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Blog posts amount to misappropriation of trade secrets

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How does something that requires absolute silence thrive in a world full of communication? For decades, businesses depended on tight lips and rigid security; today, that may not be enough. The days of putting a secret formula in a secured safe or hiding valuables in vaults are long gone. The Internet has transformed business assets into something intangible. In the blink of an eye, businesses went from calculating wealth by liquid cash or property to forecasting their future based upon investments in a concept or an idea. We need look no further than the recent initial public offering issued by a social networking giant to illustrate that point. Unfortunately, the intangible assets on which successful modern day companies depend cannot be protected the old fashioned way. The Internet has changed the world with information. So the question remains, how can businesses protect something that cannot be seen, heard or touched?

Although businesses with trade secrets have always risked disclosure of their highly sensitive and confidential information, today the Internet magnifies that risk. See Elizabeth A. Rowe, "Saving Trade Secret Disclosures on the Internet Through Sequential Preservation," B.C. Intell. Prop. & Tech. F., Sept. 11, 2007. The Internet facilitates complete destruction of a trade secret in an instant, and with it the legal power to control or contain the damage.

These intangible assets have been the subject of lawsuits in the U.S. since the late 1800s. By 1907, trade secrets were well embedded in the law, and the state Supreme Court declared, "[t]hat equity will always protect against the unwarranted disclosure of trade secrets and confidential communications ... settled beyond peradventure." Empire Steam Laundry v. Lozier, 130 P. 1180, 1182 (Cal. 1913). After the court dubbed this type of information as "trade secrets," the next goal was figuring out a way to protect those secrets. Laws protecting trade secrets evolved over the decades and created an arguably effective framework for guarding trade secrets and punishing those that dare misappropriate them. Fast-forward to the Internet age, and for better or worse, everything has changed.

Trade secret law in the U.S. does not exist in a single doctrine. Rather, states rely on their own legislative acts and common law that generally apply either the principles reflected in the Restatement (First) of Torts or those from the more recent Uniform Trade Secrets Act (UTSA). State trade secret acts generally provide that a trade secret is any information that: (i) has independent economic value by not being generally known to others; (ii) has not become readily known or discovered by proper means; and (iii) is the subject of reasonable security precautions.

In Abba Rubber Co. v. Seaquist, 234 Cal. App. 3d 1 (1991), the court discussed a simpler version of proving the existence of a trade secret. That test is whether the matter sought to be protected is information (1) that is valuable because it is unknown to others and (2) that the owner has attempted to keep secret.

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The main issue regarding misappropriation on the Internet is how far information can be dispersed in such little time. Courts have left the door open as this issue unfolds, but a landslide of Internet misappropriation cases is headed their way.

In today's globalized world, one moment of indiscretion from a disgruntled employee can destroy a multi-million dollar company; a feat that the employee might be able to accomplish without leaving his or her desk at work. Imagine this: A longtime employee of a thriving Internet startup company finds out that his contract will not be renewed for the next year. Instead of packing his desk in boxes, he angrily walks straight to his computer and begins feeding as much company information as he can onto his personal blog. The information may include customers, blueprints, ideas or future concepts. He takes it all because he thinks that he has a good opportunity to recreate his own company with the knowledge he acquired from his current employer. Even though he does not have many visitors to his blog, is this employee liable for misappropriation of trade secrets?

Art of Living Foundation v. Does 1-10, No. 5:10-cv-05022-LHK (N.D. Cal. May 1, 2012), decided a very similar issue when ex-employees of a "spiritual learning center" divulged the company's instruction manual regarding breathing, meditation and yoga. The plaintiff, Art of Living Foundation (AOLF), a California corporation, brought an action for misappropriation of trade secrets under California Civil Code Sections 3426 et seq., against former adherents-turned AOLF critics. Sometime around May 2009, the defendants created the blog "Leaving the Art of Living" and, in June 2010, began posting various AOLF materials on the blog. According to data generated by Wordpress (the host of the blog), the webpage that contained the material taken from AOLF was viewed 147 times in July 2010, and 351 times in August 2010, the only two months during which the material was posted on the blog. The plaintiff claimed that the information posted on the defendants' blog contained trade secrets and that the defendants misappropriated those trade secrets by posting them on the blog.

The court concluded that the requisite elements had been proven by the plaintiffs to establish: (1) information in their manual was indeed a trade secret pursuant to state law, and (2) there was harm resulting from posting the secrets on the defendants' blog.

The Art of Living court took a strong stance against allowing any such misappropriation to occur on the Internet. The court did not excuse the fact that the blog was only visited a few hundred times. The case stands for the commonsensical fact, "Widespread, anonymous publication of the information over the Internet destroys its status as a trade secret." See Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 481-82 (1974); Technology Center v. Netcom On-Line Com, 923 F. Supp. 1231, 1256 (N.D. Cal. 1995). After the Art of Living opinion, the court seems to be leaning toward a protectionist point of view when it comes to trade secrets. With that in mind, the inherent interconnectedness of the Internet satisfies the "widespread" factor from Kenawee Oil and Technology Center.

Hopefully, after the recent boom in social networking and blogging, courts will be reluctant to reach a different outcome in terms of Internet misappropriation simply based on how fast information can travel using this unbelievable and ever-growing technology. Businesses can only hope that this trend continues and tightens the vice of justice around any possible misappropriation. The Internet has helped businesses get to this point; now the law needs to make sure to protect their ideas from the pitfalls of mass Internet communication. Without such protections, there won't be any secrets left to keep.