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Trade Secrets in the Legal Studies Curriculum—A Case Study

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Introduction

Trade secrets can be a valuable company asset because of their potential to last forever.[1] Unfortunately, along with such a significant benefit, there is also a significant risk—the risk that the trade secret can be lost in an instant if it is not sufficiently protected. Companies must be vigilant in protecting these secrets.[2] However, the law is not always clear on what constitutes sufficient protection. Therefore, understanding the nuances of trade secret law is important for any business professional who may need to protect a trade secret in the future. Case studies provide an ideal format for presentation of complex legal issues, such as those involving trade secrets, to business students. This article presents such a case study.

The case is based on actual events and reflects a common problem faced by companies. All too often, one company trains an employee, shares certain trade secret information with that employee, and the employee leaves for a better opportunity at a competing company. After the employee begins work at the competing company, the competing company releases a product similar to that produced by the former employer, before the former employer has the opportunity to release its own product to market. The former employer sues the employee and the current employer for misappropriation of trade

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[1] *See* Jim Pooley & Walt Bratic, *The Value of Trade Secrets*, Managing Intell. Prop., Oct. 1, 1999, at 66. It is estimated that as much as 75 percent of the value of American companies rests in intellectual property assets; however, companies rarely value each individual asset. ASIS International, Trends in Proprietary Information Loss: Survey Report 1 (Aug. 2007), *available at* http://www.asisonline.org/newsroom/surveys/spi2.pdf.

[2] In 2000, it was estimated that trade secret misappropriation cost companies approximately $100 million annually. Scott D. Marrs, *Inside Story on Trade Secrets: Protective Measures are Necessary to Preserve a Company's Vital Information*, ABA J. 77 (Oct. 2000).

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secrets. The first question in such a lawsuit is whether the former employer had a protectable trade secret.

This case study, along with the discussion and analysis questions provided, can be used by legal studies faculty to introduce the concept of trade secrets into basic employment law, business ethics, or intellectual property law discussions. Through discussion and analysis, students are encouraged to think like business owners trying to protect their own trade secrets while considering whether the hypothetical company, Cerecidal Industries, Inc., used sufficient efforts to protect its secrets. In addition, students are encouraged to think like future employees exposed to trade secrets or assigned to develop trade secret information.

Part I of this article explains the underlying pedagogy of this exercise. This part discusses the use of case studies in business-related courses. Because the use of case studies as a teaching tool prompts students to learn by experience, it describes the experiential learning model proposed by David Kolb. Part II presents learning objectives and guidance for implementing the case. The case study, with discussion questions, is in Part III. Part IV is a teaching note on trade secret law with emphasis on the requirements necessary to prove the existence of a trade secret under the Uniform Trade Secrets Act.[3] This part provides suggested answers to the discussion and analysis questions to illustrate the application of the law to the facts in the case study. Finally, Appendix A contains a sample table that can be used in class to start the formal discussion of the case study.[4]

I. Pedagogy

A. Case Studies in Business-Related Courses

Harvard Business School began using case studies as part of the business curriculum in 1908.[5] Over the years, educators have continued to use case studies as a method of instruction in business courses because they expose

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[3] *See* Unif. Trade Secrets Act § 1 (amended 1985), 14 U.L.A. 538 (2005).

[4] Additional teaching materials for this project, such as grading rubrics, trade secret law notes, and sample discussion tables, are available from the author.

[5] *See* Katherine K. Merseth, *The Early History of Case-Based Instruction: Insights for Teacher Education Today*, 42 J. Tchr. Educ. 243 (1991); Jeffrey Pittman, *Consumer Electronics v. Jones & Diamond: A Hypothetical Case Study*, 20 J. Legal Stud. Educ. 117 (2002).

students to experiences they might face in the real world.[6] Several good case studies on intellectual property topics are available.[7]

If an instructor has never used a case study in the classroom, however, the first attempt can be quite intimidating. Several articles provide guidance on the use of case studies in the classroom. Some researchers have found that small group discussions and student-driven techniques enhance learning with case studies.[8]

B. Kolb's Experiential Learning Model

One value of case studies is in expanding students' experiences. The use of case studies for this purpose is referred to as experiential learning.[9] A leading model of experiential learning was developed by Kolb. This model characterizes learning as a cycle and divides the learning process into four

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[6] *See* Anna E. Flynn & James D. Klein, *The Influence of Discussion Groups in a Case-Based Learning Environment*, 49 Educ. Tech. Res. & Dev. 71 (2001); Julie C. Kunselman & Kathrine A. Johnson, *Using the Case Method to Facilitate Learning*, 52 C. Teaching 87 (2004).

[7] *See, e.g.*, Steven J. Arsenault & Marsha E. Hass, *Pizza Wars: A Case Study on False Advertising Under Section 43 of the Lanham Act*, 20 J. Legal Stud. Educ. 219 (2002) (examining false advertising issues); Robert C. Bird et al., *Troubled Times at Uptown Records: Getting Traditional Legal Concepts to Dance to the New Online Beat*, 22 J. Legal Stud. Educ. 1 (2004) (considering business issues in a global online market); Margo E.K. Reder, *Case Study of Apple, Inc. for Business Law Students: How Apple's Business Model Controls Digital Content Through Legal and Technological Means*, 26 J. Legal Stud. Educ. 185 (2009) (introducing business technology issues).

[8] For articles addressing the use of small groups for case study discussion, see generally Flynn & Klein, *supra* note 6, at 71 (investigating the effect of small discussion groups on performance, student attitudes, and time on task for case studies in introductory purchasing and supply management class); Sterling H. Schoen & Raymond L. Hilgert, *Small Group Case Study*, 12 Improving C. & U. Teaching 31 (1964) (discussing an experimental small group study program implemented to improve student performance with case studies in undergraduate personnel management courses). For further discussion of student driven techniques for presenting case studies, see generally Paula J. Haynes & Marilyn M. Helms, *Increasing Participation in Case Method Courses*, 17 J. Mgmt. Educ. 114 (1993) (discussing increased participation in case study discussions by transitioning from instructor led at the beginning of the course to student led by the end of the course); Sarah B. Laditka & Margaret M. Houck, *Student-Developed Case Studies: An Experiential Approach for Teaching Ethics in Management*, 64 J. Bus. Ethics 157 (2006) (investigating the use of student developed case studies in a capstone course for the health management concentration in a graduate business management program).

[9] For further discussion of experiential learning, see generally Thomas F. Hawk & Amit J. Shah, *Using Learning Style Instruments to Enhance Student Learning*, 5 Decision Sci. J. Innovative Educ. 1 (2007); Kate Wynn-Williams et al., *The Influence of Business Case Studies on Learning Styles: An Empirical Investigation*, 17 Acct. Educ. 113 (2008).

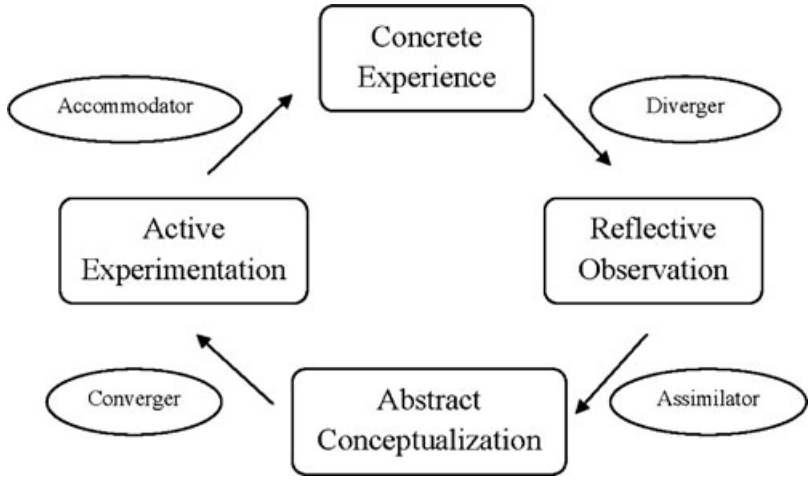


Figure 1: Kolb's Experiential Learning Model

parts: concrete experience, reflective observation, abstract conceptualization, and active experimentation.[10] This model is shown in more detail in Figure 1.

According to Kolb, each learner perceives and processes experience during the learning process. Concrete experience and abstract conceptualization are two approaches for perceiving experience, while reflective observation and active experimentation are for processing experience.[11] As a result, four types of learning styles are possible from this model.[12] Each of these learners exhibits specific characteristics, but each can be categorized

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[10]For further discussion of the Kolb learning cycle, see Susan W. Dana et al., *Sunabi, Inc.: The Case of the Disgruntled Employee*, 21 J. Legal Stud. Educ. 151 (2003); Robert Loo, *The Distribution of Learning Styles and Types for Hard and Soft Business Majors*, 22 Educ. Psychol. 349 (2002); Wynn-Williams et al., *supra* note 9, at 115.

[11]For further discussion of the means by which a learner perceives and processes experience, see Loo, *supra* note 10; Adel M. Novin et al., *An Investigation into the Preferred Learning Styles of Accounting, Management, Marketing, and General Business Majors*, 18 Teaching & Learning 24 (2003) (finding the preferred learning styles for various business majors to be assimilator and converger).

[12]For further discussion of the four Kolb learning styles, see Hawk & Shah, *supra* note 9, at 3; D. Christopher Kayes, *Internal Validity and Reliability of Kolb's Learning Style Inventory Version 3* (1999), 20 J. Bus. & Psychol. 249, 250 (2005). For criticism of the Kolb learning styles, compare Daniel T. Willingham, Why Don't Students Like School? A Cognitive Scientist Answers Questions About How the Mind Works and What It Means for the Classroom 148 (2009);

simply as the decision maker (converger), the creator (diverger), the planner (assimilator), or the doer (accommodator).[13]

The design of the present case study and discussion questions was influenced by the theories of learning styles developed by Kolb. The author, over several years, has observed that students are having greater difficulty with planning and decision making. Many who were observed to have superior planning skills lacked the ability to make a simple "yes" or "no" decision based on the planning. Several students who had no trouble making a decision made those decisions quickly without sufficient planning. While these were only classroom observations, it is from this basis that the present trade secret case study and discussion questions were developed to help planners become better decision makers and vice versa.

II. Teaching Objectives and Use of the Case Study

This trade secret case study was based on actual events experienced by the owner of a privately held corporation.[14] The author was legal counsel for the owner; therefore, fictitious names have been used.[15] The owner received an undergraduate degree in Business but unfortunately never received an introduction to trade secret law as part of the curriculum. In addition, he never sought legal counsel when he started the business. The legal dispute between all parties was resolved during a confidential mediation proceeding

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Harald Bergsteiner et al., *Kolb's Experiential Learning Model: Critique from a Modelling Perspective*, 32 Stud. Continuing Educ. 29, 31 (2010); Michael Reynolds, *Learning Styles: A Critique*, 28 Mgmt. Learning 115, 117 (1997).

[13]For further discussion of the characteristics for each type of learner using this model, see generally Hay Group, Learning Styles Booklet, *available at* http://www.haygroup.com/LeadershipAndTalentOnDemand/DownloadFiles/misc/Learning_styles_booklet.pdf (last visited May 16, 2011).

[14]The case study in the present article is used to discuss whether the business owner has a protectable trade secret. For trade secret case studies that primarily discuss misappropriation of trade secrets and related ethics issues, see Janell M. Kurtz & Drue K. Schuler, *Competitive Intelligence at Proctor & Gamble: A Case Study in Trade Secrets*, 21 J. Legal Stud. Educ. 109 (2003) (case study about Proctor & Gamble trade secrets); Kurt M. Saunders, *The Law and Ethics of Trade Secrets: A Case Study*, 42 Cal. W. L. Rev. 209 (2006) (hypothetical case study).

[15]*See* Donna Steslow & Carolyn Gardner, *More Than One Way to Tell a Story: Integrating Storytelling into Your Law Course*, 28 J. Legal Stud. Educ. 249, 261 (2011) (discussing attorney-client privilege and ethical constraints on using "war stories" in class).

because all parties were concerned about whether a trade secret existed. No final decision concerning trade secret status was reached in a court.

Learning objectives of the present case study and discussion questions are to help students (1) understand the nuances of trade secret law; (2) think like future employees exposed to trade secrets or assigned to develop trade secret information; (3) think like business owners trying to protect their own trade secrets; (4) develop critical thinking and problem-solving skills as they discuss whether Cerecidal Industries, Inc., has protectable trade secrets; (5) enhance decision-making skills as they decide whether a trade secret existed; and (6) develop clear and effective communication skills as they discuss the various issues.

The case is suitable for use in both upper-level undergraduate and graduate legal studies courses designed to introduce students to real-world issues. It can also be used in a course devoted to intellectual property law. The case study has been used by the author in a graduate business organizations course designed to introduce students to different business entities and their legal concerns. In this course, the case study is used to introduce trade secret law and procedures necessary to protect trade secrets. The entire discussion on these topics usually spans one three-hour session. During this session, the entire class is dedicated to discussing whether trade secrets exist and the procedures that Cerecidal should have used to better protect the company and its secrets. Before the first class, students are provided with notes covering trade secret law as reading material. In addition, students are provided with the trade secret case study and the discussion questions presented in Section III.

III. A Case Study on Trade Secrets with Discussion Questions

Cerecidal Industries, Inc., a reinforced-block manufacturer, has been in business for thirty years. The company currently employs fifty-three people. The founder, Tom Connors, and the original twenty employees still work at the company. Cerecidal had a humble beginning. Mr. Connors began the company after he graduated from college with a degree in business. He believed employee loyalty came from treating the employees as family. Therefore, he shared all company information with all of the employees. To encourage this family environment, offices and file cabinets were never kept locked. The manufacturing facility was kept locked for safety purposes, but every

employee had the access code. Over time, he installed a central computer network. While each employee had password access to his or her computer, the entire network was available for all employees to review. When he incorporated the business, he required all employees at the time to sign employment agreements that contained confidentiality provisions but still maintained the open access environment.

Jeremy South heard about this open environment at Cerecidal and applied for a job there. He was hired by the company in 1989 as a Technician I right out of high school. When he was hired, he was required to sign an employment agreement. The employment agreement provided that he was "not to divulge any of the trade secrets or other confidential information of Cerecidal" that he may receive or obtain during his employment. The agreement also provided that the confidentiality provision continued to apply after termination of his employment but would no longer apply if the information became part of the public domain. In addition, at the time of his hiring, he received a company handbook that gave more detail on information within the company that was to be kept confidential. He signed the last page of the company handbook acknowledging he received it and gave the page to Jane Lippe, the secretary in the human resources department. His primary duty at that time was to ensure the floors in the manufacturing facility remained free of hazards.

Mr. South enjoyed working in the manufacturing facility. If it was not raining outside, the rolling doors were kept open to allow in fresh air and sunshine. In addition, many of the equipment operators would take time to show him how to operate the equipment and how to produce a final product. He soon took on responsibility for accepting orders from vendors at the back entrance. With this new task, he was to meet the vendor at the back entrance when the bell sounded, confirm the vendor received a vendor's pass from the receptionist in the main office, check the order, and permit the vendor to unload the order at the back door.

He was ultimately trained to give visitor tours through the facility. He and three other technicians would take turns conducting the tours. As tour guides, these individuals were expected to meet the visitors in the lobby of the main office, ensure the visitors signed the appropriate nondisclosure forms with the receptionist to receive a visitor pass, guide the visitors through the building to the locked manufacturing facility door, and proceed with the tour in the manufacturing facility where they would show visitors how a final product was produced. With these new responsibilities, the company soon promoted Mr. South to Technician III.

Over the years, someone else took over the vendor and tour responsibilities for the company. Mr. South attended college and received an undergraduate degree in chemistry, as well as a Ph.D. in materials science. After each degree Mr. South received, Cerecidal promoted him until ultimately he was a member of the division team responsible for development of a new polymer composite reinforced-block. The supervisor of this team was Anita Collin.

The new polymer composite reinforced-block was to have a specific tensile strength for use in certain applications. Eager to make a good impression, Mr. South consulted each of his school textbooks looking for a known polymer composite with the requisite tensile strength for the project. After an exhausting search, he found a reaction mechanism, A+B+C, which would produce a composite with a tensile strength slightly below the required amount. Through his experience working on his dissertation, however, he was aware of various chemicals similar to B that could be substituted in reactions. He believed if he used these B substitutes he might create a polymer composite with the requisite strength. A key word search on the Internet revealed a series of articles on B substitutes. To narrow the possibilities, he decided to search for information on his favorite materials science Web site. The search engine on this Web site allowed him to design a more detailed search so there were fewer hits. One article on the site suggested that when F is used as a substitute for B in most known reactions, the resulting polymer composite has greater strength. He proceeded with the reaction mechanism A+F+C and was able to produce a promising polymer composite in the lab. The resulting composite had the tensile strength necessary for the project.

Unfortunately, the team initially experienced great difficulty manufacturing a test block, even though the polymer composite could be successfully produced in the lab. The equipment they were using was the standard equipment used by all block manufacturers to make standard blocks. Eventually they decided the project would probably work if the manufacturing equipment were modified. Mr. South was the team member responsible for designing and implementing the equipment modifications. He spent three months modifying the equipment to accommodate the composite, via trial and error. After several attempts, a final modification was designed.

A protective housing was placed around the area modified, but the housing was not locked down. When the modifications were complete, the director of operations at Cerecidal placed a sign on the equipment that stated "Trade Secret—No Unauthorized Personnel."

A prototype of the new polymer composite reinforced-block was finally developed by Mr. South and the remainder of the team in 2009. Testing was performed on the prototype block to determine whether it had the appropriate strength for the intended project. This testing took several months to complete but was completed by the end of 2009.

Because of the confidential nature of the project, reports concerning the testing were always distributed in envelopes marked "confidential," and the people entitled to see the information were listed on the envelope. These reports were stored as Microsoft Word documents in the "office supply" directory on the company's computer network. This was done to ensure that the information was uploaded onto the company's tape drive when the computer network was backed up for offsite storage. The officers of the company, the supervisor, and members of the division team were the only ones authorized to see these testing reports. In addition, the company handbook prohibited disclosure and copying of the information by those authorized to see it. Once read, the envelopes containing the confidential information were to be resealed and locked in the appropriate division file cabinet. It was common knowledge at the company, however, that the key to the file cabinet was kept taped under the receptionist's desk.

Due to the success of the tests, Cerecidal decided to start manufacturing the new polymer composite reinforced-block and also decided on an official product launch date of April 1, 2010. The company expected to file a patent application on the product after the official product launch. In addition, the company expected to submit a bid for use of the product in building a local elementary school, but the product had to be reviewed by the Environmental Protection Agency to determine if the composition produced emissions that had an impact on air quality.

After Mr. South completed work on the block, he began seeking employment elsewhere. During his search, he learned of a job opening for a Lead Chemist at Kiser Products, LLC, a direct competitor of Cerecidal. He applied and was ultimately hired by Kiser in January 2010 as the supervisor of the company's division for development of new product designs. He gave Cerecidal two week's notice that he was leaving the company. Before leaving, Mr. South attended an exit interview at Cerecidal with Anita Collin. During the exit interview, he was reminded of his employment agreement with the company and his continuing obligation of confidentiality concerning any company information. He signed a written confirmation that he was aware of this continuing obligation of confidentiality. Anita Collin also signed the document as the individual who conducted the exit interview.

While Mr. South was working at Kiser, his new employer released a polymer composite reinforced-block with a polymer composite similar to the one designed at Cerecidal. This new design was released March 1, 2010.

Because the use of polymer composites in reinforced-blocks was a new concept, Cerecidal is convinced Mr. South disclosed confidential information concerning the modified manufacturing equipment and the product composition to Kiser in exchange for his job as a supervisor. On March 22, 2010, Cerecidal filed a lawsuit against Mr. South and Kiser Products seeking damages for misappropriation of trade secrets due to Mr. South's disclosure to the new employer of information learned during his employment with Cerecidal and subsequent use of the trade secret information by Kiser to design a polymer composite reinforced-block in direct competition with Cerecidal. In order to succeed on its misappropriation of trade secrets claim, Cerecidal must first show that it has a protectable trade secret.

Discussion Questions:

A. Define a trade secret under the Uniform Trade Secrets Act and identify the potential trade secrets held by Cerecidal Industries.
B. Discuss the factors that a court considers to determine whether the information claimed as a trade secret "derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use" and apply those factors to the case study.
C. Discuss the factors that a court considers to determine whether the information claimed as a trade secret "is the subject of efforts that are reasonable under the circumstances to maintain its secrecy" and apply those factors to the case study.
D. Decide whether Cerecidal Industries has a protectable trade secret and explain your decision.
E. Identify and evaluate the facts of the case study that you believe are more favorable to Cerecidal Industries' claim for trade secret protection.
F. Identify and evaluate the facts of the case study that you believe are more favorable to Mr. South's and Kiser Products' claims that there is no protectable trade secret.
G. What should Cerecidal Industries have done to better protect its trade secret(s)?

IV. Teaching Note: Assigned Discussion Questions

Students are expected to review trade secret notes provided by the instructor and answer the discussion questions related to the case study before class to prepare for the class discussion.[16] This part presents answers to Discussion Questions A-D and sources for additional reading on the issues presented.[17]

A. Define a trade secret under the Uniform Trade Secrets Act and identify the potential trade secrets held by Cerecidal Industries, Inc.

The majority of states have adopted the Uniform Trade Secrets Act.[18] Under this Act, a trade secret is defined as information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[19]

In order to keep this article to a manageable length, this teaching note will focus on two potential trade secrets for which Cerecidal may claim protection.[20] The first potential secret is the modified manufacturing equipment and process designed to produce the new polymer block. The

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[16] An eleven-page summary prepared by the author describing major provisions of the Uniform Trade Secrets Act and representative cases is provided to the students. These trade secret notes are available on request from the author. For additional material that can be incorporated into the trade secret notes, see generally Roger M. Milgrim & Eric E. Bensen, Milgrim on Trade Secrets (2010).

[17] Discussion Questions A-C were designed to enhance the students' planning (assimilator) skills, while Discussion Question D was designed to enhance their decision-making (converger) skills. The answers to Discussion Questions E-G will depend upon the direction of students' discussion of Questions A-D; therefore sample answers are not contained in this teaching note.

[18] For a list of statutory citations for states that have adopted the Uniform Trade Secrets Act, see Unif. Trade Secrets Act § 1 (amended 1985), 14 U.L.A. 538 (2005).

[19] *See id.*

[20] Students generally identify several additional potential trade secrets as they review the case study. Those identified include contents of offices, file cabinets, individual computers, the computer network, and the manufacturing facility. These are addressed throughout the article as subparts to the discussion.

second potential secret is the composition of the polymer composite block product.

B. Discuss the factors that a court considers to determine whether the information claimed as a trade secret "derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use" and apply those factors to the case study.

There are two key factors a court will consider for the first part of the trade secret definition. The first is whether the information has actual or potential independent economic value. If the owner of the information can show it derived independent economic value from the information, the court will generally permit trade secret status.[21] One way to show that the information has independent economic value is to show that marketing companies would pay money for the information such as customer lists.[22] An argument can be made that duplication of the competing product by Kiser demonstrates the information has value.[23]

The second factor concerns whether the information is generally known or readily ascertainable by others by proper means. Proper means, according to the Uniform Trade Secrets Act comments, include discovery by independent invention, reverse engineering, under license, from public observation, or from published literature.[24]

If the information is generally known or readily ascertainable, it can be duplicated with ease. If the information is readily ascertainable by proper means, courts will generally deny trade secret protection.[25] This is especially

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[21] *See generally* R. Mark Halligan & Richard F. Weyand, *The Economic Valuation of Trade Secret Assets*, J. Internet L., Feb. 2006, at 19 (discussing property valuation methods).

[22] *See, e.g.,* Fred's Stores of Miss., Inc. v. M. & H. Drugs, Inc., 725 So. 2d 902, 910 (Miss. 1998).

[23] *See, e.g.,* Rogers Indus. Prods. Inc. v. HF Rubber Mach., Inc., 936 N.E.2d 122, 129 (Ohio Ct. App. 2010) (assembly drawings can have economic value to a competitor if they enable the competitor to duplicate the product).

[24] Unif. Trade Secrets Act § 1, cmt. (amended 1985), 14 U.L.A. 538 (2005).

[25] *See, e.g.,* Lasermaster Corp. v. Sentinel Imaging, 931 F. Supp. 628, 637 (D. Minn. 1996) (denying trade secret protection for customer lists that could be compiled through publicly available information).

true if the information is published on the Internet.[26] However, there are instances when available sources are insufficient to develop the information in question without a significant expenditure of time, effort and expense.[27] Furthermore, the fact that some or all of the aspects of the trade secret information are generally known does not automatically preclude trade secret protection for information that combines the various aspects, particularly where there is a competitive advantage.[28] If the trade secret information is not generally known or readily ascertainable by proper means by others, the information will have greater value to Cerecidal and its competitors and will therefore be protectable as a trade secret.

The standard manufacturing equipment Cerecidal used to manufacture its other block products was designed by another company. Cerecidal expects only to protect the modification it made to the equipment to accommodate the manufacture of the polymer composite blocks. Mr. South spent a considerable amount of effort and time designing and implementing the equipment modifications. Much of his time was spent using trial and error techniques to develop the desired result. This level of effort would be difficult to easily duplicate even for someone who was aware of the polymer composite composition. Therefore, for someone unaware of the composite composition, duplication would be nearly impossible.

The polymer composite, on the other hand, may or may not be considered generally known or readily ascertainable. The initial reaction mechanism for a potential polymer composite was discovered by Mr. South in his school textbook. Information contained in textbooks is considered generally

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[26] For further discussion of trade secrets and the Internet, see generally Elizabeth A. Rowe, *Saving Trade Secret Disclosures On the Internet: Through Sequential Preservation*, 42 Wake Forest L. Rev. 1 (2007); Ryan Lambrecht, Note, *Trade Secrets and the Internet: What Remedies Exist for Disclosure in the Information Age?*, 18 Rev. Litig. 317 (1999).

[27] *See, e.g.,* Elmer Miller, Inc. v. Landis, 625 N.E.2d 338, 342 (Ill. App. Ct. 1993) (finding that for a custom tailoring business a telephone directory can be useful to form a preliminary list of potential customers; however, developing a list of repeat customers for tailored clothing cannot be easily duplicated without a significant expenditure of time, effort and expense).

[28] *See, e.g.,* Hexacomb Corp. v. GTW Enters., Inc., 875 F. Supp. 457, 463 (N.D. Ill. 1993) (finding the plaintiff's machines were protectable as trade secrets, even though the components were known and used by others, because the combination gave the machines a competitive advantage by making them five times faster).

known or readily ascertainable.[29] In addition, Mr. South's decision to substitute one of the chemical precursors of the reaction for another to get a higher tensile strength was suggested by an article available to the public on the Internet. Since the information concerning this substitute is available on the Internet, it too may be considered generally known or readily ascertainable.

On the other hand, the desired tensile strength for the polymer composite was established by Cerecidal so the blocks could be used in specific applications. Without knowledge of this desired tensile strength, all of the information in textbooks or on the Internet would not be helpful to a person attempting to duplicate the product. Specific reference to a substitute chemical from an obscure Web site would be difficult to locate without knowledge of the tensile strength and without knowledge from the textbook. Furthermore, additional research was necessary to confirm that the chemical substitution produced the desired result, and still further research was necessary to use the composite as block material. All of these factors tend to favor treatment of the product as a trade secret.

C. Discuss the factors that a court considers to determine whether the information claimed as a trade secret "is the subject of efforts that are reasonable under the circumstances to maintain its secrecy" and apply those factors to the case study.

Extent to which the information is kept secret from those outside of the company

There are several factors a court will consider to determine whether the trade secret owner has used "reasonable efforts" to protect the trade secret.[30] The first is the extent to which the information is kept secret from those outside the business. For this first factor, the fewer security precautions in place to keep the information secret from outsiders, the less likely the information will be treated as a trade secret.[31] What constitutes "reasonable"

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[29]RF Techs. Corp. v. Applied Microwave Techs., Inc., 369 F. Supp. 2d 17, 22 (D. Me. 2005) (finding that the alleged trade secret was generally known or readily ascertainable because it was contained in engineering textbooks and guides).

[30]For further discussion about "reasonable efforts," see generally Jermaine S. Grubbs, *Give The Little Guys Equal Opportunity At Trade Secret Protection: Why The "Reasonable Efforts" Taken By Small Businesses Should be Analyzed Less Stringently*, 9 Lewis & Clark L. Rev. 421 (2005).

[31] *See, e.g.*, Sheets v. Yamaha Motors Corp., USA, 849 F.2d 179, 183 (5th Cir. 1988) (finding the plaintiff failed to use reasonable efforts to protect the secrecy of its modified motorcycle when the plaintiff allowed it to be shown at a seminar, allowed another to demonstrate the modified

under the circumstances will vary. From the case study, there are several categories of outsiders who may be exposed to information from Cerecidal Industries. The first category includes visitors and vendors.

Visitors and vendors

Trade secret information should be protected from view by both visitors and vendors to maintain the secrecy and prevent inadvertent disclosure. There are several ways a company can do this.[32] For example, the company could limit access to the company parking lot.[33] In addition to the entry procedure at the parking lot, the company could utilize some form of check-in procedure.[34] Another layer of security can be added by restricting all visitor and vendor movement after the check-in procedure.[35]

In addition to limiting access, a confidentiality agreement could be used with visitors and vendors who may be exposed to trade secret information. In such an agreement, the person is informed that he or she may be exposed to trade secret information and any confidential information belongs to the company. The contract clarifies that the person will not disclose any information he or she may learn. Many companies will not permit outsiders to proceed within the company without such an agreement in place. Information learned by visitors and vendors can still be protectable as a trade secret

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motorcycle without restriction, allowed photographs to be taken of the modification without restrictions, and installed the modification on other individual's motorcycles with only minimal restrictions); Interox v. PPG Indus., Inc., 736 F.2d 194, 202 (5th Cir. 1984) (finding the plaintiff's manual containing a list of plant machinery and equipment was not a trade secret where the information was provided to two contractors without precautions to protect the secrecy of the information).

[32] *See, e.g.,* Leonard v. State, 767 S.W.2d 171, 177 (Tex. App. 1988) (discussing elaborate procedures used by the trade secret owner to keep the information secret). This case was used as the basis for the author's suggestions concerning reasonable efforts.

[33] One way this can be accomplished is with the use of a guard at each entrance to the parking lot for the company. The visitor or vendor would be required to give his or her name to the guard before entry. The person would then be directed to proceed to a designated location.

[34] For example, when the person arrives at his or her designated location, the person must complete a sign in sheet with name and contact information.

[35] Vendors may be sent to a central receiving dock where deliveries can be made. Ideally trade secret information should not be visible from the loading dock. Visitors will generally wait to be met by an employee before proceeding any further within the company. Trade secret information should not be viewable from corridors frequented by visitors. Security tags and security coded doors can further limit vendor and visitor access to trade secret information.

as long as the individuals are required to sign confidentiality agreements.[36] Without such an agreement or other restriction in place, the trade secret argument will generally fail.[37]

The visitors who toured the manufacturing facility at Cerecidal were required to sign nondisclosure agreements before the tour.[38] In addition, the visitors were guided to and admitted to the manufacturing facility by authorized personnel since the facility was kept locked.[39] While the tour did show production of the final block, it would appear that trade secret protection is not lost because (1) the new product composition was never disclosed to the visitors as part of the tour, and (2) visitors were not permitted to take all or part of the composite as a souvenir. It is also important to note that the modified manufacturing equipment was contained within a protective housing, included a label designating it as a trade secret, and restricted access to authorized personnel. All of the steps taken concerning the visitors would appear to be reasonable efforts to protect the secrecy of both the product and the modified manufacturing equipment.

There were also vendors who regularly visited the company. There is no indication from the case study that the vendors were required to sign a confidentiality agreement. However, they were required to check in at the main office before proceeding to the manufacturing facility. The vendors were to ring the bell at the back entrance door and were met there by authorized personnel. The delivery was made at the back entrance door, and there is no indication the vendors were permitted to access the manufacturing facility. While these steps appear to be reasonable efforts to limit the vendor's access to the facility, one must also consider that the rolling doors of the

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[36] *See, e.g.,* Liberty Am. Ins. Group, Inc. v. WestPoint Underwriters, LLC, 199 F. Supp. 2d 1271, 1286 (M.D. Fla. 2001).

[37] *See, e.g., In re* Dippin' Dots Patent Litig., 249 F. Supp. 2d 1346, 1376 (N.D. Ga. 2003) (finding the plaintiff failed to use reasonable efforts to protect its trade secret when it (1) made written disclosures of the information without restriction, (2) permitted plant "roll-out" visits, (3) failed to restrict public observation of truck loading and unloading, (4) failed to inform the defendant that the information was trade secret, and (5) failed to require a confidentiality agreement to protect the secrecy of the information).

[38] *See, e.g.,* Uncle B's Bakery, Inc. v. O'Rourke, 920 F. Supp. 1405, 1429 (N.D. Iowa 1996) (finding "reasonable efforts" where the trade secret owner required all visitors to its plant to sign a confidentiality agreement).

[39] *See, e.g.,* La Calhene, Inc. v. Spolyar, 938 F. Supp. 523 (W.D. Wis. 1996) (finding that reasonable measures were taken, in part, because visitors were not permitted to move through the building without escort).

manufacturing facility are regularly kept open. Still, the protective housing with trade secret designation provided on the modified manufacturing equipment would obscure any view of the modification from the street. Furthermore, seeing the final block product without some sample for analysis would be useless for duplication. Therefore, the efforts taken concerning vendors are probably reasonable under the circumstances.

Government disclosure

In addition to visitors and vendors, a second category of company outsiders is government entities. Even with government entities "reasonable efforts" must be used to protect a trade secret.

1. Environmental Protection Agency

In order to make the bid for use of the polymer composite block in the elementary school, Cerecidal was required to present evidence of indoor air quality to the Environmental Protection Agency (EPA). This includes disclosure of its composite composition to the EPA. The agency uses the information to confirm the product does not emit hazardous air pollutants. The EPA has a form available on its Web site that permits a company to identify chemicals it believes to be trade secret.[40] If Cerecidal discloses the trade secret to this governmental agency without any indication that the chemical information is to be maintained in confidence, this could be enough for Cerecidal to abandon its trade secret as to the product.[41] Any trade secret regarding the modified manufacturing equipment would remain intact since it need not be disclosed for the test.

2. United States Patent and Trademark Office

Cerecidal has expressed interest in obtaining a patent because obtaining a patent can substantially increase the value of the company. There are three inventions Cerecidal might claim as patentable: the modified manufacturing

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[40] *See generally* Envtl. Prot. Agency, *Substantiation to Accompany Claims of Trade Secrecy under the Emergency Planning and Community Right-To-Know Act of 1986, available at* http://www.epa.gov/osweroe1/docs/chem/ts-form.pdf.

[41] *See, e.g.,* Eli Lilly and Co. v. E.P.A., 615 F. Supp. 811, 820 (S.D. Ind. 1985) (finding the owner's disclosure of its trade secret data to the Environmental Protection Agency pursuant to the Federal Insecticide, Fungicide and Rodenticide Act abandoned the secret since there was no requirement that the agency maintain confidentiality).

equipment, the process for manufacturing the block, and the polymer composite block.

Once a patent application is filed at the U.S. Patent and Trademark Office, it is kept confidential until the application is published after eighteen months.[42] Because of this publication requirement, companies are well advised to consider the patent process carefully. If it appears from dealings with the patent examiner that a patent will not be forthcoming, the company may withdraw its application before the eighteen months and protect the information as a trade secret.[43] After the U.S. Patent and Trademark Office publishes the patent application, however, the option of treating the information as a trade secret is lost. The general rule of thumb is that a patent attempt should be made for products sold in the market since products can be seen, analyzed, and duplicated ("reverse engineered").[44] Because Cerecidal is expected to put the polymer composite block on the market for use as a building material, it should proceed with the patent process to obtain a patent on the product. On the other hand, modified manufacturing equipment and processes that are never seen by the public should be maintained as trade secrets because trade secrets are not of limited duration.[45] The modified manufacturing equipment used by Cerecidal to produce the block should not be disclosed in a patent application, but rather maintained as a trade secret with its protective housing and trade secret notification. Note that if a trade secret is accidently disclosed in a patent application when it is published, the secret is abandoned.[46]

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[42] *See* 35 U.S.C. § 122(a) and (b)(1) (2010).

[43] For further discussion of trade secrets and patent application publication, see generally Lisa M. Brownlee, Intellectual Property Due Diligence in Corporate Transactions § 11:33 (2011).

[44] For distinctions between patenting and maintaining a trade secret, see generally John Gladstone Mills et al., Patent Law Basics § 2.17 (2010); Beckerman-Rodau, *The Choice Between Patent Protection and Trade Secret Protection: A Legal and Business Decision*, 84 J. Pat. & Trademark Off. Soc'y 371 (2002).

[45] Utility patent protection generally lasts twenty years from the date of filing the patent application. 35 U.S.C. § 154(a)(2) (2010).

[46] *See* On-Line Techs., Inc. v Bodenseewerk Perkin-Elmer GmbH, 386 F.3d 1133, 1141 (Fed. Cir. 2004).

Extent to which the information is kept secret from employees

A second factor a court will consider to determine if the second element for a trade secret is met is the extent to which the information is kept secret from employees who do not have a need to know.[47] One measure to put into place to protect the trade secret information when disclosed to employees is a confidentiality agreement. The confidentiality agreement can be an independent agreement with the employee or it can be a provision within an employment agreement. In some instances, the confidentiality provision is part of an employment handbook which employees are required to sign. In each of these instances, however, the confidentiality agreement should impose a continuing obligation. Any provision addressing confidentiality of trade secrets should specifically note that it survives employment termination and continues perpetually.[48] Note that general skills and knowledge in the industry, as well as general skills and knowledge acquired while employed, are not protectable as trade secrets.[49]

Limiting the number of employees within a company who are aware of the trade secret information tends to protect trade secret status. This is particularly useful with multinational employers because trade secrets are treated differently in foreign countries.[50] If the information is disclosed only to those employees who need to know the information, there is a greater likelihood the courts will determine the information was a trade secret.[51] It is also helpful to deny employee access to areas of the company where the person

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[47] For further discussion of methods to keep information protected from employees, see Douglas E. Dexter & Jessica Beckett-McWalter, *Protecting Trade Secrets: Best Practices from Hiring to Terminating and Everything in Between*, 26 Licensing J. 1 (2006); Marguerite S. Walsh, The *Top Ten Reasons Employers Lose Trade Secret Cases- And How to Prevent Them*, 15 Intell. Prop. & Tech. L.J. 1 (2003) (suggesting one solution is to undertake periodic reviews of employee confidentiality agreements to ensure continued effectiveness).

[48] *See, e.g.,* ECT Int'l, Inc. v. Zwerlein, 597 N.W.2d 479, 484-85 (Wis. 1999); for further discussion of the enforceability of employee confidentiality agreements, see generally Louis Altman & Malla Pollack, Callmann on Unfair Competition, Trademarks and Monopolies § 14:6 (4th ed. 2011); Jeffrey S. Klein et al., *Drafting Employment Related Agreements,* 762 PLI/Lit. 143 (2007); Gerald Sobel, *Preserving Trade Secret Protection*, 269 PLI/Pat. 205 (1989).

[49] *See* Manuel v. Convergys Corp., 430 F.3d 1132, 1140 (11th Cir. 2005).

[50] For further discussion of trade secret protection for multinational employers, see generally Kevin Cranman, *Where in the World Are Your Employees? Institutions as Global Employers: Employment Law Considerations in the Age of International Programs*, 36 J.C. & U.L. 565, 606-08 (2010); Elizabeth Rowe, *Trade Secrets, Data Security and Employees,* 84 Chi.-Kent L. Rev. 749 (2010).

[51] *See, e.g.,* Progressive Prods., Inc. v. Swartz, 205 P.3d 766, 774 (Kan. Ct. App. 2009).

does not need to be.[52] This can be accomplished through the use of controlled access security doors or other similar measure for each department. Furthermore, employee access to the company's computer network should be limited. Most network operating systems permit administrators to limit file access to predefined groups. Restricting employee access to key information can prevent inadvertent disclosure of the information through e-mail, blogs, or social networking.[53] Electronic communications by employees are often monitored by a company to ensure that trade secret information is not inadvertently disclosed.[54] It is generally sufficient to include a paragraph in the company handbook that addresses an employee's expectation of privacy in company electronic mail.

In addition, limiting the use of information by employees is helpful for protecting information as a trade secret.[55] Where information is freely used by all employees, there will be less of a tendency for the court to treat the information as a trade secret.[56] There is also a greater tendency that the employee will disclose the information if he or she leaves.[57] Noncompetition agreements and other techniques for limiting employee

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[52] *See, e.g.,* 205 Corp. v. Brandow, 517 N.W.2d 548, 551 (Iowa 1994).

[53] For further discussion of blogs and social networking in the workplace, see generally Konrad S. Lee et al., *An Exercise for Teaching the Employment Law Implications of Employee Blogging*, 26 J. Legal Stud. Educ. 399 (2009); Brian Van Wyk, Note, *We're Friends, Right? Client List Misappropriation and Online Social Networking in the Workplace*, 11 Vand. J. Ent. & Tech. L. 743 (2009).

[54] For further discussion of employee email monitoring, see generally Matthew A. Chivvis, *Consent to Monitoring of Electronic Communications of Employees as an Aspect of Liberty and Dignity: Looking to Europe*, 19 Fordham Intell. Prop. Media & Ent. L.J. 799 (2009); Corey A. Ciocchetti, *The Eavesdropping Employer: A Twenty-First Century Framework for Employee Monitoring*, 48 Am. Bus. L.J. 285 (2011); Michael L. Rustad & Sandra R. Paulsson, *Monitoring Employee E-Mail and Internet Usage: Avoiding the Omniscient Electronic Sweatshop: Insights from Europe*, 7 U. Pa. J. Lab. & Emp. L. 829 (2005).

[55] *See, e.g.,* Enter. Leasing Co. of Phoenix v. Ehmke, 3 P.3d 1064, 1071 (Ariz. Ct. App. 1999) (finding plaintiff's financial documents and customer service worksheet were protectable as trade secrets even though the secrets were disclosed to employees, where the disclosure was for a limited purpose and confidentiality provisions were contained in employment agreements and in the employee handbook).

[56] *See, e.g.,* Alagold Corp. v. Freeman, 20 F. Supp. 2d 1305, 1315 (M.D. Ala. 1998).

[57] For further discussion of issues to consider when an employee leaves, see generally Eleanore R. Godfrey, *Inevitable Disclosure of Trade Secrets: Employee Mobility v. Employer's Rights*, 3 J. High Tech. L. 161 (2004).

disclosures after employment can be introduced into this portion of the discussion.[58]

Students may not agree on whether the efforts used by Cerecidal to restrict employee access to the trade secret information were reasonable. There are several facts that support the argument for "reasonable efforts." Cerecidal did not initially use a confidentiality agreement with its employees, but ultimately incorporated a confidentiality provision within its employment agreement. In addition, at the time Mr. South was hired, employees were required to sign the last page of the company handbook acknowledging receipt. This company handbook included additional information concerning disclosure of confidential information. Furthermore, at the time Mr. South was hired, the company used an employment agreement that contained a provision concerning this continuing obligation of confidentiality without an indication of limitation. Confidentiality concerning the modified manufacturing equipment was maintained by including a protective housing around the modification along with a notice indicating the information was trade secret. For the polymer composite block, the company maintained confidentiality during testing by using envelopes marked "confidential" to distribute the test results to authorized recipients. In addition, these reports were kept in a locked division file cabinet. All of these factors weigh in favor "reasonable efforts" to protect both the product and the modified equipment.

On the other hand, Cerecidal undermines those "reasonable efforts" by maintaining a company policy that permits sharing all company information with employees, keeping offices and file cabinets unlocked, and providing the access code for the manufacturing facility to all employees. The company's computer policy is also problematic. While access to each remote computer should be password protected as was the case here, each employee within the company should not have unlimited access to all information on the network. Limited access should be given to each employee on a need-to-know basis. Network operating systems can be programmed to limit access without much effort. Courts favor trade secret protection when passwords are used.[59]

In addition, the protective housing kept around the modified manufacturing equipment is not locked; therefore, any employee can access the

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[58] For further discussion of noncompete agreements, see generally Michael J. Garrison & John T. Wendt, *The Evolving Law of Employee Noncompete Agreements: Recent Trends and an Alternative Policy Approach*, 45 Am. Bus. L.J. 107 (2008).

[59] *See, e.g.,* Trandes Corp. v. Guy F. Atkinson Co., 996 F.2d 655, 664 (4th Cir. 1993).

manufacturing facility and remove the housing to discover the modifications. Furthermore, even though the "confidential" envelopes concerning the product are kept in a locked file cabinet, the key is readily accessible by any employee. Lastly, confidential test data was stored on the network so it could be backed up on the tape drive to prevent loss. Rather than limiting employee access at this point, the file was saved to an obscure directory still accessible by all employees that could be located with a proper key word search.

D. Decide whether Cerecidal Industries has a protectable trade secret and explain your decision.

Finally, in order to enhance the students' decision-making (converger) skills, students are required to make a decision for or against the existence of a trade secret. Many students have difficulty making a decision when they reach this discussion question. For this exercise, it is useful to construct a table of issues raised in the case study for each element of the trade secret definition. Since there are two potential trade secrets, two tables are needed.

Student answers to Discussion Questions B and C are used to develop the tables in class.[60] The factors used in the tables are contributed by each student at the beginning of the discussion. This aids in quickly identifying students who are unprepared. Other teaching techniques attempted with this case study include small group discussions (in which each group discusses one factor and whether it favors trade secret status) and role-playing exercises (in which students are assigned the role of Mr. Connors or Mr. South, and must present their arguments either for or against trade secret status). The sample tables can also be used as a writing assignment to substitute for the discussion questions at the end of the case study.

The issues for each class will vary since students will introduce their own assumptions from the case study. For each issue listed on the table, an indication is made concerning whether the issue favors or does not favor trade secret status. In addition, the students are required to describe in detail why they believe each factor favors or does not favor trade secret status. The results are tabulated to determine whether a trade secret existed.

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[60]A sample table for determining the trade secret status of the manufacturing equipment/process is in Appendix A.

Once the students have completed the tables, they are required to determine which factors were more important to their decision.[61] The twenty-three students who attended the discussion in the spring 2010 course reached different conclusions concerning whether the polymer composite reinforced-block should be protected as a trade secret. Fifteen students believed the product was protectable as a trade secret, while only eight believed it was not.[62] Twenty-one students believed the manufacturing process and/or equipment was protectable as a trade secret while only two believed it was not.[63]

Fourteen of the fifteen students who believed the product was protectable gave more weight to the employment contract between Cerecidal and Mr. South than any other considerations. The remaining student believed the most important factor was the difficulty in duplicating the product. All fifteen students, however, believed the modified manufacturing equipment and process were protectable both because of the agreement and because of the extra security precautions taken to guard the modifications.[64]

The majority of students who believed the block composition was not protectable saw the composition as information developed from Mr. South's knowledge, even though it was aided by other factors.[65] In addition, these same students believed the business environment was too open and accessible. On the other hand, this group of students did not dispute trade secret protection for the modified manufacturing equipment and process, even

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[61]The students' answers to Discussion Questions E and F apply to this part of the discussion.

[62]Even though there were differences of opinion on whether the block constituted a trade secret, all twenty-three students had sufficient knowledge of the key concepts from the trade secret notes to form plausible explanations for their decisions. Therefore, all answers were considered correct.

[63]However, the two students who did not believe the manufacturing process and/or equipment was protectable as a trade secret did not select the factors that influenced their decision. The remaining twenty-one students had sufficient knowledge of the key concepts from the trade secret notes to form plausible explanations for their decisions and their answers were considered correct.

[64]Eight of the fifteen students gave first priority to the contract with second priority to the security measures taken, while seven of the fifteen students gave first priority to the security measures and second priority to the contract.

[65]Of the eight students who believed the block composition was not a protectable trade secret, six of them gave first priority to Mr. South's prior knowledge and second priority to the lack of limited access to information. The remaining two students gave first priority to the lack of limited access to information.

though the modification was completed by Mr. South, because additional security measures were used to protect the modifications.[66]

Once the students reach their conclusions concerning which items are protectable as trade secrets, the students conclude their project by discussing the steps Cerecidal should have taken to better protect its trade secrets.[67] The students' written answers to the discussion questions are turned in at the end of class.

V. Conclusion

This case study gives business law faculty an opportunity to introduce trade secret concepts into their courses. Using a case study based on actual events gives students the opportunity to understand the real-world risks and benefits associated with using the trade secret method of asset protection. The discussion and analysis questions can be used in a class discussion to present the law as well as to give the law practical application. Students will be encouraged to think like future employees exposed to trade secrets or assigned to develop trade secret information. In addition, students will develop the ability to think like business owners trying to protect their own trade secrets while considering whether the presented company used sufficient efforts. Forcing students to choose a side and support their position helps them develop the decision-making skills that are essential for business owners. Overall, the exercise gives students a better opportunity to understand the steps a business owner should take to protect information as a trade secret should the issue arise in the future.

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[66]Of these six students who believed the manufacturing equipment and/or process was protectable as a trade secret, all six gave first priority to the additional security measures.

[67]The students' answers to Discussion Question G apply to this part of the discussion.

Appendix A: Trade Secret Status for Cerecidal Industries' Modified Manufacturing Equipment/ Process

Sample Table for Class Discussion

Modified Manufacturing Equipment/ Process	**Favor Trade Secret Status? (Yes/No)**
Generally Known or Readily Ascertainable	
-Time and effort to design	
-Ease or difficulty in duplicating	
Extent Information Secret from Outsiders	
-Nondisclosure agreement with visitors	
-Check in procedure for visitors	
-Limited access for visitors	
-Nondisclosure agreement for vendors	
-Check in procedure for vendors	
-Limited access for vendors	
-Government agency disclosure	
Extent Information Secret from Employees	
-Confidentiality agreement	
-Limited access to information	
-Prior knowledge of employee	
Additional Factors Not Included Above	
Total Factors in Favor of Trade Secret Status	