2/16/2011	2/16/2011	North Dakota	Williams	Hess Corporation	TI-Ives 157-95-0106H-1
	33-105-01773-00-00	2/16/2011	2/16/2011	North Dakota	Williams	EOG Resources, Inc.	Round Prairie 009-3625H
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ŋ	33-105-01951-00-00	2/18/2011	2/18/2011	North Dakota	Williams	XTO Energy/ExxonMobil	Linda 41X-22
1	33-105-01943-00-00	2/24/2011	2/24/2011	North Dakota	Williams	Hess Corporation	Dustin Brose 2-29H
	33-105-01948-00-00	2/26/2011	2/26/2011	North Dakota	Williams	XTO Energy/ExxonMobil	Normark 24X-31
2	33-105-02361-00-00	3/2/2011	3/26/2011	North Dakota	Williams	Hess Corporation	Go-Hauge-156-97-2116H 1

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Trade Secret – Subject Matter

Key takeaways

- Trade secret subject matter can be doctrinally unclear and unpredictable in court.
- Trade secret subject matter is not (at least theoretically) 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.
- The requirement of independent economic value is unclear. A possible uniting concept: positive transferable value. Information that a competitor could use to the same ends as the trade secret owner to obtain commercial advantage in the same way.
- The idea of positive transferable value seems predictive insofar as it identifies things that are definitely "in" in terms of independent economic value. But things that don't fall under this articulation might still be held to have independent economic value by a court.

Trade Secret – Subject Matter	
Confusion	in the doctrine
 There is room to an conception of trad 	rgue for a very broad e secret subject matter.
 This is because: 	
– There is a lack of d	evelopment of the doctrine.
trade-secret status	ery, since a successful assertion of s means a court decision won't say otherwise, the secret would be out!).
– Litigants are often	non-adverse when courts rule on
trade secret subjec	t matter.
everything away fr	o a business dispute want to keep om the press, so they will stipulate to de swath of discovery as trade secret.

Trade Secret – Subject Matter

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