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A REVIEW OF STATE CRIMINAL TRADE SECRET THEFT STATUTES

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A Review of State Criminal Trade Secret Theft Statutes

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*“There is not a crime . . . which does not live by secrecy.”*¹

I. Introduction

Trade secret protection promotes innovation and economic efficiency.² Because so many businesses choose to protect valuable commercial information as trade secrets, the theft of trade secrets has been and remains an ongoing threat to U.S. economic security and competitiveness.³ Most often, victims of trade secret theft seek redress through civil actions for misappropriation under state law. The Uniform Trade Secrets Act (UTSA) now forms the basis for forty-eight states’ civil trade secret statutes.⁴ Under the UTSA, victims of trade secret theft may bring an action for misappropriation when their confidential proprietary information has been acquired through improper means, or is used or disclosed without permission.⁵ The main remedies for misappropriation are monetary damages and injunctive relief.⁶

¹ ALLEYNE IRELAND, AN ADVENTURE WITH A GENIUS: RECOLLECTIONS OF JOSEPH PULITZER 115 (1920) (quoting Joseph Pulitzer).

² See *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 493 (1974) (observing that “[t]rade secret law promotes the sharing of knowledge, and the efficient operation of industry; it permits the individual inventor to reap the rewards of his labor by contracting with a company large enough to develop and exploit it”).

³ See Michelle Evans, *Trade Secrets in the Legal Studies Curriculum – A Case Study*, 29 J. LEGAL STUD. EDUC. 1, 1 (2012). Trade secrets are an especially critical asset for almost every small business. See also Kurt M. Saunders, *The Law and Ethics of Trade Secrets: A Case Study*, 42 CAL. W. L. REV. 209, 216 (2006).

⁴ UNIF. TRADE SECRETS ACT (amended 1985), 14 U.L.A. 529–659, introductory cmt. (2005) (hereinafter UTSA).

⁵ According to the UTSA, trade secret misappropriation occurs when someone other than the trade secret owner either acquires the information by improper means or uses or discloses it without permission. *Id.* § 1(2). “Improper means” includes acts involving “theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means.” *Id.* § 1(1). The level of misconduct considered improper means must involve knowledge on the part of the defendant that the information is a trade secret; the conduct does not necessarily have to be criminal or tortious, though this is most often the case. *Id.* § 1(2). Improper means might also “include otherwise lawful conduct which is improper under the circumstances.” *Id.* § 1 cmt. As such, a defendant is liable for misappropriation if he or she knowingly used or disclosed a trade secret that had been acquired by accident or mistake, or acquires a trade secret from another whom the defendant knew had obtained it through improper means. *Id.* § 1(2).

⁶ *Id.* § 2–3. Attorney’s fees may be awarded where warranted. See *id.* § 4. For a detailed analysis of the UTSA, see generally Ramon A. Klitzke, *The Uniform Trade Secrets Act*, 64 MARQ. L. REV. 277 (1980).

In some instances, however, these civil remedies are inadequate in protecting the broader public interest in deterring trade secret theft. In fact, so serious was the concern with the growing threat of trade secret theft in the United States, particularly by foreign businesses and governments, that Congress criminalized it by enacting the Economic Espionage Act (EEA) in 1996 rather than a federal civil trade secret statute.⁷ The EEA imposes federal criminal liability for the intentional and knowing theft of a trade secret for the benefit of someone other than the trade secret owner.⁸

Nevertheless, long before the UTSA and the EEA, states were enacting criminal trade secret statutes on which victims of trade secret theft could rely.⁹ Most of these statutes have been around for nearly fifty years. Unfortunately, there has not been much recent published scholarship on these state criminal statutes, presumably because they are so individualized.¹⁰ Unlike their civil counterparts based on the UTSA, state criminal trade secret theft statutes are far from uniform. Some states treat the offense as a felony, while in other states the offense is a misdemeanor. As to penalties, the term of imprisonment and the amount of the fines that may be imposed varies among states. What many of the statutes have in common, however, is a common origin or parent statute, leading to similarities in the scope of trade secrets covered, the types of acts prohibited, and the mental state required for conviction.

Despite their lack of general uniformity, these statutes play a vital role because they are often the only option for a victim of trade secret theft. In practice, federal prosecutors have shown little interest in bringing charges under the EEA unless the case involves theft of trade secrets owned by large corporations or economic espionage by agents of a foreign government.¹¹ Thus, small to medium-sized businesses that have been victimized by trade secret theft may be forced to

⁷ 18 U.S.C. §§ 1831–39 (2016).

⁸ See *infra* notes 15–29 and accompanying text.

⁹ For historical background connecting trade secret theft from American drug companies with the enactment of state criminal trade secret theft statutes, see generally RONALD PAYNE, *PRIVATE SPIES* (1967).

¹⁰ For a discussion of state criminal theft secret statutes before the EEA, see generally Daniel D. Fetterley, *Historical Perspectives on Criminal Laws Relating to the Theft of Trade Secrets*, 25 *BUS. LAW.* 1535 (1970); Eli Lederman, *Criminal Liability for Breach of Confidential Commercial Information*, 38 *EMORY L.J.* 921 (1989); Jeffrey L. Orr, *Industrial Espionage – Nebraska’s New Felony*, 45 *NEB. L. REV.* 644 (1966); John P. Sutton, *Trade Secret Legislation*, 9 *PAT. TRADEMARK & COPY. J. RES. & ED.* 587 (1965); John R. Vandervoort, *Trade Secrets: Protecting a Very Special “Property,”* 26 *BUS. LAW.* 681 (1971).

¹¹ In fact, the number of prosecutions under the EEA has been relatively few. See Michael L. Rustad, *The Negligent Enablement of Trade Secret Misappropriation*, 22 *SANTA CLARA COMPUT. & HIGH TECH. L.J.* 455 (2006). A study in 2012 found that there had been only 124 criminal prosecutions under the EEA since its enactment. See Peter J. Toren, *An Analysis of Economic Espionage Act Prosecutions: What Companies Can Learn From It and What the Government Should Be Doing About It!*, 84 *BLOOMBERG BNA’S PAT., TRADEMARK & COPYRIGHT J.* 884, 1 (Sept. 21, 2012), <http://petertoren.com/wp-content/uploads/2011/05/toren-eea2.pdf>.

resort to civil remedies.¹² That might sound fine in theory, but those in homestead states are all too familiar with the judgment-proof debtor and the uncollectable judgment from civil proceedings.¹³ State criminal trade secret theft statutes can provide an alternative avenue for legal action.

We believe that an understanding of the scope and applicability of these state criminal statutes would be useful to prosecutors as well as business owners contemplating pressing criminal charges against an offender for trade secret theft. As such, this article reviews and analyzes state criminal trade secret theft statutes.¹⁴ We begin with a discussion of the EEA as a point of comparison, and then examine the origins of various state statutes. Next, we discuss and contrast their definitional scope, pertinent provisions, and penalties. Finally, we conclude by offering our observations as to the usefulness of these statutes alongside federal law.

II. The Federal Approach to Trade Secret Theft

In enacting the Economic Espionage Act (EEA),¹⁵ Congress intended to protect trade secrets owned by U.S. businesses and to safeguard American critical technologies and economically

¹² Prosecutions for theft under state criminal trade secret laws differ in many respects from civil actions. Most significantly, the case is brought by the government rather than the actual victim of the theft, though the victim plays an important role in providing evidence for the prosecution. This also means that the action will be brought at the discretion of the prosecutor rather than that of the victim. In addition, the burden of proof in criminal cases is more demanding than that in civil actions, requiring that the government prove the charge beyond a reasonable doubt rather than by a preponderance of the evidence as in civil cases. *See Jackson v. Virginia*, 443 U.S. 307, 316 (1979). Although the victim will not receive an award of damages if the case is successful, there is likely to be a deterrent effect that comes with punishing the offender with a fine and imprisonment. Unlike civil remedies, criminal sanctions are punitive and discourage socially undesirable conduct. *See Lederman, supra* note 10, at 999. For further discussion of this aspect of criminal trade secret law, *see Nicola Searle, The Criminalization of the Theft of Trade Secrets: An Analysis of the Economic Espionage Act*, 2 IP THEORY (2012), <http://www.repository.law.indiana.edu/ipt/vol2/iss2/2>. Indeed, this may be the most important result in cases where the cost of litigation is unaffordable to the plaintiff, and in those cases involving defendants such as former employees who own no assets that would be available to pay a judgment. *See Spencer Simon, The Economic Espionage Act of 1996*, 13 BERKELEY TECH. L.J. 305, 306, 309–10 (1998) (discussing the need to supplement civil remedies with criminal enforcement in the context of the EEA).

¹³ *See Michelle Evans, Trade Secret Misappropriation in Texas*, 24 S. L.J. 67, 87 (2014) (discussing the use of federal and state criminal statutes to prosecute judgment-proof debtors).

¹⁴ For an overview of these statutes without analysis, *see generally* JAY DRATLER, JR., INTELLECTUAL PROPERTY LAW: COMMERCIAL, CREATIVE & INDUSTRIAL PROPERTY, § 13.04(3)(c) (1999); MELVIN F. JAGER, TRADE SECRETS LAW (2016).

¹⁵ 18 U.S.C. §§ 1831–39 (2016).

valuable research and data.¹⁶ To effect this purpose, the EEA imposes federal criminal penalties for the misappropriation of trade secrets.¹⁷ In many respects, the EEA closely parallels the basic elements of the UTSA. The definition of a “trade secret” in the EEA is based on the language of the definition found in the UTSA.¹⁸ The EEA defines a “trade secret” as:

all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if (A) the owner thereof has taken reasonable measures to keep such information secret; and (B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.¹⁹

The EEA creates two separate offenses addressing trade secret misappropriation. The first of these is the crime of economic espionage, which requires proof that the theft of the trade secret was done with the specific intent to benefit a foreign government, instrumentality, or agent.²⁰ The second offense, theft of trade secrets, is a more general prohibition. That section provides:

¹⁶ See *United States v. Hsu*, 155 F.3d 189, 194 (3d Cir. 1998). For a comprehensive discussion of the background and provisions of the EEA, see James H.A. Pooley, et al., *Understanding the Economic Espionage Act of 1996*, 5 TEX. INTELL. PROP. L.J. 177 (1997).

¹⁷ Before the enactment of the EEA, federal prosecutors had to rely on a variety of statutes that did not specifically apply to trade secret theft. For instance, the National Stolen Property Act, 18 U.S.C. § 2314 (2016), does not apply to the theft of trade secrets not also embodied in physical form. See *Dowling v. United States*, 473 U.S. 207, 216 (1985); *United States v. Brown*, 925 F.2d 1301, 1307–08 (10th Cir. 1991). Although the Computer Fraud and Abuse Act, 18 U.S.C. § 1030 (2016), covers the theft of electronic information or data that may be a trade secret, it applies regardless of whether the information or data qualifies for trade secret protection. Finally, the mail and wire fraud statutes, 18 U.S.C. §§ 1341, 1343 (2016), unsurprisingly apply only when mail or wire communication is used as part of a scheme to defraud. See Peter J.G. Toren, *The Prosecution of Trade Secret Thefts Under Federal Law*, 22 PEPP. L. REV. 59 (1994) (discussing the inadequacy of federal law to address trade secret theft prior to the EEA).

¹⁸ 18 U.S.C. § 1839(3) (2012). “[T]he term ‘trade secret’ means all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing” *Id.* The definition has been interpreted to include customer lists. See *United States v. Nosal*, 844 F.3d 1024 (9th Cir. 2016).

¹⁹ *Id.*

²⁰ *Id.* at § 1831. Section 1831(a) provides:

Whoever, with intent to convert a trade secret, that is related to a product or service used in or intended for use in interstate or foreign commerce, to the economic benefit of anyone other than the owner thereof, and intending or knowing that the offense will, injure any owner of that trade secret, knowingly –

- (1) steals, or without authorization appropriates, takes, carries away, or conceals, or by fraud, artifice, or deception obtains such information;
- (2) without authorization copies, duplicates, sketches, draws, photographs, downloads, uploads, alters, destroys, photocopies, replicates, transmits, delivers, sends, mails, communicates, or conveys such information;
- (3) receives, buys, or possesses such information, knowing the same to have been stolen or appropriated, obtained, or converted without authorization;
- (4) attempts to commit any offense described in paragraphs (1) through (3); or
- (5) conspires with one or more other persons to commit any offense described in paragraphs (1) through (3), and one or more of such persons do any act to effect the object of the conspiracy,

shall, except as provided in subsection (b), be fined under this title or imprisoned not more than 10 years, or both.²¹

Whoever, intending or knowing that the offense will benefit any foreign government, foreign instrumentality, or foreign agent, knowingly –

- (1) steals, or without authorization appropriates, takes, carries away, or conceals, or by fraud, artifice, or deception obtains a trade secret;
- (2) without authorization copies, duplicates, sketches, draws, photographs, downloads, uploads, alters, destroys, photocopies, replicates, transmits, delivers, sends, mails, communicates, or conveys a trade secret,
- (3) receives, buys, or possesses a trade secret, knowing the same to have been stolen or appropriated, obtained, or converted without authorization,
- (4) attempts to commit any offense described in any of paragraphs (1) through (3), or
- (5) conspires with one or more other persons to commit any offense described in any of paragraphs (1) through (3), and one or more of such persons do any act to effect the object of the conspiracy, shall, except as provided in subsection (b), be fined not more than \$5,000,000 or imprisoned not more than 15 years, or both.

²¹ *Id.* § 1832. The prosecution is not required to prove that the defendant knew the information was a trade secret. “For a person to be prosecuted, the person must know or have a firm belief that the information he or she is taking is in fact proprietary.” 142 CONG. REC. 27,051, at 27,117 (1996). Evidence that a defendant knew the trade secret owner marked the information “confidential” or “secret,” restricted access to the information, or required employees to sign nondisclosure agreements, is proof of this element. *See United States v. Martin*, 228 F.3d 1, 12 (1st Cir. 2000).

There is no requirement of any foreign involvement in this prohibition, although the trade secret must relate to a product or service involving interstate or foreign commerce.²² Moreover, the defendant must have acted “with intent to convert a trade secret” and “intending or knowing that the offense will injure” the trade secret owner.²³ This is a distinction from the UTSA, which does not require that the defendant intend or know of the potential economic loss to the trade secret owner.²⁴ Significantly, the EEA does not preempt prosecutions under state criminal trade secret laws.²⁵ In order to augment the uneven enforcement of the EEA with a civil remedy on the federal level,²⁶ Congress amended the EEA in 2016 with the Defend Trade Secrets Act (DTSA).²⁷ The DTSA creates a new civil action for trade secret misappropriation if the trade secret is related to a product or service used in interstate or foreign commerce.²⁸ The definitions of trade secret and misappropriation used within the DTSA are substantially similar to those found in the UTSA.²⁹

III. The Origin and Definitional Scope of State Criminal Trade Secret Theft Statutes

A. State Statutory Definitions

Because both the EEA and the DTSA were enacted after the UTSA, a substantial portion of these federal statutes relies on UTSA language. By contrast, state criminal trade secret theft statutes began to be enacted about twenty years before the UTSA, so the language used within most of these statutes is distinctly different.³⁰ Interestingly, a significant portion of these state statutes

²² Unlike state criminal statutes, the EEA applies to extraterritorial conduct. It extends to conduct occurring outside the United States if the offender is a U.S. citizen or corporation, or if any act in furtherance of the offense was committed in the United States. *See* 18 U.S.C. § 1837 (2016).

²³ *Id.* § 1832. For cases applying the EEA, *see, e.g.*, *United States v. Lange*, 312 F.3d 263 (7th Cir. 2002); *United States v. Yang*, 281 F.3d 534 (6th Cir. 2002); *United States v. Krumrei*, 258 F.3d 535 (6th Cir. 2001).

²⁴ *See* Pooley, *supra* note 16, at 199.

²⁵ 18 U.S.C. § 1838.

²⁶ *See* Robin J. Effron, *Trade Secrets, Extraterritoriality, and Jurisdiction*, 51 WAKE FOREST L. REV. 765, 768–69 (2016).

²⁷ 18 U.S.C. § 1836. In addition, the EEA authorizes prosecutors to initiate separate civil proceedings to enjoin continued trade secret violations during a criminal prosecution. *See id.*

²⁸ *Id.* § 1836(b)(1). As with the EEA, the DTSA does not preempt trade secret protection and civil or criminal remedies for misappropriation under state law. *See id.* § 1838.

²⁹ *See* Michelle Evans, *Plausibility under the Defend Trade Secrets Act*, 16 J. MARSHALL REV. INTELL. PROP. L. 188, 189 (2017) (comparing the DTSA definitions to those of the UTSA).

³⁰ *See, e.g.*, N.J. STAT. ANN. § 2A:119–5.2(c) (repealed 1978) (added pursuant to 1965 N.J. Laws ch. 52, § 2(c)); N.Y. PENAL LAW § 155.00(6) (McKinney 2016) (added pursuant to 1967 N.Y. Laws ch. 791, § 20).

has not been amended to align with the UTSA or the EEA. In fact, only one statute, that of South Carolina, tracks the language of the EEA.³¹

Unlike state civil trade secret statutes based on the UTSA, there is a distinct lack of uniformity among the criminal statutes. Today, most trade secret theft at the state level may be prosecuted either through a general theft statute modeled after the Model Penal Code (MPC)³² or through a separate specific trade secret theft statute.³³ Some states have both types of statutes; however, the basis for both criminal liability and the punishment generally differs. For purposes of this article, statutes based on the MPC will be addressed only where a state does not have a separate specific trade secret theft statute.

When determining the applicability of general theft statutes modeled after the MPC to trade secret theft, the first consideration is how these statutes define “property.” The MPC defines “property” as “anything of value, including real estate, tangible and intangible personal property, contract rights, choses-in-action and other interests in or claims to wealth, admission or transportation tickets, captured or domestic animals, food and drink, electric or other power.”³⁴ This general definition includes coverage for “intangible property,” which would apply to trade secrets.³⁵ Several states have adopted a modified version of this definition, which maintains coverage for “intangible property.”³⁶ However, some states have chosen to remove coverage for

³¹ S.C. CODE ANN. § 39–8–90(A) (2016).

³² MODEL PENAL CODE (AM. LAW INST., Official Draft & Revised Comments 1980) (hereinafter MPC).

³³ See *infra* Part III.B. A few states have not adopted a general theft statute modeled after the MPC to address trade secret theft or a specific trade secret theft statute. These states provide limited trade secret theft penalties through computer crime statutes. See MISS. CODE ANN. § 97-45-1 (2016); 11 R.I. GEN. LAWS § 11-41-1 (2016); VT. STAT. ANN. tit. 13, § 2501 (2016); VA. CODE ANN. §§ 18.2-95, -96 (2016); W. VA. CODE ANN. § 61-3-13 (West 2016); WYO. STAT. ANN. § 6-3-502 (2016). An analysis of these statutes is outside the scope of this article.

³⁴ MPC § 223.0(6). In contrast, “common-law larceny was limited to thefts of tangible personal property.” *Bell v. United States*, 462 U.S. 356, 360 (1983); see also *Commonwealth v. Engleman*, 142 N.E.2d 406 (Mass. 1957) (holding that larceny involves the stealing of articles of personal property rather than trade secrets).

³⁵ *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003 (1984). It is generally understood that intangible property is an incorporeal right or asset that has value aside from any physical form in which it may be embodied or represented. Cf. *Intangible Property*, BLACK’S LAW DICTIONARY (9th ed. 2009). The MPC does not define “intangible property,” nor do state statutes that employ this term in their criminal theft provisions. For further discussion of this omission, see Thomas G. Field, *Crimes Involving Intangible Property*, 11 U.N.H. L. REV. 171 (2013).

³⁶ See ALASKA STAT. ANN § 11.81.900(52) (West 2016); IOWA CODE ANN. § 702.14 (West 2016); KAN. STAT. ANN. 21-5111(w) (West 2016); KY. REV. STAT. ANN. § 514.010(6) (West 2016); MO. ANN. STAT. § 570.010(19) (West 2016); NEB. REV. STAT. ANN. § 28-509(5) (West 2016); N.D. CENT. CODE ANN. §

“intangible property” altogether.³⁷ To clarify coverage for trade secrets, some states have elected to also include “trade secrets” along with “intangible property” in the definition,³⁸ while others have elected to include trade secrets within the definition itself, but with an exclusion of “intangible property.”³⁹ For states that have added “trade secrets” to property coverage under these general theft statutes, there are three distinct definitions for “trade secrets” that provide a basis for comparing these statutes with the specific trade secret theft statutes. These definitions follow the New Jersey, New York, and Uniform Trade Secrets Act statute definitions.

The most common definition of “trade secret” used in state criminal legislation originated in New Jersey.⁴⁰ The New Jersey statute defined a “trade secret” as:

[T]he whole or any portion or phase of any scientific or technical information, design, process, procedure, formula or improvement which is secret and of value; and a trade secret shall be presumed to be secret when the owner thereof takes measures to prevent it from becoming available to persons other than those selected by the owner to have access thereto for limited purposes.⁴¹

New Jersey kept this definition when it later adopted the MPC.⁴² Other states enacting the MPC adopted a similar, if not identical, definition,⁴³ as did several states with specific trade secret theft statutes.⁴⁴

The second definition used in these statutes is the UTSA definition.⁴⁵ The UTSA definition of “trade secret” sets forth three necessary elements. First, a trade secret must be information. The

12.1-23-10(7) (West 2016); OR. REV. STAT. ANN. § 164.005(5) (West 2016); S.D. CODIFIED LAWS § 22-1-2(35) (2016).

³⁷ HAW. REV. STAT. § 708—800 (West 2016).

³⁸ See ME. REV. STAT. ANN. tit. 17-A, § 352(1)(F) (2015); MONT. CODE ANN. § 45-2-101(61)(j) (2016); N.H. REV. STAT. ANN. § 637:2(1) (2016); N.J. STAT. ANN. § 2C:20-1(g), (i) (West 2016); OHIO REV. CODE ANN. § 2901.01(A)(10)(a), (b) (West 2017); UTAH CODE ANN. § 76-6-401(1) (West 2017).

³⁹ See DEL. CODE ANN. tit. 11, § 857(9) (2016); IDAHO CODE ANN. § 18-2402(8) (West 2016); 720 ILL. COMP. STAT. ANN. 5/15-1 (West 2016); MD. CODE ANN., CRIM. LAW § 7-101(i)(2)(xii) (West 2016); MINN. STAT. ANN. § 609.52(1)(1), (6) (West 2016); N.Y. PENAL LAW § 155.00(1), (6) (McKinney 2016).

⁴⁰ For a discussion of the original but now repealed New Jersey statute, see Rainer M. Kohler, *Trade Secrets*, 7 B.C. INDUS. & COM. L. REV. 324 (1966).

⁴¹ N.J. STAT. ANN. § 2A:119-5.2(c) (repealed 1978) (added pursuant to 1965 N.J. Laws ch. 52, § 2(c)).

⁴² N.J. STAT. ANN. § 2C:20-1(i) (West 2016).

⁴³ See, e.g., ME. REV. STAT. ANN. tit. 17-A, § 352(1)(F) (2016); N.H. REV. STAT. ANN. § 637:2(1) (2017); OHIO REV. CODE ANN. § 2901.01(A)(10)(a) (West 2017), (b); UTAH CODE ANN. § 76-6-401(1) (West 2017).

⁴⁴ See e.g., ALA. CODE § 13A-8-10.4(a)(4) (2016); ARK. CODE ANN. § 5-36-101(12) (West 2016); FLA. STAT. ANN. § 812.081(1)(c) (West 2016); 18 PA. STAT. AND CONS. STAT. ANN. § 3930(e) (West 2016); TENN. CODE ANN. § 39-14-138(a)(4) (West 2016); TEX. PENAL CODE ANN. § 31.05(a)(4) (West 2015).

⁴⁵ UTSA § 1(4). According to this section:

UTSA provides a nonexclusive list of different types of information that qualify for protection including: formulas, patterns, compilations, programs, devices, methods, techniques, and processes. The definition is expansive, and courts have applied it broadly.⁴⁶ In addition, the information must have economic value, either actual or potential, from not being known or readily ascertainable by competitors. In essence, this means that the information affords the business a competitive advantage because it is unknown to, or not easily discoverable by, competitors.⁴⁷ Finally, the owner of the economically valuable information must have taken reasonable steps to keep it secret. The reasonableness of the steps taken is relative to such facts as the nature of the information, the type of precautions taken, and their cost.⁴⁸

Some states with specific trade secret theft statutes that started with the New Jersey definition later amended their statutes to adopt the UTSA definition,⁴⁹ as did at least one MPC state.⁵⁰ Other states with specific trade secret theft statutes adopted the New Jersey definition.⁵¹ Many newer enactments of criminal trade secret theft statutes started with the UTSA definition.⁵²

The third common trade secret definition originated in New York's general larceny statute.⁵³ This definition for "secret scientific material" refers to:

"'Trade secret' means information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy"

⁴⁶ See, e.g., *Camp Creek Hosp. Inns v. Sheraton Franchise Corp.*, 139 F.3d 1396 (11th Cir. 1998) (hotel prices and occupancy rates); *Pioneer Hi-Bred Int'l v. Holden*, 35 F.3d 1226 (8th Cir. 1994) (seed genetic codes); *Sun Media Sys. v. KDSM, LLC*, 564 F. Supp. 2d 946 (S.D. Iowa 2008) (advertising method); *Mabrey v. Sandstream, Inc.*, 124 S.W.3d 302 (Tex. App. 2003) (negative information); *Minuteman, Inc. v. Alexander*, 434 N.W.2d 773 (Wis. 1989) (customer lists).

⁴⁷ See, e.g., *Metallurgical Indus., Inc. v. Fourtek, Inc.*, 790 F.2d 1195 (5th Cir. 1986); *Uncle B's Bakery, Inc. v. O'Rourke*, 938 F. Supp. 1450 (N.D. Iowa 1996); *Stampede Tool Warehouse, Inc. v. May*, 651 N.E.2d 209 (Ill. App. Ct. 1995).

⁴⁸ See, e.g., *Rockwell Graphic Sys., Inc. v. DEV Indus., Inc.*, 925 F.2d 174 (7th Cir. 1991); *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 825 F. Supp. 340 (D. Mass. 1993); *Aries Info. Sys., Inc. v. Pacific Mgmt. Sys. Corp.*, 366 N.W.2d 366 (Minn. Ct. App. 1985).

⁴⁹ See CAL. PENAL CODE § 499c(a)(9) (West 2016); GA. CODE ANN. § 16-8-13(a)(4) (West 2016); OKLA. STAT. ANN. tit. 21, § 1732(B)(c) (West 2016); WIS. STAT. ANN. § 943.205(2)(e) (West 2015).

⁵⁰ See MINN. STAT. ANN. § 609.52(1)(6) (West 2016).

⁵¹ See COLO. REV. STAT. ANN. § 18-4-408(2)(d) (West 2016); OHIO REV. CODE ANN. § 2901.01(A)(10)(a), (b) (West 2017).

⁵² See ARIZ. REV. STAT. ANN. § 13-1820(D) (2016); S.C. CODE ANN. § 39-8-20(5) (2016).

⁵³ N.Y. PENAL LAW § 155.30(3) (McKinney 2016).

[A] sample, culture, micro-organism, specimen, record, recording, document, drawing or any other article, material, device or substance which constitutes, represents, evidences, reflects, or records a scientific or technical process, invention or formula or any part or phase thereof, and which is not, and is not intended to be, available to anyone other than the person or persons rightfully in possession thereof or selected persons having access thereto with his or their consent, and when it accords or may accord such rightful possessors an advantage over competitors or other persons who do not have knowledge or the benefit thereof.⁵⁴

Some states adopting the MPC adopted a similar, if not identical, definition.⁵⁵ A few states with specific trade secret theft statutes started with this, or a similar, definition.⁵⁶ To date, very few states utilize the New York definition.

Almost all of the state criminal trade secret theft statutes appear to be based on the criminal law concept of larceny as to the nature of the acts prohibited and their attendant mental state. At common law, larceny involved the taking and carrying away of the personal property of another with the intent to permanently deprive the owner of that property.⁵⁷ The MPC classifies larceny as a form of theft, which occurs when a person unlawfully takes or exercises control over the movable property of another with intent to deprive him or her of the property.⁵⁸ Movable property, for purposes of the MPC, refers to “property the location of which can be changed . . . and documents although the rights represented thereby have no physical location.”⁵⁹ The common heritage that state criminal trade secret theft statutes share with the crime of larceny is particularly reflected in the mental state required for conviction. In one form or another, the statutes require proof of the defendant’s intent to deprive the trade secret owner of his or her property.⁶⁰

⁵⁴ N.Y. PENAL LAW § 155.00(6) (McKinney 2016) (added pursuant to 1967 N.Y. Laws ch. 791, § 20).

⁵⁵ See IDAHO CODE ANN. § 18–2402(8) (West 2016); 720 ILL. COMP. STAT. ANN. 5/15-1 (West 2016); MD. CODE ANN., CRIM. LAW § 7-101(i)(2)(xii) (West 2016); MONT. CODE ANN. § 45-2-101(61)(j) (2016).

⁵⁶ See CONN. GEN. STAT. ANN. § 53a-124(a) (West 2016); N.C. GEN. STAT. ANN. § 14-75.1 (West 2016).

⁵⁷ See WAYNE R. LAFAVE, CRIMINAL LAW §§ 19.3-.5 (5th ed. 2010) (explaining the elements of larceny).

⁵⁸ MPC § 223.2(1).

⁵⁹ *Id.* § 223.0(4).

⁶⁰ The MPC provides that acting “intentionally” or “with intent” means to act “purposely.” *Id.* § 1.13(12). A person acts “purposely” if “it is his conscious object to engage in conduct of that nature or to cause such a result” and “he is aware of the existence of such circumstances or he believes or hopes that they exist.” *Id.* § 2.02(2)(a). In the context of theft, the MPC defines “deprive” as “to withhold property of another permanently or for so extended a period as to appropriate a major portion of its economic value.” *Id.* § 223.0(1). The element of intent to permanently deprive distinguishes theft from the mere unauthorized use of another’s property without such intent.

B. Application of the Definitions

Overall, the New Jersey and UTSA definitions share important elements. Both protect information, although the New Jersey definition is narrower as it is limited to scientific and technical information.⁶¹ As a result, purely business or commercial information, such as marketing strategies, customer lists, and financial data, as well as negative know-how, may not be covered by state statutes that use the New Jersey definition.⁶² In addition, both definitions require that the information have value, though they define value differently. The UTSA measure of value is more specific in that it expressly ties the value of the information to it being unknown or not readily discoverable by competitors, rather than to some other measure of value such as the amount spent in creating the trade secret. Finally, both definitions specify that the owner of the information must employ measures to maintain the secrecy of the information, with the UTSA definition specifying that such measures need only be reasonable under the circumstances.

By contrast, the New York definition is the most restrictive of the three. The definition in the New York statute is limited to “secret scientific material” only, and that material must exist or be recorded in physical form. The statute does not specify that an owner is obligated to take steps to maintain secrecy. Additionally, the New York definition measures the worth of the information to those in lawful possession with the advantage it provides to them over competitors and others. In sum, it is likely that the narrower scope of information protected by the New Jersey and New York definitions limits their usefulness and deterrent effects.

To put the New York, New Jersey, and UTSA definitions into perspective, consider the following two hypotheticals. In the first hypothetical, Andy was employed as an executive by Karat-Bote, an executive search firm. Karat-Bote’s core asset was Findum, an internal database of corporate executives, which it used to generate source lists of candidates for a search. Findum was housed on Karat-Bote’s confidential computer network. Employees had access through unique passwords, and they were subject to confidentiality agreements. Andy decided to resign and secretly launch his own search firm with other Karat-Bote employees. Before departing, he downloaded source lists from Findum.

For this first hypothetical, liability exists under the UTSA-based statutes, but not under statutes that follow the general New York or New Jersey definitions. The information Andy took was source lists of potential job candidates. Liability under the New Jersey definition is limited to

⁶¹ One commentator has postulated that this narrow scope of protection is due to an outdated belief that trade secrets in scientific and technical information are more valuable or easier to prove than business and commercial information. *See* Lederman, *supra* note 10, at 962.

⁶² In this respect, the New Jersey definition is also narrower than that of the EEA, which expressly includes financial, business, and economic information, in addition to scientific, technical, and engineering information. *See supra* note 18.

scientific and technical information,⁶³ while liability under the New York definition is even more limited to secret scientific material.⁶⁴ Neither definition encompasses lists of potential job candidates. By contrast, the UTSA definition includes information broadly, so a list of potential job candidates is covered. In addition to the definition, both the actus reus and mens rea elements in the statute must be met. Under statutes that define theft as simply “taking” the information, the actus reus is satisfied in this hypothetical.⁶⁵ The mens rea requirement is satisfied under any standard—even a strict mental state standard of intent to deprive—because the facts indicate that he intended to take the information.

In the second hypothetical, Alex was employed as an executive at Platnifem, a financial services firm. At Platnifem, he and his team developed code for Platform, which is Platnifem’s valuable high frequency trading platform. Platnifem protects Platform’s source code by employee confidentiality agreements and does not license the software or make it publicly available. Zeta, a competitor of Platnifem, hired Alex as an executive to design Zeta’s new high frequency trading platform. Before departing, Alex copied and transferred Platform source code and algorithms to a server in Germany, later downloaded this code at home onto a flash drive and laptop, and then took these to use in his work at Zeta.

Liability would exist under UTSA-based statutes and statutes that follow the New Jersey definition for this second hypothetical. Alex transferred lines of source code to a German server and subsequently downloaded it to his home computer, other computers, and a flash drive. Unlike the information taken in the first hypothetical, lines of source code fall within the New Jersey definition covering scientific and technical information as well as the broad UTSA definition covering merely information. The New York definition is only partially satisfied in this hypothetical. The New York statute applies to “secret scientific material” only, and it requires that the material exist or be recorded in physical form.⁶⁶ When the lines of source code are transferred to the German server, there is no recording in a physical form; the definition is thus not satisfied. However, when the source code is downloaded to a computer or flash drive, it is placed in physical form, which satisfies the definition. Again, both the actus reus and mens rea in the statute must also be proved. Under statutes that prohibit the taking of the information, the actus reus is satisfied. Even under statutes that require a strict mental state standard of intent to deprive, the mens rea requirement is established because his objective was to transfer the information.

⁶³ See *supra* note 39 and accompanying text.

⁶⁴ See *supra* note 48 and accompanying text.

⁶⁵ See *infra* note 116 and accompanying text.

⁶⁶ See *supra* note 48 and accompanying text.

IV. A Detailed Look at State Criminal Trade Secret Theft Statutes

The three definitions discussed above provide a common basis for further comparison of the statutes. This section will first examine general theft statutes modeled after the MPC and compare how each statute provides for trade secret protection—specifically whether they provide protection for intangible property or trade secrets directly. This first part will focus only on those states that do not have a separate specific trade secret theft statute. States that have a separate specific trade secret theft statute will be discussed in the second part of this section. The second part will compare how each statute defines trade secrets. Although there is no uniformity among state criminal trade secret theft statutes, they all require proof of an unlawful act by the defendant. As such, merely learning of or memorizing another’s trade secret, without further action to appropriate or reveal it, is not trade secret theft.⁶⁷

A. The MPC Approach to Prosecuting Trade Secret Theft in Those States Without a Specific Trade Secret Theft Statute

General theft statutes modeled after the MPC are used in several states to prosecute offenders for trade secret theft. A review of these statutes reveals three major categories based on how each state addresses trade secret status in relation to the MPC’s protection for intangible property. The first category of states has maintained protection for intangible property without specific reference to trade secrets. Alaska,⁶⁸ Iowa,⁶⁹ Kansas,⁷⁰ Kentucky,⁷¹ Missouri,⁷² Nebraska,⁷³ North Dakota,⁷⁴ Oregon,⁷⁵ and South Dakota⁷⁶ fall within this category. A summary of each of these state statutes is found in Table 1. Although these states share this common property definition, the acts prohibited by the statutes are varied.⁷⁷ There is also variation in the mental states

⁶⁷ In civil actions for misappropriation involving defendants who memorized another’s trade secrets, the act of memorization is followed by the defendant’s unauthorized *use* of the information. *See, e.g., Al Minor & Assoc., Inc. v. Martin*, 881 N.E.2d 850 (Ohio 2008) (defendant memorized former employer’s trade secret customer list and then used it to solicit those customers); *See also Stampede Tool Warehouse, Inc. v. May*, 651 N.E.2d 209, 209 (Ill. App. Ct. 1995); *Ed Nowogroski Ins., Inc. v. Rucker*, 971 P.2d 936 (Wash. 1999).

⁶⁸ ALASKA STAT. ANN. § 11.81.900(52) (West 2016).

⁶⁹ IOWA CODE ANN. § 702.14 (West 2016).

⁷⁰ KAN. STAT. ANN. § 21-5111(w) (West 2016).

⁷¹ KY. REV. STAT. ANN. § 514.010(6) (West 2016).

⁷² MO. ANN. STAT. § 570.010(19) (West 2016).

⁷³ NEB. REV. STAT. ANN. § 28-509(5) (West 2016).

⁷⁴ N.D. CENT. CODE ANN. § 12.1-23-10(7) (West 2016).

⁷⁵ OR. REV. STAT. ANN. § 164.005(5) (West 2016).

⁷⁶ S.D. CODIFIED LAWS § 22-1-2(35) (2016).

⁷⁷ ALASKA STAT. ANN. § 11.46.100(1) (West 2016); IOWA CODE ANN. § 714.1(1) (West 2016); KAN. STAT. ANN. § 21-5801(a) (West 2016); KY. REV. STAT. ANN. § 514.030(1)(a) (West 2016); MO. ANN.

required. For example, Oregon and Alaska require a mental state of intent to deprive or appropriate, whereas most of the remaining states in this category require only an intent to deprive, with Kansas requiring the stricter mental state of intent to permanently deprive.⁷⁸

Whether the offense is either a felony or misdemeanor in these states generally depends on the value of the property stolen.⁷⁹ In Kentucky, the demarcating value is \$500; Alaska, Iowa, North Dakota, Oregon, and South Dakota require a value greater than \$1,000.⁸⁰ Kansas and Nebraska require a value of at least \$1,500.⁸¹ There is no value distinction in Missouri, which classifies the crime as a felony.⁸² The penalties vary in these states as well. Punishment terms vary widely from a maximum of forty-three months to fifteen years, with fines ranging from \$5,000 to \$300,000.⁸³

STAT. § 570.030(1)(1); NEB. REV. STAT. ANN. § 28-511(1); N.D. CENT. CODE ANN. § 12.1-23-02; OR. REV. STAT. ANN. § 164.015; S.D. CODIFIED LAWS § 22-30A-1.

⁷⁸ See ALASKA STAT. ANN. § 11.46.100(1); IOWA CODE ANN. § 714.1(1); KAN. STAT. ANN. § 21-5801(a); KY. REV. STAT. ANN. § 514.030(1)(a); MO. ANN. STAT. § 570.030(1)(1); NEB. REV. STAT. ANN. § 28-511(1); N.D. CENT. CODE ANN. § 12.1-23-02(1); OR. REV. STAT. ANN. § 164.015; S.D. CODIFIED LAWS § 22-30A-1.

⁷⁹ The MPC notes that larceny was formerly treated as a felony. See MPC § 223.1 cmt. 2(a).

⁸⁰ ALASKA STAT. ANN. § 11.46.130(a)(1); IOWA CODE ANN. § 714.2(2); KY. REV. STAT. ANN. § 514.030(2)(d); N.D. CENT. CODE ANN. § 12.1-23-05(3); OR. REV. STAT. ANN. § 164.055(1)(a); S.D. CODIFIED LAWS § 22-30A-17.

⁸¹ KAN. STAT. ANN. § 21-5801(b)(3); NEB. REV. STAT. ANN. § 28-518.

⁸² MO. ANN. STAT. § 570.030.

⁸³ ALASKA STAT. ANN. §§ 12.55.035(b), .125; IOWA CODE ANN. § 902.9; KAN. STAT. ANN. §§ 21-6611(a)(2), (3), 21-6804; KY. REV. STAT. ANN. §§ 532.060(2), 534.030(1); MO. ANN. STAT. §§ 558.002(1)(1), 558.011(1); NEB. REV. STAT. ANN. § 28-105(1); N.D. CENT. CODE ANN. § 12.1-32-01; OR. REV. STAT. ANN. §§ 161.605(3), 161.625(1)(d); S.D. CODIFIED LAWS § 22-6-1.

State	Acts Prohibited	Mental State	Classification	Penalties
Alaska	Obtains	Intent to deprive or appropriate	Felony (if property value greater than \$1,000) (misdemeanor if less)	Up to 10 years imprisonment, \$100,000 fine
Iowa	Takes possession or control	Intent to deprive	Felony (if property more than \$1,500) (misdemeanor if less)	Up to 10 years imprisonment, up to \$10,000 fine
Kansas	Obtaining or exerting unauthorized control	Intent to permanently deprive	Felony (if value is at least \$1,000); misdemeanor if less	Up to 43 months imprisonment, up to \$300,000 fine
Kentucky	Takes or exercises control	Intent to deprive	Felony (if property value is \$500 or more; misdemeanor if less)	5 - 10 years imprisonment, \$1,000 - \$10,000 fine
Missouri	Appropriates property	Purpose to deprive	Felony	Up to 15 years imprisonment and up to \$5,000 fine or twice the amount of financial gain to the offender (if value \$25,000/more)
Nebraska	Takes or exercises control	Intent to deprive	Felony (if property value is \$1,500 or more) (misdemeanor if less)	Up to 4 years imprisonment, \$25,000 fine
North Dakota	Knowingly takes, exercises unauthorized control over, makes unauthorized transfer of interest in	Intent to deprive	Felony (if property value more than \$1,000) (misdemeanor if less)	Up to 5 years imprisonment, \$10,000 fine
Oregon	Takes, appropriates, obtains, withholds, or receives	Intent to deprive or appropriate	Felony (if property value is \$1,000 or more) (misdemeanor if less)	Up to 5 years imprisonment, \$125,000 fine, or both
South Dakota	Takes or exercises unauthorized control	Intent to deprive	Felony (if property value is more than \$1,000) (misdemeanor if less)	Up to 10 years imprisonment, \$20,000 fine

Table 1: Protection for Intangible Property without Specific Reference to Trade Secrets

In the second category, several MPC states have taken an additional step to clarify criminal coverage for trade secret theft by including trade secrets along with intangible property within the definition of property. Within this group of states, Maine,⁸⁴ New Hampshire,⁸⁵ New Jersey,⁸⁶ and Utah⁸⁷ follow the New Jersey definition of trade secrets. Montana⁸⁸ follows the

⁸⁴ ME. REV. STAT. ANN. tit. 17-A, § 352(1)(F) (2015).

⁸⁵ N.H. REV. STAT. ANN. § 637:2(I) (2016).

⁸⁶ N.J. STAT. ANN. § 2C:20-1(g), (i) (West 2016).

⁸⁷ UTAH CODE ANN. § 76-6-401(1) (West 2016).

⁸⁸ MONT. CODE ANN. § 45-2-101(61)(j) (2016).

New York trade secrets definition while Ohio⁸⁹ and Indiana⁹⁰ follow the UTSA definition. Nevada does not provide a definition for trade secrets, but merely defines intangible property to include trade secrets.⁹¹ Each of these states prohibits exercising control over the trade secrets.⁹² Montana additionally prohibits the use, concealment, or abandonment of a trade secret, while Nevada prohibits the transfer or use.⁹³ See Table 2 for a comparison.

There is some overlap in the mental states required for the actions. New Hampshire, New Jersey, Ohio, and Utah require a mental state of purpose to deprive.⁹⁴ However, Montana requires a mental state of purposely or knowingly,⁹⁵ while Indiana, Maine, and Nevada require an intent to deprive.⁹⁶ Classification of the offense as either a felony or misdemeanor varies based on the value of the property stolen. The value that distinguishes the classification in Maine, New Hampshire, and Ohio is \$1,000; Montana and Utah require a value greater than \$1,500, and Indiana requires at least \$750.⁹⁷ At the lower end of the spectrum, New Jersey requires a value over \$500,⁹⁸ while Nevada requires only \$650.⁹⁹ There is variation in the

⁸⁹ OHIO REV. CODE ANN. §§ 1333.61(D), 2901.01(A)(10)(a), (b) (West 2016).

⁹⁰ IND. CODE ANN. §§ 24-2-3-2, 35-31.5-2-253(a)(9) (West 2016).

⁹¹ NEV. REV. STAT. ANN. § 205.08255 (West 2015).

⁹² IND. CODE ANN. § 35-43-4-2(a); ME. REV. STAT. ANN. tit. 17-A, § 353(1)(A) (2015); MONT. CODE ANN. § 45-6-301(1); NEV. REV. STAT. ANN. § 205.0832(a); N.H. REV. STAT. ANN. § 637:3(I) (2016); N.J. STAT. ANN. § 2C:20-3(a) (West 2016); OHIO REV. CODE ANN. § 2913.02(A); UTAH CODE ANN. § 76-6-404.

⁹³ MONT. CODE ANN. § 45-6-301(1)(b); NEV. REV. STAT. ANN. § 205.0832(b).

⁹⁴ N.H. REV. STAT. ANN. § 637:3(I); N.J. STAT. ANN. § 2C:20-3(a); OHIO REV. CODE ANN. § 2913.02(A); UTAH CODE ANN. § 76-6-404.

⁹⁵ MONT. CODE ANN. § 45-6-301(1). According to the MPC, a “person acts knowingly with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.” MPC § 2.02(2)(b).

⁹⁶ IND. CODE ANN. § 35-43-4-2(a); ME. REV. STAT. ANN. tit. 17-A, § 353(1)(A); NEV. REV. STAT. ANN. § 205.0832(a).

⁹⁷ IND. CODE ANN. § 35-43-4-2(a)(1); ME. REV. STAT. ANN. tit. 17-A, § 353(1)(B)(4); MONT. CODE ANN. § 45-6-301(8); N.H. REV. STAT. ANN. § 637.11(II)(a); OHIO REV. CODE ANN. § 2913.02(A); UTAH CODE ANN. § 76-6-412. Maine has abolished traditional felony/misdemeanor classifications, but previously recognized that every offense punishable by imprisonment in the state prison was a felony. All imprisonments for one year or more are in the state prison. *See State v. Vainio*, 466 A.2d 471, 472 n.1 (Me. 1983).

⁹⁸ N.J. STAT. ANN. §§ 2C:20-2(b) (value classification), :43-1(b) (misdemeanors as fourth degree offenses).

⁹⁹ NEV. REV. STAT. ANN. § 205.0835(2).

penalties as well. The maximum imprisonment terms range from six months to fifteen years, and fines range from \$4,000 to \$150,000.¹⁰⁰

State	Acts Prohibited	Mental State	Classification	Penalties
Indiana	Knowingly or intentionally exerts unauthorized control	Intent to deprive	Felony (if property value is \$750 or more)	Up to \$10,000 fine, up to 8 years imprisonment
Maine	Obtains or exercises unauthorized control	Intent to deprive	Felony (if property value more than \$1000)	Up to 10 years imprisonment and up to \$20,000 fine
Montana	Obtains or exerts unauthorized control; and uses, conceals, or abandons	Purposely or knowingly	Felony (if property value exceeds \$1,500)	Up to 10 years imprisonment, \$50,000 fine, or both
Nevada	Knowingly controls, converts, transfers, uses	Intent to deprive	Felony (if value is \$650/more)	1 – 10 years imprisonment, up to \$10,000 fine
New Hampshire	Obtains or exercises unauthorized control	Purpose to deprive	Felony (if property value is more than \$1,000)	Up to 15 years imprisonment, no more than \$4,000 fine
New Jersey	Takes or exercises unlawful control	Purpose to deprive	Felony (if value is more than \$500)	Up to 10 years imprisonment, \$150,000 (or double amount of monetary loss to the victim, whichever is higher)
Ohio	Knowingly obtain or exert control	Purpose to deprive	Felony (if property value is \$1,000 or more)	6 months – 11 years imprisonment, up to \$20,000 fine
Utah	Obtains or exercises unauthorized control	Purpose to deprive	Felony (if property value exceeds \$1,500)	Up to 15 years imprisonment and \$10,000 fine (2d degree felony); up to 5 years imprisonment and \$5,000 fine, (3d degree felony)

Table 2: Protection for Intangible Property with Specific Reference to Trade Secrets

A third category of MPC states have simply elected to remove any reference to intangible property in favor of trade secrets. Within this group of states, Idaho,¹⁰¹ Illinois,¹⁰² and Maryland,¹⁰³ follow the New York trade secret definition.¹⁰⁴ By contrast, Delaware¹⁰⁵ and

¹⁰⁰ IND. CODE ANN. §§ 35-50-2-6, -7; ME. REV. STAT. ANN. tit. 17-A, §§ 1252(2), 1301(1-A); MONT. CODE ANN. § 45-6-301(8)(c); NEV. REV. STAT. § 193.130(2); N.H. REV. STAT. ANN. § 651:2(IV)(a), (c); N.J. STAT. ANN. §§ 2C:-43-3, -6(a); OHIO REV. CODE ANN. §§ 2929.14, .18; UTAH CODE ANN. §§ 76-3-203, -301.

¹⁰¹ IDAHO CODE ANN. § 18-2402(8) (West 2016).

¹⁰² 720 ILL. COMP. STAT. ANN. 5/15-1 (West 2016).

¹⁰³ MD. CODE ANN., CRIM. LAW § 7-101(i)(2)(xii) (West 2016).

¹⁰⁴ N.Y. PENAL LAW § 155.00(1), (6) (McKinney 2016).

¹⁰⁵ DEL. CODE ANN. tit. 11, § 857(9) (West 2016).

Minnesota¹⁰⁶ follow the UTSA definition. However, Washington does not define trade secrets within its criminal statute.¹⁰⁷ Although there is some commonality in the trade secret definition among these statutes, the acts prohibited are varied.¹⁰⁸ For a comparison, see Table 3.

Even with these variations, most of these states require a mental state of intent to deprive with or without an intent to appropriate.¹⁰⁹ Illinois additionally requires a mental state of “knowingly” while Minnesota requires “intentionally.”¹¹⁰ In some instances, the definition of deprive can include making unauthorized use or copies of trade secrets.¹¹¹ Most of these states classify the theft as a felony if a certain value for the property is involved, although Minnesota and New York classify theft of trade secrets as a felony regardless of value.¹¹² Idaho and Maryland require the value of the property to exceed \$1,000 and Delaware requires a value of \$1,500.¹¹³ Illinois requires the value of the property exceed \$500 while Washington sets the value at \$750.¹¹⁴ The penalties vary in these states as well, with the maximum imprisonment ranging from one to twenty-five years and the maximum fines ranging from \$10,000 to \$30,000.¹¹⁵

¹⁰⁶ MINN. STAT. ANN. § 609.52(1)(1), (6) (West 2016).

¹⁰⁷ WASH. REV. CODE ANN. § 9A.56.010(6) (West 2016).

¹⁰⁸ DEL. CODE ANN. tit. 11, § 841(a); IDAHO CODE ANN. § 18-2403(1) (West 2016); 720 ILL. COMP. STAT. ANN. 5/16-1(a) (West 2016); MINN. STAT. ANN. § 609.52(2)(8); MD. CODE ANN., CRIM. LAW § 7-104(a); N.Y. PENAL LAW § 155.05(1); WASH. REV. CODE ANN. § 9A.56.020(1)(a).

¹⁰⁹ DEL. CODE ANN. tit. 11, § 841(a); IDAHO CODE ANN. § 18-2403(1); 720 ILL. COMP. STAT. ANN. 5/16-1(a); MD. CODE ANN., CRIM. LAW § 7-104(a)(1); N.Y. PENAL LAW § 155.05(1); WASH. REV. CODE ANN. § 9A.56.020(1)(a).

¹¹⁰ 720 ILL. COMP. STAT. ANN. 5/16-1(a); MINN. STAT. ANN. § 609.52(2)(a)(8).

¹¹¹ *See, e.g.*, WASH. REV. CODE ANN. § 9A.56.010(6).

¹¹² MINN. STAT. ANN. § 609.52(3)(2); N.Y. PENAL LAW § 155.30(3).

¹¹³ DEL. CODE ANN. tit. 11, § 841(c)(1); IDAHO CODE ANN. § 18-2407(1)(b); MD. CODE ANN., CRIM. LAW § 7-104(g)(1)(i).

¹¹⁴ 720 ILL. COMP. STAT. ANN. 5/16-1(b)(4); WASH. REV. CODE ANN. § 9A.56.040.

¹¹⁵ DEL. CODE ANN. tit. 11, §§ 841(d), 4205; IDAHO CODE ANN. § 18-2408(1); 730 ILL. COMP. STAT. ANN. 5/5-4.5-25, -30, -35, -40, -45, -50; MD. CODE ANN., CRIM. LAW, § 7-104(g)(1); MINN. STAT. ANN. § 609.52(3)(2); N.Y. PENAL LAW §§ 70.00(2), 80.00(c); WASH. REV. CODE ANN. § 9A.20.021(1).

State	Acts Prohibited	Mental State	Classification	Penalties
Delaware	Takes, exercises control over or obtains	Intent to deprive or appropriate	Felony (if property value is \$1,500 or more)	Up to 25 years imprisonment (based on felony class), fine (as deemed appropriate), plus restitution
Idaho	Wrongfully takes, obtains, or withholds	Intent to deprive or appropriate	Felony (if property value is more than \$1,000)	Up to 20 years imprisonment, \$10,000 fine, or both
Illinois	Obtains or exerts unauthorized control	Knowingly and with intent to deprive	Felony (if value exceeds \$500)	Up to \$25,000 fine, between 1 – 7 years imprisonment (based on felony class), plus restitution
Maryland	Willfully or knowingly obtain or exert unauthorized control	Intent to deprive	Felony (if property value is \$1,000 or more)	Up to 25 years imprisonment, \$25,000 fine, or both (depending on property value)
Minnesota	Converts to own use a trade secret article (knowing it is trade secret of another)	Intentionally	Felony (if property is a trade secret)	Up to 10 years and a fine of not more than \$20,000
New York	Wrongfully takes, obtains, or withholds	Intent to deprive or appropriate	Felony (if property value exceeds \$1,000)	Up to 25 years imprisonment and \$30,000 fine (based on felony class)
Washington	Wrongfully obtain or exert unauthorized control	Intent to deprive	Felony (if property value exceeds \$750)	Up to 10 years imprisonment, \$20,000 fine, or both (based on felony class)

Table 3: Protection for Trade Secrets Only

The language prohibiting certain acts in these MPC based statutes may limit their applicability. For instance, many of the statutes proscribe the unauthorized “taking” of the intangible or trade secret.¹¹⁶ The intangible nature of trade secrets is important for purposes of defining “taking” under these statutes. Since intangible property lacks a physical form, taking for purposes of intangible property should presumably include means by which one can gain possession or control of nonphysical property. For example, if a trade secret is stored on a hard drive, and the defendant uploads a copy to a cloud but does not otherwise physically remove the flash drive or

¹¹⁶ IOWA CODE ANN. § 702.14 (West 2016); KY. REV. STAT. ANN. § 514.010(6) (West 2016); NEB. REV. STAT. ANN. § 28-509(5) (West 2016); N.D. CENT. CODE ANN. § 12.1-23-10(7) (West 2016); OR. REV. STAT. ANN. § 164.005(5) (West 2016); S.D. CODIFIED LAWS § 22-1-2(35) (2016).

the data stored on it, has he or she “taken” the trade secret? Or is it sufficient that the defendant has made a copy of the data and relocated it elsewhere to constitute a taking?¹¹⁷

Unfortunately, there are no cases from these MPC states that address this issue. This dilemma can be solved if the statute also proscribes unauthorized “obtaining” of the trade secret since this term is often defined to mean bringing “about a transfer or purported transfer of a legal interest in property.”¹¹⁸ This would likely include electronic transfer of a copy.¹¹⁹ Some statutes also prohibit the exercising of “unauthorized” control over the trade secret.¹²⁰ Under these statutes, it is unlikely that a defendant who is permitted access to a trade secret formula but, without authorization, discloses it to the public or to a competitor could be charged under these provisions.¹²¹

B. States With Separate Specific Trade Secret Theft Provisions

As an alternative to using a modified MPC approach to punish trade secret theft, several states elected to enact separate trade secret theft provisions to specifically address this crime.¹²² Similar to the modified MPC states that specifically addressed trade secrets, the same three distinct definitions arose within states that enacted separate trade secret theft provisions. These include the New Jersey, New York, and the UTSA definitions discussed above.

¹¹⁷ In defining the crime of larceny, for instance, this term was generally understood to involve the defendant physically seizing the property and moving it. The MPC, however, equates “taking” with wrongfully exercising dominion or control over another’s property. See MPC § 223.2 cmt. 2.

¹¹⁸ MPC § 223.0(5).

¹¹⁹ See, e.g., CONN. GEN. STAT. ANN. § 53a-118(a)(2) (West 2016); ME. REV. STAT. ANN. tit. 17-A, § 352(2) (2015); N.H. REV. STAT. § 637.2(II) (2016); N.J. REV. STAT. § 2C:20-1(f) (West 2016); N.Y. PENAL LAW § 155.00(2).

¹²⁰ E.g., ME. REV. STAT. ANN. tit. 17-A, § 353(1)(A); N.H. REV. STAT. ANN. § 637:3(I); UTAH CODE ANN. § 76-6-404 (West 2016).

¹²¹ The extent to which criminal laws are to be strictly construed may further constrain the application of these statutes. The doctrine of strict construction of criminal statutes in favor of the defendant is famously illustrated in the Supreme Court decision of *McBoyle v. United States*, 283 U.S. 25 (1931) (holding that an airplane was not a “self-propelled vehicle not designed for running on rails” as used in the National Motor Vehicle Theft Act).

¹²² Interestingly, both Michigan and New Mexico had state specific trade secret theft statutes, which were repealed when the states enacted the Uniform Trade Secrets Act. MICH. COMP LAWS § 752.771 was repealed by 1998 Mich. Pub. Acts No. 448 (effective Dec. 30, 1998). N.M. STAT. ANN. § 30-16-24 was repealed by 1989 N.M. Laws Ch. 156, § 8 (effective June 16, 1989).

Alabama,¹²³ Arkansas,¹²⁴ Colorado,¹²⁵ Florida,¹²⁶ Pennsylvania,¹²⁷ Tennessee,¹²⁸ and Texas¹²⁹ enacted separate trade secret theft statutes centered on the New Jersey definition. The acts prohibited by these statutes are also quite similar to what was seen in the original New Jersey trade secret theft statute.¹³⁰ See Table 4 for the specific details of these state statutes. The original New Jersey trade secret theft statute punished stealing, embezzling, or making a copy of a trade secret.¹³¹ Each of these states prohibits these actions.¹³² Additionally, Alabama, Arkansas, Colorado, and Texas prohibit disclosure of the trade secret.¹³³ Furthermore, Pennsylvania includes a higher offense if the trade secret is taken by force, which is similar to the original New Jersey trade secret theft statute.¹³⁴

There is also some variation in the mental states required. Similar to the original New Jersey trade secret theft statute, Colorado, Florida, Pennsylvania, and Tennessee require an intent to deprive, withhold, or appropriate the trade secret with Arkansas only requiring a purpose to deprive.¹³⁵ Alabama and Texas only require that the act be committed knowingly.¹³⁶ Pennsylvania additionally requires willfulness and maliciousness for the higher offense.¹³⁷ In contrast to the majority of MPC-based state statutes, classification of the crime as a felony or misdemeanor is generally not tied to the value of the property, with Tennessee as the lone

¹²³ ALA. CODE § 13A-8-10.4(a)(4) (2016).

¹²⁴ ARK. CODE ANN. § 5-36-101(12) (West 2016).

¹²⁵ COLO. REV. STAT. ANN. § 18-4-408(2)(d) (West 2016).

¹²⁶ FLA. STAT. ANN. § 812.081(1)(c) (West 2016).

¹²⁷ 18 PA. STAT. AND CONS. STAT. ANN. § 3930(e) (West 2016). The Pennsylvania statute includes a defense related to whether the information is unknown or not readily ascertainable by others. *Id.* § 9390(d) (“It shall be a complete defense . . . for the defendant to show that information comprising the trade secret was rightfully known or available to him from a source other than the owner of the trade secret.”).

¹²⁸ TENN. CODE ANN. § 39-14-138(a)(4) (West 2016).

¹²⁹ TEX. PENAL CODE ANN. § 31.05(a)(4) (West 2015).

¹³⁰ See *infra* notes 130–31 and accompanying text.

¹³¹ N.J. STAT. ANN. § 2A:119-5.3 (repealed 1978).

¹³² ALA. CODE § 13A-8-10.4(b) (2016); ARK. CODE ANN. § 5-36-107(a) (West 2016); COLO. REV. STAT. ANN. § 18-4-408(1) (West 2016); FLA. STAT. ANN. § 812.081(2) (West 2016); 18 PA. STAT. AND CONS. STAT. ANN. § 3930(a), (b); TENN. CODE ANN. § 39-14-138(b)(1); TEX. PENAL CODE ANN. § 31.05(b)(1).

¹³³ ALA. CODE § 13A-8-10.4(b); ARK. CODE ANN. § 5-36-107(a); COLO. REV. STAT. ANN. § 18-4-408(1); TEX. PENAL CODE ANN. § 31.05(b)(3).

¹³⁴ 18 PA. STAT. AND CONS. STAT. ANN. § 3930(a)(1).

¹³⁵ ARK. CODE ANN. § 5—36—107(a); COLO. REV. STAT. ANN. § 18-4-408(1); FLA. STAT. ANN. § 812.081(2); 18 PA. STAT. AND CONS. STAT. ANN. § 3930(b); TENN. CODE ANN. § 39-14-138(b).

¹³⁶ ALA. CODE § 13A-8-10.4(b); TEX. PENAL CODE ANN. § 31.05(b).

¹³⁷ 18 PA. STAT. AND CONS. STAT. ANN. § 3930(a)(2).

exception.¹³⁸ Most of these state statutes treat trade secret theft as a felony,¹³⁹ although Arkansas and Colorado treat the crime as a misdemeanor.¹⁴⁰ The felony classification states provide for a maximum imprisonment from one to ten years and fines ranging from \$1,000 to \$50,000.¹⁴¹

State	Acts Prohibited	Mental State	Classification	Penalties
Alabama	Steals, makes a copy of a trade secret article, communicates, or transmits	Knowingly	Felony	1 to 10 years imprisonment, \$15,000 fine
Arkansas	Obtains or discloses, makes a copy of trade secret article	Purpose to deprive	Misdemeanor	Up to 1 year imprisonment, \$2,500 fine
Colorado	Steals or discloses, or makes copy of trade secret article	Intent to deprive, withhold, or appropriate	Misdemeanor	6 to 18 months imprisonment, \$500 - \$5,000 fine, or both
Florida	Steals or embezzles, makes copy of trade secret article	Intent to deprive, withhold, appropriate	Felony	Up to 5 years imprisonment and \$5,000 fine
Pennsylvania	By force or violence or putting in fear takes a trade secret article; willfully or maliciously enters building with intent to obtain possession of or access to a trade secret article (2d degree felony); or Obtains possession or access, converts, or makes copy of a trade secret article (3d degree felony)	Intent to deprive, withhold, or appropriate (3d degree felony); willfully and maliciously (2d degree felony)	Felony	Up to 10 years imprisonment, \$25,000 fine (2d degree felony); up to 7 years imprisonment, \$15,000 fine (3d degree felony)
Tennessee	Steals, embezzles, or makes a copy of trade secret article	Intent to deprive, withhold, or appropriate	Felony (if property value is more than \$1,000)	Up to \$50,000 fine, not less than 1 year imprisonment
Texas	Steals, makes a copy of trade secret article, or communicates or transmits trade secret	Knowingly	Felony	2 – 10 years imprisonment, and up to \$10,000 fine

Table 4: States Using the New Jersey Definition

¹³⁸ TENN. CODE ANN. § 39-14-105(a)(2).

¹³⁹ ALA. CODE § 13A-8-10.4(c); FLA. STAT. ANN. § 812.081(2); 18 PA. STAT. AND CONS. STAT. ANN. § 3930(a), (b); TEX. PENAL CODE ANN. § 31.05(c).

¹⁴⁰ ARK. CODE ANN. § 5-36-107(b); COLO. REV. STAT. ANN. § 18-4-408(3)(a).

¹⁴¹ ALA. CODE §§ 13A-5-6(a)(3), -11(a)(3); ARK. CODE ANN. §§ 5-4-201, -401; COLO. REV. STAT. ANN. § 18-1.3-501; FLA. STAT. ANN. §§ 775.082(3)(e), 083(1)(c); 18 PA. STAT. AND CONS. STAT. ANN. §§ 1101, 1103; TENN. CODE ANN. § 40-35-111(b); TEX. PENAL CODE ANN. § 12.34.

Only three states, Connecticut,¹⁴² Massachusetts,¹⁴³ and North Carolina,¹⁴⁴ elected to follow the New York trade secret definition when enacting their separate trade secret theft statutes. Although these states have this common trade secret definition, the acts prohibited by the statutes are varied.¹⁴⁵ See Table 5 for a comparison. The mental states required, however, are similar; all of the statutes require an intent to act even though the specific actions differ.¹⁴⁶ Both Connecticut and North Carolina classify the offense as a felony, while Massachusetts requires the trade secret value to exceed \$250 before the offense is classified as a felony.¹⁴⁷ The maximum imprisonment in these states ranges from five months to twenty years and the fines range from \$5,000 to \$25,000.¹⁴⁸

State	Acts Prohibited	Mental State	Classification	Penalties
Connecticut	Wrongfully takes, obtains, or withholds	Intent to deprive or appropriate	Felony	Up to 20 years imprisonment, up to \$15,000 fine
Massachusetts	Steals, embezzles, converts, secretes, takes, carries away, conceals, copies	Intent to steal or embezzle	Felony	Up to 5 years imprisonment, or by \$25,000 fine and up to 2 years imprisonment
North Carolina	Steals	Intent to deprive	Felony	5 – 20 months imprisonment

Table 5: States Using the New York Definition

¹⁴² CONN. GEN. STAT. ANN. § 53a-124(a) (West 2016).

¹⁴³ MASS. GEN. LAWS ANN. ch. 266, § 30(4) (West 2016).

¹⁴⁴ N.C. GEN. STAT. ANN. § 14-75.1 (West 2016).

¹⁴⁵ CONN. GEN. STAT. ANN. § 53a-119; MASS. GEN. LAWS ANN. ch. 266, § 30(4); N.C. GEN. STAT. ANN. § 14-75.1.

¹⁴⁶ CONN. GEN. STAT. ANN. § 53a-119; MASS. GEN. LAWS ANN. ch. 266, § 30(4). Felonious intent to permanently deprive the owner of his or her property is a requirement for proving larceny in North Carolina. *State v. McCrary*, 139 S.E.2d 739, 740–41 (N.C. 1965).

¹⁴⁷ CONN. GEN. STAT. ANN. § 53a-124(c); MASS. GEN. LAWS ANN. ch. 266, § 30(4); N.C. GEN. STAT. ANN. § 14-75.1.

¹⁴⁸ CONN. GEN. STAT. ANN. §§ 53a-35a, -41; MASS. GEN. LAWS ANN. ch. 266, § 30(4), ch. 274, § 1; N.C. GEN. STAT. ANN. §§ 14-75.1, 15A-1340.17.

Arizona,¹⁴⁹ California,¹⁵⁰ Georgia,¹⁵¹ Louisiana,¹⁵² Oklahoma,¹⁵³ South Carolina,¹⁵⁴ and Wisconsin¹⁵⁵ follow the UTSA definition. Although these states share a similar trade secret definition, there are significant differences in the acts prohibited by the statutes.¹⁵⁶ For a comparison, see Table 6. Arizona and South Carolina have the most overlap in the acts prohibited by the statutes.¹⁵⁷ This is important to note because South Carolina's statute is the most similar of all the states to the EEA.¹⁵⁸ Each of the remaining states, except South Carolina, is alike in the required mental state, requiring, at a minimum, an intent to deprive.¹⁵⁹ Here, the mental states for California, Georgia, Oklahoma, and Wisconsin, which specifically require an intent to deprive, withhold, or appropriate, illustrate their historical reliance on the original New Jersey trade secret theft statute and the New Jersey trade secret definition.¹⁶⁰ The states classify the offense as a felony, although the maximum imprisonment terms and fines vary.¹⁶¹ The maximum imprisonment term in these remaining states ranges from one to ten years and the fines range from \$5,000 to \$150,000.¹⁶²

¹⁴⁹ ARIZ. REV. STAT. ANN. § 13-1820(D) (2016).

¹⁵⁰ CAL. PENAL CODE § 499c(a)(9) (West 2016).

¹⁵¹ GA. CODE ANN. § 16-8-13(a)(4) (West 2016).

¹⁵² LA. STAT. ANN. § 14:67.20(B)(4) (2016).

¹⁵³ OKLA. STAT. ANN. tit. 21, § 1732(B)(c) (West 2016).

¹⁵⁴ S.C. CODE ANN. § 39-8-20(5) (2016).

¹⁵⁵ WIS. STAT. ANN. § 943.205(2)(e) (West 2015).

¹⁵⁶ ARIZ. REV. STAT. ANN. § 13-1820(A) (2016); CAL. PENAL CODE § 499c(b) (West 2016); GA. CODE ANN. § 16-8-13(b); LA. STAT. ANN. § 14:67.20(A); OKLA. STAT. ANN. tit. 21, § 1732(A); S.C. CODE ANN. § 39-8-90(A); WIS. STAT. ANN. § 943.205(1).

¹⁵⁷ ARIZ. REV. STAT. ANN. § 13-1820(A); S.C. CODE ANN. § 39-8-90(A).

¹⁵⁸ S.C. CODE ANN. § 39-8-90(A).

¹⁵⁹ ARIZ. REV. STAT. ANN. § 13-1820(A); CAL. PENAL CODE § 499c(b); GA. CODE ANN. § 16-8-13(b); LA. STAT. ANN. § 14:67.20; OKLA. STAT. ANN. tit. 21, § 1732(A); WIS. STAT. ANN. § 943.205(1).

¹⁶⁰ CAL. PENAL CODE § 499c(b); GA. CODE ANN. § 16-8-13(b); OKLA. STAT. ANN. tit. 21, § 1732(A); WIS. STAT. ANN. § 943.205(1).

¹⁶¹ ARIZ. REV. STAT. ANN. § 13-1820(C); CAL. PENAL CODE § 1170(h); GA. CODE ANN. § 16-8-13(b); LA. STAT. ANN. § 14:2(4); OKLA. STAT. ANN. tit. 21, § 1704; S.C. CODE ANN. § 16-1-20(c); WIS. STAT. ANN. § 943.205(3).

¹⁶² ARIZ. REV. STAT. ANN. §§ 13-702(D), -801(A); CAL. PENAL CODE § 499c(c); GA. CODE ANN. § 16-8-13(b); LA. STAT. ANN. § 14:67.20(C); OKLA. STAT. ANN. tit. 21, § 1705; S.C. CODE ANN. § 39-8-90(A); WIS. STAT. ANN. § 939.50(3)(i).

State	Acts Prohibited	Mental State	Classification	Penalties
Arizona	Takes, transmits, exhibits, conveys, alters, destroys, conceals or uses, make a copy of trade secret article, or receives, purchases or possesses	Intent to deprive or withhold	Felony	2 years imprisonment, up to \$150,000 fine
California	Steals, takes, carries away, uses; fraudulently appropriates a trade secret article; makes copy of trade secret article	Intent to deprive, withhold control, or appropriate	Felony	Up to: 1 year imprisonment, \$5,000 fine, or both
Georgia	Takes, uses, discloses, or makes a copy.	Intent to deprive, withhold, appropriate	Felony (if property value exceeds \$100)	1 – 5 years imprisonment, and fine of \$50,000
Louisiana	Misappropriation or taking	Intent to deprive	Felony	Up to 2 years imprisonment, \$10,000 fine, or both
Oklahoma	Steals or embezzles, make a copy of trade secret article	Intent to deprive, withhold, appropriate	Felony (if property value exceeds \$1,000)	Up to 5 years imprisonment, \$5,000 fine or both
South Carolina	Steals, wrongfully appropriates, takes, carries away, or conceals, or by fraud, artifice, or deception; Wrongfully copies, duplicates, sketches, draws, photographs, downloads, uploads, alters, destroys, photocopies, replicates, transmits, delivers, sends, mails, communicates, or conveys; or Receives, buys, or possesses	Intent to or reason to believe that it will injure trade secret owner and benefit another	Felony	Up to \$ 100,000 fine, 10 years imprisonment, or both
Wisconsin	Takes, uses, transfers, conceals, exhibits, retains possession of trade secret article; obtains title to trade secret property or a copy by deception, false representation, or fraud	Intent to deprive, withhold, or appropriate	Felony	Up to 3½ years imprisonment, \$10,000 fine, or both

Table 6: States Using the UTSA Definition

V. Conclusion

Although the EEA provides for criminal penalties for trade secret theft, federal prosecutors have shown little interest in bringing charges under this statute unless the case involves theft of trade secrets owned by large corporations or economic espionage by agents of a foreign government.

Beyond civil actions for damages and injunctive relief, there is, however, an alternate route for trade secret owners to consider: state criminal trade secret theft statutes. This article has endeavored to shed light on these statutes by detailing the scope of their definitional provisions and comparing the range of their application among the various states.

Although a number of states have enacted criminal trade secret theft statutes to punish trade secret theft, there are important variations in their approaches to addressing this problem. Some statutes expressly apply to trade secrets, while other states include trade secrets or intangibles within the definition of property in their general theft statutes. Among those statutes, the definition of trade secret is often limited to scientific and technical information, which may exclude such information as customer lists, business strategies, and negative know-how. By contrast, those statutes that are modeled on the UTSA are more expansive in their definitional scope. Classification of the offense as a felony or misdemeanor varies among the states, as does the range of sanctions imposed. On the other hand, almost all of the statutes require proof of some form of intent to deprive as the required mental state, with a few states requiring proof that the defendant acted knowingly, which is nearly the same as acting with intent or purpose.¹⁶³

Interestingly, although it has been over 20 years since the EEA was enacted, there has been no move by the states to amend their laws to align them with the EEA. Nevertheless, despite their various differences and limitations, state criminal sanctions have an important role to play in protecting U.S. technology and economic competitiveness. They afford a means of combatting trade secret theft to victim small businesses, especially where the defendant lacks sufficient assets to pay a civil court judgment. Small and medium-sized businesses may find it easier to report trade secret theft and work with local law enforcement authorities than federal prosecutors. More broadly, expanded enforcement of these statutes can serve as an additional deterrent to misappropriation of confidential proprietary information.

¹⁶³ See *supra* notes 65 and 88 and accompanying text.