

instance, Kaplan Educational Centers filed an action alleging trademark infringement and unfair competition against its competitor, Princeton Review, which had registered an Internet domain name of "Kaplan.com." Kaplan reported that an arbitration panel ruled, in an unreported opinion, that Princeton Review must relinquish all rights in the "Kaplan.com" name and transfer it to Kaplan. Other companies noted in the news that have expressed concern recently about third party domain name registration of their well-known trademarks include Coca Cola, McDonald's, MCI and Hertz.

#### D. TRADE SECRET

Unlike many of the other forms of intellectual property protection previously mentioned, trade secrets are generally protected by state law, not Federal law.<sup>500</sup> Trade secret protection is very limited. A trade secret holder is only protected from unauthorized disclosure and use of the trade secret by others and from another person obtaining the trade secret by some improper means.<sup>501</sup>

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National Information Center (InterNIC). The InterNIC performs this function under a cooperative agreement with the National Science Foundation. Within the context of a prescribed format, the Internet user may register any domain name as long as the identical domain name has not been previously registered with the InterNIC by another party. According to the InterNIC, there is no state or Federal statutory or regulatory authority under which the InterNIC performs this registration function. The InterNIC does not conduct an examination of trademark or other records before registering a domain name. However, the applicant is required to follow a policy relating to assumption of responsibility and to potential conflict resolution. The InterNIC policy is available at URL <http://rs.internic.net>.

<sup>500</sup> Federal law does prohibit the disclosure of confidential information obtained by federal officials in the course of their official duties. *See* 18 U.S.C. § 1905 (1988).

<sup>501</sup> "A trade secret is commonly defined as any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it." RESTATEMENT OF TORTS § 757, Comment b (1939).

There are several factors used to determine if subject matter qualifies as a trade secret. Among the factors considered are the extent of measures taken by the trade secret owner to guard the secrecy of the information and the ease or difficulty with which the information could be properly acquired or duplicated by others.<sup>502</sup> Based on these considerations, the general rule is that subject matter cannot be successfully protected as a trade secret if it is widely distributed. However, if adequate security precautions are taken to ensure that access to the subject matter being distributed is treated as secret, the subject matter may still be considered a trade secret.

Whether trade secret owners distribute their trade secrets through the NII will largely depend on the extent that they believe that the secrecy of the trade secret will not be compromised by such a distribution. Consequently, if the NII is going to be used as a tool for disseminating trade secret information the NII must be equipped with adequate security measures to ensure that trade secrets distributed through the NII will remain secret.<sup>503</sup>

In addition to the concerns regarding security precautions, issues of jurisdiction may also arise when the NII is used to transmit trade secrets. As trade secrets are generally protected by state law, determining which state's law should control in a trade secret dispute may become an important choice of law issue in the NII. This choice of law issue, however, is no more problematic than those issues presently associated with the distribution of trade secrets and can be adequately resolved by the choice of law rules presently codified in state law.

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<sup>502</sup> *Id.* The trade secret owner may communicate the trade secret to others provided that those to whom the trade secret is communicated pledge not to reveal the trade secret to others. *Id.*

<sup>503</sup> See discussion of methods of protection for material distributed through the NII *infra* pp. 183-200.

To some degree, whether trade secret owners distribute their trade secrets through the NII may also depend on the type of information products and services being disseminated. For instance, it has been suggested that the most common way to protect software is through trade secret protection.<sup>504</sup> Unlike most trade secret information, computer programs can be copied and used without the copier ever understanding or viewing the information in a comprehensible form. Although the trade secrecy problems associated with computer programs are not unique to the NII, the capabilities of the NII may cause these problems to become more prevalent.

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<sup>504</sup> See *CONTU Final Report* at 127.

