

**THE THIRD PARTY PROBLEM:  
Possible Justifications for Protecting Information Outside of a Direct Relationship**

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**ABSTRACT**

A lot of attention has been paid in recent years to the question whether intellectual property (patents, copyrights, trademarks, and trade secrets) and other forms of information are property. To many owners and creators of information, the characterization of information as property provides the moral and legal imperative for its protection. However, property law has its limits. Thus, merely characterizing information as property does not answer the question whether such characterization provides a viable cause of action against a person who is alleged to be wrongfully possessing or using information. Additionally, a property characterization, alone, does not explain why information owners need more protection than is already provided to them under current law. This article transcends the property/not property debate to focus instead on what seems to be at the heart of the information industry's interest in greater protection for information: curing what I refer to as "the third party problem."

Currently, information owners can use a combination of legal doctrines – principally copyright, trade secret, and contract law – to protect information that they voluntarily choose to share with another. However, none of these bodies of law provide absolute protection, particularly with respect to information that falls into the hands of a third party; i.e., a person with whom the information owner does not have a direct relationship. To the extent information is protected by copyright law, information owners enjoy the greatest level of protection because third parties can be sued for direct copyright infringement or based upon principles of vicarious liability, contributory infringement, or inducement. Trade secret law provides lesser protection for information that falls into the hands of third parties because a claim of trade secret misappropriation is usually dependent upon the existence of a relationship between the trade secret owner and the alleged misappropriator. Third parties to such a relationship can only be held liable for trade secret misappropriation if they "knew or should have known" of the second party's misappropriation. Contract law, while extremely useful in filling gaps in protection that exist under copyright and trade secret law, provides the least possible protection vis-à-vis third parties due to the well-established rule that only parties who are in privity are bound by a contract.

The question addressed by this article is: Given the incomplete solutions to the third party problem that are provided by copyright, trade secret, and contract law, should information owners be given additional means of protecting their information and, if so, why? To answer this question, the article focuses on the public policy rationales that underlie existing doctrines of third party liability. It begins with a brief overview of the existing means of protecting information with particular emphasis on the policy reasons behind the limitations that are placed on such protection. Obviously, any effort to expand

the protection that is currently provided for information must consider why such protection is limited and whether there is a sufficient public policy basis for altering such limits.

As is discussed in the final section of this article, the challenge for information owners who want additional solutions to the third-party problem is to articulate a sufficient rationale for such protection while respecting the important public policy that underlies the limits that exist upon the scope of copyright, trade secret, and contract law. Merely labeling information as a form of property does not go far enough. Instead, they must either explain how and why the acts of a third-party constitute actionable independent wrongs or identify ancillary benefits to society that make the imposition of third-party liability without fault worthwhile.