

Balancing Legitimate Interests in the Trade Secret System

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Starting Principles

Trade secret protection has economic and social benefits, but . . .

Information and knowledge diffusion (and free competition) are the rule and intellectual property protection is the exception.

Because of the rule, all IP laws are limited in multiple ways.

Trade secret law is no exception; in fact, because there is no required disclosure (or quid pro quo) they are more limited.

Why is information and knowledge diffusion important?

Because invention and creativity are not possible without information and knowledge

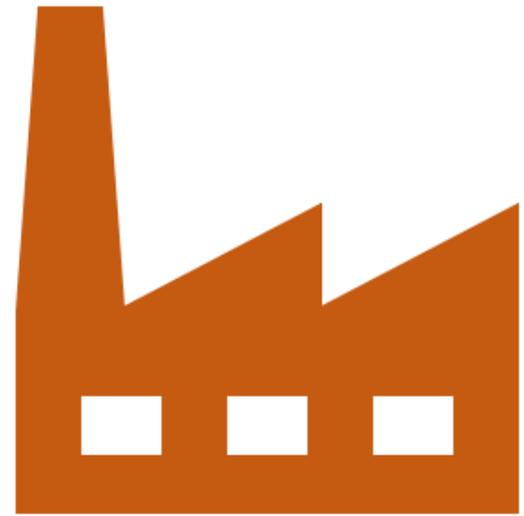
Information and knowledge promote other important social values, including personal growth and democracy
(See Art. 19 of the UDHR)

“Indeed, for our industrial competition to remain healthy there must be breathing room for observing a competing industrialist.”

From *DuPont v. Christopher*

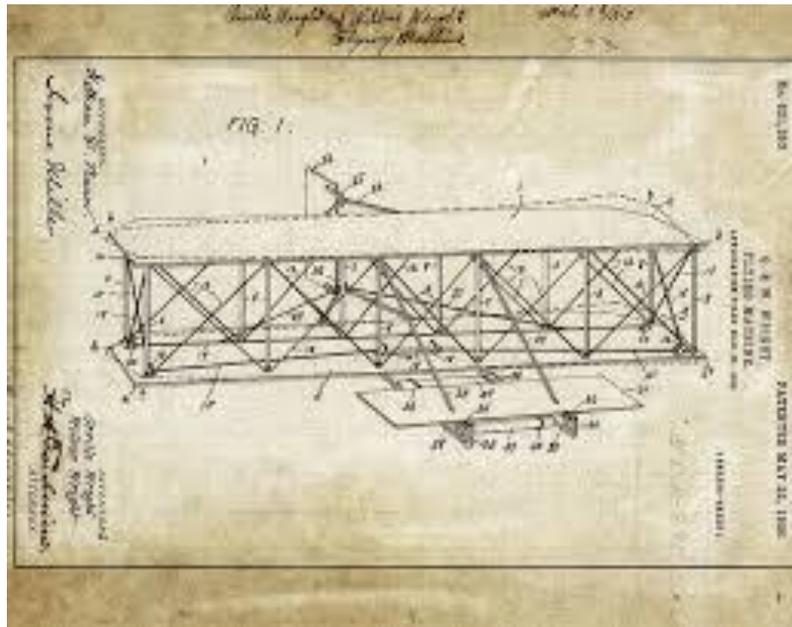
“[I]mitation and refinement through imitation are both necessary to invention itself, and the very lifeblood of a competitive economy.”

From *Bonito Boats v. Thunder Craft Boats*



Two examples: Both inventions relied heavily on pre-existing information and knowledge.

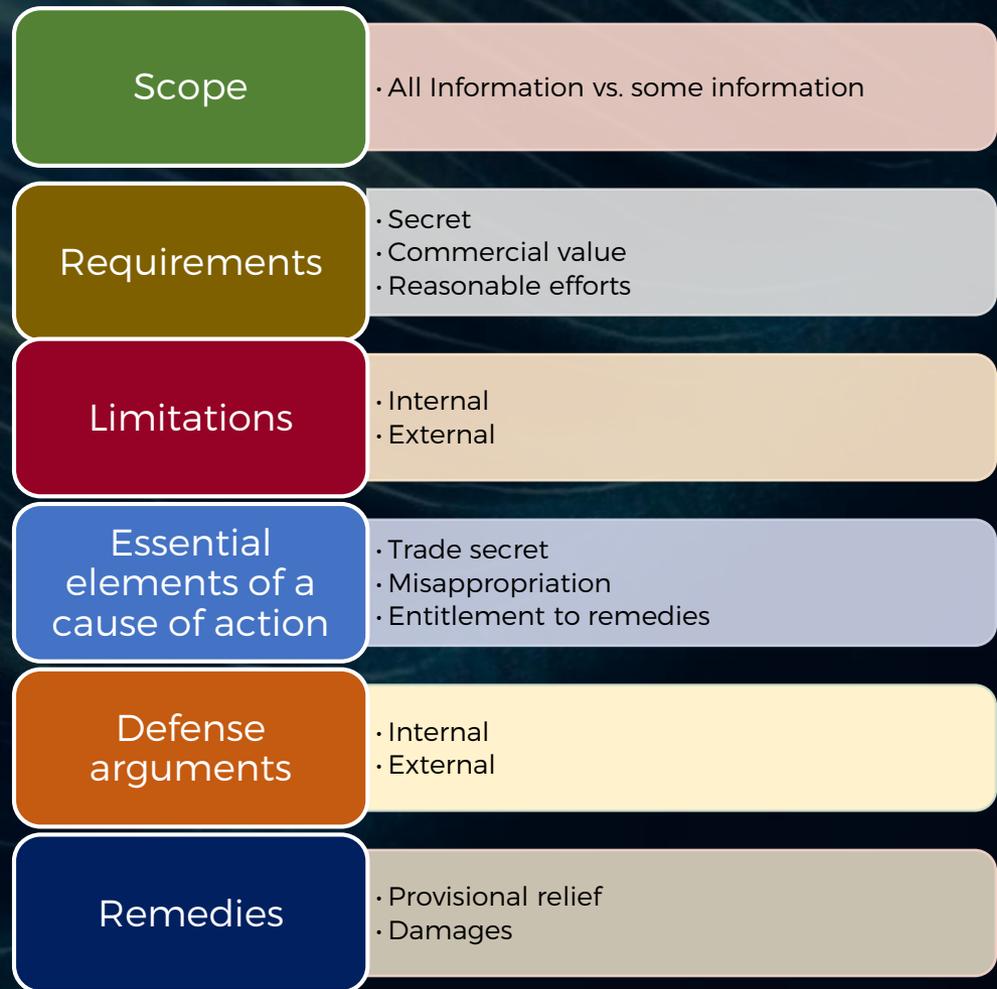
The Wright Brothers' Flying Machine



Autonomous Vehicles



How is trade secret law limited?



Internal limitations of U.S. trade secret law

The definition of a trade secret does not protect all secret or confidential information

- Generally known
- Readily ascertainable
- General skill and knowledge

The definition of misappropriation does not prohibit all acquisition, disclosure, or use

- Reverse engineering allowed
- Independent development allowed
- Self-learning allowed

Limits are placed on the scope of remedies, including the length of injunctive relief.

Trade secrets are fleeting and can be lost without misappropriation.

Defenses

- Whistleblowing
- Statute of limitation
- Preclusion

External limits of U.S. trade secret law

Free speech and
freedom of the
press

Government
regulation and
oversight

The public interest

- e.g...
- Public health
- Preemption

Procedural
requirements

- Pleading
- Equitable relief
- Territorial Reach

External counter-balances and related unresolved policy questions:

Information owners can:



Use contract law to protect confidential information not qualifying for trade secret protection.



Engage in self-help to protect both confidential and non-confidential information.



Rely on other laws like data exclusivity and database protections.

1. Should harmonization efforts address the proper scope of confidentiality agreements?
2. How do we incentivize the sharing of important information, particularly when it is not protected by trade secret law?
3. How do we address overlapping protections?