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Making Sense of Georgia's State Law Protections for Trademarks and Trade Secrets

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MAKING SENSE OF GEORGIA’S STATE LAW PROTECTIONS FOR TRADEMARKS AND TRADE SECRETS

I. INTRODUCTION

Which law applies? What kind of claim should I bring? What approach will be the most likely to rectify the wrong I am suffering? In the realm of trademark law in the state of Georgia, several avenues may be taken to try to stop someone from utilizing your idea or mark. Separate state laws govern unfair competition and deceptive trade practices as well as trade secrets. Compounding the confusion are the federal laws on the subject which may or may not be utilized to effectuate a remedy. This Note attempts to explain the differences among the governing laws of Georgia, to identify which remedies are available to plaintiffs who believe that their trademark or trade name is being infringed, and to clarify what is required to succeed in claims alleging trademark infringement, violation of anti-dilution provisions, violation of the Georgia Uniform Deceptive Trade Practices Act or violations of the Georgia Trade Secrets Act.

Claims arising from the misappropriation of trade secrets are distinct in nature and will be treated separately in the final section of this Note. In the past eight years Georgia trade secret law has been completely overhauled. The end result has been quite beneficial for the owner of the trade secret. No longer are the Georgia courts bound by the narrow definition of a trade secret that for many years kept Georgia out of step with a majority of jurisdictions and left plaintiffs without any real compensation for their losses. Instead, under the current, broader definition, plaintiffs may more easily meet the requirements for obtaining relief.
Part II of this Note addresses unfair competition including such topics as the remedies available for trademark and trade name infringement. The concept of dilution is explored, as well as the purposes behind dilution statutes, namely that the owner of a mark should have some cause of action when he witnesses the value of his mark being diminished by the action of others. Lastly, Part III will address the most permissive of Georgia's provisions, the Uniform Deceptive Trade Practices Act.

II. UNFAIR COMPETITION

Unfair competition is a form of unlawful business injury. It consists in passing off, or attempting to pass off, on the public, the goods or business of one person as and for the goods or business of another. It consists essentially in the conduct of a trade or business in such a manner that there is either an express or implied representation to that effect. In fact, it may be stated broadly that any conduct, the nature and probable tendency and effect of which is to deceive the public so as to pass off the goods or business of one person as and for the goods or business of another, constitutes actionable unfair competition. 1

In an attempt to promote both commerce and competition, states have taken various forms of action. By providing multiple means of enjoining unfair conduct by a party, states may better attain the goal of promoting real competition by eradicating unfair competition practices. In Georgia, the legislature has codified the common law right of trademark protection thereby giving more force to the long recognized right. In addition, Georgia statutes protect against the dilution of a distinct mark and outlaw deceptive trade practices. The legislature enacted each of these statutes with an eye toward reducing consumer confusion about products and protecting the owner by emphasizing the value associated with the work required to build and maintain a name and reputation. 1

1 Multiple Listing Serv., Inc. v. Metropolitan Multi-List, Inc., 166 S.E.2d 356, 358 (Ga. 1969) (quoting Atlanta Paper Co. v. Jacksonville Paper Co., 190 S.E. 777, 782-83 (Ga. 1937)).
A. TRADEMARK

As the symbols of a business's reputation and goodwill, trade names, trademarks and service marks employed to identify distinctly, by meaning or association, one's business, products or services are generally regarded as a species of intangible property capable of exclusive ownership and entitled to legal protection from encroachment.\(^2\)

Many consider the protection of trademarks,\(^3\) and trade names\(^4\) to be an integral part of both the marketing and distribution of products, and "[a]s has often been observed, the law of trademark infringement is but a part of the law of unfair competition."\(^5\) Created at common law, trademarks have enjoyed a long history of both recognition and protection. Therefore, existing statutes protecting trademarks and providing for their registration are not essential for obtaining protection, but rather serve to strengthen the right through statutory title.\(^6\)

1. Georgia's Trademark Law. Georgia's law offering protection for trademarks is not significantly different from the federal protection offered by the recently revised trademark law known as

\[^2\] 27 ENCYCLOPEDIA OF GEORGIA LAW Trade Names, Trademarks, Copyrights and Unfair Competition § 3, at 241 (1974).

\[^3\] "A 'trademark' is a name, sign symbol, or device which is attached to goods offered for sale in the market so as to distinguish them from similar goods, and to identify them with a particular trader, or with his successors, as owners of a particular business, as being made, worked on, imported, selected, certified, or sold by him or them." 87 C.J.S. Trademarks, Trade-Names, and Unfair Competition § 1 (1954).

\[^4\] "Trade-names are names which are used in trade to designate a particular business of certain individuals considered somewhat as an entity, or the place at which a business is located, or of a class of goods, but which are not technical trade-marks either because not applied or affixed to goods sent into the market, or because not capable of exclusive appropriation by anyone as trade-marks." 87 C.J.S. Trademarks, Trade-Names, and Unfair Competition § 8 (1954).


the Lanham Act. Moreover, state registration of a trademark provides limited protection within the state. This does not intimate, however, that state registration of trademarks has no value. On the contrary, practitioners utilize state registration as a means of providing notice to those performing research before attempting to register their own mark. However, under both Georgia and federal law, the term of registration is ten years, and the trademark owner may renew registration for successive periods of ten years.

Under Georgia trademark law, certain marks are ineligible for registration. A party may not register marks that incorporate immoral, deceptive or scandalous material. The state prohibits these marks to prevent valueless materials from taking a protected position among other, more worthy marks. The rationale is that if the state registers immoral marks, then the state is condoning their use.

Also ineligible for registration are marks which, "comprise matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols or bring them into contempt or disrepute." Flags, coats of arms and insignia of the United States or any other country or municipality are also unavailable for registration. However, this exclusion does not bar a county, municipality or board of education from registering its own service mark. Furthermore, the name, portrait or signature of a living person cannot qualify as a registered mark without the written consent of the person.

The statute enumerates three other general provisions for exclusion of registration of a mark. These include the following situations: when the mark is descriptive, resembles a mark previously registered in Georgia or resembles a mark previously

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9 GA. CODE ANN. § 10-1-441 (1994).
10 GA. CODE ANN. § 10-1-441(1) (1994).
11 GA. CODE ANN. § 10-1-441(2) (1994).
12 GA. CODE ANN. § 10-1-441(3) (1994).
13 GA. CODE ANN. § 10-1-441(4) (1994).
registered in the United States Patent Office. The forthrightness of the statute has forestalled much litigation from arising. However, subsection five concerning descriptive words has proven troublesome for potential owners of a mark. The manner in which the Georgia courts have construed "descriptive" and the necessary requirements that must be met in order to acquire a secondary meaning are discussed at length, later in this Note.

2. Trademark Infringement: Tests Under Georgia and Federal Law. Trademark infringement is a popular claim to bring not only because of its long history, but also because of the available remedies. Under Georgia law, sanctions are available for infringement. The statute provides:

(a) Any owner of a trademark or service mark registered under this part may proceed by action to enjoin the manufacture, use, display, or sale of any counterfeits or imitations thereof; and any court of competent jurisdiction may grant injunctions to restrain such manufacture, use, display, or sale as may be by the court deemed just and reasonable and may require the defendants to pay to such owner all

14 GA. CODE ANN. § 10-1-441(5)-(7). These sections provide in full:

(5) When applied to the goods or services of the applicant, is merely descriptive or deceptively misdescriptive of them; or

(B) When applied to the goods or services of the applicant, is primarily geographically descriptive or deceptively misdescriptive of them; or

(C) Is primarily merely a surname; or

(6) Consists of or comprises a trademark or service mark which so resembles a trademark or service mark registered in this state or a trademark or service mark or trade name previously used in this state by another and not abandoned as to be likely, when applied to the goods or services of the applicant, to cause confusion or mistake or to deceive; or

(7) Consists of or comprises a trademark or service mark which so resembles a trademark or service mark registered in the United States Patent Office by another and not abandoned as to be likely, when applied to the goods or services of the applicant, to cause confusion or mistake or to deceive; provided, however, that, should the applicant prove that the applicant is the owner of a concurrent registration in the United States Patent Office of a trademark or service mark covering an area including this state, the applicant may register such trademark or service mark under this part.
profits derived from such wrongful manufacture, use, display, or sale, and all damages suffered by reason of such wrongful manufacture, use, display, or sale, or both profits and damages. The enumeration of any right or remedy in this part shall not affect a registrant’s right to prosecute under any penal law of this state.\textsuperscript{15}

\textbf{a. Georgia's Determination of Likelihood of Confusion.} Seemingly, the test applied by Georgia courts as to whether an injunction should be granted against an alleged trademark infringer is whether the public is likely to be deceived.\textsuperscript{16} Gordy v. Dunwoody concerned restaurants with similar names operated by the plaintiff in Atlanta and Athens and the defendant in Macon.\textsuperscript{17} The Gordy court expounded that “[a]n encroachment upon the business of another may be made without direct competition.”\textsuperscript{18} Therefore, in order to establish infringement under existing trademark laws, there must be a showing of the likelihood of confusion of some accused mark with the registered mark. In making such a determination, the courts look at a multitude of factors which include: the type of trademark, the strength of the prior owner's mark, the degree of similarity between the two marks, similarity between the two products, identity of retail outlets and purchasers, identity of advertising media utilized, the defendant's intent, and actual confusion.\textsuperscript{19}

\textbf{b. The Test Under Federal Law.} Although the test is the same under federal law, the considerations used to determine infringement under federal law vary somewhat from the factors used by the Georgia courts. When operating under federal law, courts consider the following: similarity in appearance, sound and meaning of the mark, strength or weakness of the mark, proximity or similarity of the goods, evidence of actual confusion, the marketing channels used to market the goods, the type of goods and the degree of care likely to be exercised by the purchaser, the alleged infringer's

\begin{itemize}
\item \textsuperscript{15} GA. CODE ANN. § 10-1-451 (1994).
\item \textsuperscript{16} Gordy v. Dunwody, 74 S.E.2d 886, 98 U.S.P.Q. (BNA) 200 (Ga. 1953).
\item \textsuperscript{17} Id. at 889.
\item \textsuperscript{18} Id. at 891.
\end{itemize}
intent in selecting the mark, and the likelihood of expansion of product lines. Furthermore, in determining whether confusion on part of the consumer exists so as to constitute an infringement under federal law, courts are willing to assume likelihood of confusion based on the showing that the plaintiff's trademark was intentionally copied by the defendant.

Furthermore, under federal law, in making the determination of likelihood of confusion for trademark infringement purposes, the likelihood is said to be increased where the buyers are either unsophisticated or else make their purchasing decisions both quickly and casually. Consider as an example a case involving two "fast food" restaurants.

In the case of McDonald's Corp. v. McBagel's, Inc., both parties catered to those people wishing to purchase food and eat quickly for a low cost. The court found that under circumstances which are likely to exist (i.e. the patrons are in a hurry and want to grab a quick bite to eat) that the likelihood that there would be confusion between the two restaurants is more apt to occur than in a situation where the purchase is expensive or requires some degree of research or sophistication. In other words, whereas someone might put little thought into where they are going to eat lunch, people will expend much more time and consideration when making a major purchase. Therefore, customers making the quick, relatively inconsequential decisions are prone to confusion by similar marks or names.

The approach utilized by Georgia courts in determining the existence of infringement differs somewhat from the federal approach. In Ackerman Security Systems v. Design Security Systems, the Georgia Court of Appeals held that there is a presumption raised against confusion if marks have coexisted in the marketplace for a significant amount of time without any

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23 Id.

evidence of actual confusion. The presumption operates on the same theory as laches. While it is unfair for one to use a mark that is substantially the same as one belonging to another, it is equally unfair to enjoin the second party’s use of his mark when it has been able to coexist in the market without any real harm or confusion being realized. This presumption may be rebutted, however, by evidence of other factors which support a finding of a likelihood of confusion.

3. Trademark Sanctions Under Georgia Law. A 1988 amendment increased the available sanctions for trademark infringement under Georgia law. Under this amendment, upon a finding of infringement by a third party of a state registered mark, the infringer is liable to the owner of the mark “for liquidated damages in the amount of $10,000.00, if such act has been committed with knowledge that a trademark or service mark has been registered . . . and such act has been committed without previously obtaining the consent of the owner.”25 Even though actual damages are precluded upon an award of liquidated damages, the owner of the mark benefits because they have a reduced burden of proving actual damages.26

Georgia’s statutory provisions governing trademarks provide a strict course of action if the court determines a trademark or service mark is counterfeit. If such a situation arises, “the court may order the destruction of all such trademarks or service marks and all good, articles, or other matter bearing the trademarks or service marks, which are in the possession or control of the court or any party to the action . . . .”27 The statute further provides that upon a showing of good cause and a probability of success on the merits, the court may order seizure of the counterfeit goods from persons “manufacturing, displaying for sale, or selling the goods. . . .”28

Utilization of the seizure provisions is not to be taken lightly. The statute attaches liability to any person who causes the seizure.

27 GA. CODE ANN. § 10-1-451(c) (1994).
of non-counterfeit goods. As with other portions of the trademark statute, while it is not determinative to establish a cause of action, acting in bad faith generally involves stiffer penalties.

B. TRADE NAMES

Protection is available for trade names as well as trademarks. As the Georgia Supreme Court explained: "[a] trademark differs from a trade name in that the former identifies a product or its manufacturer but not the owner of the business selling it, while the latter primarily identifies the owner or operator of a business and may, but need not, identify the products handled." Because of the overlap of trademarks and trade-names, the two are often confused and even the courts sometimes use the terms interchangeably. Still, the Georgia Supreme Court has recognized that a difference exists between the two.

Trade-names are broader in scope than trademarks, and many describe trade-names as appealing to the ear more so than to the eye. Typically, trade-names are characterized as being either fixed or transitory. Fixed trade-names mean the name is itself attached to a particular place without regard to the owner, while a transitory trade-name follows the person with whom it is associated wherever the person is located.

Trade-names may also be exclusive or nonexclusive. Protection of exclusive trade-names is treated like protection of trademarks, while nonexclusive trade-names are thought of as if they belong to the public.

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29 Ga. Code Ann. § 10-1-451(e)(1) (1994). Section 10-1-451(e)(1) provides that the liability occasioned will equal:

(A) Any damages proximately caused to any person having a financial interest in the seized goods by the seizure of goods which are not counterfeit;
(B) Costs incurred in defending against seizure of noncounterfeit goods; and
(C) Upon a showing that the person causing the seizure to occur acted in bad faith, expenses, including reasonable attorneys' fees expended in defending against the seizure of any noncounterfeit or noninfringing goods.

30 Gordy v. Dunwoody, 74 S.E.2d 886, 887 (Ga. 1953).
31 Children's Bootery v. Sutker, 107 So. 345 (Fla. 1926).
In 1983, in a case of first impression, the Georgia Supreme Court held that the right to use a trade name was a property right and therefore the court could foreclose upon that right.\(^{33}\) In *Reis v. Ralls*, the plaintiff, Reis, sold the business known as Atlanta Refrigeration Service Co., Inc. to the defendant, Ralls. The sale agreement explicitly stated that the buyers were to acquire the name of the corporate seller. Because of a subsequent breach of the lease by the defendants, the plaintiff foreclosed on the property. The defendants then began doing business as and advertising under the names of both Atlanta Air Conditioning, Inc., and Atlanta Refrigeration Co. The plaintiffs then filed suit seeking the money owed to them by the defendants as well as an injunction barring their use of the name Atlanta Refrigeration Co. due to its similarity to the name Atlanta Refrigeration Service Co.\(^{34}\)

In making its determination, the court initially looked to applicable trademark law, and noted that trademarks, like other forms of property, may be transferred.\(^{35}\) The court then stated, "[w]e find this statement of the law as to trademarks applicable to trade names where the business of a corporation, including its name, but not the corporation is sold."\(^{36}\) The court next performed an analysis of the governing Uniform Commercial Code article.\(^{37}\) Beginning with the premise that a trade name is a form of intangible property, the court concluded that the trade name along with the good will represented thereby may be the subject of an Article 9 interest.

The Georgia Supreme Court in *Multiple Listing Service, Inc. v. Metropolitan Multi-List, Inc.*\(^{38}\) held that the defendant had infringed a real name because defendant's name constituted a colorable imitation of a name that the general public, exercising

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\(^{33}\) Reis v. Ralls, 301 S.E.2d 40 (Ga. 1983).
\(^{34}\) Id. at 41-42.
\(^{35}\) Id. at 42 (citing 27 ENCYCLOPEDIA OF GEORGIA LAW Trade Names, Trademarks, Copyrights and Unfair Competition, § 3, at 384 (1974)).
\(^{36}\) Reis, 301 S.E.2d at 42.
\(^{37}\) The court utilized the 1972 Official Comment to UCC § 9-106 which says, "the term 'general intangibles' brings under this Article miscellaneous types of contractual rights and other personal property which are used or may become customarily used as commercial security. Examples are goodwill, literary rights and rights to performance. Other examples are copyrights, trademarks and patents." Reis, 301 S.E.2d at 42-43.
\(^{38}\) 159 S.E.2d 52 (Ga. 1968).
ordinary care, might believe was the name of the original holder. The standard for infringement is the same as the standard applied under Georgia trademark law. The court further held that the use of such name constitutes a fraud against the one entitled to use it, "when the infringer intends to create the impression in the minds of the public that he and the person or corporation first appropriating the name are the same."  

In *Multiple Listing Service*, the plaintiffs had been operating under the name Multiple Listing Service or "MLS" for ten years before the defendant filed for registration of the name Metropolitan Multiple Listing Service. In that time, the plaintiffs had spent $1,434,773.95 on advertising, 90% of which included either "MLS", "Multiple Listing Service" or both. Also during this ten year period, the plaintiff had listed 15,141 houses, and in each of these yards, located primarily in the Atlanta, Decatur and Marietta metropolitan areas, the plaintiff's sign bore the names "MLS" and "Multiple Listing Service." Under these circumstances, the court held that secondary meaning had been acquired by the plaintiff's use and therefore the name deserved protection. Because of the competitive nature of business in which both parties were engaged, the court held that the plaintiff would inevitably suffer irreparable injury unless injunctive relief was granted.

C. ANTI-DILUTION

The anti-dilution statute represents another remedy available to holders of trademarks and trade-names that are being infringed. The Georgia anti-dilution statute provides protection of trademarks and trade-names even if there is no competition between the parties or actual confusion among the public as to the source of the products. The basis for a cause of action under the anti-dilution statute as explained by the United States District Court for the Northern District of Georgia, "is the belief that the owner of these

39 Id.
40 Id. at 54 (quoting Saunders Sys. v. Drive It Yourself Co., 123 S.E. 132, 135 (Ga. 1924)).
41 *Multiple Listing Service*, 159 S.E.2d at 52-53.
42 Id. at 53.
43 Id.
44 Id. at 55-56.
marks should not have to stand by and watch the diminution in their trademark's value as a result of unauthorized uses by others." The statute provides:

Every person, association, or union of working men adopting and using a trademark, trade name, label, or form of advertisement may proceed by action; and all courts having jurisdiction thereof shall grant injunctions to enjoin subsequent use by another of the same or any similar trademark, trade name, label, or form of advertisement if there exists a likelihood of injury to business reputation or of dilution of the distinctive quality of the trademark, trade name, label, or form of advertisement of the prior user, notwithstanding the absence of competition between the parties or of confusion as to the source of goods or services, except that this Code section shall not deprive any party of any vested lawful rights acquired prior to March 4, 1955.46

Georgia courts have consistently interpreted "distinctive quality" to mean that the trade name must be capable of exclusive appropriation. In a recent Georgia Supreme Court case, Justice Sears wrote, "[i]t is well established that descriptive words or phrases are incapable of exclusive appropriation, and are not entitled to protection as a mark or name unless the party seeking relief establishes that the word or phrase has acquired a secondary meaning due to (1) its use in connection with the business or trade of the party seeking relief, and (2) the public's understanding, through such use, that the word or phrase designates the goods, services, or business of that party."47

46 GA. CODE ANN. § 10-1-451(b) (1994).
47 Future Professionals, Inc. v. Darby, 470 S.E.2d 644, 646 (Ga. 1996). See Giant Mart Corp. v. Giant Discount Foods, Inc., 279 S.E.2d 683, 686, 217 U.S.P.Q. (BNA) 189 (Ga. 1981) (finding the word "Giant" incapable of exclusive appropriation but the phrase "Giant Discount Foods" to be a properly acquired trade name entitled to protection); Dolphin Homes Corp. v. Tocomc Dev. Corp., 156 S.E.2d 45, 47-48, 155 U.S.P.Q. (BNA) 543 (Ga. 1967) (ruling the trade-name, Old National East, did not have secondary meaning because no facts were
The test, under federal law, for establishing secondary meaning for descriptive words and phrases is not dramatically different from the one employed by the Georgia courts. Federal courts consider several factors in order to determine whether a secondary meaning for a symbol or device has been achieved. These factors include the following: whether or not the actual purchasers of the product associate the trademark with the producer; the amount and type of advertising done under the mark; the length and manner of use to which the trademark has been subject; and whether the use has been exclusive. The court in Transgo, Inc. v. Ajac Transmission Parts Corp. further explained that in order to achieve secondary meaning, the primary inquiry concerns the purchaser's attitude. The producer must be of the utmost significance, even more significant than the product itself.

There are two forms typically recognized by both commentators and the courts that dilution may take. The first of these is "blurring" or "whittling down" of the distinctive quality of a mark. An example of blurring is when a mark is widely seen on all different types of products so that it is not associated with any particular item, but various items. A mark may lose its entitlement to protection if such blurring is allowed to continue unabated for a significant length of time. This is possible because the very nature of a mark is that the mark must be distinctive in order to warrant protection. Once a mark loses its distinctiveness, it is no longer worthy or even capable of protection.

The second manifestation of dilution is the "tarnishment" of a product. Tarnishment occurs when a mark is used by one in such a way that it creates an unfavorable association with the producer's alleged which showed the public associated the trade-name with the business of plaintiff's corporation; Saunders Sys. Atlanta Co. v. Drive It Yourself Co., 123 S.E. 132, 135 (Ga. 1924) (stating words descriptive of the goods, service, or place where they are made may by long use in connection with the business of the particular trade, come to be understood by the public as designating the goods, service, or business of a particular trader).

48 Transgo, Inc. v. Ajac Transmission Parts Corp., 768 F.2d 1001, 1015; 227 U.S.P.Q. (BNA) 598 (Cal. 1985). See also American Television & Communications Corp. v. American Communications & Television, Inc., 810 F.2d 1546; 1 U.S.P.Q.2d (BNA) 2084 (Fla. 1987) (holding that the district court's determination that evidence failed to show that corporate name had acquired secondary meaning with any relevant group was not clearly erroneous).

49 Transgo, 768 F.2d at 1014.

50 Id. at 1015.
mark. An example of a successful dilution suit based on tarnishment theory is discussed below in *Original Appalachian Artworks v. Topps Chewing Gum, Inc.*

In order to sustain a successful action under the Georgia antidilution statute, the plaintiff must show that the marks in question are similar and that the contested use is likely to injure the plaintiff's commercial reputation or dilute the distinctive quality of its marks. In *Amstar Corp. v. Domino's Pizza, Inc.*, the Fifth Circuit found that the plaintiff failed to meet the necessary requirements under the statute. In *Amstar*, the plaintiff argued that Domino's Pizza infringed on their trademark of "Domino" which was used in conjunction with the sale of sugar and salt. The court held that not only were the two marks not confusing, but also that "Domino" had become a weak mark and was therefore outside the plaintiff's line of products. Perhaps if the defendant in this case had been marketing pepper or other spices under the name of Domino, the court would have found in the plaintiff's favor. As it was, pizza delivery, although still in the same genre of food advertising, was too far removed from the business of marketing sugar/salt products.

A Hawaii case similar to the "Domino" case yielded the same results as the Fifth Circuit applying Georgia law. In *Carrington v. Sears, Roebuck & Co.*, the court found that the plaintiff's registered word "Sunspots" when used in conjunction with its stationery and greeting card business was unlikely to be confused with defendant's use of "Sun Spots" for a clothing line. As in the Domino case, the two products were found to be too dissimilar with only a small possibility of confusion among the consumers.

The statute did serve as the basis of relief for the plaintiffs in *Original Appalachian Artworks Inc. v. Topps Chewing Gum, Inc.* Here, the court held that in order to prevail under a dilution claim

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53 Id.
54 Id. at 265.
56 Id.
57 Id.
where it is alleged that the same or similar mark has been used in a way that creates an undesirable, unwholesome or unsavory association with the plaintiff's mark, the plaintiff must show that the marks in question are similar and either that their commercial reputation is likely to be harmed or else that their mark's distinctiveness will be diluted.\(^6\)

In this case, the court ruled that the defendant's Garbage Pail Kids were disparaging to the reputation and wholesome image that the plaintiff's Cabbage Patch Kids were trying to project and protect. The defendant itself admitted that it was borrowing from the plaintiff's good will and making Cabbage Patch Kids the butt of their joke.\(^6\) Behavior such as the defendant's is clearly impermissible under the tarnishment portion of the anti-dilution statute.

The federal anti-dilution statute has its own set of criteria which must be met in order for relief to be granted.\(^6\) Generally, it is easier to maintain an action under Georgia's law than under the federal law which is one reason that the Georgia anti-dilution statute is so attractive. Furthermore, the remedy of an injunction of the offending use is the same under both, so it seems unnecessary to utilize the federal dilution statute in Georgia. Georgia law is more permissive for bringing claims and the relief available under both statutory schemes is identical. However, Georgians

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\(^6\) Id. at 1039.
\(^6\) Id. at 1040.

15 U.S.C.A. § 1125(c)(1) (West Supp. 1997) lists the factors which may be considered in determining whether there is a cause of action under dilution. These include:

(A) the degree of inherent or acquired distinctiveness of the mark;
(B) the duration and extent of use of the mark in connection with the goods or services with which the mark is used;
(C) the duration and extent of advertising and publicity of the mark;
(D) the geographical extent of the trading area in which the mark is used;
(E) the channels of trade for the goods or services with which the mark is used;
(F) the degree of recognition of the mark in the trading areas and channels of trade used by the marks' owner and the person against whom the injunction is sought;
(G) the nature and extent of use of the same or similar marks by third parties; and
(H) whether the mark was registered under the Act of March 3, 1881, or the Act of February 20, 1905, or on the principal register.

should still be aware of the availability and components of the federal statute for purposes of diversity claims.

D. UNIFORM DECEPTIVE TRADE PRACTICES ACT

A state derives its ability to enact legislation for the purpose of securing fair trade practices from its police power. As long as Constitutional lines are not crossed, states may regulate trade so as to prohibit fraud, deception and other commercial activities which may act to stifle competition. In the 1960's and 1970's many states (including Georgia) passed deceptive trade statutes for these purposes. Many of these statutes, in an effort to prevent their circumvention, do not define what constitutes "unfair," "deceptive" or "fraudulent" practices with any specificity. As a result, the factual circumstances which surround each individual case have proven determinative.  

The Georgia Assembly enacted the Uniform Deceptive Trade Practices Act ("UDTPA") in 1968 to afford another source of relief for victims of trademark or trade name infringement. While the UDTPA, does not preclude other actions from being pursued concurrently, the only remedy it offers those seeking relief is an injunction.

In addition to an injunction, the statute does provide for costs to be awarded to the prevailing party under certain situations, and the court, in its discretion, may also award attorney's fees. If the court finds that the complaining party knowingly brought a groundless suit, costs and attorney's fees may be awarded to the defendant. But, the defendant may also be assessed costs if the court finds that he engaged in willful deceptive trade practice.

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64 See Diedrich v. Miller & Meier and Assoc., Architects and Planners, Inc., 334 S.E.2d 308, 227 U.S.P.Q. (BNA) 1052 (Ga. 1985) (holding that the Uniform Trade Practices Act did not displace the common law right to protection of trade names, but instead expressly preserved the common law rights).
1. Benefits of the UDTPA. One of the major benefits of the UDTPA is that the requirements for obtaining an injunction under it are the least stringent of all other Georgia code sections that seek to protect trade names and trademarks. In order to obtain relief, the plaintiff need not prove direct competition or actual confusion. "All that is required is that the use of a name cause confusion to others using reasonable care." Furthermore, the UDTPA does not require a party seeking relief to have registered the relevant trade or service mark name whereas registration is a prerequisite for relief under other Code sections. The ease of obtaining relief under the UDTPA makes it one of the most often pleaded grievances by plaintiffs seeking to protect their mark.

However, in recent history many did not view the UDTPA as very accessible due to the confusion caused by the decision of the Georgia Supreme Court in Elite Personnel, Inc. v. Elite Personnel Services, Inc. In this case, the defendant, Elite Personnel, Inc., had begun using the name "Elite Personnel" in October of 1987. The plaintiff, Elite Personnel Services, Inc., however, was not incorporated until six months later in April of 1988. Although defendant had clearly been using the name for a longer period of time, the court affirmed the lower court's position enjoining the defendant from using the name. The court reasoned that the defendant's failure to register the mark precluded them from using it.

This segment of Elite Personnel was later expressly overruled by the Georgia Supreme Court. In Future Professionals, Inc. v. Darby, the court held that "[w]hile the registration of a trademark or service mark is a prerequisite for relief under certain other sections of the Code, UDTPA does not require a party seeking relief thereunder to have registered the relevant trade or service mark or

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69 Id. at 685.
72 Id. at 119.
73 Id.
74 470 S.E.2d 644 (Ga. 1996).
name. To the extent this court ruled otherwise in *Elite Personnel v. Elite Personnel Services*, that opinion is hereby overruled.\textsuperscript{75}

The portion of the decision in *Elite Personnel* which continues to be good law concerns the mark's characteristics. In *Elite Personnel*, the court held that the trial court was correct, "in finding that the term 'Elite Personnel' is descriptive in nature and incapable of exclusive appropriation in the absence of a secondary meaning."\textsuperscript{76} The court noted that to acquire secondary meaning the name must be used over time so "that the name has become associated with a particular business or product."\textsuperscript{77} The court held that the six month period in this case was too short for any secondary meaning to have arisen.\textsuperscript{78}

Even more troubling is the final paragraph of this Georgia Supreme Court decision. In these last statements, the court assumes that since the Secretary of State granted Articles of Incorporation to the defendant after the plaintiff was incorporated that "presumably the Secretary of State found the name sufficiently distinguishable for corporate purposes."\textsuperscript{79} Based on this assumption, the court held that the defendant may continue to use the name Elite Personnel for corporate purposes (as distinguished from trade or business purposes).\textsuperscript{80}

2. **Caselaw Interpreting the UDTPA.** Much of the other case law that has developed as a result of deceptive trade practice statutes revolves around the disputed lawfulness of activity where the statute in question provides only a general definition for unfair or deceptive acts creating a likelihood of confusion. As a general rule, courts are more willing to find a violation of the statute in situations where there is a greater opportunity for confusion. The federal case, *Rolls-Royce Motors, Ltd. v. A & A Fiberglass, Inc.*,\textsuperscript{81} ("Rolls-Royce") illustrates this point by interpreting and applying Georgia law. Here, the court held that a violation of Georgia's

\textsuperscript{75} Id. at 646.
\textsuperscript{77} Id.
\textsuperscript{78} Id.
\textsuperscript{79} Id.
\textsuperscript{80} Id.
deceptive trade practices act was established by the evidence.\textsuperscript{82}

The defendant in \textit{Rolls-Royce} sold plastic and fiberglass products. The controversy arose over defendant’s manufacturing of car customizing kits which included both a simulated grill and hood ornament quite similar to the plaintiff’s registered trademark Rolls-Royce grill and hood ornament. In fact, the court held that the defendant’s product was too similar and enjoined the defendant from the manufacture of the product.\textsuperscript{83} The court stated that the likelihood of confusion was readily apparent by simple visual examination of the defendant’s merchandise and the protected mark of the plaintiff.\textsuperscript{84}

The Fifth Circuit interpreted Georgia’s law to require an apparent (or “obvious”) likelihood of confusion. However, using a twist on this approach in an earlier case applying Florida’s deceptive practices act, the same court had made the opposite determination. In \textit{Holiday Inns, Inc., v. Holiday Out in America}\textsuperscript{85} the Fifth Circuit found that where there was an absence of a likelihood of confusion, no violation of the statute occurred.\textsuperscript{86} The defendant in this case was the operator of campground facilities utilizing marks such as “Holiday Out,” “Holiday Out in America,” and “The Nation’s Campground,” while the plaintiff operated a chain of motels whose marks included “Holiday Inn,” “Holiday Inn of America,” and “The Nation’s Innkeeper.” Despite plaintiff’s claim of confusion, the court granted no relief.\textsuperscript{87} Though the court’s conclusion here is certainly questionable, it serves to emphasize that the stronger the chance for confusion among consumers, the better the chance the plaintiff has to stop the offending conduct.

3. \textit{Injunctions for Unauthorized Use of Family Name}. In \textit{Baker Realty Co. v. Baker},\textsuperscript{88} the court held that the UDTPA authorizes injunctions restraining even the use of a family name that has been

\textsuperscript{82} Id.
\textsuperscript{83} Id.
\textsuperscript{84} Id. at 695.
\textsuperscript{85} 481 F.2d 445, 178 U.S.P.Q. (BNA) 257 (5th Cir. 1973).
\textsuperscript{86} Id.
\textsuperscript{87} Id. at 450.
appropriated as a trade-name. In this case, Baker Realty Company sued Baker to enjoin him from operating under the name Baker Realty Associates. The plaintiff was authorized to act as a real estate agent and broker within the metropolitan area of Atlanta, while the defendants operated solely in Clayton county. Defendant claimed that he was the only Baker acting as a broker in that area, and further argued that he was using his own name both reasonably and honestly. The court held that even though Baker was the defendant's family name, when looking at all the surrounding circumstances, "such as the other descriptive words of the trade name, the type of business carried on, the geographical area in which the trade name has acquired a meaning, and other distinguishing factors, there remains a likelihood of confusion and misunderstanding among the general public." Therefore, the plaintiff prevailed in its claim to enjoin the defendant from using his family name to sell real estate in Atlanta.

A Colorado case provides a similar outcome with regard to the use of a family name for a corporation, although the case itself implies that the prohibition of the use of a family name previously registered to someone else only extends to an actual corporation. The court held, "the right of an individual to use his own name in business does not extend to the use of a family name by a corporation." The chosen language leads to the conclusion that in other business settings more than one entity can operate under a common family name even where one party has previously registered it.

The decision of the Georgia court appears to be the more logical of the two decisions. Corporate identity should not be the dispositive factor. Instead, the rationale of the Georgia court in Baker which focused primarily on factors such as the likelihood of confusion and area of operation as well as the type of services,

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89 Id.
90 Id. at 851.
91 Id.
92 Id.
93 Id. at 852.
95 Id. at 1215.
should be the basis for a decision to enjoin the use of a family name. In fact, the Colorado Court of Appeals looked at these factors in issuing the injunction against the defendant corporation. Why such limitations on usage of a family name apply only when dealing with corporations is inexplicable.

E. GEORGIA STATUTES PROVIDE CONCURRENT REMEDIES

The UDTPA, antidilution statute and codification of the common law protection of trademarks are a few of the steps taken by the Georgia legislature to ensure the protection of intellectual property. These various means of enjoining and sometimes punishing unfair conduct by a party are not mutually exclusive. Bringing one claim does not preclude asserting them all concurrently. These statutes, together and separately, serve as protectionary measures designed, not only to secure an individual’s ideas and work associated with those ideas, but also to promote commerce and competition within the state. In prohibiting one party from appropriating another’s ideas with impunity, the state implicitly recognizes the importance of hard work in building a good reputation.

Furthermore, an equally important by-product of these statutes is the reduction of consumer confusion about products. It is a legitimate state goal to ensure that the consumers of the state know what they are purchasing and from whom. Georgia has provided its residents, visitors and those conducting business in the state a genuine service through its laws protecting trademarks and trade-names. By punishing those who would abuse the notions of fair competition and, whether willfully or innocently appropriate ideas and merchandizing techniques not uniquely their own, Georgia has created a fair and honest consumer environment.

III. TRADE SECRETS

The unique nature of trade secrets makes them equally worthy of protection as trademarks and trade-names. Trade secrets include information that is so sensitive as to require extra measures of protection to ensure that the owner’s rights in his property are not violated. Relatively recent actions by the Georgia legislature have improved the ability of trade secret owners to protect
their property. The new and clear parameters outlined in the statute governing trade secrets allow for a cause of action upon a showing of value of what is to be protected and that the owner has taken measures to protect the secrecy of the formula, program or whatever other information sought to be guarded.

Until the passage of the 1989 Trade Secret Act, and subsequently the 1990 Trade Secret Act, Georgia law regarding trade secrets was not in accord with the majority of states. Prior to 1989, Georgia law used the narrow definition of trade secrets as provided by Corpus Juris Secundum which was as follows: "[a] trade secret, within the rules pertaining to the rights which may be protected by injunction, is . . . a plan, process, tool, mechanism, or compound, known only to its owner and those of his employees to whom it must be confided in order to apply it to the uses intended." The more widely accepted definition of trade secret as provided by § 757 of the Restatement of Torts was expressly rejected by the Georgia Supreme Court as too broad.

The practical reality of the accepted definition of a trade secret in Georgia before 1989 was that in order to get protection under the law, there had to be close to absolute secrecy. However, the courts were willing to grant relief under theories which emphasized the circumstances of the misappropriation. Fiduciary duties of agents and officers of corporations, contractual measures such as restraint from competition agreements and certain forms of tort liability such as fraud and coercion were all theories under which the Georgia courts would grant relief when the action did not fall under the narrow provision for trade secrets.

Perhaps the most confusing aspect of the former regime was the distinction made by the courts between "trade secrets" and "confidential information." Remedies and degrees of protection were determined by into which of the two categories the material was placed. For example, trade secrets were protectable as long

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96 43A C.J.S. Injunctions § 151(a) (1978).
98 See Peter C. Quittmeyer, Trade Secrets and Confidential Information Under Georgia Law, 19 GA. L. REV. 623, 645-70 (1985) (stating that each type of information receives distinctly different legal protection).
as they were not duplicatable by legitimate means. All that was required for protection of confidential information was an enforceable contractual or otherwise confidential relationship. The criteria used in the Georgia courts' decisions distinguishing between trade secrets and confidential information was fuzzy, further complicating matters.

The Georgia Trade Secrets Act of 1990 (the "Act") replaced the statute adopted in 1989, which was the first attempt by the Georgia legislature at a broader definition of trade secrets. The definition adopted in 1989 was based on the definition as provided in the Uniform Trade Secrets Act ("UTSA"), and it focused on information with economic value which was maintained in comparative secrecy. The new definition also contained an illustrative list of what qualified under the definition of trade secret. In departing from the previously recognized Corpus Juris Secundum definition, the 1989 Act required only relative secrecy.

The Georgia legislature amended the 1989 Act the following year. The current definition under the 1990 Act, which is a more modified version of the UTSA, illustrates which information may now qualify as a trade secret under Georgia law. The definition now in use brings Georgia law in step with a majority of other jurisdictions. No longer are the courts confined to such a narrow construction of what may be protected as a trade secret. Furthermore, under the current definition, clearer parameters have been

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provided for the definition of a trade secret. Now a plaintiff need only establish two criteria in order to gain protection for a trade secret: value and the measures taken for secrecy.

Under the new law of trade secrets in Georgia, the distinction between confidential information and trade secret will no longer be necessary or valid. The Act is broad enough that confidential information has been swallowed up by the general definition of trade secret. The current, accepted definition of trade secret includes information that was previously held by Georgia courts to constitute only confidential information. 105

A. JUDICIAL INTERPRETATION OF THE NEW SCOPE OF TRADE SECRET

Since the passage of the Act, the Georgia Supreme Court has had a few occasions to interpret its impact on the common law treatment of trade secrets. For example, in *Avnet, Inc. v. Wyle Laboratories, Inc.*, 106 the Georgia Supreme Court held that the common law distinction whereby employer's customer lists were the property of the employer but the employee's personal knowledge was not protected by trade secret law, was still in effect. 107 This is so because the Act does not expressly obviate this distinction. 108 " [S]tatutes are not understood to effect a change in the common law beyond that which is clearly indicated by express terms or by necessary implication. ' 109 The court reasoned that a broader definition of trade secrets which included all forms of customer "information" instead of the specifically enumerated "customer lists" would be necessary in order to obviate the common law distinction. 110 However, since the Act is not so broadly drawn, a person leaving employment still has the right to take with him the skill and knowledge he has obtained during the course of that employment in the absence of any contractual restraint.

105 *Id.*
106 437 S.E.2d 302 (Ga. 1993).
107 *Id.* at 305. See also *Vendo Co. v. Long*, 102 S.E.2d 173, 175 (Ga. 1958) (holding that "[a] person who leaves the employment of another has a right to take with him all the skill he has acquired, all the knowledge he has obtained, and all the information that he has received, so long as nothing is taken that is the property of the employer.").
109 *Avnet*, 437 S.E.2d at 305 (quoting *Sears v. Minchew*, 93 S.E.2d 746, 748 (Ga. 1956)).
110 *Id.*
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The court reaffirmed this position in *Leo Publications, Inc. v. Reid* and held that only the tangible customer lists were the property of the former employer and warranted protection as trade secrets. In *Leo*, the defendant was an advertising director for the plaintiff, and before she left her job, she compiled a list of customers to leave for her successor which included contact persons, telephone numbers, and information regarding the type and amount of advertising done by these clients. After leaving the plaintiff's employ, she began publishing an advertising paper of her own that competed with plaintiff's paper. The plaintiff sought an injunction against the defendant's use of customer lists obtained while working for the plaintiff. The trial court found for the defendant, concluding that the list was not a trade secret because the information it contained was readily ascertainable by proper means. However, the court did order the defendant to return the original list she compiled if indeed it was in her possession.

B. REMEDIES UNDER GEORGIA TRADE SECRET LAW

Under the Act there are several different remedial actions available for one whose trade secret is misappropriated. Obtaining an injunction of either an actual or threatened misappropriation of a trade secret is one action that may be pursued. Under the Act, the injunction terminates when the trade secret is no longer in existence, but it may be continued for a reasonable amount of time if the trade secret "ceases to exist due to the fault of the enjoined party or others by improper means." The Act further provides that under "exceptional circumstances" a court may order the wrongdoer to pay reasonable royalties to the owner of the trade secret if it would be unreasonable to prohibit future use.

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111 458 S.E.2d 651 (Ga. 1995).
112 Id. at 652.
113 Id.
115 Id.
116 Id.
117 GA. CODE ANN. § 10-1-762(b) (1994). This section further states, "[e]xceptional circumstances include, but are not limited to, a material and prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation that renders a prohibitive injunction inequitable." Id.
The Act also authorizes damages to be recovered either in conjunction with obtaining an injunction or as the sole remedial measure taken.\textsuperscript{118} Under the Act, "[d]amages can include both the actual loss caused by misappropriation and the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss."\textsuperscript{119} Upon failure to prove by a preponderance of the evidence either damages or unjust enrichment, the Act authorizes the court to award "a reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret for no longer than the period of time for which use could have been prohibited."\textsuperscript{120} Under circumstances such as these, it is expected that the court will determine what license price negotiations between the parties would have yielded. For example, a district court in Florida looked to uncompleted negotiations between the owner of the trade secret and the misappropriator to reach its finding of a reasonable royalty.\textsuperscript{121}

In University Computing Co. v. Lykes-Youngstown Corp.,\textsuperscript{122} the following factors were used in determining the fair license price:

\begin{itemize}
\item the resulting and foreseeable changes in the parties' competitive posture; the prices past purchasers or licensees may have paid; the total value of the secret to the plaintiff, including the plaintiff's development costs and the importance of the secret to the plaintiff's business; the nature and extent of the use the defendant intended for the secret; and finally whatever other unique factors in the particular case which might have affected the parties' agreement, such as the ready availability of alternative processes.\textsuperscript{123}
\end{itemize}

\begin{enumerate}
\item \textsuperscript{118} GA. CODE ANN. § 10-1-763(a) (1994).
\item \textsuperscript{119} Id.
\item \textsuperscript{120} Id.
\item \textsuperscript{121} Biodynamic Technologies, Inc. v. Chattanooga Corp., 658 F. Supp. 266, 270 (S.D. Fla. 1987).
\item \textsuperscript{122} 504 F.2d 518 (5th Cir. 1974) (citing Hughes Tool Co. v. G.W. Murphy Indus. Inc., 491 F.2d 923, 931 (5th Cir. 1973)).
\item \textsuperscript{123} University Computing, 504 F.2d at 539.
\end{enumerate}
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As the Fifth Circuit illustrates in *University Computing*, there is some flexibility available in determining the cost of the license to be utilized.

Under the Act, exemplary damages may be awarded by the court upon a finding of willful and malicious misappropriation in an amount that is not to exceed twice the amount of any award under subsection (a). This provision is the final one of the Act which authorizes damages to be paid to the plaintiff. If the owner of the trade secret is unable to demonstrate any of the preceding requirements, then he will have exhausted the available remedial provisions and find no relief in the statutory scheme.

Criminal penalties are not provided for in the Act, but it does expressly reference Section 16-8-13 of the Georgia Code which addresses criminal offenses pertaining to the theft of a trade secret. The Act does purport to "[e]xcept as provided in subsection (b) . . . supersedes conflicting tort, restitutionary, and other laws of this state providing civil remedies for misappropriation of a trade secret." Laws which are not affected include contractual duties or remedies and other civil remedies not based on misappropriation of a trade secret.

The current statutory regime employed in Georgia and as interpreted by the courts is a large advancement from where the law on trade secret was less than ten years ago. The broader definition affords owners some real protection from having their work illegally appropriated. Furthermore, although trade secrets are discoverable during litigation, the 1990 Act provides for protection of an alleged trade secret through "reasonable means, which may include granting protective orders in connection with discovery proceedings, holding in-camera hearings, sealing the records of the action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval." This provision acts to increase the possibility that a party suspecting misappropriation of their trade secret will come forward and seek relief. Without such measures to maintain

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124 GA. CODE ANN. § 10-1-763(b) (1994).
126 GA. CODE ANN. § 10-1-767(a) (1994).
127 GA. CODE ANN. § 10-1-767(b)(1)-(2) (1994).
secrecy during trial, an owner would likely be hesitant in bringing a suit for fear that legal action would result in forfeiture of the right to the trade secret because of forced disclosure in court.

The statute of limitations under the Act is five years, and it does not begin to toll until the "misappropriation is discovered or by the exercise of reasonable diligence should have been discovered."\textsuperscript{129} Also under this code section, a continuing misappropriation constitutes only a single claim, but separate claims may arise against each individual who receives the trade secret from the one who misappropriated it.\textsuperscript{130}

IV. CONCLUSION

While the statutory language of each of the provisions governing unfair competition and trade secrets are fairly straightforward, or, in the instances where the language is vague, there is an appropriate interpretation by the Georgia courts, the sheer multitude of the provisions cause confusion and anxiety among those who need to understand them. The fact that one cause of action does not preclude another is, perhaps, the most important aspect of these statutes. When brought together, it is likely a plaintiff with a colorable argument will have success in attaining, at the very least, a temporary injunction.

The unfair competition statutes were designed to protect the mark owner's investment of time, creativity and money while also ensuring that the consuming public is not lead astray by one seeking to profit off of another's ingenuity and sweat. These asserted goals of the state go a long way toward explaining the relative ease, especially under the Uniform Deceptive Trade Practices Act, of obtaining relief. While it is not in the state's interest to hamper competition, providing an open yet fair market place is one of its primary goals. Thus, those who have been operating under a certain name or mark may realize the benefit of their years, and the newcomers are forced to break new ground instead of treading on those who have come before them.

\textsuperscript{129} GA. CODE ANN. § 10-1-766 (1994).
\textsuperscript{130} Id.
The same proposition can be said for the protection afforded owners of trade secrets. Imagine the possible consequences if the formula for Coca-Cola was released to the public or individuals working in the soft drink industry; this formula has been closely guarded for decades and with good reason. The potential value of possessing the most coveted secrets of the soft drink industry is impossible to estimate. It is extreme scenarios such as this that help to emphasize the vital importance of having provisions to protect the product of others. This is especially true when they have invested time and effort into keeping the formula or plans a secret, which is a prerequisite for being eligible for relief under the Trade Secrets Act of 1990.

The recent efforts of the Georgia legislature to bring their trade secret law in line with the majority of jurisdictions, speak volumes on the recognized importance of trade secrets. The broader, more inclusive definition finally affords those who have suffered from the misappropriation of their work the necessary relief.

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