The Questionable Case for Federalizing Trade Secrecy

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Trade secrecy is unique among the major forms of intellectual property as not being primarily governed by a federal statute. Unlike patents and copyrights, trade secrecy is a creation of state law, arising in the nineteenth century out of a variety of common law to become a separate source of protection against the improper acquisition, disclosure, and use of commercially-valuable information that has been maintained in confidence. And unlike trademarks, which also arose under state law but now are predominantly protected under the Lanham Act, trade secrecy has maintained its state law status throughout the twentieth century.

Recently, there have been gradual but persistent attempts to expand federal authority in the realm of trade secrecy. This incremental expansion began in criminal law, most prominently by the adoption of the Economic Espionage Act (EEA) and the 1996 amendments to the Computer Fraud and Abuse Act (CFAA) regarding unauthorized access to electronically-stored information. More recently, these efforts have included the proposed adoption of a federal civil cause of action for trade secret misappropriation, headlined by the Protecting American Trade Secrets and Innovation Act of 2012 (PATSIA).

Proponents have offered several justifications in support of a federal civil trade secret statute. First, they contend that a federal statute would create substantive uniformity in trade secret law, thus eliminating choice of law problems and reducing forum shopping in trade secret litigation. Second, they assert that a federal civil cause of action would offer additional protection against the theft of highly valuable but vulnerable electronically-stored information, particularly by foreign entities and actors. Third, they argue that a federal statute would provide the advantages of a federal forum for litigating civil trade secrecy claims, including liberal discovery rules, nationwide service of process, and judicial competency with complex commercial litigation.

In this paper, I question proponents’ claims that a federal civil trade secret statute is normatively desirable. First, proponents’ concerns about the alleged lack of uniformity in state law regarding trade secrecy are overstated. To date, 46 states have adopted the Uniform Trade Secrets Act (UTSA) and, despite some differences, have largely interpreted it in a consistent and predictable manner. Second, it is not clear that adoption of a federal civil trade secret statute would accomplish proponents’ articulated objective of substantive uniformity. In particular, the absence of a preemption clause in PATSIA leaves open the possibility that federal trade secret regime would exist in parallel with
existing state laws. And even if a federal statute would preempt any state law regarding trade secrets, state law would still play an important role in trade secret litigation, as many trade secret issues are inherently intertwined with other state law doctrines, including contract law (e.g., nondisclosure and non-compete agreements), employment law (e.g., employees’ fiduciary duties), and even criminal law (e.g., theft and bribery). Third, a federal forum is already available for many trade secret claims, either under the diversity jurisdiction statute—including alienage jurisdiction for claims against foreign entities—or via supplemental jurisdiction when there is an independent federal law claim. Finally, and perhaps most significantly, a federal statute that creates stronger protection for trade secrets could undermine patent law’s objective of promoting the disclosure and widespread dissemination of information regarding new inventions by causing more inventors to opt out of the patent system in favor of trade secrecy.