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TRADE SECRETS IN NEW ZEALAND

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TRADE SECRETS IN NEW ZEALAND

The major problems associated with trade secret law in New Zealand are that it is confused in definition and in jurisdiction. This confusion contributes to the failure of trade secret law in some instances, particularly to protect information created in the emerging biotechnology and computer software industries. This has contributed to alternative forms of protection, notably through copyright for computer programs.

From a review of the current law, categories of trade secrets are identified, including sub-patentable and patentable trade secrets. The jurisdictional dispute may be resolved if it is recognised that trade secrets represent a form of property right. To this end, the legal and economic approaches to property rights are synthesised. This synthesis is then extended to create a legal-economic model of the justifications for, and the problems with, the protection of these rights: the intellectual property rights continuum. From this model, it is concluded that some legal protection of trade secrets is justified, provided that equally harmful effects are not created. In particular, sub-patentable trade secrets may warrant greater protection, and patentable trade secrets may be over-protected.

One proposal is to punish industrial espionage, although some harmful effects may result. Utility models and laws that protect trade secrets in general are considered and rejected as solutions. Instead, patents of improvement (PI) are proposed which would protect trade secrets that represent an advance on an existing patent. PI would represent a lower standard of inventiveness that is adopted from American biotechnology patent disputes, and so protect sub-patentable trade secrets. The other, higher threshold from the existing English patent law would remain as the patent standard. If a PI were granted to a patent owner, then s/he could practise price discrimination, but if granted to a rival, then competition could result. Either outcome could protect trade secrets, yet mitigate the harmful effects of legal protection. If these proposals were adopted, more information could be produced as well as utilised. Moreover, the growth of the biotechnology and computer software industries in New Zealand could be furthered.

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