

The Trade Secret Examiner® Platform

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Background

There is an intellectual property revolution on the horizon called automated trade secret asset management (TSAM). While most companies recognize the importance of protecting trade secret assets, most companies fail to adequately manage and protect these critical assets.

This article will explore the functionality of the Trade Secret Examiner® (TSE) software system, used to inventory, track, and evaluate trade secrets. The TSE software system is the most sophisticated TSAM tool available on the market today. See www.thetso.com

The TSE platform has been commercially deployed to corporate clients both in the United States and abroad.

The Two-Stage Approach

There is a two-stage approach in the TSO platform to review and approve trade secret submissions. The first stage is the “potential” trade secret stage, in which a potential trade secret is submitted by someone in the company for consideration. The second stage requires a legal review of the potential trade secret and a decision to accept or reject the potential trade secret. This two-stage approach encourages the bounteous entry of potential trade secrets while ensuring legal oversight and protecting the attorney-client and attorney work product privileges.

Subject-Format-Product

Trade Secret Examiner® categorizes trade secrets within a Subject-Format-Product three-dimensional space. The Subject is generally the department within the company, like Marketing or Engineering, Research or Manufacturing. The Format captures the physical evidence of the trade secret: Is it a spreadsheet, a formula, a plan, an algorithm or source code? The Product identifies the existing product, prototype, or failed product to which the trade secret applies.

A major benefit of the SFP system is the use of simple and consistent English to identify the SFP classification. Every employee knows how to identify an Engineering (S)

Specification (F) for large screen televisions (P). There is no drafting or complicated reporting process. There is no ambiguity. There is no training required.

The Six Factors

The six factors from §757 of the First Restatement of Torts are the most powerful indicators and the most useful method for determining whether an alleged piece of information qualifies as a statutory trade secret under the Uniform Trade Secrets Act (UTSA) and/or the Defend Trade Secrets Act (DTSA). The six factors are:

- the extent to which the information is known outside of the company;
- the extent to which it is known by employees and others involved in the company;
- the extent of measures taken by the company to guard the secrecy of the information;
- the value of the information to the company and competitors;
- the amount of time, effort and money expended by the company in developing the information;
- the ease or difficulty with which the information could be properly acquired or duplicated by others.

The Trade Secret Examiner® platform evaluates and scores the alleged trade secrets for each of the six factors on a five-point scale.

These values are collected and recorded on the initial submission of the information to the Trade Secret Examiner®. The whole process is protected by the attorney client and the attorney work product privileges. The legal department reviews the initial submission, and amends it as necessary, considering the six-factor scores.

The Defendability Factor

With five-point scale values of the six factors in hand for each trade secret, the Trade Secret Examiner® can *classify* alleged trade secrets based on their likelihood of success, by a preponderance of the evidence, in a trade secret misappropriation lawsuit.

The values for the six factors (Outside Knowledge Inside Knowledge, Investment, Economic Benefit, Reproducibility, and Security) are combined together. The math behind the calculation is the geometric mean of the 6 values. The geometric mean is a special type of average that works well for analyzing the six factors. The resulting value

is called the defendability factor and ranges from 1 to 5. The higher the number, the more strategic the alleged trade secret is and the easier it will be to prove the existence of the trade secret in litigation.

The defendability factor is a critical calculation in a trade secret misappropriation lawsuit. If thousands of trade secrets are downloaded and stolen, the trade secret owner must have a way to extract 10-15 critical trade secrets. The trial court will not allow discovery relating to “thousands” of trade secrets. Utilizing the TSE platform, the plaintiff can identify the most critical 10-15 trade secrets by classifying the trade secrets using the defendability factor.

Redundancy

Based on 24/7 day-to-day use of the Trade Secret Examiner® software across the corporation, there will often be multiple submissions of the same trade secret.

The TSE platform includes redundancy elimination to combine the redundant trade secret submissions into a single trade secret entry. The consolidation of redundant entries will be subject to the review and approval of the Legal Department.

When the consolidation is approved, the Trade Secret Examiner® software turns the redundancy into a benefit. The six-factor assessment by *multiple* submitters results in a more accurate scoring of the redundant trade secret.

Blockchain

Trade secret disputes are fact intensive. The rules of evidence require authentication of the evidence. The Trade Secret Examiner® software uses blockchain technology to protect the integrity of the trade secret data. Any time TSE information is changed, a blockchain entry is simultaneously created. Blockchain technology allows one to record information in a way that it cannot subsequently be changed. The blockchain would be broken. Blockchain and its underlying technology, hash codes, have now been accepted by the courts to authenticate evidence in trade secret misappropriation lawsuits.

Artificial Intelligence

Artificially intelligent systems can perform tasks commonly associated with human cognitive functions—such as playing games, interpreting speech, and identifying patterns by processing massive amounts of data.

The current conundrum is whether artificial intelligence can ferret out trade secrets in an automated trade secret asset management system.

Based on the current state of the technology, there are two reasons the authors have decided that the risks exceed the benefits in the trade secret environment.

The first reason is simple. The most valuable trade secrets are unlikely to be discoverable by searching the company's computer databases. Artificial intelligence will have no utility in identifying the crown jewel trade secrets.

The second reason is more subtle. Artificial intelligence takes in data in two ways: from its learning process and from queries. All this data is used to answer future queries, and therein lies the problem. If you submit a query about trade secrets within an artificial intelligence system, that query will now be part of the data that the AI system will use to answer future queries, including from outside the company. This will put the trade secrets at risk and will be grounds for forfeiture of the trade secrets in litigation. An unprotected disclosure of a trade secret without an obligation of confidentiality results in forfeiture of the status of the information as a trade secret.

But what if we limited the artificial intelligence's scope of action, after its initial learning period, to the company? No outside queries, no outside answers. You still have the problem of trade secrets leaking within the company, from someone who knew the trade secret and referenced it in a query, to someone who had no need to know that trade secret and received it in an answer. Given the danger of insider theft of trade secrets, this is a significant risk.

Conclusion

Trade secret owners must utilize modern technology to identify, classify, protect and value trade secret assets. The Trade Secret Examiner® software system automates collecting, evaluating, and maintaining trade secret information. It is a revolutionary TSAM software tool that provides trade secret owners and trade secret lawyers with a revolutionary new tool for trade secret asset management.