

Congress Passes Landmark IP Legislation: Defend Trade Secrets Act

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On April 28 Congress passed the Defend Trade Secrets Act ("DTSA"), which creates a federal private right of action for trade secret misappropriation. Enactment into law is virtually certain, as President Obama, a long-time supporter, has promised to sign the bill if passed by Congress.

The DTSA has been heralded as one of the largest developments in intellectual property law in years. By creating a federal private right of action it brings both uniformity in the law and access to the federal courts for trade secret holders.

As its name implies, a trade secret is a form of intellectual property that by its nature is not disclosed. A trade secret, in a broad sense, is confidential information that provides one with a competitive advantage. It differs from patents and copyrights in that it does not have a certain term in which it expires, and it is unlike patents, trademarks or copyrights in that it is not examined by any governmental authority.

Trade secrets can range from formulas and algorithms to manufacturing processes and customer lists. The most famous example is the secret formula for Coca-Cola®. Typically something is considered a trade secret if it derives economic value from not being known to the public or to competitors, and reasonable measures are taken to protect its secrecy.

Until the DTSA, the only way to enforce a trade secret was an action in state court. Individual states have their own statutes to protect against the misappropriation of trade secrets. While most states have closely tracked the Uniform Trade Secrets Act ("UTSA"), there are significant differences in the laws of various states. Enactment of the DTSA will bring uniformity, at least in the federal courts.

While the DTSA has many similarities to the UTSA, it has a number of important distinctions. Importantly, along with the remedies of injunctive relief and damages, the DTSA allows an ex parte order, in "extraordinary circumstances," for the "seizure of property necessary to prevent the propagation or dissemination of the trade secret that is the subject of the action" (S.1890(2)(A)(i) 2016). It also allows the assertion of other causes of action that arise under the same facts.

By opening the doors of the federal courts and providing new remedies to prevent disclosure of trade secrets, the DTSA will be a valuable tool for businesses that own and seek to protect valuable trade secret.



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