Trade Secret Valuation

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A Practice Note discussing important issues for counsel to consider when evaluating and determining the value of a client's trade secrets. This Note provides important legal, financial, and tax reasons for determining the value of trade secrets, and discusses various legal and economic frameworks for determining trade secret value.

A company's intellectual property (IP), especially its trade secrets, can be a core strategic asset that is fundamental for the company's continued successful operation. Therefore, determining the value of a company's IP can be critical in many circumstances, such as in connection with:

- Tax and accounting requirements.
- Licensing and sales activities.
- Litigation.
- Commercial transactions, including mergers, acquisition, and divestitures.
- Raising capital.

However, companies often do not appreciate the need to value their trade secrets and even when they do understand this need, they face challenges when attempting to do so. This can be the case:

- When there is no robust licensing market for similar trade secrets.
- Because in some cases the valuation process may not transparently demonstrate how the final valuation was determined.

Despite these challenges, counsel should assist a client with trade secret valuation activities to ensure that it uses:

- A thorough and thoughtful analysis.
- Appropriate legal and economic frameworks.
- Sound business judgement.

This Practice Note addresses the key issues a company should consider for trade secret valuation, including a discussion on why companies should determine their trade secrets' value, and various legal and economic frameworks for valuing trade secrets.

For information on trade secrets generally, see Practice Note, Intellectual Property: Overview: Trade Secrets (8-383-4565).

For information concerning patent valuation, see Practice Note, Patent Valuation: Qualitative Considerations (W-003-3262).

THE NEED FOR TRADE SECRET VALUATION

Because the motivation for valuing trade secrets can impact the analysis and presentation of the results, it is important for counsel to understand the various rationales for conducting a trade secret valuation. For example, a company may seek to conduct a trade secret valuation analysis:

- For tax planning and compliance.
- For strategic planning, accounting, management information, or other business purposes.
- To support a commercial transaction, such as a trade secret license.
- To support litigation or other dispute resolution activity.
- To raise capital.
- For value reporting, such as in a bankruptcy proceeding.

In addition, it is important for a multinational company to value its trade secrets in view of:

- New laws addressing trade secrets, specifically:
  - the Defend Trade Secrets Act (DTSA), which became law in the US in early 2016 and, as compared to the Uniform Trade Secrets Act, grants litigants access to federal courts in theft of trade secrets cases, irrespective of the amount in controversy, and authorizes ex parte seizure orders where it is clearly shown that injunctive relief would be inadequate (see Article, Expert Q&A on the Defend Trade Secrets Act and its Impact on Employers (W-002-2128)); and
  - the European Parliament and the Council's adoption of the EU Directive 2016/943 on the protection of trade secrets on

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June 8, 2016, which came into force in EU member countries on June 9, 2018.

- The effort by intergovernmental organizations, such as the Organization for Economic Co-operation and Development (OECD), to address tax avoidance schemes involving intangible assets, such as trade secrets (see Trade Secrets and Tax Avoidance).
- Transfer pricing issues (see Transfer Pricing).
- Certain accounting standards for intangible assets set by the International Accounting Standards Board (IASB) (see IASB 38).

TRADE SECRETS AND TAX AVOIDANCE

Multinational companies have long employed complicated tax structures to help them lower their overall tax rate, many of which involve:

- The innovative assignment of intangible assets and intellectual property (see COMMISSION DECISION of 30.8.2016 ON STATE AID SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP), European Commission (EC), 2016, finding that Apple's tax arrangements in Ireland were improper, thereby forcing Ireland to recover 13 billion euros in deficient tax payment from Apple).
- Licensing intangibles, including trade secrets, between affiliated companies to:
  - realize profits in lower tax jurisdictions; and
  - take advantage of artificially low IP valuations.

For a discussion of the effectiveness of these rules, see Dissecting the EU's Recent Anti-Tax Avoidance Measures: Merits and Problems, EconPol Policy Report Vol. 2, Collier, September 2018.

To address these schemes, the EC issued a directive on tax avoidance effective January 2019, requiring member states to implement certain rules to minimize various tax-avoidance schemes (see New EU Rules to Eliminate Main Tax Loopholes, European Commission Press Release, December 30, 2018).

In addition, multinational companies may engage in base erosion and profit-shifting (BEPS) to shift profits from higher–tax jurisdictions to lower–tax jurisdictions, therefore eroding the tax–base of the higher–tax jurisdictions. These companies also seek to avoid paying taxes in the lower tax jurisdiction. U.S. multinational companies tend to be the most prolific users of BEPS (see The Exorbitant Tax Privilege, National Bureau of Economic Research, Wright and Zucman, September 2018).

The OECD and BEPS

One of the key initiatives of the OECD, which seeks to stimulate economic progress and foster world trade, is to publish and update a model tax convention designed to serve as a template for bilateral negotiations on tax coordination and cooperation. As part of this, the OECD leads efforts to improve international tax co-operation between governments to counter international tax avoidance and evasion, and sustain economic growth into the future.

The OECD has promulgated a package of regulations to minimize the impact of BEPS, which have been agreed on by over 100 countries and jurisdictions that have confirmed their commitment to the consistent implementation of this comprehensive package. An essential new feature of these new regulations is an emphasis on intangible assets, especially trade secrets, because:

- It is increasingly recognized that intangible assets create a substantial part of the business value.
- There has not previously been a single definition of intangible assets and no proper guidance on how businesses should report these assets.

The OECD Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations 2017 (OECD Transfer Pricing Guidelines) explicitly recognize trade secrets and are at the heart of the OECD BEPS reform (see Section A.4.2, Paragraph 6.20, Pages 253-54). These OECD Transfer Pricing Guidelines, which the member countries must implement by 2021, require multinational companies to:

- Recognize the value of trade secrets and the intrinsic role they play in the business.
- Regularly assess their activities to ensure that they:
  - correctly identify their trade secrets; and
  - continually track their trade secrets in light of the new international tax rules.

Practical Implications of the OECD Transfer Pricing Guidelines

The OECD Transfer Pricing Guidelines will require multinational companies having valuable intangible assets, including trade secrets, to:

- Understand the trade secrets definition so they can properly include them when valuing their IP.
- Identify the trade secrets within the corporate structure, by affiliated operating unit and country.
- Identify each trade secret's legal owner.
- Identify the specific affiliate within the corporate structure that performs functions, use, or assume risks related to the development, enhancement, maintenance, protection, and exploitation of any trade secrets (DEMPE).
- Ensure the trade secret's legal owner reimburses the corporate affiliate for its contribution to the creation and maintenance of the trade secret.
- Disclose the financial agreements in existence between corporate affiliates concerning trade secrets and confirm that those agreements represent arm's length transactions.

TRANSFER PRICING

Transfer pricing is probably the most important issue in international corporate taxation. In taxation and accounting:

- Transfer pricing:
  - refers to the rules and methods for pricing transactions between enterprises under common ownership or control; and
  - comes into play when the transaction between group members involves intangible assets, including trade secrets.
- A transfer price is the price at which members of a group transact with each other, such as the trade of goods and services between group members.

For more information on transfer pricing in the US, see Practice Note, US Transfer Pricing: Basic Rules (9-517-3449).

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The OECD Transfer Pricing Guidelines broadly define intangible assets for transfer pricing, which may cause the scope of the valuation and the resulting value to differ when the analysis is performed for accounting purposes and management information purposes. As the OECD Transfer Pricing Guidelines state:

> "Intangibles that are important to consider for transfer pricing purposes are not always recognised as intangible assets for accounting purposes. For example, costs associated with developing intangibles internally through expenditures such as research and development and advertising are sometimes expensed rather than capitalized for accounting purposes and the intangibles resulting from such expenditures therefore are not always reflected on the balance sheet. Such intangibles may nevertheless be used to generate significant economic value and may need to be considered for transfer pricing purposes."

(see Section A.1, Paragraph 6.7, Page 249.)

Since the OECD Transfer Pricing Guidelines explicitly recognize trade secrets as an intangible asset, companies must:

- Address trade secrets for transfer pricing purposes.
- Identify relevant trade secrets and develop a clear understanding of their economic value to ensure the transfer prices reflect an arm's length compensation for the trade secrets contributed by individual corporate affiliates.
- Ensure that transfer prices reflect an arm's length compensation to the corporate affiliate for the contribution it made to the development and maintenance of the trade secrets included in the agreement.

IASB 38

The IASB's standard IAS 38 Intangible Assets:

- Defines an intangible asset as "an identifiable non-monetary asset without physical substance."
- Specifies that an intangible asset must be:
  - identifiable;
  - capable of being controlled so a user can obtain benefits from it; and
  - capable of providing future economic benefits such as revenues or reduced future costs.
- Includes customer lists, copyright, patents, and franchise agreements as examples of intangible assets.

A trade secret is therefore an intangible asset under IASB 38 so long as it meets the three critical attributes mentioned above.

The IASB provides some guidance on how businesses should account for intangible assets in financial statements. In general, internally developed intangible assets are not recognized in financial statements but legal intangibles that are purchased from third parties are recognized.

TRADE SECRET VALUATION REQUIREMENTS

Conducting a trade secret valuation requires:

- Transparent inputs, which includes establishing the sufficiency and validity of the:
  - valuation inputs;
  - assumptions; and
  - risks and sensitivities.
- A reliable valuation model so the company can repeat the valuation and obtain comparable and consistent results.
- The objectivity of the person conducting the valuation.
- Recognition of the relevant legal and financial parameters.

Properly observing and documenting these requirements greatly contributes to the defensibility of the trade secret valuation. This is important because tax authorities:

- Are typically sensitive to the effects of information asymmetries.
- Assume, whether justified or not, that they are generally at a disadvantage when assessing transactions involving trade secrets.

As a result, tax authorities frequently second guess the valuations during tax audits. The recent public discussion on BEPS points to an increased burden of proof for taxpayers, as the OECD explicitly stated in the implementation guidance for hard-to-value-intangibles:

> "This guidance protects tax administrations from the negative effects of information asymmetry by ensuring that tax administrations can consider ex post outcomes as presumptive evidence about the appropriateness of the ex ante pricing arrangements. At the same time, the taxpayer has the possibility to rebut such presumptive evidence by demonstrating the reliability of the information supporting the pricing methodology adopted at the time the controlled transaction took place".

(BEPS Action 8, Implementation Guidance on Hard-to-Value Intangibles, Public Discussion Draft, 23 May - 30 June 2017.)

Without observing the above requirements for the valuation process, it will be challenging for counsel to rebut presumptive evidence and hindsight the tax authorities present in response to a company's valuation analysis.

TRADE SECRET VALUATION BASED ON REMEDIES FOR MISAPPROPRIATION

Trade secret valuation should include a quantitative analysis based on how the company uses the trade secret (see Quantitative Economic Trade Secret Valuation).

However, that economic analysis should be cross-referenced with the remedies available to a trade secret owner when a third party misappropriates the trade secret to ensure some symmetry between the two. This helps the company sustain the validity of its valuation analysis.

Under the DTSA, a court may award damages for trade secret misappropriation based on either:

- The trade secret owner's actual loss (see Actual Damages), including any unjust enrichment the actual damages do not address (see Unjust Enrichment).
- A reasonable royalty for the trade secret's unauthorized disclosure or use (see Reasonable Royalties).

(18 U.S.C. § 1836(b)(3)(B).)

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In addition, if the trade secret misappropriation was willful and malicious, the DTSA allows the court to:

- Double the damages award (18 U.S.C. § 1836(b)(3)(C)).
- Award reasonable attorney's fees (18 U.S.C. § 1836(b)(3)(D)).

The monetary remedies available under the UTSA are comparable to those available under the DTSA (compare 18 U.S.C. § 1836(b)(3)(B), (C), (D) with UTSA §§ 3, 4; see Rowe, Unpacking Trade Secret Damages, 55 Hou. L. Rev. 155, 160 (Fall 2017)).

ACTUAL DAMAGES

Actual damages for trade secret misappropriation are measured by the trade secret owner's loss (*Sw. Energy Prod. Co. v. Berry-Helfand*, 491 S.W.3d 699, 711 (Tex. 2016)). In New York, this loss:

- Is broadly defined.
- Includes loss of competitive advantage.

(*E.J. Brooks Co. v. Cambridge Sec. Seals*, 80 N.Y.S.3d 162, 172 (2018).)

Typically, the owner's lost profits is:

- The basis for trade secret misappropriation damages.
- Based on a market share approach demonstrating the causal relationship between the misappropriation and lost profits.

(see *E.J. Brooks Co.*, 80 N.Y.S.3d at 168.)

Actual damages may also be based on:

- The misappropriater's profits, but only if they are attributable to the trade secret owner's losses from the misappropriation (see *E.J. Brooks Co.*, 80 N.Y.S.3d at 172).
- The difference in the company's market value before and after the trade secret misappropriation. For example, if the trade secret owner was formerly able to command a higher price for its product by using the trade secret, and disclosure eroded the price, the trade secret owner may recover the losses attributable to price erosion (see *Wellogix, Inc. v. Accenture, LLP*, 716 F.3d 867, at 879-81 (5th Cir. 2013)).
- The value of the trade secret to the misappropriater, such as savings from increased productivity or research cost savings (*Avery Dennison Corp. v. Four Pillars Enter. Co.*, 45 F. App'x 479, 486 (6th Cir. 2002)).
- The trade secret owner's increased costs caused by the misappropriation, including marketing and advertising costs to recapture the market share taken by the misappropriater (*Salsbury Labs., Inc. v. Merieux Labs., Inc.*, 908 F.2d 706, 714 (11th Cir. 1990)).
- Future profits based on historical data or the fair market value of the trade secret (*Grove US LLC v. Sany Am. Inc.*, 2019 WL 969814, at *3-4 (E.D. Wis. Feb. 28, 2019) (an expert may testify that an asset's value may be determined by considering the likely income the asset would generate based on projections)).
- The amount an investor would have paid to own the trade secret (*Sw. Energy Prod. Co.*, 491 S.W.3d at 711 (citing *Precision Plating & Metal Finishing Inc. v. Martin-Marietta Corp.*, 435 F.2d 1262, 1263-64 (5th Cir. 1970))).
- The impact that actions outside the US have on the US (in a minority of jurisdictions, such as California) (*Applied Materials, Inc. v. Advanced Micro-Fabrication Equip., Inc.*, 2008 WL 11398913, at *6 (N.D. Cal. Feb. 29, 2008)).

UNJUST ENRICHMENT

Under an unjust enrichment damages theory, the trade secret owner may receive the portion of the benefit a misappropriater received from the misappropriation. This requires the trade secret owner to establish a connection between the trade secret and the misappropriater's profits. An award based on unjust enrichment can:

- Be combined with a lost profits award as compensatory damages (see *Sw. Energy Prod. Co.*, 491 S.W.3d at 711 n.7).
- In some states, include the costs the misappropriater avoided in having to develop the trade secret on its own (see *GlobeRanger Corp. v. Software AG USA, Inc.*, 836 F.3d 477, 499 (5th Cir. 2016)). Although in New York, a misappropriater's avoided costs are not properly included as compensatory trade secrets misappropriation damages (*E.J. Brooks and Co.*, 80 N.Y.S.3d at 172).

REASONABLE ROYALTIES

In some circumstances, a damages award based on lost profits may fail to reasonably compensate the trade secret owner for the misappropriation. In that case, damages may be based on a reasonable royalty calculation, where, as in the patent infringement context, the award is based on a hypothetical licensing negotiation between the parties at the time of the misappropriation for the trade secret's use. States may have different requirements for allowing a reasonable royalty damage award, so counsel should evaluate the relevant state's law. For more information, see Trade Secret Laws: State Q&A Tool.

In *University Computing Co. v. Lykes-Youngstown Corp.*, the court determined a reasonable royalty damage award for trade secret misappropriation using a multi-factor analysis similar to that used in the patent context in *Georgia-Pacific Corp. v. U.S. Plywood Corp*. 318 F. Supp. 1116, 1120 (S.D.N.Y. 1970), modified by 446 F.2d 295 (2d Cir. 1971). Some of the factors the court analyzed included:

- The resulting and foreseeable changes in the parties' competitive posture.
- The prices past purchasers or licensees may have paid.
- The total value of the trade secret to its owner, including development costs and the importance of the trade secret to the business.
- The nature and extent of the use the misappropriater intended.
- Other unique factors in the particular case that might have affected the parties' agreement, such as the ready availability of alternatives.

(504 F.2d 518, 539 (5th Cir. 1974); see *Sonoco Prods. Co. v. Güven*, 2015 WL 127990, at *8 (D.S.C. Jan. 8, 2015).)

In *LinkCo, Inc. v. Fujitsu Ltd.*, the court considered what evidence is admissible for determining an appropriate royalty and concluded that the facts of a particular case should determine the admissibility of evidence concerning the misappropriater's and trade secret owner's:

- Sales projections.
- Actual sales.
- Lack of profits.

(232 F. Supp. 2d 182, 188-90 (S.D.N.Y. 2002).)

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When determining a reasonable royalty, whether as an ongoing royalty or a lump sum, counsel should consider:

- Any royalties the trade secret owner obtained for voluntarily licensing the trade secret to other parties.
- Rates the misappropriater paid to license other comparable technology.
- The nature and scope of the misappropriater's use of the trade secret.
- The owner and misappropriater's commercial relationship.
- Any increase in sales of the misappropriater's products or services resulting from the trade secret use.
- The profitability, commercial success, and popularity of the products or services using the misappropriated trade secret.
- Any advantage the trade secret provides.
- How the misappropriater used the trade secret, and any evidence proving that use's value.
- The portion of the profit attributable to the trade secret.

For information on calculating a reasonable royalty in a patent infringement context, see Practice Notes, Patent Litigation: Reasonable Royalty Damages (W-006-8805) and Patent Licensing: Negotiating a Reasonable Royalty (W-001-0378).

QUANTITATIVE ECONOMIC TRADE SECRET VALUATION

In addition to analyzing trade secret value based on the legal concepts for trade secret misappropriation remedies, a robust trade secret valuation analysis should include an economic analysis based on one or more of the following models:

- The expected income from the trade secret (see Expected Income Approach).
- The market for the trade secret (see Market-Based Approach).
- The cost of developing the trade secret (see Cost Approach).

For any of these models, counsel should work with a qualified economist or accountant, whether for tax accounting or litigation purposes.

EXPECTED INCOME APPROACH

If the trade secret produces any measurable operating or licensing income, counsel should consider basing the valuation on the expected income. This framework determines trade secret value through the present value of the economic benefits the trade secret owner expects to receive over the trade secret's remaining life.

One method for determining the present value is a discounted cash flow (DCF) analysis, which uses future free cash flow projections, discounted at an appropriate annual rate, to arrive at an estimate of the cash flow's present value. This framework applies the concept of the time value of money so all future cash flows associated with the trade secret are estimated and discounted by using the cost of capital to give their present values.

When conducting a DCF analysis in the context of transfer pricing (see Transfer Pricing), counsel should note that the valuation should consider both the buyer's and the seller's perspective because in an arm's length transaction:

- The buyer generally anticipates earning higher profits from the use of the intangibles.
- The parties negotiate a price within a corresponding bid-ask range.

Inputs which feed into the DCF valuation calculation include:

- Costs (see Costs to Develop Trade Secrets).
- Timing (see Term of Trade Secret Protection).
- Benefits (see Benefits from Trade Secrets).
- Risks (see Associated Risks).

Costs to Develop Trade Secrets

The economic outlay to create or develop the trade secret may include:

- The time taken to develop the trade secret, including the time taken to test it.
- The labor costs.
- Any investment in tangible assets associated with the trade secret, such as equipment and property and related expenses.

The economic outlay also includes the cost to provide reasonable trade secret protection and may include administrative, legal, and technical protection mechanisms deployed to protect the trade secret.

Term of Trade Secret Protection

The anticipated protection period as impacted by the likelihood of a competitor discovering the trade secret through reverse engineering or other proper means is an important consideration. In addition, the trade secret owner should recognize that it may decide to declassify the trade secret after a period of time due to changed technical or market situations.

In addition, the trade secret owner should contemplate the current existence or expected development of acceptable alternatives or substitutes that could diminish or eliminate the trade secret's competitive advantages.

Benefits from Trade Secrets

The trade secret owner should consider the economic benefits it expects to receive from:

- Its use of the trade secret in a product or service, such as greater sales, price premiums, or cost reduction.
- Possessing the trade secret in terms of its improved internal capabilities or improved efficiency and effectiveness.
- Licensing or selling the trade secret, whether as part of a specific IP transaction or as part of a larger business transaction.
- Prior user rights, which may give the trade secret owner the right to continue to use the trade secret in the face of a subsequent third-party patent. For more information on prior user rights, see Practice Note, Leahy-Smith America Invents Act: Overview: Prior Commercial Use Defense (6-508-1601).
- A potential damage award from a trade secret misappropriation claim against a misappropriater, although this is typically not a preferred way of generating a return on investment from on a trade secret.

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Associated Risks

The DCF analysis should incorporate risks that:

- The business fails to treat the information as a trade secret, such as by not controlling access and not putting reasonable protection mechanisms in place.
- The trade secret is misappropriated by, for example, a disgruntled employee, a former executive, a collaboration partner, a competitor, or a hacker.
- An independent third party either patents or publishes the trade secret thereby putting it into the public domain.

MARKET-BASED APPROACH

Valuation based on the market for the trade secret requires determining what other purchasers paid for similar assets. In addition to considering the price third parties paid to acquire similar trade secrets, a market-based approach may rely on a hypothetical royalty the parties would have agreed to for the trade secret's use calculated from:

- Royalty rate information from other licenses to similar trade secrets.
- Other market information, such as:
  - changes in the parties' competitive positions;
  - the nature and extent of the misappropriater's use of the trade secret; and
  - the availability of alternative trade secrets.

A market-based approach should reflect the amount a licensee would be willing to pay in an arm's-length transaction to a third-party owner or licensor to obtain the use of the trade secret. However, this approach is rarely used to value trade secrets because:

- There is a limited amount of publicly available trade secret acquisition and license transaction information.
- Many trade secret licenses are bundled with a patent license or other IP license in a single agreement. See for example, Standard Document, Patent and Know-How License Agreement (Pro-Licensor) (3-509-6005).
- Different trade secrets are rarely comparable.

COST APPROACH

The cost approach to valuing trade secrets is based on the cost to create and develop the trade secret, which may be thought of as the cost to:

- Reproduce the trade secret.
- Develop other processes, systems, products, or information in place of the misappropriated trade secret and that have similar utility.

Often the cost approach:

- Does not reflect the value of the trade secret to its owner.
- Is used to calculate a floor for the trade secret's value.

TRADE SECRET VALUATION REPORT CONTENTS

A trade secret valuation report should ideally contain the following sections.

- The report's:
  - audience, including affiliation and titles; and
  - date, including the date of the valuation.
- Position and status of appraiser.
- The valuation's purpose.
- Identification and details of the trade secrets.
- Approach and methods used.
- Data sources used in the analysis.
- Key assumptions and sensitivities.
- Limitations.
- Valuation conclusion.

When preparing the report, the appraiser should keep the company's tax department and any external accounting and tax firms representing the company informed of the contents. This may be important because the report's overview or list of trade secrets is:

- A compulsory part of any transfer pricing documentation (see Transfer Pricing), known as the Master File (see OECD Transfer Pricing Guidelines (Section C.1, Paragraph 5.19, Page 234)).
- A valuable information source verifying that the trade secrets have been adequately considered for any intercompany transaction.

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04-19

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