THE UNIFORM TRADE SECRETS ACT:  
THE STATES' RESPONSE

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INTRODUCTION

The development and utilization of new technology is a major component of business success. The ability to sustain investment in research and development in a competitive environment is dependent to a large extent upon a company's ability to protect its proprietary information. For many companies, trade secrets are the most valuable form of proprietary information. Trade secrets often provide the most comprehensive, easily obtained and long-lived protection for a company's innovative ideas, provided the requisite secrecy can be maintained. Arguably, preserving confidentiality is now more difficult due to recent developments in telecommunications and increased employee mobility, which facilitate the improper disclosure and misappropriation of trade secrets.

In the United States, trade secret law developed through court decisions, primarily at the state level. Drawing guidance from the

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1. Unlike patent protection, there is no requirement of disclosure. While the secrecy must be maintained, there is no government examination and no inquiry as to originality, lack of obviousness or novelty. A trade secret which remains secret can last in perpetuity, while a patent lasts seventeen years and a copyright lasts the life of the author plus fifty years.

2. Reasonable efforts must be made to maintain the secrecy of the information or it will lose secret status. Efforts which have been held to be reasonable include “advising employees of the existence of a trade secret, limiting access to a trade secret on a 'need to know' basis, and controlling plant access.” Alternately, “public disclosure of information through display trade journal publications, advertising, or other carelessness can preclude protection.” UNIFORM TRADE SECRETS ACT § 1 Commissioners' comment, 14 U.L.A. 439 (1985).

Restatement of Torts, each state constructed, on a case-by-case basis, its own body of trade secret law.4 Unlike the two other major methods of protecting proprietary information (patent and copyright law), trade secret law is not governed by a comprehensive federal statute. Congress could legislate under the Commerce Clause, but it has not yet chosen to do so, except in the limited area of governmental disclosures of trade secrets.5 However, there have been several efforts toward greater uniformity in the law of trade secrets, most notably the Restatement of Torts (1939)6 and the Uniform Trade Secrets Act ("UTSA").7 Still, at present, trade secret protection varies widely among the states.8

In recognition of the increasing importance of trade secret protection to setting standards of ethical behavior, and of the need to clarify and harmonize the law among the states,9 the Uniform Trade Secrets Act was drafted by the National Conference of Commissioners on Uniform State Laws. It was approved and recommended for enactment in all the states in 1979.10 The Uniform Act was amended in 1985. The Act, as amended, includes the following sections: § 1 Definitions; § 2 Injunctive Relief; § 3 Damages; § 4 Attorney’s Fees; § 5 Preservation of Secrecy; § 6 Statute of Limitations; § 7 Effect on Other Law; § 8 Uniformity of Application and Construction; § 9 Short Title; § 10 Severability; § 11 Time of Taking Effect; and § 12 Repeal.11 The 1985 act amended the following sections of the 1979 Act: § 2 Injunctive Relief; § 3 Damages; § 7 Effect on Other Law; and § 11 Time of Taking Effect.12

6. RESTATEMENT OF TORTS § 757 (1939). The Restatement articulated the common law principles of trade secret law, which were then adopted "in virtually every reported case." Klitzke, The Uniform Trade Secrets Act, 80 PAT. TRADEMARK REV. 157, 162 (1980). The Restatement (Second) of Torts (1974) omitted mention of trade secrets.
12. See Appendix. The following are the sections of the 1979 Act which were amended by the 1985 Act:
   § 2. (Injunctive Relief)
   (a) 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 rea-
This article analyzes the Uniform Trade Secrets Act, as adopted by the states, in the ten years since its initial endorsement. As of the time of this article, thirty-two states and the District of Columbia have enacted versions of the Uniform Trade Secrets Act or trade secret acts which draw on the UTSA. Alaska, Arkansas, Connecticut, Delaware, Kansas, Idaho, Indiana, Louisiana, Montana, and Washington generally follow the 1979 Act with modifications. Colorado, District of Columbia, Florida, Hawaii, Maine, Maryland, Minnesota, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon,
South Dakota, Utah, Virginia, West Virginia, and Wisconsin generally follow the 1985 Act with variations. The Rhode Island Trade Secret Act is identical to the 1985 Act. California and Illinois incorporate certain sections of both the 1979 Act and the 1985 Act. The Alabama and North Carolina statutes are major departures from the Uniform Act and were not actually intended to be an enactment of the Uniform Trade Secrets Act.\textsuperscript{14} Alabama law generally narrows the application of trade secret protection, while North Carolina law probably broadens it.\textsuperscript{15} At least three states have considered but rejected the Act.\textsuperscript{16} This analysis will trac the language of the 1985 Act, but where the 1979 Act differs from the 1985 Act, that difference will be indicated. Changes in section headings, section references, reference numbers, (made by the states to conform with their own statutory numbering system) and pronoun gender substitutions will not be mentioned.

HIGHLIGHTS OF TRADE SECRETS LAW

Under the common law of trade secrets, the owner of information that qualifies as a trade secret is entitled to relief for injury or potential injury where there is a misappropriation. Prior to the Uniform Act, the principles set forth in the Restatement of Torts were commonly used by the courts in resolving questions of liability. Under the Restatement, information is considered to be protected if it includes “any 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.”\textsuperscript{17} While independent discovery and reverse engineering are permissible means of learning a trade secret, the misappropriation of trade secrets triggers the owner’s rights regarding relief. Tortious conduct such as fraud or espionage, as well as breach of contract and abuse of confidentiality, can form the basis of a misappropriation claim.\textsuperscript{18}

\textsuperscript{14} Most commentators do not address these laws when considering state enactments of the Uniform Trade Secrets Act. However, they are incorporated here for completeness since the impetus for these laws was provided by the UTSA.
\textsuperscript{16} Texas, Ohio and New Hampshire. See Lydon, 69 J. PAT. & TRADEMARK OFF. SOC’Y at 441-42.
\textsuperscript{17} \textit{RESTATEMENT OF TORTS} § 757 comment b (1939).
COURTS HAVE LONG WRESTLED WITH THE QUESTION OF WHAT IS A TRADE SECRET. THE RESULTING CASE LAW OFTEN FAILS TO CLEARLY GUIDE COMPANIES AS TO WHAT INFORMATION MAY BE PROTECTED. ADDITIONALLY, CASE LAW HAS RESULTED IN DIVERGENT LINES OF AUTHORITY ON SEVERAL IMPORTANT POINTS.

THOUGH THE RESTATEMENT CONTRIBUTED CONSIDERABLY TOWARD THE DEVELOPMENT OF THE COMMON LAW, THIS APPROACH HAS MANY DISADVANTAGES. ONE MAJOR PROBLEM IS THE VARIATIONS IN THE LAW FROM STATE TO STATE AND THE LACK OF LAW IN MANY STATES. COURTS ARE NOT BOUND TO ADOPT THE RESTATEMENT VIEW AND, EVEN WHEN THEY DO, INTERPRETATIONS VARY. EVEN IN THOSE STATES WHICH HAD A RICH BODY OF CASE LAW, THE REACH OF TRADE SECRET PROTECTION AND THE AVAILABILITY OF REMEDIES WERE OFTEN IN DOUBT. ADDITIONALLY, THE RESTATEMENT IS NOT COMPREHENSIVE IN NATURE AND HAS NOT BEEN UPDATED. ALSO, PRIOR TO THE UNIFORM ACT, THE STATE STATUTES THAT EXISTED GENERALLY FOCUSED ON CRIMINAL LIABILITY FOR THEFT AND GOVERNMENTAL DISSEMINATION OF TRADE SECRETS.

THE UNIFORM ACT DOES NOT REPLACE EXISTING STATE STATUTES. RATHER, IT IS DESIGNED TO SUPPLEMENT STATE LAW, INCLUDING THOSE STATUTES RELATING TO PRELIMINARY INJUNCTIONS AND THE BURDEN OF PROOF. THE UTSA IS LIMITED TO CIVIL REMEDIES. WHILE IT DRAWS UPON MANY OF THE RESTATEMENT CONCEPTS, IT VENTURES FAR BEYOND THE GUIDANCE OF THE RESTATEMENT. IT ATTEMPTS TO CODIFY COMMON LAW PRINCIPLES AND RESOLVE INCONSISTENCIES IN JUDICIAL DECISIONS. THE ACT ELIMINATES MANY STATUTES OF LIMITATIONS AND DAMAGES QUESTIONS ARISING FROM APPLYING TORT OR CONTRACT LAW THEORIES, SUBSTITUTE AN UNIFIED CAUSE OF ACTION. THE 1985 AMENDMENTS PRIMARILY CLARIFY SEVERAL AMBIGUOUS SECTIONS AND STRENGTHEN THE OBTAINABLE REMEDIES.

19. CHAPMAN, 2 COMPUTER & HIGH-TECH. L.J. at 392.
20. KLITZKE, 80 PAT. & TRADEMARK REV. at 158-59 n.6, n.7 & n.10. See also Miller, Florida's Uniform Trade Secrets Act, 15 FLA. ST. U.L. REV. 863, 867 (1988).
21. KLITZKE, 80 PAT. & TRADEMARK REV. at 162.
23. KLITZKE, 80 PAT. & TRADEMARK REV. at 162.
28. CHAPMAN, 2 COMPUTER & HIGH-TECH. L.J. at 405.
29. LYDON, 69 J. PAT. & TRADEMARK OFF. SOCIETY at 439.
DEFINITIONS

The definitional section of the UTSA does a great deal more than provide definitions. It is substantive in nature and actually sets forth the elements of what constitutes a violation of the statute through its definitions of improper means, misappropriation, person and trade secret. As a result of its dual nature, the section is rather complex in construction.

CONTEXT

The Act indicates that the definitions are not absolute, but are to be applied when appropriate. The language gives the court discretion in the application of the statute. The introduction to "§ 1 Definitions" states that "[a]s used in this [Act], unless the context requires otherwise" the definitions will have the meanings listed within that section.30

Several states have made changes which affect the level of discretion exercised by a court. Alabama and Delaware have stricter section one requirements. The Alabama Act mandates that "unless the context clearly indicates otherwise" the definitions have the following meanings. While the Delaware Act states that "except where the context clearly indicates a different meaning . . . ."31 The District of Columbia, Maryland, New Mexico and Wisconsin omit the language about words whose context indicate a different meaning.32 In those states, judges may have less discretion in the application of the statute, though an argument could be made that the language is superfluous as it only reflects the standard discretionary power of the judiciary. Maine, Minnesota, Virginia and Washington have made minor grammatical changes in the language of the introduction that do not appear to change its meaning.33

IMPROPER MEANS

To qualify for relief, the trade secret must have been misappropriated by "improper means," thereby violating standards of business

30. UNIF. TRADE SECRETS ACT § 1.
ethics. That definition is pivotal because the central policy behind trade secrecy is to deter “breach of faith and reprehensible means of learning another’s secret.” The UTSA states that “[i]mproper means’ includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means.” “Improper means” includes conduct that is situationally improper, as well as the unauthorized disclosures of lawfully acquired secrets. The language represents a broadening of the common law concept of breach of confidence. However, to the extent that the Restatement definition of “improper means” became the common law of a state, the adoption of the UTSA may not result in a change in state law. The catalog of acts that constitute “improper means” is not meant to constitute a complete roster of the possibilities for unethical behavior and can include improper conduct that may not be criminal or otherwise tortious. The term “other means” is intended to expand the adaptability of the statute to inventive misappropriation.

In addition to defining “improper means,” the UTSA also defines the term “proper means.” The comment to the UTSA defines “proper means” to include discovery by independent invention, reverse engineering, licensing, and observation of the trade secret via public use or display and by publication.

The Alabama act departs from the definition of improper means. The Alabama definition includes “inducement of a breach of confidence” in its definition of improper means, but excludes specific mention of “breach” of confidence. However, because the Ala-

34. UNIF. TRADE SECRETS ACT § 1 Commissioners’ comment.
35. UNIF. TRADE SECRETS ACT Commissioners’ prefatory note. The Court in Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 481 (1974) recognized that “the maintenance of standards of commercial ethics” is a leading policy underlying trade secret law. See also RESTATEMENT OF TORTS § 757 comment b (1939).
36. UNIF. TRADE SECRETS ACT § 1.
37. UNIF. TRADE SECRETS ACT § 1 Commissioners’ comment (citing E.I. du Pont de Nemours & Co. v. Christopher, 431 F.2d 1012 (5th Cir.), cert. den. 400 U.S. 1024 (1970)) (holding use of aerial reconnaissance to discover a trade secret was improper).
38. UNIF. TRADE SECRETS ACT § 1.
40. Root & Blynn, 18 WAKE FOREST L. REV. at 832 (arguing that the definition is the same in the Restatement and the UTSA). See RESTATEMENT OF TORTS § 757(a) (1939).
41. UNIF. TRADE SECRETS ACT § 1, Commissioners’ comment (1985). See also Root & Blynn, 18 WAKE FOREST L. REV. at 833.
42. Klitzke, 80 PAT. & TRADEMARK REV. at 202.
43. Chapman, 2 COMPUTER & HIGH-TECH. L.J. at 404.
44. UNIF. TRADE SECRETS ACT § 1.
45. Id. Commissioners’ comment.
47. Id.
bama definition of improper means uses the words "such as," the list that follows is apparently nonexclusive. Therefore, a breach of confidence would probably fall within the Alabama statutory definition. Additionally, the Alabama act does not specifically include the phrase "espionage through electronic or other means" in its definition of improper means. Instead, Alabama outlaws "[o]ther deliberate acts taken for the specific purpose of gaining access to the information of another by means such as electronic, photographic, telescopic or other aids to enhance normal human perception, where the trade secret owner reasonably should be able to expect privacy." That would restrict the application of the Alabama statute in some situations which would be "improper means" under the UTSA. The Alabama statute also expands the offenses that are within the definition by specifically listing trespass as within the definition of improper means.

Other states make more limited changes to this section. For example, instead of stating that there must be a "breach or inducement of a breach of a duty to maintain secrecy," the Illinois statute expands the definition by stating that there must be a "breach or inducement of a breach of a confidential relationship or other duty to maintain secrecy." One state, Nebraska, substitutes "shall mean" for "includes," thereby mandating the list of impermissible acts as an inclusive list. The wording of the Nebraska statute apparently would not allow for any improper means beyond those set forth in the Uniform Act. The acts of four states, California, Illinois, North Carolina, and Oregon, specifically provide that "reverse engineering," "independent development" and "independent derivation" are not to be considered improper means. Those additions clarify the principle that when a secret can be obtained by buying a competitor's

48. Id.
49. See supra note 46-48 and accompanying text.
51. Id.
52. The Alabama comment refers to espionage as an "undefined and ambiguous term" and justifies its addition as providing "some contours to the nature of the activity that constitutes improper means." Id.
53. Id.
product or service and analyzing it, then the secret can be legally used.

Though the UTSA does not specifically address this issue, the Commissioner's comments, as stated above, though not statutory, include "independent invention"\(^{59}\) and "reverse engineering as proper means of discovery."\(^{60}\) As a result, the additions in those four states are consistent with the UTSA approach. Wisconsin reorders the wording without altering the meaning.\(^{61}\)

North Carolina has no definition of "improper means." This is because, in a major departure from the UTSA, the North Carolina statute does not use this term to explain misappropriation.\(^{62}\) Instead, the North Carolina statute includes "consent and authority from the trade secret owner, terms that are subject to objective determination."\(^{63}\) Interestingly, the absence of the bad faith requirement may put the North Carolina Act in conflict with federal patent law.\(^{64}\)

**MISAPPROPRIATION**

Pursuant to the UTSA, misappropriation must occur before relief will be granted. Misappropriation may occur through a voluntary disclosure under confidential circumstances, as well as by acquisition of a trade secret through improper means. Liability for misappropriation can extend to those who knew or should have known of the misappropriation, including third parties, and even to some acquisitions by accident and mistake.\(^{65}\) The accident or mistake must not have been due to a failure of the trade secret owner to undertake reasonable efforts to maintain secrecy.\(^{66}\) The UTSA defines misappropriation as:

(i) acquisition of a trade secret of another by a person who

\(^{59}\) Unif. Trade Secrets Act § 1 Commissioners' comment.

\(^{60}\) Id. Reverse engineering is defined as "starting with the known product and working backward to find the method by which it was developed. The acquisition of the known product must, of course also be by a fair and honest means, such as purchase of the item on the open market for reverse engineering to be lawful." Id.


\(^{62}\) See infra notes 72-79 and accompanying text.

\(^{63}\) Root & Blynn, 18 Wake Forest L. Rev. at 834.

\(^{64}\) Id. at 844. This may occur because the North Carolina law "is so different from the state law considered in Kewanee, that the North Carolina Act is not automatically protected under the Kewanee analysis." Id. at 852.

\(^{65}\) Unif. Trade Secrets Act § 1(2)(ii)(C). See also Klitzke, 80 Pat. & Trademark Rev. at 206 (stating that the Restatement did not require a change of position).


knows or has reason to know that the trade secret was acquired by improper means; or

(ii) 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 [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.67

The Alabama, North Carolina and Wisconsin statutes make almost complete changes in the wording of the section. Rather than including misappropriation within the definition section, Alabama has a separate provision for misappropriation.68 The intention of this section, according to the Alabama comment, is to codify “the common law means of misappropriation embodied in the Restatement” and to recognize “the common law of privilege.”69 However, in a departure from the Restatement (and also from the Uniform Act), the Alabama statute provides no recourse against an innocent recipient of the secret. The Alabama statute limits actions for misappropriation to those who personally “discover . . . by improper means,” or “breach . . . confidence,” or other parties who “knew or should have known” that a disclosure was of a trade secret and was either discovered by improper means or a breach of confidence or that the “disclosure was

67. UNIF. TRADE SECRETS ACT § 1.
68. ALA. CODE § 8-27-3 (Supp. 1989). Section 8-27-3 states that
[a] person who discloses or uses the trade secret of another, without a privilege to do so, is liable to the other for misappropriation of the trade secret if
(1) That person discovered the trade secret by improper means; (2) That person’s disclosure or use constitutes a breach of confidence reposed in that person by the other; (3) That person learned the trade secret from a third person, and knew or should have known that (i) the information was a trade secret and (ii) that the trade secret had been appropriated under circumstances which violate the provisions of (1) or (2) above; or (4) That person learned the information and knew or should have known that it was a trade secret and that its disclosure was made to that person by mistake.

Id.
69. ALA. CODE § 8-27-3 Commissioners’ comment (Supp. 1989).
made . . . by mistake.” The Uniform Act addresses the question of liability for mistaken disclosure by limiting misappropriation to situations where recipients knew or should have known before a material change of position. Though not specified in the Alabama act, innocent acquisition of a trade secret, according to the comment, cannot constitute misappropriation against the acquirer, even after subsequent notice otherwise. However, liability can be imposed on the person who wrongfully or mistakenly made the disclosure. This makes the Alabama statute narrower in application than the Uniform Act. In one further difference, which may also narrow its application, the Alabama statute mentions only “mistake,” while the Uniform Act refers to “accident or mistake.”

The North Carolina act overhauls the definitional section on misappropriation by simplifying the definition, but simultaneously, adds two other sections which pertain to misappropriation. This change was made because the Patent, Trademark, and Copyright Committee of the North Carolina Bar Association, which drafted the state law, believed that the structure of the definitional section of the UTSA was too “lengthy and complex” for a jury trial. The North Carolina statute defines misappropriation as “acquisition, disclosure, or use of a trade secret of another without express or implied authority or consent, unless such trade secret was arrived at by independent development, reverse engineering, or was obtained from another person with a right to disclose the trade secret.” The North Carolina act also contains a separate provision entitled “Action for Misappropriation,” which provides that “[t]he owner of a trade secret shall have remedy by civil action for misappropriation of his trade secret.” The North Carolina act contains a separate burden of proof provision, which provides that, in order to prove a prima facie case, the plaintiff must establish that the defendant “(1) [k]nows or should have known of the trade secret; and (2) [h]as had a specific opportunity to acquire it for disclosure or use or has acquired, disclosed, or used it without the express or implied consent or authority of the owner.” Additionally, the section states that:

This prima facie evidence is rebutted by the introduction of substantial evidence that the person against whom relief is
sought acquired the information comprising the trade secret by independent development, reverse engineering, or it was obtained from another person with a right to disclose the trade secret. This section shall not be construed to deprive the person against whom relief is sought of any other defenses provided under the law.\textsuperscript{79}

This is an attempt to simplify the misappropriation section by setting out the elements of, and defenses to, a prima facie case for easier use by the practitioner.\textsuperscript{80} At the same time, the North Carolina law may apply more broadly than the Uniform Act. This is because under the North Carolina act there is no requirement of improper means.\textsuperscript{81}

Like the Alabama act, the Wisconsin act provides for a separate section for misappropriation.\textsuperscript{82} The Wisconsin statute states that:

No person, including the state, may misappropriate or threaten to misappropriate a trade secret by doing any of the following:

(a) Acquiring the trade secret of another by means which the person knows or has reason to know constitute improper means.

(b) Disclosing or using without express or implied consent a trade secret of another if the person did any of the following:

1. Used improper means to acquire knowledge of the trade secret.

2. At the time of disclosure or use, knew or had reason to know that he or she obtained knowledge of the trade secret through any of the following means:

a. Deriving it from or through a person who utilized improper means to acquire it.

b. Acquiring it under circumstances giving rise to a duty to maintain its secrecy or limit its use.

c. Deriving it from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use.

d. Acquiring it by accident or mistake.\textsuperscript{83}

The statute specifically mentions "the state" as well as a "person," even though "the state" falls within the definition of person,\textsuperscript{84} to meet a judicially-decreed requirement in Wisconsin that a regulatory statute expressly indicate when it applies to the state.\textsuperscript{85} Wisconsin

\textsuperscript{79} Id.

\textsuperscript{80} Root & Blynn, 18 WAKE FOREST L. REV. at 834.

\textsuperscript{81} Id.

\textsuperscript{82} WIS. STAT. ANN. § 134.90 (West 1989).

\textsuperscript{83} Id.

\textsuperscript{84} See supra note 81 and accompanying text.

\textsuperscript{85} WIS. STAT. ANN. § 134.90 Commissioners' comment (West 1989). See State ex
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The law differs from the Uniform Act, which addresses the question of liability for mistaken disclosure, by limiting misappropriation to situations where recipients knew or should have known before they materially changed position.\textsuperscript{86} Instead, the Wisconsin statute is much more inclusive, as it regards misappropriation as trade secrets acquired "by accident or mistake."\textsuperscript{87} It makes no reference to any requirement of knowledge, thereby including innocent reliance as a grounds for misappropriation. Interestingly, the Wisconsin statutory comment makes no mention of this change.

Several states make minor changes to the section. New Mexico changes part of the definition of misappropriation from "disclosure or use" to "disclosure of use."\textsuperscript{88} If not a drafting error, this would appear to limit the scope of misappropriation. Connecticut, Delaware, District of Columbia, Maryland, Minnesota and Nebraska also made insignificant drafting changes.\textsuperscript{89}

PERSON

The UTSA states that "'Person' means a natural person, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or any other

\textsuperscript{rel. Dep't of Pub. Instruction v. Department of Indus., Labor & Human Relations, 68 Wis. 2d 677, 229 N.W.2d 591 (1975).\textsuperscript{86}} Compare Wis. Stat. Ann. § 134.90(2) (West 1989) with Unif. Trade Secrets Act § 1(2).}

\textsuperscript{87} Wis. Stat. Ann. § 134.90(2) (West 1989).


\textsuperscript{89} Without any significant impact on the meaning, the Alaska statute changed section (B)(II) from "acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use" to "who owed a duty to the person seeking relief to maintain its secrecy or limit its use." Alaska Stat. § 45.50.940 (1987). The Connecticut provision clarifies the phrase "acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use" by stating that it includes, but is not limited to, disclosures made under certain sections of its statutes (section 1-19, sections 31-40j to 31-40p, inclusive, or subsection (b) of section 12-62). Conn. Gen. Stat. Ann. § 35-51 (West 1987). The Delaware and Nebraska legislatures both modified "'[m]isappropriation' means:" to "'[m]isappropriation' shall mean," without any apparent effect. Del. Code Ann. tit. 6, § 2001 (Supp. 1988) and Neb. Rev. Stat. § 87-502 (1988). In clarification, the District of Columbia and Nebraska provisions changed the first reference to "it" in Section 2(ii)(C) to "the information" and the District of Columbia changes the following "it" to "the trade secret." D.C. Code Ann. § 48-501 (Supp. 1989) and Neb. Rev. Stat. § 87-502 (1988). The Maryland legislature made an insignificant grammatical change. Maryland insets "the" before "person's position." Md. Com. Law Code Ann. § 11-1201(C)(2)(iii) (1990). The Minnesota provision clarifies the section "at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret" to "at the time of disclosure or use, knew or had reason to know that the discloser's or user's knowledge of the trade secret." Minn. Stat. Ann. § 325C.01 (West Supp. 1990). In the same way, the Minnesota legislature changed "before a material change of his [or her] position. . . ." to "before a material change of the discloser's or user's position. . . ." Id.
legal or commercial entity.” Wisconsin omits any definition of person from its statute, because another state law defines “persons.” According to the comment, the Wisconsin definition of person is equivalent to that in the UTSA. The Maryland and North Carolina statutes broaden what is encompassed by the term “person” by changing “natural person” to “individual.” The District of Columbia statute omits “business trust” from the definition. Several other states make small language changes which do not affect the meaning.

TRADE SECRET

Trade secret is defined by the UTSA as:

- information, including a formula, pattern, compilation, program, device, methods, 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.

This definition considerably expands the definition provided in the Restatement of Torts. The UTSA definition focuses on the word “information,” rather than the ways that the information may be utilized. Additionally, by using the word “including,” the UTSA definition indicates that the examples are not exclusive. The UTSA list adds the terms “program,” “method,” and “technique” to those specified in the Restatement definition.

While the Restatement requires continuous use in business, the

90. UNIF. TRADE SECRETS ACT § 1.
91. WIS. STAT. ANN. § 990.01(26) (West 1985). See also WIS. STAT. ANN. § 134.90 (West 1989).
92. WIS. STAT. ANN. § 134.90 (West 1989).
96. UNIF. TRADE SECRETS ACT § 1.
97. Id. See RESTATEMENT OF TORTS § 757, comment b (1939). The Restatement utilized an analytical framework for deciding whether information is a trade secret, but did not specifically define a trade secret to be information. See also Klitzke, 80 PAT. & TRADEMARK REV. at 165.
98. UNIF. TRADE SECRETS ACT § 1.
UTSA definition does not specifically require that the secret be business related, or that it be continuously used. The UTSA definition would potentially include trade secrets obtained but not yet in use, or not in use because they provided negative information, as well as single event information. Instead, in a conceptually simpler manner, the UTSA definition focuses on actual or potential economic value. In addition, the comment to the UTSA specifies that more than one independent developer can have the same trade secret and that “know-how” is included within the definition of “method” and “technique.” That settles the confusion pertaining to the line of demarcation between a trade secret and “know-how.” Including “know-how” has the effect of considerably expanding the scope of what is statutorily protectable by the employer in an employment relationship. The word “program” refers to the inclusion of computer programs. Additionally, the UTSA addresses the question of the trade secret owner’s efforts regarding secrecy and specifies that they be “reasonable under the circumstances.”

The Idaho and Montana statutes further expand the protection of the Act by specifically adding computer software within the definition of trade secrets. The Montana statute adds “computer software” and the Idaho statute adds “computer program” to the definition of trade secrets. To clarify what is encompassed within the phrase “computer program,” Idaho states that:

'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

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99. See infra notes 66-71 and accompanying text.
100. UNIF. TRADE SECRETS ACT § 1 Commissioners’ comment.
101. Trade secrets not in use include “information that has commercial value from a negative viewpoint, for example the results of lengthy and expensive research which proves that a certain process will not work could be of great value to a competitor.” Id.
102. Miller, 16 FLA. ST. U.L. REV. at 873.
104. Klitzke, 80 PAT. & TRADEMARK REV. at 167. At least one commentator is of the opinion that the word “economic value” is broader than “commercial value” which appeared in the original draft of the UTSA. Id.
105. Id.
107. UNIF. TRADE SECRETS ACT § 1. See also RESTATEMENT OF TORTS § 757 comment b (1939). This requirement can be traced to the Restatement’s analytical framework which considers as factors “the extent to which it is known by employees and others involved in his business” and “the extent of measures taken by him to guard the secrecy of the information.”
proprietary or confidential marking, either within or on the media containing the information.\[110\]

By this provision, the Idaho legislature apparently equated copyright notice or other proprietary marking with a confidential marking, though neither would be required of other trade secrets.

The Illinois, Maine and Nebraska statutes augment the UTSA provision by stating that trade secrets include “but are not limited to” the definition as stated.\[111\] Illinois also added “technical or non-technical data,” “drawing,” and “financial data, or list of actual or potential customers or suppliers” to the statutory definition.\[112\] The Nebraska statute adds “drawing” and “code” to the definition.\[113\]

This reference to code appears to be an attempt by Nebraska to add something akin to computer program or software. The Connecticut and Oregon legislatures both added the words “drawing,” “cost data” and “customer list” to the statutory definition.\[114\] The Alaska definition of trade secret omits mention of formula, pattern, compilation, program, device, method, technique or process.\[115\]

Pursuant to UTSA, the requirement that the information not be “generally known to” nor “readily ascertainable” addresses the level of secrecy necessary in order to qualify as a trade secret. Information which is known to persons who can benefit economically would not qualify as a trade secret.\[116\] However, it is possible that knowledge gained through “lengthy and expensive” reverse engineering is a trade secret.\[117\] Published information is “readily ascertainable” and therefore is not a trade secret.\[118\] The UTSA concept is one of relative, rather than absolute, secrecy.\[119\]

The Nebraska statute narrows the situations whereby information would be defined as a trade secret by changing “generally known to” to “known to” and “readily ascertainable by” to “ascertainable by.”\[120\] The omissions of “generally” and “readily” in the Nebraska statute result in a stricter standard for trade secrets. The Oregon statute also changed clause (i) of the trade secret definition to substitute “not being generally known to the public” for the UTSA lan-

\[116\] Unif. Trade Secrets Act § 1 Commissioners’ comment.
\[117\] Id.
\[118\] Id.
\[119\] Id.
guage, stating that a trade secret is "not being generally known to, and not being readily ascertainable by proper means ...". Whether this change will impact the application of the law depends on whether "not known to the public" equates with "not being readily ascertainable by proper means." In clause (i) the Illinois statute also deleted "and not being readily ascertainable by proper means" and changed the definition of trade secret to "is sufficiently secret to derive economic value, actual or potential, from not being generally known to other persons who can obtain economic value from its disclosure or use." In so doing, the Illinois legislature substituted "is sufficiently secret to derive economic value" for "derives independent economic value." The California statute dropped "not being readily ascertainable by proper means" from the definition, thereby eliminating the defense that even though improper means or a breach of confidence took place, the misappropriator could have learned the information through "diligent research."

The UTSA requires reasonable efforts to maintain secrecy. This includes security measures, as well as disclosure only to those employees and other persons with a need to know. These measures need not be severe or inordinately costly. In clause (ii) of the trade secret definition, the Illinois statute broadens that provision by adding confidentiality as an alternative to secrecy.

Three states, Alabama, Colorado and North Carolina, made substantial changes to the definition. Alabama's approach is more restrictive than the UTSA approach. The Alabama statute defines a trade secret as:

- information that: (a) Is used or intended for use in a trade or business; (b) Is included or embodied in a formula, pattern, compilation, computer software, drawing, device, method, technique, or process; (c) Is not publicly known and is not generally known in the trade or business of the person asserting that it is a trade secret; (d) Cannot be readily ascertained or derived from publicly available information; (e) Is

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121. OR. REV. STAT. § 646.461 (1989).
123. Id.
124. The California provision reads, "(1) Derives independent economic value, actual or potential, from not being generally known to the public or to other person who can obtain economic value from its disclosure or use." CAL. CIV. CODE ANN. § 3426.1(d)(1) (West Supp. 1990). See also Chapman, California Uniform Trade Secrets Act: A Comparative Analysis of the Act and the Common-Law, 2 COMPUTER & HIGH-TECH. L.J. 389, 403 (1986).
125. UNIF. TRADE SECRETS ACT § 1(4)(i).
126. Id. Commissioner's comment.
127. Id.
the subject of efforts that are reasonable under the circum-
stances to maintain its secrecy; and (f) Has significant eco-
nomic value.129

The Alabama definition does not include “program” but includes
“computer software” and “drawing.”130 The Alabama “embodiment
limitation” results in a more restrictive definition of trade secret
than provided by the UTSA or the Restatement.131 The Alabama
statute specifies that there must be at least an intention to use the
secret in a trade or business. According to the Alabama commentary,
the definition “retains the Restatement view that a trade secret, first,
must relate to a trade or business, and, second, must be secret.”132
The comment explains that “trade” and “business” may include non-
profit making activities with business-like characteristics.133 This
provision is meant as a departure from the Uniform Act, which does
not specifically require that the trade secret be trade or business-re-
lated and only requires secrecy by the implication of requiring rea-
sonable efforts to maintain secrecy.134 In another variation from the
UTSA, the Alabama statute requires that the information “c. is not
publicly known and is not generally known in the trade or business
of the person asserting that it is a trade secret; d. cannot be readily
ascertained or derived from publicly available information;”135 thereby
providing a tougher standard. Therefore, to qualify as a trade
secret in Alabama, the information must not be publicly known or
generally known in the specific field or available without diligent re-
search.136 In another departure from the Uniform Act, the Alabama
statute requires that the trade secret have “significant economic
value;”137 the UTSA requires only “independent economic value, ac-
tual or potential.”138

The Colorado legislature also restructured the definition, by
omitting several items specified to qualify as a trade secret under the
UTSA. At the same time, the Colorado statute potentially expands
the definition of trade secret by adding “the whole or any portion or
phase of any scientific or technical information, design, procedure,
 improvement, confidential business or financial information, listing
of names, addresses, or telephone numbers, or other information re-

130. Id.
133. Id.
134. Id.
136. Long, 18 CUMB. L. REV. at 563-64.
138. UNIF. TRADE SECRETS ACT § 1(4)(l).
lating to any business or profession which is secret and of value.” Under Colorado law, “[t]o be a ‘trade secret’ the owner thereof must have taken measures to prevent the secret from becoming available to persons other than those selected by the owner to have access thereto for limited purposes.” 139 This is more ambiguous than the UTSA, which goes into detail regarding the information’s “independent economic value.” It is unclear whether the Colorado statute includes information not yet put to use, which is covered by the UTSA. Colorado law is silent as to the characteristics necessary for information to be a trade secret other than stating that it must be “secret and of value.”

The North Carolina trade secrets statutes provide that:

‘[t]rade secret’ means business or technical information, including but not limited to a formula, pattern, program, device, compilation of information, methods, technique, or process that: (a) Derives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering by persons who can obtain economic value from its disclosure or use. 140

The final section of that definition is the same as section (4) of the UTSA. 141 However, at least one commentator cautions that the absence of the concept of improper means in the North Carolina statute “opens the door to a quasi-patent analysis” of what is meant by generally known or “readily ascertainable.” 142 The North Carolina statutory enumeration of what constitutes a trade secret is nearly the same as the UTSA. However, the North Carolina statute modifies the word “information” with “business or technical,” as well as modifying the word “compilation” by adding “of information.” Yet, an interpretation of the Uniform Act may result in the same limitation. 143

Two states go beyond the UTSA’s definition of trade secrecy. The Minnesota statute adds the following provision to an otherwise unchanged UTSA definition:

[the existence of a trade secret is not negated merely because an employee or other person has acquired the trade secret without express or specific notice that it is a trade secret if, under all the circumstances, the employee or other person

139. COLO. REV. STAT. § 7-74-102(4) (1986).
141. Id.
143. Id. at 837. See also 12A R. MILGRIM, TRADE SECRETS, BUSINESS ORGANIZATION § 1, at A-6 n.7 (1981).
knows or has reason to know that the owner intends or expects the secrecy of the type of information comprising the trade secret to be maintained.\textsuperscript{144}

The Minnesota legislature amended its statute in 1985\textsuperscript{145} to add this provision. The amendment was an apparent response to a 1983 court decision which held that the employee's duty not to disclose the trade secret would not arise unless the employer had treated the information as confidential and used reasonable efforts to maintain secrecy.\textsuperscript{146} In addition to the changes noted above, the North Carolina statute also adds the following section, "the existence of a trade secret shall not be negated merely because the information comprising the trade secret has also been developed, used, or owned independently by more than one person, or licensed to other persons."\textsuperscript{147} This clarifies the concept that a trade secret can be known by more than one party, disclosed to those who have a need to know and still be considered to be secret.\textsuperscript{148} Similarly, addressing the concern that disclosure to those who have a need to know not jeopardize information's status as a trade secret, the Wisconsin statute states that "'[r]eadily ascertainable' information does not include information accessible through a license agreement or by an employee under a confidentiality agreement with his or her employer."\textsuperscript{149} The Connecticut, Delaware, District of Columbia, Nebraska and Wisconsin statutes also made minor language changes to the definition, none of which change the meaning of the statute.\textsuperscript{150}

\textsuperscript{144} MINN. STAT. ANN. § 325C.01 (West 1990).
\textsuperscript{145} Id. Amended by 1985 Minn. Laws 196, § 1 (effective May 24, 1985).
\textsuperscript{146} Electro-Craft Corp. v. Controlled Motion, Inc., 332 N.W.2d 890 (Minn. 1983).
\textsuperscript{147} N.C. GEN. STAT. § 66-152 (1985).
\textsuperscript{148} Secrecy is a relative concept permitting "controlled disclosure to employees and licensees." UNIF. TRADE SECRETS ACT § 1 Commissioners' comment.
\textsuperscript{149} WIS. STAT. ANN. § 134.90(1)(b) (West 1989). This section was intended to clarify that information obtained under employee confidentiality and licensing agreements is not readily ascertainable. Whitesel & Sklansky, Revisions to the Law of Trade Secrets, 59 Wisc. Bar. Bul. 15, 16 (Aug. 1986).
\textsuperscript{150} The Wisconsin legislature made several other minor changes to the definition, none which seem intended to change the meaning of the statute. Instead of using the word "that" to introduce the subsections, the statute provides: "to which all of the following apply." WIS. STAT. ANN. § 134.90(1)(C) (West 1989). Also, the words "[t]he information" precede sections (1) and (2). Id. The District of Columbia provision has several minor changes to this section. The District of Columbia provision substitutes "another" for "other persons" deletes "under the circumstances" and reorders the wording, but without substantive effect. D.C. CODE ANN. § 48-501 (Supp. 1989). The Connecticut legislature preceded its definition with the phrase "notwithstanding the provisions of" certain sections of its code (1-19, 31-40) to 31-40p and subsection (b) of 12-62). CONN. GEN. STAT. ANN. § 35-51(d) (West 1987). The Delaware and Nebraska legislatures changed "'[t]rade secret' means" to "'[t]rade secret' shall mean," without any apparent effect. DEL. CODE ANN. tit. 6, § 2001(4) (Supp. 1988); NEB. REV. STAT. § 87-502(4) (Supp. 1988).
INJUNCTIVE RELIEF

The section providing injunctive relief affords the most sought after remedy for actual or threatened trade secret misappropriation. Money damages are difficult to prove and are often inadequate to remedy the harm.\textsuperscript{151} The statute provides standards for the length of injunctions, the alternative of royalty payments, and affirmative acts. Perpetual injunctions are not provided for by the UTSA.\textsuperscript{152} The statute departs somewhat from the remedies recommended in the Restatement, though those remedies are available under the UTSA.\textsuperscript{153}

The injunctive relief provision in the UTSA, section (a), provides:

\begin{quote}
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.\textsuperscript{154}
\end{quote}

Injunctive relief is granted only where appropriate.\textsuperscript{155} An important aspect of this section is that injunctive relief is available even before the trade secret is used or disclosed. Significantly, the duration of relief is limited to the length of time that the misappropriator’s competitive advantage exists. The duration can be no longer than the time necessary for lawful discovery, taking into consideration any necessary “lead time.”\textsuperscript{156} Under this section, the court would enjoin use and disclosure only until the misappropriator could provide evidence that the trade secret is no longer secret.\textsuperscript{157} The section also provides for a reasonable royalty, similar to a compulsory license, in circumstances where an injunction would be unreasonable due to an overriding public interest.\textsuperscript{158} In particular, the misappropriator can be compelled, by court order, to affirmatively act if it is necessary to protect a trade secret.\textsuperscript{159} According to the UTSA comment, where

\begin{enumerate}
\item UNIF. TRADE SECRETS ACT § 2(a), 14 U.L.A. 449 (1985).
\item Id. Commissioners’ comment.
\item Id.
\item Lydon, 69 J. PAT. & TRADEMARK OFF. SOC’Y at 432.
\item UNIF. TRADE SECRETS ACT § 2 Commissioners’ comment. See also Lydon, 69 J. PAT. & TRADEMARK at 433. For a discussion of the concept of “reasonable royalty,” see Borgman, The Adoption of the Uniform Trade Secrets Act: How Uniform Is Uniform?, 27 IDEA 73, 86-94 (1986).
\item UNIF. TRADE SECRETS ACT § 2(C). See Chapman, California Uniform Trade
the trade secret is known by more than one party, only the actual victim of the misappropriation may seek relief.\textsuperscript{160}

Several state statutes made limited changes to this provision, when the states adopted the trade secret act. The Oregon statute clarifies the meaning of the first sentence of the UTSA by stating that "[a]ctual or threatened misappropriation may be temporarily, preliminarily or permanently enjoined."\textsuperscript{161} The UTSA scheme leaves out these references to temporary and preliminary injunctions, because that would presumably be covered in separate state statutes.\textsuperscript{162} The Illinois legislature made extensive changes to the second sentence of UTSA section (2) by stating that:

Upon application to the court, an injunction may be terminated when the trade secret has ceased to exist, provided that the injunction may be continued for an additional reasonable period of time in appropriate circumstances for reasons including, but not limited to, an elimination of the commercial advantage that otherwise would be derived from the misappropriation, deterrence of willful and malicious misappropriation, or where the trade secret ceases to exist due to the fault of the enjoined party or others by improper means.\textsuperscript{163}

The effect of the Illinois change boosts the discretion of the judge in terminating an injunction (by changing "shall" to "may") and to increase the number of situations whereby an injunction could be continued (by providing additional examples in the statute).

The Connecticut legislature clarified the meaning of the word "court" by changing the UTSA language of "[u]pon application to the court," to "[u]pon application to any court of competent jurisdiction."\textsuperscript{164} The Hawaii legislature specifically directed applications for injunctive relief "to a circuit court of the State."\textsuperscript{165} The Alaska, Arkansas, District of Columbia and North Dakota statutes include insignificant grammatical changes.\textsuperscript{166}
Section (b) of the 1979 and 1985 versions of the UTSA address the payment of reasonable royalties as a condition of future use of the trade secret by the misappropriator. This remedy would be fashioned by the court, for public policy reasons, where the misappropriator did not have notice of the misappropriation and would be injured in the event of an injunction.\textsuperscript{167} This includes consideration of the effect of an injunction on innocent third parties.\textsuperscript{168} The Uniform Act departs from the Restatement of Torts, which gave total immunity to bona fide purchasers.\textsuperscript{169} The same restrictions on appropriateness and length of injunction found in section (a) above pertain to the royalty payments.\textsuperscript{170}

The injunctive relief provision of the 1979 version of the UTSA, section (b), provided that "[i]f 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."\textsuperscript{171} The Illinois statute requires that there be "an overriding public interest." before the court can condition future use upon a royalty.\textsuperscript{172} The Indiana statute includes a similar restriction to conditioning future use upon a royalty, by requiring a determination of "exceptional circumstances" by the court.\textsuperscript{173} The term "exceptional circumstances" was added to the 1985 UTSA version of the injunctive relief provision.\textsuperscript{174}

The injunctive relief provision of the 1985 version of the UTSA, section (b), provides that:

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.\textsuperscript{175}

This restriction was added in response to concerns that the 1979 version gave the court too much discretion to award a royalty, rather
than an injunction. However, according to the comment, the 1985 version was not intended to change the standard to be applied. None of the states which adopted the 1985 version has made any serious changes to this section. The Hawaii legislature added a sentence providing that "the alleged wrongful user shall bear the burden of proof of exceptional circumstances." This may make it less likely that a court will impose a reasonable royalty under section (b) rather than an injunction under section (a) because of "an overriding public interest" as it adds a standard of proof to what is within the discretion of the court under the Uniform Act. The changes made by the District of Columbia, Maryland, Nebraska, Nevada and Oregon legislatures are all without significant impact. Though California and Illinois statutory schemes generally follow the 1985 Act, the injunctive relief provisions are statutorily more similar to the 1979 version of the UTSA than the 1985 version of the act.

The UTSA injunctive relief provision, section (c), provides "[i]n appropriate circumstances, affirmative acts to protect a trade secret may be compelled by court order." This allows the court to order injunctions requiring the return of anything produced during the misappropriation. No states have made significant modifications to UTSA section (c). However, three states, Oregon, Nevada and New Mexico have made some minor changes.

The Alabama, Colorado and North Carolina legislatures made

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177. Borgman, 27 IDEA at 93.
178. HAW. REV. STAT. § 482B-3(b) (Supp. 1989).
179. See UNIF. TRADE SECRETS ACT § 2 Commissioners' comment.
180. Both Nevada and Maryland statutes eliminated the words "but are not limited to" from the second sentence of that section without significant effect on the meaning of that section. MD. COM. LAW CODE ANN. § 11-1202(c) (1990); NEV. REV. STAT. § 600A.040 (1987). The Nevada legislature changed the words "prior to" to "before," but that also does not appear to change that section's meaning. NEV. REV. STAT. § 600A.040 (1987). The Maryland provision clarifies the second sentence by preceding it with the phrase "[i]n this section." MD. COM. LAW CODE ANN. § 11-1202(c) (1990).
182. UNIF. TRADE SECRETS ACT § 2(c).
183. Two states, Oregon and Nevada, change the structure of that phrase, but not its meaning, by stating that "[i]n appropriate circumstances, the court may order affirmative acts to protect a trade secret." NEV. REV. STAT. § 600A.040(3) (1987) and OR. REV. STAT. § 646.463 (1989). The New Mexico legislature made an insignificant addi-
radical changes to the 1979 and 1985 UTSA injunctive relief provisions. The Alabama statute provides that "[t]o the extent that they are not duplicative: [the court may grant] a. Such injunctive and other equitable relief as may be appropriate with respect to any actual or threatened misappropriation of a trade secret."\(^{184}\) This broad provision for equitable relief, which is part of the Alabama remedies section,\(^{185}\) affords great discretion to the court. The statutory comment alludes to the fact that in rare circumstances a perpetual injunction could be issued.\(^{186}\) Like the Uniform Act,\(^{187}\) once the secret is publicly known, the enjoined party may petition the court to dissolve the injunction.\(^{188}\) However, the Alabama comment states that the secret must have become publicly known through no action of the enjoined party.\(^{189}\) The Alabama statute does not include any of the details pertaining to "[e]xceptional circumstances" (Section 2(b)) or "affirmative acts" (Section 2(c)).

Rejecting the UTSA scheme as to injunctive relief, the Colorado statute provides that "[t]emporary and final injunctions including affirmative acts may be granted on such equitable terms as the court deems reasonable to prevent or restrain actual or threatened misappropriation of a trade secret."\(^{190}\) The Colorado statute does not address compelled royalty payments or affirmative acts to protect a trade secret. Nor does the Colorado trade secrets act provide standards for continued injunctive relief.

The Wisconsin injunctive relief provision of the trade secrets act departs from the wording of the UTSA, but basically retains the same meaning, with only one area of difference.\(^{191}\) Prior to the issu-

\(^{185}\) Id. (providing for "remedies for actual or threatened misappropriation.").
\(^{186}\) Id. Comment.
\(^{187}\) UNIF. TRADE SECRETS ACT § 2.
\(^{188}\) ALA. CODE § 8-27-4 Comment.
\(^{189}\) Id.
\(^{190}\) COL. REV. STAT. § 7-74-103 (1990).
\(^{191}\) The Wisconsin statute provides:

(a) 1. A court may grant an injunction against a person who violates sub. (2). Chapter 813 governs any temporary or interlocutory injunction or ex parte restraining order in an action in an action under this section, except that no court may issue such an injunction or restraining order unless the complainant makes an application which includes a description of each alleged trade secret in sufficient detail to inform the party to be enjoined or restrained of the nature of the complaint against that party or, if the court so orders, includes written disclosure of the trade secret. The complainant shall serve this application upon the party to be enjoined or restrained at the time the motion for the injunction is made or the restraining order is served, whichever is earlier. 2. Except as provided in subd. 3, upon application to the court, the court shall terminate an injunction when a trade secret ceases to exist. 3. The court may continue an injunction for a reasonable period of time to eliminate com-
ance of temporary or interlocutory injunctions or ex parte restraining orders, a Wisconsin complainant must describe in writing each trade secret "in sufficient detail." According to the Wisconsin statutory comment, this addition was made:

192. According to the Wisconsin statutory comment, this addition was made:

to allow the defendant to bring evidence early in the process as to whether the information is a trade secret and allow the plaintiff an opportunity to respond to specific allegations. In addition, the party to be enjoined or restrained must receive a copy of the application at the time the motion for the injunction is made or at the time the restraining order is served, whichever is earlier. 193

The goal of the Wisconsin provision is to ensure that the defendant has sufficient information regarding the nature of the complaint and to provide a mechanism for an early clarification of the allegations. 194

The North Carolina injunctive relief provision is substantially similar to the UTSA provision in effect, however, the statutory language of the two provisions is substantially different. 195 Overall, the

mercantile advantage which the person who violated sub. (2) otherwise would derive from the violation. (b) In exceptional circumstances, an injunction granted under par. (a) may condition future use of a trade secret by the person who violated sub. (2) upon payment of a reasonable royalty by that person to the owner of the trade secret for no longer than the period of time for which the court may enjoin or restrain the use of the trade secret under par. (a). Exceptional circumstances include a material and prejudicial change of position, prior to acquiring knowledge or reason to know of a violation of sub. (2), that renders an injunction inequitable. (c) In appropriate circumstances, the court may order affirmative acts to protect a trade secret.

WIS. STAT. ANN. § 134.90(3) (West 1989).

192. WIS. STAT. ANN. § 134.90(3) (West 1989).
193. WIS. STAT. ANN. § 134.90 Comment (West 1989).
194. Whitesel & Sklansky, 59 Wis. BAR. BUL. at 16 and 50.
195. The North Carolina provision provides that:

(a) [except as provided herein, actual or threatened misappropriation of a trade secret may be preliminarily enjoined during the pendency of the action and shall be permanently enjoined upon judgment finding misappropriation for the period that the trade secret exists plus an additional period as the court may deem necessary under the circumstances to eliminate any inequitable or unjust advantage arising from the misappropriation. (1) If the court determines that it would be unreasonable to enjoin use after a judgment finding misappropriation, an injunction may condition such use upon payment of a reasonable royalty for any period the court may deem just. In appropriate circumstances, affirmative acts to protect the trade secret may be compelled by order of the court. (2) A person who in good faith derives knowledge of a trade secret from or through misappropriation or by mistake, or any other person subsequently acquiring the trade secret therefrom or thereby, shall be enjoined from disclosing the trade secret, but no damages shall be awarded against any person for any misappropriation prior to the time the person knows or has reason to know that it is a trade secret. If the person has substantially changed his position in good faith reliance upon the availability of the trade secret for future use, he shall not be enjoined from using the trade secret but may be required to pay a reasonable royalty as deemed just by the court. If the person has acquired inventory through such knowledge or use of a trade secret, he can dispose of the inventory without payment of royalty. If
North Carolina act appears to allow complainants to obtain injunctive relief more easily than does the UTSA. The North Carolina statute specifically allows the use of preliminary injunctions. This change is apparently just for the sake of clarity since, presumably, the UTSA would also allow for such injunctions if otherwise allowed under state law. Also, the North Carolina act expands the period that an injunction may last. By stating that an injunction may last for "an additional period as the court may deem necessary under the circumstances to eliminate any inequitable or unjust advantage arising from the misappropriation," the North Carolina legislature appears to have countenanced a perpetual injunction. Conversely, the UTSA limits injunctions by the language of the act to a period of time necessary to eliminate commercial advantage. Additionally, the UTSA comment specifically rejects perpetual injunctions, though noting that some courts have granted them, stating that "this Act adopts the position of the trend of authority limiting the duration of injunctive relief to the extent of the temporal advantage over good faith competitors gained by a misappropriator."  

Certain changes made by the North Carolina legislature could also affect the ability of a judge to condition the future use of a trade secret upon payment of a reasonable royalty in lieu of injunctive relief. The North Carolina act mandates the award of a permanent injunction upon the finding of a "misappropriation" under the language of the statute. However, at least one commentator believes that the result of the language gives judges discretion as to the proper remedy, though it may make the award of a non-injunctive remedy vulnerable upon appeal.

DAMAGES

In addition to injunctive relief, the UTSA provides for recovery of damages for actual loss, unjust enrichment and exemplary damages. Under the act, all of the issues pertaining to damages can be resolved in a unified action. The UTSA approach differs from the
Restatement approach to damages. The UTSA approach will undoubtedly lead to more consistency than was the situation under the Restatement.202

Pursuant to the 1985 UTSA, a reasonable royalty can be imposed, instead of actual or unjust enrichment damages. These damages can be imposed in addition to injunctive relief. The trade secret owner's actual damages and the misappropriator's unjust enrichment may both be recovered. However, double counting is prohibited.203 Actual damages and unjust enrichment, as with injunctive relief, may be computed for only the duration the trade secret would have existed, plus any lead time that it would take to put the secret to use.204 Though monetary damages may be combined with injunctive relief, they would generally not be granted during the term of the injunction.205 Monetary relief may be denied for the same policy reasons supporting the denial of injunctive relief.206 However, this relief is not conditional on the granting of injunctive relief.207 As with injunctive relief, where more than one party possesses a trade secret, only the party against whom the misappropriation occurred can obtain money damages.208 Exemplary damages are available, in the court's discretion, for willful and malicious misappropriation, but are limited to no more than twice money damages.209

Section (a) of the 1979 UTSA damages provision provides that "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."210

The Illinois legislature rewrote the entire damage section before adopting the act. The Illinois act provides:

In addition to the relief provided for by Section 3, a person is

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203. Id. at 841-42.
204. UNIF. TRADE SECRETS ACT, 14 U.L.A. § 3, Commissioners' comment (1985).
205. Id.
206. Id.
207. Id.
208. Id. One commentator has stated the opinion that the statutory language "is also amenable to the better construction - that any person harmed by the misappropriation may recover damages." Borgman, The Adoption of the Uniform Trade Secrets Act: How Uniform is Uniform?, 27 IDEA 73, 99 (1986).
209. UNIF. TRADE SECRETS ACT § 3(b). See also Lydon, The Deterrent Effect of the Uniform Trade Secrets Act, 69 J. PAT. & TRADEMARK OFF. SOC'Y 427, 434-35 (1987). The restriction of the awarding of attorneys fees and exemplary damages to "willful and malicious misappropriators" is criticized as a too high a standard to provide sufficient deterrence of bad faith misappropriation. Id.
210. UNIF. TRADE SECRETS ACT § 3(a).
entitled to recover damages for misappropriation. Damages can include both the actual loss caused by misappropriation and the unjust enrichment caused by the misappropriation that is not taken into account in computing actual loss. If neither damages nor unjust enrichment caused by the misappropriation are proved by a preponderance of the evidence, the court may award damages caused by misappropriation measured in terms of a reasonable royalty for a misappropriator’s unauthorized disclosure or use of a trade secret.\textsuperscript{211}

While the first two sentences generally incorporate the meaning of the 1979 Act, the language in the last sentence is essentially the same as that added to the 1985 UTSA damage provision.\textsuperscript{212} The net effect of the Illinois provision is to provide an additional alternative remedy provided by the 1985 Act for damages based upon a reasonable royalty.\textsuperscript{213}

Similarly, the Indiana legislature added “[w]hen neither damages nor unjust enrichment are provable, the court may order payment of a reasonable royalty for no longer than the period during which the use could have been prohibited.”\textsuperscript{214} The California trade secrets law is similar in this regard to the Indiana statute, however, the word “when” was changed to “if.”\textsuperscript{215} These additions for the most part parallel the 1985 amendments to the UTSA allowing an additional alternative remedy of a reasonable royalty.\textsuperscript{216} However, the wording leaves less discretion to the court in imposing a royalty than the 1985 UTSA amendments.\textsuperscript{217}

Section (a) of the 1985 UTSA damages provision provides that:

\textit{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

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{211} ILL. ANN. STAT. ch. 140, para. 354, § 4(a) (Smith-Hurd Supp. 1990).
\item \textsuperscript{212} UNIF. TRADE SECRETS ACT § 3(a).
\item \textsuperscript{213} \textit{See UNIF. TRADE SECRETS ACT} § 3 Commissioners’ comment.
\item \textsuperscript{214} IND. CODE ANN. § 24-2-3-4(b) (Burns 1990 Supp.).
\item \textsuperscript{215} CAL. CIV. CODE § 3426.3(b) (West Supp. 1990). The California provision also has an inconsequential language change in the section by eliminating the phrase “in addition to, or in lieu of injunctive relief.” \textit{Id.}
\item \textsuperscript{216} \textit{Id.}
\item \textsuperscript{217} Borgman, 27 IDEA at 97-98. They also fail to address other criticisms of the 1979 damages provision.
\end{enumerate}
\end{footnotesize}
be measured by imposition of liability for a reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret.\textsuperscript{218}

The 1985 amendment thus significantly strengthens the damages provision of the UTSA. In particular, unless there was innocent reliance, the amendment specifically requires the award of money damages.\textsuperscript{219} This was accomplished by the use of the word "entitled."\textsuperscript{220} Additionally, an alternative measure of damages, "based upon a demonstrably reasonable royalty," was added.\textsuperscript{221} The Commissioner's Comment explains, at length, that the amount of these damages must be established by competent evidence.\textsuperscript{222}

Care must be taken to differentiate these royalty damages, which are a "general option," from the section 2(b) royalty order injunction which is available only under "exceptional circumstances."\textsuperscript{223} The section 3(a) royalties are compensation for past conduct, while a royalty order injunction is based on future conduct. When a royalty order injunction is appropriate, section 3 monetary damages may not be awarded for the same conduct.\textsuperscript{224}

As part of the remedies section, the North Carolina statute provides only that "[i]n addition to the relief authorized by subsection (a), actual damages may be recovered, measured by the economic loss or the unjust enrichment caused by misappropriation of a trade secret, whichever is greater."\textsuperscript{225} This is certainly a more straightforward provision than the UTSA and may be more favorable to plaintiffs.\textsuperscript{226} If damages are awarded by the court, North Carolina law mandates that they be measured by the greater of economic loss or unjust enrichment. The Uniform Act gives the judge discretion in the damage award. In addition, by leaving out language regarding situations where a monetary recovery would be inequitable and where a payment of a reasonable royalty would be appropriate, the North Carolina statute downplays these alternatives.\textsuperscript{227}

Consistent with the UTSA, the Alabama trade secrets act pro-

\textsuperscript{218} Unif. Trade Secrets Act § 3(a). One commentator has pointed out that this language does not "explicitly allow the prevailing plaintiff to recover the greater amount of actual damages or unjust enrichment. In addition, the question remains open whether the plaintiff bears the burden of allocating the amount of the misappropriator's profits not attributable to the plaintiff's losses." Borgman, 27 IDEA at 99.

\textsuperscript{219} Lydon, 69 J. Pat. & Trademark Off. Soc'y at 438.

\textsuperscript{220} Borgman, 27 IDEA at 97.

\textsuperscript{221} Unif. Trade Secrets Act § 3 Commissioners' comment.

\textsuperscript{222} Id.

\textsuperscript{223} Id.

\textsuperscript{224} Id.


\textsuperscript{226} Root & Blynn, 18 Wake Forest L. Rev. at 841-42.

\textsuperscript{227} See supra notes 167-70 and accompanying text.
vides for recovery of both actual and unjust enrichment damages, where appropriate. However, the Alabama legislature added language concerning the establishment of the misappropriator's profits. The statutory comment suggests that the language was added to ensure that such relief was available. The Alabama statute specifies that while the complainant must prove gross revenue, the misappropriator has the burden of proof as to reductions. The Alabama statute is silent concerning "prejudicial change of position" and alternative measures of damages via a "reasonable royalty." However, an Alabama court has wide discretion to provide remedies.

The Oregon and Wisconsin legislatures made complete language changes to the UTSA damages provision. However, though worded somewhat differently, the Wisconsin statute provides the same damages remedies as the 1985 UTSA. The Oregon statute provides a stronger damage provision than that found in the UTSA. The Oregon statute provides in part:

b. [recovery of any profits and other benefits conferred by the misappropriation that are attributable to the misappropriation (In establishing the misappropriator's profits, the complainant is required to present proof only of the misappropriator's gross revenue, and the misappropriator is required to present proof of his or her deductible expenses and the elements of profit attributable to factors other than the trade secret), and c. The actual damages suffered as a result of the misappropriation.


228. The Alabama code provides in part:

b. [recovery of any profits and other benefits conferred by the misappropriation that are attributable to the misappropriation (In establishing the misappropriator's profits, the complainant is required to present proof only of the misappropriator's gross revenue, and the misappropriator is required to present proof of his or her deductible expenses and the elements of profit attributable to factors other than the trade secret), and c. The actual damages suffered as a result of the misappropriation.


230. ALA. CODE § 8-27-4b (Supp. 1989). The intention of that provision is to assure that the plaintiff is made whole and that the misappropriator recognize no profit from the wrongdoing. Any combination of the three types of relief may be used. ALA. CODE § 8-27-4b Comment (Supp. 1989). See also Telex Corp. v. International Business Mach. Corp. 510 F.2d 894, 931 (10th Cir. 1975).

231. The Oregon statute provides that

[e]xcept to the extent that a material and prejudicial change of position prior to acquiring knowledge or reason to know of a violation of sub. (2) [misappropriation] renders a monetary recovery inequitable, a court may award damages to the complainant for a violation of sub. (2). A court may award damages in addition to, or in lieu of, injunctive relief under sub. (3) [injunctive relief]. Damages may include both the actual loss caused by the violation and unjust enrichment caused by the violation that is not taken into account in computing actual loss. Damages may be measured exclusively by the imposition of liability for a reasonable royalty for a violation of sub. (2) if the complainant cannot by any other method of measurement prove an amount of damages which exceeds the reasonable royalty.

gon trade secrets statute sets a "reasonable royalty" as a minimum measure of damages, rather than an alternative damage measure, as provided for in the 1985 UTSA. The West Virginia legislature eliminated the words "that is not taken into account in computing actual loss" from the second sentence, thereby potentially allowing for double recovery.\(^\text{233}\)

The Virginia legislature changed the language throughout its damages provision, but basically adheres to the intent of the 1985 UTSA damage provisions.\(^\text{234}\) The Virginia statute tightened the language regarding the circumstances whereby the measure of damages would be a "reasonable royalty," thereby possibly limiting judicial discretion. The Virginia statute states that "[i]f a complainant is unable to prove a greater amount of damages by other methods of measurement, the damages caused by misappropriation can be measured exclusively by imposition of liability for a reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret."\(^\text{235}\) The Colorado, District of Columbia, Maryland, Nebraska, Nevada and West Virginia legislatures made insignificant language changes.\(^\text{236}\)

The UTSA damages provision, section (b), provides that "[i]f willful and malicious misappropriation exists, the court may award exemplary damages in an amount not exceeding twice any award

\(^{233}\) W. VA. CODE § 47-22-3 (1986).

\(^{234}\) The Virginia statute provides:

Except where the user of a misappropriated trade secret has made a material and prejudicial change in his position prior to having either knowledge or reason to know of the misappropriation and the court determines that a monetary recovery would be 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. If a complainant is unable to prove a greater amount of damages by other methods of measurement, the damages caused by misappropriation can be measured exclusively by imposition of liability for a reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret.


\(^{235}\) Id.

made under subsection (a)." 237 The granting of punitive damages lies in the sole discretion of the judge. 238

In a major departure from the Uniform Act, the North Carolina trade secrets act provides for liberal punitive damages as part of its remedies section. 239 The North Carolina statute imposes no limit on the amount of punitive damages awarded and puts the determination of the amount in the "discretion" of "the trier of fact," thereby strengthening the plaintiff's position. 240 While the UTSA always puts the decision as to award of damages in the court, the North Carolina statute gives this decision to the jury in jury trials.

The Colorado, Connecticut, and Oregon legislatures made extensive changes to this section before adopting the UTSA. The Colorado statute provides that "[i]f the misappropriation is attended by circumstances of fraud, malice, or a willful and wanton disregard of the injured party's right and feelings, the court or the jury may award exemplary damages in an amount not exceeding the award made" under the provision. 241 The Colorado provision added fraud as an element for relief and also changed the element of "willful" to "willful and wanton" for recovery of exemplary damages. 242 The total effect of these changes may be to increase those instances whereby an injured party recovers. However, the Colorado provision is limited to "damages in an amount not exceeding the award made under subsection (1) [UTSA Damages (a)]." 243 Thus, the Colorado Legislature limited the recovery of exemplary damages to a maximum of the compensatory amount received, as opposed to the double recovery allowed under the UTSA provision. 244

The Connecticut provision states that "[i]n any action brought pursuant to subsection (a) of this section, if the court finds willful and malicious misappropriation, the court may award punitive damages in an amount not exceeding twice any award made under subsection (a) and may award reasonable attorney's fees to the prevailing party." 245 Except for the inclusion of reasonable attorney's fees within the damages provision, 246 the Connecticut legisla-

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237. UNIF. TRADE SECRETS ACT § 3(b).
238. Id. at § 3(b) Commissioners' comment.
240. Id.
242. Id.
243. Id.
244. Under the UTSA, section 3 gives the court discretion to grant a treble recovery. UNIF. TRADE SECRETS ACT § 3(b) Commissioners' comment. Under the Colorado statute the maximum would be a double recovery. COLO. REV. STAT. § 7-74-104 (1990).
246. See infra notes 261-75 and accompanying text.
ture adopted the UTSA. The Oregon Legislature conditioned the award of punitive damages “[u]pon a finding of willful or malicious misappropriation” rather than the UTSA requirement of “wilful and malicious,”247 thereby providing greater opportunity for the award of such relief.

In a unique approach, to avoid the possibility of nominal exemplary damages, but at the same time to more strictly limit the maximum recovery, the Alabama damage provision allows for recovery of “[e]xemplary damages in an amount not to exceed the actual award made under subdivision (1), but not less than $5,000.00.”248 According to the statutory comment, the exemplary damages maximum recognizes the fine line between permissible and impermissible practices. Examples of permissible practices are reverse engineering and the hiring of employees who formerly worked for competitors.249 The treble damages provision of the UTSA was rejected due to the argument that Alabama allowed for more liberal damages because of the $5000.00 minimum.250 This may well be the case where actual and unjust enrichment damages are small.251

The Arkansas and Louisiana legislatures adopted the UTSA 1979 damages provision, as it applies to actual loss and to unjust enrichment.252 However, in an important departure from the UTSA, neither state provided for exemplary damages. The Nebraska law generally mirrors the 1985 UTSA provision, however, like the Arkansas and Louisiana provisions, exemplary damages were omitted.253 Virginia, which basically follows the 1985 UTSA regarding actual loss and unjust enrichment,254 also has no exemplary damages provision. The omission of exemplary damages by these four states may seriously weaken the remedies available. Arguably, however, punitive damages could still be imposed by the court.255

The Montana legislature did not set a maximum ceiling for exemplary damages, thereby potentially strengthening the punitive aspect of the damages remedy.256 While the original statute adopted by Minnesota allowed for punitive damages “in an amount which the

249. Id. at Comment.
254. See supra notes 236-37 and accompanying text.
255. Borgman, 27 IDEA at 104-05.
256. The Montana statute eliminates the UTSA phrase “in an amount not exceeding twice any award made under subsection (a).” MONT. CODE ANN. § 30-14-404 (1989).
court deems just and equitable," Minnesota amended its trade secrets act in 1987 to parallel the 1985 UTSA amendment. The Alaska, Oklahoma and Wisconsin legislatures made minor grammatical changes and the District of Columbia provided a minor addition to the 1985 UTSA punitive damages section.

ATTORNEY'S FEES

The Uniform Act, in a change from the usual common law rule, provides for the payment of attorney's fees in egregious situations. Given the complexity of litigating a trade secret case, this can be a substantial sum of money. The attorney's fees provision states that "[i]f (i) a claim of misappropriation is made in bad faith, (ii) a motion to terminate an injunction is made or resisted in bad faith, or (iii) willful and malicious misappropriation exists, the court may award reasonable attorney's fees to the prevailing party." When awarding attorney's fees for willful and malicious misappropriation, the granting of punitive damages can be considered. The judge, rather than the jury, has sole discretion to grant attorney's fees. Though the comment refers to this section as a "deterrent," bad faith is not statutorily defined.

The Oregon statute permits either the judge or the jury to decide whether attorney's fees should be granted. The Alabama legislature, under a combined section, clarified and expanded liability for bad faith claims of misappropriation to include "actual or threatened" misappropriation claims "resisted" in bad faith. The

257. MINN. STAT. ANN. § 325C.03(b) (West 1981).
258. The Alaska legislature changed "any award made under subsection (a)" to "the damages awarded under (a) of this section." ALASKA STAT. § 45.50.915 (Supp. 1989). The District of Columbia statute adds the words "of this section" at the end. D.C. CODE ANN. § 48-503 (Supp. 1989). The Oklahoma statute makes a inconsequential change by using the word "pursuant to" instead of "under." OKLA. STAT. ANN. tit. 78, § 88 (1987). The Wisconsin legislature changed some language, however adopted the basic the meaning of the UTSA. The Wisconsin statute mandates that if the violation of the act was "wilful and malicious, the court may award punitive damages in an amount not exceeding twice any award" made under the provision. WIS. STAT. ANN. § 134.90(4) (West 1989).
260. Id.
262. Id. Commissioners' comment.
263. Id.
264. Id. See Chapman, 2 COMPUTER & HIGH-TECH. L.J. at 410.
265. In cases of "[w]ilful or malicious misappropriation if found by the court or jury." OR. REV. STAT. § 646.467(3) (1989).
266. ALA. CODE § 8-27-4 (Supp. 1989) (providing "[r]emedies for actual or threatened misappropriation").
267. Id.
Wisconsin statute does not have a separate attorney’s fees provision, but, within the damages provision, there is the following pertinent statement: “[i]f a claim that [the misappropriation provision] has been violated is made in bad faith, a motion to terminate an injunction is made or resisted in bad faith, or a violation of [the misappropriation provision] is wilful and deliberate, the court may award reasonable attorney fees to the prevailing party.”

The wording change from “willful and malicious” to “willful and deliberate” in the Wisconsin statute is a weaker standard than found in the UTSA. That change could make it easier to recover attorneys fees in Wisconsin. The North Carolina attorney’s fee provision omits any mention of an awarding of reasonable attorneys fees for a bad faith motion, but otherwise tracks the language of the UTSA provision. The wording change from “willful and malicious” to “willful and deliberate” in the Wisconsin statute is a weaker standard than found in the UTSA. That change could make it easier to recover attorneys fees in Wisconsin. The North Carolina attorney’s fee provision omits any mention of an awarding of reasonable attorneys fees for a bad faith motion, but otherwise tracks the language of the UTSA provision.

Connecticut provided for the awarding of “reasonable attorney’s fees to the prevailing party” as part of its punitive damages provision where the “court finds wilful and malicious misappropriation.”

The attorney’s fees section of the Connecticut act only provides for the award of attorney’s fees for bad faith claims or motions. Despite the placement of the attorney’s fee provisions in two separate sections of the act, the Connecticut legislature essentially adopted the UTSA approach to attorney’s fees.

The District of Columbia, Hawaii, Maryland, Oklahoma and Oregon changed the sequence, but not the language of the provision. The New Mexico legislature changed the sequence and also added the phrase “of proper jurisdiction” to “the court.” The version of the UTSA adopted by the Alaska, Idaho, Nebraska and Virginia legislatures omitted the award of attorney’s fees, thereby preventing recovery of attorney’s fees, unless otherwise provided for under a separate state statute.

PRESERVATION OF SECRECY

Under the Uniform Act, courts have authority to protect trade secrets from disclosure due to litigation. The UTSA preservation of secrecy provision states that:

[i]n an action under this [Act], a court shall preserve the secrecy of an alleged trade secret by reasonable means, which

[271] Id.
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 with-
out prior court approval.\textsuperscript{274}

The purpose of this section is to protect trade secrets during the
course of the litigation. Several judicial procedures are specified as
eamples, however, these are not exclusive.\textsuperscript{275} The Nebraska statute
does not include “holding in-camera hearings” or “sealing the records
of the action” among those judicial orders specifically available.\textsuperscript{276}
However, the Nebraska legislature prefaced the section by adding the
words “but not be limited to,” thereby converting the list more
learly to examples.\textsuperscript{277} This probably would not effectuate a restric-
tion, but instead may give the court more discretion. Rather than
“ordering any person involved in the litigation not to disclose an
alleged trade secret without prior court approval,” the Nebraska statute
refers to “ordering nondisclosure of the alleged trade secret by
the parties’ attorneys, witness, or experts.”\textsuperscript{278} Though the Nebraska statute is not exclusive as to the situations where secrecy shall be
preserved, the fact that the parties specified are narrower than the
phrase “any person” may guide the judiciary toward an interpreta-
tion which excludes those not specified.\textsuperscript{279} As an further change, the
Nebraska legislature added that “[t]he disclosure or publication of a
trade secret in a court proceeding or as a result thereof shall not con-
stitute an abandonment of the secret.”\textsuperscript{278} This serves to clarify what
would be implicit in the UTSA. Though the Nebraska rewrite is
fairly extensive, in sum, the changes have little effect.

Several other states make language alterations to this section,
however, the intent of the UTSA is preserved. The North Carolina
legislature made three important changes. First, “shall preserve the
secrecy of an alleged trade secret by reasonable means” was changed
to “shall protect an alleged trade secret by reasonable steps.” Secondly, the North Carolina act provides limits on “sealing the records
of the action” rather than the UTSA provision which provides for
“sealing the records of the action subject to further court order.” Fi-
nally, the North Carolina act broadens the scope of the UTSA provi-
sion “ordering any person involved in the litigation not to disclose an

\begin{footnotes}
\item[275] \textit{Id.} Commissioners’ comment.
\item[277] \textit{Id.}
\item[278] \textit{Id.}
\item[279] \textit{Id.} The Nebraska statute identifies “persons” as parties’ attorneys, witnesses, and experts.
\item[280] \textit{Id.}
\end{footnotes}
alleged trade secret without prior court approval” by changing it to read “ordering any person who gains access to an alleged trade secret during the litigation not to disclose such alleged trade secret without prior court approval.”

The Alabama trade secret act has no provision concerning preservation of secrecy. If not provided under other powers of the judiciary, this omission could discourage litigation concerning trade secret misappropriation. According to one commentator, this omission reflects a concern with the overuse of protective orders, but would not necessarily bar a court from issuing such an order. The District of Columbia, Oklahoma and Wisconsin made minor language changes in the preservation of secrecy section.

STATUTE OF LIMITATIONS

The UTSA statute of limitations sets forth a three year time period for bringing suit for non-contractual theories of liability, independent of whether the action is considered to be grounded theoretically in contract or tort. It also eliminates a line of case authority supporting the concept of a continuing wrong, which held that each day of misuse triggered the running of a separate statutory period. Instead, the UTSA provides that the statute of limitation begins to run from the time the trade secret owner knew or should have known of the misuse. The UTSA provides that “[a]n action for misappropriation must be brought within 3 years after the misap-

283. The District of Columbia substituted the word “or” for a comma between “holding in-camera hearings” and “sealing the records.” D.C. CODE ANN. § 48-505 (Supp. 1989). The Oklahoma legislature made grammatical changes in the language of that section. The Oklahoma statute provides that:

[(In an action brought pursuant to the provisions of the Uniform Trade Secrets Act, 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 pursuant to the provisions of Section 3203 of Title 12 of the Oklahoma Statutes, 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.)


284. The Restatement does not specifically provide a statute of limitations, though the commentary to the Restatement can be interpreted as suggesting both tort and contract actions. Klitzke, The Uniform Trade Secrets Act, 80 PAT. & TRADEMARK REV. 157, 212-13 (1980).


286. Id. at 214.
propriation 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. Three state acts provide for a longer statute of limitations: Maine and Nebraska provide for a four year statute of limitations; Illinois has a five year statute of limitations. The North Carolina statute does not address continuing misappropriation. This might have the effect of lengthening the three year statute of limitations in the case of continuing misappropriation, should it be considered separate events. However, this omission avoids misconstruing what is meant by a continuing tort, ensuring a three year period of limitations. The Alabama act provides a two year statute of limitations “[a]fter the misappropriation is discovered or by the exercise of reasonable diligence should have been discovered.” The Wisconsin act does not contain any provision pertaining to a statute of limitations. The Connecticut, Nebraska, North Carolina, and Virginia legislatures made minor grammatical changes from the UTSA statute of limitations.

EFFECT ON OTHER LAW

The remedies set forth in the Uniform Act are not exclusive remedies for trade secret violations. The “Effect on Other Law” provision differentiates between what will be enforced under the UTSA and other laws. The Act only effects civil remedies for trade secret misappropriation that meet the definitional criteria set forth in the statute. Contractual, other non-misappropriation-based civil remedies, and criminal remedies are not affected by the UTSA. In particular, the statutory comment indicates that duties imposed by an

294. The Connecticut legislature phrased the provision as a negative: “No action for misappropriation shall be brought but within three years...” but does not change the overall meaning of it. Conn. Gen. Stat. Ann. § 35-56 (West 1987). The Nebraska and Virginia legislatures changed the word “must” to “shall” with no apparent effect to the meaning of the provision. Neb. Rev. Stat. § 87-506 (Supp. 1988); Va. Code Ann. § 59.1-340 (1987). the North Carolina statute changes the word “brought” to “commenced.” Additionally, the North Carolina statute changes the phrase “misappropriation is discovered or by the exercise of reasonable diligence should have been discovered” to “misappropriation complained of is or reasonably should have been discovered.” N.C. Gen. Stat. § 66-157 (1989).
express or implied-in-fact contract or by a covenant not to disclose or not to compete are outside the scope of the statute.\textsuperscript{295} The 1979 version provides that:

(a) [t]his Act displaces conflicting tort, restitutionary, and other law of this State pertaining to civil liability for misappropriation of a trade secret. (b) This Act does not affect:

(1) contractual or other civil liability or relief that is not based upon misappropriation of a trade secret; or (2) criminal liability for misappropriation of a trade secret.\textsuperscript{296}

The Connecticut act provides that "(a) [u]nless otherwise agreed by the parties, the provisions of this chapter supersede any conflicting tort, restitutionary, or other law of this state pertaining to civil liability for misappropriation of a trade secret."\textsuperscript{297} Thus, under the Connecticut provision, parties could agree to be governed by other laws of the state. Connecticut also adds an exclusion for "the duty of any person or state or municipal agency to disclose information pursuant to section 1-19, sections 31-40j to 31-40p, inclusive, or subsection (b) of section 12-62, or wherever expressly provided by law," in addition to those listed by the UTSA, which could significantly affect the application of its trade secret statute in the government sector.\textsuperscript{298} This indicates that Connecticut governmental disclosure laws take precedence over the trade secret statute.\textsuperscript{299} These two changes, taken together, appear to substantially limit those situations where the Connecticut act will apply.

The Alaska legislature also added an exclusion beyond those in the UTSA. However, the Alaska provision is much narrower than the Connecticut provision, as it applies only to "investigations or actions by the attorney general."\textsuperscript{300} Neither the Indiana nor North Carolina legislatures included any provision pertaining to other laws within their articles.

Though the 1985 amendments yielded substantial language

\textsuperscript{295} UNIF. TRADE SECRETS ACT § 7 Commissioners' comment, 14 U.L.A. 463 (1985).
\textsuperscript{296} UNIF. TRADE SECRETS ACT § 7, 14 U.L.A. 463 (1985) (providing the language of the 1979 version of the UTSA, modified by the 1985 amendments).
\textsuperscript{297} CONN. GEN. STAT. ANN. § 35-57 (West 1987).
\textsuperscript{298} Id.
\textsuperscript{299} Id.
\textsuperscript{300} Many states do not clearly indicate whether disclosure under open records laws takes precedence over trade secrecy statutes. See Samuels, Protecting Confidential Business Information Supplied to State Governments: Exempting Trade Secrets From State Open Records Laws, 27 AM. BUS. L.J. 467, 469 (Fall 1989).
\textsuperscript{300} The Alaska provision provides that "(c) AS 45.50.910 - 45.50.945 do not apply to investigations or actions by the attorney general under AS 45.50.471 - 45.50.561 (unfair trade practices and consumer protection) or under AS 45.50.562 - 45.50.596 (restraint of trade)." ALASKA STAT. § 45.50.930 (Supp. 1989).
changes to this provision, the content of the amended version is quite similar to the 1979 original. The major change was to clarify that this section does not impliedly replace contractual liability for misappropriation.301 Under the 1985 UTSA, the “Effect on Other Law” article provides that:

(a) Except as provided in subsection (b), this [Act] displaces conflicting tort, restitutionary, and other law of this State providing civil remedies for misappropriation of a trade secret.

(b) This [Act] does not affect: (1) contractual remedies, whether or not based upon misappropriation of a trade secret; (2) other civil remedies that are not based upon misappropriation of a trade secret; or (3) criminal remedies, whether or not based upon misappropriation of a trade secret.302

The Alabama “Effect on Other Law” provision departs from the UTSA model by stating that “[t]hose provisions of this chapter that are inconsistent with the common law of trade secrets supersede the common law; otherwise, this chapter should be construed to be consistent with the common law of trade secrets.”303 The UTSA version mentions tort, restitutionary, and other law without specifying the relationship of the act to the common law of trade secrets, while the Alabama section does not specify remedies not affected by the law. Though the Alabama provision may be incomplete when compared to the UTSA, it states its relationship to the common law of trade secrets in a more definitive fashion.304 The intent was to use the existing common law to “round out” areas of the law not specifically covered in the statute.305 In clarification of the relationship of the Alabama section to other law, the comment to the Alabama act indicates that the law intends “to codify and modify the common law of trade secrets” and not “to supersede other areas of the law.”

In a substantive departure from the 1985 UTSA, the California act provides that “[e]xcept as otherwise expressly provided, this title does not supersede any statute relating to misappropriation of a trade

304. The Supreme Court of Minnesota in Electro-Craft Corp. v. Controlled Motion, Inc., 332 N.W.2d 890, 899 (Minn. 1983) (interpreting the 1980 language of the UTSA as enacted in Minnesota) (discussing the Minnesota Supreme Court decision in Electro-Craft holding “[t]he UTSA more or less embodies their common law definition of a trade secret.”) See also Miller, Florida’s Uniform Trade Secrets Act, 16 Fla. St. U.L. Rev. 863, 868, 870. The Alabama statutory variation is an attempt to codify this result. Ala. Code § 8-27-6 Commissioners’ comments (Supp. 1989).
secret, or any statute otherwise regulating trade secrets.” Through this change, the California legislature reversed the approach of section (a) of the 1985 UTSA provision, resulting in an act which applies only to those situations where there is no other law relating to or regulating trade secrets, “except as otherwise expressly provided.” However, the California statute never “otherwise expressly provide[s]” where the act would apply, resulting in questions as to when the statute would apply. The California legislature also excluded the same contractual, civil and criminal remedies as the 1985 UTSA. The California statute provides in part:

(c) This title does not affect the disclosure of a record by a state or local agency under the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code). Any determination as to whether the disclosure of a record under the California Public Records Act constitutes a misappropriation of a trade secret and the rights and remedies with respect thereto shall be made pursuant to the law in effect before the operative date of this title.

Like Connecticut, in its modification of the 1979 version, the California legislature exempted public disclosures under the state Public Records Act from application of the UTSA.

The District of Columbia, Maine, Maryland and Oregon added new sections relating to disclosures mandated under other laws. The Oregon statute provides that the act does not affect “[a]ny defense, immunity or limitation of liability afforded public bodies, their officers, employees or agents under ORS 30.260 to 30.300.” The Oregon statute also provides that:

[n]otwithstanding any other provision in [the Oregon UTSA], 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.

Similarly, the Maryland statute provides that “[n]othing contained in this act may be applied or construed to waive or limit any common law or statutory defense or immunity possessed by State personnel as

306. CAL. CIV. CODE § 3426.7(a) (West Supp. 1990).
307. Id.
308. Id.
309. Id.
311. Id.
TRADE SECRETS defined under § 12-101 of the State Government Article. 312 The Maine legislature provided that the act did not affect “[t]he duty of any person to disclose information where expressly required by law” or “[t]he provisions of the Maine Tort Claims Act, Title 14, chapter 741.” 313 Similarly, though not included under the “Effect on Other Law” provision, the District of Columbia statute includes an article entitled “Disclosure of Information to Enforce the Occupational Safety and Health Act of 1988 and Pesticide Operations Act of 1978.” 314 That addition allows for disclosure consistent with these statutes.

The Illinois legislature changed the UTSA provision in several ways. First, the Illinois statute includes “unfair competition” as an area of law superseded by the act where a conflict exists. 315 Secondly, the Illinois statute adds a provision to the exclusion of contractual remedies, “that a contractual or other duty to maintain secrecy or limit use of a trade secret shall not be deemed to be void or unenforceable solely for lack of durational or geographical limitation on the duty.” 316 This would appear to limit judicial findings of overly broad secrecy clauses. Lastly, the Illinois statute adds that “the definition of a trade secret contained in any other Act of this State” is not affected. 317 District of Columbia, Nevada, Oregon and Wisconsin all made some grammatical changes. 318 The North Carolina, Nebraska and New Mexico trade secret acts have no provision pertaining to other laws within their articles.

UNIFORMITY OF APPLICATION AND CONSTRUCTION

The UTSA uniformity of application and construction provision provides that “[t]his [Act] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among states enacting it.” 319 There has been no sig-

316. Id. at para. 358, § 8(b)(1).
317. Id. at para. 358, § 8(b)(4).
significant deviation from that provision by the states which enacted it. However, Alaska, the District of Columbia and Wisconsin Legislature made minor changes. Those modifications do not deviate in any significant way from the UTSA provision. The Alabama, Arkansas, Hawaii, Idaho, Illinois, Indiana, Maine, Minnesota, Nebraska, New Mexico, Nevada, North Carolina, North Dakota, and Virginia trade secret acts do not include any provision concerning uniformity.

SEVERABILITY

The UTSA severability provision provides that:

If any provision of this [Act] or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the [Act] which can be given effect without the invalid provision or application, and to this end the provisions of this [Act] are severable. Only eight states, California, Colorado, Hawaii, Kansas, Oklahoma, Oregon, Rhode Island and Washington, retain that provision in their trade secrets acts. Washington is the only one of those states to modify the language, providing that "[i]f 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." Still, that change does not deviate significantly from the UTSA provision.

TIME OF TAKING EFFECT

Under the 1979 Act, the time of taking effect provision states "[t]his Act takes effect on —, and does not apply to misappropriation occurring prior to the effective date." The 1985 Act provides that "[t]his [Act] takes effect on —, and does not apply to misappropriation occurring prior to the effective date. With respect to a continuing misappropriation that began prior to the effective date, the
[Act] does not apply to the continuing misappropriation that occurs after the effective date." 324 Only California, the District of Columbia, Kansas, Illinois, Indiana, Nebraska, Nevada, Oklahoma, Oregon, Rhode Island, South Dakota, Utah, Virginia, West Virginia and Washington enacted one of the forms of this provision. California, the District of Columbia, Indiana, Kansas, Nebraska, Nevada, Oklahoma, Virginia and West Virginia all made modifications to the provision. Reversing the addition of the 1985 amendment regarding continuing misappropriation, the California statute provides that the provisions of the Act apply "to the part of the misappropriation occurring on or after that date [the date the Act took effect] unless the appropriation was not a misappropriation under the law in effect before the operative date of this title." 325 The Indiana legislature adopted a similar section as that of California. 326 The District of Columbia, Kansas, Nebraska, Nevada, Oklahoma, Virginia and West Virginia statutory provisions made various language modifications which did not impact upon the meaning of the provision. 327

CONCLUSION

The success of a company hinges, in part, upon ownership and control of its assets, such as trade secrets. This is particularly so in the United States because our country emphasizes industrial technology and service industries. The need for a precise, workable law is growing, as many industries are becoming increasingly vulnerable to the misappropriation of their trade secrets. This is due, at least in

324. Id.
327. The District of Columbia provision reads "[t]his chapter does not apply to misappropriation occurring prior to March 16, 1989, the chapter does not apply to the continuing misappropriation that occurs after March 16, 1989. D.C. CODE ANN. § 48-509 (Supp. 1989). The Kansas legislature changed the provision to "[t]his act does not apply to misappropriation occurring prior to the effective date." KAN. STAT. ANN. § 60-3330 (1983). The Nebraska legislature changed the first sentence to "[t]he Trade Secrets Act shall not apply to any misappropriation occurring prior to July 9, 1988." NEB. REV. STAT. § 87-507 (Supp. 1988). In the second sentence Nebraska statute changed "does not apply" to "shall not apply." Id. The Nevada provision states that "[t]his chapter does not apply to a misappropriation that occurred before July 1, 1987, or to a misappropriation that began before and continues after July 1, 1987." Nev. REV. STAT. § 600A.100 (1987). The Oklahoma statute provides that:

[t]he Uniform Trade Secrets Act shall not be construed to apply: 1. to a misappropriation occurring prior to the effective date of this act; or 2. with respect to a continuing misappropriation that began prior to the effective date of this act, to the continuing misappropriation that occurs after the effective date of this act.

part, to advances in telecommunications, increased employee mobility, Pacific Rim competition, and the lack of applicable law and clear ethical guidelines. As a result of the growing significance of technology-based industries and the increased vulnerability of trade secrets, the need to strengthen protection of trade secrets takes on greater importance.

Though there are significant variations among the states, most states, thus far, have followed the thrust of the Uniform Trade Secret Act. However, the result is far from uniform, due to the differences between the original and amended versions, as adopted, and the multitude of changes made by the individual states. Some states have significantly changed the language and applicability of the act. Also, as of early 1990, eighteen states have not enacted any version of the UTSA, though some of those states have incorporated various types of trade secret law protection through case law and piecemeal legislation. The result is a lack of substantial agreement among the states concerning trade secret protection. The UTSA has helped to clarify and unify the law, but considerable improvement can still be made.

Lack of uniformity among state trade secret laws can cause difficulty for businesses with multistate operations. It may also be less than optimal for domestic companies competing internationally and for foreign companies doing business in the United States. Without clear, comprehensive and uniform protection, businesses may find that the legal protections against misappropriation have limited utility. Arguably, differing state statutes suggest that state legislatures and state intellectual property organizations are not satisfied with the UTSA in its present format. Revision may be necessary to provide a more generally acceptable statute. Ambiguities may need to be clarified, especially where the judiciary is in disagreement. Loopholes and gaps in coverage, which become apparent, may need to be closed. At a minimum, greater efforts should be expended by the intellectual property community, at this time, to ensure that states follow through on consideration and enactment of the current version of the Uniform Trade Secrets Act. Problems with UTSA provisions, and differing state provisions, in specific applications, should be

328. See Borgman, The Adoption of the Uniform Trade Secrets Act: How Uniform is Uniform?, 27 IDEA 73, 118 (1986), which concludes, upon a review of twelve state adoptions, that “the substance of the Act remains uniform throughout the adopting states.” However, a number of state enactments subsequent to this article make significant departures. Additionally, Borgman does not consider North Carolina, as it technically is not a UTSA enactment. Id.

329. For example, Georgia recently enacted a trade secret definition that partially tracts the definition found in the UTSA. GA. CODE ANN. § 10-1-760 (Supp. 1989).
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monitored. Hopefully, the Act can be improved further, and greater uniformity can be achieved. In the alternative, consideration should be given to a federal statute to provide uniformity and clarity to trade secret protection.330

APPENDIX

UNIFORM TRADE SECRETS AMENDED (1985)

1. Definitions.

As used in this [Act], unless the context requires otherwise:

(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: (i) 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 (ii) 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 [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: (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.

§ 2. Injunctive Relief.

(a) 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.

(b) 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.

(c) In appropriate circumstances, affirmative acts to protect a trade secret may be compelled by court order.

§ 3. Damages.

(a) 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.

(b) If willful and malicious misappropriation exists, the court may award exemplary damages in an amount not exceeding twice any award made under subsection (a).

§ 4. Attorney's Fees.

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

§ 5. Preservation of Secrecy.

In an action under this [Act], 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.


An action for misappropriation must be brought within 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.

§ 7. Effect on Other Law.

(a) Except as provided in subsection (b), this [Act] displaces con-
flicting tort, restitutionary, and other law of this State providing civil
remedies for misappropriation of a trade secret.

(b) This [Act] does not affect: (1) contractual remedies, whether
or not based upon misappropriation of a trade secret; (2) other civil
remedies that are not based upon misappropriation of a trade secret;
or (3) criminal remedies, whether or not based upon misappropria-
tion of a trade secret.

§ 8. Uniformity of Application and Construction.

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

§ 9. Short Title.

This [Act] may be cited as the Uniform Trade Secrets Act.

§ 10. Severability.

If any provision of this [Act] or its application to any person or
circumstances is held invalid, the invalidity does not affect other pro-
visions or applications of the [Act] which can be given effect without
the invalid provision or application, and to this end the provisions of
the [Act] are severable.

§ 11. Time of Taking Effect.

This [Act] takes effect on —, and does not apply to misappropria-
tion occurring prior to the effective date. With respect to a continu-
ing misappropriation that began prior to the effective date, the [Act]
also does not apply to the continuing misappropriation that occurs af-
after the effective date.

§ 12. Repeal.

The following Acts and parts of Acts are repealed:

(1)

(2)

(3)