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## TRADE SECRETS IN THE CLOUD

Paul J. Tauber  
Taglaw -- May 6, 2014

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## OVERVIEW

- Overview of Cloud Computing
- Overview of Trade Secrets
- Protection of Trade Secrets
- Suggestions to Protect Trade Secrets in the Cloud

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## The Cloud

### BRIEF OVERVIEW OF CLOUD COMPUTING

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### WHAT IS CLOUD COMPUTING?

- Generally means the delivery of on-demand resources, services or information over a digital network (usually the Internet)
- Creates potential for increased operational capabilities by improving accessibility, sharing, management and storage of electronic data in a cost efficient manner
- The New Outsourcing

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### TYPES OF CLOUD SERVICES

- Content as a Service (CaaS) – delivers content to users
  - Examples: Amazon, iTunes
- Software as a Service (SaaS) – provides access to software over the internet
  - Examples: Google apps, Gmail
- Platform as a Service (PaaS) – delivers a platform (cloud operating system) via the internet
  - Example: Google Cloud, Amazon Web Services
- Infrastructure as a Service (IaaS) – allows customers to utilize computer resources, such as servers, storage and firewall protection
  - Examples: Box, Dropbox

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## TYPES OF CLOUD SERVICES

- **Public Cloud:** computing environment in which an organization uses computing resources provided *externally*, i.e., outside of the organization, by third parties. Generally what we think of as the "cloud".
- **Private Cloud:** computing environment in which an organization (or even a closed consortium of allied organizations) provides and manages a proprietary arrangement of computing resources *in-house*, not "Publicly".
- **The Hybrid Cloud:** computing environment in which an organization provides and manages some of its computing resources *in-house*, while other resources are provided externally.

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## BENEFITS OF CLOUD COMPUTING

- **Scalability:** resources and services can be quickly increased or decreased to meet business demands
- **Cost Effectiveness** – reduces operational costs by outsourcing certain IT functions to third party cloud service provider ("CSP")
- **Data Sharing** – improves information sharing and management capabilities
- **Accessibility** – employees can collaborate and work remotely

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## RISKS OF USING THE CLOUD

- Information stored in the cloud may be susceptible to theft, misappropriation and disclosure
- **Risks include:**
  - Hackers, data mining
  - Corporate espionage
  - Inadvertent disclosure by current employees
  - Theft by former employees
  - Reliability of cloud provider
  - Corporate compliance

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## TRADE SECRETS

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## DEFINITION OF TRADE SECRETS

- Definitions vary but under US law, a trade secret is defined as information which derives independent economic value from not being publicly known and for which reasonable measures are taken to protect the information (18 U.S.C. Section 1839(3)(A), (B) (1996))
- Unlike patent and copyright protections, which provide owners with certain legal rights only after disclosure (to the Patent and Trademark Office and Copyright Office, respectively), “[w]hether the information sought to be protected qualifies as a trade secret focuses fundamentally on the *secrecy* of such information.” *Thermadyne Food Serv. Prods., Inc. v. McDonald’s Corp.*, 940 F. Supp. 1300, 1304 (N.D. Ill. 1996) (emphasis by court)

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## PROTECTION OF TRADE SECRETS

- Information is only protectable as a trade secret if reasonable security measures are used to protect the secrecy or confidentiality of the information
- Customary methods include strictly limiting the number of people who know or have access to the trade secret, physical protections for the information, encryption, and contractual restrictions
- Once information becomes known, it no longer qualifies for protection as a trade secret

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## TYPES OF TRADE SECRETS

- Trade Secrets may include:
  - Technical Information – designs and patterns (for specialized equipment), processes and formulas (e.g. to manufacture drugs, food, advanced materials), computer software (programs or source code)
  - Business Information - customer lists, financial information (prior to public release), cost and pricing information, market analyses and forecasts, personnel information (e.g. identity of key employees and their compensation)

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## TRADE SECRETS IN JEOPARDY

- Trade secrets are vulnerable in the cloud
- Storing trade secrets in the cloud potentially adds an additional layer of risk to protecting confidential/proprietary information as a trade secret.
- However, mere storage in the cloud not sufficient to lose trade secret protection

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## INCREASED RISKS

- All software systems are vulnerable to hackers and corporate espionage
- Often, a greater number of employees have access to cloud services compared to internally-controlled systems or physical files
- Without adequate data security, departing employees at all levels in the company may take commercially sensitive information to a competitor
- BYOD (“bring your own device”) policies, combined with general employee mobility in the technology sector

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## PROTECTION OF TRADE SECRETS

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## TRADE SECRET LITIGATION

- Trade secret litigation is unpredictable and costly particularly costly due to the need for forensic experts
- Most litigation is focused on whether “reasonable measures” have in fact been taken
- Courts have not provided clear measures of what will be deemed “reasonable” for protecting trade secrets in the cloud

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## REASONABLE STEPS

- In evaluating whether reasonable steps have been taken have generally focused on whether the following have been done:
  - Limiting who has access to trade secrets.
  - Requiring third parties with access to trade secrets to sign confidentiality agreements
  - Requiring employees to sign nondisclosure agreements (NDAs) and participate in training and exit interviews
- Affixing confidentiality labels to trade-secret documents and files

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## REASONABLE STEPS CONT'D...

- Enforcing known violations of confidentiality agreements
- Taking prompt action to halt any public exposure of trade secrets, such as by sending cease-and-desist letters or initiating litigation

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## TRADE SECRET CASES IN THE CLOUD

- *Zynga Inc. v. Alan Patmore et al.* (Oct. 2012) – departing employee transferred 760 confidential files, including game design and strategy info, to a personal Dropbox account
  - Zynga obtained a temporary restraining order against Patmore and subsequently added Patmore's new employer Kixeye to the lawsuit
  - Case settled in early 2013
- *SanDisk Corp. v. SK Hynix, Inc.* (March 2014) – former SanDisk employee allegedly stole a large number of files from SanDisk's research database while working on a SanDisk/Toshiba joint venture, and took the files to SK Hynix. Documents were distributed among SK Hynix employees containing the legend "SanDisk/Toshiba confidential"

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## SUGGESTIONS TO PROTECT TRADE SECRETS IN THE CLOUD

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## SUGGESTIONS

- Identify what trade secrets are in the cloud and how that information is used, stored and accessed
- Review and understand the CSP's terms of service
- Seek contractual terms obligating the CSP to protect confidential information and restricting use and access to data
- Understand CSP's security management systems
- Perform routine audits to monitor compliance with confidentiality obligations and security systems
- Electronic tagging of trade secret information coupled with data segregation
- Limit access to authorized users only
- Electronic encryption of data

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## SUGGESTIONS CONT'D...

- Regularly train employees on data company's protection policies
- Establish controls designed to limit departing employees' access to company information
- Establish robust onboarding procedures to negate the appearance of collusion with new hires who may possess data from a former employer
- Process and procedures regarding access and passwords
- Review financial strength of CSP

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## TERMS OF SERVICE COMPARISON

- Dropbox: Access to stored information is very limited:

"To be clear, aside from the rare exceptions we identify in our Privacy Policy, no matter how the Services change, we won't share your content with others, including law enforcement, for any purpose unless you direct us to."

"We may disclose to parties outside Dropbox files stored in your Dropbox and information about you that we collect when we have a good faith belief that disclosure is reasonably necessary to (a) comply with a law, regulation or compulsory legal request; (b) protect the safety of any person from death or serious bodily injury; (c) prevent fraud or abuse of Dropbox

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## TERMS OF SERVICE COMPARISON CON'T...

- Amazon and Microsoft: Access and use of stored information is boarder:
- “We may use, access, and retain Your Files in order to provide the Service to you and enforce the terms of the Agreement, and you give us all permissions we need to do so.”
- “When you upload your content to the services, you agree that it may be used, modified, adapted, saved, reproduced, distributed, and displayed to the extent necessary to protect you and to provide, protect and improve Microsoft products and services.”

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## TERMS OF SERVICE COMPARISON CON'T...

- Apple's rights are the broadest:

“You acknowledge and agree that Apple may, without liability to you, access, use, preserve and/or disclose your Account information and Content to law enforcement authorities, government officials, and/or a third party, as Apple believes is reasonably necessary or appropriate, if legally required to do so or if we have a good faith belief that such access, use, disclosure, or preservation is reasonably necessary to: (a) comply with legal process or request; (b) enforce this Agreement, including investigation of any potential violation thereof; (c) detect, prevent or otherwise address security, fraud or technical issues; or (d) protect the rights, property or safety of Apple, Coblentz Patch Duffy, a third party, or the public as required or permitted by law.

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## OTHER IMPORTANT CLOUDY CONSIDERATIONS

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## SENSITIVE INFORMATION

- Sensitive Customer or Employee Information - different laws may be implicated depending on the nature of data being stored
- Examples:
  - Sarbanes Oxley – imposes various controls over how financial information is stored, retained and monitored
  - HIPAA – imposes various technical requirements on the storage of protected health information
  - Gramm-Leach-Bliley – addresses treatment of personal data in banking and insurance industries
  - Export Control

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## Thank you!

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## OTHER IMPORTANT CLOUDY CONSIDERATIONS

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## Thank you!

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## SPAM Light: an overview of CASL Canada's Anti-Spam Legislation

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## The Act



Not reviewing provisions relating to altering transmission data or installing computer programs

Effective date is 1 July, 2014

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## Who does CASL affect?

- Anyone who sends commercial electronic messages (CEMs) to, from or in Canada
- CEM - any electronic message that encourages participation in a commercial activity, regardless of any expectation of profit
- Tech neutral
  - Applies to emails, text messages, social media etc
- Unless exempt, you must have consent (express or implied)
- 2 categories of exemptions
  - Exempt from content and consent
  - Exempt from consent

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## But why should we care? - the penalties



- Fines
  - up to \$1 million per individual
  - up to \$10 million per organization
- In 2017 private right of action
  - i.e. you can be sued

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## To whom will the penalties apply?



- The individual or organization sending the CEM
- Officers and directors
- Employers liable for violations by employees or agents
- NOTE: due diligence is a defence
  - document your processes

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## CEM itself



- Mandatory content includes
  - Name, telephone number & email or web address of sender, affiliates & beneficiaries
  - Physical mailing address (correct for at least 60 days after the message)
  - Unsubscribe mechanism

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## Unsubscribe Mechanism



- Must be able to be “readily performed”
  - accessed easily and without delay
  - simple, quick and easy to use
- Honour opt out or unsubscribe “without delay”
  - no longer than 10 business days

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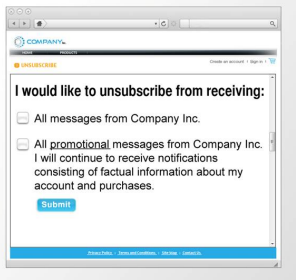
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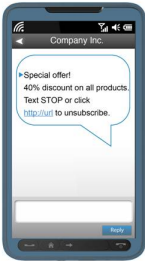

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## Exceptions

Consent & special content don't apply if CEM:

- is sent to one with a personal relationship
- factors considered include:
  - had direct, voluntary, 2 way communications
  - sharing of interests, experiences, opinions and info
  - frequency of communications
  - length of time since the communication
  - have you met in person?

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## Exceptions

Consent & Special Content Requirements  
(cont.)

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- sent to one with a family relationship
  - related by marriage, common law partnership, or legal parent-child relationship; &
  - with direct, voluntary, 2 way communication
- solely an inquiry or application regarding recipient's existing commercial activities
- between employees, reps, consultants, franchisees of an organization re the organization's activities
- sent to enforce a right
- sent by a charity AND primary purpose is fund raising
- ...

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## Exceptions

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- Consent requirements don't apply if CEM merely:
  - provides a requested quotation
  - facilitates, completes or confirms commercial transaction that recipient previously agreed to enter
  - provides warranty, recall or safety info about a purchase
  - provides info about existing employment relationship or related benefits

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## Exceptions

Consent Requirements (cont.)

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- First CEM to contact after referral
  - Referrer has existing business, existing non-business, family or personal relationship; and
  - CEM discloses full name of referrer; and
  - States CEM is sent as a result of the referral
- CEM sent to a listed foreign state AND conforms to that state's laws

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So what does this mean?

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### Meet Bob!



- Bob runs a make your own wine establishment and thinks I may be interested in the service

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- Does Bob require my consent to email me about it if:
  - He is my brother?
    - Not a "family relationship"
    - Is it a "personal relationship"?
      - Direct, voluntary, 2-way communications; and
      - Look at relevant factors

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- Does Bob require my consent if:
  - He is my friend?
    - Is it a “personal relationship”?
  - He is my boss?
    - Does it relate to the organization’s activities?

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## Express Consent

- A CEM asking for consent is still a CEM
  - consent is required to send it
- Can be oral if verified by a third party or recorded
- Must not bundle consent with terms & conditions
- Must be opt in NOT opt out

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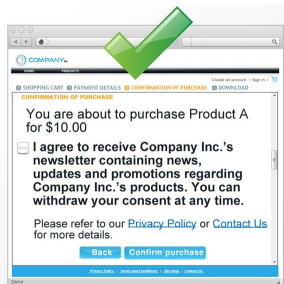
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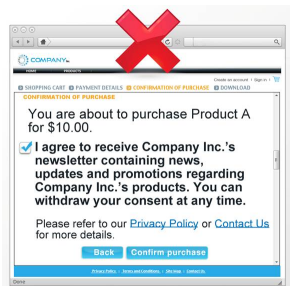
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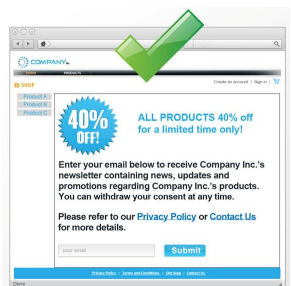
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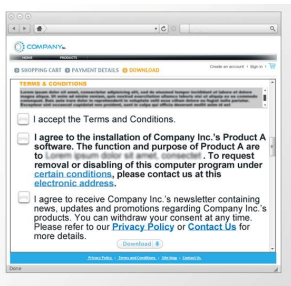
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## Implied Consent

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- Existing business relationship
  - Purchased services within the past 2 years
  - An enquiry within the past 6 months ...
- Existing non-business relationship if in the last 2 years
  - A donation or gift to or volunteer work for a charity or political party; or
  - Membership in a “club”, “association” or “voluntary organization”

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## Implied Consent – Transitional Provisions

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- If an existing business or existing non-business relationship; and
- Your relationship includes CEMs then
- Consent is implied for 3 years

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## Bob the winemaker

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- What if we had exchanged emails regarding winemaking in the last year?
  - Is it within the transition period (3 years)?
  - Did I make an enquiry less than 6 months ago?

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## What steps should businesses take?



- Take note of the dates
  - 1 July 2014
  - 3 year transition period
- Take note of what CEMs are used and how
- Take note of contacts
  - Who fits in which categories?
    - Friends/family/existing relationships...

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## What steps should businesses take (cont'd)



- Educate staff
- Put processes in place
  - E.g. track those who opt out and honour their requests
- Due diligence is a defence
- Wash, rinse, repeat
  - Don't become complacent once we are compliant

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## Questions & Answers



- Thank you
- For further information:
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  - 902-460-3413

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