

## *The Temporary Trade Secret*

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One of the oldest, and most enduring, forms of protection for intellectual property is the trade secret. Over the centuries, governments have adapted to the fact of secrecy. Patent protection encourages disclosure, for instance, and discourages trade secrets, by promising a government-enforced right to exclusive reproduction of an invention, so long as the secret is obtained.

For this reason, patent and trade secret law have always been considered somewhat at odds. Sometimes they are presented as utterly contradictory choices—one must either choose patent protection or trade secret protection. Occasionally, nods are made to the fact that the larval state of many inventions is often trade secret, no matter what form of protection the inventor eventually pursues.

But the Uniform Trade Secret Act (UTSA) allows inventors to claim as trade secrets any invention which derive value from their secrecy. This has given rise to lawsuits wherein the claimed “trade secret” is one that could never remain a trade secret if the invention were commercially exploited.<sup>1</sup> The value of the “secret” is that the first person to bring devices to market will get some kind of a first-mover advantage.

This article discusses the rise of these temporary trade secrets, and explains why, even though these trade secrets are worthy of protection, the remedies typically offered under the UTSA—in particular, permanent injunctions—are inappropriate: they would overcompensate the owners of such trade secrets because they assume a lifespan of the trade secret that is not only commercially infeasible, but commercially impossible. I argue that, under most circumstances, disclosure or appropriation of temporary trade secrets should only give rise to remedies under liability rules rather than property rules.

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<sup>1</sup> For instance, the lawsuit that arose between Barnes and Noble over Spring Design’s Alex e-reader claimed that the “trade secret” in question was the use of both a touch-sensitive LCD screen (for navigation) and an e-ink screen (for easy-on-the-eyes reading). This trade secret would have been disclosed the instant a consumer laid eyes on the device.