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Abstract: A foundational question in every dispute over intellectual property is whether the defendant's product is too similar to the plaintiff's. For almost all intellectual property regimes, an extensive body of case law and academic commentary has examined how such similarity should be measured. Trade secrecy, however, remains a remarkable exception. In trade secrecy cases, just as in other intellectual property cases, the defendant's good can diverge markedly from what the plaintiff developed. Yet it turns out that trade secret case law provides little guidance for assessing how much similarity is too much. The standard remains, fittingly but frustratingly, a secret.

This Article takes the first close look at what that standard should be. We argue that trade secrecy's similarity doctrine is currently asking an incomplete set of questions. It inquires almost exclusively into the defendant's innovation process, instructing fact-finders to determine whether the defendant had acquired any advantage from familiarity with the secret. In doing so, it wrongly skips over an inquiry into the defendant's product. A better test would consider not only the defendant's benefit from knowing the secret, but also the kind of product into which that benefit ultimately translates. Part of the trouble is that trade secrecy is looking in the wrong place for guidance. Courts sometimes make analogies to patent law, but the doctrine turns out to be a poor fit. It's copyright, not patent, that offers trade secrecy's similarity analysis the best blueprint for improvement.