

SHHH! IT’S A SECRET: A COMPARISON OF THE UNITED STATES DEFEND TRADE SECRETS ACT AND EUROPEAN UNION TRADE SECRETS DIRECTIVE

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I. INTRODUCTION

Perhaps one of the world's greatest mysteries is what ingredients comprise the recipe for Coca-Cola. This recipe sits in a vault in Atlanta, Georgia with a palm scanner, numerical code, and large steel door.¹ Once inside the vault, there is another safe box and metal case that store what the owners call "the most guarded trade secret in the world."² Only two senior executives know the recipe at any given time, and they are not allowed to travel on the same plane.³ The great lengths Coca-Cola goes through to guard its secret recipe indicate the importance of protecting trade secrets.

Recently, there has been an increase in attempted trade secret thefts, especially as technology advances. In 2010, a research chemist stole trade secrets worth \$400 million and passed them to a Chinese university.⁴ In 2011, a former Ford employee copied over four thousand documents worth \$50 million onto a hard drive.⁵ In 2012, a former General Motors employee was found guilty of trying to pass trade secrets related to hybrid cars to a Chinese automobile company.⁶ Theft of trade secrets costs U.S. companies billions of dollars every year.⁷ These instances are just a few of the examples that prompted both the United States and the European Union (EU) to draft and adopt trade secret legislation.

The object of this Note is to understand the similarities and differences between recent trade secret legislation passed in the United States and the EU. Both pieces of legislation seek to obtain similar trade secret protection between the two major economies. Although the EU and United States have passed similar measures to protect trade secrets, trade secret protection remains stronger in the United States.

This Note will first analyze the history of trade secret protection in both the United States and the EU. This Note will then look at the similarities and differences between the recently enacted legislation in the United States and the EU. Next, it analyzes the differences in the effects of the United States'

¹ Ivana Kottoasova, *Does Formula Mystery Help Keep Coke Afloat?*, CNN (Feb. 19, 2014), <http://edition.cnn.com/2014/02/18/business/coca-cola-secret-formula/>.

² *Id.*

³ *Id.*

⁴ EXEC. OFFICE OF THE PRESIDENT OF THE U.S., ADMINISTRATION STRATEGY ON MITIGATING THE THEFT OF U.S. TRADE SECRETS 5 (2013), <https://www.justice.gov/criminal-ccips/file/938321/download>.

⁵ *Id.* at 8.

⁶ *Id.* at 11.

⁷ BRIAN T. YEH, CONG. RESEARCH SERV., R43174, PROTECTION OF TRADE SECRETS: OVERVIEW OF CURRENT LAW AND LEGISLATION (2016), <https://www.fas.org/sgp/crs/secrecy/R43714.pdf>.

legislation and the EU's directive. Finally, this Note will consider whether the legislation will lead to uniformity in trade secret protection in both jurisdictions.

II. BACKGROUND ON TRADE SECRET PROTECTION

In order to provide a deeper understanding of the trade secrets legislation in each world power, it is important to understand the trade secret protections that already existed in both the United States and the EU. Many states in the United States adopted similar provisions for trade secret protection, whereas many countries in the EU had extremely different, or non-existent, approaches to trade secret protection.⁸ This section will explore the concept of a trade secret and the type of information that qualifies as a trade secret. This section will then explore the history of trade secret protection in the United States as a source for comparing the recently adopted legislation. Subsequently, this section will explain trade secret protection as it exists in the EU as foundation to analyze the effects of the recently adopted legislation.

A. *What is a Trade Secret and Why Do They Matter?*

The first element of analyzing trade secret legislation is defining a trade secret. According to the *Restatement of Torts*, “[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.”⁹ A trade secret is typically “a process or device for continuous use in the operation of the business” that relates to the production of goods.¹⁰ Trade secrets can include “customer lists, proprietary technologies, formulas and codes, manufacturing processes, recipes . . . sensitive product and marketing plans, research and development, and other business information” that can provide a competitive advantage because of its confidentiality.¹¹ These examples of trade secrets derive their value not only from the information itself but also the secrecy of the information.¹² Trade secrets are important because they help companies

⁸ Natalja Sosnova, *EU Directive Proposal: Trade Secrets*, 20 MARQ. INTELL. PROP. L. REV. 45, 47 (2016).

⁹ RESTATEMENT OF TORTS § 757 cmt. b (AM. LAW INST. 1939).

¹⁰ *Id.*

¹¹ 3M et al., Letter from 36 Organizations with an Interest in Trade Secret Protection to the Securities and Exchange Commission (Aug. 8, 2016), <https://www.sec.gov/comments/s7-06-16/s70616-352.pdf> [hereinafter Hearings from Organizations].

¹² *Id.*

distinguish themselves from competitors and create advantages in the industry.¹³ If a competitor acquires a company's trade secret, that company loses the value of its secret and the competitor gains an advantage by having access to information they did not develop, thereby eliminating the trade secret owner's incentive to invest in innovations.¹⁴

The importance of trade secrets has grown in the global economy. Though it is difficult to value just how much trade secrets are worth, 81% of the total value of S&P 500 companies can be attributed to intangible assets like trade secrets and other forms of intellectual property.¹⁵ A primary reason for the growing importance of trade secrets is new technology.¹⁶ In today's world, a thief can simply upload files onto a hard drive and deliver that information anywhere in the world, rather than stealing physical files or prototypes. Trade secret theft is also growing because hackers have the ability to access confidential company information¹⁷ which has become a growing concern because some developing countries use trade secret theft as a means of economic growth.¹⁸ Additionally, trade secrets are rising in importance precisely because of the term's broad definition—the definition is “perfectly suited to the evolutionary . . . and revolutionary . . . nature of innovation.”¹⁹ Finally, trade secrets are attractive to companies because they are less costly than patents and require less formality.²⁰ Companies risk losing their patent information if their application is denied by the U.S. Patent and Trademark Office, but they do not risk losing their trade secret because it is not on the application.²¹

B. History of Trade Secret Protection in the United States

The United States has a strong background in intellectual property and the protection of trade secrets. Historically, the U.S. government gave patents and copyrights stronger protection than trade secrets; however, in 1939, trade

¹³ Daliah Saper, *Confidential Information: The Importance of Keeping Trade Secrets*, BUSINESS.COM (Jan. 11, 2016), <http://www.business.com/legal/the-importance-of-keeping-secrets-trade-secrets-that-is/>.

¹⁴ Hearings from Organizations, *supra* note 11.

¹⁵ David S. Almeling, *Seven Reasons Why Trade Secrets Are Increasingly Important*, 27 BERKELEY TECH. L.J. 1091, 1093 (2012).

¹⁶ *Id.* at 1098–1101.

¹⁷ *Id.* at 1100.

¹⁸ *Id.* at 1110.

¹⁹ *Id.* at 1008.

²⁰ *Id.* at 1116.

²¹ *Id.* at 1115–16. “A regular US Patent application will be published eighteen months after filing. If . . . a patent application . . . does not mature into an issued patent, they have neither trade secret nor patent protection.”

secrets entered the intellectual property scene when the *Restatement of Torts* addressed trade secrets in two sections.²² In particular, companies used trade secret law to protect information that was outside the scope of traditional intellectual property law²³ or to avoid the disclosure of patented information after twenty years.²⁴ Another advantage to trade secret protection is that it is easier, quicker, and cheaper to obtain compared to patent protection.²⁵

The increased use of trade secrets led to the publication of the Uniform Trade Secrets Act (UTSA) in 1979 to facilitate uniform trade secret protection among states.²⁶ Forty-eight states have adopted the UTSA.²⁷ The UTSA was published by the National Conference of Commissioners on Uniform State Law with the intent “to codify the basic principles of common law trade secrets protection” and promote uniformity, simplicity, and fairness in the resolution of trade secret issues.²⁸ Under the UTSA, information qualifies as a trade secret if three requirements are met: (1) it must be information; (2) it must “have actual or potential ‘independent economic value’ stemming from its secrecy”; and, (3) it must have “been the object of reasonable efforts designed to maintain its secrecy.”²⁹ The UTSA guidelines provide that a trade secret owner has no remedy unless the secret has been misappropriated.³⁰ Misappropriation under the UTSA occurs when information is obtained by improper means including: theft, bribery, misrepresentation, breach, or inducement of a breach of duty to maintain secrecy or espionage.³¹ According to the UTSA, a trade secret owner may receive injunctive relief and damages if their trade secret is misappropriated.³² A trade secret owner may bring an action for misappropriation within three years after the misappropriation was discovered or should have been discovered.³³ Thus, the UTSA provides a way for trade secret owners to ensure uniformity in the protection of trade

²² YEH, *supra* note 7.

²³ Robert C. Van Arnem, Comment, *Business War: Economic Espionage in the United States and the European Union and the Need for Greater Trade Secret Protection*, 27 N.C. J. INT'L L. & COM. REG. 95, 100–101 (2001).

²⁴ YEH, *supra* note 7.

²⁵ *Id.*

²⁶ Rosaria A. Suriano & Mark A. Fantin, *Protecting Your Business Assets*, INDUSTRYWEEK (Sept. 30, 2016), <http://www.industryweek.com/intellectual-property/protecting-your-business-assets>.

²⁷ *Id.*

²⁸ Ramon A. Klitzke, *The Uniform Trade Secrets Act*, 64 MARQ. L. REV. 277, 284 (1980).

²⁹ *Id.* at 285.

³⁰ *Id.* at 293.

³¹ *Id.* at 294.

³² *Id.* at 301.

³³ *Id.* at 306.

secrets from state to state. Overall, the UTSA has been widely accepted based on the fact that only New York and Massachusetts have not adopted the Act.³⁴ However, it is important to note that though the UTSA provides a strong foundation for the protection of trade secrets, it is only applicable in state courts or federal courts sitting in diversity jurisdiction.³⁵

While the UTSA permitted trade secret owners to have a civil remedy against trade secret misappropriation in state court, the Economic Espionage Act of 1996 (EEA) made trade secret misappropriation a federal crime.³⁶ Congress passed the EEA due to concerns that foreign countries were stealing trade secrets from American companies, thereby reducing American economic power.³⁷ Prior to the EEA's enactment, prosecutors brought trade secret theft charges under mail fraud statutes.³⁸

The EEA was the first criminal law in the United States to protect trade secrets. The EEA criminalizes the theft of trade secrets for the benefit of a foreign entity or with an intention to confer an economic benefit to another party.³⁹ Only intentional violations of trade secret theft are punishable under the EEA.⁴⁰ Penalties under the EEA include a maximum prison sentence of fifteen years and a maximum fine of \$500,000 for an individual.⁴¹ An organization that violates the law could receive a maximum fine of \$10 million.⁴²

C. History of Trade Secret Protection in the European Union

In contrast with the United States' fairly uniform application of trade secret law due to most states' adoption of the UTSA, a 2013 study found no uniform definition of trade secrets among the European Union's member states.⁴³ Each of the twenty-eight member states has a different definition of "trade secret" and different protections for trade secrets, but the Directive of the European Parliament and of the Council of 8 June 2016 on the Protection

³⁴ Suriano & Fantin, *supra* note 26; Trade Secrets Act Enactment Status Map, UNIFORM LAW COMM'N, <http://www.uniformlaws.org/Act.aspx?title=trade%20Secrets%20Act> (last visited Oct. 25, 2017).

³⁵ ROGER M. MILGRIM, MILGRIM ON TRADE SECRETS § 13.02 (2015).

³⁶ Economic Espionage Act, 18 U.S.C. § 1831 (2017).

³⁷ Robin L. Kuntz, *Cyberlaw: How Not to Catch A Thief: Why the Economic Espionage Act Fails to Protect American Trade Secrets*, 28 BERKELEY TECH. L.J. 901, 902–03 (2013).

³⁸ *Id.* at 904.

³⁹ YEH, *supra* note 7.

⁴⁰ Van Arnam, *supra* note 23, at 110.

⁴¹ Kuntz, *supra* note 37, at 906.

⁴² *Id.* at 907.

⁴³ For the purposes of this Note, the United Kingdom is analyzed as a part of the European Union as the withdrawal was not yet complete.

of Undisclosed Know-How and Business Information (Trade Secrets) Against Their Unlawful Acquisition, Use and Disclosure (Directive) aims to change this disjunction.⁴⁴

Historically, the common view was that trade secrets did not deserve the same level of protection as other intellectual property rights.⁴⁵ A European Commission report showed that fewer trade secret actions were heard by the courts than patent or other intellectual property cases.⁴⁶ The United Kingdom's Ministry of Justice stated that there were 95 trade secret cases in 2009 compared to 146 trademark cases, 130 patent cases, and 120 copyright cases.⁴⁷ Further, the European Commission was more concerned with encouraging competition than securing the rights of companies regarding trade secrets.⁴⁸ Thus, even though there were trade secret standards around the EU, the standards were ignored which led to weak trade secret protection measures.⁴⁹

The present disjunction in trade secret protection causes concern because it leads to barriers to trade and distortion of competition.⁵⁰ For instance, various jurisdictions refer to trade secrets using different terms including: know-how, confidential information, or business secret.⁵¹ There is little agreement as to the meanings of each these terms, which can create confusion as to what qualifies as a trade secret.⁵² Further, different countries may deem the theft of trade secrets as a civil or criminal offense or both.⁵³ For instance, in France, the criminal code has had provisions related to the theft of trade secrets since 1844.⁵⁴ On the other hand, Ireland and the U.K. do not have any criminal provisions on trade secret infringement.⁵⁵ Moreover, some EU member states lack any remedy for trade-secret theft.⁵⁶

⁴⁴ Sosnova, *supra* note 8, at 47.

⁴⁵ Katarzyna A. Czapracka, *Antitrust and Trade Secrets: The U.S. and the EU Approach*, 24 SANTA CLARA COMPUTER & HIGH TECH. L.J. 207, 208–09 (2008).

⁴⁶ HOGAN LOVELLS INT'L, LLP, REPORT ON TRADE SECRETS FOR THE EUROPEAN COMMISSION: STUDY ON TRADE SECRETS AND PARASITIC COPYING (LOOK-ALIKES), at 41, MARKT/2010/20/D (Sept. 23, 2011), http://ec.europa.eu/internal_market/iprenforcement/docs/trade-secrets/120113_study_en.pdf [hereinafter REPORT].

⁴⁷ *Id.*

⁴⁸ Czapracka, *supra* note 45, at 209.

⁴⁹ *Id.*

⁵⁰ *Id.* at 229.

⁵¹ *Id.* at 230.

⁵² *Id.* at 231.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 213, 234.

⁵⁶ *Frequently Asked Questions: Protection Against the Unlawful Acquisition of Undisclosed Know-how Business Information (Trade Secrets)*, EUROPEAN COMM'N, http://ec.europa.eu/growth/industry/intellectual-property/trade-secrets/faq_en (last visited Oct. 5, 2016) [hereinafter

There are also differences in national legislation as to why a person may bring a claim for the theft of a trade secret. Only Germany and Poland require that a trade secret holder “have a justifiable interest to keep the information secret, which is assessed in relation to the relevance of the subject of the secret for the competitiveness of the enterprise.”⁵⁷

Additionally, there are differences in legal procedures. For instance, Belgium requires a written pleading communicating that the information is a trade secret, which serves as a deterrent for those seeking to bring a trade secret action unless the information is already generally known.⁵⁸ Belgium illustrates that there is a dearth of protection from the disclosure of trade secrets in the courts of European Union member States.

Though there is widespread fragmentation, some similarities exist among those countries that do have trade secret laws in the EU. In general, the information is required to be secret, and the owner is required to maintain efforts to keep the information secret.⁵⁹ If a third party can easily discover the information, it is not protectable.⁶⁰ The trade secret owner should intend to maintain the secrecy of the information.⁶¹ Finally, there must be a link between the trade secret and an economic advantage.⁶² The trade secret does not need to be patentable, although some jurisdictions do require the trade secret to be “novel.”⁶³

Key elements of a trade secret include the confidentiality of information and the owner’s efforts to maintain the secrecy of the information.⁶⁴ Countries that do not formally define “trade secret” use a multitude of factors to determine if the information is a trade secret.⁶⁵ Only one country has legislation wholly dedicated to trade secrets, whereas some jurisdictions protect trade secrets using the law of unfair competition.⁶⁶ Most countries

Frequently Asked Questions]. Austria, Bulgaria, the Czech Republic, Estonia, Finland, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, and Sweden have legislation on the misappropriation of trade secrets, though Germany, Finland, Greece, Denmark, and Spain do not define “trade secret.” *Id.* Belgium, France, Ireland, Luxembourg, Malta, the Netherlands, and the U.K. have no specific provision on trade secrets in state law. *Id.* In Cyprus, trade secrets are only protected by contract. *Id.* In France, the theft of manufacturing secrets are criminally punished if committed by employees. *Id.*

⁵⁷ Czapracka, *supra* note 45, at 234.

⁵⁸ REPORT, *supra* note 46.

⁵⁹ Czapracka, *supra* note 45, at 234.

⁶⁰ *Id.* at 234–35.

⁶¹ *Id.* at 235.

⁶² *Id.*

⁶³ *Id.* at 234–35.

⁶⁴ REPORT, *supra* note 46.

⁶⁵ *Id.*

⁶⁶ *Id.*

have criminal sanctions against trade secret infringement and provide for the protection of trade secrets by contractual obligations.⁶⁷ While most states offer injunctions and damages, the remedies vary from state to state depending on the cause of action.⁶⁸ Further, some countries do not issue orders protecting trade secret information because the protection can last forever, thereby broadening intellectual property rights.⁶⁹ Finally, it has historically been difficult for plaintiffs to get into the court because claimants could not prove that the information was stolen.⁷⁰

The European Commission created a directive partially due to a recent study showing that 75% of companies stated that trade secrets are important for competitiveness and innovative performance.⁷¹ The lack of consistent trade secret laws discourages cross-border research and development; companies refrain from sharing trade secrets; and few companies seek legal remedies after they are a victim of trade secret misappropriation.⁷² The statistics indicated that it was clearly time for a change in the European Union. The European Commission cited company requests for coherent legal protection against the unlawful acquisition of trade secrets as a primary reason for the legislation.⁷³ Further, in the past ten years, one in five European companies suffered from at least one misappropriation attempt,⁷⁴ and many of those respondents likely did not seek redress because of fragmentation in trade secret laws. These companies also indicated that the danger of misappropriation was increasing.⁷⁵ Of the 140 companies that reported attempts or acts of misappropriation, only 40.7% sought remedies in EU courts.⁷⁶ The primary reasons for failing to do so were collecting evidence, reputation, and litigation costs.⁷⁷

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Frequently Asked Questions*, *supra* note 56.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Study on Trade Secrets and Confidential Business Information in the Internal Market*, 13 (Apr. 2013), http://ec.europa.eu/internal_market/iprenforcement/docs/trade-secrets/130711_fi_nal-study_en.pdf [hereinafter *Study*]. These responses were based on a survey with “a stratified sample encompassing large, medium, and small firms belonging to a wide range of business sectors.” *Id.* at 12. Overall, a total of 537 responses to the survey were received from EU firms. *Id.*

⁷⁵ *Id.* at 13.

⁷⁶ *Id.*

⁷⁷ *Id.* Of 140 companies surveyed, 43% stated difficulty in collecting evidence, 30% stated reputation, and 30% stated reputation costs.

Though each jurisdiction has unique trade secret laws, there are basic principles that apply to all EU states. First, several different types of information are eligible for trade secret protection.⁷⁸ Many states do not include definitions in their trade secrets legislation, though it is generally understood to mean information including technical or non-technical data, patterns, compilations, programs, devices, methods, techniques, financial data, customer lists, or supplies that have economic value as the information is not generally known to third parties and secrecy is maintained due to the owner's efforts.⁷⁹

III. OVERVIEW OF THE TRADE SECRETS DIRECTIVE AND DEFEND TRADE SECRETS ACT

The European Commission proposed the Trade Secrets Directive on November 28, 2013, and on June 8, 2016 the European Union adopted the Directive.⁸⁰ The Directive requires all member states to create legislation that aligns with the Directive within two years from the adoption date.⁸¹ The Directive is “applicable when the appropriation, use or disclosure of trade secrets is done without the consent of the trade secret holder and through the use of dishonest means, breach of law, or breach of contract.”⁸² Further, it is important for companies “from different EU countries to build trusted networks for collaborative research or to enter into know-how transfer agreements” which can only be done by repairing the fragmented system of trade secret laws.⁸³

A. *European Union Trade Secrets Directive*

On June 8, 2016, the European Parliament and Council adopted a Directive called Directive (EU) 2016/943 of the European Parliament and of the Council on 8 June 2016 on the Protection of Undisclosed Know-How and Business Information (Trade Secrets) Against Their Unlawful Acquisition, Use, and Disclosure (Trade Secrets Directive).⁸⁴ The rationale behind the

⁷⁸ REPORT, *supra* note 46.

⁷⁹ *Id.*

⁸⁰ *Frequently Asked Questions, supra* note 56.

⁸¹ See Directive 2016/943, of the European Parliament and of the Council of 8 June 2016 on the Protection of Undisclosed Know-How and Business Information (Trade Secrets) Against Their Unlawful Acquisition, Use and Disclosure 2016 O.J. (L 157) 18 [hereinafter Trade Secrets Directive].

⁸² *Frequently Asked Questions, supra* note 56.

⁸³ *Id.*

⁸⁴ Trade Secrets Directive, *supra* note 81.

Trade Secrets Directive was to limit European companies' increasing exposure to the misappropriation of trade secrets.⁸⁵ The Directive does not establish criminal sanctions, but harmonizes the civil remedies available to a trade secret owner including:

stopping the unlawful use and further disclosure of misappropriated trade secrets[;] the removal from the market of goods that have been manufactured on the basis of a trade secret that has been illegally acquired[;] the right to compensation for the damages caused by the unlawful use or disclosure of the misappropriated trade secret.⁸⁶

The Directive dictates that a trade secret has three components. First, it should be a secret that is not generally known or readily accessible by people that usually deal with the information in question.⁸⁷ Second, it should have commercial value derived from the fact that it is a secret.⁸⁸ Finally, the trade secret holder should have taken reasonable steps to protect the secrecy of the information.⁸⁹

The Directive prohibits the unlawful acquisition, use, and disclosure of trade secrets. It is unlawful for a person to use or disclose a trade secret if they know or should have known that the trade secret was obtained directly or indirectly from another person who unlawfully used or disclosed the trade secret.⁹⁰

The Directive also provides for the preservation of confidentiality of trade secrets in the course of legal proceedings. Member states must take specific measures that are necessary to preserve the confidentiality of any trade secret or alleged trade secret used or referred to in the course of legal proceedings.⁹¹ These protections include: restricting access to any document containing trade secrets, restricting access to hearings when trade secrets may be disclosed, limiting access to only certain people, and limiting a non-confidential version of a judicial decision to only a specified number of persons.⁹² The number of persons is limited to what is necessary to ensure the right to an effective remedy and fair trial and must include at least one

⁸⁵ *Id.* at 3.

⁸⁶ *Trade Secrets*, EUROPEAN COMM'N, https://ec.europa.eu/growth/industry/intellectual-property/trade-secrets_en (last visited Oct. 24, 2017).

⁸⁷ Trade Secrets Directive, *supra* note 81, at 2.

⁸⁸ *Id.* at 4.

⁸⁹ *Id.* at 7.

⁹⁰ *Id.* at 10.

⁹¹ *Id.* at 5–6.

⁹² *Id.* at 6.

natural person from each party and their respective lawyers.⁹³ Exceptions to trade secret protections occur when secrets are exposed as the result of whistleblowing, conflicting with the right to freedom of expression, or when the protections conflict with the functions of workers' representatives.⁹⁴

B. United States Defend Trade Secrets Act

On May 11, 2016, President Obama signed Public Law 114-153. The Public Law, which amends Chapter 90 of Title 18 of the United States Code (Economic Espionage Act), is called the Defend Trade Secrets Act of 2016 (DTSA).⁹⁵ In a rare showing of bipartisanship, the Senate unanimously passed the bill in a vote of 87–0 on April 4, 2016. The bill passed the House 410–2.⁹⁶ Under the DTSA, the owner of a trade secret may bring a civil action if the trade secret is misappropriated and the trade secret is related to a product or service that is used in or intended for use in interstate or foreign commerce.⁹⁷ President Obama explained that the bill serves to prevent competitors from stealing trade secrets from American companies, which costs the economy over \$300 billion a year.⁹⁸ The legislation expands the Economic Espionage Act of 1996.⁹⁹ The DTSA enables trade secret owners to bring trade secret lawsuits in a federal forum. Previously, owners were limited to only state forums or federal courts in diversity.¹⁰⁰

The DTSA is like the UTSA. The trade secret definition is very similar, and the misappropriation definition is identical.¹⁰¹ Both the DTSA and UTSA have a three-year statute of limitations following the discovery of misappropriation.¹⁰² The DTSA does not preempt state law, and federal court jurisdiction is not exclusive.¹⁰³

⁹³ *Id.*

⁹⁴ *Id.* at 4–5.

⁹⁵ Defend Trade Secrets Act of 2016, Pub. L. No. 114-153, 130 Stat. 376 (2016).

⁹⁶ REUTERS, *Congress Just Passed Tough New Trade Secret Protection Legislation*, FORTUNE (Apr. 28, 2016), <http://fortune.com/2016/04/28/congress-trade-secret-legislation/>.

⁹⁷ 18 U.S.C. § 1836(b)(1) (2016).

⁹⁸ Gregory Korte, *Obama Signs Trade Secrets Bill, Allowing Companies to Sue*, USA TODAY (May 11, 2016), <http://www.usatoday.com/story/news/politics/2016/05/11/obama-sign-trade-secrets-bill-allowing-companies-sue/84244258/>.

⁹⁹ Eric Goldman, *The New 'Defend Trade Secrets Act' Is the Biggest IP Development in Years*, FORBES (Apr. 28, 2016), <http://www.forbes.com/sites/ericgoldman/2016/04/28/the-new-defend-trade-secrets-act-is-the-biggest-ip-development-in-years/#7946ea00a64f>.

¹⁰⁰ *Id.*; see also ROGER M. MILGRIM, MILGRIM ON TRADE SECRETS § 13.02 (2015).

¹⁰¹ See 18 U.S.C. § 1839(3); Unif. Trade Secrets Act § 1(4)(i) (amended 1985).

¹⁰² See 18 U.S.C. § 1836(d); Unif. Trade Secrets Act § 6 (amended 1985).

¹⁰³ 18 U.S.C. § 1838 (2016).

However, the DTSA is also distinct from the UTSA in multiple ways. First, the trade secret must satisfy the commerce clause, meaning that the trade secret must be related to a product or service use in or intended for use in interstate or foreign commerce.¹⁰⁴ Second, the DTSA allows for ex parte civil seizure.¹⁰⁵ Third, the DTSA grants whistleblower immunity.¹⁰⁶ Fourth, the U.S. legislation requires employers to give notice of whistleblower immunity, and finally, it applies to activity outside the United States.¹⁰⁷

IV. COMPARISON OF THE EUROPEAN UNION TRADE SECRETS DIRECTIVE AND THE UNITED STATES DEFEND TRADE SECRETS ACT

Both the European Union and the United States decided to implement these trade secret measures because of the growing importance of trade secret protection in the global economy. The nature of trade secrets requires a common definition and protections, especially as trade secret misappropriation is litigated in court.

Overall, the DTSA is comparable to the European Union Trade Secrets Directive. Both have similar definitions of a trade secret with three requirements. First, the information must be a secret meaning that it is not generally known. The U.S. definition states that the information should not be known to another person who can derive economic value from the information,¹⁰⁸ whereas the EU only requires that the information should not be known within circles that deal with the kind of information in question.¹⁰⁹ Second, the trade secret must have economic or commercial value.¹¹⁰ Finally, in order to be a trade secret, the owner or controller of the information must take efforts to prevent others from obtaining the trade secret information.¹¹¹

In order for a trade secret to be misappropriated, both the DTSA and the Directive require either wrongful acquisition, use, or disclosure.¹¹² Wrongful acquisition occurs if someone acquires the trade secret information through unauthorized access. The DTSA describes this as “theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain

¹⁰⁴ *Id.* § 1832(a).

¹⁰⁵ *Id.* § 1836(b).

¹⁰⁶ *Id.* § 1833(b); *id.* § 1837.

¹⁰⁷ *Id.* § 1837.

¹⁰⁸ *Id.* § 1839(3)(B).

¹⁰⁹ Trade Secrets Directive, *supra* note 81, at 4.

¹¹⁰ *See* 18 U.S.C. § 1839(3)(B); Trade Secrets Directive, *supra* note 81, at 9.

¹¹¹ *See* 18 U.S.C. § 1839(3)(A); Trade Secrets Directive, *supra* note 81, at 9.

¹¹² *See* 18 U.S.C. § 1839(5); Trade Secrets Directive, *supra* note 81, at 10.

secrecy, or espionage.”¹¹³ Both acts also state that the acquisition, use, or disclosure of a trade secret is unlawful if one obtains the trade secret with knowledge that the information was obtained from another person who was using or disclosing the trade secret unlawfully.¹¹⁴ However, a person is shielded from liability if he or she obtains the information without knowledge that it was wrongfully acquired, according to both the DTSA and the Directive.¹¹⁵

Wrongful use or disclosure occurs if one of three criteria are met. First, wrongful use occurs if a person acquires a trade secret improperly or unlawfully.¹¹⁶ It can also occur if a person obtains a trade secret despite a duty to not disclose the secret, or, in other words, if a person has an obligation to keep the information confidential or a duty to limit the trade secret’s use.¹¹⁷ Third, wrongful use or disclosure can occur if a person knowingly obtains a trade secret from a person who owed a duty to maintain a trade secret’s confidentiality or limit its use.¹¹⁸

While both the DTSA and Directive seek to prevent the misappropriation of trade secrets, both the United States and EU strive to maintain innovation. As such, both pieces of legislation also define lawful means to acquire trade secret information. The United States explicitly allows for reverse engineering.¹¹⁹ Though the Directive does not explicitly use the words “reverse engineering,” it does allow for “observation, study, disassembly or testing of a product or object that has been made available to the public or that is lawfully in the possession of the acquirer of the information who is free from any legally valid duty to limit the acquisition of the trade secret.”¹²⁰ Though the difference is subtle, the DTSA does not address whether a person with access to the trade secret information could “reverse engineer” an item. Further, both the DTSA and Directive allow for any independent discovery, creation, or derivation of the trade secret information.¹²¹ This means that if a person, through their own testing methods, developed an identical recipe for Coca-Cola, the acquisition of that trade secret would be lawful.

The Directive goes a step further than the DTSA as to what types of trade secret disclosures are lawful. The Directive states that it does not apply to those who exercise the right to freedom of expression and information as set

¹¹³ 18 U.S.C. § 1839(6)(A).

¹¹⁴ 18 U.S.C. § 1839(5)(B); Trade Secrets Directive, *supra* note 81, at 6–7.

¹¹⁵ See 130 Stat. 376; Trade Secrets Directive, *supra* note 81, at 6–7.

¹¹⁶ 18 U.S.C. § 1839(5)(A); Trade Secrets Directive, *supra* note 81, at 10.

¹¹⁷ 18 U.S.C. § 1839(5)(B)(ii)(II); Trade Secrets Directive, *supra* note 81, at 10.

¹¹⁸ 18 U.S.C. § 1839(5)(B)(ii)(III); Trade Secrets Directive, *supra* note 81, at 10.

¹¹⁹ 18 U.S.C. § 1839(6)(B).

¹²⁰ Trade Secrets Directive, *supra* note 81, at 10.

¹²¹ 18 U.S.C. § 1839(6)(B); Trade Secrets Directive, *supra* note 81, at 4.

out in the European Union Charter of Fundamental Rights.¹²² It is not clear what the freedom of expression and information covers; however, the text of the Directive indicates that the Directive intends to protect “investigative journalism and the protection of journalistic sources.”¹²³ The Directive also allows for the acquisition, use, or disclosure of trade secrets if such action is permitted by law.¹²⁴ In particular, this provision applies to unions. Union representatives should still be able to exercise their rights to information according to the EU or the national laws of EU countries.¹²⁵

Both regimes also allow for whistleblower protections, though again, the Directive provides broader protections for whistleblowers. The DTSA only protects a whistleblower if he discloses a trade secret “in confidence to a Federal, State, or local government official, either directly or indirectly, or to an attorney.”¹²⁶ The Directive protects any disclosure that “serves the public interest” meaning the disclosure reveals “misconduct, wrongdoing, or illegal activity.”¹²⁷ The EU also allows for good faith immunity for whistleblowers so long as they believe that they revealed misconduct, wrongdoing, or illegal activity in furtherance of the public interest.¹²⁸

Both the United States and EU also seek to protect employees through their respective legislation. The DTSA prohibits injunctions that prevent someone from entering into an employment relationship.¹²⁹ In addition, if a person has conditions placed on entering into an employment relationship, those conditions can only be based on evidence of threatened misappropriation, not solely an employee’s knowledge.¹³⁰ Additionally, conditions may not conflict with applicable state law that may prohibit restraints on “the practice of a lawful profession, trade, or business.”¹³¹ The Directive provides even stronger protections for employees. First, the

¹²² Trade Secrets Directive, *supra* note 81, at 5.

¹²³ *Id.*

¹²⁴ *Id.* at 4.

¹²⁵ *Id.*

The acquisition, use, or disclosure of trade secrets, whenever imposed or permitted by law, should be treated as lawful for the purposes of this Directive. This concerns, in particular, the acquisition and disclosure of trade secrets in the context of the exercise of the rights of workers’ representatives to information, consultation, and participation in accordance with Union law and national laws and practices, and the collective defen[s]e of the interest of workers and employees.

¹²⁶ 18 U.S.C. § 1833(b)(1)(A)(i).

¹²⁷ Trade Secrets Directive, *supra* note 81, at 5.

¹²⁸ *Id.* at 11.

¹²⁹ 18 U.S.C. § 1836(b)(3)(A)(i)(I).

¹³⁰ *Id.*

¹³¹ *Id.* § 1836(b)(3)(A)(i)(II).

Directive points out that it should not be used as a method to limit an employee's use of information that is not a trade secret.¹³² Next, the Directive should not be used to limit an employee's use of experience and skills that were acquired throughout their course of employment.¹³³ Finally, the Directive should not be used to impose additional restrictions on an employment contract, unless that restriction is imposed according to EU or national law.¹³⁴

The DTSA also provides anti-retaliation protection while the Directive does not. The DTSA states that an individual may disclose a trade secret after filing a lawsuit for retaliation by an employer if certain conditions are met.¹³⁵ The employee must file any document under seal and cannot disclose the trade secret unless ordered by a court.¹³⁶ Further, employers are required to provide employees with notice of immunity.¹³⁷

The laws diverge with regard to who can bring a claim for trade secret misappropriation. The DTSA only allows for the owner to bring a claim.¹³⁸ The Directive extends more broadly by allowing one who controls the information to bring such a claim.¹³⁹ Because the Directive applies to those who control information, those in upper-level managerial positions may be entitled to bring trade secret claims, in lieu of just the person that owns the proprietary information. The broader standing for those who control information may also include licensees of trade secret information.

The DTSA gives U.S. courts jurisdiction over conduct occurring outside of the United States, as long as the person who misappropriated the information is a U.S. citizen or entity.¹⁴⁰ The Directive does not specify whether it applies to extraterritorial conduct; however, EU member states will likely be able to provide for broader national reach in their own national laws.

Recognizing the importance of trade secrets, both the DTSA and Directive seek to preserve the confidentiality of a trade secret throughout litigation. This is a key factor that will encourage parties to bring trade secret claims—otherwise, the legislation in both the United States and EU would be futile. In the United States, the trade secret owner must be given the opportunity to describe their interest in keeping information confidential

¹³² Trade Secrets Directive, *supra* note 81, at 9.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ 18 U.S.C. § 1833(b)(2).

¹³⁶ *Id.* § 1833(b)(2)(B).

¹³⁷ *Id.* § 1833(b)(3)(A).

¹³⁸ *Id.* § 1836(b)(1).

¹³⁹ Trade Secrets Directive, *supra* note 81, at 9.

¹⁴⁰ 18 U.S.C. § 1837.

before the court is able to authorize or direct disclosure of any information that the owner asserts to be a trade secret.¹⁴¹ The Directive provides greater detail about confidentiality measures. The Directive identifies specific baseline measures that a court should consider to preserve confidentiality.¹⁴² These measures include restricting access to documents containing trade secrets, restricting access to hearings where trade secrets may be disclosed and corresponding transcripts, and limiting the number of people who can access a non-confidential version of a judicial decision.¹⁴³

The Directive also outlines factors that judicial authorities should consider to determine which protective measures should be implemented.¹⁴⁴ These eight factors are: (1) the value of trade secret; (2) the measures taken to protect the trade secret; (3) the conduct used to acquire and to use the trade secret; (4) the impact of unlawful use or disclosure of trade secret; (5) the interest of parties; (6) the interests of third parties; (7) the public interest; and, (8) the need to safeguard fundamental rights.¹⁴⁵ Finally, the Directive offers more specificity about who has access to information during legal proceedings. In a trade secret proceeding, one natural person from each party and their respective lawyers will have full access to evidence or hearings.¹⁴⁶ The DTSA provides no such specificity. Finally, the Directive addresses the publication of judicial decisions after the case has been decided.¹⁴⁷ In any legal proceeding concerning the unlawful acquisition, use, or disclosure of a trade secret, judicial authorities may order the dissemination of information concerning the decision, which includes publishing the decision in full or in part.¹⁴⁸ Any publication must preserve the confidentiality of trade secrets.¹⁴⁹ The infringer bears the cost for “dissemination of the information concerning the decision, including publishing it in full or in part.”¹⁵⁰ A court must take into account “the value of the trade secret, the conduct of the infringer in acquiring, using or disclosing the trade secret, the impact of the unlawful use or disclosure of the trade secret, and the likelihood of further unlawful use or disclosure of the trade secret by the infringer.”¹⁵¹ The Directive also aims to provide some

¹⁴¹ *Id.*

¹⁴² Trade Secrets Directive, *supra* note 81, at 5.

¹⁴³ *Id.* at 6.

¹⁴⁴ *Id.* at 13.

¹⁴⁵ *Id.* at 14.

¹⁴⁶ *Id.* at 6.

¹⁴⁷ *Id.* at 17.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

protection to the infringer if the information in the publication of the decision would allow a natural person to be identified.¹⁵² In particular, the court will take into account whether publication of the identifying information is justified because the publication may cause harm to the privacy and reputation of the infringer.

Both documents also allow for similar remedies for trade secret misappropriation. Remedies can be either temporary or permanent. Temporary remedies include the seizure of property and preliminary injunctions. Both the DTSA and Directive allow for the seizure of infringing goods.¹⁵³ The EU defines infringing goods as goods whose design, characteristics, functioning, manufacturing, and process of marketing significantly benefit from trade secrets unlawfully acquired, used, or disclosed.¹⁵⁴ The DTSA is unique from the Directive because it allows for the ex parte seizure of property necessary to prevent the propagation or dissemination of the trade secret *only* upon the proper showing by the trade secret owner.¹⁵⁵ Ex parte seizure only occurs in extraordinary circumstances, and the trade secret owner must post bond.¹⁵⁶ The Directive does not state whether the seizure of infringing goods can be done ex parte. Further, the DTSA allows for the seizure of any property “necessary to prevent the propagation or dissemination of the trade secret,”¹⁵⁷ whereas the Directive only allows for the seizure of infringing goods.¹⁵⁸ The seizure of property under the DTSA is broader because it pertains to any documents that may include trade secret information; whereas infringing goods are only those produced using the trade secret itself.

Other temporary forms of relief in the EU and United States include preliminary injunctions. The Directive specifically requires EU states to allow “prohibition, offering, placing on the market or use of infringing goods” under the sub-title of “Provisional and Precautionary measures.”¹⁵⁹ The DTSA does not explicitly mention preliminary injunctions, however, an ex parte seizure can only be ordered if equitable relief under Rule 65 of the Federal Rules of Civil Procedure is inadequate.¹⁶⁰ This implies that preliminary injunctions are a form of relief for trade secret misappropriation. The Directive specifies that a court should take into account the eight factors

¹⁵² *Id.* at 9.

¹⁵³ 18 U.S.C. § 1836(b)(2); Trade Secrets Directive, *supra* note 81, at 13.

¹⁵⁴ Trade Secrets Directive, *supra* note 81, at 9.

¹⁵⁵ 18 U.S.C. § 1836(b)(2)(A)(i).

¹⁵⁶ *Id.* § 1836(b)(2)(B)(vi).

¹⁵⁷ *Id.* § 1836(b)(2)(A)(i).

¹⁵⁸ Trade Secrets Directive, *supra* note 81, at 13.

¹⁵⁹ *Id.*

¹⁶⁰ 18 U.S.C. § 1838(c)(2)(A)(ii)(I).

described above before issuing a preliminary injunction.¹⁶¹ A plaintiff must meet the requirements for a preliminary injunction.¹⁶²

Both the EU and the United States include limitations on preliminary relief through bonds and time limitations. In the United States, an ex parte seizure order or preliminary injunction requires the movant to post a bond.¹⁶³ Similarly, in the EU, a movant may be required to post a security to ensure that the respondent is compensated for any prejudice.¹⁶⁴ Both jurisdictions also impose time limits for judicial action for more permanent measures.¹⁶⁵ In the EU, an applicant must institute legal proceedings leading to a decision on the merits within either twenty working days or thirty-one calendar days, whichever is longer.¹⁶⁶ In the United States, after an ex parte seizure order, the court must set a date for a hearing no later than seven days after the order is issued, unless there is consent from the respondent to delay.¹⁶⁷

The DTSA places particular emphasis on the criteria surrounding the seizure of property related to the trade secret. If a trade secret has been misappropriated, a court can issue an order for the civil seizure of property necessary to prevent the propagation or dissemination of information that is the subject of the action.¹⁶⁸ In order to issue a civil seizure, the court must find that another form of equitable relief would be inadequate, an immediate and irreparable injury will occur if the seizure is not ordered, and the harm of denying the seizure outweighs the harm to the legitimate interests of the person against whom seizure would be ordered and substantially outweighs the harm to any third parties who may be harmed by such seizure.¹⁶⁹ The court must also find that the applicant is likely to show that the information is a trade secret and that the person against whom seizure would be ordered misappropriated the trade secret of the applicant by improper means or conspired to use improper means to misappropriate the trade secret, and that

¹⁶¹ Trade Secrets Directive, *supra* note 81, at 15.

¹⁶² *See* Winter v. Natural Res. Def. Council Inc., 555 U.S. 7 (2008). In order to obtain a preliminary injunction, a plaintiff must show that “he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” States interpret these requirements differently with some states requiring all four criteria, whereas some states use a sliding scale. *Id.* at 51.

¹⁶³ 18 U.S.C. § 1836(b)(2)(B)(vi).

¹⁶⁴ Trade Secrets Directive, *supra* note 81, at 14.

¹⁶⁵ 18 U.S.C. § 1836(b)(2)(B)(v); Trade Secrets Directive, *supra* note 81, at 14.

¹⁶⁶ Trade Secrets Directive, *supra* note 81, at 14.

¹⁶⁷ 18 U.S.C. § 1836(b)(2)(B)(v).

¹⁶⁸ *Id.* § 1836(b)(2)(A)(i).

¹⁶⁹ *Id.* § 1836(b)(2)(A)(ii).

the person against whom the seizure would be ordered has actual possession of the trade secret.¹⁷⁰

After the seizure, any materials seized will be taken into the custody of the court, and the court shall secure the seized material from physical and electronic access during the seizure and while in the court's custody.¹⁷¹ If the seized material includes a storage medium or is stored on a storage medium, the medium will not be connected to a network or the Internet without the consent of both parties.¹⁷² The court will take appropriate measures to protect the confidentiality of seized materials that are unrelated to the trade secret information ordered seized, unless the person against whom the order is entered consents to disclosure of the material.¹⁷³ Finally, "[t]he court may appoint a special master to locate and isolate all misappropriated trade secret information and to facilitate the return of unrelated property and data to the person from whom the property was seized."¹⁷⁴ In addition, the special master will be bound by a non-disclosure agreement approved by the court.¹⁷⁵

A finding of trade secret misappropriation can also result in monetary damages.¹⁷⁶ These monetary damages can come in three forms. First, they may equate to lost profits.¹⁷⁷ Second, the damages can reflect unjust enrichment.¹⁷⁸ Third, monetary damages can be in the amount of a reasonable royalty that may have been due had the trade secret been licensed for use.¹⁷⁹ However, in the EU, if an employee does not act with intent, member states have the ability to limit employees' damages.¹⁸⁰ The Directive does not explicitly address punitive damages, but the DTSA allows for punitive damages up to twice the amount awarded if the misappropriation was willful and malicious.¹⁸¹

On the other hand, if a court finds that a plaintiff brought a trade secret misappropriation claim in bad faith, both the DTSA and Directive provide for specific sanctions. In the United States, the defendant may be awarded

¹⁷⁰ *Id.* § 1836(b)(2)(A)(ii)(V)(aa).

¹⁷¹ *Id.* § 1836(b)(2)(D)(i).

¹⁷² *Id.* § 1836(b)(2)(D)(ii).

¹⁷³ *Id.* § 1836(b)(2)(D)(iii).

¹⁷⁴ *Id.* § 1836(b)(2)(D)(iv).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* § 1836(b)(3)(B)(i)–(ii); Trade Secrets Directive, *supra* note 81, at 7.

¹⁷⁷ 18 U.S.C. § 1836(b)(3)(B)(i)(I); Trade Secrets Directive, *supra* note 81, at 7.

¹⁷⁸ 18 U.S.C. § 1836(b)(3)(B)(i)(II); Trade Secrets Directive, *supra* note 81, at 7.

¹⁷⁹ 18 U.S.C. § 1836(b)(3)(B)(ii); Trade Secrets Directive, *supra* note 81, at 7.

¹⁸⁰ Trade Secrets Directive, *supra* note 81, at 7.

¹⁸¹ 18 U.S.C. § 1836(b)(3)(C).

attorney's fees if a claim is brought in bad faith.¹⁸² Further, if a defendant opposed a motion to terminate an injunction in bad faith, the DTSA may award attorney's fees to the plaintiff.¹⁸³ Similarly, the Directive allows for individual member states to impose sanctions on a plaintiff or award damages to the defendant.¹⁸⁴

In addition to monetary damages, judicial authorities can award permanent equitable relief. When there has been an unlawful acquisition, use, or disclosure of a trade secret, a European court has a few options. It may order:

- (a) the cessation of or . . . the prohibition of the use or disclosure of the trade secret; (b) the prohibition of production, offering, placing on the market or use of infringing goods, or the importation, export, or storage of infringing goods for these purposes; (c) the adoption of the appropriate corrective measures with regard to the infringing goods; [or] (4) the destruction of all or part of any document, object, material, substance or electronic file containing or embodying the trade secret or, where appropriate, the delivery up to the applicant of all or part of those documents, objects, materials, substances, or electronic files.¹⁸⁵

In the United States, permanent relief includes an injunction.¹⁸⁶ Both jurisdictions allow for the payment of a reasonable royalty in lieu of an injunction.¹⁸⁷ However, the United States permits this only in exceptional circumstances, and the EU allows this only when conditions are met including lack of intent, disproportionate harm, or if the royalty appears satisfactory.¹⁸⁸

Though the remedies in both the EU and United States are similar, the EU provides guidelines for revoking these remedies. The first is failure to institute legal proceedings.¹⁸⁹ Temporary remedies can also be removed if there is no unlawful acquisition, use, or disclosure found.¹⁹⁰ Both temporary and permanent remedies can be revoked at the request of the respondent if

¹⁸² 18 U.S.C. § 1836(b)(3)(D).

¹⁸³ *Id.*

¹⁸⁴ Trade Secrets Directive, *supra* note 81, at 16.

¹⁸⁵ *Id.* at 15.

¹⁸⁶ 18 U.S.C. § 1836(b)(3)(A).

¹⁸⁷ *Id.* § 1836(b)(3)(B)(ii); Trade Secrets Directive, *supra* note 81, at 7.

¹⁸⁸ *Id.* § 1836(b)(3)(A)(iii); Trade Secrets Directive, *supra* note 81, at 6–7.

¹⁸⁹ Trade Secrets Directive, *supra* note 81, at 14.

¹⁹⁰ *Id.*

the information is no longer a trade secret for reasons not attributable to the respondents.¹⁹¹

A fundamental difference between the two regimes is seen in regards to criminal liability. Although not a part of the DTSA, the United States allows for potential criminal liability for wrongful acquisition, use, or disclosure under the Economic Espionage Act.¹⁹² Remedies include fines, forfeiture of property, destruction of property, restitution to victim, and imprisonment.¹⁹³ There is no criminal liability under the Directive. However, individual member states may choose to have more “far-seeking protection” and enact criminal sanctions within their own jurisdiction that are aligned with the protections dictated by the Directive.¹⁹⁴

Another issue that will be determined by individual states in the EU is the statute of limitations. The United States statute of limitations period only lasts three years after the date on which the misappropriation is discovered or should have been discovered.¹⁹⁵ The Directive merely specifies that the statute of limitations should not exceed six years.¹⁹⁶ Each state will be able to tailor the statute of limitations to a period shorter than six years.¹⁹⁷ States will also be able to specify when the statute of limitations begins to run.¹⁹⁸

The DTSA grants federal courts jurisdiction over conduct that occurs outside of the United States, which is not present in the Directive.¹⁹⁹ However, the Directive only dictates a minimum level of protection so EU states can choose to have their trade secrets legislation apply to conduct outside of their territory, like the DTSA.

Both the EU and the United States also seem committed to ensuring that the DTSA and Directive are properly implemented. In the Directive, the European Commission cited certain requirements for member states. First, each member state is required to appoint at least one national correspondent “for any question relation to the implementation of the measures provided for by [the] Directive.”²⁰⁰ The national correspondents are required to communicate details to other member states and the European Commission regarding how their country is implementing the measures required by the

¹⁹¹ *Id.*

¹⁹² Economic Espionage Act, 18 U.S.C. § 1831 (1996).

¹⁹³ 18 U.S.C. § 1832(b); 18 U.S.C. § 1834.

¹⁹⁴ Trade Secrets Directive, *supra* note 81, at 8.

¹⁹⁵ 130 Stat. 376.

¹⁹⁶ Trade Secrets Directive, *supra* note 81, at 12.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ 18 U.S.C. § 1837.

²⁰⁰ Trade Secrets Directive, *supra* note 81, at 17.

Directive.²⁰¹ Further, the European Union seems committed to monitoring the effects of the Directive. The European Union Intellectual Property Office must prepare a report on the litigation trends “regarding the unlawful acquisition, use or disclosure of trade secrets pursuant to” the Directive.²⁰² Then, by June 2022, the European Commission must submit an intermediate report on the application of the Directive to the European Parliament and Council.²⁰³ The purpose of that report is to analyze the effects of the Directive on “research and innovation, the mobility of employees and on the exercise of the right to freedom of expression and information.”²⁰⁴ The European Commission will submit a final report evaluating the impact of the Directive to the European Parliament and Council by June 9, 2026.²⁰⁵ After member states implement “laws, regulations, and administrative provisions” necessary to comply with the Directive, they must communicate the text of the measures to the European Commission.²⁰⁶ The measures should also contain reference to the Directive.²⁰⁷ In the United States, two years after the DTSA’s enactment, the Federal Judicial Center is required to develop recommended best practices.²⁰⁸ These best practices concern “the seizure of information and media storing the information and the securing of information and media once seized.”²⁰⁹ Further, those best practices have to be updated periodically.²¹⁰

V. EFFECT OF LEGISLATION IN THE EUROPEAN UNION AND UNITED STATES

Despite the similarities between the two pieces of legislation, the effects will prove to be drastically different in each regime. The implementation of the DTSA will likely experience few hurdles, primarily because of the United States’ strong history of protecting trade secrets through the UTSA. On the other hand, there will be greater challenges with implementation in the EU for two reasons. First, effective implementation will require coordination between countries. Second, there are unanswered questions surrounding the Directive.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.* at 17–18.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 18.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ Defend Trade Secrets Act of 2016, Pub. L. No. 114-153, 130 Stat. 376 (2016).

²⁰⁹ *Id.*

²¹⁰ *Id.*

A. Implementation and Effects of the Trade Secrets Directive in the European Union

To begin with, the effects of the DTSA and the Directive will differ because of the nature of the documents. The DTSA is U.S. legislation, whereas the EU document is a directive. As such, the Directive does not have the same binding effect as the DTSA. A directive is a “legislative act that sets out a goal that all EU countries must achieve.”²¹¹ If the document was a “regulation,” it would serve as a binding legislative act applicable to the entire EU.²¹² However, with a directive, the EU defines a set of standards that each country should then implement. The Directive allows flexibility regarding statute of limitations and criminal liability.²¹³ This flexibility, in turn, will lead to stronger trade secret protection in some countries.

Across the board, trade secret litigation is bound to increase in the EU; however, the increased litigation will raise unanswered questions.²¹⁴ Though the Directive does not explicitly address jurisdictional issues, these will often arise in the Directive’s implementation. Generally, domicile of the defendant determines jurisdiction.²¹⁵ Historically, this likely served as a deterrent for trade secret claims because if the defendant lived in a state that did not offer trade secret protection, the trade secret owner was better off not bringing the claim at all because of the risk that the trade secret would be revealed during the litigation process. In the EU, a plaintiff can bring a claim related to a contractual obligation in the place of performance of that obligation.²¹⁶ Because of the Directive, any employee who was obliged to preserve a trade secret as part of their employment contract is now subject to suit in their former state of employment. Thus, if an employee misappropriates a trade secret and then moves to a new country, they will still be subject to a civil suit. The amount of trade secret litigation is likely to increase in nations that are more developed and industrial than others; for

²¹¹ *Regulations, Directives and Other Acts*, EUROPEAN UNION, https://europa.eu/european-union/eu-law/legal-acts_en (last visited Oct. 26, 2017).

²¹² *Id.*

²¹³ *See supra* notes 194, 197–98.

²¹⁴ *Jurisdiction of the Courts – Community Law*, EUROPEAN COMM’N, http://ec.europa.eu/civiljustice/jurisdiction_courts/jurisdiction_courts_ec_en.htm (last visited Nov. 3, 2016). These jurisdictional rules are based on the 2000 Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgment in commercial civil matters that lays down the rules on jurisdiction for court cases with an international dimension involving more than one Member State. It is also worth noting that these rules do not apply to Denmark because those relations are still governed by the 1968 Brussels Convention.

²¹⁵ *Id.*

²¹⁶ *Id.*

instance, Germany will likely see an increase in trade secret litigation. If a trade secret owner brings any action for damages, the courts of the state where the harmful event occurred can hear the case.²¹⁷ However, the place where the event giving rise to the liability occurred may differ from the place where the event results in damage—for instance, if a trade secret is stolen in Germany and then used in Latvia, an issue will arise as to which is the harmful event—the actual theft or the use. The EU guidelines state that if the events giving rise to liability in tort occurred in different states, the plaintiff is free to choose a court from those member states.²¹⁸ Facially, this guideline will not increase forum shopping as litigants in the EU will know that they will receive a minimal amount of protection regardless of what state they litigate in. The Directive, however, gives countries flexibility to harshen provisions, devise criminal sanctions, and modify statutes of limitations for trade secret misappropriation. Thus, if states do not uniformly implement the Directive, there may be an increase in forum shopping as it relates to trade secrets. In this case, a plaintiff would be able to argue that the harmful effects are widespread because of reduced sales, particularly if their products or services are sold in a number of countries. Plaintiffs will likely attempt to devise a strong argument that the harm is far reaching in order to obtain jurisdiction in the country that provides the best trade secret protection.

The jurisdictional guidelines do provide some limits: if the trade secret relates to immovable property, the trade secret litigation can only be brought in the member state where the property is situated.²¹⁹ Another unknown issue deals with whether trade secrets will be considered under the same category as patents and trademarks. If so, the guidelines provide that in matters relating to rights that have been registered such as patents or trademarks, the courts of the member state in which the registration has taken place are exclusively competent.²²⁰ Trade secrets are not registered intellectual property; thus, it would only be logical for this constraint to be inapplicable to the Directive.

The Directive may also lead to choice of court agreements in employment contracts as parties may have the possibility of choosing the member state with jurisdiction.²²¹ If a widespread corporation based in the European Union knows that it has trade secret information that is used in multiple jurisdictions, the company may choose to have employees sign contracts

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

dictating where the trade secret misappropriation claim will be litigated to receive the most protection or a longer statute of limitations.

Prior to the Directive, the prospect of bringing a trade secret misappropriation claim was costly. Before even contemplating the costs of litigation, a trade secret owner would have to spend time and money to identify whether the information was protectable as a trade secret in a particular member state.²²² After doing so, the enforcement of trade secret litigation was difficult and costly to handle.²²³ Now, however, there is uniformity across all member states as to what sort of information is protected as a trade secret, reducing the pre-litigation costs. Further, the procedure for maintaining the secrecy of the information is now consistent among member states. The decreased costs coupled with the increased protection of information throughout the course of litigation will lead to many more claims for trade secret misappropriation.

Most significantly, there were fewer trade secret claims brought in years past because the fragmentation in laws created the possibility that a trade secret could be leaked during a court proceeding.²²⁴ That problem will be ameliorated as member states implement legislation guided by the Directive. Prior to the Directive, a plaintiff typically had to substantiate his or her claim by disclosing the allegedly infringed secret.²²⁵ Now, a plaintiff does not have to fear this unwanted disclosure. This will ultimately lead to more trade secret claims, particularly from the pharmaceutical, automotive, information technology, and chemical companies. Further, it was generally impossible to enforce a trade secret against a third party who obtained the information in good faith.²²⁶ The Directive will allow those claims, though it will limit damages.

The European Union countries will encounter problems in ensuring uniform implementation of trade secret legislation. First, there will be problems ensuring that each country is implementing legislation that corresponds with other member countries to prevent diverging results.²²⁷

²²² *Study, supra* note 74, at 4.

²²³ *Id.*

²²⁴ *Id.* at 6.

²²⁵ *Id.* Particular industries stated that they avoided bringing trade secret litigation out of fear of losing control of trade secrets. These industries include pharmaceutical, automotive, IT, and chemical sector companies.

²²⁶ *Id.* at 11.

²²⁷ *Commission Staff Working Document: Implementation Plan Accompanying the Document Proposal for a Directive of the European Parliament and of the Council on the Protection of Undisclosed Know-How and Business Information (Trade Secrets) Against Their Unlawful Acquisition, Use and Disclosure*, at 2, COM (2013) 813 final (Nov. 28, 2013), <http://>

Another problem will be ensuring that countries are applying their respective legislation such that there is uniformity and comparable protection among EU states.²²⁸ To help alleviate this situation, the European Union has recommended that countries meet with each other to discuss their legislation.²²⁹ Ultimately, however, each country has control over its legislation and does not have to follow the actions of another country.

In response to the issues regarding uniform implementation, the European Commission states that member states will receive support services from the European Commission and that national best practices will help other member states.²³⁰ This fact supports the inference that certain countries that already have strong trade secret protection will prove to be leaders in the EU. A country that already has strong trade secret protection will have less work to do to implement the Directive. Further, since that country has a history of strong trade secret protection, others will likely follow their lead. Judicial authorities will have the role of ensuring the uniform protection of trade secrets.²³¹ A key issue for judicial authorities will be carrying “out a proportionate enforcement of the rules and ensuring that there are no material divergences among different judicial authorities.”²³² This is a vital component of the implementation of the Trade Secrets Directive, failure to do this may lead to forum shopping.

Ultimately, the Directive in the EU will do what the UTSA did for the states in the United States. The legal framework will provide greater clarity on the remedies available to trade secret owners. The Directive will also lead to deterrence.²³³ Notably, the Directive provides a greater amount of detail than the DTSA. The Directive contains greater detail regarding remedies for trade secret misappropriation, factors courts should take into consideration when determining which remedies are appropriate, and steps the court should take to ensure confidentiality of the trade secret information. The Directive requires more detail than the DTSA because all states in the United States have had experience with trade secret claims, and federal courts are also experienced with trade secret claims through diversity suits. Both the pre-existing guidelines in the UTSA and case law in the United

eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52013SC0493&from=en
[hereinafter *Commission Staff Working Document*].

²²⁸ *Id.* at 5.

²²⁹ *Id.* at 4.

²³⁰ *Id.*

²³¹ *Id.* at 5.

²³² *Id.*

²³³ *Study, supra* note 74. When asked about the benefits of EU common rules, 43% of companies said a benefit would be greater legal certainty and 49% stated deterrence would be a benefit.

States provide detailed information about trade secret claims, such that the information did not need to be included in the DTSA. In contrast, some countries in the EU had no experience with trade secret claims. As such, those countries required more guidance about trade secrets which explains why the Directive is far more intricate than the DTSA.

B. Implementation and Effects of the Defend Trade Secrets Act in the United States

While the Directive will have a profound impact on trade secret litigation in the EU, trade secret litigation in the United States will remain largely the same. Though a primary rationale in favor of enacting the Defend Trade Secrets Act was that it would lead to state law uniformity,²³⁴ the new federal legislation will likely have little effect on uniformity. First, a majority of states already have uniform approaches to trade secrets litigation because forty-eight states have adopted the UTSA. Though each state has been able to modify aspects of the UTSA, the protection of trade secrets was mostly the same among the states that adopted the UTSA.²³⁵ The definition of misappropriation in the DTSA and the UTSA is identical²³⁶ so the DTSA does not create a revolutionary definition of a trade secret, unlike in Europe where many states will have to define a trade secret for the first time. Further, the remedial provisions of the DTSA are similar to those that exist under state law.²³⁷

The DTSA offers better protection because it allows trade secret claims to be heard in either state or federal court. This is particularly important given the time sensitive nature of trade secrets. First, federal courts in recent years have experienced a backlog of cases slowing the time it takes to resolve a case.²³⁸ The average time to take a civil case through trial in some districts is over three years.²³⁹ Trade secrets are an important business tool for companies, and it is unlikely that a business would want to be involved in litigation for years. Thus, if a company knows that their federal district court is experiencing backlog, they will choose to bring the claim in state court.

²³⁴ Christopher B. Seaman, *The Case Against Federalizing Trade Secrecy*, 101 VA. L. REV. 317, 321 (2015).

²³⁵ See Suriano & Fantin, *supra* note 26.

²³⁶ Seaman, *supra* note 234, at 341.

²³⁷ *Id.*

²³⁸ Sudhin Thanawala, *Overloaded Federal Courts Lead to Delays in Civil, Criminal Cases as Judges Try to Keep Up*, US NEWS (Sept. 27, 2015), <http://www.usnews.com/news/us/article/s/2015/09/27/wheels-of-justice-slow-at-overloaded-federal-courts> (noting that the delay can lead to higher costs for civil lawsuits and that the delays were caused by judicial vacancies).

²³⁹ *Id.*

This flexibility allows trade secret owners to have their cases resolved in the most expedient way possible.

The DTSA improves trade secret protection in the United States because trade secret owners can choose if they want to bring their claim in federal court and avail themselves of certain advantages that only exist in federal court. Federal judges have more experience with intellectual property disputes than state court judges given the federal court's exclusive jurisdiction over other forms of intellectual property such as trademarks, copyrights, and patents. Defendants may also prefer federal court because initial mandatory disclosures will help weed out false trade secrets claims. A trade secret owner may also want to limit the exposure of their trade secret information, given the value and sensitivity of the information. Federal courts provide a better forum for achieving that goal as only one judge handles the entire case, limiting the number of people exposed to the information.

The federal court also has broader reach. State trade secret claims do not allow for nationwide service of process. Further, it is more difficult to seek discovery across state or national borders in state courts rather than federal courts. Some litigants may choose to bring their claims in federal court to take advantage of a less burdensome litigation process.

Most importantly, however, federal courts offer the option of *ex parte* seizure. This is a distinct advantage to trade secret owners aiming to protect the privacy of their vital business information. This provision is one that many companies will choose to take advantage of, especially given the advancement of technology and the ability to disseminate information widely and quickly—a trade secret thief need only put information on the internet for the potential of immitigable effects. Imagine if one of the two Coca-Cola executives with knowledge of Coca-Cola's top secret formula goes rogue and posts that recipe to the internet or e-mails the recipe to all of the contacts in his address book; Coca-Cola would lose its competitive advantage in the market. The very nature of a trade secret is that it is not well known, and once that information is widely disseminated, it is no longer a trade secret. Aiming to avoid that doomsday scenario, companies will seek to have any and all property that may contain the trade secret seized by the court and protected until trial. This remedy is not available in state court and is further evidence that the DTSA will lead to a substantial increase in the number of trade secret claims heard in federal courts in lieu of state courts.

It is worth noting that a majority of the trade secret owners who aim to take advantage of the *ex parte* seizure will probably believe that they have a viable claim. The DTSA calls for the trade secret holder to pay a security bond that will cover damages in the event the court later finds that the

seizure was unnecessary or caused harm. Because a plaintiff is required to provide money at the outset, a plaintiff will not waste money as a means to prevent competition. This provision may help quell concerns about frivolous litigation under the DTSA.

The potential to receive treble damages and attorney's fees will also increase federal trade secret claims. If a trade secret owner believes that the trade secret was misappropriated with intent, as opposed to accidentally, they may be more likely to bring the claim in federal court. The DTSA allows exemplary damages of up to two times the amount of damages if the secret is willfully and maliciously misappropriated.²⁴⁰

The statute of limitations is three years for both the UTSA and DTSA. This similar statute of limitations will not lead to an increase in federal trade secret claims because there is no extra time to bring a claim under the DTSA.

Similarly, the number of trade secret cases heard in EU countries will also increase. Generally, in EU countries, fewer trade secret cases were heard relative to patent and other intellectual property cases.²⁴¹ This low number of cases was likely due to a lack of legislation in many countries governing trade secret misappropriation. For now, however, trade secret owners recognize that because of the Directive, they will receive a minimum level of protection across all countries, thereby increasing the likelihood that a trade secret owner may bring a misappropriation claim.

Finally, the Directive and DTSA will have a significant effect on the relations between EU countries and the United States. Historically, the Agreement on Mutual Recognition Between the European Community and the United States of America established an agreement on trade secrets such that the two regimes agreed to maintain confidentiality of information including trade secrets.²⁴² Though this agreement established a right to protection, American trade secrets would have received less protection because of the weaker trade secret laws in the EU.²⁴³ Now, however, because the Directive provides more protection in line with prior U.S. protection, the agreement carries more weight.

VI. CONCLUSION

In conclusion, though the DTSA and Directive have a significant number of similarities, ultimately, the results will be far different. The DTSA will

²⁴⁰ 18 U.S.C. § 1836(b)(3)(C).

²⁴¹ REPORT, *supra* note 46, at 41.

²⁴² Van Arnem, *supra* note 23, at 135.

²⁴³ *Id.*

lead to little change in the protection of trade secrets in the United States. On the other hand, the impact on the EU will be dramatic.

The EU is lagging behind the United States in terms of trade secret protection. Whereas the United States has moved to harmonize trade secret legislation on a federal level while there is already some protection at the state level, the EU Trade Secrets Directive will do for the EU what the UTSA did for the United States. While all EU member countries will have some form of trade secret protection, that protection will vary from country to country.

While the United States has a strong history of protecting trade secrets at the state level through the UTSA, no such guidance existed in the European Union. Thus, the Directive, in some ways, serves as a guiding document, much like the publication of the UTSA did. There will be problems in implementing the EU Trade Secrets Directive and ultimately, the Directive will not lead to consistency in trade secret protection.

There will not be uniform protection because it is up to each country's legislature to design its individual legislation. Given the history of trade secrets, some countries will place more emphasis on the protection of trade secrets whereas other countries will let the protections fall by the wayside. Further, the Directive provides a great deal of discretion to judicial authorities in the protection of trade secrets, especially with regard to seizures. The judges will probably be affected by their past interactions with trade secret cases and the general attitudes surrounding the protection of trade secrets. Judges who do not understand the nuances associated with trade secrets and the importance they hold are less likely to grant *ex parte* seizures. This does not differ from the United States where judges will be given a significant amount of discretion as well.

The United States also has stronger trade secret protection because it allows for *ex parte* seizures. The fact that a seizure can be *ex parte* is crucial. If a trade secret thief is put on notice that they will be taken to court to defend against alleged trade secret theft, the thief will be more likely to pull the trigger and disseminate the information before they are held legally accountable; especially if the trade secret thief is seeking revenge or expecting a large amount of monetary compensation. The EU Directive does not specify if seizure can be *ex parte* which probably means that each respective country will be permitted to make this decision. Again, because each country has its own ability to shape its legislation, individual results will differ.

The DTSA also applies to extraterritorial conduct which is important for trade secrets that may be misappropriated abroad. This is particularly important as an administration report showed that in many cases of trade

secret theft, the purchaser of the trade secret was either the Chinese government or a company in China.²⁴⁴ The Directive does not say anything about extraterritorial conduct, and each country will have to decide how it will treat this type of conduct. If, however, the legislation does not apply to extraterritorial conduct, it will be ineffective. The trade secret legislation only applies to domestic misappropriation; however, given the size of the EU and the ease of transportation, it is very easy to transport information across country lines. Thus, to ensure strong protection, it is important that EU countries recognize that their legislation should apply to extraterritorial conduct. Again, this variable shows that EU trade secret protection may not be as strong because some countries may choose to limit their legislation to domestic misappropriation and there will be a lack of uniformity from country to country.

Another factor that supports the argument that trade secret protection is stronger in the United States than the EU is the fact that the United States imposes criminal liability upon a trade secret thief. This is particularly important at the company level. Without the risk of criminal liability, a low-level employee may be inclined to steal a trade secret knowing that if he or she is caught, they will only be liable for damages. However, the low-level employee may know that he or she does not have the ability to pay damages, so there is no real deterrent. However, if a low-level employee knows that she can face jail time if caught stealing a trade secret, she may think twice before conducting the criminal act. EU states can choose to criminalize trade secret misappropriation in each state's legislation. Because only some countries will likely criminalize trade secret misappropriation, some countries in the EU will continue to be known for their strong trade secret protection whereas some may lag behind.

Finally, trade secret protection will remain stronger in the United States because opposing parties will not have access to the trade secret information. In contrast, in the EU, a party may have access to the information. This will have the effect of leading to false claims of trade secret theft. For instance, Company *A* may wonder if Company *B* has any trade secret information. Company *A* could bring a claim for trade secret theft and hedge their bets as to whether Company *B* has any information. When in court, Company *A* will gain access to Company *B*'s information. Essentially, this is a form of corporate espionage. However, major corporations may bear the costs of litigation in order to find out information that has even more potential value.

²⁴⁴ OFFICE OF THE DIR. OF NAT'L INTELLIGENCE, FOREIGN SPIES STEALING US ECONOMIC SECRETS IN CYBER SPACE: REPORT TO CONGRESS ON FOREIGN ECONOMIC COLLECTION AND INDUSTRIAL ESPIONAGE, 2009–2011, at 5 (2011).

Though the EU has taken steps to equalize trade secret protection throughout EU countries, there are many variables that will result in inconsistent protection, though trade secrets will be better protected than they were prior to the Directive. The trade secret protection in the United States will remain strong due to uniform laws and multiple forums to bring misappropriation claims arising under those laws.