

# SEE EVIL, SPEAK NO EVIL:

A First Amendment Challenge to Trade Secret  
Protections of Fracking Recipes

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## Abstract

Hydraulic fracturing, or “fracking,” is a process of drilling and injecting high-pressure fluids into underground rock formations in order to extract oil and natural gas. The fluid used in the fracking process is a mix of water, sand, and various chemical additives. This mixture varies by well and by company. Many have expressed concerns about the health and environmental hazards of the fracking process, and have demanded information regarding the chemical composition of the fracking fluids. Companies have resisted disclosure, maintaining that the mixture must be kept confidential as a trade secret. Should these trade secret protections, however, prohibit a journalist, doctor, or an environmental activist from informing the public about these fracking chemical mixtures?

To answer this question, this paper analyzes fracking recipe protections under trade secrecy law, and argues that these protections may conflict with First Amendment rights. I will argue that this tension must be resolved by weighing the public interest against the commercial interests vested in the trade secret. I will then propose that a viable framework for balancing the two interests is a trade secret fair use doctrine. Through this paper, I hope to offer the framework for a balanced solution to not only the issue of fracking recipe disclosure, but a solution to an underlying flaw of current trade secret protections in the U.S.

## Introduction

A young boy in Pittsburg is brought to a doctor, plagued by strange skin lesions, nosebleeds, and liver damage. The doctor suspects these symptoms are a result of exposure to chemicals from the nearby fracking drilling in the town. Normally, the doctor would share his diagnosis with the boy and his family, and consulted other doctors about best treatment options. However, the non-disclosure agreement drafted by the fracking company to protect its trade secret “fracking recipe” acts as a gag order to prevent the doctor from speaking about the chemical culprit of the boy’s symptoms.<sup>1</sup>

Residents in Texas, concerned about the increasing numbers of violent earthquakes in areas of fracking activity, demand accountability from the fracking companies they believe to be at the source of these earthquakes. In order to win in court, the residents must prove that the fracking company’s negligent actions directly caused the harm. However, this is a difficult feat: the residents lack access to a key element of evidence—information on the chemical composition of the company’s well injections.<sup>2</sup> Texas regulators find there is insufficient evidence linking the companies to increased seismic activity, deterring residents from filing civil lawsuits.<sup>3</sup>

A homeowner in Weatherford, Texas, files a lawsuit against a fracking company because he can light his tap water on fire, due to what he believes is fracking contamination. The fracking company pours millions of dollars into its defense and counter-sues the homeowner for defamation. Unable to hold the fracking company accountable for the contamination, the homeowner instead endures two years of litigation

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<sup>1</sup> Phillips, “Pennsylvania Doctors Worry Over Fracking ‘Gag Rule.’”

<sup>2</sup> “Texas Regulators Find No Evidence for Link between EnerVest Disposal Well and Earthquakes.”

<sup>3</sup> Davis, “Texas Quake Findings Likely To Deter Civil Suits.”

battles, becomes racked with legal bills, and just barely manages to have the defamation charges dismissed.<sup>4</sup>

These instances are neither hypothetical nor rare in the current battle to regulate the fracking industry. Corporate profit motives are shielded under the guise of protecting innovation incentives and fair trade practices. Public health is endangered, access to information is fettered, speech is gagged, and corporate accountability is nonexistent under the protections afforded by trade secret laws.

Public fears about health and environmental implications of fracking activity have been exacerbated by the reluctance of the fracking industry to disclose information about their use of chemicals in the fracking process. Increasing numbers of class action lawsuits against fracking companies and heated rhetoric reflect this growing public concern.<sup>5</sup> But fracking companies hide behind trade secret protections and cite questionable EPA reports asserting that fracking poses “little or no harm”<sup>6</sup> and no “widespread systemic risks.”<sup>7</sup> Environmental activists and concerned citizens have responded that the EPA findings are faulty and were industry-influenced,<sup>8</sup> demanding more comprehensive and independently conducted research.<sup>9</sup>

While other branches of law have developed to allow considerations for public interest, trade secret does not. Copyright allows fair use defenses, and patents require

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<sup>4</sup> Dermansky, “Fracking Victim Sued for Defamation After Proving Drinking Water Flammable.”

<sup>5</sup> Hagstrom, Earl, “Hydraulic Fracturing Litigation Is on the Rise.”

<sup>6</sup> US EPA, “Evaluation of Impacts to Underground Sources of Drinking Water by Hydraulic Fracturing of Coalbed Methane Reservoirs”

<sup>7</sup> US EPA, “EPA’s Study of Hydraulic Fracturing for Oil and Gas and Its Potential Impact on Drinking Water Resources.”

<sup>8</sup> EPA documents show that company Chesapeake Energy lobbied the agency to limit the EPA’s ability to conduct testing on groundwater chemical presence.

<sup>9</sup> Ouzts, “Science Advisors Say EPA Fracking Study’s Conclusion Is Suspect. Now What?”

federal approval and have an expiration date. Trade secret law, however, has none of these features that serve as a public interest safety valve, thereby threatening the most essential facets to public welfare, including health and safety.

This paper seeks to illuminate an underlying flaw in trade secrecy law by showing that First Amendment rights can conflict with trade secret protections in cases involving information of public concern. In addition, this paper hopes to propose a viable legal framework that alleviates free speech and public interest conflicts, while also preserving the purposes that trade secret law was intended to serve.

Part I delineates U.S. governance of fracking to show that lax regulations fail to hold the industry accountable to public interests regarding health and environmental implications of fracking. Part II reviews U.S. trade secret regulations and its application to the industry. Part III argues that the extensiveness of trade secret protections results in social harms, including the potential suppression of free speech. Part IV explains why past First Amendment challenges to trade secrets have been rare, and asserts that future First Amendment challenges will become more frequent. Part V shows the variance in judicial standards that have been applied to First Amendment challenges in trade secret cases by analyzing several notable decisions. Part VI then argues that a trade secret fair use doctrine will serve as a viable mechanism to create a consistent and balanced approach to resolving First Amendment challenges. Part VII anticipates criticisms of adopting a fair use framework, and Part VIII considers the application and implications of this framework to fracking recipe disclosures. Finally, Part XI concludes by asserting the importance of balancing free speech and public concerns with commercial interests, and

discusses the broader implications of my proposed fair use framework in trade secret cases.

### **I. Current Patchwork of U.S. Fracking Regulations**

The fracking industry has proliferated in the U.S. since 2005, and U.S. shale gas production rose by nearly 500 percent from 2007 to 2013.<sup>10</sup> Ninety percent of the 3,000 new wells in 2015 were drilled by fracking.<sup>11</sup> However, regulations of this growing industry have lagged behind. With an inconsistent patchwork of state laws sprinkled among federal and municipal legislation, fracking regulations are neither effective in protecting public health or welfare, nor are easily navigated by the fracking industry.

A primary regulatory concern has been the content of the chemical cocktail or “recipe” used in the fracking process. Each fracking company claims to have its own signature recipe for each well, depending on the conditions of the well.<sup>12</sup> Studies show that an average of 14 unique ingredients is used at every well.<sup>13</sup> At least 29 chemicals commonly used in fracking fluids are known or possible carcinogens and neurotoxins, such as lead, benzene, and methanol.<sup>14</sup>

The chemical content of fracking recipes has raised health and environmental concerns, as citizens and legislators demand more information and accountability.<sup>15</sup> While several federal statutes exist to protect these public concerns, the fracking industry is largely shielded from these statutes by the Halliburton loophole. Named after the

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<sup>10</sup> Levitan, Dave, “Inhofe on Fracking, Water Contamination.”

<sup>11</sup> *Ibid.*

<sup>12</sup> Hall, “Hydraulic Fracturing.”

<sup>13</sup> Hildreth, Randy, “New EPA Report Refutes Activists’ Claims on Fracking Fluid.”

<sup>14</sup> Kimball, “Toxic Chemicals Used In Fracking.”

<sup>15</sup> Fisk, “The Right to Know?”

Halliburton Company that patented hydraulic fracturing in the 1940s and the influence of former Halliburton CEO Vice President Dick Cheney’s Energy Task Force, it is a troublesome facet of the Bush Administration’s Energy Policy Act of 2005.<sup>16</sup> The Halliburton loophole explicitly excludes fracking from the legislative definition of “underground injections”, thereby exempting fracking companies from key laws such as the Safe Drinking Water Act, the Clean Water Act, and the Community Right-to-Know Act.<sup>17</sup>

The Halliburton exemption is but one example of the fracking industry’s political sway. Because the industry has poured \$750 million into lobbying for less regulatory oversight in the past decade,<sup>18</sup> legislative reform initiatives such as the FRAC Act<sup>19</sup> and the FRESHER Act,<sup>20</sup> which sought to repeal the Halliburton exemption for fracking under the Safe Drinking Water Act and Clean Water Act respectively, have been unsuccessful. Due to the powerful lobbying efforts of the industry, neither legislative initiative has been able to make it out of the committee in either the House or the Senate. Current regulations therefore fail to hold the fracking industry accountable to public health and safety concerns.

One area where legislation has attempted to respond to the public outcry has been to demand information on the chemical content of fracking recipes. States began enacting mandatory disclosure laws, requiring fracking companies to disclose certain information about their fracking recipes. Wyoming was the first to enact such legislation in 2010, and

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<sup>16</sup> Barton, “H.R.6 - 109th Congress (2005-2006).”

<sup>17</sup> Earthworks, “The Halliburton Loophole.”

<sup>18</sup> Browning, James, “Shareholders Take on Fracking: Why Do Gas Companies Spend so Much on Politicians? | Pittsburgh Post-Gazette.”

<sup>19</sup> Casey, “S.785 - 114th Congress (2015-2016).”

<sup>20</sup> Cartwright, “H.R.1175 - 113th Congress (2013-2014).”



was followed by Arkansas and Pennsylvania.<sup>21</sup> Twenty-five states now have disclosure laws, with each state setting a different standard as to what information can be requested and the level of specificity required, leaving the public with a patchwork of legislation.<sup>22</sup>

However, all of these laws contain exemptions for “trade secrets”, generally defined as commercially valuable information that is not generally known, and that has been generated by those who wish to retain its secrecy. The fracking industry is therefore able to avoid mandatory disclosure by invoking trade secrecy rights. With these trade secret exemptions, disclosure laws are a suggestion rather than a requirement for the fracking industry.<sup>23</sup>

Federal agencies have also attempted to introduce mandatory disclosure rules, but to no avail. The Obama administration granted the Interior Department’s Bureau of Land Management (“BLM”) the authority to create federal regulations on fracking. The BLM issued a rule regulating fracking on public and Indian tribal lands, requiring disclosure of the chemicals used in the process and certain preventative measures against leaks. However, several industry groups, four states and an Indian tribe brought a lawsuit against the BLM, seeking injunctive relief. In the case, *Wyoming v. U.S. Department of the Interior*, the federal judge blocked the rule, finding that the BLM lacked authority from Congress to regulate fracking on public lands.<sup>24</sup> The judge has enjoined the BLM from enforcing the rule, pending appeal.

Trade secrecy protections, combined with the patchwork of lax regulations, allow the industry to place their commercial interests above public interests in health, safety and

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<sup>21</sup> Hall, “Hydraulic Fracturing.”

<sup>22</sup> Vinson & Elkins, “Hydraulic Fracturing Fluid Disclosure Requirement.”

<sup>23</sup> String, “A Fracking Good Solution To The Hydraulic Fracturing Regulation Conundrum.”

<sup>24</sup> Cicero, “Judge Blocks New Rule For Fracking on Public Lands, Wyoming v. U.S. Dep’t of the Interior.”

the environment. The fundamental facets and implications of trade secrets in the U.S. are delineated in the following section, illustrating the need for trade secrecy reform.

## **II. Trade Secrecy Protections and Its Application to the Fracking Industry**

Trade secrets are defined by the Uniform Trade Secret Act (“UTSA”) as information of commercial value that (a) derives independent economic value from being generally not known and (b) about which reasonable efforts have been made to maintain its secrecy.<sup>25</sup> The UTSA protects against “misappropriation” of trade secrets.

Misappropriation is defined as (1) acquiring trade secrets by improper means, (2) disclosing trade secrets that were directly acquired by improper means, and (3) disclosing trade secrets that were indirectly obtained via a source the discloser “knew or had reason to know” acquired the trade secret by improper means. Improper means includes theft, fraud, bribery, corporate espionage, and breaching a contractual duty of confidentiality. There is no federal law, and thus trade secrets are governed by states.<sup>26</sup> States have adopted the UTSA, with the exception of Massachusetts and New York, though both of these states have enacted versions similar to the UTSA.<sup>27</sup>

The UTSA does not have a public interest safety valve, in that it does not specify any considerations for matters of public concern. In contrast, the Restatement (Third) of Unfair Competition explicitly lists “interests of third persons and of the public” as a

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<sup>25</sup> Uniform Law Commission, “Trade Secrets Act Summary.”

<sup>26</sup> While at the time of this writing (April 2016) there is no enacted federal law governing trade secrets, the Defend Trade Secrets Act has been passed by the Senate and may signed into law within the next year.

<sup>27</sup> Dole, Jr, Richard F., “Permanent Injunctive Relief for Trade Secret Misappropriation Without an Express Limit Upon Its Duration: The Uniform Trade Secrets Act Reconsidered.”

factor to consider when determining the appropriateness and scope of injunctive relief.<sup>28</sup> However, the Restatement is nonbinding. It serves as a secondary source, a distillation of general common law principles rather than an authoritative rule. One study shows that only 2% of modern trade secret cases (from 1995 to 2009) cited the Restatement (Third) of Unfair Competition.<sup>29</sup> Thus, by adopting the UTSA, states do not have public interest considerations outlined in their trade secret laws.

Unlike a patent, which must be registered and approved by the U.S. Patent Office, there is no formal process to claim a trade secret.<sup>30</sup> The validity of a trade secret is tested and reviewed when compliance issues arise. For example, consider the case of a medical device manufacturer. The manufacturer does not have to validate its trade secret claim of a device it has designed until it sues another manufacturer for misappropriating its trade secret. The state court will review and determine the validity of the trade secret claim during the litigation proceedings.

Thus, when a fracking company simply claims its chemical recipe is a trade secret, the company is conferred the right to take legal action against those using or disclosing the secret. The court then decides whether the company has a valid trade secret, and whether or not the use or disclosure constitutes misappropriation.

Most trade secret cases are typically litigated in a preliminary injunction proceeding, given that the primary goal of the right holder is to prevent the dissemination or use of the trade secret.<sup>31</sup> State statutes are silent on the issue of how much courts should take into consideration the public's interest in the matter.

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<sup>28</sup> "Right Of Publicity » Restatement (Third) of Unfair Competition, s.46-49."

<sup>29</sup> Almeling et al., "A Statistical Analysis of Trade Secret Litigation in State Courts."

<sup>30</sup> Halligan, Mark, "Trade Secrets v. Patents."

<sup>31</sup> Johnson, "Injunctive Relief in the Internet Age."

When chemicals pose health and environmental hazards to citizens, the public has a legally acknowledged right to know the hazardous source and demand regulations.<sup>32</sup> This right to know has been enshrined in several laws: Congress enacted the Emergency Planning and Community Right-to-Know Act, requiring information reporting for the express purpose of increasing public knowledge about chemical use by individual facilities to improve chemical safety, protect public health and protect the environment.<sup>33</sup> While this and other federal and state laws provide for the public “right to know” and to access information when public health and safety are at stake, due to the Halliburton loophole and the strength of trade secrecy protections, fracking companies are exempt from the very public disclosure requirements designed to grant public access to essential information. The fracking recipe case thus shows an inherent flaw in trade secrecy law: the lack of a public interest safety valve results in overbroad legal protections that no other branch of intellectual property confers.

Not only does trade secrecy law allow exemptions from disclosure rules, it also provides fracking companies a mechanism for doling out punitive measures and suppressing the speech of those who wish to reveal information about fracking recipes to the public. The following section discusses how the breadth of trade secret protections results in harms that signal an urgent need for rectification.

### **III. Harm Arising from the Lack of a Public Interest Safety Valve in Trade Secrecy Law**

The harms arising from extensive trade secret protections of fracking recipes can be summarized into three types: enforcing accountability, informing public opinion, and

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<sup>32</sup> Jennings, Jr., “Constitutional Law: The People’s Right To Know.”

<sup>33</sup> US EPA, “What Is EPCRA?”

formulating policies. First, the recourse for those who claim to have been harmed by fracking activity is through tort law, in the form of a civil lawsuit.<sup>34</sup> However, without evidence linking fracking activity to the harm, which requires information about the chemical content of fracking fluids, many are unable to sustain a lawsuit.<sup>35</sup> Those that are settled outside of court often require non-disclosure agreements. This results in further information suppression, fueling the cycle of information deficiency.

Second, with this lack of information, independent researchers are unable to conduct comprehensive research.<sup>36</sup> Public opinion remains muddled and uninformed. Misinformation and uncertainty spread, raising public fears. For example, the EPA 2004 Report on fracking claimed that it found “little or no harm” to drinking water by fracking activities. The results were criticized as unsupportable, due to alleged conflicts of interest in five of the seven peer reviewers.<sup>37</sup> The 2016 EPA Report has also been criticized by the EPA’s own peer review board, which has stated that the EPA’s conclusions are not supported by their research.<sup>38</sup>

Third, this misinformation and uncertainty results in obstacles to formulating sound policies or to drum up the legislative and political will to push forth effective regulations.<sup>39</sup> An underlying problem of all three harms, however, is the public information deficit. This lack of public knowledge is compounded by the punitive aspects of trade secrecy law.

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<sup>34</sup> Johnson, *supra*.

<sup>35</sup> *Ibid*.

<sup>36</sup> Philips, Susan, “Lack of Data on Fracking Spills Leaves Researchers in the Dark on Water Contamination.”

<sup>37</sup> Ouzts, “Science Advisors Say EPA Fracking Study’s Conclusion Is Suspect. Now What?”

<sup>38</sup> Greenwire et al., “Frack Study’s Safety Findings Exaggerated, Bush EPA Official Says.”

<sup>39</sup> Hochschild and Einstein, “Do Facts Matter?”

To illustrate, consider the case of a concerned employee of the industry, who conveys industry trade secrets and tells them to a journalist for the purpose of informing the public about potentially hazardous industry practices. The journalist, promising to keep the source anonymous, then publishes an exposé to raise awareness. Both the employee and the journalist have misappropriated the industry's trade secret. Because the employee remains anonymous, it is the journalist who would then be subject to punitive damages that must be paid to the industry for its loss of the trade secret.

Now, consider the same case, but the journalist has not yet published the exposé. The industry gets wind of the publication plans, and files a lawsuit against the journalist and his source. The court, if strictly abiding by the letter of trade secret law, would likely find that the source had directly misappropriated the trade secret, and would issue a preliminary injunction, a "gag order," to prevent the journalist from publishing the expose and thereby preserving the industry's trade secret. This is clear violation of the journalist's First Amendment rights. Assigning damages to a journalist for exposing an industry's trade secrets is also a dangerous step toward restricting speech and news reporting. Yet, under trade secrecy law, the journalist was a third party who misappropriated a trade secret, and is thus subject to being "gagged" by injunction and penalized.

This example illustrates the inherent tension between the First Amendment and trade secrecy law. The courts in the past have encountered similar cases, and the judicial responses in dealing with this tension have widely varied. However, as First Amendment challenges in trade secret cases have been relatively rare in the past, a consistent judicial

trend towards one doctrine has not yet been solidified, resulting in a big question mark when it comes to resolving these tensions.

#### **IV. Rarity of Past and Likelihood of Future First Amendment Challenges in Trade Secrecy Jurisprudence**

First Amendment considerations in matters of copyright have been thoroughly discussed in scholarship and case law, due to the expressive nature of both protected works and infringing works. In contrast, First Amendment application in trade secrecy cases has been rare for two reasons. First, trade secrets are often things, not information. For example, “things” that companies may claim as trade secrets are tools that aid in production, a particular device, or a recipe to produce a good.<sup>40</sup> The First Amendment affords no protections when a trade secret misappropriator is told to stop using that device or tool or formula in his own production process. Second, trade secret cases most often arise between two private entities, and noncommercial public interests are rarely involved. Take for example a classic corporate espionage scenario: a competitor sends a spy to steal Coca Cola’s famous trade secret syrup formula in order to launch its own competing soda product. In this case, the misappropriator has the same goal as the trade secret owner: to profit from an industry secret. In order to do so, the secret must remain a secret, and thus misappropriators rarely wish to disclose information about the trade secret to the public.<sup>41</sup> Neither the proprietor nor the misappropriator wish to involve or inform the general public, and the case is either litigated or settled between the two private actors. In such cases, the First Amendment is not implicated.

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<sup>40</sup> Jasnoff, “Injecting Trade Secret Principles into Pennsylvania’s Fracking Law, Extracting Its First Amendment Deficiencies.”

<sup>41</sup> Johnson, *supra*.

However, due to a trend of strengthening the intellectual property regime in the U.S., alongside an increasingly information-based economy, conflicts between the First Amendment and trade secrets will likely become more frequent.<sup>42</sup> The question of whether or not states had the jurisdiction to enact state trade secret laws was largely left unresolved until 1974 in *Kewanee Oil v. Bicron*, a landmark Supreme Court decision.<sup>43</sup> After *Kewanee* affirmed and strengthened states' abilities to establish trade secret laws, the once weak protections grew stronger, and today it is widely accepted that trade secrecy laws provide strong legal protections.<sup>44</sup> For example, in 2003 the Seventh Circuit extended trade secret protections to one toy designer's idea of carving grooves into a toy railroad track to make clickety-clack sounds and to brand it as the "Clickety-Clack Track", even if the designer had barely invested any time or capital coming up with this idea.<sup>45</sup> That the court extended trade secret protection to the concept of cutting specific grooves into wood to make clacking sounds illustrates the current trend toward broadening trade secret law in the U.S. Furthermore, there have been legislative efforts to push forth a federalized form of strong trade secrecy laws, which will be discussed in Section IX of this paper. As a result of this trend, companies are increasingly turning to trade secret protections rather than copyright and patent protections, and one study shows that trade secret litigations have been nearly doubling every decade since 1988.<sup>46</sup> This is especially problematic, as the U.S. moves away from the better-developed intellectual property frameworks that allow for public interest considerations (copyright's fair use

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<sup>42</sup> Samuelson, "First Amendment Defenses in Trade Secrecy Cases."

<sup>43</sup> *Kewanee Oil Co. v. Bicron Corp.*, 416 US 470 (Supreme Court 1974).

<sup>44</sup> Halligan, Mark, "Trade Secrets v. Patents."

<sup>45</sup> *Learning Curve Toys, Inc. v. PlayWood Toys, Inc.*, 342 F. 3d 714 (Court of Appeals, 7th Circuit, 2002).

<sup>46</sup> Almeling, "Seven Reasons Why Trade Secrets Are Increasingly Important."



doctrine and patent's common law public interest test established in *eBay Inc. v. MercExchange, LLC*<sup>47</sup>), and towards a trade secret regime that lacks these necessary considerations.

As First Amendment conflicts become more prevalent in trade secret cases, it will be important that courts have a consistent way of evaluating and balancing these conflicts. However, as the following section will illustrate, the courts have demonstrated a wide variance of approaches to these conflicts in the past, necessitating a more uniform and balanced approach.

## **V. Charting Judicial Trends: First Amendment Exceptionalists versus Trade Secrecy Preservationists**

While First Amendment challenges in trade secret cases have been relatively rare, there is a wide variance of judicial stances on the role of the First Amendment in these rare cases. This section will analyze three decisions (Superior Court, Appellate Court, and Supreme Court of California)<sup>48</sup> surrounding one case, *DVD Copy Control Ass'n, Inc. v. Bunner* (“*Bunner*”), to illustrate the lack of a consensus on how to address First Amendment challenges to trade secret protections. I will then focus on delineating the views and arguments of both ends of the spectrum, the pro-First Amendment and pro-trade secret stances, providing additional case examples.

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<sup>47</sup> *eBay Inc. v. MercExchange, LLC* (Supreme Court, 2006), established a four-pronged test for granting permanent injunctions in patent cases, one prong requiring the patentee to show that “the public interest would not be disserved by a permanent injunction.”

<sup>48</sup> Hereinafter, the district court case will be called *Bunner I*. *Bunner I* was decided by the Superior Court of California, County of Santa Clara in 2000. *Bunner II* will refer to the appellate case, heard by the California Sixth District Court of Appeal in 2001. *Bunner III* will refer to the California Supreme Court case, decided in 2003.

*Bunner I* was a California case concerning a decryption program called DeCSS. DeCSS is the name of a DVD decoder program, used to defeat an access control system called CSS that prevented digital copying of DVD discs. Andrew Bunner, the defendant, posted a copy of this program on his website. To stop the dissemination of the DeCSS program the plaintiffs DVD Copy Control Association (“DVD-CCA”) filed a lawsuit against Bunner and hundreds of others who posted any form of the program. Plaintiffs sought to enjoin use, disclosure, and distribution of CSS trade secrets.<sup>49</sup>

The trial court entered a preliminary injunction, which prohibited Bunner and co-defendants from disclosing any CSS trade secrets.<sup>50</sup> Bunner appealed, and in the appeals case *Bunner II*, the court of appeals reversed, stating that the injunction violated Bunner’s right to free speech under the U.S. Constitution and the California Constitution.<sup>51</sup> DVD-CCA then appealed to the California Supreme Court, which in *Bunner III*, issued a limited decision that the injunction was for the legitimate enforcement of trade secret law and thus the burden on Bunner’s speech was justified.<sup>52</sup>

Within the Bunner case alone, the judicial opinion varied vastly in regards to the First Amendment implications in trade secret cases. The judge in *Bunner I* neglected the fact that the First Amendment defense had even been raised, *Bunner II* focused primarily on the First Amendment defense and went so far as to say that injunctions in all such cases violated free speech rights, while *Bunner III* disagreed with the level of scrutiny applied by the appellate court and found that prohibiting speech in order to protect a valid

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<sup>49</sup> “Order Granting Prelim. Injunction for Plaintiffs against Defendants, in DVD CCA v. McLaughlin, Bunner et Al. (Jan. 20, 2000).”

<sup>50</sup> *Ibid.*

<sup>51</sup> DVD Copy Control Assn v. Bunner, 113 Cal. Rptr. 2d 338 (California Court of Appeal, 6th Appellate Dist. 2001).

<sup>52</sup> DVD Copy Control Ass’n, Inc. v. Bunner, 75 P. 3d 1 (California Supreme Court 2003).

trade secret was not an infringement on free speech rights. As the rest of this section will show, adopting one extreme view versus the other does not make sound law. Both views must be considered in formulating a balancing mechanism.

### ***Trade Secrecy Preservationists***

As the courts did in *Bunner I* and *Bunner III*, proponents of strong trade secrecy protections, whom I will refer to as “preservationists”, find that there is no role for the First Amendment in trade secret cases. There are several arguments that preservationists rely on to make this assertion. First, the importance of trade secrecy protections is emphasized. As stated by Justice Elfving in *Bunner III*, trade secret protections aim to “permit the individual innovator to reap the rewards of his labor by contracting with a company large enough to develop and exploit it” and to maintain “important standards of commercial ethics.”<sup>53</sup>

Second, preservationists utilize the property justification for trade secrecy law. This justification categorizes trade secrets as “property,” and asserts that property rights often trump First Amendment rights. The *Bunner III* decision, for example, asserts that the “First Amendment does not prohibit courts from incidentally enjoining speech in order to protect a legitimate property right.”<sup>54</sup>

Third, trade secret preservationists argue that other means of alleviating First Amendment conflicts exist. As the *Bunner III* decision asserts, the injunction does not stop *Bunner* from discussing and debating the issues surrounding DeCSS, without posting the technical information and program on his website. In addition, preservationists argue that since trade secrecy law allows anyone to obtain a trade secret through proper means.

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<sup>53</sup> *Bunner III* at 13 citing *Kewanee Oil Co. v. Bicron Corps.*

<sup>54</sup> *Ibid.*

As one of these ways is to reverse engineer a trade secret, those interested in public disclosure can simply reverse engineer the secret and disclose with impunity.<sup>55</sup> Other proper means of attaining trade secrets also include accidental disclosure and independent creation. Thus, preservationists argue that these “leaks” that allow the legal acquisition of trade secrets within the law ensure that protections are not overbroad and allow an outlet for trade secret discovery while shielding against misappropriation.<sup>56</sup>

### *Addressing Problems in the Preservationist Approach*

While some of these preservationist arguments have merit, careful analysis reveals the inherent flaws and dangers of adopting these views as law. **First**, it is true that the purpose of trade secret protections is to incentivize innovators and to prevent unfair competition by facilitating data sharing between businesses and dissuading cheaters who try to reap the benefits of another’s work.<sup>57</sup> However, the unfair competition purpose solely applies to those who misappropriate for commercial purposes. The law should distinguish between a misappropriator who violates trade secret laws for his own commercial gain, and one who violates the law for the explicit purpose of disclosing information of public concern.

As for the purpose of incentivizing innovation, the incentivizing portion of trade secret protections can remain intact without having to neglect First Amendment implications. For example, a law that protects trade secrets, while allowing some cases of infringement when public interest outweighs the commercial interests, would still largely protect the incentives for innovation. This same reasoning is used to support the fair use affirmative defense in copyright law, a defense that has been largely supported by courts

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<sup>55</sup> Argento, “Killing the Golden Goose.”

<sup>56</sup> *Ibid* at 186.

<sup>57</sup> Rowe, “Trade Secret Litigation and Free Speech.”

and codified by Congress.<sup>58</sup> The incentives for data sharing between businesses are not lost if the law distinguishes between commercially motivated and public interest-motivated misappropriations. As long as commercially motivated misappropriations are penalized, trade secret owners can be reassured that data sharing with other businesses will not jeopardize their trade secret at the hands of cheating competitors. But where substantial public interests exist (e.g. due to health or environmental concerns), disclosure would be allowed. Preservationists may decry this, arguing that frivolous public interest claims would result in greater trade secret disclosures before the courts have a chance to determine whether or not they truly contain matters of weighty public concern. However, the law could protect against frivolous public interest claims by awarding damages when no substantial public interest is found in the amount of the lost revenue, as does copyright, if the secret has already been disclosed. In cases where the secret has not yet been disclosed, the information remains a secret and there is no harm to the trade secret holder.

Furthermore, innovation incentives are enshrined in patent and copyright law. It is argued that trade secrets in fact provide “little or no marginal incentive to innovate” when compared to the other intellectual property protections.<sup>59</sup> Trade secrets do not have to be novel or innovative to obtain protections, they do not confer exclusive use, and do not necessarily allow owners to charge more for their trade secret than if they did not exist.<sup>60</sup> Thus, the fear that injecting public interest considerations into trade secret law will result

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<sup>58</sup> The copyright fair use doctrine allows infringing uses in some cases by weighing public interests against the market harm effects.

<sup>59</sup> Risch, “Why Do We Have Trade Secrets?”

<sup>60</sup> Risch, *supra*.

in degradation of innovation incentives is an unconvincing argument to exclude public interest and First Amendment considerations.

In addition, the current strength of protections allow companies to invoke trade secret rights in the name of fair competition and innovation incentives, when the underlying motivation may instead be the suppression of information to the public to avoid negative publicity about industry practices.<sup>61</sup> The fact that select fracking companies have begun to voluntarily disclose their recipes in light of the public relations controversy surrounding fracking recipe secrecy indicates that public disclosure does not result in a significant loss of competitive advantage. Furthermore, while there is little empirical research on the economic impact of trade secret protections of fracking recipes, several scholars<sup>62</sup> assert that trade secrecy law may hinder more than it promotes innovation. A letter from thirty-one law professors to Congress, arguing against a federal trade secrets act stated,

The threat of a trade secret misappropriation action can and does have a chilling effect on collaborative innovation efforts between businesses and can be used by those who would rather compete in a courtroom than the marketplace to quell legitimate competition. Adding a new remedy that allows companies to seek preliminary relief to seize wide swaths of property... would only heighten the risk that trade secret litigation will be used as an anti-competitive tool.<sup>63</sup>

The stated purposes of trade secrecy laws have merit, but should not therefore confer categorical immunity from First Amendment scrutiny. Doing so would result in

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<sup>61</sup> Schieck, "Trade Secrets Trolls."

<sup>62</sup> Argento, *supra*.

<sup>63</sup> Professors of Law, "Professors' Letter in Opposition to the 'Defend Trade Secrets Act of 2014' (S. 2267) and the 'Trade Secrets Protection Act of 2014' (H.R. 5233)."

unconstitutional suppressions of speech, based solely on the existence of a trade secret. Rather, a more balanced approach would fulfill the purposes of trade secrecy law while also allowing for First Amendment considerations in cases of substantial public interest.

**Second**, the argument that trade secrets are “property” rights and thus outweigh First Amendment rights is a contested one. Several cases have challenged both these assertions. For example, in the 1917 Supreme Court case *E.I. du Pont de Nemours Powder Co. v. Masland*, Justice Holmes rejected the classification of trade secrets as property, stating,

The word property applied to trade-marks and trade secrets is an unanalyzed expression of certain secondary consequences of the primary fact that law makes some rudimentary requirements of good faith...the starting point for the present matter is not property or due process of law, but that the defendant stood in confidential relations.<sup>64</sup>

Furthermore, the Restatement (First) of Torts expressly rejects the property classification,<sup>65</sup> and the Restatement (Third) of Unfair Competition covers trade secrets, supporting that trade secrets are measures against unfair competition rather than as property.<sup>66</sup> The debate as to the proper justification for trade secrets is an ongoing one, a debate that has not yet been resolved. The assertion that trade secret property rights trump the First Amendment is therefore based on a shaky and contested assumption that can easily be rebutted by rejecting this property classification.

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<sup>64</sup> *E.I. du Pont de Nemours Powder Co. v. Masland*, 244 US 100 (Supreme Court 210AD).

<sup>65</sup> American Law Institute, “United States of America: Restatement (First) of Torts § 757, Liability for Disclosure or Use of Another’s Trade Secret.”

<sup>66</sup> American Law Institute, “United States of America: Restatement (Third) of Unfair Competition, Chapter 4, Appropriation of Trade Values, Topic 2. Trade Secrets (Sections 39-40).”

**Third**, the assertion that the existence of avenues to properly obtain trade secrets therefore negates the need to consider First Amendment implications is unsubstantiated. As trade secret protections have grown stronger and companies have become more assertive of these rights, it has become increasingly difficult to obtain trade secrets through proper means. Companies now often employ mass-market licenses, clickwrap agreements, and other tools that fully prohibit or make incredibly difficult reverse engineering,<sup>67</sup> as evidenced by the *Bunner* case (*DeCSS* was in fact reverse engineered, but the license agreements made any reverse engineering of CSS an improper acquisition of the trade secret).<sup>68</sup> Furthermore, requiring any journalist, activist, or concerned citizen to pour resources to reverse engineer a trade secret before reporting information pertinent to the public would be an undue burden and tantamount to a restriction of speech.<sup>69</sup> The mere fact that “proper means” are available to access trade secrets does not negate the need to address valid First Amendment challenges when they arise.

### ***First Amendment Exceptionalists***

On the opposite end of the spectrum are First Amendment “exceptionalists,” as coined by scholar Richard Epstein.<sup>70</sup> Exceptionalists argue for an expansive role of the First Amendment in trade secrecy cases. The appellate court decision in *Bunner II* embodies this exceptionalist view. *Bunner II* states, for example, that trade secret laws

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<sup>67</sup> Companies often insert anti-reverse engineering clauses into their mass-market licenses and clickwrap agreements, which contractually prohibits any reverse engineering. While these broad licenses and agreements are generally enforced, the enforceability of the specific anti-reverse engineering clauses has yet to be determined.

<sup>68</sup> Samuelson, “Reverse Engineering Under Siege.”

<sup>69</sup> Argento, *supra* at 187.

<sup>70</sup> Epstein, “Privacy, Publication, and the First Amendment: The Dangers of First Amendment Exceptionalism.”



“must bow to the protections offered by the First Amendment.”<sup>71</sup> *Bunner II* found that Bunner’s publishing of DeCSS was protected speech, and injunctive relief would be constitutionally valid only if publication threatened “an interest more fundamental than the First Amendment itself.”<sup>72</sup>

The dangers of adopting this exceptionalist view were emphasized in an amicus brief put forth by Microsoft and other firms in *Bunner III*. The brief expressed concern that such exceptionalist views would negatively affect the “intellectual property of American businesses embedded in trade secrets” and would turn the state into a “haven for intellectual property thieves.”<sup>73</sup> *Kewanee* emphasizes that due to the special nature of trade secrets, where the commercial value lies in the secretive nature, public disclosure could result in stealing away that commercial advantage. Thus, going so far as to favor First Amendment rights in all trade secret cases goes too far and may well be tantamount to nullifying trade secret protections.

### ***A Balancing Act***

As addressed above, a First Amendment exceptionalist approach to trade secrets would in essence strip away the ability of trade secrecy protections to facilitate innovation and fair competition. However, the economic value of trade secrets does not negate the need to consider First Amendment implications, particularly in cases of public health and welfare. Eight notable cases<sup>74</sup> affirm that First Amendment implications

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<sup>71</sup> *Bunner II*, *supra*.

<sup>72</sup> *Ibid*.

<sup>73</sup> Attorneys for Microsoft Corporation, “Brief of Amici Curiae Microsoft Et. Al Supporting DVD CCA.”

<sup>74</sup> The eight notable federal cases on prior restraint include: *Near v. Minnesota* (Supreme Court, 1931); *Bantam Books, Inc. v. Sullivan* (Supreme Court, 1963); *Freedman v. Maryland* (Supreme Court, 1965); *New York Times v. United States* (Supreme Court, 1971); *Nebraska Press Ass’n v. Stuart* (Supreme Court, 1976); *Religious Technology Center, Inc. v. Lerma* (E.D. Va., 1995); *Ford Motor Co. v. Lane* (E.D. Mich., 1999); *Bartnicki v. Vopper* (Supreme Court, 2001).

warrant consideration when granting or denying injunctive relief, while *Bunner III* is an anomaly on this issue.

The challenge is then to identify how to strike a balance between the First Amendment and trade secret protections. I will argue that the balancing should be based upon whether or not the public interest in receiving the trade secret information outweighs the economic interest in maintaining secrecy. *Ruckelshaus v. Monsanto* supports this argument for a public interest balancing mechanism. I will then use the cases *CBS, Inc. v. Davis* and *Cherne Industrial, Inc. v. Grounds & Associates, Inc.* to illustrate the contrasting factors that tilt the balance in favor of the public and in favor of the right holder, respectively.

#### ***Weighing Public Interest Considerations: Ruckelshaus v. Monsanto***

*Ruckelshaus v. Monsanto* is a 1984 Supreme Court case concerning the right of the EPA to disclose pesticide information to the public, information that was protected as a trade secret. While this case considers Fifth Amendment issues of government seizures rather than First Amendment tensions, the broader implications of *Ruckelshaus* affirm that societal interests and trade secret interests must be balanced, and that public interests may outweigh trade secret interests. Justice Blackmun wrote that “the Trade Secrets Act is not a guarantee of confidentiality to submitters of data,” finding that “in an industry that has been the focus of great public concern...the possibility was substantial that the Federal Government...would find disclosure to be in the public interest.”<sup>75</sup> The *Ruckelshaus* decision affirms that societal interests may in certain cases outweigh the trade secret interests if the information is of substantial public concern.<sup>76</sup>

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<sup>75</sup> *Ruckelshaus v. Monsanto Co.*, 467 US 986 (Supreme Court 1984).

<sup>76</sup> Samuelson, “First Amendment Defenses in Trade Secrecy Cases.”

Another noteworthy landmark case that lends support to the argument that public interest considerations must be weighed when tensions arise between statutory protections and the First Amendment is *New York Times v. United States*.<sup>77</sup> In this case, the New York Times sought to disclose information that was classified for national security purposes, a criminal act under the Espionage Act. The Supreme Court found that the injunctions against the New York Times were a clear violation of the First Amendment. Justice Black asserted that “every moment’s continuance of the injunctions against these newspaper amounts to a flagrant, indefensible, and continuing violation of the First Amendment.” He continues that such a holding “would make a shambles of the First Amendment.” While this case may be unique in that the discloser was a newspaper, and not all trade secret cases will involve a newspaper, this decision heartily confirms the necessity of First Amendment protections in matters of public interest. As Justice Douglas wrote, “Open debate and discussion of public issues are vital to our national health. On public questions there should be ‘uninhibited, robust, and wide-open’ debate.”<sup>78</sup>

Thus, if public interest considerations outweighed national security interests despite the existence of a federal criminal statute against disclosure is it not a far logical jump to extend this reasoning to say that trade secret disclosures may also be permitted when public interests outweighs trade secrecy interests.

### ***Tilting Towards the Public Interest***

To illustrate the ideal application of balancing public interests in trade secrecy cases, I will contrast *CBS, Inc. v. Davis* and *Cherne Industrial Inc v. Grounds &*

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<sup>77</sup> *New York Times Co. v. United States*, 403 US 713 (Supreme Court 1973).

<sup>78</sup> *New York Times Co. v. United States*, 403 US 713 (Supreme Court 1973), inter-textually citing *New York Times Company v. Sullivan*, 376 So. 2d 25 (Supreme Court 1962).

*Associates Inc.* Both are trade secret cases whose contrasting decisions reveal the balancing mechanism in action.

*CBS, Inc. v. Davis* is a precedent-setting 1994 Supreme Court case, supporting that First Amendment consideration be given substantial weight in trade secret cases. *CBS* involved an employee of a meatpacking company who gave a journalist at CBS undercover video footage taken during the employee's work shift showing unsanitary condition in the plant.<sup>79</sup> Before releasing the footage on television, the meatpacking company rushed to the courts and obtained a preliminary injunction by the Circuit Court of South Dakota, prohibiting CBS from broadcasting the tape.

After the South Dakota Supreme Court denied CBS's application for a stay of the preliminary injunction, Justice Blackmun of the U.S. Supreme Court stayed the injunction, finding that preliminary injunctions of trade secret disclosures are prior restraints on speech, regardless of the misappropriating behavior of CBS.<sup>80</sup> The prior restraint doctrine requires there be greater scrutiny of the trade secret interests in order to overcome the constitutional tension. Justice Blackmun found that inhibiting CBS from broadcasting the video footage, despite the misappropriation of trade secrets, was an unconstitutional infringement on speech. Citing *Near v. Minnesota* and *New York Times Co. v. United States*, Justice Blackman states that "gagging publications" can only be considered if "the evil that would result from the reportage is both great and certain and cannot be militated by less intrusive measures."<sup>81</sup>

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<sup>79</sup> *CBS, Inc. v. Davis*, 510 US 1315 (Supreme Court 1994).

<sup>80</sup> *Ibid.*

<sup>81</sup> *CBS, Inc. v. Davis*, inter-textually citing *Near v. Minnesota* (Supreme Court 1931) and *New York Times Co. v. United States* (Supreme Court 1873).

### ***Tilting Towards the Right Holder's Interest***

In contrast, *Cherne Industrial, Inc. v. Grounds & Associates, Inc.* was a case where injunctive relief was found to be a proper remedy for the misappropriation of a trade secret.<sup>82</sup> In this Minnesota Supreme Court case (1979), plaintiff Cherne Industrial produced operation and maintenance manuals for his production company. Defendants were several previous employees of Cherne Industrial, who took trade secrets and, in breach of an employee non-compete agreement, used them to provide their own competing services. Defendants raised a First Amendment challenge in this case, saying that the trial court's preliminary injunction was prior restraint on their right to free speech.

The Minnesota Supreme Court promptly dismissed the defendant's First Amendment assertions, stating that the injunction was based upon a valid contract to protect the plaintiff's business. The court correctly affirmed the right holder's commercial interests, and prevented defendants from continuing the use of misappropriated trade secrets for their own financial gain. The court relied on an analogy to copyright protections to assert that trade secret misappropriators have no First Amendment entitlements.

The court in *Cherne Industrial* took the public interest into consideration, but as public disclosure was not at issue, the court reasoned that the public interest favors "preserving the ability of parties freely to enter contracts and to seek judicial enforcement..." to conclude that any First Amendment infringements on defendant's speech was justified.

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<sup>82</sup> *Cherne Indus., Inc. v. Grounds & Associates*, 278 NW 2d 81 (Minnesota Supreme Court 1979).

*Cherne Industrial* is a classic economic interest-based case between two competitors, a category in which most trade secret cases fall. In these cases, it is important that the trade secret protections are enforced by courts to fulfill the purposes of trade secrecy law as outlined above. However, with an increasingly information-based economy and stronger trade secret protections, First Amendment tensions in trade secret cases will arise more frequently. In such cases, a balancing of public interests with right holder interest should inform the court's decision. As illustrated in this section, there currently is a problematic inconsistency in how courts handle these First Amendment challenges. Thus, the following section will propose a solution that will confer more uniformity and balance to the jurisprudence.

## **VI. Fair Use Doctrine as a Viable Solution**

Without a mechanism to allow some privilege of trade secret disclosure while protecting innovation incentives, trade secret protections may extend too far in favor of commercial interests at the expense of free speech and public interest. The question of how to balance public interests and a right holder's interest has already been grappled with in copyright law. Notably, copyright law confers right holders with exclusive rights to their works, thereby protecting the incentives for innovation.<sup>83</sup> Copyright law then incorporates the public interest in two ways: time limitations and the fair use doctrine. First, the exclusive copyright has an expiration date ensuring that after the owner has been well rewarded for his or her innovative contribution and then making the work available for use

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<sup>83</sup> Hansen, *Intellectual Property Law and Policy* at 276.

in the public domain. The time length of a copyright is typically for the duration of the author's life plus 75 years.<sup>84</sup>

Second, the copyright fair use doctrine has developed into a well-formulated legal rule to allow for public interest considerations when a copyright has been infringed.<sup>85</sup> The basis of what would later become the fair use doctrine arose in *Folsom v. Marsh*, a case before the Massachusetts Circuit Court in 1841.<sup>86</sup> The fair use doctrine was not codified until the 1976 revision of the U.S. Copyright Act. Section 17 U.S. Code § 107 states that fair use “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”<sup>87</sup> The statute also sets out a four-pronged test to determine whether a particular case is fair use, which considers (1) the purpose and character of the use, (2) the nature of the work, (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and (4) the effect of the use upon the potential market for or value of the work. The four tests are not given any particular weight, and it is up to courts to weigh each consideration case-by-case.<sup>88</sup>

In contrast trade secret law has neither of the two safety valves to accommodate public interest. As mentioned before, while other safety valves such as the ability to reverse engineer or independently obtain a trade secret do exist, they fail to alleviate First Amendment and public interest concerns. Thus, I believe a trade secret fair use doctrine will provide a balancing mechanism that is absent from the existing body of trade secret law.

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<sup>84</sup> Ibid.

<sup>85</sup> “Copyright Timeline: A History of Copyright in the United States.”

<sup>86</sup> Ibid.

<sup>87</sup> “17 U.S. Code § 107 - Limitations on Exclusive Rights.”

<sup>88</sup> Ibid.

In formulating a trade secret fair use doctrine, it is important to revisit the primary interests that must be balanced. These interests, I believe, are well-embodied in the trade secret preservationist and First Amendment exceptionalist views. For the former, trade secrets generally aim, whether classified as property or not, to protect innovation by facilitating business transactions and production efficiencies while hedging against unfair competition. It is crucial to note the unique nature of trade secrets as opposed to copyright. The economic value of a trade secret lies in its being a secret. Once disclosed, by definition the trade secret loses its protections and economic value.<sup>89</sup> The economic value of copyright on the other hand lies in the author's ability to have an exclusive right to his or her work. It can be argued that the commercial value at stake is much higher in trade secret fair use than in copyright, since one instance of a fair use disclosure nullifies the existence of that trade secret. While infringing on a copyrighted work can also result in future economic loss for the copyright holder, fair use of works can coexist with the copyrighted work, and both the original work and the fair use work can generate commercial value. For example, take the spoof movie *Vampires Suck*. The movie contains infringing use of materials from other vampire movies like *Twilight*, but as a spoof movie it is a fair use of the copyrighted work under the fair use doctrine.<sup>90</sup> The *Twilight* movie series are able to commercially profit despite the existence of the infringing spoof movie.<sup>91</sup> Trade secret disclosures are much more an all-or-nothing game.

However, it can also be argued that there is much more at stake for prohibiting a fair use trade secret disclosure than for prohibiting a fair use of a copyrighted work.

Prohibiting trade secret disclosure means the information remains hidden from public

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<sup>89</sup> Uniform Law Commission, "Trade Secrets Act Summary."

<sup>90</sup> Chaney, "'Twilight' Parody 'Vampires Suck' Lives Up To Its Name."

<sup>91</sup> "Twilight Franchise Box Office History - The Numbers."



scrutiny, and as the fracking recipe case shows, has grave implications for public health and safety. Equally alarming is the potential ramifications for First Amendment rights when trade secret disclosures are prohibited by injunctions. Prohibiting a copyright fair use does not suppress information from the public; it only prevents others from building on the copyrighted work. Prohibiting trade secret disclosure, however, may violate free speech rights and block important information from public access.

Thus trade secret fair use cannot pluck the copyright fair use doctrine and adopt it verbatim. It must account for these differences, paying heightened attention to the grave risks for both interests. Due to the particularly large cost of disclosure to the trade secret holder, the majority of trade secret cases, especially those that involve purely commercial interests between two industry actors, should not pass the fair use test. Only in cases where the public interest in knowing the information weighs heavily should the courts accept a fair use defense for disclosure.

But here lies another issue: determining fair use based on the weight of public interest would result in a subjective test, whereby judges would determine which information is of public interest and which is not. As seen in *Bunner I*, the judge dismissed the possibility of public concern around the DVD decryption program, which many be argued was an inaccurate replacement of the judge's personal opinion for the greater public interest. Scholar Pamela Samuelson offers insight on the issue. In her discussion of preliminary injunctions, she distinguishes between the media and individuals. She maintains that courts should be wary of making "newsworthiness" determinations when it comes to the freedom of the press, stating that First Amendment rights of third party disclosers are "simply too important for the issuance of preliminary injunctions to turn on

such a subjective question as whether the secrets pertain to matters of public concern.”<sup>92</sup>

Thus, her argument implies that with media defendants, the court should presume the newsworthiness of the information content. She also cautions that when the discloser is an individual, the court must determine whether the newsworthy content is enough of a public concern to allow disclosure.<sup>93</sup>

These considerations culminate in the prongs of the trade secret fair use doctrine test: (1) the purpose of the trade secret, (2) motivations of the user, (3) substantial public interest, and (4) effects on the owner’s incentives. The formulation below will discuss a general framework for the proposed test.

1. Purpose of the use

The purpose of the use, similar to that of the copyright test, would include whether the purpose of the infringing use is of a commercial nature or for public awareness purposes. Commercial uses weigh against fair use, while noncommercial uses weigh in favor of fair use. This factor would, for example, weigh favorably for an environmental activist wishing to inform the public about fracking fluid contents, while unfavorably towards a fracking competitor who utilizes the fracking recipe for its own commercial use.

2. Nature of the user’s relationship and duties to the rights holder

This factor addresses the need to look more favorably on media and third party disclosers of trade secret information. For example, consider a former employee of a fracking company, who takes trade secret information and wishes to publish it. He may wish to disclose information out of a genuine motivation to inform the public, or he may

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<sup>92</sup> Samuelson, *supra*.

<sup>93</sup> *Ibid*.

be doing so in a vindictive manner to damage the company. It would be difficult for the court to make such distinctions, and thus the court should err on the side of caution before accepting his fair use defense. Media defendants, however, have the purpose and responsibility of informing the public, which allows the public to scrutinize commercial practices.<sup>94</sup> Media defendants also tend to be third party disclosers, where they receive the trade secret information from the direct misappropriator. This secondary liability would weigh in favor of fair use in comparison to a direct liability. While that former employee may go to the media with the information, it can be assumed that the media defendant would determine whether or not to publish the information based upon its role of informing the public, not based upon the former employee's motivations. This does not mean that the media should be given free rein to publish trade secrets at whim; it simply gives greater weight to media defendants with the understanding that the media has a significant role in deciding what information to publish in the public interest.

Likewise, the concerned citizen who wishes to disclose the fracking fluid content of a nearby well because he believes the groundwater has been contaminated and is affecting the health of his neighborhood. The citizen has no relationship to the rights holder except for living within range of the company's well. The nature of the concerned citizen's noncompetitive relationship would weigh favorably for fair use.

Relationships where the infringer has commercially competitive relationships with the rights holder should weigh unfavorably for fair use. In addition, this factor would also take into consideration any contracts or duties of the user to the rights holder, which depending on the nature of the agreements would weigh unfavorably for fair use.

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<sup>94</sup> Donohue, Tichenor, and Olien, "A Guard Dog Perspective on the Role of Media."

### 3. Substantial public interest

Findings of substantial public interest would weigh in favor of fair use. This is an essential factor that would help determine fair use in cases where the defendant is an individual and not the press. If the content of the information is significant enough to public interests, like health and environmental concerns, public disclosure would be allowed. Combined with the second factor, the public interest test differentiates between frivolous uses and those that affect matters of substantial public concern.

### 4. Effects of the use on the owner's incentives

The fourth factor weighs the interests of the right holder, acknowledging the underlying purposes of trade secrecy law. This test would include considerations for the effect of the use on innovation incentives and unfair competition. The impact of losing a trade secret by disclosure is an important factor, but it must be weighed against the other factors in determining fair use.

These four factors, as in the copyright test, should be given independent consideration, in that one factor is not more significant than another. It is the court's role to balance and weigh these factors for the particular case to determine if the four factors, considered together, allows the infringing use.

### ***The Question of Damages***

Proponents of fair use in other areas of law, such as patent law, have argued that even if granted a fair use determination, infringers should pay damages to the rights holder. However, in the doctrine framework that I put forth, only cases in which the substantial public interest outweighs the harms to the trade secret holder should be allowed a fair use defense. Under the framework, media defendants and third party users

who disclose information of significant public interest would be favored. When information of significant public interest is at stake, assigning damages for the loss of a trade secret may be tantamount to suppressing speech because of the undue burden the damages places on the speaker.

## **VII. Addressing Criticisms of a Trade Secrecy Fair Use Defense**

Copyright fair use developed in response to a need for a mechanism “to overcome market failures that would otherwise prevent socially desirable uses of the protected work from occurring.”<sup>95</sup> So should trade secret fair use, in response to a need to balance free speech and public interest considerations. However, the copyright fair use test has been subject to criticisms. I will therefore anticipate similar arguments in the trade secret context.

One objection may be that fair use doctrines are overbroad, and that a statutory requirement of disclosing fracking recipe content would suffice to fix the problem. However, enacting statutory fixes requires significant legislative willpower. Further, enforcement of regulatory compliance is a major hurdle, as state enforcement agencies often lack the budget, staff and economies of scale for enforcement and detection of noncompliance.<sup>96</sup> Considering that new federal regulations are being enacted to federalize and strengthen trade secret protections, the strength of the industry’s lobbying power to sway legislation, and the lack of information available to hold companies accountable through civil suits; it is more feasible that a court doctrine will provide the

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<sup>95</sup> Daines, “Truth or Consequences: Mandatory Disclosure and the Impact of the 1934 Act.”

<sup>96</sup> Kate Konschnik, Policy Director for the Environmental Law and Policy Program at Harvard University, was the lead author of a study reporting the failures of the FracFocus website as a tool for regulatory compliance. The report is titled “Legal Fractures in Chemical Disclosure Laws.”

solution. Furthermore, the First Amendment disclosure issue of trade secrets expands beyond fracking recipes, and applies to numerous industries. Even if Congress mustered up enough legislative will to enact a statutory fix, a mandate for full disclosure of fracking chemicals for example, it would only alleviate the conflicts underlying the specific issue of fracking recipes, but would not apply to the meat production industry or the pharmaceutical industry. A statutory fix would be a mere band-aid to cover one blemish, rather than a corrective solution to the underlying problem. A fair use doctrine allows flexibility to be applied across industries, acting as a balancing mechanism to alleviate free speech and public interest conflicts in trade secret cases overall.

Another common objection is that a fair use doctrine is too flexible, allowing too much subjectivity of judges into determinations about fair use.<sup>97</sup> For example, a First Amendment exceptionalist judge would weigh the third factor of public interest far more strongly than a preservationist judge who may give more weight to the fourth factor of business incentives. However, this is a more general concern regarding judicial competence and bias, one that exists beyond the application of a trade secret fair use. Furthermore, under the guidance of a fair use doctrine, judicial review via appeals would provide a chance to correct any biased findings by lower courts.<sup>98</sup> In addition, once courts begin using fair use analyses in trade secret cases, it would encourage policymakers to codify the doctrine for consistency purposes. The developmental history of copyright fair use, briefly outlined in Part VI, supports this assertion. Finally, codifying statutory safe harbor exemptions would certainly guide courts and provide consistency should

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<sup>97</sup> Hansen, *Intellectual Property Law and Policy*.

<sup>98</sup> Gray, "The Line Between Legal Error and Judicial Misconduct: Balancing Judicial Independence and Accountability."

policymakers find the legislative will to do so. Statutory safe harbor exemptions would allow Congress to specify certain requirements or subject matter that should be seen as valid fair uses, thereby guiding courts and addressing the objection that the doctrine is too flexible.

### **VIII. Implications for Fracking**

Applications of the trade secret fair use doctrine to real fracking recipe cases will illustrate the effectiveness of this test in balancing both right holders' commercial interests and public interests.

*Ecosphere Technologies, Inc. v. Halliburton Energy Services, Inc.* was a dispute between the two energy corporations over misappropriated trade secrets.<sup>99</sup> While Ecosphere Technologies, Inc. ("Ecosphere") served a demand for arbitration (rather than litigation through courts), applying the trade secret fair use doctrine to the facts of this dispute is an informative exercise for this discussion.

Ecosphere developed a new "green" business platform and technologies to recycle and produce an environmentally friendly fracking fluid. Halliburton Energy Services, Inc. ("Halliburton") wanted to purchase Ecosphere. After entering into a confidentiality agreement prohibiting unauthorized use or disclosure, Halliburton was provided with unfettered access to Ecosphere's trade secrets. Negotiations broke down, and Ecosphere alleged that Halliburton then proceeded to disclose Ecosphere trade secrets to market itself as an environmentally friendly company. Ecosphere also alleged that Halliburton

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<sup>99</sup> PR Newswire, "Ecosphere Technologies Announces Results of Halliburton Arbitration."

had used Ecosphere's trade secret-protected oxidation process to apply for three patents for a similar process.<sup>100</sup>

If the fair use doctrine existed and Halliburton raised it as a defense, the four-factor test would unequivocally reject Halliburton's defense. (1) The purpose of Halliburton's disclosure of Ecosphere secrets was solely to gain a commercial competitive advantage. (2) The nature of the relationship between Halliburton and Ecosphere was that of industry competitors. (3) There was no substantial public interest in Halliburton's use of Ecosphere's platform to advertise itself. (4) The incentives for Ecosphere were certainly at risk, as its competitive platform was to be a leading green technologies developer, and had invested in the technologies to support its platform. The misappropriation of the fruits of those investments by a direct competitor weighs heavily against fair use. This example shows that in the fair use trade secret test would not affect most trade secret cases where a significant public interest in, for example, health and environment hazards, does not exist.<sup>101</sup>

In contrast, *Rodriguez v. Secretary of Pennsylvania Environmental Protection of PA et al.* concerns a doctor who challenged the Pennsylvania "gag order" law requiring physicians to sign a confidentiality agreement in order to obtain proprietary information about the chemicals used in fracking. Rodriguez argued, "The Medical Gag Rules interfere with the free and open exchange of information expressly required of the plaintiff by the ethical obligations imposed by the medical profession."<sup>102</sup> This gag order

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<sup>100</sup> Ibid.

<sup>101</sup> At the conclusion of arbitration, Halliburton dropped its three patents and said it did not intend to commercialize an oxidation process, and both parties paid their own expenses for the arbitration.

<sup>102</sup> Alfonso Rodriguez v. Secretary of Pennsylvania Environmental Protection of PA et al. (2015).



prevents doctors from telling their patients or warning the public about any of the information related to the health harms of fracking chemicals. While the appellate court in this case found that Rodriguez lacked standing because he did not have an actual patient in this situation, the court left open the possibility of future similar challenges by a doctor who has an actual patient with actual or imminent risk of harm.<sup>103</sup>

Applying the proposed fair use doctrine, if Dr. Rodriguez returned to the court with an actual patient who he believed had become sick from exposure to fracking chemicals, the court would have to decide whether or not Dr. Rodriguez could disclose the information about the proprietary fracking recipe to his patient and warn other patients about such hazards. The court would find that (1) the purpose of the use would be to disclose information to his patients and the public. This is a noncommercial and educational use, thereby weighing in favor of a fair use determination; (2) there is in essence no relationship between the doctor and the rights holder (except that the doctor refuses to sign a confidentiality agreement set forth by the rights holder), likewise weighing in favor of the doctor's use; (3) there is a clear substantial public interest in knowing the health hazards of a fracking well that is affecting them, particularly as in this case the "public" includes the doctor's ill patient; and (4) that while there may be some economic harm in disclosing which materials are present in the fluids, which is all the doctor needs to disclose, the right holder's incentives remain sufficiently protected in that many details of the fracking recipe such as the exact quantities within the mixture remain a trade secret. Considering the significant weight of at least three factors in favor of Dr.

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<sup>103</sup> Elser, "In Non-Precedential Case, Third Circuit Affirms Fracking Trade Secrets Trump Physician's Right to Know, Absent Actual Harm."

Rodriguez, he would be allowed to disclose this information by invoking a fair use defense.

As illustrated in the extension of Dr. Rodriguez's case, the trade secret fair use doctrine resolves First Amendment conflicts by allowing infringing use only when matter of public concern outweigh the commercial incentives. However, as the Ecosphere case shows, in traditional trade secret cases where only commercial interests are at stake, the fair use analysis tilts towards upholding the trade secret owner's interests.

Allowing for disclosure in some cases will benefit both the public and the fracking industry. Greater public access to fracking information may aid doctors in better treating their patients, plaintiffs in better supporting valid tort claims, and environmental activists in lobbying and grassroots organizing.<sup>104</sup> More available information will also allow more comprehensive research, which may aid in reducing the uncertainty that has developed due to contradictory research publications. A trade secret fair use doctrine may also encourage voluntary disclosure by fracking companies. If information related to the health and environmental concerns is already disclosed, the need to claim a trade secret fair use defense in publishing a fracking recipe decreases, since the public already has access to the pieces of information pertinent to its primary issues of concern. In fact, some fracking companies have already voluntarily disclosed fracking recipe information, whether in good faith or for public relations purposes.<sup>105</sup>

A balanced fair use doctrine will also help the fracking industry. Due to pervasive public fears about health and environmental hazards, certain states have banned fracking practices. New York for example has placed a moratorium on fracking until further

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<sup>104</sup> Volokh and Lemley, "Freedom of Speech and Injunctions in Intellectual Property Cases."

<sup>105</sup> Valentine, "Major Drilling Services Company Will Now Disclose All Fracking Chemicals."

information on the health and environmental implications are fully and comprehensively examined.<sup>106</sup> Internationally, countries like France and Bulgaria have banned the “controversial technique.” The president of a French oil and natural gas lobby has said that moving forward with fracking on legal grounds is moot, and is instead encouraging the French government to move forward with research. “At the moment the whole of the knowledge is being taken from the United States. Instead of that we should be developing our own.”<sup>107</sup> As some U.S. companies have already done, disclosing information to alleviate these public concerns may convince states to allow fracking. U.S. drilling companies like Baker Hughes who have published the full chemical makeup of their recipes have cited instilling more public trust as a primary reason for the voluntary disclosure. Companies like Baker Hughes are also able to differentiate themselves from their more secretive competitors based on their voluntary transparency. In the same article praising Baker Hughes, Exxon is criticized for their relative resistance to disclosure. “[Exxon] provides no concrete data on whether it is actually reducing risks.”<sup>108</sup> Greater pressures to disclose have also spurred more innovation to produce safer fracking fluids, and will likely continue on this trend as disclosures of harmful chemicals in recipes increase.<sup>109</sup>

## **IX. Conclusion: Broader Implications**

A fair use doctrine will provide much needed balance to a highly critiqued and the most litigated branch of the intellectual property regime. Its importance as a balancing

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<sup>106</sup> Horn, “NY Assembly Passes Two-Year Fracking Moratorium, Senate Expected to Follow.”

<sup>107</sup> Jolly, “France Upholds Ban on Hydraulic Fracturing.”

<sup>108</sup> Valentine, *supra*.

<sup>109</sup> Liroff, “Apache and ACS GCI collaborate to advance greener fracking fluids.”

mechanism will become increasingly important as trade secret protections grow in strength and breadth. In response primarily to cyber espionage concerns, the U.S. Senate passed the most recent version of the Defend Trade Secrets Act on April 4, 2016.<sup>110</sup> The President has indicated that he will sign the Senate's version of the bill. The DTSA creates a federal civil remedy for the misappropriation of trade secrets. Notably, the DTSA creates a new weapon for trade secret owners: the civil seizure provision. This provision allows federal courts to seize property necessary to preserve evidence or prevent dissemination of a trade secret.<sup>111</sup> In light of this provision, it is even more urgent that federal courts, in particular, consider allowing some infringing uses in interests of public concern. Chemical contents of fracking recipes are a compelling case example, but the implications of the tensions outlined in this paper reach far beyond just one industry. It will thus be crucial for courts to recognize these implications and adopt a balancing mechanism to prevent the overreach of trade secrecy protections into the freedom of speech and public interest.

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<sup>110</sup> Fort and Freitag, "Federal Defend Trade Secrets Act Clears the Senate."

<sup>111</sup> Perrelli, "Latest Updates on Federal Trade Secrets Legislation."

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