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On Contract Law's Increasing Distortionary Effect on Substantive Trade Secret Law and How to Stop It

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Deepa Varadarajan, [The Trade Secret-Contract Interface](#), 103 *Iowa L. Rev.* 1543 (2018).

Trade secret law and contract law have a complicated relationship. Every subject of commerce is extensively privately regulated by contracts. Intellectual property is distinct from other things of value, because it provides exclusive rights to its owners, and burdens others with corresponding responsibilities to others. Yet unlike trade secret's intellectual property cousins copyright and trademark, there is no state or federal public register of trade secret interests to give potential infringers notice of a trade secret. What's more, trade secret rights are relational, that is, liability for disclosure of a trade secret based on the context and expectations of the owner and the discloser. Therefore in trade secret law, unlike other intellectual property, contracts frequently are key evidence of the substance of the trade secret and the standard of behavior required for former employees to avoid infringing trade secrets.

In *The Trade Secret-Contract Interface* Professor [Deepa Varadarajan](#) argues contract law should not be used to undermine the policy reason the law grants companies intellectual property in trade secrets—to promote the progress of science and the useful arts. And yet, as she chronicles in the article, contract law has increasingly been used to do just that in an economy where some of the most valuable assets are trade secrets, including algorithms and databases. She writes: "Contracts' centrality to trade secret law provides putative owners ample opportunity to define—and overstate—the boundaries of their trade secret rights, particularly to employees. Trade secret's intersection with contract law poses particular threats to employee mobility—as employee non-competes and non-disclosure provisions can deter employees from starting new jobs and competition enterprises." (P. 1547.)

Varadarajan identifies two distinct functions that contracts play within trade secret law. First, she describes the "evidentiary function of contracts." This is the use of contracts as evidence to support the content of the trade secret and the context of a particular employee's relationship to it. Second, she describes the "evasive function of contracts." This is the use of contracts, typically by employers in the context of non-compete agreements, to create rights that exceed or conflict with trade secret protections without disclaiming trade secret protection. Some specific examples she discusses are: enlarging trade secret subject matter, avoiding ongoing reasonable secrecy protections, and eliminating the reverse engineering defense.

Concerns about the moment of contract between employer and employee are paramount in Varadarajan's analysis. She points out: "[f]irms' trade secret-evasive uses of contract often occur in employee agreements and mass-market consumer licenses—contexts where the restricted party often lacks the capacity to understand, negotiate, and alter terms." (P. 1573.) What's more, most trade secret controversies arise out of contracts that were formed in the context she described, rather than out of espionage or some other form of disclosure.

As a result of these formational concerns, Varadarajan calls for what she calls a "reinvigoration" of contract law's non-enforcement doctrines. Relying on a series of court opinions, she argues that courts can and should limit enforcement of non-disclosure, non-compete, and other trade secret-related contract provisions in light of "public policies that operate to restrict the scope of trade secret protection." (P. 1589.) She argues that in some circumstances, the "evasive" uses of contract conflict with underlying trade secret policies, such as promoting innovation. She also cites unconscionability as a possible avenue for non-enforcement of some contracts regarding trade secrets.

Both the problem Varadarajan describes and the solution she sketches ultimately sound in contract law. In effect,

contract law has allowed individual actors to distort substantive trade secret for their unilateral benefit. So, correspondingly, contract law must correct itself to prevent such an effect in the context of trade secret.

The Trade Secret-Contract Interface is a significant contribution to the contracts literature. It shows how the thin veneer of formal contractual consent is being used to upend not just the expectations of the less powerful contracting party, which is a longstanding and worsening problem in contract law generally, but also settled, established intellectual policy principles. A future agenda for other scholars inspired by Varadarajan's work may be to examine how contract law consent's increasing thinness without a corresponding decrease in formal power may be leading to distortionary effects in other sectors of law, society, and the economy.

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