

Trade Secret Disputes

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I. Introduction

Trade secrets law is concerned with the protection of technological and commercial information not generally known in the trade against unauthorized commercial use by others. The policy basis for trade secret protection is the desire to encourage research and development by providing protection to the originator of business information, and to maintain proper standards of business ethics. *See Kewanee Oil Company v. Bicron Corp.*, 416 U.S. 470 (1990). The trade secret owner is not granted exclusivity to the information, but rather is only protected against improper acquisition and/or use of the information. As a result, others are free to discover a trade secret by any fair means.

II. Legal Basis

Until relatively recently, trade secret protection had been based on common law principles; namely, trade secrets had been protected under contract, quasi-contract, and property theories. Protection of trade secrets under contract theories includes instances in which there existed an express contract concerning non-disclosure or use of a trade secret, or there existed a confidential relationship giving rise to a duty not to disclose or use the trade secret, such as an employer-employee relationship. The quasi-contract basis of trade secret protection includes avoidance of unjust enrichment from trade secret misappropriation. Finally, under the property theory, a trade secret is viewed as a property right that is subject to protective restrictions on its use and disclosure.

Perhaps the most widely used common law definition of a trade secret was set forth in the Restatement of Torts, § 757 comment b (1939):

[A trade secret is] [a]ny formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.

More recently, the Restatement of Unfair Competition, § 39 (2002), defines a trade secret with a slight difference.

A trade secret is any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others.

Washington State is also one of the few states that recognize the theft of trade secrets as a crime. *See, generally*, RCW § 9A.56.010. There are no reported cases of criminal trade secret theft in Washington.

The Restatement also lists six factors to be considered in determining the existence of a trade secret:

1. the extent to which the information is known outside the business;
2. the extent to which it is known by employees and others involved in his business;
3. the extent of measure taken by the owner to guard the secrecy of the information;
4. the value of the information to the owner and to his competitors;
5. the amount of efforts or money expended by the owner in developing the information; and
6. the ease or difficulty with which the information could be properly acquired or duplicated by others.

These factors are “[t]he most-cited listing of the objective criteria for determining the existence of a trade secret.” *M. Jager*, Trade Secrets Law § 5.05 (1995). Note that this definition is still widely used in spite of the decision of the authors of the Restatement (Second) of Torts (1979) to omit any discussion of trade secrets.

In recent years, trade secret law has become largely statutory. The Uniform Trade Secret Act (UTSA) has now been adopted (sometimes with modifications) in 46 states and the District of Columbia. *M. Jager, supra*, at § 3.05 (2001). Washington adopted the UTSA as of January 1, 1982. RCW 19.108 *et seq.* Nonetheless, and despite the UTSA’s widespread adoption, the *Restatement’s* definition retains vitality and is often referred to by the courts during the course of their deliberations in applying the UTSA.

The Oregon State Trade Secrets Act was adopted in 1987 and is also based on the UTSA. *See, generally*, OR. Rev. Stat. §§646.461 *et seq.* (1998).

In slight contrast, the Idaho State Trade Secrets Act is based on the 1985 revised version of the USTA. *See, generally*, Idaho Code §48-801 *et seq.* (2002).

The UTSA defines a trade secret as information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

III. Elements of a Trade Secret

Under both the old Restatement of Torts and the current statutory definition, to establish the existence of a trade secret one must show that the information or item alleged to be a trade secret is: (1) of an appropriate subject matter to be protected as a trade secret; (2) not a matter of common knowledge in the trade and not readily ascertainable by proper means; (3) of value; and (4) the object of reasonable precautions taken under the circumstances to maintain secrecy.

A. *Protectable Subject Matter*

Under the common law and the Washington statutory definition, almost any knowledge or information used in conjunction with one's business may be held as a trade secret. Specific examples include:

1. Formulas for chemicals, drugs, cosmetics, foods, et cetera.
2. Industrial Processes. *E.I. du Pont de Nemours & Company, Inc. v. Christopher*, 431 F.2d 1012 (5th Cir. 1970).
3. Know-how, *i.e.*, technical information relating to the practical application of patented or unpatented inventions.
4. Blueprints, such as for a building or machinery.
5. Computer software, to the extent it cannot be reverse-engineered.
6. Sources of supply, pricing information, identity of vendors or suppliers, and customer lists.

In addition and contrary to common belief, trade secrets are not limited to technical items, know-how and related matters, but include a wide variety of business information (*i.e.*, employee benefit information and financial statements and projections). Under the Washington statute, a trade secret can include information that has commercial value from a negative standpoint (*e.g.*, knowledge that a particular process cannot be used to produce a certain product).

B. *Not Generally Known or Readily Ascertainable*

Trade secret protection is available only for information not generally known (*i.e.*, secret information), and is not available for information, which is common knowledge. In addition to not being generally known, a trade secret must not be readily ascertainable by proper means. The comments to the UTSA indicate that information is "readily ascertainable" if it is available in trade journals, reference books or other published materials.

Note that secrecy is not lost if the possessor of the information disclosed it to another in confidence or under an express or implied obligation not to disclose it. Thus, information can be disclosed, for example, to prospective purchasers of the trade secret, or to employees involved in a manufacturing process, which utilizes the trade secret, without destroying the trade secret. These types of disclosures comport with commercial reality.

In Washington, trade secrets must be “novel” and not ascertainable from other sources. *Spokane Research & Dev. Found. v. City of Spokane*, 983 P.2d 682 (Wash. App. 1999) (citing *Confederated Tribes of Chehalis Res. v. Johnson*, 135 Wn.2d 734, 749, 958 P.2d 260 (1998) (*en banc*); *See also, Buffets, Inc. v. Klinke*, 73 F.3d 965, 969 (9th Cir. 1996) (recipes denied trade secret protection under USTA because they lacked requisite novelty and economic value).

Another interesting twist in Washington trade secret law is that even memorizing information, such as customer lists, can be considered trade secret misappropriation. *Ed Nowogroski Ins., Inc. v. Rucker*, 88 Wn. App. 350, 356, 944 P.2d 1093, 1096 (1997) (memorized information included insurance agency’s confidential customer lists and other unspecified confidential customer information).

C. *Independent Economic Value*

To be protectable, the trade secret information must provide a competitive advantage over others who are unaware of the secret information. Earlier decisions required that for a trade secret to have value, the information must be regularly used in the proponent’s business. This requirement, which could post a problem during research and development, has been rejected by the UTSA.

D. *Reasonable Efforts to Maintain Secrecy*

The requirement that the possessor of a trade secret must make reasonable efforts to maintain secrecy is based on the rationale that if the possessor does not treat the information as a trade secret, then the law also should not. The degree of secrecy required is that which is reasonable under the circumstances and may include:

1. establishing / enforcing clear policies about confidential business information;
2. identifying technological and technical information deemed to be secret;
3. advising / training employees and others of the existence of trade secrets;
4. use of nondisclosure and confidentiality agreements with employees and others;
5. limiting access to trade secrets on a “need-to-know-basis”;

6. controlling access to company files and facility locations;
7. central control of blueprints and engineering drawings;
8. use of security systems and guards;
9. providing locked storage for sensitive information such as laboratory notebooks;
10. implementation of document protection and retention policies; and
11. use of computer passwords and firewalls throughout organization.

IV. Trade Secret Misappropriation

Under the common law, liability for trade secret misappropriation required acquisition by another by improper conduct or unfair means together with the use or disclosure by such person to the trade secret owner's detriment. Under the UTSA, the definition of misappropriation is much broader; it can include simple acquisition of a trade secret by a person who knows or has reason to know that the trade secret was acquired by improper means no subsequent or impending use of the trade secret is required.

The UTSA specifies that "improper means" includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means. Again, one of the broadly stated policies behind trade secret law is the maintenance of standards of commercial ethics. Thus, improper means could include otherwise lawful conduct which is improper under the circumstances; *e.g.*, an airplane over-flight used as aerial reconnaissance to determine the competitor's plant layout during construction of the plant. *E.I. du Pont de Nemours & Co., Inc. v. Christopher*, 431 F.2d 1012 (CA5, 1970).

V. Relief Available

A. Injunctive Relief

Once it has been established that a trade secret has been misappropriated, injunctions to enjoin further use of a trade secret generally have been issued by the courts. This remedy is expressly provided under the UTSA. Under the common law, there were several different views concerning the duration of prohibitory injunction. Under one doctrine, the defendant could be permanently enjoined from using the misappropriated trade secret, even if it later became public knowledge. *Allen-Qualia Co. v. Shellmar Products Co.*, 87 F.2d 104 (7th Cir. 1936). This view was based on the theory that the defendant by her own inequitable conduct had permanently deprived herself of the right to employ the trade secret. Under a second doctrine, the injunction is terminated once the information becomes available to the public. *Conmar Products*

Corp. v. Universal Slide Fastener Co., 172 F.2d 150 (2d. Cir. 1949). And under a third doctrine, the duration of the injunction is limited to the period of time it would have taken the defendant either by reverse engineering or by independent development to develop its product or process without the use of the trade secret. *K-2 Ski Company v. Head Ski Co., Inc.*, 506 F.2d 471 (9th Cir. 1974).

UTSA adopts the *K-2* rule; injunctive relief terminates once a trade secret ceases to exist. The injunction, however, may be continued for an additional length of time to eliminate any commercial advantage derived from the misappropriation. As such, the maximum duration of an injunction is the period of time it would have taken the defendant to lawfully discover the trade secret either through independent development or reverse engineering.

B. Damages and Attorney's Fees

The UTSA provides that in addition to or in lieu of injunctive relief, damages of the actual loss caused by the misappropriation may be awarded. In addition to damages, the complainant may recover the unjust enrichment resulting from the misappropriation, provided that such amount is not taken into account in computing the actual loss. If willful or malicious misappropriation is found, the court can award exemplary damages in an amount not to exceed twice the actual damages, together with recovery for unjust enrichment. In such circumstance, the court may also award attorney's fees. The comments to the UTSA indicate that the patent laws of the United States are followed in determining whether attorney's fees should be provided.

C. Statute of Limitations

The UTSA specifies that an action for misappropriation must be brought within three years after the misappropriation is discovered or reasonably should have been discovered.

APPENDIX

A. UNITED STATES FEDERAL ECONOMIC ESPIONAGE ACT OF 1996

The United States Federal Economic Espionage Act of 1996, 18 U.S.C. § 1831-1831, is effectively the only federal law of protecting trade secrets per se. In most cases trade secrets are protected under state statutes and common law. The Washington State trade secret act, excerpted below, is based on the Uniform Trade Secret Act, which has also been adopted in some form in most jurisdictions.

Sec. 1831. Economic Espionage

- (a) In General. - Whoever, intending or knowing that the offense will benefit any foreign government, foreign instrumentality, or foreign agent, knowingly -
 - (1) steals, or without authorization appropriates, takes, carries away, or conceals, or by fraud, artifice, or deception obtains a trade secret;
 - (2) without authorization copies, duplicates, sketches, draws, photographs, downloads, uploads, alters, destroys, photocopies, replicates, transmits, delivers, sends, mails, communicates, or conveys a trade secret;
 - (3) receives, buys, or possesses a trade secret, knowing the same to have been stolen or appropriated, obtained, or converted without authorization;
 - (4) attempts to commit any offense described in any of paragraphs (1) through (3); or
 - (5) conspires with one or more other persons to commit any offense described in any of paragraphs (1) through (3), and one or more of such persons do any act to effect the object of the conspiracy, shall, except as provided in subsection (b), be fined not more than \$500,000 or imprisoned not more than 15 years, or both.
- (b) Organizations. - Any organization that commits any offense described in subsection (a) shall be fined not more than \$10,000,000.

Sec. 1832. Theft of Trade Secrets

- (a) Whoever, with intent to convert a trade secret, that is related to or included in a product that is produced for or placed in interstate or foreign commerce, to the economic benefit of anyone other than the owner thereof, and intending or knowing that the offense will, injure any owner of that trade secret, knowingly –
- (1) steals, or without authorization appropriates, takes, carries away, or conceals, or by fraud, artifice, or deception obtains such information;
 - (2) without authorization copies, duplicates, sketches, draws, photographs, downloads, uploads, alters, destroys, photocopies, replicates, transmits, delivers, sends, mails, communicates, or conveys such information;
 - (3) receives, buys, or possesses such information, knowing the same to have been stolen or appropriated, obtained, or converted without authorization;
 - (4) attempts to commit any offense described in paragraphs (1) through (3); or
 - (5) conspires with one or more other persons to commit any offense described in paragraphs (1) through (3), and one or more of such persons do any act to effect the object of the conspiracy, shall, except as provided in subsection (b), be fined under this title or imprisoned not more than 10 years, or both.
- (b) Any organization that commits any offense described in subsection (a) shall be fined not more than \$5,000,000.

Sec. 1833. Exceptions to Prohibitions

This chapter does not prohibit -

- (1) any otherwise lawful activity conducted by a governmental entity of the United States, a State, or a political subdivision of a State; or
- (2) the reporting of a suspected violation of law to any governmental entity of the United States, a State, or a political subdivision of a State, if such entity has lawful authority with respect to that violation.

Sec. 1834. Criminal forfeiture

- (a) The court, in imposing sentence on a person for a violation of this chapter, shall order, in addition to any other sentence imposed, that the person forfeit to the United States –
 - (1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation; and
 - (2) any of the person's property used, or intended to be used, in any manner or part, to commit or facilitate the commission of such violation, if the court in its discretion so determines, taking into consideration the nature, scope, and proportionality of the use of the property in the offense.
- (b) Property subject to forfeiture under this section, any seizure and disposition thereof, and any administrative or judicial proceeding in relation thereto, shall be governed by section 413 of the Comprehensive Drug Abuse Prevention and Control Act of 1970 (21 U.S.C. 853), except for subsections (d) and (j) of such section, which shall not apply to forfeitures under this section.

Sec. 1835. Orders to preserve confidentiality

In any prosecution or other proceeding under this chapter, the court shall enter such orders and take such other action as may be necessary and appropriate to preserve the confidentiality of trade secrets, consistent with the requirements of the Federal Rules of Criminal and Civil Procedure, the Federal Rules of Evidence, and all other applicable laws. An interlocutory appeal by the United States shall lie from a decision or order of a district court authorizing or directing the disclosure of any trade secret.

Sec. 1836. Civil proceedings to enjoin violations

- (a) The Attorney General may, in a civil action, obtain appropriate injunctive relief against any violation of this section.
- (b) The district courts of the United States shall have exclusive original jurisdiction of civil actions under this subsection.

Sec. 1837. Applicability to conduct outside the United States

This chapter also applies to conduct occurring outside the United States if –

- (1) the offender is a natural person who is a citizen or permanent resident alien of the United States, or an organization organized under the laws of the United States or a State or political subdivision thereof; or
- (2) an act in furtherance of the offense was committed in the United States.

Sec. 1838. Construction with other laws

This chapter shall not be construed to preempt or displace any other remedies, whether civil or criminal, provided by United States Federal, State, commonwealth, possession, or territory law for the misappropriation of a trade secret, or to affect the otherwise lawful disclosure of information by any Government employee under section 552 of title 5 (commonly known as the Freedom of Information Act).

Sec. 1839. Definitions

As used in this chapter –

- (1) the term "foreign instrumentality" means any agency, bureau, ministry, component, institution, association, or any legal, commercial, or business organization, corporation, firm, or entity that is substantially owned, controlled, sponsored, commanded, managed, or dominated by a foreign government;
- (2) the term "foreign agent" means any officer, employee, proxy, servant, delegate, or representative of a foreign government;
- (3) the term "trade secret" means all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if -
 - (A) the owner thereof has taken reasonable measures to keep such information secret; and
 - (B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, the public; and
- (4) the term "owner", with respect to a trade secret, means the person or entity in whom or in which rightful legal or equitable title to, or license in, the trade secret is reposed.

B. WASHINGTON STATE UNIFORM TRADE SECRETS ACT

In most cases trade secrets are protected under state statutes and common law. The Washington State trade secret act, Wash Rev. Code § 19.108.010, et seq. (2000), excerpted below, is based on the Uniform Trade Secret Act which has also been adopted in some form in most jurisdictions.

RCW 19.108.010 - Definitions

Unless the context clearly requires otherwise, the definitions set forth in this section apply throughout this chapter.

- (1) "Improper means" includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means;
- (2) "Misappropriation" means:
 - (a) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
 - (b) Disclosure or use of a trade secret of another without express or implied consent by a person who:
 - (i) Used improper means to acquire knowledge of the trade secret; or
 - (ii) At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was (A) derived from or through a person who had utilized improper means to acquire it, (B) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use, or (C) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or
 - (iii) Before a material change of his or her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.
- (3) "Person" means a natural person, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity.
- (4) "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process that:
 - (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and

- (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

[1981 c 286 § 1.]

RCW 19.108.020 - Remedies for misappropriation -- Injunction, royalty

- (1) Actual or threatened misappropriation may be enjoined. Upon application to the court, an injunction shall be terminated when the trade secret has ceased to exist, but the injunction may be continued for an additional reasonable period of time in order to eliminate commercial advantage that otherwise would be derived from the misappropriation.
- (2) If the court determines that it would be unreasonable to prohibit future use, an injunction may condition future use upon payment of a reasonable royalty for no longer than the period of time the use could have been prohibited.
- (3) In appropriate circumstances, affirmative acts to protect a trade secret may be compelled by court order.

[1981 c 286 § 2.]

RCW 19.108.030 - Remedies For Misappropriation -- Damages

- (1) In addition to or in lieu of injunctive relief, a complainant may recover damages for the actual loss caused by misappropriation. A complainant also may recover for the unjust enrichment caused by misappropriation that is not taken into account in computing damages for actual loss.
- (2) If willful and malicious misappropriation exists, the court may award exemplary damages in an amount not exceeding twice any award made under subsection (1).

[1981 c 286 § 3.]

RCW 19.108.040 - Award Of Attorney's Fees

If a claim of misappropriation is made in bad faith, a motion to terminate an injunction is made or resisted in bad faith, or willful and malicious misappropriation exists, the court may award reasonable attorney's fees to the prevailing party.

[1981 c 286 § 4.]

RCW 19.108.050 - Court Orders To Preserve Secrecy Of Alleged Trade Secrets

In an action under this chapter, a court shall preserve the secrecy of an alleged trade secret by reasonable means, which may include granting protective orders in connection with discovery proceedings, holding in-camera hearings, sealing the records of the action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval.

[1981 c 286 § 5.]

RCW 19.108.060 - Actions For Misappropriation -- Time Limitation

An action for misappropriation must be brought within three years after the misappropriation is discovered or by the exercise of reasonable diligence should have been discovered. For the purposes of this section, a continuing misappropriation constitutes a single claim.

[1981 c 286 § 6.]

RCW 19.108.900 - Effect Of Chapter On Other Law

- (1) This chapter displaces conflicting tort, restitutionary, and other law of this state pertaining to civil liability for misappropriation of a trade secret.
- (2) This chapter does not affect:
 - (a) Contractual or other civil liability or relief that is not based upon misappropriation of a trade secret; or
 - (b) Criminal liability for misappropriation of a trade secret.

[1981 c 286 § 7.]

RCW 19.108.910 - Construction Of Uniform Act

This chapter shall be applied and construed to effectuate its general purpose to make uniform the law, with respect to the subject of this chapter among states enacting it.

[1981 c 286 § 8.]

RCW 19.108.920 - Short Title

This chapter may be known and cited as the uniform trade secrets act.

[1981 c 286 § 9.]

RCW 19.108.930 - Effective Date -- Application -- 1981 c 286

This chapter takes effect on January 1, 1982, and does not apply to misappropriation occurring prior to the effective date.

[1981 c 286 § 12.]

RCW 19.108.940 - Severability -- 1981 c 286

If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

[1981 c 286 § 10.]

NOTE:

Theft of trade secrets: **RCW 9A.56.010 (6), 9A.56.020.**

Idaho Trade Secrets Act: **Idaho Code §48-801 et seq. (2002)**

TITLE 48
MONOPOLIES AND TRADE PRACTICES
CHAPTER 8
IDAHO TRADE SECRETS ACT

48-801. DEFINITIONS.

As used in this chapter unless the context requires otherwise:

- (1) "Improper means" include theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means.
- (2) "Misappropriation" means:
 - (a) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
 - (b) Disclosure or use of a trade secret of another without express or implied consent by a person who:
 - (A) Used improper means to acquire knowledge of the trade secret; or
 - (B) At the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was:
 - (i) Derived from or through a person who had utilized improper means to acquire it;
 - (ii) Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or
 - (iii) Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or
 - (C) Before a material change of his position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.
- (3) "Person" means a natural person, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity.

- (4) "Computer program" means information which is capable of causing a computer to perform logical operation(s) and:
 - (a) Is contained on any media or in any format;
 - (b) Is capable of being input, directly or indirectly, into a computer; and
 - (c) Has prominently displayed a notice of copyright, or other proprietary or confidential marking, either within or on the media containing the information.

- (5) "Trade secret" means information, including a formula, pattern, compilation, program, computer program, device, method, technique, or process, that:
 - (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
 - (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. Trade secrets as defined in this subsection are subject to disclosure by a public agency according to chapter 3, title 9, Idaho Code.

48-802. INJUNCTIVE RELIEF.

- (1) Actual or threatened misappropriation may be enjoined. Upon application to the court, an injunction shall be terminated when the trade secret has ceased to exist, but the injunction may be continued for an additional reasonable period of time in order to eliminate commercial advantage that otherwise would be derived from the misappropriation.
- (2) In exceptional circumstances, an injunction may condition future use upon payment of a reasonable royalty for no longer than the period of time for which use could have been prohibited. Exceptional circumstances include, but are not limited to, a material and prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation that renders a prohibitive injunction inequitable.
- (3) In appropriate circumstances, affirmative acts to protect a trade secret may be compelled by court order.

48-803. DAMAGES.

- (1) Except to the extent that a material and prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation renders a monetary recovery inequitable, a complainant is entitled to recover damages for misappropriation. Damages can include both the actual loss caused by misappropriation and the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss. In lieu of damages measured by any other methods, the damages caused by misappropriation may be measured by imposition of liability for a reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret.
- (2) If willful and malicious misappropriation exists, the court may award exemplary damages in an amount not exceeding twice any award made under subsection (1) of this section.

48-804. PRESERVATION OF SECRECY.

In an action under this chapter, a court shall preserve the secrecy of an alleged trade secret by reasonable means, which may include granting protective orders in connection with discovery proceedings, holding in-camera hearings, sealing the records of the action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval.

48-805. STATUTE OF LIMITATIONS.

An action for misappropriation must be brought within three (3) years after the misappropriation is discovered or by the exercise of reasonable diligence should have been discovered. For the purposes of this section, a continuing misappropriation constitutes a single claim.

48-806. EFFECT ON OTHER LAW.

- (1) Except as provided in subsection (2) of this section, this chapter displaces conflicting tort, restitutionary, and other law of this state providing civil liability remedies for misappropriation of a trade secret.
- (2) This chapter does not affect:
 - (a) Contractual remedies, whether or not based upon misappropriation of a trade secret; or
 - (b) Other civil remedies that are not based upon misappropriation of a trade secret; or

- (c) Criminal remedies, whether or not based upon misappropriation of a trade secret.

48-807. SHORT TITLE.

This chapter may be cited as the "Idaho Trade Secrets Act."

TRADE SECRETS

646.461 Definitions for ORS 646.461 to 646.475. As used in ORS 646.461 to 646.475, unless the context otherwise requires:

- (1) "Improper means" includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy or espionage through electronic or other means. Reverse engineering and independent development alone shall not be considered improper means.
- (2) "Misappropriation" means:
 - (a) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means;
 - (b) Disclosure or use of a trade secret of another without express or implied consent by a person who used improper means to acquire knowledge of the trade secret;
 - (c) Disclosure or use of a trade secret of another without express or implied consent by a person who, before a material change of position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake; or
 - (d) Disclosure or use of a trade secret of another without express or implied consent by a person, who at the time of disclosure or use, knew or had reason to know that the knowledge of the trade secret was:
 - (A) Derived from or through a person who had utilized improper means to acquire it;
 - (B) Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or
 - (C) Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use.
- (3) "Person" means a natural person, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency or any other legal or commercial entity.

- (4) "Trade secret" means information, including a drawing, cost data, customer list, formula, pattern, compilation, program, device, method, technique or process that:
 - (a) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and
 - (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. [1987 c.537 §2]

646.463 Enjoining misappropriation; payment of royalties; affirmative acts.

- (1) Actual or threatened misappropriation may be temporarily, preliminarily or permanently enjoined. Upon application to the court, an injunction shall be vacated when the trade secret has ceased to exist, but the injunction may be continued for an additional reasonable period of time in order to eliminate commercial advantage that otherwise would be derived from the misappropriation.
- (2) In exceptional circumstances, an injunction may condition future use upon payment of a reasonable royalty for the period of time for which use could have been prohibited. Exceptional circumstances include, but are not limited to, a material and prejudicial change of position prior to acquiring knowledge or reason to know of the misappropriation that renders a prohibitive injunction inequitable.
- (3) In appropriate circumstances, the court may order affirmative acts to protect a trade secret. [1987 c.537 §3]

646.465 Damages for misappropriation.

- (1) A complainant is entitled to recover damages adequate to compensate for misappropriation, unless a material and prejudicial change of position by a defendant prior to acquiring knowledge or reason to know of the misappropriation renders a monetary recovery inequitable.
- (2) Damages may include both the actual loss caused by misappropriation, and the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss, but shall not be less than a reasonable royalty for the unauthorized disclosure or use of a trade secret.
- (3) Upon a finding of willful or malicious misappropriation, punitive damages may be awarded in an amount not exceeding twice any award made under subsections (1) and (2) of this section. [1987 c.537 §4]

646.467 Attorney fees.

The court may award reasonable attorney fees to the prevailing party if:

- (1) A claim of misappropriation is made in bad faith;
- (2) A motion to terminate an injunction is made or resisted in bad faith; or
- (3) Willful or malicious misappropriation is found by the court or jury. [1987 c.537 §5]

646.469 Preservation of trade secret by court; methods.

In any action brought under ORS 646.461 to 646.475, the court shall preserve the secrecy of an alleged trade secret by reasonable means, which may include granting protective orders in connection with discovery proceedings, holding in camera hearings, sealing the records of the action or ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval. [1987 c.537 §6]

646.471 Limitation on commencement of action.

An action for misappropriation must be brought within three years after the misappropriation is discovered or by the exercise of reasonable diligence should have been discovered. For the purposes of this section, a continuing misappropriation constitutes a single claim. [1987 c.537 §7]

646.473 Conflicting tort, restitution or other law providing civil remedies; exclusions for certain other remedies; limited immunity for public bodies and officers, employees and agents.

- (1) Except as provided in subsection (2) of this section, ORS 646.461 to 646.475 supersedes conflicting tort, restitution or other law of Oregon providing civil remedies for misappropriation of a trade secret.
- (2) ORS 646.461 to 646.475 shall not affect:
 - (a) Contractual remedies, whether or not based upon misappropriation of a trade secret;
 - (b) Other civil remedies that are not based upon misappropriation of a trade secret;
 - (c) Criminal remedies, whether or not based upon misappropriation of a trade secret; or

- (d) Any defense, immunity or limitation of liability afforded public bodies, their officers, employees or agents under ORS 30.260 to 30.300.
- (3) Notwithstanding any other provision in ORS 646.461 to 646.475, public bodies and their officers, employees and agents are immune from any claim or action for misappropriation of a trade secret that is based on the disclosure or release of information in obedience to or in good faith reliance on any order of disclosure issued pursuant to ORS 192.410 to 192.490 or on the advice of an attorney authorized to advise the public body, its officers, employees or agents. [1987 c.537 §8]

646.475 Application and construction of ORS 646.461 to 646.475; short title; effect of invalidity.

- (1) ORS 646.461 to 646.475 shall be applied and construed to effectuate their general purpose to make uniform the law with respect to the subject of ORS 646.461 to 646.475 among states enacting them.
- (2) ORS 646.461 to 646.475 may be cited as the Uniform Trade Secrets Act.
- (3) If any provision of ORS 646.461 to 646.475 or its application to any person or circumstances is held invalid, the invalidity shall not affect other provisions or applications of ORS 646.461 to 646.475 which can be given effect without the invalid provision or application, and to this end the provisions of ORS 646.461 to 646.475 are severable. [1987 c.537 §§9,10,11]