

*Tailoring Trade Secrecy:  
The Moral Imperative of Industry-Specific Application of Doctrine*

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Companies and governments use data to categorize, rank, and rate individuals. Are you a terrorist threat? A good credit risk? A diligent worker or student? Software programs crunch the numbers, delivering silent judgments as the formula is a trade secret, immune from scrutiny. Internet access providers use secret methods to decide what sites to prioritize, and which to block or slow down. Finance companies shroud deals in impenetrable complexity. When the resulting lack of trust pushed the banking system to the brink of collapse in 2008, the Federal Reserve chose to classify its stabilizing interventions as secret, too. Finally, secret methods in hydraulic fracturing are also deeply affecting the natural world, in ways that we are only beginning to understand. And the list goes on. What is leading to such a bizarre array of infringements on the public right to know basic features of its finance, energy, and communications systems? We believe that the problem may lie in an improper treatment of trade secrets as a form of intellectual property subject to few, if any, exceptions. Thus, this article explores two solutions to the overprotection of trade secrecy. First, within the property paradigm, courts could apply some classic limits familiar from other areas of IP: copyright's fair use, patent's quid pro quo, or even redefining "value." However, none of those solutions squarely address the theoretical morass - is it property, tort, contract, or some or none of the foregoing? - that underscores trade secrecy. Thus, this Article proposes that the theoretical problem lies in ignoring how information is used by the recipient of the information. Indeed, identifying the intended and actual use of the information by the recipient - the actual misappropriation - is a usually overlooked and/or assumed aspect of trade secret law analysis. A better second solution is found in tort law. When we identify the actual use of the purported trade secret, the theoretical lines become easier to draw - who should and should not have access, and under what conditions. Today, an increasingly important use of a trade secret is not competitive advantage, but for the good of the public at large (i.e., public health or consumer protection). Until recently, that was at best a marginal basis for trade secret access. But as we are in a new information-aggregating world, trade secrecy theory and doctrine must adapt to its new powers.

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