

Intellectual Property

Trade Secrets

Economic Espionage Act

Trade Secret Law Reform: Could an Amended Economic Espionage Act Overcome Inconsistencies in the Current State Law System?



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Introduction

Trade secret protection is, by and large, governed by state law. Presently, there is no comprehensive federal civil trade secret misappropriation statute.¹ This is in contrast to other forms of intellectual property, including patents, copyrights, and trademarks, which are protected by federal civil statutes.² As a result, the scope of recognition and protection of trade secrets

varies from state to state. This can potentially lead to inconsistent enforcement and can create confusion as to how one would define and/or protect a trade secret.

To overcome potential inconsistencies and confusion with the current system, some have suggested “federalizing” trade secret law by making it the exclusive jurisdiction of the federal courts.³ Others have suggested a middle road, enacting a federal civil statute that would not preempt state laws.⁴ This latter approach was recently attempted in October 2011, when a proposed amendment to the Economic Espionage Act (“EEA”), a federal criminal statute penalizing certain types of trade secret misappropriation, would have created a private federal cause of action. The proposed amendment, however, did not pass the Senate on procedural grounds. This article will discuss the current legal landscape for trade secret protection and its potential inconsistencies, the EEA and the proposed amendment, compare the proposed EEA amendment to the current state-defined trade secret laws, and discuss the proposed EEA amendment as a vehicle to overcome the inconsistencies in the current state law system.

The Current “States” of Trade Secret Law

Trade secret protection is a matter of state law and, until the 1980s, was primarily governed by common law.⁵ The Restatement of Torts chronicled the common law, which numerous courts have turned to as a source of authority when deciding trade secret cases. However, the Restatement of Torts is not binding and states remained split on several issues. In an attempt to unify state common law, the Uniform Law Commission promulgated the Uniform Trade Secrets Act (“UTSA”) in 1979.⁶ However, since states were not required to adopt the UTSA in its entirety, several states adopted significant variations of the UTSA, thus continuing

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inconsistencies among the states.⁷ Currently, 46 states have adopted the UTSA in some form or have similar statutes (“UTSA jurisdictions”).⁸ The remaining states still follow the common law (“common law jurisdictions”).⁹ Although some groups have argued that the differences between the states are not sufficient to require a private federal cause of action,¹⁰ differences nonetheless exist, and it is incumbent upon the practitioner to appreciate the operative laws in the state at issue.

Generally, trade secret misappropriation has two elements: existence of a trade secret and misappropriation. At common law, a trade secret must (1) be a secret; (2) confer a competitive advantage to the owner; and (3) be continuously used in the owner’s business.¹¹ Misappropriation requires the unauthorized use or disclosure of the trade secret (1) discovered by improper means; (2) in breach of confidence; or (3) by a third party with (i) knowledge that the trade secret was obtained by improper means or breach of confidence, or (ii) an understanding that the information was a trade secret and discovery was by mistake or accident.¹²

The UTSA follows the common law with a few exceptions. One difference is that the UTSA does not require the continuous use of the trade secret in the owner’s business.¹³ It also expands the notion of “competitive advantage” with “economic advantage,” which some commentators have suggested specifically includes one-off business information (e.g., bids) and negative know-how¹⁴ (e.g., failed test results) because “economic advantage” can be derived from information that is not incorporated into a commercial product that “competes” in the marketplace.¹⁵ The UTSA also recognizes the acquisition of a trade secret by improper means alone as a sufficient basis for finding misappropriation without use or disclosure of the trade secret.¹⁶

Despite the Restatement of Torts and the UTSA, state-to-state differences remain. First, the Restatement is merely a recitation of the common law, which still differs from state to state. Second, several states have not adopted the UTSA. Third, several states have adopted variations of the UTSA. For example, Illinois’s trade secret act is a broader version of the UTSA (which explicitly creates a duty to maintain secrecy when there is a confidential relationship),¹⁷ while Alabama has a narrower version (which maintains certain common law requirements rejected by the UTSA).¹⁸ Below are examples of differences between the states, which are not necessarily dictated by the common law-UTSA divide:

Subject matter. As stated earlier, the common law generally requires continuous use of a trade secret, but the UTSA does not. Alabama, however, has adopted a modified version of the UTSA and requires the trade secret to be “used or intended for use in a trade or business.”¹⁹

Secrecy. Most states agree that, at a minimum, a trade secret must not be “generally known” or “readily ascertainable.”²⁰ California, however, does not have a proscription against “readily

ascertainable” information.²¹ It should be noted that California is one of the most popular jurisdictions to bring a trade secret misappropriation suit,²² and its laws are frequently applied in other jurisdictions.²³ Therefore, California’s departure from the traditional evaluation of this element should not be overlooked.

Statute of limitations. At common law, a trade secret misappropriation claim could be based in tort, contracts, or property law, which has led to variations in determining the applicable statute of limitations.²⁴ For example, in New York, the statute of limitations for the tort of theft is three years,²⁵ and for breach of contract it is six years.²⁶ The UTSA provides a three-year statute of limitations,²⁷ but not all UTSA jurisdictions follow this rule. For example, although both states adopted the UTSA, the statute of limitations in Georgia is five years²⁸ but four years in Ohio.²⁹ Furthermore, the states are split on whether trade secret misappropriation can constitute a continuing tort,³⁰ under which a new statute of limitations starts every time the trade secret is used. The UTSA does not recognize a continuing tort theory.³¹

A practitioner must consider these differences at every stage of protecting a trade secret, from planning IP protection through litigation. During litigation, these differences could lead to accusations of “forum shopping”³² and disagreements over the applicable law, resulting in a fact-intensive choice-of-law analysis by the court.³³ For example, if a party does not “continuously” use its trade secret, it may seek a jurisdiction that does not require that element even though the party may have little connection to such jurisdiction. This scenario could result in the lengthy adjudication of procedural issues before reaching the merits of a trade secret case.

The Economic Espionage Act and Proposed Amendment

The EEA is a federal statute enabling the Attorney General (“AG”) to criminally prosecute accused trade secret misappropriators and also to bring civil proceedings to enjoin violations. The EEA was intended by Congress to “provide a comprehensive ‘national scheme’ to protect trade secrets in the face of ‘haphazard’ protection under state laws.”³⁴ It, however, does not preempt state laws for trade secret misappropriation.³⁵ Nor does it contain a private right of action.³⁶

The EEA provides two causes of action: economic espionage, [18 U.S.C. Section 1831](#), and theft of trade secrets, [18 U.S.C. Section 1832](#).³⁷ The main difference is that economic espionage, designed to target foreign, government-sponsored intelligence activity, requires a foreign beneficiary, while theft of trade secrets is a broad general provision that “applies to anyone who knowingly engages in the theft of trade secrets,” including those who attempt or conspire to do so.³⁸ Section 1832 has additional limitations not included in section 1831.³⁹ First, it requires that the defendant demonstrate an “intent to convert” the trade secret to “the economic benefit” of someone besides the owner. Second, the

defendant must intend to or knowingly injure the owner of the trade secret. Third, the trade secret must relate to interstate or foreign commerce.⁴⁰ Both causes of action have the standard five-year statute of limitations for federal criminal offenses,⁴¹ require proof beyond a reasonable doubt, and share the same definition of trade secret.⁴²

Section 1839(3) of the EEA broadly defines a “trade secret” to include: “all forms and types of . . . information . . . whether tangible or intangible,” as long as it also meets the two-prong test of (1) taking “reasonable measures” to ensure secrecy; and (2) deriving “independent economic value . . . from not being generally known to, and not being readily ascertainable . . . by, the public.” The “reasonable measures” prong is a factual determination of the “secrecy” of the information: the level of care and control the trade secret owner has taken to protect the trade secret.⁴³ Because the determination of “reasonableness” is left to the subjectivity of the trier of fact, defendants often challenge the EEA as vague, leading to arbitrary and discriminatory enforcement of the law.⁴⁴ Courts have consistently dismissed this argument.⁴⁵ The “independent economic value” prong is also subject to controversy regarding the meaning of “public” to which the trade secret is not generally known. Courts are split on whether the term refers to “the general public”⁴⁶ or the “economically relevant public,” a definition that is closer to traditional trade secret law.⁴⁷ Most of the discussion has been rhetorical and not outcome-determinant.⁴⁸

Overall, almost all EEA cases have been found to have met the EEA definition of “trade secret,” which may be a reflection of the AG’s choice in which cases to prosecute rather than an indication of the breadth of the definition. Indeed, while there have been more than a hundred prosecutions under the EEA, all of them have involved “aggravated conduct,” which is only a small subset of applicable trade secret violations.⁴⁹

– EEA Amendment: A Federal Private Cause of Action

To expand the EEA and address the shortcomings in the current state-based system of trade secret protection, in October 2011, Senator Christopher Coons (D-DE) and Senator Herb Kohl (D-WI), who authored the EEA, introduced an amendment to the EEA, attached to the Currency Exchange Rate Oversight Reform Act. It would have amended section 1836 of the EEA, which currently authorizes only the AG to bring civil actions, by creating a federal civil private cause of action for section 1832 violations (i.e., theft of trade secrets).⁵⁰ This private cause of action would essentially be grafted onto the EEA: it would use the same broad definition of trade secrets, require intent,⁵¹ and be subject to the same two-prong test of “reasonable measures” and “independent economic value.” While the language of the amendment is silent on the burden of proof for the private cause

of action, the court would likely apply a lower burden of proof, most likely the “preponderance of the evidence” burden typical of civil cases and the UTSA in state courts.⁵²

The proposed private cause of action has two pleading requirements: the complaint must describe with “specificity” the “reasonable measures” taken to protect secrecy, and it must include a sworn representation that the dispute involves “substantial need for nationwide service of process or misappropriation . . . from United States to another country.”⁵³ The “reasonable measures” requirement mirrors the secrecy prong in section 1832; but the requisite amount of “specificity” will be a question left to the courts. The second requirement concerning a “substantial need for nationwide service of process” limits the number of cases that are eligible.⁵⁴ Legislators are looking to establish a limited federal private cause of action⁵⁵ that is consistent with the anti-preemption clause of the EEA (section 1838) and retains the usefulness of state trade secrets laws, especially for cases involving only intra-state commercial disputes. This new private cause of action was designed to help companies that operate nationwide and that have been challenged by trade secret theft involving interstate or international commerce, by addressing the complexities of multi-jurisdictional litigation with out-of-state fact witnesses and critical evidence.⁵⁶

As an additional tool for the private litigants, the amendment would have created a civil ex parte seizure order.⁵⁷ A claimant would have had to demonstrate by “clear and convincing evidence” the necessity to prevent irreparable harm. Upon such a showing, the ex parte seizure order would have provided for the seizure of any property intended for use in the commission of a trade secret theft and prevent the destruction of crucial evidence or purloined trade secrets, which can occur in seconds with computers.⁵⁸

Furthermore, the amendment clarified the meaning of “appropriate injunctive relief” in section 1836 by describing two types of injunctive orders that the AG can request from the courts. The AG may request (1) an order requiring “affirmative actions to be taken to protect a trade secret,” or (2) an order for payment of reasonable royalties, when prohibiting use would be unreasonable.⁵⁹

In the end, however, the Kohl-Coons amendment failed to become law for procedural reasons: the legislative vehicle through which the amendment was introduced, the Currency Exchange Rate Oversight Reform Act, was voted cloture, meaning all non-germane amendments were rejected without regard to their merits.⁶⁰

EEA vs. Existing State System

There are several similarities and differences between what would have been the amended EEA and the existing state UTSA and common law approaches to trade secrets. These include the issues detailed below:

– The Potential Impact of the EEA Amendment on Inconsistent Areas of the Current State System

Subject matter. The scope of the trade secret definition under the amended EEA would have resembled the scope of the UTSA definition, which does not require continuous use. Certain states require continuous use or an intention to use the trade secret in a business.

Secrecy. The amended EEA would have been similar to both the UTSA and common law regarding “reasonable measures” to maintain secrecy,⁶¹ “not being generally known,”⁶² and not readily ascertainable.⁶³ Certain states do not proscribe against readily ascertainable information achieving trade secret status.

Statute of limitations. The statute of limitations under the amended EEA would have been three years. The statutes of limitation vary from state to state, but the UTSA also provides for three years. The amended EEA also would have expressly rejected the “continuing tort theory.”⁶⁴ The states are split on “continuing tort theory,” but the UTSA has rejected it.

– The Potential Impact of the EEA Amendment on Other Areas of the Current State System

Pleading. The amended EEA would have required a sworn affidavit asserting the “substantial need for nationwide service of process.” This is not required under the current system. The EEA would also have required pleadings to describe with “specificity” the reasonable measures taken to safeguard the trade secret. The current system only requires the pleadings to allege enough facts to describe the trade secret and misappropriation to put the defendant on notice.⁶⁵

Intent required. The amended EEA would have required a showing of intent or knowledge to establish misappropriation, which the UTSA and common law do not.

Ex parte seizure. The amended EEA would have provided a statutory method for obtaining a civil ex parte seizure order upon showing by clear and convincing evidence a necessity to prevent irreparable harm. The current system does not provide for such an order. Claimants, however, can seek an ex parte seizure order under Rule 65(b), which requires a high level of proof that a party will destroy evidence or the trade secret (e.g., demonstrated pattern of behavior).⁶⁶

Acts constituting violations. The EEA does not require the existence of a trade secret or actual misappropriation.⁶⁷ The

EEA punishes attempt and conspiracy to steal a trade secret.⁶⁸ In contrast, the current state-based system requires the existence of a trade secret, and common law jurisdictions further require use or disclosure.

Could an Amended EEA Overcome Existing Shortcomings?

The proposed amended EEA would not have eliminated the shortcomings in the current legal system, primarily because it would not have preempted state law. But it could have provided litigants with a vehicle to bring trade secret misappropriation claims in federal court, which in turn may have allowed federal courts to develop a more uniform body of trade secret case law. At least one commentator likened that situation to the present trademark system.⁶⁹ It is also important to note that the amended EEA would have presented additional requirements that are not present in the current state-based system, as detailed above.

The amended EEA would have provided more uniformity regarding (1) subject matter (i.e., continuous use not required); (2) secrecy (e.g., not readily ascertainable); (3) statute of limitations (three years); and (4) continuous tort theory (not recognized). It would have also provided access to the federal courts, which in certain cases would have alleviated inter-state discovery issues that can be difficult in state court litigation.

The affidavit requirement of the proposed amendment would have excluded cases where there is no substantial need for “nationwide service of process” (e.g., fact witnesses located in the same state). But conversely, this requirement would have allowed litigants to bring a case in federal court if out-of-state service of process would have been required and difficult to obtain from another state. This would have opened another door to the federal courts when complete diversity among the parties was missing or when the court lacked supplemental jurisdiction.⁷⁰

Despite these potential benefits from an amended EEA, certain plaintiffs nevertheless may have continued to favor the current state-based system because it does not require a showing of intent. Also, at least in the short term, the body of case law interpreting the EEA would have been relatively small compared to the significant amount of cases dealing with state law. Therefore, the predictability and certainty that many commentators hoped would follow the enactment of a federal trade secret statute may not have materialized immediately.

Lastly, a question remains regarding how many litigants would have been deterred from bringing a suit in federal court under the amended EEA, knowing that they had to swear to an affidavit asserting a substantial need for service of process, when many states already allow interstate discovery. It is quite possible that the current state-based system, despite its inconsistencies, remains more appealing to certain litigants.

Conclusion

The current state-based system for protecting trade secrets contains several inconsistencies. The recently proposed amendment to the EEA would have provided a vehicle for litigants to bring limited misappropriation actions in federal courts, but would not have preempted state law. Although uniform enforcement and consistent protection might have been aided by the proposed amendment to the EEA, parties would still be left with the fragmented state law system that has remained in place for many years. Although state law remains inconsistent, the real question is whether these inconsistencies can be solved through the enactment of federal laws that may create inconsistencies of their own.

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¹ There is a very limited federal civil statute that allows plaintiffs to sue for misappropriation of trade secrets through unauthorized computer access. See The Computer Fraud Abuse Act, 18 U.S.C. § 1030(a)(2)(C), (a)(4) and (g); *US Bioservices Corp. v. Lugo*, 595 F. Supp. 2d 1189, 1195 (D. Kan. 2009).

² Patent law is governed by Title 35 of the U.S. Code, which preempts state

common law, but patent misuse claims can be brought under state law. Federal copyright law is governed by Title 17 of the U.S. Code, which preempts most, but not all, forms of common law. See 17 U.S.C. § 301. Federal trademark law is governed by the Lanham Act (Title 15 of the U.S. Code), but does not preempt state common law.

³ Christopher Rebel J. Pace, *The Case for a Federal Trade Secrets Act*, 8 Harv. J.L. & Tech 427, 442 (1995).

⁴ R. Mark Halligan, *Protection of U.S. Trade Secret Assets: Critical Amendments to the Economic Espionage Act of 1996*, 7 J. Marshall Rev. Intell. Prop. L. 656, 667 (2008).

⁵ See Pace, *supra* note 3, at 429-435.

⁶ UNIFORM TRADE SECRETS ACT ("UTSA"), Prefatory Note (1986); see also Pace, *supra* note 3, at 432-33, n.17.

⁷ Pace, *supra* note 3, at 443.

⁸ See Uniform Law Commission website, <http://www.nccusl.org/Act.aspx?title=Trade%20Secrets%20Act> (last visited Dec. 20, 2011); Henry H. Perrit, Jr., *Trade Secrets: A Practitioner's Guide*, 2d Ed. § 1:5.1 (2010) (noting North Carolina has a broader statute that omits an "improper means" limitation).

⁹ The four common law jurisdictions are: Massachusetts, New Jersey, New York, and Texas. In addition to common law, Massachusetts also has a general business statute applicable to trade secrets (Mass. Gen. Laws. Ann. ch. 93 § 42). Despite the small number of states still applying common law, those states are responsible for a substantial amount of commercial activity relative to the nation as a whole. See David S. Almeling, et al., *A Statistical Analysis of Trade Secret Litigation in State Courts*, 46 Gonz. L. Rev. 57, 76 (2011).

¹⁰ *Report of the Trade Secret Committee, America Intellectual Property Law Association*, p. 7 (Dec. 17, 2010), www.aipla.org/committees/committee.../Trade_Secret.../Report.doc (last visited Dec. 20, 2011).

¹¹ See Restatement of Torts § 757, cmt. b (1939). "Continuous use" is more than use of "information as to single or ephemeral events in the conduct of the business." *Id.*

¹² See *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 521 (9th Cir. 1993) (quoting California version of UTSA); M. Roger Milgrim, *Milgrim on Trade Secrets* § 1.01[1] (2011).

¹³ See *Milgrim on Trade Secrets* § 1.01 (2010).

¹⁴ "Negative know-how" includes negative test results and other documentation of failed procedures and experiments. See Ramon A. Klitzke, *The Uniform Trade Secrets Act*, 64 Marquette L. Rev. 277, 289 (1980); UTSA § 1, cmt (1986).

¹⁵ See Klitzke, *supra* note 14, at 289.

¹⁶ See *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d 1081, 1090 (9th Cir. 1989) (reversing summary judgment dismissing trade secret misappropriation claim because of an issue of fact regarding whether a license conferred the right to possess the information).

¹⁷ Robert T. Neufeld, Note, *Mission Impossible: New York Cannot Face the Future Without a Trade Secret Act*, 7 Fordham Intell. Prop. Med. & Ent. L. J. 883, 903 (1997).

¹⁸ *Id.* at 909.

¹⁹ Alabama Trade Secrets Act § 8-27-2(1)(a) (1987).

²⁰ See, e.g., *USM Corp. v. Marson Fastener Corp.*, 393 N.E.2d 895, 900 (Mass. 1979); *Leo Silfen, Inc. v. Cream*, 29 N.Y.2d 387, 393-394 (N.Y. 1972). See also UTSA § 1(4)(i) (1986).

²¹ California Uniform Trade Secrets Act § 3426.1(d)(1). See also Pace, *supra* note 3, at 444.

²² Almeling, *supra* note 9, at 74; David S. Almeling, et al., *A Statistical Analysis of Trade Secret Litigation in Federal Courts*, 45 Gonz. L. Rev. 291, 306 (2010).

²³ Almeling, *supra* note 9, at 74; Almeling, *supra* note 22, at 306.

²⁴ Klitzke, *supra* note 14, at 306.

²⁵ N.Y. Civ. Prac. L. & R. § 214(4) (McKinney's 1996).

²⁶ *Id.* at § 213.

²⁷ UTSA § 6 (1986).

²⁸ O.C.G.A. § 10-1-766 (2011).

²⁹ Ohio Rev. Code § 1333.66 (1994).

³⁰ *Intermedics, Inc. v. Ventritex, Inc.*, 822 F.Supp. 634, 645 n.10 (N.D. Cal. 1993) (noting California does not accept continuing tort theory); *Greenberg v. Svane*, 36 A.D.3d 1094, 1098 (3d Dept. 2007) (noting New York accepts continuing tort theory).

³¹ UTSA § 6 (1986).

³² See, e.g., *Manuel v. Convergys Corp.*, 04-cv-1279 (N.D. Ga. 2004).

³³ See *id.*; see also *Aspect Software, Inc. v. Barnett*, 787 F. Supp. 2d 118, 125-27 (D. Mass. 2011).

³⁴ *United States v. Aleynikov*, 737 F. Supp. 2d 173, 185 (S.D.N.Y. 2010).

³⁵ Tyler G. Newby, *Parallel Proceedings in Trade Secret and Economic Espionage Cases*, in 57 *Economic Espionage and Trade Secrets* No. 5, US Attorneys' Bulletin 34, 34 (2009); Spencer Simon, *The Economic Espionage Act of 1996*, 13 *Berkeley Tech. L.J.* 305, 315-16 (1998).

³⁶ *Cooper Square Realty Inc. v. Jensen*, No. 04-cv-01011, 2005 BL 87956 (S.D.N.Y. Jan. 10, 2005).

³⁷ The Economic Espionage Act, 18 U.S.C. 1831-32 (1996).

³⁸ *United States v. Hsu*, 155 F.3d 189, 195, 201-02 (3d Cir. 1998).

³⁹ *Id.* at 195-96.

⁴⁰ *Id.*

⁴¹ *United States v. Case*, 309 F. App'x. 883, 886 (5th Cir. 2009).

⁴² 18 U.S.C. § 1839.

⁴³ *United States v. Lange*, 312 F.3d 263, 266 (7th Cir. 2002); *United States v. Chung*, No. 10-50074 (9th Cir. Sept. 26, 2011); *United States v. Genovese*, 409 F. Supp. 2d 253, 258 (S.D.N.Y. 2005).

⁴⁴ *Hsu*, 40 F. Supp. 2d at 628; *United States v. Krumrei*, 258 F.3d 535, 538 (6th Cir. 2001).

⁴⁵ *Genovese*, 409 F. Supp. 2d at 258; *Krumrei*, 258 F.3d at 538; *Hsu*, 40 F. Supp. 2d at 628.

⁴⁶ *Hsu*, 155 F.3d at 196.

⁴⁷ *Lange*, 312 F.3d at 267.

⁴⁸ *Lange*, 312 F.3d at 268; *Hsu*, 155 F.3d at 196.

⁴⁹ Mark L. Krotoski, *Common Issues and Challenges in Prosecuting Trade Secret and Economic Espionage Act Cases*, in 57 *Economic Espionage and Trade Secrets* No. 5, US Attorneys' Bulletin 2, 7 (2009).

⁵⁰ Press Release, Senator Herb Kohl, Kohl Offers Amendment To Protect American Businesses, http://kohl.senate.gov/newsroom/pressrelease.cfm?customel_dataPageID_1464=4775 Oct. 5, 2011 (last visited Dec. 21, 2011).

⁵¹ S. AMDT. 729, 112th Congress (2011).

⁵² Halligan, *supra* note 4, at 675.

⁵³ S. AMDT. 729, 112th Congress (2011).

⁵⁴ David S. Almeling, *First Patent Reform, Now Trade Secret Reform?* Patentlyo website, Oct. 12, 2011, <http://www.patentlyo.com/patent/2011/10/almeling-trade-secret.html> (last visited Dec. 21, 2011).

⁵⁵ *Id.*

⁵⁶ Halligan, *supra* note 4, at 667.

⁵⁷ *Id.*

⁵⁸ *Id.* at 669.

⁵⁹ S. AMDT. 729, 112th Congress (2011).

⁶⁰ S. 1619, 112th Congress (2011); S.1619 Bill Summary & Status All Congressional Actions, Thomas.gov website, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:SN01619:@@X> (last visited Dec. 21, 2011).

⁶¹ *Chung*, No. 10-50074 (citing only UTSA state court cases for support of the court's factual analysis).

⁶² See *id.*

⁶³ See *id.*

⁶⁴ S. 1619, 112th Cong. § 1836(d) (2011). Under the current EEA, however, the statute of limitations accrues on the last day of the misappropriator's continuing offense. *Case*, 309 Fed. Appx. at 886.

⁶⁵ See *Power Marketing Direct v. Pagnozzi*, No. C2-05-766, (S.D. Ohio Sept. 29, 2006).

⁶⁶ *First Tech. Safety Sys., Inc. v. Depinet*, 11 F.3d 641, 651 (6th Cir. 1993).

⁶⁷ *United States v. Yang*, 281 F.3d 534, 543-544 (6th Cir. 2002); *Hsu*, 155 F.3d at 203.

⁶⁸ *Hsu*, 155 F.3d at 195.

⁶⁹ Halligan, *supra* note 4, at 667.

⁷⁰ *Id.* at 668.