

Dumpster Diving and Trade Secret Theft

Is Your Company Adequately Protecting Its Trade Secrets?

By Alan J. Ross, Esq.



Editor's Note: This article, commissioned by NAID, is written as an advisory to companies about protecting their trade information. It, therefore, contains a wealth of information for secure destruction services as well.

If your company is like many in the United States today, it doesn't pay a great deal of attention to its trash. Much of the record keeping is done electronically, and paper, whether generated externally or internally, is relegated to the wastebasket when it has served its purpose. At the end of each day, a company employee or maybe a vendor collects the day's accumulation. By the time the sun goes down, the discard from a day in the life of your company has found its way to the dumpster out back – maybe in the parking lot, maybe in an alley. And maybe in your competitor's office.

Dumpster diving is not confined to the homeless and treasure hunters seeking discarded antiques. Corporate espionage is also conducted out of dumpsters, sometimes quite successfully, as, for example, when the diver finds documents containing important trade secrets thoughtlessly thrown into the trash.

That's exactly what happened in the case of *Winne v. Palmer*. Winne sued Palmer for trade secret theft after learning that Palmer was using trade secrets that had been

recovered by a dumpster diver from Winne's trash. What may surprise you is the result of that lawsuit. Palmer sought to throw out the case on the theory that Winne had failed to protect its trade secrets, and the court seemed inclined to do so, responding with two questions. Was the dumpster in an area exclusively under plaintiff Winne's control, or was the dumpster accessible to others? And were Winne's documents shredded? It's clear from the way the court asked the questions that if the dumpster was accessible to others and the documents were not shredded, it was goodbye trade secrets.

The case, which was decided over a decade ago by a Pennsylvania federal court, has been sharply criticized for its failure to take account of and encourage minimum standards of commercial ethics. But only one state – Connecticut — has made dumpster diving illegal in response to the decision, and neither trade secret law nor privacy law, the two areas of law that govern the decision, have changed in any meaningful way since the decision.

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TRADE SECRET LAW

The concept of a trade secret has evolved over the years and is not by any means uniform throughout the country. The Restatement (Third) of Unfair Competition, a compendium of legal principles accepted by the experts and often cited by the courts, defines a trade secret as “any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others.” The key here is the concept of “secret.” It is the trade secret owner’s responsibility to ensure that a trade secret remains secret.

The National Conference of Commissioners on Uniform Laws adopted a similar definition, but one that emphasizes the burden of proof an aggrieved plaintiff confronts in a trade secret case: “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

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reasonable under the circumstances to maintain its secrecy.” Again, the key here is secrecy. The trade secret owner must employ reasonable efforts to maintain secrecy or the trade secrets may be irrevocably lost.

Trade secret law protects an enormous variety of business assets and methods. The only requirements are that the asset or method must provide value to the business, actual or potential competitors must not be aware of it, and the owner of the tool must engage in reasonable efforts to keep those competitors from learning the secret. Trade secrets must in fact be secret, and the trade secret owner must take steps – reasonable steps – to maintain that secrecy.

The problem in the Winne case was secrecy. The court had trouble with Winne’s efforts to maintain that secrecy, particularly the reasonableness of their efforts under the

circumstances. The court observed that secrecy was the single most important factor in the law of trade secrets. Reasonable precautions under the circumstances are required. If owners do not take reasonable precautions, their trade secrets will not be protected, even from a person who uses improper means to obtain them.

The court dealt with Winne’s trade secrets by asking whether Winne had a reasonable expectation of privacy when he placed the trade secrets in the trash. To answer this question, the court turned to privacy law.

THE ROLE OF PRIVACY LAW

The resolution to the issue regarding reasonable expectations of privacy begins with illegal drugs, specifically with the police finding evidence of illegal drugs in the trash. This factual scenario arose in the case of *Greenwood v. California*, which was eventually decided by the U.S. Supreme Court.

After receiving information from a criminal suspect about an impending delivery of illegal narcotics to a home in Laguna Beach, Calif., and receiving complaints from a neighbor of heavy vehicular traffic in front of the home at night, a police investigator conducted surveillance of the home. She confirmed the late-night visits of short duration, and she followed one of the visitors to another home that had been under surveillance for narcotics trafficking. Without obtaining a search warrant, the investigator requested that the trash collector pick up the plastic garbage bags left on the curb in front of the home and turn the bags over to her without mixing their contents with garbage from other houses.

The trash collector complied and, after searching through the trash, the officer found items indicative of narcotics use. The officer then obtained a search warrant based upon the contents of the trash, searched the home and found narcotics. The trial court, however, quashed the subpoena on the theory that the warrantless search of the trash violated the defendant’s Fourth Amendment rights. The case eventually reached the U.S. Supreme Court as *Greenwood v. California*. The Court reversed and held the search to be legal.

The Court left no doubt about where it stood: “The warrantless search and seizure of the garbage bags left at the curb outside the Greenwood house would violate the Fourth Amendment only if respondents manifested a subjective expectation of privacy in their garbage that society accepts as objectively reasonable.” The defendants argued that the trash was placed on the street for collection at a fixed time, and was contained in opaque plastic bags, which the garbage collector was expected to pick up, mingle with the trash of others and deposit at the garbage dump. In other words, the trash was only temporarily on the street, and there was little likelihood that it would be inspected by anyone. The

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question, according to the Court, was whether society was prepared to accept that expectation of privacy as reasonable. The Court held that it was not.

The Court stated, “It is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops and other members of the public.” As if that were not enough, the Court noted that defendants had placed their refuse at the curb for the express purpose of conveying it to the trash collector, who was free to sort through it or permit others, such as the police, to do so, which of course is exactly what occurred. Thus, having deposited their garbage “in an area particularly suited for public inspection and, in a manner of speaking, public consumption, for the express purpose of having strangers take it,” respondents could have had no reasonable expectation of privacy in their discarded trash.

In a moment of humor, the Court suggested that the homeless are not the only people who make use of others’ refuse. The Court cited a nationally syndicated consumer columnist who suggested that apartment dwellers obtain cents-off coupons by befriending the trash handlers in their buildings. The columnist also recounted the tale of “the ‘Rich lady’ from Westmont who once a week puts on rubber gloves and hip boots and wades into the town garbage dump looking for labels and other proofs of purchase” needed to obtain manufacturers’ refunds. While the anecdotes are humorous, the point is well-taken.

For business owners seeking to protect trade secrets, the most significant aspect of the decision may be the Court’s conclusion, which pointed to decisions from the overwhelming majority of state and federal courts. Those decisions have rejected the proposition that a reasonable expectation of privacy exists with respect to trash discarded outside the home.

The law has universally recognized that one’s home is the most private of places and hence the most deserving of protection from intrusion. So, if there is no reasonable expectation of privacy in trash discarded from the home, it is no great leap of logic to reach the same conclusion about one’s place of business.

EFFECT ON TRADE SECRET LAW

As you might expect, the Winne court seized on the Supreme Court’s reasoning about the expectation of privacy

in Greenwood, as well as several other criminal cases that reached the same result, and adopted that reasoning in the trade secret context. The Court stated, “While these are not commercial trade secret cases, it is rather difficult to find that one has taken reasonable precautions to safeguard a trade secret when one leaves it in a place where, as a matter of law, he has no reasonable expectation of privacy from prying eyes.”

Critics of the Winne case have attacked it on two grounds. Some have argued that Winne’s reliance on the Greenwood presumption that there is no expectation of privacy in trash is based upon antiquated notions of the nature and value of trash in the modern business world. Under this line of reasoning, there are two kinds of trash in the world: (1) trash that is abandoned to the world; and (2) trash meant to be kept secret until destroyed. Naturally, trash that contains

trade secrets which may be gleaned from the detritus of modern offices falls into the second category.

A second line of criticism has focused upon the intangible aspects of modern business trash. The fact that our modern economy is supposedly driven more by bits than tangible assets, and these bits, at least the valuable kind, are more likely to be found in business trash, is somehow supposed to cause society to place more value on its trash – valuing trash as we value our homes themselves. One commentator has argued that if the law does not protect trade secrets at all points in the disposal process, businesses will be forced to adopt a separate, private system of waste disposal. Indeed, that is precisely the point.

Neither of these criticisms seems likely to win the day. There are exceptions to every rule, and even the Winne court noted that these cases must be decided on the individual facts of each case. Nonetheless, if in fact there are two kinds of trash, it follows that there are at least two ways to treat that trash. Absent state legislation criminalizing dumpster diving for business espionage purposes, it seems highly unlikely that society is suddenly going to place an increased value on its trash.

Indeed, the overwhelming volume of modern trash, particularly in big cities, is likely to produce exactly the opposite effect. We just want it gone as quickly as possible, and we’re certainly not going to start providing heightened protection for it. The recent approach by Congress and the Federal Trade Commission in dealing with the epidemic of identity theft is illustrative.

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THE FACTA DISPOSAL RULE

It is no secret that the purpose behind dumpster diving is not confined to searching for business trade secrets. Indeed, a much greater problem lies in the use of discarded business records to facilitate identity theft. In 2004, Congress passed the Fair and Accurate Credit Transactions Act (FACTA). Among other things, the Act required the FTC to work with the federal banking agencies and the National Credit Union Administration to enact regulations governing disposal of sensitive information derived from consumer reports.

The FACTA Disposal Rule went into effect in 2005. It requires disposal practices that are reasonable and appropriate to prevent the unauthorized access to – or use of – information in a consumer report. According to the FTC, reasonable measures for disposing of consumer report information could include establishing and complying with policies to: (1) burn, pulverize or shred papers containing consumer report information so that the information cannot be read or reconstructed; (2) destroy or erase electronic files or media containing consumer report information so the information cannot be read or reconstructed; or (3) conduct due diligence and hire a document destruction contractor to dispose of material specifically identified as consumer report information.

Thus, with respect to paper containing consumer report information, the FACTA Disposal Rule provides two possible approaches. A business may burn, pulverize or shred such paper so it cannot be reconstructed. Or it may convey the paper to a document destruction contractor, which in turn will dispose of the paper in such a way – burning, pulverizing or shredding – that it cannot be reconstructed. Moreover, if the latter approach is taken, it is not enough to turn the paper over to the contractor. Businesses must first conduct due diligence sufficient to warrant a belief that the contractor will destroy the paper in a secure way, so there is little chance that the paper will end up in the wrong hands.

The FTC has suggested that such due diligence could include: (1) reviewing an independent audit of a disposal company's operations and/or its compliance with the Rule; (2) obtaining information about the disposal company from several references; (3) requiring that the disposal company be certified by a recognized trade association, such as NAID; and (4) reviewing and evaluating the disposal company's information security policies or procedures. As a practical matter, references should be relatively easy to come by, as should an indication of whether the disposal company is certified by NAID. A review and evaluation of a disposal company's information security policies and procedures seems mandatory.

Several questions must be answered to apply the rules governing FACTA disposal to the trade secret setting. To what extent does any of this apply to disposal of documents that

may contain trade secrets? And, what is required to ensure that a court would find the effort sufficiently reasonable under the circumstances to maintain the secrecy of any trade secrets contained in the documents? In other words, at what point does a business have a reasonable expectation of privacy in trade secrets contained in its trash?

The first question, whether the rules governing FACTA disposal apply to the trade secret setting, is, of course, no – and yes. They don't really apply, but then it should be clear that dumpster diving is a significant risk to every company, and trade secrets taken from your trash may no longer be trade secrets. They're likely gone, because your company has no expectation of privacy in its trash. So, how do you comply with the legal test for protection of your trade secrets – reasonable efforts to maintain secrecy? The FACTA Disposal Rule demands disposal practices that are reasonable and appropriate to prevent the unauthorized access to, or use of, information in a consumer report. The similarity in the standard – reasonableness – cannot be ignored.

Thus, if you want to assure yourself that you have a reasonable expectation of privacy in your business trash – at least that portion of it that might contain your trade secrets – and thus ensure your efforts at protecting your trade secrets are reasonable under the circumstances, you follow the FACTA Disposal Rules. They are congressionally approved for protecting information which Congress has deemed important. That should be sufficient to meet the trade secret standard for protecting the secrecy of your trade secrets.

DISPOSAL CONTRACTS

While many companies opt to do their own document destruction, many others wisely choose to outsource this task. In doing so, the focus must necessarily be on obtaining secure destruction. The company's due diligence in evaluating potential partners in this task must emphasize security and document the company's activities in ensuring that security is maintained. In contracting with a third-party partner, the following must be part of the agreement:

- The document destruction company will comply with all FACTA regulations.
- The document destruction company is a member of NAID and will supply certification to that effect every year in which the contract is in effect.
- The document destruction company will supply a Certificate of Destruction on a periodic basis certifying to the manner in which documents and media were destroyed.
- The document destruction company will provide documentation of an annual audit certifying the methods employed in its document destruction process.

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- The actual steps that the document destruction company will employ in taking possession of your documents, mixing them with other documents to be destroyed, maintaining security until the documents are destroyed, destroying the documents, and disposing of the shredded or burned documents after they have been destroyed.
- Your company has the right to periodically audit the methods employed by the document destruction company.
- If your contractor employs shredding as a document destruction method, insist that the documents be cross-shredded, because software is now available that will take scanned images of the strips and electronically piece them together into a reasonable facsimile of the original document.

CONCLUSION

A company's trade secrets are often its most important asset. You don't want to risk losing them as a result of careless or improper document disposal techniques. With the passage of FACTA and the implementation of the FACTA Disposal Rule by the FTC, the government has essentially dictated the manner in which important information is to be treated when it is placed in the trash and discarded. A quick audit of your company's disposal practices will reveal whether your company's trade secrets are at risk. Implementing the procedures dictated by FACTA will help ensure reasonable steps are taken to ensure the secrecy of your documents.

Alan Ross, Esq. is a partner at *Bricker and Eckler LLP*. He works in the *Cleveland, Ohio, office* and specializes in *intellectual property litigation and transactional law*.

