

IP Law

Prof. Roger Ford
Class 8 – April 8, 2019
Copyrightable subject matter

17 U.S.C. § 102. Subject matter of copyright: In general

(a) **Copyright protection subsists**, in accordance with this title, in **original works of authorship fixed in any tangible medium of expression**, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures and other audiovisual works;
- (7) sound recordings; and
- (8) architectural works.

(b) In no case does copyright protection for an original work of authorship extend to any **idea, procedure, process, system, method of operation, concept, principle, or discovery**, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

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17 U.S.C. § 101. Definitions

* * * “**Pictorial, graphic, and sculptural works**” include two-dimensional and three-dimensional works of fine, graphic, and applied art, photographs, prints and art reproductions, maps, globes, charts, diagrams, models, and technical drawings, including architectural plans. **Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article**, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates **pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article**.

* * * A “**useful article**” is an article having an **intrinsic utilitarian function** that is **not merely to portray the appearance of the article or to convey information**. An article that is normally a part of a useful article is considered a “useful article”. * * *









Question 1. Give the best argument that the Predictim algorithms are trade secrets and the best argument that they are not. Which side is more persuasive?

Question 2. I haven't told you every fact that would weigh in on the question of whether the algorithms are trade secrets. If you were a lawyer representing the departed employees who wanted to prove that they are not valid trade secrets, what facts would you try to find and prove to help your case?

Question 3. If Predictim sues the two departed employees to prevent them from going to work for ZipRecruiter under an inevitable-disclosure theory, who should win? Why? (Assume that *PepsiCo* is good law in their jurisdiction.)

Elements of a claim for misappropriation of trade secrets:

1. There must be information that derives economic value from its secrecy, due to:
 - (i) not being generally known to others who can obtain economic value from its disclosure or use, and
 - (ii) not being readily ascertainable by proper means by those others.
2. The owner must make reasonable efforts, under the circumstances, to maintain its secrecy.
3. The defendant must commit some act of misappropriation.

Is there a trade secret?

Elements of a claim for misappropriation of trade secrets:

1. There must be information that derives economic value from its secrecy, due to:
 - (i) not being generally known to others who can obtain economic value from its disclosure or use, and
 - (ii) not being readily ascertainable by proper means by those others.
2. The owner must make reasonable efforts, under the circumstances, to maintain its secrecy.
3. The defendant must commit some act of misappropriation.

For question 1:

- Is the information valuable?
- Is the information generally known to others?
- Is the information readily ascertainable by proper means?
- Does the owner make reasonable efforts to maintain secrecy?

Note: I have not asked about misappropriation.

For question 2:

- What would tell us if the information is valuable?
- What would tell us if the information is generally known to others?
- What would tell us if the information is readily ascertainable?
- What would tell us if the owner makes reasonable efforts to maintain secrecy?

For question 3:

- Is there a trade secret?
- Would the trade secret inevitably be disclosed if the employees can work for ZipRecruiter?
 - Would the information be useful to ZipRecruiter?
 - Would the employees inevitably disclose it?