

Contributory Negligence, Technology, and Trade Secrets  
Abstract

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In tort law, the doctrine of contributory negligence captures conduct by the plaintiff which falls below the standard to which he should conform for his own protection. Whether one has been contributorily negligent is determined by an objective standard of reasonableness under the circumstances. This Article, for the first time, applies these contributory negligence principles to trade secret law. It draws upon this doctrine to frame and analyze a problem posed by modern technology. The very technological tools in use today that increase the efficiency with which companies do business create challenges for trade secret protection. They make trade secrets easier to store, easier to access, easier to disseminate, and more portable, thus increasing the risks that trade secrets will be destroyed. There is therefore tension between the need to keep information secret and modern technological methods that allow the information to be easily accessed, reproduced, and disseminated. In trade secret law, courts evaluate the sufficiency of measures to protect the secret through the “reasonable efforts” requirement. The trade-secret owner must show that it took efforts reasonable under the circumstances to protect the secret.

The Article explores a question previously unaddressed in the literature: should the greater risks presented to trade secrets in a digital world change the way that courts evaluate reasonable efforts when a trade secret is misappropriated using some form of computer technology? Should reasonableness be pegged to a “should have known” standard such that courts impute an objective expectation (similar to a contributory negligence determination) that higher safety precautions will be utilized because of the risks that in today’s digital world trade secrets are easier to access and disseminate?

The Article urges courts to give special consideration to the known technological risks that may or may not have been considered by the trade-secret owner. It proposes guidelines for the reasonable efforts analysis in digital misappropriation cases, including consideration of such factors as: (a) the nature of the industry, (b) the nature of the trade secrets and how they were stored, (c) the nature of the measures taken to protect the secrets, and (d) the known risks from storage and protection choices. This approach is informed and supported by contributory negligence principles that consider the plaintiff’s conduct relative to the defendant’s in apportioning liability. Ultimately, the paper posits that because the plaintiff trade-secret owner is in a better position than the defendant to decide whether to risk being injured or at least the extent of that risk, based on the precautions it selects, it is sensible to allocate the burden of that choice to the plaintiff.

