

Information and Inefficiency: Trade Secrets as Anti-Intellectual Property

Christopher Morten

New York University School of Law

This article describes how contemporary trade secrecy law distorts markets. It argues that trade secrecy requires deep reform if intellectual property (IP) and capitalism itself are to be saved.

The article illuminates the dysfunctions of trade secrecy through engagement with dominant, law-and-economics-based justifications for IP. The title puns on Harold Demsetz's influential "Information and Efficiency: Another Viewpoint." Demsetz and other Chicago School economists propounded IP—rights in information—on at least two justifications: First, and most famously, IP permits producers of valuable information to internalize some of that value and thus incentivize production of that information. Second, IP permits markets to generate and transmit valuable information about the value of information, thus encouraging information producers to focus activity on the kinds of information that people need and want most. Yochai Benkler, citing Demsetz, deems this second justification IP's "signaling effect." The signaling effect: In a market economy with IP, we learn what kinds of information have the most social value from watching the market price IP-protected goods and services that embody that information—software, self-driving cars, etc. The price signal reveals something about the underlying value of the embodied information and so informs R&D-intensive companies and investors where future information production should be focused. Demsetz contrasted this elegant efficiency with the (supposed) inefficiency of centralized government planning, which often guesses wrong as to what kinds of information will prove most valuable.

On the Demsetzian account, trade secrecy's current role is alarming. Today's trade secrecy—expanded in scope far beyond its mid-20th-century boundaries—injures efficient markets in at least two ways. First, it stifles flows of information on informational goods' and services' value. Trade secrecy throttles flows of information on goods' and services' properties—their utility, versatility, reliability, safety, discriminatory effects, and so on. This article builds on past work by showing how trade secrecy thwarts efforts by even the most sophisticated "stakeholders" of capitalism—investors, competitors, and so on—to make the myriad rational, arms-length decisions that are the hallmark of a healthy market economy. Robust research and negotiation are increasingly difficult. Second, trade secrecy can obscure even the sacred price signal. Secrecy of value and secrecy of price together render increasingly impossible—increasingly inefficient—the efforts of would-be competitors and investors to know what kinds of information the dysfunctional "market" wants more of. This worrisome phenomenon is characteristic of "informational capitalism," as distinct from previous capitalist forms.

The article concludes that those who wish to preserve intellectual property and the efficiencies of a market economy must endorse efforts to reform trade secrecy law substantially, to allow information on value and price to flow freely.