1-1-1980

The Uniform Trade Secrets Act

Ramon A. Klitzke
Marquette University Law School, ramon.klitzke@marquette.edu

Follow this and additional works at: http://scholarship.law.marquette.edu/facpub

Part of the Law Commons
Publication Information

Repository Citation
http://scholarship.law.marquette.edu/facpub/39

This Article is brought to you for free and open access by the Faculty Scholarship at Marquette Law Scholarly Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.
THE UNIFORM TRADE SECRETS ACT

RAMON A. KLITZKE*

In an increasingly complex technological society, the protection of the commercially valuable ideas that fuel such a society is an economic necessity. The law presently protects such ideas by two methods, each important in its own sphere. The first method is the federal patent law, effectuated through a uniform statutory scheme. As an alternative to patent protection, the law provides a second method for protecting such ideas: trade secret law. Unlike the patent law, the law of trade secrets is a common law development, hence its principles vary from jurisdiction to jurisdiction.

In an effort to harmonize and clarify the law of trade secrets as it has evolved in different states, the Commissioners on Uniform State Laws adopted the Uniform Trade Secrets Act at their 1979 Annual Conference. This article will examine the provisions of the Act, compare the Act with the common law of trade secrets, and note potential problems in the application of select provisions of the Act.

I. INTRODUCTION: THE COMMON LAW OF TRADE SECRETS

Before examining the factors indicating the need for a uniform act codifying trade secret law and the specific provisions of the Act itself, the outlines of trade secret law must be sketched. The fundamental right created by trade secret law is the owner's entitlement to relief for harm, or potential harm, caused when his trade secret is taken by misappropriation, that is, improper means. Several questions arise in de-

* B.S., Illinois Institute of Technology; J.D., Indiana University; LL.M., New York University; Professor of Law, Marquette University Law School. Admitted to practice before U.S. Patent and Trademark Office; Wisconsin, Texas and New York Bars; Reporter, Section on Government and Administrative Law, Wisconsin State Bar. The author gratefully acknowledges the invaluable editing of Attorney James R. Custin of Milwaukee.


terminating whether "information" is afforded legal protection under this doctrine: (1) Is the information a trade secret? (2) Was the information misappropriated? and (3) What remedies are available?

The answer to the first question depends upon the definition of the term, "trade secret." The definition most often used by courts is that contained in a comment to the Restatement of Torts, section 757, where it was noted that "[a] trade secret may consist of 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."

While this definition of a trade secret is quite broad, its scope has been narrowed by at least three prerequisites. First, protection of information under section 757 is limited to that information which is used continuously in the operation of the business. Thus, information relating to a single or transitory event, such as a secret bid, or financial data of a nonrecurring nature, falls outside of the protection of section 757. Second, although information need not meet the patent law standards of novelty and nonobviousness to warrant trade secret protection, it must at least amount to a discovery. Such a discovery could be of any idea not generally known in the trade secret owner's trade or business.

A third prerequisite under the definition of a trade secret is that its owner must exercise reasonable diligence in preventing the unintended disclosure of the secret. Absolute secrecy is not required; only substantial secrecy is necessary.

5. Id.
9. Elaborating on this principle, one court noted:
A certain amount of publicity is unavoidable in any manufactory, but an un-
In determining whether a trade secret owner has exercised reasonable diligence in protecting the information's secrecy, courts consider a number of factors. Most important among these factors are the amount of time, expense, effort and risk involved in keeping the information secret;\(^1\) the value of the information to the owner and to his competitors;\(^11\) and the specific measures taken to protect the secrets from disclosure.\(^12\)

The second critical issue which arises in determining whether trade secret protection exists is whether the information was misappropriated from its owner. This is the graver-men of a trade secret action because, unlike patented inventions, trade secrets are protected, generally, against one who has acquired the secret through improper means.\(^13\) Improper means include gaining knowledge of the information through fraud,\(^14\) use of surreptitious means,\(^15\) or participation in a locked door is not an invitation to the passerby or to the servant of the household to help himself. Neither does a manufacturer abandon his property in a design by delivering it or a copy to another for a restricted purpose, nor by a limited publication. His property rights will be protected in such cases, and he will be protected against a breach of trust, confidence or contract, and, especially, will he be protected against a breach of the confidence existing between employer and employe.


11. G. ALEXANDER, COMMERCIAL TORTS 206 (1973); RESTATEMENT OF TORTS, Explanatory Notes § 757, comment b at 5 (1939).


wrongful conspiracy. In addition to recognizing liability for discovery of the secret by improper means, the Restatement of Torts catalogued three other situations in which liability would be incurred. The Restatement provided that:

One who discloses or uses another's trade secret without a privilege to do so, is liable to the other if . . .
(b) His disclosure or use constitutes a breach of confidence reposed in him by the other in disclosing the secret to him; or
(c) He learned the secret from a third person with notice of the facts that it was a secret and that the third person discovered it by improper means or that the third person's disclosure of it was otherwise a breach of his duty to the other; or
(d) He learned the secret with notice of the facts that it was a secret and that its disclosure was made to him by mistake.

Therefore, in addition to recognizing the misappropriation of a trade secret by tortious conduct or by use of a trade secret with knowledge that it was gained by another by tortious conduct, misappropriation occurs when there is a breach of a confidential relationship. Where the defendant breaches a duty of confidence himself, or uses a secret with knowledge that it was acquired by such a breach, liability will lie.

Once a trade secret owner determines that the trade secret was misappropriated by another, the third major issue in the substantive law of trade secrets arises, specifically, what remedies are available. While the remedies available in any given case are dependent upon its facts, the general rule is that a

(1967).
17. RESTATEMENT OF TORTS § 757(a) (1939) provided that "one who discloses or uses another's trade secret without a privilege to do so, is liable to the other if (a) he discovered the secret by improper means . . . ."
18. RESTATEMENT OF TORTS § 757 (1939).
19. RESTATEMENT OF TORTS, Explanatory Notes § 757, comment e at 10 (1939) provides that:
One who has a right under the rule stated in this section is entitled to a remedy or remedies appropriate under the circumstances. He may recover damages for past harm, or be granted an injunction against future harm by disclosure or adverse use, or be granted an accounting of the wrongdoer's profits, or have the physical things embodying the secret, such as designs, patterns, and so forth,
plaintiff may pray for both injunctive relief and damages in
the complaint, and either or both forms of relief may be
awarded.20

Injunctive relief will, of course, vary with the nature of the
harm or threatened harm in each case. However, an aggrieved
party may be granted an injunction against future harm
caused by either the secret's disclosure or by its use.21 Fur-
thermore, an injunction ordering the return of "physical
things embodying the secret, such as designs, patterns, and so
forth" may be appropriate.22

Monetary relief for trade secret misappropriation may in-
clude the plaintiff's damages,23 an accounting of the defen-
dant's profits,24 reasonable royalties,25 punitive damages,26
and reasonable attorney's fees.27 While it is generally recognized

surrendered by the wrongdoer for destruction. Moreover, he may have two or
more of these remedies in the same action if the court is competent to adminis-
ter them.

20. K-2 Ski Co. v. Head Ski Co., 506 F.2d 471 (9th Cir. 1974); Restatement of
Torts, Explanatory Notes § 757, comment e at 10 (1939).
22. Id.
23. Crocan Corp. v. Sheller-Globe Corp., 385 F. Supp. 251 (N.D. Ill. 1974); De
App. 355, 224 N.W.2d 80 (1974); Restatement of Torts, Explanatory Notes § 757,
comment e at 10 (1939).
24. International Indus. v. Warren Petroleum Corp., 248 F.2d 696 (3d Cir. 1957);
Booth v. Stutz Motor Car Co., 66 F.2d 962 (7th Cir. 1928); Crocan Corp. v. Sheller-
Globe Corp., 385 F. Supp. 251 (N.D. Ill. 1974); Certified Laboratories of Tex., Inc. v.
Rubinson, 303 F. Supp. 1014 (E.D. Pa. 1969); Restatement of Torts, Explanatory Notes
§ 757, comment e at 10 (1939).
1974); Carter Prod. Inc. v. Colgate-Palmolive Co., 214 F. Supp. 383 (D. Mo. 1963);
Cal. Rptr. 829 (1968); Triangle Sheet Metal Works, Inc. v. Silver, 154 Conn. 116, 222
A.2d 220 (1966); Quad County Distrib. Co. v. Burroughs Corp., 68 Ill. App. 2d 163,
385 N.E.2d 1108 (1979); Mann v. Tatge Chemical Co., 201 Kan. 326, 440 P.2d 640
(1968). See also Jet Spray Cooler, Inc. v. Crampton, 385 N.E.2d 1349 (Mass. 1979)
(allowing trade secret tort damages up to double the amount of actual damages).
1970), aff'd sub nom. Forest Labs, Inc. v. Pillsbury Co., 452 F.2d 621 (7th Cir. 1971)
(affirmed in substance but reversed as to award of attorneys' fees); Irving Iron Works
N.Y. 1970), aff'd mem., 444 F.2d 1092 (2d Cir. 1971), where the court stated that
attorneys' fees may be awarded only where punitive damages are warranted.
that these forms of monetary relief are available in actions for misappropriation of trade secrets, historically there has been disagreement among the courts over which of the monetary remedies was most appropriate and whether the award of one form of monetary relief precluded the award of another. The court in *Telex Corp. v. International Business Machine Corp.* noted, in reviewing the cases exploring the damage issue, that “unfortunately the general law as to the proper measure of damages in a trade secrets case is far from uniform.”

The trend in recent cases, however, seems to be to allow the plaintiff to recover whatever forms of monetary relief are necessary to compensate him for his loss.

II. The Need for a Uniform Trade Secrets Act

Trade secrets law is of critical importance in protecting commercially valuable ideas that bestow competitive advantage. As such, it deserves a coherent, systematic, complete and uniform treatment as a body of law. The Uniform Act is presently the only such attempt at a systematic treatment of this area. Accordingly, it should be carefully scrutinized with a view toward its ultimate adoption.

The development of the law of trade secrets, as a creature of the common law, was greatly facilitated by the adoption of sections 757 through 759 (regarding trade secrets and trade information) of the first *Restatement of Torts* in 1939. The *Restatement* was the first attempt to enunciate the generally accepted principles of trade secrets law. Its principles became primary authority by adoption in virtually every reported case.

However, while the *Restatement* greatly contributed to the evolution of trade secrets law, two factors worked to prevent it from providing the uniformity that was essential for such a commercially significant body of law. The first factor limiting the effectiveness of the *Restatement* in providing uniformity

---

28. 510 F.2d 894 (10th Cir. 1975).
29. Id. at 930.
30. Milgrim, *Trade Secrets*, in 12 *Business Organizations* § 7.08[3] at 7-167 (1978). The law of damages in the patent area has been heavily borrowed upon in structuring remedies in trade secret litigation. Id. at 7-156.
31. See notes 4 to 31 *supra* and accompanying text for insight into the reliance placed by courts upon *Restatement* principles.
was inherent in the work itself. The *Restatement* is a description of what the American Law Institute sees as the generally accepted principles of common law. It is expositive in nature, depending upon its adoption by courts for its ultimate efficacy. Jurisdictions considering its pronouncements are free to adopt or reject them in whole or in part. While courts have relied heavily upon the *Restatement* in articulating the concepts of trade secrets law, they have interpreted the *Restatement* differently. Moreover, after adoption of the *Restatement* provisions, courts are free to reconsider and then reject them, a possibility not present with a statutory scheme.

The second factor limiting the overall effectiveness of the *Restatement* is that it treated some areas of trade secrets law inadequately, and others not at all. This required the courts to adopt their own solutions, a situation not conducive to the uniformity of trade secret law. Moreover, the second edition of the *Restatement of Torts*, published in 1979, deleted all provisions relating to trade secrets. It was the opinion of the American Law Institute that trade regulation law, of which the law of trade secrets was a part, had developed into an independent body of law no longer based primarily upon tort principles. It was therefore not appropriate to include these principles in the *Restatement of Torts, Second*. Thus, the American Law Institute has neither considered nor discussed the law of trade secrets as it has evolved since publication of the *Restatement of Torts, First*.

Just as there has not been a current analysis of the body of trade secrets law by the American Law Institute, state legislatures have failed to examine and legislate in this area. State statutory effort is usually limited to statutes imposing crimi-
nal liability for theft of trade secrets or to statutes governing dissemination of trade secrets by governmental bodies.  

The conclusion is inescapable. Trade secrets law, a branch of the law of considerable importance and one which shows signs of vitality, has been neglected. To fill this void, the Commissioners on Uniform State Laws have drafted and adopted an excellent statute. The intent was to codify the basic principles of common law trade secrets protection with some modification and to resolve issues decided differently by courts in various jurisdictions so as to promote uniformity, simplicity and fairness.

III. THE UNIFORM TRADE SECRETS ACT

A. Definitions Under the Act

The definitions section of the Uniform Trade Secrets Act delineates the substantive rights created by the Act. Therefore, this section, particularly the definitions of "trade secret" and "misappropriation," which define important parameters of the rights created by the Act, will be considered in some detail.

1. Trade Secret

The Uniform Trade Secrets Act grants the right to injunctive relief for actual or threatened misappropriation of a trade secret. In addition, a complainant may recover damages for

36. A list of such state statutes may be found in ABA SECTION ON PATENT, TRADEMARK & COPYRIGHT LAW, 1976 Committee Reports, at 212-16. See also Milgrim, Trade Secrets, in 12A BUSINESS ORGANIZATIONS Appendices B & D (1978).

37. A number of reasons may be found for this neglect. First, trade secret owners are frequently unaware that they have a legally enforceable right as against those who misappropriate their trade secrets. Second, even if this right is recognized by a trade secret owner, he may desire to forego further publication of the secret rather than pursue his cause of action, a course which would likely require additional disclosures. Third, some attorneys may not discuss the need for legal protection of trade secrets or even the manner in which protection is afforded trade secrets with clients. This problem is compounded because the parameters of trade secret protection generally defy precise identification.


40. The substantive right created by the Act is set forth in the relief sections of the Act. See UNIFORM TRADE SECRETS ACT §§ 2 & 3 (1979). The right given is protection against misappropriation. Id.

41. UNIFORM TRADE SECRETS ACT § 2 (1979).
any loss sustained by virtue of the misappropriation of its trade secret. 42

The Act provides a broad definition of a trade secret. The term "trade secret" is defined by the Act as follows:

"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. 43

Clearly, there are three essential elements to this definition. The trade secret must (1) be information, (2) have actual or potential “independent economic value” stemming from its secrecy and (3) have been the object of reasonable efforts designed to maintain its secrecy.

Although the first Restatement of Torts did not, as noted above, provide a black letter definition of a trade secret, it did provide a concept which served as a forerunner of the Act’s definition. In its comments to section 757, the Restatement suggests that a trade secret “may consist of any formula, pattern, device or compilation of information” which is used in one’s business. 44 The comments also suggest that a formula for a chemical compound, a manufacturing process or a method of treating or preserving materials, a machine pattern or other such device, or a customer list may constitute a trade secret. Thus, while the Restatement did not, even in its comments, define a trade secret, it did tacitly recognize, by its choice of examples, that a trade secret is information. 45 This is

42. Uniform Trade Secrets Act § 3 (1979).
44. Restatement of Torts, Explanatory Notes § 757, comment b at 5 (1939). See also text accompanying note 5 supra.
45. Instead of providing a definition of a trade secret, the Restatement established a six-point analytical framework for determining the existence of a trade secret. The six factors to be considered were:
(1) the extent to which the information is known outside of the business;
(2) the extent to which it is known by employees and others involved in the business;
(3) the extent of the measures taken to guard the secrecy of the information;
obviously the source of the Act's definition.

In addition to the examples of trade secrets that the Act borrowed from the Restatement, the Act adds as examples, "method," "program" and "technique." Because the Act defines a trade secret as information, this list of examples was not meant to be all-inclusive. However, it would seem to have been advisable to include "drawing" in this list. A substantial number of trade secrets are expressed in technical drawings and diagrams. Courts will undoubtedly construe the definition of a trade secret as broad enough to include these forms. Nevertheless, the inclusion of "drawing" in the laundry list of examples would remove the question entirely.

It is interesting to note that the Restatement of Torts provided not only for the protection of trade secrets, but also for protection of all business information obtained by improper means. The Restatement provided that: "One who, for the purpose of advancing a rival business interest procures by improper means information about another's business is liable to the other for the harm caused by his possession, disclosure or use of the information."46

Clearly, section 759 is broad enough to apply whenever information is improperly procured from another, whether or not the information constitutes a trade secret.47 For example, section 759 protects secret bids on a contract offering or secret security investments made or contemplated, even though these types of information are explicitly recognized in Restatement comments as outside of the scope of section 757.48

However, the value of section 759 to one seeking to protect information outside the scope of section 757 is diminished by contradictions appearing in the comments to section 759 which relate to its scope. Comment (b) to section 759 first notes that all business information falls within the parameters

---

(4) the amount of effort or money expended in developing the information;
(5) the value of the information to the owner and to his competitors; and
(6) the ease or difficulty with which the information could be acquired or duplicated by others.

Restatement of Torts, Explanatory Notes § 757, comment b at 5 (1939).
46. Restatement of Torts § 759 (1939).
47. Restatement of Torts, Explanatory Notes § 759, comment b at 23 (1939).
of the section, "whether or not it constitutes a trade secret." Of the section, "whether or not it constitutes a trade secret." Later in the same comment, the scope of the section is said to be restricted to information of a secret or confidential nature.

Obviously, the information must be secret to qualify for protection under section 757, unless the section 757 definition was more restrictive. If the same definitional test were applied to both sections, each would protect the same kinds of information. Unfortunately, the Restatement did not explicitly treat this issue. Instead, comments to section 759 suggest that the significant difference in the requirements of secrecy revolves about the trade secret requirement that the secret be used continuously in the operation of the owner’s business.

Generally, where courts have used section 759 in their decisions, the underlying fact situations lend themselves to the application of section 757 as well. However, some courts have used section 759 to impose liability when the information procured was not of the usual “trade secret” type. Thus, the provision has elicited some confusion in the courts.

The Uniform Trade Secrets Act eliminates this confusion by including “business information,” as defined in the Restatement, in its broad definition of a trade secret as information. As a result, “business information” is explicitly subjected to the same standards of secrecy, etc., as is information used continuously in a trade or business.

---

49. RESTATEMENT OF TORTS, Explanatory Notes § 759, comment b at 23 (1939).
50. Id. at 24.
51. Id.
54. UNIFORM TRADE SECRETS ACT § 1(4) (1979).
55. UNIFORM TRADE SECRETS ACT, 14 U.L.A. 543 (Commissioners’ comments to § 1) (1980).
Thus, the Act has defined the term "trade secret" by phrasing it in terms of the generic concept of "information" and thereafter providing contours to the scope of relief by adding additional requirements. This approach eliminates problems associated with the laundry list approach to defining a concept. Furthermore, this definition, which combines the notions of "trade secret" and "business information" as a single concept, eliminates problems which arose by virtue of the Restatement's division of the concepts.

While the Act initially creates broad trade secrets protection by defining a trade secret as "information," two provisions of the definition restrict the Act's reach. First, the information must have actual or potential "independent economic value" stemming from its secrecy. Second, the information must be the object of reasonable efforts designed to maintain its secrecy.

The requirement that information have "independent economic value" represents a departure from the position enunciated in the Restatement of Torts. As noted earlier, the Restatement distinguished between trade secrets and business information in that the latter was not used continuously in the operation of the owner's business.\(^{56}\)

The Uniform Act rejects this approach in two ways. First, a trade secret is defined in a generic sense as "information," and is thereafter subject to certain modifications.\(^{57}\) Second, the Act allows protection for information having potential, as well as actual, economic value.\(^{58}\) The Act, therefore, extends protection to valuable information not continuously used in the trade or business. Thus, the Act would provide trade secret protection for "single event" information, such as a current status report, and for information of future value, although not currently in use because of lack of capital or opportunity.

The original draft of the Act approved by the National Conference of Commissioners on Uniform State Laws defined a trade secret as information that derives independent actual or potential "commercial value" from not being generally

56. Restatement of Torts, Explanatory Notes § 757, comment b at 5 (1939).
58. Id. § 1(4)(i); 14 U.L.A. 543 (Commissioners' comments to § 1) (1980).
The final draft substituted the words "economic value" for the words "commercial value." Interestingly enough, the comments to the Act do not explain the significance of this change, and, instead, create the impression that the two terms are synonymous.

However, "economic value" is arguably a much broader term than "commercial value." A secret could have economic value without having commercial value. Information regarding a future manufacturing process may have no present commercial value and yet have economic value, as where time and effort have been expended in its development. Moreover, the term "economic value" is elastic enough to include "negative information," that is, information that a certain process or formula will not work. It is unclear whether such information could be said to have commercial value. Therefore, it would seem that the drafters opted for providing the broadest protection possible consistent with the underlying principles of trade secrets law.

Not only must information have economic value to constitute a trade secret, but it must also derive its economic value from not being generally known by persons who can obtain economic value from its use or disclosure.\footnote{61} In other words, the value of the information must arise from its not being generally known to, or readily ascertainable by, others who can derive economic gain from such knowledge. Thus, information generally known in an industry cannot be a trade secret. Similarly, information developed by independent discovery or other "proper means" is outside of trade secret protection, as between the parties with such knowledge. Therefore, the original trade secret owner has no right to prevent use of the information by the subsequent discoverer.\footnote{62}


\footnote{60} \textit{Uniform Trade Secrets Act} § 1(4)(i) (1979).

\footnote{61} Id.

\footnote{62} This is a major difference from the right granted to an inventor under the Patent Act. A patentee has the exclusive right to make, use and sell the invention for 17 years, even as against one who later conceived the invention independently. The limited right of the trade secret owner is, on the other hand, somewhat analogous to the rights of a copyright owner. Independent subsequent creation of a copyrighted work by another does not result in liability for copyright infringement if there has been no access to the copyrighted work.
Whether information is "generally known" is a question of fact not always susceptible to easy resolution. For example, if the information is known to a small number of competitors and there are a large number of competitors unaware of it, each business competitor possessing the information may enjoy protection as against those who do not possess it. However, as an ever increasing number of competitors gain knowledge of the information by independent discovery or by other proper means, the question of "general knowledge" becomes more difficult to resolve. The comments to section 1 of the Uniform Act, not suprisingly, do not provide solid guidelines for resolving this issue. They merely note that there will be no trade secret if "the principal person who can obtain economic benefit from information is aware of it . . . ."63 Obviously this issue cannot be resolved by drawing an arbitrary line representing what is or is not generally known. Not surprisingly, this problem was present under the language of the Restatement as well.

Another difficult question of fact under the Act which, incidentally, was also present under the Restatement, is whether an alleged trade secret was "readily ascertainable" by the alleged misappropriator. This requirement of the Act makes it necessary for a court to determine whether the information to be protected was available without difficulty from sources other than the owner of the trade secret.

The cases provide little in the way of generally applicable or sound theoretical principles to resolve this problem. For example, in Abbott Laboratories v. Norse Chemical Corp.,64 Abbott's confidential technology reputedly achieved improved purity, yield and speed in the basic production process of cyclamates. Abbott alleged that its process involved at least nine vital elements that were collectively eligible for trade secret protection. The court attacked the trade secret status of each element of the process, finding that each step, in turn, was previously known to chemical engineers, was not used by the defendant, or was disclosed in foreign or U.S. patents. With great pains, the trial court carefully explained how each

63. Uniform Trade Secrets Act, 14 U.L.A. 543 (Commissioners' comments to § 1) (1980).
64. 33 Wis. 2d 445, 147 N.W.2d 529 (1967).
step had either been anticipated in the prior part or had been avoided by the defendant's use of other means. On appeal, the Wisconsin Supreme Court agreed with this approach and held that no trade secret could exist. The detailed technical analysis made by the trial court in Abbott seems to place undue emphasis on the novelty of the trade secret. Novelty is not a critical characteristic of a trade secret. Instead, the critical question should be the ease with which the information could have been ascertained from sources other than the trade secret owner.

In contrast to the Wisconsin approach to the "availability" issue is the approach of the Seventh Circuit in Forest Labs, Inc. v. Pillsbury Co. Forest Labs found that the shelf life of packaged effervescent sweetener tablets could be lengthened by tempering them in a room having 40 percent or less relative humidity for a period of 24 to 48 hours. Pillsbury then began using a similar process. However, Pillsbury attempted to prove, as defenses, that its tempering was accomplished under different conditions and that each step in Forest Labs' procedure was well known in the trade. The court, applying Wisconsin law, cited Abbott only to show that Wisconsin adopted the rule of the Restatement. The court did not use the Abbott "availability" analysis, nor did it attempt to distinguish Abbott. Instead, it relied heavily on cases from other federal courts in holding that a trade secret need not be essentially new, novel or unique to warrant protection, and further, that a user of another's protectable trade secret is subject to liability even if he has modified or improved the trade

65. The majority rule is that the state of the prior part is not relevant to trade secret determination. See Milgrim, Trade Secrets, in 12 Business Organizations § 2.08[3] at 2-90 (1978); Restatement of Torts, Explanatory Notes § 757, comment b at 6-7 (1939).
66. 33 Wis. 2d 445, 465, 147 N.W.2d 529, 539 (1967).
68. 452 F.2d 621 (7th Cir. 1971).
69. Id. at 623.
70. Id. at 624-25.
72. Forest Labs, Inc. v. Pillsbury Co., 452 F.2d 621, 623 (7th Cir. 1971).
Thus, the problem of deciding whether information is “readily ascertainable” remains a difficult question for the trier of fact. Furthermore, the Act fails to provide any guidelines for making this determination. Consequently, this issue will remain a source of argument.

In addition to the requirement that the information derive independent economic value from not being generally known, the Act demands that it be the object of reasonable efforts designed to maintain its secrecy. This concept is not new. The Restatement of Torts recognized the need for the owner of a trade secret to take reasonable steps to protect the secrecy of the information. The comments to section 757 note that, in establishing whether given information is a trade secret, one must consider “the extent of measures taken by him [the owner] to guard the secrecy of the information . . . .” The comments further recognize this need by noting that a “substantial element of secrecy must exist, so that, except by the use of improper means, there would be difficulty in acquiring the information.” The Act, however, formalizes the requirement of secrecy to a much greater extent than did the Restatement.

The factual issue here is the determination of what constitutes reasonable efforts designed to protect the secrecy of the information. The Act requires “efforts that are reasonable under the circumstances to maintain its secrecy.” The comments to the Act indicate that “extreme and unduly expensive procedures” need not be taken to protect trade secrets against “flagrant industrial espionage.”

The leading case dealing with the extent of the efforts necessary to protect a trade secret is E.I. du Pont de Nemours &

73. Id. at 624-25.
75. Restatement of Torts, Explanatory Notes § 757, comment b at 6 (1939). This secrecy consideration is one of six factors to be considered in determining if given information constitutes a trade secret. The others are set forth in note 45 supra.
76. Id.
78. Uniform Trade Secrets Act, 14 U.L.A. 543 (Commissioners’ comments to § 1) (1980).
Co. v. Christopher. During du Pont's construction of a chemical plant at Beaumont, Texas, an undisclosed third party hired the defendants to take aerial photographs of the plant. A skilled chemical engineer could, by examining the photographs, deduce du Pont's highly secret process for making methanol, because no protective roof had as yet been erected over the machinery in the plant. The court held that du Pont was entitled to trade secret protection, notwithstanding the complete visibility of the trade secret from the air:

To require du Pont to put a roof over the unfinished plant to guard its secret would impose an enormous expense to prevent nothing more than a school boy's trick. We introduce here no new or radical ethic since our ethos has never given moral sanction to piracy.

Furthermore, the court recognized that although there was no trespass or other illegal conduct, and no breach of confidential relationship, aerial photography of the plant was an improper means constituting a misappropriation. This is a fair result. The expense or difficulty of shielding the trade secret from all outside observation should correctly weigh heavily in deciding whether reasonable efforts to maintain secrecy have been expended.

The citation of the Christopher case by the Commissioners underscores their intent to allow otherwise lawful conduct to constitute improper means and to allow the courts to consider all relevant circumstances in determining what reasonable efforts are in a given case. Likewise, it underscores the notion that the Act does not here depart from accepted common law principles.

2. Improper Means

The Uniform Trade Secrets Act provides no legal remedy unless a trade secret has been misappropriated, that is, acquired by "improper means." The term "improper means" is a basic building block upon which the framework of the Act depends.

80. Id. at 1016-17.
81. Id. at 1014-15.
The concept of "improper means" is founded upon one of the broadly stated policies behind trade secret law, that being "the maintenance of standards of commercial ethics." By invoking ethical considerations when discussing conduct that constitutes "improper means," the Commissioners suggest that "improper means" cannot be precisely defined, but must be determined in each case by applying prevailing notions of commercial fair play and integrity.

The Act defines "improper means" to include "theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means . . . ." This definition of "improper means" was not intended to be exclusive because "[a] complete catalogue of improper means is not possible . . . ." The full scope and meaning of the term "improper means" is therefore found in other sources. The obvious starting point is the Restatement of Torts.

"Improper means" is a key concept in section 757 of the Restatement of Torts. The Uniform Law Commissioners were undoubtedly inspired by the Restatement to transport this term verbatim into the Act. "Improper means," as the concept developed in the cases, is broader than the concept of "illegal conduct" because an acquisition of a trade secret can be improper without violating any criminal or tort standards of conduct. For example, in E.I. du Pont de Nemours & Co. v. Christopher, discussed earlier, the aerial photography over the plaintiff's chemical plant, in and of itself, was neither tortious nor otherwise unlawful. It did, however, constitute "improper means" under the Restatement provisions.

Some of the law that developed under the Restatement is summarized by the Uniform Law Commissioners in the comment following the definitions section of the Act. The com-

84. Uniform Trade Secrets Act, 14 U.L.A. 542 (Commissioners' comments to § 1) (1980).
85. 431 F.2d 1012 (5th Cir.), cert. denied, 400 U.S. 1024 (1970).
86. See text accompanying notes 79-81 supra.
87. 431 F.2d 1012, 1014, 1015 (5th Cir. 1970).
88. Id. at 1015.
ment specifically excludes several types of conduct from the category of "improper means." Among the proper means approved by the Commissioners are discovery by independent invention or reverse engineering, observation of an item in public use, discovery under license, and derivation from published literature.89

3. Misappropriation

There is no legal remedy under the Uniform Trade Secrets Act unless there has been a "misappropriation." Misappropriations divide into two general categories: those involving the taking of a trade secret and those involving the voluntary disclosure of a trade secret. The key element of most misappropriations under the Act is the acquisition of a secret by "improper means."90

"Misappropriation" includes several distinct species of conduct. The Act defines "misappropriation" as follows:

"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;
(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 in his position, knew or had reason to know that it was a trade secret and that

89. Uniform Trade Secrets Act, 14 U.L.A. 542 (Commissioners' comments to § 1) (1980).
knowledge of it had been acquired by accident or mistake.\textsuperscript{91}

The Uniform Trade Secrets Act's approach to the concept of a misappropriation represents a simplification of its common law counterpart. At common law, misappropriation of a trade secret sounded in either tort or contract, depending on whether the "improper means" was an intentional tort, such as theft, bribery, misrepresentation or espionage, or was a breach of a contractually-created duty to maintain secrecy.\textsuperscript{92} Different approaches attached to tort and contract actions for misappropriations.\textsuperscript{93} In tortious misappropriation cases, the duty that the defendant breached was imposed by law. In a contractual misappropriation, the defendant had willingly accepted the duty. The underlying distinction between the causes of action led courts to focus on different issues as the gravamen of the actions.

An examination of the Act shows that the distinction between tortious and contractual misappropriation has been eliminated.\textsuperscript{94} While a misappropriation may still stem from the breach of a confidential relationship or from tortious or criminal misconduct, the underlying cause of action assumes a character independent of the conduct out of which it has arisen. This change eliminates many statute of limitation problems\textsuperscript{95} and damage questions.\textsuperscript{96}

Misappropriations involving acquisitions are of two basic types. The first involves the acquisition of a trade secret by

\begin{itemize}
\item \textsuperscript{91} Id.
\item \textsuperscript{92} E. I. du Pont de Nemours Powder Co. v. Masland, 244 U.S. 100 (1917); Northern Petrochemical Co. v. Tomlinson, 484 F.2d 1057 (7th Cir. 1973); \textit{Restatement of Torts}, Explanatory Notes § 757, comment a at 4 (1939).
\item \textsuperscript{93} Two issues treated differently under each cause of action will suffice to illustrate the differences. The first issue is the statute of limitations applicable to the actions brought under each theory. The statute of limitations for a tort action may differ in length from the statute of limitations for a contract action. See notes 151-56 \textit{infra} and accompanying text for a discussion of this topic.
\item The second illustrative issue is that of the availability of punitive damages under each theory. In general, punitive damages in tort cases are available where the defendant's behavior can be characterized as outrageous, willful and in reckless disregard of the plaintiff's rights. In contract actions, however, courts are more reluctant to grant punitive damages.
\item \textsuperscript{94} \textit{Uniform Trade Secrets Act} § 1(2) (1979).
\item \textsuperscript{95} See notes 151-67 \textit{infra} and accompanying text.
\item \textsuperscript{96} See notes 128-35 \textit{infra} and accompanying text.
\end{itemize}
one who has knowledge, or who should have knowledge, that the information was misappropriated from another. The second involves acquisition of the trade secret by accident or mistake.

Trade secret protection under the Uniform Act is available against a defendant who received the information from or through a third person who, in turn, acquired it by improper means. To constitute misappropriation, however, the defendant deriving a trade secret from a third person must know or have reason to know the relevant facts of the third person's misappropriation. The Commissioners' comments fail to suggest standards for the requisite notice for such knowledge but, because the Act tracks the Restatement at this point, the Restatement comments will no doubt continue to guide the courts in this regard.

Comment 1 to Restatement section 757 suggests that notice exists if, "a reasonable man would infer the facts in question," or "would be put on inquiry and an inquiry pursued with reasonable intelligence and diligence would disclose the facts." Illustration 3 in comment 1 covers the fact situation where A is offered the purchase of manufacturing information by C, and A knows that it is the trade secret of B, who is A's competitor. Even though A does not know how C acquired the secret, A is put on notice that the acquisition would be improper. Illustration 4 in comment 1 is where A knows that his competitors have several trade secrets, but he does not know that a process being offered to him for sale by C is a trade secret. A knows that C is a trusted employee of A's competitor, B, and that the process is valuable to both A and B. A would, under these facts, have notice that the process is B's trade secret if the process is novel to A.

An example of court treatment of the notice issue is RTE
Initially, RTE's 200-ampere connector for use in underground electrical systems was unquestionably a trade secret. RTE found that its product could be improved by employing inertia welding (a friction method) in its production, and sent a drawing of the connector to the defendant Coatings for the purpose of having Coatings weld RTE's connectors. RTE unfortunately failed to warn Coatings that the drawing was confidential. Coatings was first given express notice of confidentiality four months after the original drawings were sent, when RTE placed a production order with Coatings. The purchase orders for the weldments had printed paragraphs on their reverse sides which set forth an agreement that all drawings and other information were confidential and not to be disclosed. The connectors actually constituted the trade secret, with or without the inertia welding.

In refusing any relief for RTE, the court held that a confidential relationship could not be created by implication when parties were dealing at arms length. Although the court relied heavily upon the Restatement, it ignored the fact that Coatings should have had reason to believe that the connector was a trade secret as much as two years before RTE's weldment order because Coatings had produced several inertia-welded connectors for RTE's competitors. Had the Uniform Trade Secrets Act applied, Coatings would have, under section 1(2)(ii)(B)(II), acquired the trade secret "under circumstances giving rise to a duty to maintain its secrecy or limit its use," and a different result would have been obtained.

The RTE case is to be contrasted with the approach taken in Forest Labs, Inc. v. Pillsbury. Defendant Pillsbury purchased the assets of a corporation which had received a trade secret from Forest Labs on a confidential basis. Pillsbury used the secret without the permission of Forest Labs and without complying with obligations to Forest Labs that the selling cor-

105. 84 Wis. 2d 105, 267 N.W.2d 226 (1978).
106. Id. at 111, 267 N.W.2d at 229.
107. Id. at 117, 267 N.W.2d at 232.
108. Id. at 117-18, 267 N.W.2d at 232. The court also held that Coatings independently developed its own specifications for its electrical connector. Id. at 122, 267 N.W.2d at 232.
109. 452 F.2d 621 (7th Cir. 1971).
poration had originally assumed. Although the court held that the mere purchase of the assets of a corporation does not, by itself, obligate the buyer to comply with the terms of the prior confidential relationship, it held that Pillsbury had acquired knowledge of the confidentiality of the prior disclosure after its purchase and before using the trade secret. This was sufficient to create a duty not to disclose the information under section 758(b) of the Restatement. A similar result would follow from section 1(2)(ii)(B)(III) of the Uniform Act.

The Uniform Act also protects an owner's trade secret which was acquired from him "by accident or mistake," except where the defendant materially changed his position without knowledge or reason to know that the information was acquired by accident or mistake. Accidental disclosure which may result in misappropriation under section 1(2)(ii)(C) must not result from a failure to use reasonable efforts to protect its secrecy. The Uniform Act is here consistent with section 758 of the Restatement, which also imposed no liability for an innocent reception of a trade secret without notice.

The comment to section 758 explains the reason for this immunity:

The mere use of another's trade secret is not of itself tortious. It is the improper means involved in his discovery of the secret that makes its use wrongful. If these means disclose no misconduct on his own part, but only mistake or misconduct by others in disclosing the secret, he is not chargeable with that mistake or misconduct unless he has notice of it.

If a person obtains certain information and subsequently learns that it is really the trade secret of another, both the Uniform Act and the Restatement impose liability on the appropriator for any use or disclosure thereafter. However, the

110. Id. at 627.
111. Id. at 625.
112. Id.
113. Id. at 626.
115. Id.
117. RESTATEMENT OF TORTS, Explanatory Notes § 758, comment b at 19 (1939).
Uniform Act departs from the Restatement's "literal conferral of absolute immunity upon all third parties who have paid value in good faith for a trade secret misappropriated by another."118 Under the Act, section 1(2)(ii)(C) would impose liability in such a situation while the Restatement would not. The Act would make an unauthorized user of another's trade secret liable after he learns that the information is a trade secret, even though he had no such knowledge at the time of the acquisition, provided that he has not materially changed his position before learning that the information constitutes a trade secret. This is a fair result.

Finally, the Act provides for protection of a trade secret against a variety of misappropriations resulting from an affirmative disclosure of the information. For example, the Act secures to the trade secret owner substantive rights against disclosure by one to whom the owner first voluntarily disclosed the secret, provided there were, at the time of the original disclosure, "circumstances giving rise to a duty to maintain its secrecy or limit its use."119 The subsection of the Uniform Act that encompasses the "breach of confidence" phrase of section 757(b) of the Restatement is broader than the Restatement. For section 757(b) to apply, the trade secret owner must have knowingly reposed confidence in the person who first acquired the secret.120 The language of the Uniform Act would impose liability regardless of how the duty to maintain secrecy arose and regardless of whether the trade secret owner knew the circumstances of the duty.121 Thus, if the information is gleaned from an employee or other agent, there can still be a misappropriation. However, the ultimate result may be the same as it was under the Restatement since the cases seem to indicate that it is the existence of the confidential relationship which is important, rather than its manner of creation.122

118. Uniform Trade Secrets Act, 14 U.L.A. 545-46 (Commissioners' comments to § 2) (1980).
120. Restatement of Torts, Explanatory Notes § 757, comment j at 13 (1939).
B. Remedies Under the Uniform Act

The Uniform Trade Secrets Act grants both injunctive relief and damages when a trade secret has been misappropriated.\textsuperscript{123} This is in contrast to the \textit{Restatement} rule, which did not specify the type of remedy available for the wrongful acquisition, disclosure or use of the trade secret of another; it indicated only that liability attached.\textsuperscript{124} The accompanying comments to the \textit{Restatement}, however, did note that four remedies should be available under appropriate circumstances: (1) damages for past harm, (2) injunction against future harm, (3) accounting of the wrongdoer's profits, and (4) surrender of the physical things embodying the trade secret.\textsuperscript{125} All of these remedies are available under the Uniform Act, although they are not specified in the same terms as in the \textit{Restatement} comment.

1. Injunctive Relief

The most important remedy provided by the Uniform Act, injunctive relief, is provided for in section 2:

(a) Actual or threatened misappropriation may be enjoined. Upon application to the court, an 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) If the court determines that it would be unreasonable to prohibit future use, an injunction may condition future use upon payment of a reasonable royalty for no longer than the period of time the use could have been prohibited.

(c) In appropriate circumstances, affirmative acts to protect a trade secret may be compelled by court order.\textsuperscript{125}

It is noteworthy that both present and threatened misappropriation, as misappropriation is defined in section 1, may be enjoined. Thus, the employee who has knowledge of trade secrets when he terminates employment is subject to an injunction if there is reason to believe that he may use or disclose trade secrets and may be required to surrender any

\textsuperscript{123} \textit{Uniform Trade Secrets Act} § 3(a) (1979).
\textsuperscript{124} \textit{Restatement of Torts} § 757 (1939).
\textsuperscript{125} Id., Explanatory Notes § 757, comment e at 10.
\textsuperscript{126} \textit{Uniform Trade Secrets Act} § 2 (1979).
drawings or other documents containing trade secret information that he is attempting to carry away with him. Similarly, the trade secret disclosed to an outsider in a confidential relationship can be protected even before any attempted use or disclosure.

The most potent weapon against misappropriation, injunctive relief, mentioned only in the comments to the Restatement, is expressly provided for in section 2(a) of the Act. Where a temporary injunction can be obtained, it is frequently determinative of the outcome of the lawsuit for all practical purposes. The defendant usually concedes the merits of the case when faced with the substantial additional legal expense and delay connected with a trial.

A particular problem that has troubled the courts especially in cases where the trade secret had finally become generally known or was about to become generally known, is that of the duration of the injunction.\(^\text{127}\) If damages are an inadequate remedy, the misappropriator should be deprived of the advantage in lead time over that required by other competitors who had to develop the trade secret independently.

Some courts have granted perpetual injunctions regardless of the period of time it would have taken the defendant to develop the trade secret by himself and regardless of how widely the trade secret had become known at the time of suit.\(^\text{128}\) The Uniform Law Commissioners chose to follow a line of cases which limits the duration of injunctive relief "to the extent of the temporal advantage over good faith competitors gained by a misappropriator."\(^\text{129}\)

The Commissioners' comments indicate that an injunction should terminate when a former trade secret becomes generally known to good faith competitors.\(^\text{130}\) The misappropriator is thus placed in the same position as his competitors; he is not permanently barred. If the trade secret could have been

---


129. Id.

130. Id.
independently developed or discovered by reverse engineering or otherwise, the maximum appropriate duration of the injunction would be that amount of time which the misappropriator would have needed to discover the trade secret using "proper means." In most cases, the amount of lead time that the defendant would have taken is debatable. A comparison can be made of the time taken by other competitors to develop the trade secret independently, if one or more of them had done so.

Where a misappropriation has caused a loss of secrecy throughout a particular trade, the court is left without any means to determine what the lead time would have been and, therefore, a completely satisfactory result cannot be reached. However, any finite length of time is better than a perpetual injunction if it is reasonably certain that the trade secret would have been independently developed or disclosed eventually.

In the area of mandatory injunctions, the Act appears to allow relief beyond the scope of that which the Restatement suggests is available. The Restatement indicates only that a court can compel the surrender of the physical things embodying the trade secret. The Act, on the other hand, states that "affirmative acts" may be compelled in "appropriate circumstances." The myriad of circumstances that may arise when trade secrets are involved suggests that substantial power and discretion will necessarily be placed in the hands of the judiciary, once the trade secret has been proven to exist. Among the "affirmative acts" that may be ordered are surrender of physical embodiments of the trade secret and the taking of definitive steps by the misappropriator to prevent further illegal disclosure of the trade secret to others. This could sometimes entail extraordinary measures, such as special directives to employees and agents or a substantial revision of operations.

132. RESTATEMENT OF TORTS, Explanatory Notes § 757, comment e at 10 (1939).
133. UNIFORM TRADE SECRETS ACT § 2(c) (1979).
134. UNIFORM TRADE SECRETS ACT, 14 U.L.A. 546 (Commissioners’ comments to § 2) (1980).
135. UNIFORM TRADE SECRETS ACT § 2(c) (1979).
incorporating the misappropriated trade secret.\textsuperscript{136} 

A counterpart of the third type of relief suggested by the Restatement comment — accounting — is also found in the Act. This section affords a "reasonable royalty" where it is "unreasonable" to enjoin the use of a trade secret.\textsuperscript{137} The Commissioners give, as an example of an unreasonable injunction, an injunction against the use of an aircraft weapons control system, the lack of which would have endangered military personnel in Viet Nam.\textsuperscript{138} The key to the unreasonableness here is an overriding public interest in the manufacture of the weapons system. Another example of an unreasonable prohibition is where a third party user of the trade secret acquires it from a misappropriator, but in good faith and with no reason to suspect the misappropriation.\textsuperscript{139} The Commissioners' comments state that it would be unreasonable to enjoin such a third party in some instances, although a reasonable royalty would certainly be justified.\textsuperscript{140}

2. Damages

The second major remedy allowed by the Uniform Act is damages:

(a) 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.\textsuperscript{141}

Although this section allows both injunctive and monetary relief for a single act of misappropriation, a plaintiff is not allowed a double recovery. In the usual case where both types of relief are granted, the monetary award will be limited to that amount necessary to compensate the injured party for

\textsuperscript{136} The Act requires trial courts to issue reasonable protective orders to preserve the secrecy of an alleged trade secret when an action is initiated. \textit{Uniform Trade Secrets Act} § 5 (1979).

\textsuperscript{137} \textit{Uniform Trade Secrets Act} § 2(b) (1979).


\textsuperscript{139} \textit{Id.} at 545-46 (Commissioners' comments to § 2).

\textsuperscript{140} \textit{Id.} at 546.

\textsuperscript{141} \textit{Id.} at § 3(a).
the loss incurred during the period in which the injunction is not effective.\textsuperscript{142} The monetary compensation available under the Act during such periods includes both that attributable to actual losses and to the unjust enrichment received by the misappropriator as a result of the misappropriation.\textsuperscript{143} In adopting this approach, the Act follows the prevailing principle of the recent case law in this area.\textsuperscript{144} As with injunctive relief, monetary recovery for misappropriation is appropriate only for that limited period during which a trade secret is entitled to protection.\textsuperscript{145} This period includes the time, if any, during which a misappropriator retains an advantage over good faith competitors because of a misappropriation.\textsuperscript{146}

A difficult question of who is entitled to monetary relief for a misappropriation would sometimes arise under the language of the Act. For example, where more than one competitor owns and uses a trade secret, all of them may sustain actual loss caused by a misappropriation from any one of them. While the language of section 3(a) allows recovery in damages for actual loss or unjust enrichment "caused by misappropriation," without any qualification as to which trade secret owner is the victim of the actual misappropriation, a comment to that section states that only the trade secret owner from whom there was a misappropriation is entitled to a remedy.\textsuperscript{147} If the Commissioners' comments attain the same degree of authority that the comments to the \textit{Restatement} enjoyed, then the courts will probably limit relief to the trade secret owner who was personally victimized. It must be remembered, however, that it is the text of the Act alone, exclusive of the comments, that will be enacted by state legislatures as the applicable law. The situation posited is a very real possibility. Since the Act provides no clear answer to this issue, resolution

\begin{itemize}
\item \textsuperscript{142} Id. at 547 (Commissioners' comments to § 3).
\item \textsuperscript{143} Id.
\item \textsuperscript{145} \textit{Uniform Trade Secrets Act}, 14 U.L.A. 546-57 (Commissioners' comments to § 3) (1980).
\item \textsuperscript{146} Id. at 547.
\item \textsuperscript{147} Id. at 548.
\end{itemize}
must await the proper case and forthcoming judicial interpretation.

It is interesting to note that section 3(a) provides for recovery for unjust enrichment. Some cases have awarded damages for both actual loss and for unjust enrichment thus allowing a double recovery. The Commissioners rejected this approach.\footnote{148}{Id. at 547 (Commissioners' comments to § 2, citing Telex Corp. v. IBM Corp., 510 F.2d 894 (10th Cir. 1975), cert. dismissed, 423 U.S. 802 (1975)) (1980).}

Under the Act, willful and malicious misappropriation may result in an award of punitive damages:

(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).\footnote{150}{UNIFORM TRADE SECRETS ACT § 3(b) (1979).} An award of exemplary damages is entirely appropriate where the misappropriation has been deliberate and harm has been intended.

\section{C. The Statute of Limitations}

Unlike the Restatement of Torts, the Uniform Trade Secrets Act specifically provides for a statute of limitations in trade secret actions. The Act provides that:

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.\footnote{151}{Id. at § 6 (1979).}

The Restatement of Torts, on the other hand, offers no clue as to what the statute of limitations should be for misappropriation of a trade secret. At one point, the Restatement comments suggest that the action sounds in contract, which implies that the contract statute of limitations would apply.\footnote{152}{RESTATEMENT OF TORTS, Explanatory Notes § 757, comment b at 4, comment j at 13 (1939).} Elsewhere, however, the Restatement comments note that the action arises from tort, justifying the application of the tort

\begin{thebibliography}{99}
\footnotesize

148. Id. at 547 (Commissioners' comments to § 2, citing Telex Corp. v. IBM Corp., 510 F.2d 894 (10th Cir. 1975), cert. dismissed, 423 U.S. 802 (1975)) (1980).

149. Id.

150. UNIFORM TRADE SECRETS ACT § 3(b) (1979).

151. Id. at § 6 (1979).

152. RESTATEMENT OF TORTS, Explanatory Notes § 757, comment b at 4, comment j at 13 (1939).
\end{thebibliography}
statute of limitations.\textsuperscript{153} This distinction was not without some justification, because the character of the cause of action under common law principles turned on the nature of the defendant's conduct. If the defendant acquired the information by theft, bribery, espionage, or misrepresentation, the act by which the information was secured was a tort.\textsuperscript{154} On the other hand, if the information was acquired by the defendant as a result of a breach of a contractual duty to maintain secrecy, the act giving rise to the action constituted a breach of contract.\textsuperscript{155} Hence, the common law application of a statute of limitations gave rise to unfortunate inequities. A plaintiff's right to recover for a misappropriation of his trade secret would depend not upon the wrong inflicted upon him, but rather upon the defendant's choice of the means to accomplish the wrongful end.

Fortunately, the Uniform Act eliminates this undesirable result. The Commissioners' end is achieved by incorporating within the concepts of a "misappropriation" and "improper means" the contract and tort theories existing under the common law and the Restatement of Torts and by providing a uniform statute of limitations associated with claims arising thereunder.

In addition to providing a solution to the question of whether to apply a contract or tort statute of limitations to a misappropriation of a trade secret, the Act eliminates a split of authority on the question of when the statute begins to run. One line of authority held that each day's use of another's trade secret by a misappropriator constituted a new and discrete wrong.\textsuperscript{156} Therefore, a new statute of limitations period applied to each day's use because there was a "continuing wrong." This approach, of course, extended an aggrieved's right to recover for a misappropriation. A second line of authority held that the date of the first use of a trade secret was the time of misappropriation. This line of authority thus re-

\textsuperscript{153} Id., comment e at 10, comment h at 12.

\textsuperscript{154} E.g., Northern Petrochemical Co. v. Tomlinson, 484 F.2d 1057 (7th Cir. 1973).


\textsuperscript{156} E.g., Underwater Storage, Inc. v. United States Rubber Co., 371 F.2d 950 (D.C. Cir. 1966), cert. denied, 386 U.S. 911 (1967).
jected the "continuing wrong" theory, holding that the statute began to run with the first use.\textsuperscript{157} This theory shortened the period during which the plaintiff had a right to recover for a misappropriation.

The "continuing wrong" theory was followed in \textit{Underwater Storage, Inc. v. United States Rubber Co.},\textsuperscript{158} in which a trade secret was considered to be a type of property. Consequently, each use of the trade secret was considered a separate misappropriation of the trade secret and, therefore, a separate wrong. The statute of limitations, thus, ran from the date of each misappropriation.\textsuperscript{158}

The "continuing wrong" theory was rejected in \textit{Monolith Portland Midwest Co. v. Kaiser Aluminum and Chemical Corp.}\textsuperscript{160} In that case, the plaintiff, Monolith, wanted Kaiser to produce metal shims for its rotary cement kilns.\textsuperscript{161} To this end Monolith disclosed to Kaiser, in confidence, a secret improvement it had made in the bricks used to line the cement kilns.\textsuperscript{162} Thereafter, Kaiser, without Monolith's knowledge, began to sell the improved bricks.\textsuperscript{163} After the statute of limitations had expired with respect to the first unauthorized sale of the improved bricks, but before the statute had expired with respect to the date of the last sale of the improved bricks, an action was brought by Monolith against Kaiser for misappropriation.\textsuperscript{164} The court held that the statute of limitations began to run on the date of the initial misappropriation, and that any recovery by Monolith was therefore barred.\textsuperscript{165} In so holding, the court reasoned that Monolith's action was in the nature of one for breach of a confidential relationship; this being the case, there could only be one wrong, that occurring upon the initial misappropriation.\textsuperscript{166}

\textsuperscript{157} Monolith Portland Midwest Co. v. Kaiser Aluminum & Chemical Corp., 407 F.2d 288 (9th Cir. 1969).
\textsuperscript{158} 371 F.2d 950 (D.C. Cir. 1966), \textit{cert. denied}, 386 U.S. 911 (1967).
\textsuperscript{159} \textit{Id.} at 953.
\textsuperscript{160} 407 F.2d 288 (9th Cir. 1969).
\textsuperscript{161} \textit{Id.} at 291.
\textsuperscript{162} \textit{Id.} at 291-92.
\textsuperscript{163} \textit{Id.} at 292.
\textsuperscript{164} \textit{Id.}
\textsuperscript{165} \textit{Id.}
\textsuperscript{166} \textit{Id.} at 293.
The Act's approach is a compromise between these two lines of authority. The comment to the section points out:

This Act rejects a continuing approach to the statute of limitations but delays the commencement of the limitation period until an aggrieved person discovers or reasonably should have discovered the existence of misappropriation. ¹⁶⁷

This solution to the problem is sensible for it clarifies the date at which the statute of limitations begins to run while recognizing the inequity resulting to trade secret owners as a result of mechanical operation of the first use theory.

IV. CONCLUSION

In technological society, innovative ideas assume a prominent role in the health and vigor of commerce and industry. As ideas acquire substantial value to business competitors, the law must respond by protecting them from loss to other competitors. The patent and trade secret laws provide alternatives for protecting innovative ideas from such loss.

Unlike patent protection, trade secret protection is a creature of the common law. As such, its development has been piecemeal within separate jurisdictions. Moreover, sometimes the evolution of trade secret law has proceeded along different lines in different jurisdictions. Finally, the common law development failed, at times, to deal adequately with important trade secrets issues. This lack of uniformity and piecemeal development of trade secret law has limited its effectiveness in policing thefts of trade secrets.

In an effort to harmonize and clarify the law of trade secrets as it has developed in different states, the Commissioners of Uniform State Laws adopted the Uniform Trade Secrets Act at their 1979 Annual Conference. The Act is a concisely drafted integration of the generally accepted principles of trade secret law. The Act draws heavily upon concepts in the first Restatement of Torts in the formulation of basic principles. Moreover, through some conceptual changes, the Act greatly facilitates treatment of problems not adequately dealt with by the common law. Finally, in those instances in

which a split of authority developed, the Act makes fair and equitable choices among competing alternative solutions.

The Act, if adopted, would promote uniformity, simplicity and fairness in the litigation of trade secrets issues. Hopefully state legislatures will favorably consider its adoption. The Uniform Trade Secrets Act is a major contribution to the progress of the jurisprudence of intellectual property.