

What Trade Secrets Might Teach

David Levine and Sharon K. Sandeen

For many decades, trade secret law and policy has been largely ignored by both policymakers and scholars, with much of the work and scholarship in the area being done by practicing attorneys. As explained in Sharon Sandeen's article, *The Evolution of Trade Secret Law*, the practicing bar did not get involved with trade secret policy simply because attorneys and their clients wanted more and stronger trade secret protection; they got involved because they were concerned about the interplay of trade secret and patent policy and the potential for overly broad and anti-competitive trade secret claims. Today, trade secret law deserves a broader audience and deeper scrutiny because its parameters and impact have evolved far beyond the confines of intellectual property law and the employer-employee relationship. It is now a tool of competitive intelligence, information control and dispersion, and even legislative policy itself.

The Uniform Trade Secret Act, adopted in almost all states, has generally served us well for its 35 year existence. Because the drafters carefully defined the parameters and limitations of trade secret protection, it has operated fairly well for most of its history within the narrow confines of the paradigmatic departing employee who holds an employer's secret information. Today, however, misunderstandings about the scope and limits of trade secret law among administrative bodies, courts, and litigants has led to their unfortunate and costly assertion and/or protection of weak or non-existent trade secret status. As a result, recent trade secret scholarship has been principally aimed at explaining the proper limits of trade secret law and correcting any misunderstandings concerning the history and purpose of the law. The overarching concern of most of these scholars is the very real risk that trade secret claims can be used to restrict the free-flow of information and restrict legitimate competition.

For a number of reasons and in what appears to be a coordinated effort, United States and international policymakers have recently awakened to trade secret policy. The predominate focus of their attention and associated rhetoric has advocated expansion and strengthening of trade secret protection. This article will explain why the broader intellectual property and information law scholars community should be concerned about these recent developments and how increased protection for trade secrets may affect the scope and value of patent and copyright within the broader context of information control in our economy.