

PROPERTY FAIL:

HOW THE RHETORIC OF PROPERTY RIGHTS UNDERMINES TRADE SECRET PROTECTION

© 2013 Sharon K. Sandeen

[Abstract dated November 1, 2013]

Recently, there has been a noticeable uptick in the discourse and vitriol concerning alleged trade secret theft, particularly by foreign governments and their agents. In 2012, Create.org published a *White Paper on Trade Secret* theft. Not coincidentally, the Executive Office of the President of the United States issued the *Administration's Strategy on Mitigating the Theft of U.S. Trade Secrets* in February of 2013, promising to "coordinate and improve" U.S. efforts to protect U.S. innovation, including trade secrets. Although the details are still maintained in confidence, it is anticipated that the Trans-Pacific Partnership Agreement being negotiated between the Office of the U.S. Trade Representative and various other countries will include provisions that call for increased trade secret enforcement, if not an expansion of trade secret protection. There are also a number of proposals being considered by Congress to create federal causes of action for trade secret misappropriation. What all these efforts have in common is the rhetoric of property rights that surround them and the assumption that the assertion of property rights, coupled with expanded civil and criminal penalties and enforcement efforts, will lead to greater respect for trade secret rights. Despite its appeal among policymakers, particularly as a sound bite, the purpose of this article is to explore whether the rhetoric of property actually motivates compliance with trade secrets law.

Within intellectual property (IP) circles, there is persistent debate about the proper philosophical, theoretical, and economic underpinnings of the various forms of IP protection. Although the primary theories differ depending upon whether one is speaking of patent, copyright, trademark, or trade secret law, property theory is usually in the mix. This is particularly the case with respect to trade secret law where policymakers, courts, and litigants frequently emphasize the property nature of trade secrets as justifying their protection. Among law professors and other legal commentators, the battleground is between those who emphasize the property perspectives and those who see trade secret misappropriation as a form of unfair competition. Trade secret law as expressed in the Restatement (First) of Torts and the Restatement (Third) of Unfair Competition has not been immune from the property/not property debate. To the contrary, the Restatement (First) explicitly rejects the property theory in favor of the unfair competition view while the drafters of the Restatement (Third) essentially "punted" the issue by stating that they did not need to decide which view was better. In truth, trade secret law, as currently expressed in the Uniform Trade Secrets Act (UTSA), includes both perspectives; the property theory being found in the definition of a trade secret and the unfair competition perspective being found in the definition of misappropriation.

While the debate about whether trade secret law is properly grounded in property theory or principles of unfair competition law is interesting from an academic point of view, it does not address the very practical question of which approach better resonates with the individuals and companies that are expected to respect trade secret rights. Drawing upon literature from other fields, including psychology, sociology, rhetoric, and criminology, this article explores how compliance with trade secret laws (and intellectual property laws more broadly) might be enhanced by decreasing the emphasis on property rhetoric and focusing on other values. It is based in large part on the premise, as noted by Tom Tyler in his book, *Why People Obey the Law*, that “[i]f people view compliance with the law as appropriate because of their attitudes about how they should behave, they will voluntarily assume the obligations to follow the rules.” As Tyler further notes, although individuals and companies might be compelled to obey the law for fear of punishment, they are more apt to voluntarily follow the laws if they believe that they are legitimate. Since no country can afford to build and maintain a system of law enforcement that does not depend in large part upon voluntary compliance by the vast majority of its citizenry, it makes sense to spend at least as much time considering how to encourage voluntary compliance with the law as is currently spent talking about increased enforcement efforts.