

Injunctive Relief in the Internet Age: The Battle Between Free Speech and Trade Secrets

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I. INTRODUCTION

The last century has seen substantial advances in communications, of which the Internet is only the most recent development. Each new medium, as it was introduced, changed the balance of power in the constitutional equation involving the First Amendment. Every advance in mass communication has enhanced the immediate and widespread dissemination of information, often resulting in great potential for immediate and irreparable harm. With the Internet, significant leverage is gained by the gadfly, who has no editor looking over his shoulder and no professional ethics to constrain him. Technology blurs the traditional identities of David and Goliath. Notwithstanding such technological changes, however, the Courts have steadfastly held that the First Amendment does not permit the prior restraint of speech by way of injunction, even in circumstances where the disclosure threatens vital economic interests.¹

The information revolution has led to technological innovations in the movement, storage, and dissemination of information. The Internet, which is defined as “the vast international network of computers . . . that connects individuals from many nations . . . enabl[ing] them to share an incredible array of information and ideas quickly and relatively inexpensively,” represents the foremost product of this revolution.² The new communication capabilities created by the Internet allow a person, with good or bad intent, to distribute information to millions of people via a Web site.³ This ability raises serious implications when trade secret information is posted on the Internet. Once a trade secret becomes publicly available, it loses its legal secrecy, and it can no longer receive special legal protection.⁴ Additionally, competitors and everyone else on the Internet can gain access to the information. For those who rely on trade secret protection to guard their inventions, this dilemma presents a growing concern.

Imagine yourself as the CEO or the general counsel of a large company, XYZ, which produces two million widgets annually. To be successful, XYZ must invest a significant amount of company resources in research and development. These funds support engineering and product development to ensure that XYZ will remain ahead of its competitors in developing new products, materials, and processes. Although some of these products have patents, in most cases, XYZ depends on trade secret law to

1. *Ford Motor Co. v. Lane*, 67 F. Supp. 2d 745, 753-54 (E.D. Mich. 1999).

2. Ari B. Good, *Trade Secrets and the New Realities of the Internet Age*, 2 MARQ. INTELL. PROP. L. REV. 51, 51 (1998).

3. See Bruce T. Atkins, *Trading Secrets in the Information Age: Can Trade Secret Law Survive the Internet?*, 1996 U. ILL. L. REV. 1151, 1153 (1996).

4. *Id.*

protect its investments, primarily because the trade secret approach requires no application, begins immediately, and encompasses a wide variety of uses.⁵ To ensure the guarantee of trade secret protection, XYZ implements many security measures and relies on employee confidentiality agreements.

Each of XYZ's thousands of employees has taken an oath of loyalty and signed a confidentiality agreement. Most employees see themselves as part of a team, but predictably, a few employees become disgruntled or stray at the promise of easy money. Imagine that an angry employee, to retaliate against XYZ or to make some easy money, begins stealing confidential documents. In doing so, this employee pilfers plans that detail the design and production processes of XYZ's most profitable widgets. In an instant, that employee can bring the company to its knees by selling this information to XYZ's competitors, by posting this information on the Internet, or—even worse—by giving the documents to a third party to post on the Internet. As CEO or general counsel, what can you do to protect XYZ?

In the first and second scenarios, in which a competitor pays an employee for the information or the employee has posted the information on the Internet, XYZ has legal recourse.⁶ Under trade secret law, XYZ can sue the appropriator for civil damages.⁷ In addition, the infringer may also receive criminal sanctions under the Economic Espionage Act.⁸ Under both of these theories, XYZ would be entitled to monetary compensation for damages resulting from the loss.⁹ In the second scenario, where the employee has posted the information on an Internet site, the company would probably be able to get an injunction against the employee's site, and could sue the employee for damages based on the employee's violation of the confidential relationship.¹⁰ This dual strategy allows the company both to stop the dissemination, possibly preserving the trade secret, and also to recover some measure of the losses suffered.

The third scenario, in which an employee provides trade secret information to a third party who then posts it on the Internet, presents a problem for XYZ. Under current laws, XYZ will not be able to get an injunction against the site, unless there was improper conduct on the part of a third party (such as bribery). Where improper conduct is not evident,

5. *Id.* at 1152.

6. *See* UNIF. TRADE SECRETS ACT, 14 U.L.A. 433 (1985) [hereinafter UTSA].

7. *See id.*

8. Economic Espionage Act of 1996, 18 U.S.C. §§ 1831-39 (2000).

9. XYZ can sue its competitor for trade secret infringement, under UTSA, *supra* note 6, or under the Economic Espionage Act, 18 U.S.C. §§ 1831-39; UTSA § 3.

10. *See* UTSA § 2, *supra* note 6.

courts will not restrain speech via injunction, and XYZ lacks any remedy at law¹¹ due to the interplay between trade secret and free speech protection.¹² Except for a few narrow circumstances, the First Amendment protects speech from prior restraint.¹³ The United States Supreme Court has labeled a prior restraint a “special vice,” because prior restraints suppress speech before there is “an adequate determination that it is unprotected by the First Amendment.”¹⁴ The situation mentioned above—a third party posting trade secret information on the Internet—might not fall within one of the excepted categories.¹⁵ Additionally, such posting cannot be enjoined based on a duty of confidentiality, because the third party has no relationship with XYZ, and thus, no duty to keep the information secret.¹⁶ Trade secret holders have tried to seek temporary restraining orders or preliminary injunctions to prevent actions by third parties, often basing their claims on the confidentiality agreements with the employees who gave out the information.¹⁷ The courts involved in these cases, however, have shown

11. See *Ford Motor Co.*, 67 F. Supp. 2d at 754 (denying car manufacturer’s request for injunctive relief to stop an employee from giving information to a third party for dissemination on the Internet).

12. Maintaining a trade secret requires that a company keep the trade secret information from being disseminated, or, in other words, from becoming generally known. See UTSA § 1, *supra* note 6. However, the Free Speech Clause of the First Amendment will not generally allow a preliminary injunction where speech is concerned, even if the speech involves a competing concern such as trade secret or national security. See *Procter & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 226-27 (6th Cir. 1996). The Supreme Court has required, in cases involving pure speech, that the party moving for the prior restraint show that an interest more fundamental than the First Amendment is at stake. See *Ford Motor Co.*, 67 F. Supp. 2d 745.

13. See Mark A. Lemely & Eugene Volokh, *Freedom of Speech and Injunction in Intellectual Property Cases*, 48 DUKE L.J. 147, 170-72 (1998). Exceptions include protecting a defendant’s right to a fair trial, where the interest in free speech is presumably outweighed by the interest served by restraining speech. See Ryan Lambrecht, *Trade Secrets and the Internet: What Remedies Exist for Disclosure in the Information Age?*, 18 REV. LITIG. 317, 331 (1999).

14. *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 390 (1973).

15. Lambrecht, *supra* note 13, at 331. Although the Supreme Court has never held that trade secret protection is within the narrow exceptions, there may be justifiable reasons, such as timeliness and protection of economic interests, that could lead it to do so in the future. The narrow circumstances in which the Supreme Court has allowed prior restraints include the following: obscenity, speech posing an imminent danger to national security, and speech compromising a defendant’s right to a fair trial. *Id.*

16. Duty not to disclose generally arises between two parties as a contractual obligation imposed at the time of employment, or as a result of being put on notice of this duty during employment. See Good, *supra* note 2, at 86-87.

17. See *Ford Motor Co.*, 67 F. Supp. 2d at 750 (noting that Ford tried to enjoin a third party from posting trade secret information acquired as the result of a breach of confidentiality by Ford employees); see also *CBS, Inc. v. Davis*, 510 U.S. 1315, 1316 (1994).

reluctance to restrain third parties' speech.¹⁸ The company can try to challenge this in court, but by the time the case gets to trial, any remaining modicum of "trade secrecy" will be long gone, along with the company's trade secret protection.¹⁹

After the trade secret has been lost, XYZ can sue for damages; in many instances, however, this remedy does not offer adequate protection.²⁰ This remedy is often unavailable, because courts generally require the breach of a fiduciary relationship, a contractual duty between the parties, or industrial espionage in order to support an award of damages, none of which exist in this scenario.²¹ Additionally, when courts award damages, the amount granted often falls short of covering the losses.²² Thus, the company loses its trade secret because of dissemination on the Internet, and it still has no satisfactory remedy at law. This example illustrates the problem—a gap in trade secret protection—resulting from the clash between free speech and trade secret law in the Internet age.

This Note will illustrate the void in trade secret protection arising from the conflicting goals of trade secret law and the First Amendment. This void has allowed third parties to post trade secret information, often procured through inappropriate means or in violation of an employee's duty to maintain secrecy.²³ Part II of the Note sets out the basic frameworks of trade secret and First Amendment law as they apply in these circumstances. Part III examines both sides of this conflict, including the

18. See *Ford Motor Co.*, 67 F. Supp. 2d at 750; see also *CBS, Inc.*, 510 U.S. at 1317-18; *Religious Tech. Ctr. v. Lerma*, 908 F. Supp. 1362, 1368-69 (E.D. Va. 1995) [hereinafter *Religious Tech. III*].

19. Aside from the likelihood of continued posting by the person the company sues to enjoin, an additional problem lies in the fact that, during the suit, the trade secret information will become part of court records, then becoming public record, and undermining trade secret status. See *Atkins*, *supra* note 3, at 1171 (citing *Religious Tech. Ctr. v. Lerma*, 908 F. Supp. 1353, 1356 (E.D. Va. 1995); *Religious Tech. III*, 908 F. Supp. at 1364).

20. See *Lambrecht*, *supra* note 13, at 325.

21. See *id.* at 323-24; see also *Campbell Soup Co. v. Giles*, 47 F.3d 467 (1st Cir. 1995) (affirming district court's holding that injunctive relief was not available when former employee did not have a confidentiality agreement); *Anaconda Co. v. Metric Tool & Die Co.*, 485 F. Supp. 410 (E.D. Pa. 1980) (enjoining defendant's use of trade secrets when industrial piracy was found to have occurred); *Aries Info. Sys., Inc. v. Pacific Mgmt. Sys. Corp.*, 366 N.W.2d 366 (Minn. Ct. App. 1985) (awarding monetary damages and injunctive relief when employees of one software company who had signed confidentiality agreements began their own software company and used trade secrets to develop software).

22. *Atkins*, *supra* note 3, at 1153-54; see also *Lambrecht*, *supra* note 13, at 325.

23. See *Ford Motor Co.*, 67 F. Supp. 2d at 750; *DVD Copy Control Assn., Inc. v. McLaughlin*, No. CV 786804, 2000 WL 48512 (Cal. Super. Ct. Jan. 21, 2000) (order granting preliminary injunction).

means of resolution used in cases like *Ford Motor Co. v. Lane*.²⁴ Part IV explains why injunctive relief should be permitted in trade secret cases when a third party has obtained information from an employee, in violation of a duty of confidentiality. This Note concludes that, because of the gap that has emerged in trade secret protection, stemming from developments in communication technology, courts should begin to allow trade secret owners injunctive relief. This relief will mitigate damages when third parties have, through inappropriate means or an employee's wrongful disclosures, obtained confidential trade secret information.

II. THE BACKGROUND OF THE CONFLICT BETWEEN TRADE SECRET LAW AND THE FREEDOM OF SPEECH

A basic understanding of trade secret and free speech laws provides a useful, if not necessary, context for a discussion of the necessity of injunctive relief in the case of third-party posting of trade secret information on the Internet.²⁵ These two areas of law conflict at the most basic level as to whether enforced silence benefits or impairs society.²⁶

A. *Trade Secret Law*

Intellectual property law rests on the premise that an innovator will not spend labor, time, or money to create new things if the law does not assure the profits of her invention.²⁷ As such, the area of intellectual property has evolved as a legal safeguard for individuals who invest in research and innovation. These laws have helped to propel technological progress in the United States and the rest of the world.²⁸ While several different types of intellectual property protections exist at law, businesses turn increasingly to trade secret law to protect their intellectual property interests.²⁹

Trade secret protection has acquired popularity because it is simple and effective, and it offers sweeping protection.³⁰ By utilizing trade secret protection, a company can avoid many of the administrative hassles associated with other forms of intellectual property protection, such as having to apply to a government agency like the U.S. Patent and

24. *Ford Motor Co.*, 67 F. Supp. 2d at 745.

25. The following explanations are simplified and intended to provide only a very general overview of these complex areas of law.

26. Lambrecht, *supra* note 13, at 320.

27. *See id.* at 321.

28. Atkins, *supra* note 3, at 1151.

29. *Id.* at 1151-52.

30. *Id.* at 1152.

Trademark Office for approval.³¹ By avoiding the application/approval process, a company saves itself administrative and legal costs as well as delays.³² The only cost associated with trade secret protection is that of the security measures necessary to maintain secrecy.³³ In addition, the company can benefit from immediate, sweeping, and expansive protection, as trade secret protection begins instantly upon the creation of something useful and lasts as long as the information remains secret.³⁴

State law governs trade secret protection.³⁵ Most state laws have been derived from three sources: the Restatement of Torts, the Restatement (Third) of Unfair Competition, and the Uniform Trade Secrets Act (“UTSA”).³⁶ UTSA is arguably the most important of these sources, as it has been adopted by forty-two states, and has developed out of the common law doctrines derived from the original Restatement of Torts.³⁷

UTSA sets out three elements that need to be satisfied in order to establish that a valid, protectable trade secret exists:³⁸ (1) the trade secret has actual or potential value; (2) the trade secret is not generally known or easily ascertainable by the public or other interested persons; and, (3) the trade secret is protected by reasonable measures.³⁹ “The last two elements define what constitutes secrecy,” and together with the first element, have been repackaged by courts as the “generally known” test.⁴⁰ Under this test, a trade secret is lost only after it has become “generally known” or when the efforts put forth to guard its secrecy are not reasonable, and it is readily ascertainable by those who can obtain economic value from its disclosure or use.⁴¹ “Generally known” and “reasonable secrecy” are terms of art, and their exact meanings are “factual questions which vary from case to case.”⁴² At this point in a court’s analysis, the Internet poses the greatest threat to a trade secret, because in many instances, courts will consider a trade secret

31. *Id.*

32. *Id.*

33. *Id.*

34. Atkins, *supra* note 3, at 1152.

35. Lambrecht, *supra* note 13, at 321 (citing MICHAEL A. EPSTEIN, MODERN INTELLECTUAL PROPERTY § 1.02, at 1-4 (3d ed. 1998)); *see also* Atkins, *supra* note 3, at 1155.

36. Atkins, *supra* note 3, at 1155.

37. Lambrecht, *supra* note 13, at 321.

38. *Id.* at 322 (citing MICHAEL A. EPSTEIN, MODERN INTELLECTUAL PROPERTY § 1.02[c], at 1-13 (3d ed. 1998)).

39. *Id.*

40. *Id.* at 322-23 (citing MICHAEL A. EPSTEIN, MODERN INTELLECTUAL PROPERTY § 1.02[B][1], at 1-11 (3d ed. 1998)).

41. *Id.* at 323 n.21, 336 (citing UTSA § 1(4)(i)-(ii)).

42. Good, *supra* note 2, at 65.

posted on the Internet to be “generally known,” regardless of the number of people who have actually seen it.⁴³

A trade secret owner may seek remedies for the loss of a trade secret, but only when the information has been misappropriated.⁴⁴

Misappropriation is defined under the UTSA as:

acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means, or . . . disclosure or use of a trade secret of another without express or implied consent by a person who (a) used improper means to acquire knowledge of the trade secret; or (b) at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was: (i) derived from or through a person who had utilized improper means to acquire it; (ii) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or (iii) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or (c) before a material change of his [or her] position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.⁴⁵

This definition is meant to include cases dealing with industrial espionage and traditional breaches of confidentiality where wrongful acquisition is not at issue.⁴⁶

Generally, a trade secret owner looking to sue for the violation of his trade secret has only three possible targets.⁴⁷ “First, the owner can sue an entity with whom it shared a confidential business relationship, such as an employee or third party doing business with the holder.”⁴⁸ Second, the owner can sue a party, such as an employee or subcontractor, for misappropriating the trade secret in breach of a confidentiality agreement.⁴⁹ Finally, the trade secret owner can sue an entity that has acquired the trade secret by alleging that the entity acquired the trade secret through improper means—for example by paying one of the holder’s employees to disclose.⁵⁰

43. Lambrecht, *supra* note 13, at 336; *see* Atkins, *supra* note 3, at 1154.

44. Lambrecht, *supra* note 13, at 324-25. Trade secret law does not prevent a competitor from discovering the trade secret through proper methods, such as reverse engineering or research; it simply seeks to prevent “improper discovery.” *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 475-76 (1974).

45. Good, *supra* note 2, at 65 (citing UTSA § 1(2)(ii)(A)-(C) (amended 1985)).

46. *Id.*

47. Lambrecht, *supra* note 13, at 323 (citing MICHAEL A. EPSTEIN, *MODERN INTELLECTUAL PROPERTY* § 1.02[A][2], at 1-7 to 1-8 (3d ed. 1998)).

48. *Id.*

49. *Id.* at 324.

50. *Id.*

A trade secret owner can sue third parties under certain limited circumstances, for example when he can prove that the third parties had knowledge that the information had been disclosed as a violation of a confidentiality agreement.⁵¹ However, such attempts at equitable relief or damages are rarely successful against third parties for reasons that this Note will later discuss.⁵²

After establishing that misappropriation of a trade secret has occurred, a trade secret owner has several possible remedies.⁵³ The first is criminal prosecution.⁵⁴ While this will not put the trade secret holder in the same position he was in prior to the misappropriation, it has deterrent and retributive value. Second, a trade secret owner may seek restitution or damage remedies in an attempt to recoup losses or to at least prevent the unjust enrichment of the infringing party.⁵⁵ Third, and most relevant to this Note, a trade secret owner may try to protect the secrecy of the information by seeking injunctive relief in order to keep the trade secret from becoming “generally known” and consequently losing its protection.⁵⁶

Rather than award monetary damages, courts will typically enjoin disclosure where a trade secret holder can establish a breach of confidentiality or misappropriation.⁵⁷ There are a variety of reasons for this trend. First, monetary awards usually fall short of compensating owners for the loss of their trade secret, as losses from disclosure can run into the millions of dollars.⁵⁸ Second, most violators are either simply unable to pay the damages, or even if they do have deep pockets, would simply go bankrupt if the court ordered them to pay the damages.⁵⁹ Third, damages in this area are often speculative, and thus it is difficult to assess the exact loss due to disclosure of a trade secret.⁶⁰

While injunctions represent a popular remedy when violators breach a confidentiality agreement or otherwise acquire information through improper means, courts have declined to enforce injunctions against third

51. *Id.*

52. The Free Speech Clause of the First Amendment poses one obstacle to such tactics. *Ford Motor Co.*, 67 F. Supp. 2d at 750.

53. See Lambrecht, *supra* note 13, at 324.

54. *Id.*

55. *Id.* (citing *Cherne Indus. Inc. v. Grounds & Assocs., Inc.*, 278 N.W.2d 81, 94-95 (Minn. 1979)).

56. *Id.*

57. See Lambrecht, *supra* note 13, at 325.

58. *Id.* (citing 26 CHARLES ALAN WRIGHT & KENNETH A. GRAHAM, JR., *FED. PRAC. & PROC.* § 5642, at 314 (1992)).

59. *Id.*

60. See *id.* at 326.

parties not bound by a confidentiality agreement, and those who have not engaged in improper conduct,⁶¹ based on the First Amendment's general prohibition on prior restraint of speech.⁶²

B. *Free Speech Law*

Free speech is inextricably linked to the First Amendment. The First Amendment is premised on the belief that speech is necessary to the functioning of a free society, and as such, "should be regulated only in the most rare and extreme circumstances."⁶³ A number of arguments attempt to explain the purpose behind the protection of speech. These arguments stem from a variety of viewpoints. For the purposes of this Note, these viewpoints will be broken down into four categories: epistemological, political, psychological, and sociological. The following Section will provide simple and basic summaries of each of these perspectives.

1. Theories on the Purpose of Protecting Free Speech

The first argument stems from the epistemological perspective, also known as truth theory, as articulated by philosophers such as John Stuart Mill and John Milton.⁶⁴ The argument from this perspective is that truth can only be revealed through diversity of opinion, and that there is no absolute truth.⁶⁵ Stated another way, if we do not see error in one idea, we will not be able to see truth in another.⁶⁶ This suggests that we must protect the freedom to express opinion so that an individual can listen to others' ideas, and then can use his own judgment to adjust his ideas through comparison with others.⁶⁷

A second set of arguments revolves around the political purpose of free speech protection.⁶⁸ Free speech is commonly acknowledged as essential to a democratic society. This Note will address the arguments

61. See Lemely & Volokh, *supra* note 13, at 230; Lambrecht, *supra* note 13, at 350.

62. See Lemely & Volokh, *supra* note 13, at 230.

63. Lambrecht, *supra* note 13, at 326 (citing *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 503-04 (1984)).

64. See generally JOHN STUART MILL, ON LIBERTY 15-52 (Elizabeth Rapaport ed., Hackett Publishing Co. 1978) (1859); JOHN MILTON, AREOPAGITICA: A SPEECH TO THE PARLIAMENT OF ENGLAND FOR THE LIBERTY OF UNLICENSED PRINTING (Cambridge Univ. Press 1918).

65. MILL, *supra* note 64, at 17, 26.

66. See MILTON, *supra* note 64, at 77.

67. See MILL, *supra* note 64, at 20-21; see generally MILTON, *supra* note 64.

68. See, e.g., ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1960); CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH (1993); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20-25 (1971).

advanced by two branches of political or democratic theory—Liberalism and Republicanism.⁶⁹ Liberal theorists believe that democracy represents the sum of all individual preferences, and that government should provide people with liberty so that they can pursue their individual values.⁷⁰ This theory stresses the importance of each individual's ability to make choices in the political arena.⁷¹ In order to make choices, the reasoning goes, individuals must have as much relevant information as possible.⁷² The freedom to communicate, hear, and evaluate individual ideas so that these ideas can be used in the decision making process facilitates the distribution of such information.⁷³

Some Liberal theorists believe that protection of free speech should be limited. Robert Bork says that “[c]onstitutional protection should be accorded only to speech that is explicitly political. There is no basis for judicial intervention to protect any other form of expression, be it scientific, literary or that variety of expression we call obscene or pornographic.”⁷⁴ This would mean that, among other things, the communication of a trade secret by a third party would not be entitled to judicial protection from prior restraint.

Republican theorists concentrate on the common good as opposed to individual preferences.⁷⁵ Some, such as Cass Sunstein, believe in an objective public good, and that achieving the public good requires discovery and deliberation.⁷⁶ Discovery by decisionmakers (either voters or government officials) would be limited if people could not express their opinions, ideas, or controversial interpretations of important public issues.⁷⁷ Limits on the amount of knowledge available to decisionmakers lead to poor decisions and, therefore, harm the public good.⁷⁸

The third school of thought on free speech protection offers a psychological perspective, centering on personality and self-fulfillment. According to this theory, free speech must receive protection to provide for

69. For the purposes of this Note, Alexander Meiklejohn and Robert Bork represent the Liberal theory, and Cass R. Sunstein represents the Republican theory. The Author acknowledges that these individuals represent only a few of the many possible views for these positions, and that this discussion provides only a very general view of these authors' theories and this complex area of scholarship.

70. See MEIKLEJOHN, *supra* note 68, at 51-77; Bork, *supra* note 68, at 20-25.

71. See MEIKLEJOHN, *supra* note 68, at 51-77; Bork, *supra* note 68, at 20-25.

72. See MEIKLEJOHN, *supra* note 68, at 51-77; Bork, *supra* note 68, at 20-25.

73. See MEIKLEJOHN, *supra* note 68, at 51-77; Bork, *supra* note 68, at 20-25.

74. Bork, *supra* note 68, at 20.

75. See SUNSTEIN, *supra* note 68, at 241-252.

76. See *id.*

77. See *id.*

78. See *id.*

the individual fulfillment of members of society.⁷⁹ The goal of individual fulfillment requires the ability to express individual ideas; therefore, creative and expressive speech must be protected.⁸⁰ The theory holds that individual fulfillment leads to the advancement of knowledge and increased participation in decision making by all members of the society.⁸¹

The fourth and final theory on the purpose of free speech protection is the sociological theory. This perspective stresses utilitarian arguments and toleration.⁸² According to one sociological theorist, Frederick Schauer, suppressing speech leads to disutility.⁸³ Schauer says that we should not underplay the value of false beliefs, because they act as a “gymnasium” that fosters intellectually stronger minds.⁸⁴ He also contends that the suppression of falsehood is counterproductive, because it allows for fewer theories and ideas that will, as a result of the suppression of other ideas and arguments, gain adherents and respect without having been tested.⁸⁵ Decisions that flow from reason are most effective, and the suppression of ideas leads to decision by force, not by reason.⁸⁶

The aforementioned theories present multiple perspectives on the purpose behind the First Amendment protection of free speech. Courts have used these theories and related judicially created analyses to protect public speech and other forms of communication.⁸⁷ The judicially created analysis most relevant to this Note is the prior restraint doctrine.⁸⁸

79. See generally C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964 (1978). For the purposes of this Note, C. Edwin Baker will represent this view. The Author acknowledges that other positions may be taken by psychological theorists.

80. *Id.* at 994-95.

81. *Id.* at 992.

82. For the purpose of this Note, the philosophical theory is represented by the ideas of Frederick Schauer. The Author recognizes that this only represents one perspective on a complex topic, and that other views may exist.

83. FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 73, 77 (Cambridge Univ. Press 1982).

84. *Id.* at 74.

85. *Id.* at 76.

86. *Id.* at 78.

87. Lambrecht, *supra* note 13, at 326-27 (citing *Bose Corp.*, 466 U.S. 485, 503-04 (1984); *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring) (discussing the importance of free speech in history); *Abrams v. United States*, 250 U.S. 616, 630-31 (1919) (Holmes, J., dissenting) (discussing the importance of free speech in historical and societal terms).

88. Other forms of analysis include content-neutral and overbreadth analysis. See Lambrecht, *supra* note 13, at 327.

2. Judicial Analysis of Free Speech—The Prior Restraint Doctrine

Prior restraints are government orders issued prior to the communication of information to prevent its dissemination to the public.⁸⁹ A wide variety of prior restraints are available to the judiciary to enable them to stop speech from reaching the public forum.⁹⁰ Examples of prior restraints include temporary restraining orders and permanent injunctions.⁹¹ While courts use these tools to stop communication or other action out of concern for freedom of speech, they use them conservatively and under the close scrutiny of the Supreme Court.⁹²

The use of prior restraints is closely observed because they are seen as having several negative outcomes detrimental to societal interests.⁹³ First, prior restraints prevent “information from reaching the public when it is most immediate and persuasive.”⁹⁴ This obstruction of the flow of information is worrisome because it can impede the public’s ability to debate an issue or respond to a concern.⁹⁵ This impediment is especially disturbing when public health or welfare is at issue.⁹⁶ For example, a manufacturer may want to stop the dissemination of information regarding an environmental hazard created by one of its manufacturing processes. Enjoining speech on this issue, however, would serve no legitimate interest and may harm the public. In such a situation, the information must reach the public so that the public can weigh the merits of the manufacturing process against the interest in the environment, and also so that people may take steps to adequately protect themselves from the possible danger. When prior restraints limit speech before it is even spoken or otherwise formulated,⁹⁷ the concern arises that such restraint may unintentionally reach beyond its target and prohibit speech that the First Amendment would otherwise protect.⁹⁸

The Supreme Court has developed three analytical guidelines relevant to this area of the law.⁹⁹ First, courts should apply a presumption of

89. *Id.*

90. *See id.*

91. *See id.* at 328.

92. *See* Lemely & Volokh, *supra* note 13, at 171-72 (citing *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 66 (1989); *M.I.C., Ltd. v. Bedford Township*, 463 U.S. 1341, 1343 (1983); *Vance v. Universal Amusement Co.*, 445 U.S. 308, 316-17 (1980)).

93. *See* Lambrecht, *supra* note 13, at 330.

94. *Id.*

95. *See id.*

96. *See id.*

97. *See id.*

98. *Id.*

99. *See* Lambrecht, *supra* note 13, at 330.

invalidity to prior restraints.¹⁰⁰ Courts generally permit them only to prevent imminent and irreparable harm, provided no less restrictive alternative exists.¹⁰¹ Under this analysis, only a governmental interest of the utmost importance will warrant the issuance of a prior restraint.¹⁰² Second, courts refuse to issue injunctions against speech on the basis of surmise or conjecture about the potential harm that might result from that speech.¹⁰³ Although courts will often allow restraints on unprotected commercial speech, restraints on noncommercial speech require compelling evidence of potential injury.¹⁰⁴ Finally, once the information has entered the public domain, no further disclosure may be enjoined.¹⁰⁵

Many theories have developed to make sense of courts' analyses of prior restraints.¹⁰⁶ One commentator stated that before litigants are granted a prior restraint on speech, they must first "thoroughly prove[] two narrow elements."¹⁰⁷ First, the harm to be avoided must surpass the judiciary's presumption against prior restraints.¹⁰⁸ For example, where the court has the controversial material in hand, as with obscenity, it can rule conclusively that publication or communication of the material would be harmful.¹⁰⁹ In this situation, the court can issue the prior restraint because the court can determine with certainty the effect of the prior restraint.¹¹⁰ Second, a litigant must show that the speech sought to be enjoined lacks topical content or will create irreparable harm.¹¹¹ Courts will be more apt to allow a prior restraint where the information they are restraining is not affected by time.¹¹² For example, timeliness and immediacy generally will not affect the value of speech dealing with sex.¹¹³

100. *Id.* (citing *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971)).

101. *Id.* at 327-28.

102. *Id.* at 328 (citing *Procter & Gamble Co.*, 78 F.3d at 225).

103. *Id.* (citing *CBS, Inc.*, 510 U.S. at 1318).

104. *Id.*

105. See *Lambrecht*, *supra* note 13, at 328 (citing *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 153 (1989)).

106. *Id.* at 330.

107. *Id.* (citing LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-36, at 1046 (2d ed. 1988)).

108. *Id.* (citing LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-36, at 1047 (2d ed. 1988)).

109. *Id.* at 330-31 (citing LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-36, at 1048-49 (2d ed. 1988)).

110. *Id.*

111. See *Lambrecht*, *supra* note 13, at 330-31 (citing LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-36, at 1050-51 (2d ed. 1988)).

112. *Id.*

113. *Id.* at 331 (citing LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-36, at 1051 (2d ed. 1988)).

A second way to look at prior restraint analysis is based on the Supreme Court's suggestion that prior restraints will not be allowed outside certain "narrow exceptions."¹¹⁴ The narrow exceptions are circumstances in which the Court will consider imposing injunctive relief in the form of prior restraints.¹¹⁵ These categories include obscenity, threats to national security, and speech compromising a defendant's right to a fair trial.¹¹⁶ Despite the Supreme Court's statements about strict limits on the use of prior restraints, some courts have been willing to allow them in the commercial context to prevent actions by one party against another party's business interests.¹¹⁷ The extent to which courts are willing to allow prior restraints in trade secret cases seems to depend on the facts of the case and the court. As the next Section discusses, some courts are more willing to extend protection than others.

III. THE CONFLICT

As discussed in the preceding Sections, the policies behind trade secret law and free speech clash because of a fundamental difference in views as to whether enforced silence hinders or helps the public.¹¹⁸ Trade secret protection relies on the secrecy of the information—its law seeks to protect one party's information by enforcing agreements and legal duties that limit other parties from disseminating the information.¹¹⁹ The First Amendment, on the other hand, seeks to protect public discourse in order to promote debate and the dissemination of information in the interests of society.¹²⁰ This Section will discuss and examine a few representative cases to show how trade secret law and the First Amendment intersect in practice.

A. *Where Free Speech Prevails Over Trade Secret*

While some cases exist in which one party's interest in trade secret protection prevails over First Amendment concerns, the majority of cases involving third parties unrelated to the trade secret holder are decided in favor of free speech concerns.

114. *Id.* (citing *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975)).

115. *Id.*

116. *Id.*

117. *See* *Lambrecht*, *supra* note 13, at 331 (citing *American Motors Corp. v. Hufftutler*, 575 N.E.2d 116, 120 (Ohio 1991) (holding that disclosure of confidential information does not qualify for First Amendment protection)).

118. *Id.* at 335.

119. *See, e.g., Good*, *supra* note 2, at 53-54; *Lambrecht*, *supra* note 13, at 323-24.

120. *See* *Lemely & Volokh*, *supra* note 13, at 170-72. *See also* Section II.B.2 considering the various theories on the purpose of free speech.

In *CBS, Inc. v. Davis*, the Supreme Court overturned a preliminary injunction awarded to Federal Beef Processors by a South Dakota trial court.¹²¹ CBS had obtained videotaped footage of the Federal Beef Processors' operation through a cooperative employee.¹²² The producers had planned on airing this footage on "48 Hours," a nighttime news program. Federal Beef Processors sued for an injunction on a variety of arguments, including trade secret.¹²³

As a result of the suit, CBS was enjoined from airing the footage by a South Dakota trial court, which issued a temporary restraining order and later a preliminary injunction against CBS.¹²⁴ The court stated that First Amendment prior restraint principles did not apply because CBS had obtained the footage through misdeeds.¹²⁵ CBS appealed to the Supreme Court, and the Court granted a stay.¹²⁶

Justice Harry Blackmun, writing for the Court, said that by imposing a prior restraint on reporting, the district court was infringing on CBS's First Amendment rights.¹²⁷ Justice Blackmun went on to say that prior restraints can only be used where the "evil" that would result from the reporting was both great and certain, and that neither CBS's misdeeds in acquiring the information nor the potential for harm to Federal Beef Processors justified the prior restraint.¹²⁸

This case illustrates the Court's strong presumption against prior restraints, and bears similarity to the dilemma that this Note attempts to address because it involves an employee offering possible trade secret information to a third party. The case is an imperfect analogy, however, since the third party was a news reporting agency. Also, the information at issue was likely just damaging footage regarding that company's operations or products, as opposed to technical trade secret information. Information about an indecent or unsafe operation or product has value to society and should therefore merit First Amendment protection.

In *Ford Motor Co. v. Lane*, Robert Lane had been operating a Web site entitled "fordworldnews.com," which contained information about Ford and its products.¹²⁹ Lane and Ford had several disagreements regarding Lane's use of "ford" in his domain name, which led to Lane

121. *CBS, Inc.*, 510 U.S. at 1315.

122. *Id.*

123. *Id.* at 1315-16.

124. *Id.* at 1316.

125. *Id.*

126. *Id.* at 1315.

127. *CBS, Inc.*, 510 U.S. at 1317.

128. *Id.* at 1317-18.

129. *Ford Motor Co.*, 67 F. Supp. 2d at 747.

threatening publication of Ford's confidential documents on the Web site.¹³⁰

On July 13, 1998, Lane posted an article on the Web site, including information taken from confidential documents received from an anonymous source at Ford.¹³¹ Along with this information, Lane posted Ford engineering blueprints, which he offered to sell, and an internal Ford memo containing strategies relating to fuel economy, vehicle emissions, and powertrain technology advances.¹³² Ford contacted Lane and advised him that it would file suit and intended to seek an injunction against him.¹³³ In response, Lane published forty more confidential Ford documents online, including some considered by the court to have high competitive sensitivity.¹³⁴

Ford moved for a preliminary injunction to prohibit Lane, a third party, from using, copying, or disclosing any more of Ford's internal documents on the Web site.¹³⁵ The court found it likely that Lane had violated the Michigan Uniform Trade Secrets Act, but the court would not issue a temporary restraining order or preliminary injunction because to do so would violate the prior restraint doctrine.¹³⁶ Despite recognition of Ford's commercial interest in its trade secrets, the existence of confidentiality agreements with the employees who supplied the information, and Lane's alleged misconduct, the court could not justify the use of prior restraints.¹³⁷

This case clearly illustrates the conflict between trade secret and free speech law. Ford had an economic interest in protecting its trade secrets and had taken measures to do so.¹³⁸ The defendant, on the other hand, possessed negative information about Ford that he felt should be disseminated to the public.¹³⁹ Instead of simply publishing opinions on the matter, he either solicited or was given confidential information by employees in violation of their confidentiality agreements with Ford.¹⁴⁰ Some of the material related to Ford and its products, but much of it seems

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Ford Motor Co.*, 67 F. Supp. 2d at 748.

136. *Id.* at 748-51.

137. *Id.* at 750-54.

138. *Id.* at 746-47.

139. *Id.* at 747.

140. *Id.* at 748.

to have been design material which he used for its coercive value.¹⁴¹ While Lane may initially have acted with good intentions, after the threats and dissemination of engineering and fuel economy plans—obvious trade secret information—the court should have allowed an injunction so that the nature of the material not yet disseminated could have been determined and possibly enjoined. The documents containing technical information—Ford's trade secrets—have little public value, and they are not the type of information the First Amendment seeks to protect from restraint; therefore, it should have been excepted from publication on the Web site.¹⁴²

B. Where Trade Secret Prevails Over Free Speech

While this Note stands for the proposition that a gap exists in the area of trade secret protection, there are many cases where courts do grant permanent injunctive relief.¹⁴³ Courts generally grant such relief in trade secret cases for one of two reasons: because the particular misappropriation in question does not involve speech at all, or because there was a breach of a duty, for example, the use of information without permission.¹⁴⁴ In the first scenario, where speech is not implicated, the defendant has generally acquired and used the trade secret information without permission from the owner.¹⁴⁵ Courts can freely grant injunctions under these circumstances because speech is not restricted; therefore, no First Amendment problem exists. In the second situation, a prior restraint can be constitutional because the disclosure took place in violation of a contractual relationship between the parties.¹⁴⁶ For example, in *Garth v. Staktek Corp.*, a Texas court upheld an injunction against Staktek's competitor to prohibit the use or distribution of a trade secret obtained from a former Staktek employee.¹⁴⁷ The court noted in the case that Texas free speech law provides more extensive protection than the First Amendment, so the court relied on Texas law instead of federal law.¹⁴⁸ The court analogized trade secret cases to cases dealing with the right to a fair trial, and allowed the injunction. It suggested that in either circumstance no less restrictive alternative existed

141. *Ford Motor Co.*, 67 F. Supp. 2d at 747 (indicating that Lane used documents to threaten Ford).

142. From the facts of the case, it appears that Lane had concerns about Ford's Mustang Cobra that motivated his publication of the information. *Id.* at 747-50.

143. See Lemely & Volokh, *supra* note 13, at 230-31.

144. See *id.* at 230.

145. *Id.*

146. *Id.*

147. *Garth v. Staktek Corp.*, 876 S.W.2d 545 (Tex. App. 1994).

148. *Id.* at 549.

to prevent imminent and irreparable harm to a party.¹⁴⁹

The *Staktek* case illustrates the proper balance of free speech and trade secret concerns. The court in this case considered the impact that the disclosure and use of the trade secret would have on the trade secret owner against the free speech concerns of the group trying to disseminate it.¹⁵⁰ The free speech concerns seemed minimal since the case hinged on information relating to specialized technology that would likely have inspired little public interest. The appellants in this case only wanted to disseminate the information for profit, not for the public good.¹⁵¹ Additionally, the information at issue did not originate from a member (or members) of the group challenging the restraint; it was truly someone else's intellectual property. So, by restraining the dissemination of this information, the court did not stop an individual or group from communicating its own ideas to the general marketplace. On the other hand, the information had significant value to the trade secret owner, who would have been seriously damaged by its disclosure and use.¹⁵²

In *DVD Copy Control Ass'n v. McLaughlin*, DVD obtained a preliminary injunction against McLaughlin for the misappropriation of its trade secret.¹⁵³ The evidence showed that McLaughlin had obtained DVD's encryption code through reverse engineering, likely in violation of a click license, and had posted this information to an Internet news group.¹⁵⁴ The court balanced the likely harm to each of the parties,¹⁵⁵ and determined that the defendant would suffer minimal harm by not being able to post this information (an encryption code), since he would still be able to discuss the subject, whereas DVD could suffer great harm by disclosure.¹⁵⁶ In reaching this decision, the court considered the amount of money and effort put into creating the code and maintaining its secrecy.¹⁵⁷ The court also considered the fact that failure to enjoin the posting of the information at that time would compromise the plaintiff's right to its trade secret based on the Internet's power to disseminate information quickly.¹⁵⁸

149. *Id.* at 549-50.

150. *Id.* at 550.

151. *Id.*

152. *Id.*

153. *DVD Copy Control Ass'n v. McLaughlin*, No. CV 786804, 2000 WL 48512 (Cal. Super. Ct. Jan. 21, 2000).

154. *Id.* at *1-2.

155. *Id.* at *2-3.

156. *Id.*

157. *Id.*

158. *Id.*

Taken together, the *Staktek* and *DVD* cases suggest a logical way for courts to address the interaction between trade secret protection and free speech. First, a court should consider how the person or entity obtained the information at the heart of the suit for injunction. Then, a court should look at the type of information, and its general value to the public. Finally, a court should balance the relative harm to each party of allowing or disallowing the prior restraint. The courts should allow prior restraint: (1) where the information has been obtained in breach of a confidentiality agreement or by other improper means; (2) where the information is technical and not of great value to public debate; and (3) where the information is a trade secret of value to its owner. This three-part analysis represents the proper way to balance free speech and trade secret concerns. It respects the purpose underlying the First Amendment, and it should become the test applied in all courts for similar cases.

IV. WHY TRADE SECRET PROTECTION NEEDS TO BE EXTENDED IN THE INTERNET AGE

Traditional dissemination of a trade secret can be halted in many circumstances, for example, where there has been a theft of information, or where a party who is contractually bound not to disclose threatens a disclosure.¹⁵⁹ When a trade secret is in danger of being posted on the Internet by a third party, however, a deficiency exists in the protection. Despite the accompanying First Amendment concerns, temporary restraining orders and preliminary injunctive relief need to be extended to apply to third parties who obtain trade secret information in violation of confidentiality agreements or through other illicit means.

Currently, if a trade secret holder allows employees access to trade secret information, even after the execution of a confidentiality agreement, it is putting itself at risk.¹⁶⁰ While courts will tend to allow injunctions against employees disseminating information in violation of a duty, or against competitors who have stolen the secrets, they will generally not order injunctions against third parties.¹⁶¹ This is even true in some instances where the third party has knowledge that an employee revealed the information in violation of a confidentiality agreement.¹⁶² This tendency

159. Lambrecht, *supra* note 13, at 323-24.

160. See *Ford Motor Co.*, 67 F. Supp. 2d at 748 (stating that Ford employees leaked trade secret information to a third party, in violation of employee confidentiality agreements).

161. See Lambrecht, *supra* note 13, at 323-24.

162. See *Ford Motor Co.*, 67 F. Supp. 2d at 748 (recognizing that Ford told Lane that the information was given to him in violation of confidentiality agreements. The court recognized this, but still did not allow the restraint based on First Amendment concerns).

conflicts with the public policy underlying intellectual property law, has many negative implications, and does not seem to have sufficient justification under free speech analysis.

Three factors favor the use of prior restraints against third parties in trade secret cases: (1) the deleterious effect dissemination can have on the businesses that rely on trade secrets; (2) the speed with which the information can be disseminated leading to a loss of secrecy; and (3) the lack of any adequate remedy at law to compensate the individual who loses the secret.¹⁶³

The primary reason counseling in favor of prior restraints is the deleterious effect that trade secret losses can have on businesses. As discussed previously, intellectual property laws have developed in order to facilitate technological progress by protecting innovation.¹⁶⁴ Engineering designs, encryption codes, and other forms of information compiled or formulated into specific formats are expensive in terms of labor and capital. After having spent a significant amount of resources on developing a trade secret, which by definition has economic value, the loss of the secret can be disastrous to a business,¹⁶⁵ particularly for small companies or individual inventors, who may rely on one product for their commercial existence. The loss of a design may render a product useless when others can start producing it at a much lower cost, after avoiding research and development costs.

For instance, consider a small start-up company that manufactures a particular type of computer board using a unique process that they developed. A disgruntled employee gets angry with the owner of the company and gives the secret information to a third party who, without knowledge that it is a trade secret, posts it on a Web page or Internet bulletin board. Under current trade secret law, the company probably could not obtain an injunction to prevent this, because the person posting the information has no duty to the company.¹⁶⁶ Once the public gains access to the process, the company can no longer seek trade secret protection.¹⁶⁷ In

163. See Atkins, *supra* note 3, at 1152-54 (noting that companies often rely on trade secrets, that posting information on the Internet quickly destroys the "secrecy" necessary to maintain a trade secret, and that adequate remedies do not typically exist, because the person responsible often cannot pay actual damages).

164. See *id.* at 1151 n.4 (citing *Rockwell Graphic Sys. v. DEV Indus.*, 925 F.2d 174, 180 (7th Cir. 1991)).

165. See Lambrecht, *supra* note 13, at 322, 325.

166. See generally *Ford Motor Co.*, 67 F. Supp. 2d 745 (denying injunction where a third party posts trade secret information it received from an employee in violation of a confidentiality agreement).

167. Good, *supra* note 2, at 68 (explaining that trade secret law requires that the information have value derived from it being secret. Once the information is "generally

addition to losing the trade secret, the company, in this example, also loses the uniqueness of its product, which likely gave the company a commercial advantage over competitors. Although remedies for the company may exist under certain circumstances, once the information has been disseminated, these remedies will probably not cover the losses the company will suffer.¹⁶⁸

The development of the Internet suggests a second reason to favor the use of prior restraints and injunctive relief against third parties. The Internet is a powerful, yet relatively unregulated, form of communication¹⁶⁹ that allows for the widespread dissemination of information in an incredibly short amount of time.¹⁷⁰ In the past, the fastest means of distributing information were radio, television or print media, which are all subject to various and more hands-on regulation.¹⁷¹

In the case of newspapers, radio, and television, the fear of a supervising editor or professional or legal consequences may deter a person from spreading information.¹⁷² The Internet, on the other hand, allows a person posting information to do so without such practical limitations. Internet users have virtual anonymity; anyone with access to the Internet can open an e-mail account in any name they choose. In addition to anonymity, Internet users enjoy freedom from oversight, ethical codes, and accountability that exist for other mediums.¹⁷³ For these reasons, Internet users can spread information far and wide even before truly understanding the implications of their acts. Once the information is disseminated, it will be considered "generally known," thereby terminating its trade secret status and eliminating the possibility of an injunction.¹⁷⁴

In addition to these problems, no adequate remedy exists at law to correct the situation after a trade secret has been revealed.¹⁷⁵ As mentioned previously, post hoc remedies present several problems. First, plaintiffs

known" this value is gone, as is the trade secret status).

168. Atkins, *supra* note 3, at 1153-54.

169. *See id.* at 1161 (describing the Internet as chaos and as an example of anarchy); *see also Ford Motor Co.*, 67 F. Supp. 2d at 753.

170. Atkins, *supra* note 3, at 1152-53 (citing RICHARD J. SMITH ET AL, NAVIGATING THE INTERNET 9 (3d ed. 1995)) (stating that more than 20 million people worldwide access the Internet routinely).

171. *See Ford Motor Co.*, 67 F. Supp. 2d at 753 (discussing the Internet, as opposed to other forms of communication: "With the Internet, significant leverage is gained by the gadfly, who has no editor looking over his shoulder and no professional ethics to constrain him.").

172. *See id.*

173. *See id.* (contrasting those posting information on a Web site with journalists).

174. *See Good, supra* note 2, at 68.

175. *See Atkins, supra* note 3, at 1153-54; Lambrecht, *supra* note 13, at 325-26.

often cannot show the extent of damages based on the loss of the trade secret.¹⁷⁶ For example, it is difficult to say with certainty that a company's competitor has gained an advantage worth X dollars, or that revealing the process led to a specific amount of damage. A further complication is the difficulty of determining the profit a certain trade secret would have yielded over time. Finally, and particularly applicable to the third-party scenario, the person posting the information will not likely have financial resources to compensate the company for its losses, even if a judgment were rendered against him.¹⁷⁷

Under these circumstances, the best policy would be to grant the injunction to prevent the damage in the first place. The main counterargument contends that the third party has a First Amendment right to free speech, and that in the absence of a relationship creating a duty of confidentiality toward the trade secret holder, this right should not be infringed by a prior restraint.¹⁷⁸ While freedom from prior restraint on speech obviously takes precedence in many scenarios, this presumption should not prevail where valuable trade secrets are concerned. For example, an engineer's drawing of a power plant or a detailed analysis of a manufacturing process will probably generate very little in the way of public debate; in fact, it will probably mean very little to the public at large.¹⁷⁹ In addition, the significance of such technical information to public discourse would likely not be destroyed by allowing a hearing on the matter prior to its dissemination.¹⁸⁰

Denying a third party the right to post this information immediately does not offend the intent of the First Amendment. Speech protection was meant to allow members of society to achieve a variety of things, generally through the communication of *their* ideas and opinions. Prohibiting a person from spreading someone else's intellectual property information does not contradict this purpose. If injunctions restrained opinions on the product or process, such restriction would run afoul of the theory behind the First Amendment ban on prior restraints. Stopping the dissemination of

176. Lambrecht, *supra* note 13, at 326.

177. *See id.* at 325-26.

178. *See* Lemely & Volokh, *supra* note 13, at 170-72.

179. *See* DVD Copy Control Ass'n, Inc. v. McLaughlin, No. CV 786804, 2000 WL 48512, *2 (Cal. Super. Ct. Jan. 21, 2000).

180. The value of this technical information appears analogous to sexual material. Restraining its dissemination for a period of time to allow a hearing would not harm its value. This stands in contrast to information whose value is tied to its timeliness, such as a warning about a product defect. *See* Lambrecht, *supra* note 13, at 330-31; Garth v. Staktek Corp., 876 S.W. 2d 545, 549-50 (Tex. App. 1994) (allowing injunctive relief by analogizing trade secret information to the right to a fair trial).

pure trade secret information, however, simply does not fall into this category of restrictions—especially with regard to technical information such as engineering schematics or processes, which are likely to be uninteresting, if not unintelligible, to the general public.

After weighing the competing interests, protecting intellectual property—possibly by only restraining the information for a short period of time—seems to be the better option. The public policy behind intellectual property protections and the public interest in protecting business development and innovation seem more compelling in this limited circumstance.

V. CONCLUSION

Courts must allow trade secret holders to enjoin third parties from posting trade secrets on the Internet when those secrets are obtained in violation of a duty of confidentiality or through other improper means. Allowing prior restraints in the form of temporary restraining orders or preliminary injunctions is the only way to prevent both the loss of trade secret status and the loss of economic value resulting from the dissemination of the information to competitors and to the public. While this approach may seem to run afoul of the First Amendment, closer analysis tells a different story. Restraints on this particular type of speech, the dissemination of another party's technical intellectual property, do not violate the purpose behind free speech protection—which is to allow individuals to develop and express their own thoughts and ideas, and to communicate information of value to the public.

To strike a balance between First Amendment and trade secret concerns when considering a prior restraint where third parties possess someone's trade secret information, courts must examine three factors. First, the type of information should be examined. If the information is technical and/or specialized and required a significant investment to create, the balance should favor the trade secret owner. Second, the way in which the information was obtained should be evaluated. If the third party obtained the information in an improper way, or in violation of an employee's duty of confidentiality, the balance should weigh in favor of the trade secret holder. Finally, and arguably the most important consideration, courts must compare the harm to the trade secret holder and the harm to the communicator. Where greater harm will result to the trade secret holder, the analysis should strongly weigh in her favor.

Given the rapid pace of technological innovation, widespread dissemination of trade secrets over the Internet by third parties requires the use of prior restraints, lest the incentives to create and innovate be

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destroyed forever.

