



Invention & Industry

What Qualifies as a Trade Secret

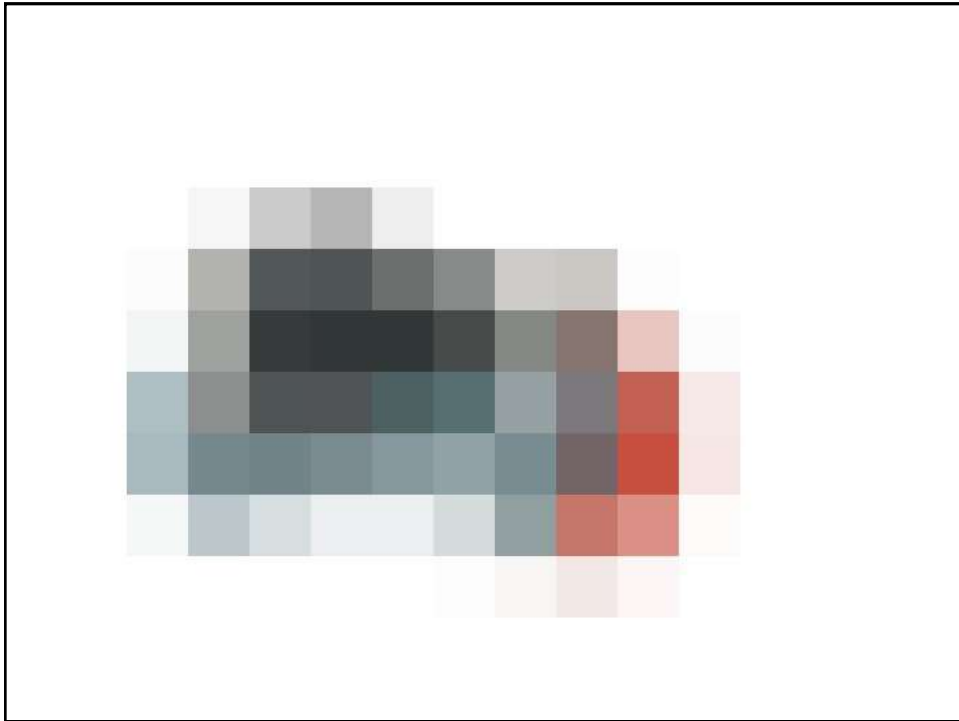
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ericejohnson.com



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Do you want to see a
trade secret?



Do you want to see a
trade secret?

Too bad!!
You don't get to!!

What makes something trade-secret-eligible subject matter?

Trade Secret – 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

Here's some examples of things that pretty much everyone would agree qualify as potential trade secret subject matter.

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Blackletter law

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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?

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So what does "independent economic value" mean?

My suggestion for a threshold for independent economic value test (FWIW):

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

source code

search algorithms

geological survey data

customer lists

obtain economic value from the disclosure or use of the information

So what does "independent economic value" mean?

My suggestion for a threshold for independent economic value test (FWIW):

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

Let's be practical: This is not a test courts use, mind you, but I think it has some good predictive value. If a putative trade secret passes this test, it's almost certainly in. If it doesn't, then whether the plaintiff succeeds is uncertain and may revolve around the context.

- 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"?

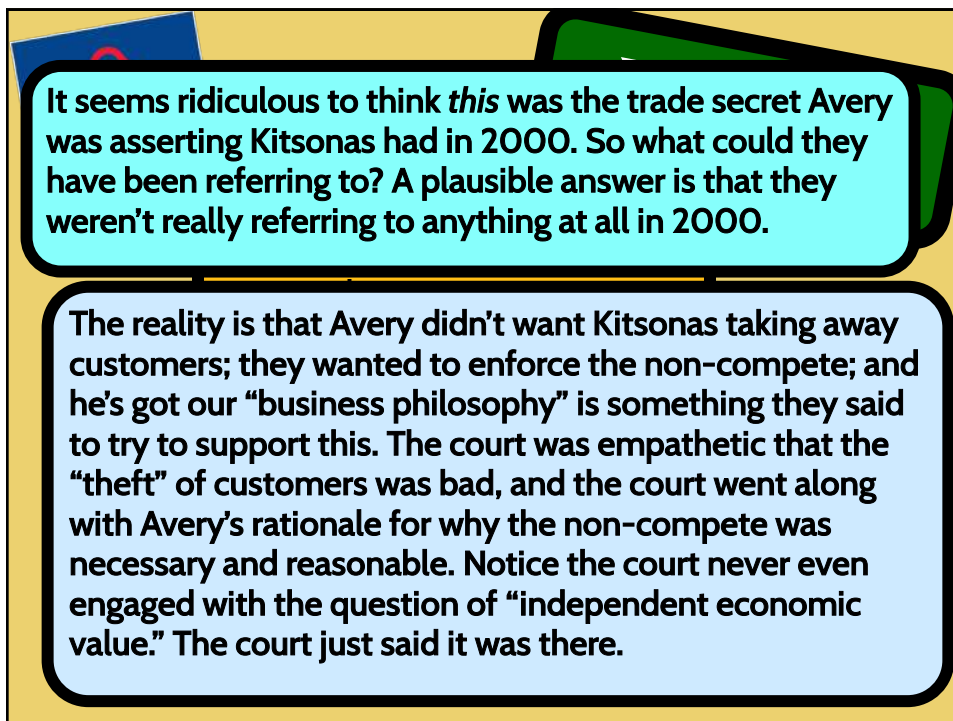
Can these be trade secrets?

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 a business philosophy be a trade secret?

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





**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
“independent economic value”? *Examples ...*

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?*

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“independent economic value”? *Examples ...*

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

Probably. 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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The financial statements of Mars (candy company), including cash flow, assets, liabilities, profit & loss.
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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?

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

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Frac Focus
Chemical Disclosure Registry

HYDRAULIC FRACTURING
HOW IT WORKS

GROUNDWATER
PROTECTION

CHEMICAL
USE

REGULATIONS
BY STATE

FIND A WELL
BY STATE

FREQUENT
QUESTIONS

Find a Well

Map Search

Search Options
Show/Hide

STATE:
North Dakota

COUNTY:
Williams

WELLS IN COUNTY:
Choose a Well Name

OPERATOR:
Choose One

JOB/SUBMITTED DATE:
Job Start Date

DATE RANGE:
Between

RANGE START DATE:

RANGE END DATE:

FEDERAL WELL:

INDIAN WELL:

API WELL NUMBER:

WELL NAME:

CAS Number:

INGREDIENT LIST

Clear Ingredient

SEARCH

RESET

Displaying 50 of 2063 Records

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API No.	Job Start Dt	Job End Dt	State	County	Operator	WellName
33-105-01693-00-00	12/9/2009	12/9/2009	North Dakota	Williams	Statoil Oil & Gas LP	Olson 10-15 #1H
33-105-01761-00-00	6/11/2010	6/11/2010	North Dakota	Williams	Statoil Oil & Gas LP	Dwan 29-32 #1H
33-105-01834-00-00	12/28/2010	12/28/2010	North Dakota	Williams	XTO Energy/ExxonMobil	Helen 11X-5
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
33-105-01919-00-00	1/17/2011	1/17/2011	North Dakota	Williams	XTO Energy/ExxonMobil	Aimer 31X-6
33-105-01909-00-00	1/17/2011	1/21/2011	North Dakota	Williams	Hess Corporation	Hodenfield 15-23H
33-105-01909-00-00	1/23/2011	1/23/2011	North Dakota	Williams	Hess Corporation	GO-Hodenfield 15-23H
33-105-01942-00-00	2/1/2011	2/1/2011	North Dakota	Williams	Hess Corporation	GO Dahl 15-22H
33-105-01628-00-00	2/7/2011	2/7/2011	North Dakota	Williams	Hess Corporation	BL-Iverson 155-95-1819H-1
33-105-01631-00-00	2/10/2011	2/18/2011	North Dakota	Williams	Hess Corporation	TI-Ives-157-95-0106H-1 2
33-105-01908-00-00	2/10/2011	2/10/2011	North Dakota	Williams	Hess Corporation	Bergstrom 2-27H
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
33-105-01899-00-00	2/17/2011	2/17/2011	North Dakota	Williams	XTO Energy/ExxonMobil	Michael State 31X-16
33-105-01951-00-00	2/18/2011	2/18/2011	North Dakota	Williams	XTO Energy/ExxonMobil	Linda 41X-22
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
33-105-02361-00-00	3/2/2011	3/26/2011	North Dakota	Williams	Hess Corporation	Go-Hauge-156-97-2116H 1

Hydraulic Fracturing Fluid Product Component Information Disclosure

Fracture Date:	12/9/2009
State:	North Dakota
County:	Williams
API Number:	3310901693
Operator Name:	BRIGHAM OIL & GAS LP
Well Name and Number:	Oleyn 10-16 #1H
Longitude:	-103.796774
Latitude:	48.182739
Long/Lat Projection:	NAD83
Production Type:	Oil
True Vertical Depth (TVD):	10,670
Total Water Volume (gal):	74,268

Hydraulic Fracturing Fluid Composition:

Trade Name	Supplier	Purpose	Ingredients	Chemical Abstract Service Number (CAS #)	Maximum Ingredient Concentration in Additive (% by mass)**	Maximum Ingredient Concentration in HF Fluid (% by mass)**	Comments
Fresh Water	Operator				100.00%	30.65326%	Density = 8.330
SAND - PREMIUM WHITE	Halliburton	Proppant	Crystalline silica, quartz	14808-60-7	100.00%	2.05052%	
VERSAPROD	Halliburton	Proppant	Aluminum silicate	1302-76-7	65.00%	4.46185%	
			Conendum	1302-44-86	65.00%	4.46185%	
OL-22 UC	Halliburton	Crosslinker	Potassium formate	580-29-4	60.00%	0.00000%	
OL-31 CROSSLINKER	Halliburton	Crosslinker	Potassium hydroxide	1310-58-3	5.00%	0.00000%	
			Potassium malaponte	13700-64-0	60.00%	0.00000%	
M-D-67	Halliburton	Buffer	Sodium hydroxide	1310-73-2	30.00%	0.00000%	
FR-66	Halliburton	Friction Reducer	Hydrocracked light petroleum distillate	84742-47-8	30.00%	0.00182%	
LOSURF-300M™	Halliburton	Surfactant	1,2,4-Trimethylbenzene	96-63-6	1.00%	0.00093%	
			Ethanol	64-17-5	60.00%	0.00713%	
			Heavy aromatic petroleum naphtha	84742-64-5	30.00%	0.02888%	
			Naphthalene	91-20-3	1.00%	0.00093%	
			Poly(ary-1,2-ethanediyl), alpha-(4-nonyloxy)omega-hydroxy, branched	127087-87-0	10.00%	0.00993%	
ALDADICER® IS ANTIMICROBIAL	Halliburton	Corrosion Inhibitor	Glutaraldehyde	111-30-8	100.00%	0.00000%	
OptiKleen-WF™	Halliburton	Surfactant	Sodium perborate tetrahydrate	10488-00-7	100.00%	0.00193%	
OPTIFLO® DELAYED RELEASE BREAKER	Halliburton	Breaker	Ammonium persulfate	7727-54-0	100.00%	0.00000%	
WG-36 GELLING AGENT	Halliburton	Gelling Agent	Crystalline silica, quartz	14808-60-7	30.00%	0.00000%	
			Guar gum	9000-30-0	100.00%	0.00000%	
Biocide 5000	JACAM	Antibacterial	Glutaraldehyde	111-30-8	50.00%	0.08353%	

			Water	7732-18-5	50.00%	0.08359%	
			Methanol	67-56-1	0.50%	0.00044%	
WSI-3607	JACAM	Scale Inhibitor	Proprietary Component	Proprietary Component	100.00%	1.62880%	
			Ethylene Glycol	167-21-1	100.00%	1.62880%	
			Methanol	67-56-1	100.00%	1.62880%	
WOS-1N	JACAM	Oxygen Scavenger	Proprietary Component	Proprietary Component	100.00%	0.06731%	
			Ethylene Glycol	167-21-1	100.00%	0.06731%	

* Total Water Volume sources may include fresh water, produced water, and/or recycled water
 ** Information is based on the maximum potential for concentration and thus the total may be over 100%
 Ingredient information for chemicals subject to 29 CFR 1910.1200(i) and Appendix D are obtained from suppliers Material Safety Data Sheets (MSDS)

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.

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