

What Trade Secrets Might Teach

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Introduction

“Trade secret” means different things to different entities. For large sophisticated companies that engage in extensive research and development, a “trade secret” is an important asset that has the potential of conferring a competitive advantage or represents the beginning of what will become a patented invention. These companies are often highly motivated to lobby for greater trade secret protection and enforcement.

For small and medium-sized entities and fledgling entrepreneurs, a “trade secret” may be a mystery: they may have little to no understanding of their meaning and potential value. Often for these companies, the possible existence of trade secrets only arises as an issue when a valued employee leaves to go to work for a competitor or to open a competing business or, worse yet, when they are on the receiving end of a trade secret misappropriation claim. They might also realize the challenges of trade secrecy when they find themselves concerned about sharing valuable information with a potential investor.

Conversely, unsophisticated individual or entities may simply be mistaken about the meaning of “trade secret.” They may hold the belief that most of what they do is special and unique and, for those reasons alone, are worthy of protection. They may not even know that what they claim as “secret” information might be in the public domain. In fact, in many cases, it is not until litigation ensues that any effort is made to identify and place a value on alleged trade secrets and statistically, the results are often unkind to the putative rights holder.

Is there a more mysterious fundamental statutory doctrine in intellectual property law? This article proposes that the answer is “no.” Remember, this is not copyright fair use’s market effects element, or trademark’s “use in commerce,” or even patent’s abstract ideas test – all critical issues, but not the crux of the law. In trade secrecy, the very question of “what is a trade secret” remains largely misunderstood, even by those that it is putatively designed to benefit.

We need good answers to the questions of the meaning and purpose of trade secrecy, which this article seeks to address. However, the benefits of answering those questions extend beyond the trade secret law community. Intellectual property lawyers and scholars would benefit from examining trade secret doctrine for what it might teach the intellectual property law community more broadly. This article approaches that task by identifying several issues within trade secret law that require deeper

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examination. Analysis of those issues requires that one look beyond the property narrative that often dominates contemporary intellectual property discourse. Through that exercise, we identify what trade secret law might teach about how to think about information policy and intellectual property law generally.

There are many unresolved issues in trade secret law, making it fertile ground for such an exercise. These include: If some businesses care a lot about trade secrets and others not at all, how should trade secret parameters be defined? Should an entire apparatus for the protection of trade secrets be devised and employed when self-help may be all that is needed, particularly if the end result is a system which restricts the free flow of information and employee mobility? If businesses are often motivated to protect their information only when they perceive the threat of competition, when and under what circumstances should they be able to respond to the threat by pursuing a trade secret misappropriation claim? Should the inevitable errors in the application of the law favor free competition or the information owner? From a broader information policy perspective, how can trade secret law co-exist with patent and copyright law and principles of governmental and corporate transparency?

Many of the foregoing questions were considered by the drafters of the Uniform Trade Secrets Act (UTSA) during the more than twelve year process that led to the adoption of the UTSA in August of 1979.² Most significantly, while they wanted to improve the circumstances for the protection of trade secrets, they also saw the need for limits and balance lest trade secrets claims be used as anti-competitive weapons. Alas, time and experience has rendered this largely unexplored history ignored, subsumed by a viewpoint that exalts the protection of property rights over the importance of free competition. While property can be a useful construct through which to consider trade secrecy, this article proposes that the property label, alone, is not enough to justify and define trade secrecy. So too, perhaps, with intellectual property law.

Point One: Intellectual property claims are torts

Whatever side you prefer in the “law of the horse” debate made famous by Judge Easterbrook and Lawrence Lessig,³ the fact remains that in the United States there are two types of civil wrongs: contract wrongs and tort wrongs. Although some will argue that a third type relates to the wrongs that are defined by statute or regulation, even those wrongs are typically based upon contract or tort principles. This is particularly true of intellectual property claims.

The importance of foundational principles of law is where Judge Easterbrook’s insights concerning the proper focus of legal education are most salient. When considering trade secret policy (and more broadly information and intellectual property policy), we should not lose sight of a basic feature of tort (or, for that matter, contract) liability: we do not provide a cause of action or a remedy for all wrongs and harms that might befall an individual or a business. Moreover, in this era of “tort reform,” the trend is not to expand potential liability and create new torts, but rather to cabin tort liability within reasonable parameters.

² See Sharon K. Sandeen, *The Evolution*.

³ We borrow our title from Lessig’s famous article.

Having developed out of common law, trade secret law can demonstrate how intellectual property torts should be defined and limited so as to address some wrongs and harms, but not all. While every type of tort has its own elements, it should be recognized that there are generally three facts that must be proven before tort liability will attach: (a) a wrong (b) that causes (c) actual harm. Some torts are clearer than others in defining these three requirements, but whether expressed clearly or not, the need of a civil plaintiff to prove both a wrong and harm are long-standing and well-established limitations on the scope of civil liability. Thus, particularly among tort reformers who are concerned about the potential liability of businesses, these limitations should not be ignored.

Unfortunately, the elements of the various intellectual property torts, including trade secret misappropriation, are less clear than they should be, particularly when it comes to causation and the need to connect wrongdoing to measurable harm. For example, compare the standard definition of negligence with the definition of copyright infringement. It is recognized that to prove negligence a plaintiff must establish that: (a) the defendant owed a duty to plaintiff; (b) the defendant breached that duty (the wrong); (c) the breach of duty was the actual and proximate cause of plaintiff's injuries; and (d) the extent and amount of actual harm. In contrast, standard expressions of the elements of an intellectual property infringement claim tend to skirt the causation requirement. For a claim concerning an alleged violation of the exclusive right of reproduction, for instance, it is often stated that the plaintiff must prove: (a) that it owns valid and subsisting copyrights in the subject work; (b) that the defendant infringed on plaintiff's copyrights by reproducing all or part of the copyrighted material; and (c) that the plaintiff is entitled to a remedy. What remains unstated in the typical formulation of elements is the need to show a causal connection between the alleged wrong (the reproduction) and plaintiff's actual harm.

In copyright litigation, causation is ordinarily addressed tangentially as part of establishing damages, when the plaintiff must prove how he was harmed. It is subsumed into the general concern for protecting the property interest of the copyright owner, part of the broad panoply of rights conferred by virtue of owning a copyright. But what if causation was treated as a separate element, and theoretically disentangled from the copyright property interest at issue? Unfortunately, standard expressions of trade secret misappropriation also tend to skirt the need of a trade secret claimant to prove causation between the alleged wrongdoing (trade secret misappropriation) and the alleged harm. In fact, due to the urging of some litigants or a misunderstanding of the law, the need to show causation and actual harm is often ignored. Consider the standard elements of a trade secret claim: (1) the plaintiff must establish that it owns (or controls); (2) a valid trade secret; that (3) the defendant misappropriated that trade secret; and (4) plaintiff is entitled to one or more remedies. Because this claim does not explicitly use the words "actual cause" or "causation," a key element of tort liability is often forgotten. Moreover, since the remedies for trade secret misappropriation were expanded (mostly by statute) to allow for injunctive relief in the case of threatened misappropriation, some forget that an award of damages (regardless of how measured) still requires proof of actual harm.

Applying tort principles to intellectual property wrongs allows policy makers and others to focus on why we have such causes of action in the first place. Stated most fundamentally, it is because the defendant did something that society deems wrongful and the wrong caused actual harm to a degree

that we are willing to provide plaintiff a remedy. As the myriad of torts reveals, the “wrong” can be defined in a number of ways, sometimes focusing on the act of the defendant and sometimes focusing on the mindset of the defendant, but usually with aspects of both. But wrongdoing alone, even with a high degree of intent, is usually not enough to impose tort liability. Because we can ill afford to incur the costs of maintaining a civil justice system for non-existent, nominal, or trivial harm, actual harm must also be shown. In the case of trade secrets, it is the loss of trade secrecy or the unauthorized use of trade secrets which creates the potential for actual harm. The mere existence of an ownership or property right in the corpus is a prerequisite to the cause of action, but without actual harm, there is little reason for a court – or the law – to intercede.⁴

Trade secret can teach intellectual property law about the value of an inquiry into actual harm and how tort claims can easily become punitive without such a requirement. During the debates that led to the enactment of the UTSA, the drafters directly confronted an important question about harm and compensation in a way that recognized the potential anti-competitive effects of trade secret liability. At issue was the so-called “perpetual injunction” and whether a trade secret violation should be seen as a wrongful act that should be punished with little to no consideration of actual harm. One series of appellate court cases favored perpetual injunctions while another did not. The drafters of the UTSA opted to follow the latter line of cases and prohibit perpetual injunctions because they viewed them to be a penalty rather than as a means to prevent further harm. Thus, section x of the UTSA clearly states that injunctions should end once the subject trade secrets cease to exist. This is consistent with the view that tort liability should ordinarily be tied to actual harm. Moreover, although the proponents of perpetual injunctions put forth alternative rationales, the potentially anti-competitive effects of such injunctions were deemed too much for society to bear. In other words, the balance was struck to favor free competition over punishment.

Point Two: Property claims are torts

The contemporary discourse that exalts the property aspects of intellectual property over all other features of the law often ignores the fact that property claims are torts. If a person or individual seeks to sue for harm to a property right, they are usually stating a claim in tort which, as noted above, ordinarily requires proof of a wrong that caused the plaintiff harm. With respect to personal property, such claims can take the form of conversion or trespass to chattels. In the case of real property, they may take the form of a simple trespass claim. Thus, merely labeling intellectual property as a form of property only gets one so far in meeting the usual elements of a property tort. The property element may be met, but the requisite wrong, causation and harm still need to be defined and proven.

⁴ One exception to the requirement of actual harm is the ability of trade secret owners (and plaintiffs in other tort cases) to obtain injunctive relief and other forms of equitable relief, but under traditional tort principles, this type of relief is the exception not the rule. Furthermore, while there are some torts that do not require proof of actual harm, usually they require some public interest that is different from and greater than the need to compensate the plaintiff.

How we define the requisite elements of a tort depend a lot on the types of behavior we are trying to prevent (or encourage) and the types of harms we wish to remedy. Significantly, at common law the elements of a cause of action for trespass to real property (including the defined “wrong”) are different from the elements of a cause of action for trespass to personal property because perceptions about the nature of the wrongdoing are different. In the case of trespass to real property, for reasons not related to the actual harm suffered by the plaintiff, common law courts were willing to define the requisite wrong and harm as the trespass itself, allowing for the award of at least nominal damages. The principal justification for this rule was the need to keep the peace and the concern that trespass to land might lead to violence.

The same cannot be said about personal property claims, at least as developed at common law. With respect to personal property claims, the plaintiff has long been required to prove very specific wrongs and harms and can only be compensated with an award of damages to the extent the wrongs caused harm that can be quantified. Thus, for instance, an individual cannot state a successful tort claim simply because someone touched his car in a way that did not cause damage.

While some may wish to treat intellectual property rights more like real property whereby any trespass is actionable, historically we have not gone so far. Rather, in keeping with general tort principles, we typically require the plaintiff in an IP case to prove a specific act of wrongdoing. If the plaintiff seeks an award of monetary damages, we also require proof of actual and quantifiable harm. As a result, owning IP rights does not give one the right to control all uses of the associated IP, but only the very specific and limited list of rights that is associated with the particular type of IP.

For example, in the case of trade secrets, it must be shown that the trade secrets were wrongfully acquired, disclosed, or used with the requisite mindset and in a manner that caused the plaintiff actual harm. This should preclude trade secret misappropriation claims against individuals and companies that merely possess the trade secrets of another, unless it can be shown that the trade secrets were wrongfully acquired or there is a legitimate threat that a duty not to use or disclose the trade secrets will be violated. In both cases, however, without proof of actual harm caused by the wrongful acquisition, disclosure, or use, the only remedy is injunctive relief.

Unlike real property torts, the principal concession we have made with respect to IP claims (including trade secret claims) is not to define the wrong so that it is easier to meet (for instance by stating that any touching or mishandling of the subject rights is wrong). Instead, we give the plaintiff greater leeway in how harm can be shown and measured. In the case of patent, copyright, and trademark misappropriation claims, we have also reduced or eliminated the element of intent (or knowledge) that is typical of most tort claims. Additionally, we statutorily recognize that injunctive relief is a potential remedy for the threatened or future acts of infringement and misappropriation. What we have not done is eliminate the requirement that the wrongdoing must cause demonstrable harm before an award of damages can be rendered.

If we now want to treat some intellectual property rights like real property rights instead of personal property rights, we have a few important as-yet not fully answered questions. Why is this

necessary? What are the circumstances where this rule will apply? What interest, like the keeping the peace rationale of real property trespass, would justify a modification to long-standing tort principles which, generally, act as a limitation on tort liability? Merely complaining about an interference with “property” should not be enough, unless we are to create an omnibus “property” right that encapsulates both personal and real property.

The history of tort law has shown that it is possible to define new torts and refine old ones to address contemporary concerns, but as we do so, we usually are cognizant of the push me-pull you features of such changes. When we create a new tort, or make it easier to prove an old one, we may provide plaintiffs with a more powerful cause of action, but we also create a situation where there are more defendants.

Trade secret doctrine can teach intellectual property about the societal costs when those defendant individuals and companies are subjected to weak or baseless claims. The history of the UTSA reveals that, in many ways, the drafters of the UTSA wanted to make it easier for trade secret owners to protect their legitimate trade secrets, but in a way that would not lead to an increase in illegitimate and anti-competitive claims. A balance was struck by clearly defining the elements of a trade secret claim to require: (1) a wrongful act; (2) a particular level of knowledge above mere negligence; and (3) actual harm as a result of the wrongful act. To address concerns that trade secret liability did not go far enough, they added “acquisition” to the traditional list of “disclosure” and “use” as potentially wrongful acts, provided the requisite knowledge is shown. They also expanded potential trade secret liability to parties who acquired trade secrets by accident or mistake, but only in the event that they possessed timely knowledge. In doing so, they stayed true to the basic principles of tort liability.

Point Three: Property boundaries need to be defined

In thinking about how IP claims might be redefined to make it easier for IP rights holders to enforce their rights, it bears remembering that there is an important difference between real property and personal property rights on one hand, and IP rights on the other. Real and personal property is tangible, touchable, and rivalrous; IP rights are not. Thus, although an individual or company may not know who owns a particular piece of real or personal property, they can see and perceive it and order their behavior around it.

The same cannot be said of intellectual property rights which, although often embedded in some tangible item, are defined by something other than their tangible embodiment. Thus, as a practical matter, if an individual or company wants to do the right thing and avoid infringing the IP rights of others, they must have some way of learning the boundaries of those rights. To state the issue another way: How can we put would-be IP trespassers on notice of the property lines of IP when we are dealing with intangible property rights? Given the lack of physical boundaries, should liability be defined to place a greater or lesser burden on the plaintiff to prove the boundaries of the claimed rights?

Many of the problems related to intellectual property rights today (including the patent troll problem, the confusing tests for copyright infringement, and the over-assertion of trademark rights) can be attributed to the difficulty that IP owners and courts have in defining the metes and bounds of such

rights. A lot of time, energy, and money - not to mention the resources of the judiciary - are spent on the issue of the existence or scope of the asserted IP rights, with the ultimate results being highly unpredictable. To understand the nature of the problem, imagine a world without clear real property boundaries, written property descriptions, and recorded property lines – in other words, the Internet. Controversies can erupt due as much to misunderstandings concerning the scope of rights as to any actual “trespass” of those rights, as numerous cases involving the placement of fences establish.

At least with respect to patent rights, there is a written document that can be examined to determine what is claimed as the scope of rights, but as every patent litigant can attest, even then the property lines are blurry at best. With respect to copyrights, U.S. law requires some tangible embodiment of the work for copyrights to attach, but there is no requirement (even when registering a work) for a copyright owner to define where copyrightable content begins and ends. Thus, copyright litigation often involves a complicated and uncertain analysis of copyrightable versus uncopyrightable content. Trademark litigation involves similar uncertainty, not because a plaintiff’s trademark cannot be identified, but because trademark rights do not extend to any and all uses. Rather, trademark rights only relate to the specific goods and services on which they are used and are only “misused” if they are used by a defendant in conjunction with the same or similar goods or services. Thus, the precise scope of a trademark owner’s rights is always at issue in trademark litigation and is often highly contested.

The uncertain nature of the property lines of particular IP rights can, and does, lead to the over-assertion of such rights. This is consistent with human nature; if you think you own something, you are likely to define it broadly. The practical effect of this reality is that IP litigation is often pursued when the asserted rights are weak or non-existent, reflecting a misunderstanding of legal rights more than the commission of any cognizable wrong. Even worse, the uncertainty creates an environment in which putative IP owners can “push the envelope” and assert rights for the purpose of exacting a settlement or for anti-competitive purposes. Making it easier for a putative IP owner to enforce its rights would not solve these problems, but would only make them worse.

Trade secret law has attempted to deal with the problem of the over-assertion of trade secret rights in a number of ways. In fact, the potential anti-competitive effects of trade secret liability is one reason why the drafters of the UTSA worked hard over many years to better define (and restrict) the meaning of trade secrets and to ensure that all common law tort claims not based upon such definition would be precluded. The problem that they were trying to solve (and that published and available property records solved with respect to real property) was how to put the would-be misappropriator on notice of the existence and boundaries of putative trade secret rights. Although they originally considered a tangibility requirement, they ultimately determined that the plaintiff should bear the burden of defining the alleged property rights by proving that the identified information: (a) is not generally known or readily ascertainable (is secret); (2) has independent economic value to others due to its secrecy; and (3) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

As set forth in the UTSA, trade secret law can teach that when dealing with intangible intellectual property rights, it is important that the putative IP owner be required to specifically identify

the rights that it claims, both before and during litigation. Only in this way can alleged infringers and misappropriators be put on effective notice of potentially wrongful behavior. While the three-part definition of trade secrecy that is set forth in the UTSA is not perfect and is often misapplied, it is arguably better than our copyright system where the copyright owner has no burden before (and sometimes during) litigation to put would-be infringers on notice about the metes and bounds of the asserted copyrights. The end result of placing such a burden on putative trade secret owners is that they cannot always prove that they have anything that meets the definition. This is not a reflection of the weakness of trade secret protection, but reflects the very reasonable and practical need to define the scope of the asserted property interest.

Point Four: Proving property rights should not substitute for proving a wrong and harm.

When torts are based upon property rights (whether real, personal, or intangible), an essential element of the tort requires the plaintiff to prove the existence and parameters of the asserted property right. This naturally shifts the focus of litigation from the alleged wrongdoing (what often motivated the creation of the tort in the first place) to the existence or non-existence of the property right. As noted previously, because of the intangible nature of IP rights this involves an expensive and costly process in most IP cases. More importantly, the need to prove the existence of property rights often distracts attention away from the existence of the requisite wrong and harm. Worse yet, particularly at an emotional and rhetorical level, the property label often operates as a short-hand proxy for both a wrong and harm when neither may actually exist.

Sometimes, focusing on the property nature of IP rights can lead to successful outcomes for IP plaintiffs, principally because juries tend to respond favorably to claims of wrongful takings of property. Moreover, that plaintiff's pre-litigation demand letter looks awfully convincing to the under-resourced and ignorant defendant when words like "property" and "ownership" are thrown around. Likewise, such claims frequently get the attention of policy makers because of the importance that our society places on property rights.

However, because most IP torts, like most torts, also require proof of wrongdoing and harm, defendants are often successful in establishing that there are no facts to justify an award of damages – if they make it that far. Indeed, this often happens near the end of very costly litigation that is a drain on the resources of defendants and the judiciary alike. This reality underscores the brilliance of the common law of torts which focuses on wrongs and harms. A lot of money can be saved if lawsuits are not allowed to proceed without sufficient (and, hopefully, early) proof of wrongdoing that caused actual harm.

Trade secret law has grappled with the vexing question of when, in the course of litigation, such harm must be asserted and established. Its answer is to include harm in the very definition of a "trade secret misappropriation." In that way, trade secret law should, in theory, never lose sight of its *raison d'être*.

How did we get there? In the decades before the adoption of the UTSA, there was a debate concerning the proper underpinnings of trade secret law. Some argued that trade secret

misappropriation was a form of unfair competition, while others argued that it was a property right. The drafters of the UTSA explicitly stated their preference for the unfair competition view, not because they did not understand the property nature of trade secrets, but because they were focused as much on defining the wrongdoing that would constitute an act of trade secret misappropriation as they were on defining the meaning of a trade secret.

Wisely, the drafters of the *Restatement (Third) of Unfair Competition* (which essentially adopted the UTSA's conception of trade secret misappropriation) chose not to wade into the debate at all, properly noting that the elements of the claim included both aspects. Specifically, as defined by the UTSA, the two principal elements of a claim for trade secret misappropriation are: (1) the existence of a trade secret; and (2) an act of misappropriation. Thus, the existence of trade secrets alone is not enough; it must also be shown that the defendant committed a wrongful act with respect to such trade secrets. For important public policy reasons, not the least of which are free competition and information diffusion, not all acts related to trade secrets are deemed wrongful under the law.

Being able to articulate a wrong that goes beyond the assertion of what amounts to a real property trespass has very important policy and practical implications for intellectual property law. For one, although the demarcation of property rights may not be clear, the definition of wrongdoing can be. In effect, these extra elements act to ameliorate the effects of fuzzy property boundaries, from copyright's joint ownership questions to patent's standard for infringement.

Moreover, this is particularly important with respect to the definition of crimes since Constitutional principles require that criminal statutes not be vague. Second, as previously noted, the requirement of wrongful acts and measurable harm helps to limit the number of cases that can be successfully brought and focuses judicial resources on remedying real rather than theoretical or imaginary harms.

Point Five: Often it is better to focus on wrongs than property rights

As just noted, one of the problems with property-based torts is that they shift the focus of litigation away from the existence of a wrong and a harm and re-focus it on the existence of a property right. This can result in much litigation that is designed to vindicate property rights instead of that which is designed to remedy actual harm. In essence, these actions appear to be declaratory in nature, rather than involving actual disputes.

Another problem with property-based torts is that sometimes the focus on property rights obscures the fact that a wrong has been committed that society should try to prevent. In other words, an adverse consequence of the use of property rights as a proxy for wrongdoing and harm is that it may be more difficult to prove the commission of a tort or crime because the existence of a property right is a predicate fact. But if intellectual property law focuses on the alleged wrongful acts, rather than the alleged property rights, society may have more success in preventing unwanted behaviors.

The existence of non-property based torts demonstrates that common law courts and legislatures can define torts not to include the element of a property right. The trick is to define a

wrongful act that does not relate to property, or that relates to some tangible item that can be clearly and easily defined. Usually, when doing so, the tort will include some element(s) other than the existence of a property right that otherwise acts to modulate the degree of wrongfulness and ensure the existence of harm. For instance, a level of intent or knowledge over and above mere negligence or proof of a specific type of harm may be required; each element being used to define and calibrate the tort within appropriate parameters. In this regard, tort law generally disfavors strict liability, instead requiring some combination of wrongful act, intent, causation and harm before liability will be imposed.

Usually in tort law, as new torts are developed through litigants urging a change in the existing elements of an established tort, another element is substituted in its place. For example, when litigants urged common law courts to recognize the tort of negligent infliction of emotional distress, the courts did not simply substitute proof of emotional distress for proof of physical harm; they added other specific elements that required additional evidence and that, together, substituted for proof of physical harm.

Trade secret law has its antecedents in this debate. Section 759 of the *Restatement (First) of Torts* described a common law tort that existed in some states before it was precluded by the UTSA. It provided a claim for relief for business information not qualifying for trade secret protection. In lieu of the existence of a trade secret (which at that time required proof of use in one's business), the tort required proof of the wrongful (and intentional) acquisition of business information. Thus, rather than focus on the nature of the business information, it focused on the acts that led to the acquisition of the information and the intent of the defendant when engaging in such acts.

The federal Computer Fraud and Abuse Act, although imperfect, is an example of a statutory law which focuses on the acts of wrongdoing more so than the existence of a property rights. In one part, it requires the existence of a "protected computer," but its focus is otherwise on the wrongful acts associated with that computer and the requisite mindset and harm. Similar to the CFAA, as policy makers consider various intellectual property behaviors perceived to be wrong, like litigation brought by patent assertion entities, it is worth considering how a civil cause of action may be defined that is not dependent upon the existence of definable property rights. The benefits of doing so can be to simplify litigation while putting potential defendants on clearer notice of the behaviors that are deemed wrongful and, perhaps, criminal.

Conclusion

Trade secret law and policy has much to teach about information and intellectual property policy. Principally, it should be recognized that the provision of a civil right of action is usually designed to prevent a defined wrong and provide compensation for harm resulting therefrom. In the same way we can ill-afford individuals running to court every time they suffer some indignity of life or emotional harm, we cannot afford intellectual property owners demanding relief simply because something has happened that involves their intellectual property, or information that they deem valuable.

At the same time, trade secret law underscores how deeper understanding of the rights at issue can benefit plaintiffs, as they can both exploit their intellectual property and defend it in a more

predictable and justifiable manner. By recalling the foundational principles of tort law, and using the elements of a claim under the UTSA as a model, we might begin to more clearly define information and intellectual property wrongs in ways that the general public can understand, the end result being more compliance and less litigation.