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Who Are These People? New Generation Employees and Trade Secrets

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WHO ARE THESE PEOPLE? NEW GENERATION EMPLOYEES AND TRADE SECRETS

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I. INTRODUCTION

Pair Charged with Theft of Trade Secrets from Harvard Medical School; L.A. Man Sentenced for Stealing Trade Secrets Pertaining to ‘Smart Card’ Technology; Former IT Director of Silicon Valley Company Pleads Guilty to Theft of Trade Secrets; Silicon Valley Engineer Indicted for Stealing Trade Secrets.

These headlines exemplify the state of trade secret misappropriation over the last few years. From students to engineers, from Massachusetts to California, from universities to high technology companies, trade secret misappropriation touches virtually every sector of our country and our economy. In the process, trade secrets have become a vulnerable asset to businesses large and small, and protecting them poses many challenges. While the stories behind the headlines often include varying conditions with underlying themes of betrayal, disloyalty, and greed, another pattern appears to be emerging. The defendants in all of the cases in the above headlines are between 19 to 37 years old. It is this observation which inspired this Article.

Traditional approaches to examining the efficacy of trade secret protection in the workplace are often focused on technological and process based measures. This Article offers a novel approach by focusing on the people. In particular, it examines the characteristics of those workers who make up the largest segment of today’s workforce. Namely, those labeled Generation X and Generation Y (collectively referred to and coined in the Article as “New Generation Employees.”) Unlike the Baby Boomers, these New Generation Employees are more likely to change jobs quickly, protect and prioritize their self-interests, expect immediate gratification and rewards from employers, start their own companies, and use technology with great ease.

The attitudes and behaviors of these New Generation Employees fit the pattern of circumstances that are often present in trade secret misappropriation cases. This forecasts a possible upward trend in trade secret misappropriation as New Generation Employees outnumber others in the workforce. If one were to review the misappropriation narratives in

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1 See notes and discussion infra at notes 111 to 116.


3 See discussion infra at notes 111 to 116.
most trade secret cases, they are replete with themes of job dissatisfaction, job hopping, reactions to changes in corporate ownership, and the use of computer technology to store or transmit trade secrets. These are the very circumstances that parallel the attitudes and behaviors of New Generation Employees. In addition, a review of the federal criminal trade secret cases indicate an overrepresentation of New Generation Employees as defendants, suggesting that a similar trend may be reflected in the wider group of civil trade secret cases.

This Article also, for the first time, applies sociological theories about employee theft to trade secret misappropriation. It integrates the attitudes and behaviors of New Generation Employees with principles of equity theory, work climate theory, and societal change theory in a framework that (a) offers some insights into what motivates employees to misappropriate trade secrets and (b) offers corresponding general preventive measures to protect trade secrets in the workplace.

Finally, the Article considers the broader usefulness of using this kind of socio-intellectual property approach beyond the workplace and beyond trade secret law. For example, changes in attitude about intellectual property in general might have implications for protection, compliance, and enforcement norms in the United States. Moreover, the approach may also be of benefit in attempts to address the frustrations United States companies experience in dealing with the foreign enforcement of their intellectual property rights in developing countries.

Part II of the Article provides a relevant overview of trade secret law, especially as it relates to the employment relationship. Part III examines the New Generation Employees and examines the characteristics of Generation X and Generation Y. Part IV discusses how these characteristics are reflected in the trade secret case law and the significance of that observation. Part V introduces a connection between sociological theories of employee theft and trade secret law, and applies those theories using New Generation Employees as the medium. Part VI suggests that there are broader benefits to the field of intellectual property in applying the socio-intellectual property approach. Finally, the Article concludes in Part VII.
II. TRADE SECRET LAW OVERVIEW

A trade secret can be any business information that is secret and derives value from its secrecy. There is no federal statutory law governing trade secrets; they are protected by state law. Most states have adopted the Uniform Trade Secrets Act ("UTSA"), which provides some uniformity in defining trade secrets and trade secret misappropriation. The states that have not adopted the UTSA tend to rely on common law based on the Restatement of Torts.

Under the UTSA, virtually anything of competitive value to a company can be a trade secret as long as it is kept secret. Accordingly, a wide range of confidential business information including customer lists, sales records, pricing information, and customer information can be protectable trade secrets. Some jurisdictions have also granted trade secret protection to secret contract terms, marketing strategies, and industry studies. Further, under the UTSA, a trade secret does not need to be in use to be protected, and negative information comprised of failed research or an ineffective

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4 UTSA § 1.


8 See PepsiCo v. Redmond, 54 F.3d 1262, 1265-70 (7th Cir. 1995) (finding strategic financial and marketing information protected trade secrets under UTSA); ConAgra, Inc. v. Tyson Foods, Inc., 30 S.W.3d 725, 728-30 (Ark. 2000) (recognizing that Tyson’s business information concerning production, marketing strategies, pricing programs and contract terms were protectible trade secrets under UTSA, but refusing to grant such protection for failure to maintain their secrecy).

9 A negative trade secret is the knowledge of what not to do or what doesn’t work, a lesson learned from a certain process or research and development effort that failed. See James Pooley, Trade Secrets 4.02 [3] (1997).
process is also protected.¹⁰

Trade secret misappropriation¹¹ occurs when a trade secret is acquired by a person who knows (or has reason to know) that the trade secret was obtained through improper means. “Improper means” under the UTSA includes, but is not limited to, theft, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means.¹² Thus, a wide range of activities by employees can constitute misappropriation. An employer who has been harmed may have misappropriation claims, including civil claims and criminal penalties against the employee. However, these remedies may be unsatisfactory and unable to fully redress the destructive harm resulting from the loss of a trade secret. When a trade secret is disclosed and becomes generally known to

¹⁰ UTSA § 1 (defining misappropriation); see Roger M. Milgrim, Milgrim on Trade Secrets § 1.01[2] (1997) (discussing the UTSA).

¹¹ The UTSA defines “misappropriation,” as:

(i) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or

(ii) disclosure or use of a trade secret of another without express or implied consent by a person who:

(A) used improper means to acquire knowledge of the trade secret; or

(B) at the time of disclosure or use, knew, or had reason to know, that his knowledge of the trade secret was:

(I) derived from, or through, a person who had utilized improper means to acquire it;

(II) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or,

(III) derived from, or through, a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or

(C) before a material change of his position knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

Uniform Trade Secrets Act § 2(a), 14 U.L.A. 449.

others, it loses its status as a trade secret, and cannot be reclaimed. In addition, most employees, for instance, do not have deep pockets, limiting the amount of financial restitution available to cure the misappropriation. An even more serious problem is that if the trade secret information passes into the hands of a third party, such as a competitor or the press, the trade secret owner may not have any recourse against the third party or any ability to stop the dissemination or use.  

A. Trade Secrets and the Employment Relationship

An employer has a strong interest in protecting its valuable trade secrets, and trade secret theft continues to be a growing problem for businesses. Trade secret protection is often justified on the grounds that it would be unfair for one party to become enriched at the expense of another through theft of the latter's secrets. Employers also rely on the protections provided under trade secret law as an incentive to invest the resources to create trade secrets, and to share those secrets with employees.

Courts have consistently recognized an employer's right to protect and preserve trade secrets, confidential, and proprietary information. An employer has a recognized business interest in protecting trade secrets disclosed in confidence to an employee during the course of his employment even where there is no enforceable restrictive covenant.

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13 See generally Elizabeth A. Rowe, Saving Trade Secret Disclosures on the Internet through Sequential Preservation, 42 WAKE FOREST L. REV. 1, 14-17 (2007).


16 See id.; see also Paul Goldstein, Copyright, Patent, Trademark and Related State Doctrines 153 (4th ed. 1997).

between the parties. This is especially true where the employee was placed in a position of trust and responsibility by the employer.

Ultimately, it is intimate knowledge of a company's inner workings that is of value to a competitor. That value to a competitor helps make the information a trade secret, and "[a] trade secret once lost, is lost . . . forever." A former employee may use the general knowledge, skills, and experience acquired during his employment, even in competition with his former employer. This principle effectuates the public interest in labor mobility, promotes the employee's freedom to practice a profession, and freedom of competition. However, the former employee may not use the confidential or trade secret information of the former employer.

B. The Confidential Nature of the Employment Relationship

The general rule is that the employee stands in a confidential relationship with his or her employer with respect to the employer’s confidences. An employee’s duty not to disclose the secrets of her employer may arise from either an express contract or may be implied from the confidential relationship existing between the employer and employee, and an employee may not use this information to the detriment of her employer. The courts have made clear that this protection applies to an

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18 See, e.g., Stevens & Co., 71 A. at 805.

19 See D.C. Wiring, 1993 WL 818562, at 2 ("Courts have confirmed that businesses may protect confidential information by means of a covenant not to compete."); see also New England Canteen Serv., 363 N.E.2d at 528 (holding that an employer's interest in trade secrets, confidential data, and goodwill are entitled to protection).

20 FMC Corp. v. Taiwan Tainan Giant Indus. Co., 730 F.2d 61, 63 (2d Cir. 1984).

21 See Restatement (Third) of Unfair Competition 42 cmt. d (1995); CVD, Inc. v. Raytheon Co., 769 F.2d 842, 852 (1st Cir. 1985) (citations omitted).

22 CVD, Inc. v. Raytheon Co., 769 F.2d 842, 852 (1st Cir. 1985) (citations omitted).

23 See id. 42 cmts. b-c.

24 See E.I DuPont de Nemours Powder Co. v. Masland, 244 U.S. 100, 102 (1917) (defendant [employee] stood in confidential relations with the [former employer]).

employer’s trade secrets even after the employee no longer works for the employer. Some courts view the employee’s duty of confidentiality to the employer as a fiduciary obligation. While working for the employer, the employee owes a duty of loyalty to the employer and consequently must not behave in any manner that would be harmful to the employer.

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26 Air Prods. & Chem., Inc. v. Johnson, 296 Pa. Super. 405, 417, 442 A.2d 1114, 1120 (1982) (“[A]n ex-employer can reasonably rely upon the obligation of its employees not to disclose trade secrets about which they obtained knowledge while working in a confidential relationship with that employer.”); L.M. Rabinowitz Co. v. Dasher, 82 N.Y.S.2d 431, 435 (Sup. Court . N.Y. County 1948 (“It is implied in every contract of employment that the employee will hold sacred any trade secrets or other confidential information which he acquires in the course of his employment.”)

27 See, e.g., Churchill Communications Corp. v. Demyanovich, 668 F. Supp. 207, 211 (E.D. N.Y. 1987)(even in the absence of a restrictive covenant an employee’s use of an employer’s trade secrets can be enjoined since it violates a fiduciary duty owed to the employer); Rubner v. Gursky, 21 N.Y.S.2d 558, 561 (Sup. Court . N.Y. County 1940) (fiduciary duty not to disclose implied in all employment contacts).

28 See Restatement (Second of Agency § 387 (1958) (“Unless otherwise agreed, an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency.”); Royal Carbo Corp. v. Flameguard, Inc., 229 A.D.2d 430, 645 N.Y.S.2d 18, 19 (2d Dep’t 1996)(duty of loyalty breached where employee surreptitiously organized competing entity and utilized former employer’s customer lists); see also Employee Duty of Loyalty (Arnold H. Pedowitz et al. Eds., 1995) (providing a comprehensive state-by-state survey).
III. UNDERSTANDING THESE NEW GENERATION EMPLOYEES

As the Baby Boomers\(^\text{29}\) retire,\(^\text{30}\) a new crop of workers have replaced them. These New Generation Employees span two generations, Generation X and Generation Y, and they constitute the majority of the workforce in the United States today.\(^\text{31}\) Generation X refers to those individuals born between approximately 1965 and 1976.\(^\text{32}\) Today they are in their early thirties to early forties. They number about 50 million.\(^\text{33}\) Generation Y, on the other hand, are in their twenties. Also sometimes referred to as Echo Boomers (because they are about the same population size as baby boomers)\(^\text{34}\) and Millennials, this group was born from 1978 to 1989.\(^\text{35}\) They


\(^{33}\) Trunk, *supra* note 30.


are the fastest growing segment of the workforce, and include approximately 76 million people.

One explanation for the much larger size of Generation Y relative to Generation X has to do with the changes in rates of abortion and infertility treatments in the 1980s. Gen Xers are said to have been born during an “anti-child” period in United States history. One author notes that while “Gen X was the more aborted generation in American history,” by 1980 the abortion rate slowed and infertility treatment rates saw a significant increase in the 1980s.

This Article refers to both Generation X and Generation Y collectively as “New Generation Employees.” Because, for the limited purposes of this paper, I find that the relevant traits of these two groups are sufficiently similar, it made sense to refer to them collectively in subsequent sections. As an introduction for the reader, however, what follows immediately below are separate descriptions of each generation. The Generation X and Generation Y labels are recognized outside the United States as well, and described with very similar characteristics. This Paper, however, focuses on the United States.

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36 Armour, supra note 32; Martin & Tulgan, supra note 31, at 3.

37 Trunk, supra note 30.


39 Martin & Tulgan, supra note 31, at 12.

40 Id.; see also WILLIAM STRAUSS & NEIL HOWE, MILLENNIALS RISING: THE NEXT GREAT GENERATION, 7 (2000) (“During the Gen-X child era, planned parenting almost always meant contraceptives or abortions. . . “).

41 See, e.g., Belinda Cranston, Talkin’ ‘Bout Their Generations, B&T WEEKLY (AUSTRALIA), May 2, 2208, available at 2008 WLNR 8764173 (discussing Generation X and Y in Australia); Sandra Davie, Generation Y @ Work, STRAITS TIMES (SINGAPORE), May 10, 2008, at Sat. Special Report, available at 2008 WLNR 8777147 (discussing Generation X and Y in Singapore).
A. Generation X

These are the children of the Baby Boomers. Some Baby Boomers have a negative impression of Gen Xers, calling them the “slacker” generation and accusing them of being “disloyal, arrogant, cynical, and lazy.” On the other hand, Gen Xers are more likely to describe themselves as “ambitious, determined, and independent.” Research has shed some light on the picture of this generation and the conditions that have led to their mindset, demonstrating in the process that there is a more complex story behind the negative labels.

Over forty percent of this generation grew up in single parent homes, in part as a result of the high divorce rates during that period. Some call them “the most unsupervised generation.” They were latchkey kids, with television as babysitter, and believed to have been most influenced by growing up with divorced parents or in homes where both parents worked. “For many Xers, the American Dream is a stable family.” This seems to have affected their attitude toward work in that they want balance. They do not want work to be all consuming because they want time for themselves and their families. They had to learn at an early age to fend for themselves, and learned to be resourceful and independent along the way. They have an entrepreneurial spirit and view themselves “more as independent contractors rather than employees.”

Gen Xers did not develop strong connections to social institutions such as churches, schools, or corporations, and are distrustful of these

43 O’Bannon, supra note 29, at 101; see also Kupperschmidt, supra note 42, at 36.
44 O’Bannon, supra, note 29, at 105
45 See O’Bannon, supra, note 29, at 98; Kupperschmidt, supra note 42, at 36-37.
46 Martin & Tulgan, supra note 31, at 12.
47 Kupperschmidt, supra note 42, at 37.
48 O’Bannon, supra, note 29, at 98.
49 See O’Bannon, supra, note 29, at 100.
50 Martin & Tulgan, supra note 31, at 12.
51 O’Bannon, supra, note 29, at 100.
institutions. They came of age at a time when they were surrounded by pictures of missing children on milk cartons, posters instilling fear of AIDS, stories of sexual abuse cases at daycare centers, and watching cases of police brutality unfold on television.

1. Loyalty to Employers

“Job-hopping” is a normal, accepted method of career advancement for Generation Xers. Indeed, the perception is that one is penalized for remaining a long term employee of a company, because he or she forgoes the pay increases that come from job hopping. This generation is motivated by money, learning, and lifestyle issues.

While the high turnover rates among Gen Xers may be perceived as disloyalty, Gen Xers may see it differently. The comments of one Gen Xer to a researcher are telling of the view of that generation: “My attitude is that as long as I continue to be challenged and it’s furthering my career goals, I’ll stay with the company. If not, I’ll move on. It’s not an act of disloyalty; it’s just the business of managing me and my career.” To Gen Xers, switching jobs frequently is career flexibility, but to their Baby Boomer managers it reflects disloyalty, and an attitude that a Gen Xer better get her way, otherwise she will leave.

Their approach is influenced by having observed their parents penalized for loyalty to companies. Generation X grew up watching their parents suffer from corporate downsizing and layoffs. As such, they came to

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52 Martin & Tulgan, supra note 31, at 12.
53 Martin & Tulgan, supra note 31, at 12.
54 Bova, supra note 32, at 57.
55 Bova, supra note 32, at 57.
56 Bova, supra note 32, at 57.
57 See O’Bannon, supra, note 29, at 96.
58 Bova, supra note 32, at 62.
59 O’Bannon, supra, note 29, at 100; see also Kupperschmidt, supra note 42, at 39.
60 O’Bannon, supra, note 29, at 100 (“Xer childhood memories are haunting them, as they recall the selling out of their parents by former employers.”)
61 Bova, supra note 32, at 57.
believe early in their working lives that institutional employers may not be trusted to fulfill their promises.62

Generation X witnessed a record number of bankruptcies, Wall Street scandals, and massive corporate layoffs, with loss of high-wage jobs and benefits. They saw the demise of the old employment contract, the belief that job security came to employees who joined an organization, paid their dues, and were productive for an extended period of time, even the duration of their working years.63

Accordingly, Generation Xers now demand gratification for short-term sacrifices.64 They have a “free agent approach to [their] careers,” they are independent, technologically savvy, and want it all now.65

2. Technological Proficiency

Generation X grew up during the computer revolution,66 witnessing new advancements in technology every few months.67 Personal computers entered the scene in the early 1980s, and, as children, Gen Xers became the first generation to use multimedia technology at home and in school.68 They became skilled at using a wide range of technology.69 Generation X produced many technology entrepreneurs, including, for instance, many of the innovators behind Microsoft and Google.70 Their technical proficiency has allowed Gen Xers to start businesses faster than might otherwise be possible.71

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62 Id.
63 Kupperschmidt, supra note 42, at 38.
64 Martin & Tulgan, supra note 31, at 12.
65 Bova, supra note 32, at 58.
66 Bova, supra note 32, at 57.
67 See O’Bannon, supra, note 29, at 98.
68 Kupperschmidt, supra note 42, at 38; see also Peter Leyden, The Bright Side: Where Were You When the PC Was Born?, STAR TRIB., June 18, 1995, at 6T.
69 Kupperschmidt, supra note 42, at 36.
70 Kupperschmidt, supra note 42, at 38.
71 O’Bannon, supra, note 29, at 103.
B. Generation Y

Offspring of the Baby Boomers and younger siblings of Gen Xers,\textsuperscript{72} the members of Generation Y have been described as “Generation X on steroids.”\textsuperscript{73} While the percentage of Gen Xers in the workplace has remained steady, it is expected that Gen Yers will outnumber Gen Xers in the workforce by 2010.\textsuperscript{74} Gen Yers tend to be more optimistic about their future than Gen Xers, with about 80 percent of Gen Yers believing that they will be better off than their parents.\textsuperscript{75} Unlike the previous generations, they grew up in households where both parents worked and thus had higher disposable incomes.\textsuperscript{76} The consciousness of this generation was shaped by such events as the terrorist attacks of September 11, 2001 (preceded by the bombings Oklahoma city, World Trade Center, and Atlanta Summer Olympics bombings) and school shootings, like Columbine.\textsuperscript{77} As a result, this appears to have made them a more “introspective” group than prior generations.\textsuperscript{78}

As products of the “most child-centered generation ever,” Gen Yers have been pampered and nurtured by their parents.\textsuperscript{79} Some consider them an “overindulged, spoiled, and disengaged group that looks at the world through a prism of self interest.”\textsuperscript{80} They are thus considered to be both “high-performance and high-maintenance.”\textsuperscript{81} Gen Yers are not interested in long term rewards, and they reject such notions as climbing the corporate ladder, paying one’s dues, and waiting to collect until retirement.\textsuperscript{82} Instead,

\begin{itemize}
  \item \textsuperscript{72} Martin & Tulgan, \textit{supra} note 31, at 16.
  \item \textsuperscript{73} Armour, \textit{supra} note 32.
  \item \textsuperscript{74} Martin & Tulgan, \textit{supra} note 31, at 3.
  \item \textsuperscript{75} BRUCE TULGAN & CAROLYN A. MARTIN, \textit{MANAGING GENERATION Y: GLOBAL CITIZENS BORN IN THE LATE SEVENTIES AND EARLY EIGHTIES} at 4 (2001).
  \item \textsuperscript{76} Gogoi, \textit{supra} note 34.
  \item \textsuperscript{77} Gogoi, \textit{supra} note 34; Martin & Tulgan, \textit{supra} note 31, at 16.
  \item \textsuperscript{78} Gogoi, \textit{supra} note 34.
  \item \textsuperscript{79} Armour, \textit{supra} note 32; \textit{see also} Strauss & Howe, \textit{supra} note 40, at 33.
  \item \textsuperscript{80} Gogoi, \textit{supra} note 34.
  \item \textsuperscript{81} Armour, \textit{supra} note 32.
  \item \textsuperscript{82} Tulgan & Martin, \textit{supra} note 75, at 21.
\end{itemize}
they want it all today.\textsuperscript{83} While they believe that they can add value today, they also want to be rewarded today for that value.\textsuperscript{84} Incentives, feedback, and rewards are therefore very important to this generation.\textsuperscript{85}

Their career choices are motivated by a desire to play meaningful roles while doing meaningful work.\textsuperscript{86} They enjoy working in collaboration with others and want to make a difference.\textsuperscript{87} They value creating relationships in the workplace, and may feel stronger connections to coworkers than they do to the company itself.\textsuperscript{88} A survey of 25- to 30-year-old attorneys revealed that this age group’s wish list for their jobs included “time for personal life, opportunities for advancement, professional growth; achievement; intrinsic nature of work; security; leadership; and being a member of a team.”\textsuperscript{89} This list is representative of the factors that motivate Gen Yers as a group.

Like Gen Xers, Gen Yers are also very entrepreneurial.\textsuperscript{90} Indeed, some believe that entrepreneurship is a safety net for Gen Yers.\textsuperscript{91} “Instead of a

\begin{itemize}
\item \textsuperscript{83} Tulgan \& Martin, supra note 75, at 21.
\item \textsuperscript{84} Tulgan \& Martin, supra note 75, at 21.
\item \textsuperscript{85} Researchers Bruce Tulgan and Carolyn Martin provide the following advice to meet the expectations of Generation Y: (1) provide challenging work that really matter (2) balance clearly delegated assignments with freedom and flexibility (3) offer increasing responsibility as a reward for accomplishments (4) spend time getting to know staff members and their capabilities (5) provide ongoing training and learning opportunities (6) establish mentoring relationships (7) create a comfortable, low-stress environment (8) allow some flexibility in scheduling (9) focus on work, but be personable and have a sense of humor (10) balance the roles of “boss” and “team player” (11) treat Gen Yers as colleagues, not as interns or “teenagers” (12) be respectful, and call forth respect in return (13) consistently provide constructive feedback (14) reward Gen Yers when they’ve done a good job. Tulgan \& Martin, supra note 75, 52-62.
\item \textsuperscript{86} Tulgan \& Martin supra note 75, at 14; see also Gogoi, supra note 34.
\item Volunteering is important to members of this generation and they prefer to work for companies that provide volunteer opportunities. See Trunk, supra note 30. “Members of this generation volunteer in their communities more than any other in American history.” Gogoi, supra note 34.
\item \textsuperscript{87} Tulgan \& Martin supra note 75, at 14; see also Armour, supra note 32.
\item \textsuperscript{88} See Leigh Jones, The ‘Gen Y’ Equation, MIAMI DAILY BUSINESS REVIEW, March 2, 2005.
\item \textsuperscript{89} Leigh Jones, supra note 88.
\item \textsuperscript{90} Tulgan \& Martin, supra note 75, 17; See also Armour, supra note 32.
\end{itemize}
simple 100-hour week, now the model is: work 60 hours a week, devote 20 hours to nonprofit, and spend 20 hours writing a plan to start your own business."[92] They are a very socially conscious generation, and volunteer activities are important to them. They enjoy working for employers who are socially responsible and who give back to the community. [94]

1. Loyalty to Employers

Shaped by such corporate scandals as Enron and Arthur Andersen, Gen Yers are cynical about long term commitments to employers. [95] They believe that job security is a thing of the past and as a result, feel little loyalty to their employers. [96] Without a promise of job security, an employee must therefore look out for herself, and be on the lookout for other job opportunities. [97]

According to Gen Y, -- job security means, --
I’ll learn all I can here, and as soon as
opportunities to keep on learning disappear,
I’ll look for a better position with another
organization. Of course, I’ll negotiate the
best deals for my expanded skills,
experiences, and knowledge. [98]

Gen Yers are prone to changing jobs and careers very quickly, thus creating a revolving door effect for employers. [99] They value creating relationships in the workplace, and may feel stronger connections to

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[92] Gogoi, supra note 34.
[95] See Armour, supra note 32.
[99] Armour, supra note 32; See also note 227 infra illustrating some examples of company policies designed to retain Generation Y workers.
coworkers than they do to the company itself. Indeed, Gen Yers “will choose a job just to be with their friends.”

2. Technological Proficiency

Gen Yers have never experienced life without computers. They are the digital generation who probably “were booting up computers long before they were hopping on bikes.” They grew up with the Internet, and are very proficient and at ease with technology. They are probably more comfortable communicating via e-mail, text messaging, and instant messaging than by in person meetings or phone calls. Indeed, they are quite adept at simultaneously using various kinds of technology while working and can be “trading instant messages, listening to music, surfing the Web and checking e-mail, all while attending to the matters at hand.” As a result, they have been criticized for their short attention spans and the fact that they absorb information “in very short chunks.”

100 See Leigh Jones, supra note 88.

101 Trunk, supra note 30.

102 TULGAN & MARTIN, supra note 75, at .5.

103 TULGAN & MARTIN, supra note 75, at 6.

104 See Armour, supra note 32; Gogoi, supra note 34.

105 Armour, supra note 32.


107 Gogoi, supra note 34.
IV. REFLECTION OF THESE CHARACTERISTICS IN THE CASE LAW

The reported case law does not generally provide the ages of the defendants in trade secret misappropriation cases. Accordingly, it is difficult to perform any kind of analysis that might accurately determine the extent to which members of Generation X and Generation Y are represented as alleged misappropriators. However, a subset of trade secret misappropriation cases, those federal criminal actions filed under the Economic Espionage Act\(^\text{108}\) (EEA), are more likely to report the ages of defendants. As discussed below, a simple review and analysis of the EEA cases indicate an overrepresentation of New Generation Employees in those misappropriation cases.

The remainder of this section provides a sampling of the kinds of circumstances that are often present in trade secret misappropriation cases. For instance, job dissatisfaction, job hopping, changes in corporate ownership, and the use of computer technology to store or transmit trade secrets are among the facts found in virtually any misappropriation case. Thus, insofar as these circumstances map closely to the attitudes and behaviors of Gen Xers and Gen Yers, one can reasonably expect an upward trend in trade secret misappropriation as New Generation Employees outnumber others in the workforce.

A. New Generation Employees in the EEA Cases

The Department of Justice issues press releases and tracks the number of cases prosecuted under the EEA. A review of that data reveals that there have been thirty-four indictments in the past seven years. Of those thirty-four, twenty report the age(s) of the defendant(s). As illustrated in Table 1, of those twenty case indictments, fifty-five percent\(^\text{109}\) include New Generation Employees.


\(^{109}\) This reflects eleven out of twenty cases.
As identified by the check marks in the table, in eleven of the twenty cases, at least one defendant was born after 1965. While some cases involved more than one defendant born after 1965, in order to be consistent I counted the number of cases involving New Generation Employees rather than the total number of New Generation Employee defendants.

While this is a small subset of the total number of trade secret misappropriation cases, there is no reason to believe that new worker

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110 Some researchers define Generation X as those born between 1965 and 1981, and others between 1961 and 1981. See references supra, note 32. I used 1965 to be conservative.
representation in the broader group of civil and criminal cases would be significantly different. The facts, or more specifically the misappropriation narratives told in the EEA cases, tend to be similar to those in the other cases. Accordingly, it is likely that a comparable trend would be reflected in the wider group of trade secret cases. A few illustrations of the type of conduct reflected in the EEA cases follow.

In *United States v. Zhang*, a 37-year-old product development manager downloaded dozens of files containing confidential product information and transferred them to a competitor.\(^{111}\) In *United States v. Tsai*, a 35-year-old design engineer transported stolen “data sheets” containing his employer’s proprietary information to a potential foreign competitor.\(^{112}\) In *United States v. Woodward*, a 34-year-old employee stole his employer’s back-up tapes and offered them for sale to a competitor.\(^{113}\) In *United States v. Serebryany*, a 19-year-old Chicago University [University of Chicago?] student stole sensitive trade secrets while he was working for a copying service.\(^{114}\)

In *United States v. Sun*, a 32-year-old information technology specialist sold his employer’s confidential information for $3 million.\(^{115}\) In *United States v. Zhu & Kimbara*, two Harvard Medical School post-doctoral research fellows, both in their thirties, were accused of stealing marketable scientific information belonging to Harvard.\(^{116}\) They were accused of

\[^{111}\text{UNITED STATES DEP’T OF JUSTICE, INTELLECTUAL PROPERTY CASES: SILICON VALLEY ENGINEER INDICTED FOR STEALING TRADE SECRETS AND COMPUTER FRAUD, http://www.usdoj.gov/criminal/cybercrime/zhangIndict.htm (last visited July 4, 2008).}\]

\[^{112}\text{UNITED STATES DEP’T OF JUSTICE, INTELLECTUAL PROPERTY CASES: CHIP DESIGN ENGINEER PLEADS GUILTY TO TRANSPORTING STOLEN PROPERTY OF SILICON VALLEY COMPANY TO TAIWAN, http://www.usdoj.gov/criminal/cybercrime/tsaiPlea.htm (last visited July 14, 2008).}\]

\[^{113}\text{UNITED STATES DEP’T OF JUSTICE, INTELLECTUAL PROPERTY CASES: FORMER IT DIRECTOR OF SILICON VALLEY COMPANY PLEADS GUILTY TO THEFT OF TRADE SECRETS, http://www.usdoj.gov/criminal/cybercrime/woodwardPlea.htm (last visited July 14, 2008).}\]


\[^{115}\text{UNITED STATES DEP’T OF JUSTICE, INTELLECTUAL PROPERTY CASES: CHICAGO, ILLINOIS MAN PLEADS GUILTY TO THEFT OF TRADE SECRETS, OFFERED TO SELL ONLINE INTERPRETER’S INFORMATION, http://www.usdoj.gov/criminal/cybercrime/sunPlea.htm (last visited July 14, 2008).}\]

\[^{116}\text{UNITED STATES DEP’T OF JUSTICE, INTELLECTUAL PROPERTY CASES: PAIR}\]
shipping more than thirty boxes of biologicals, books, and documents to a competing lab.\textsuperscript{117} They further collaborated with a Japanese company in the creation and sale of related and derivative products or otherwise capitalizing on the information.\textsuperscript{118} This kind of behavior is by no means unique to the EEA cases. Indeed, it is entirely consistent with the conduct that is often alleged in the civil trade secret misappropriation cases as well. The following two sections, which provide case examples of disgruntled employees and the use of technology to misappropriate, will further illustrate the pattern of misconduct that epitomize these cases.

\section*{B. Disgruntled Employees on the Move}

Even apart from the lack of loyalty characteristic among the New Generation Employees, researchers have, for a while, noted a general decline in loyalty in the workplace. This decline stems, in part, from the changing nature of expectations in the workplace, particularly the lack of job security.\textsuperscript{119} The expectation of long-term employment until retirement with any company is a thing of the past.\textsuperscript{120} Most full time employees change jobs several times over the span of their careers.\textsuperscript{121} That mobility, in itself, creates more opportunities for employees to transfer trade secrets to new employers or to their own competing ventures.\textsuperscript{122}

\begin{footnotesize}

\begin{enumerate}
\item \textsuperscript{117} \textit{Id}.
\item \textsuperscript{118} \textit{Id}.
\item \textsuperscript{120} \textit{Id.} at 541 ("It has been widely reported that large corporations no longer offer their employees implicit contracts for lifetime employment).
\item \textsuperscript{121} \textit{See id.} at 548.
\end{enumerate}
\end{footnotesize}
Furthermore, dissatisfied and angry employees are likely to leave their companies quietly without discussing their departure with their employers, fueling the likelihood of misappropriation in the process. The case examples below demonstrate the kinds of scenarios that result when employees who are highly mobile and quick to join competitors or start their own competing ventures, become dissatisfied with their jobs or changes in corporate ownership.

In *MicroStrategy, Inc. v. Bus. Objects, S.A.*, a software company experienced financial instability. When the company began to lay off its employees and shrink its businesses, several employees also planned their departure. In an effort to gain new employment, they disclosed confidential information to the number one competitor in the market and promised to “swing business” in return. As a result, the company lost significant amount of trade secrets, including sales techniques, descriptions of software architecture and competitive intelligence to the competitor.

In *Hilb, Rogal & Hamilton Co. of Atlanta v. Holley*, an insurance agent merged his own professional agency with another company, and became a shareholder employee. He later became dissatisfied with his new job after he learned that the merged company would no longer focus on his business specialty and he decided to leave. He took with him an electronic organizer containing customer’s contact information. By using

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125 *Id.* at 403-415.

126 *Id.* at 401, 405-415.

127 *Id.* at 403.


129 *Id.*

130 *Id.* at 865.

131 *Id.*
that information, approximately twenty to twenty-five percent of the clients he serviced during his former employment followed him to the new employer.\textsuperscript{132}

In \textit{Latuszewski v. Valic Fin. Advisors, Inc.}, several financial advisors formed their own competing business venture while they were still employed with the former employer.\textsuperscript{133} In order to move customers who represented millions of dollars in assets to their own business venture, these employees selectively targeted a group of customers and collected their customer data before submitting their resignations.\textsuperscript{134} Thus, three months after leaving they transferred $10 million in assets from the former employer.\textsuperscript{135}

In \textit{Anadarko Petroleum Corp. v. Davis & GeoSouthern Energy Corp.}, a petroleum engineer worked for the predecessor company for approximately twenty years.\textsuperscript{136} The predecessor company later merged into another corporation.\textsuperscript{137} After the change of ownership, the engineer became dissatisfied with his career.\textsuperscript{138} He felt that he had been passed over for promotions and “pushed to the side.”\textsuperscript{139} He also believed that his supervisors knew less about the business than he did and were making “poor decisions.”\textsuperscript{140} As a result, he joined a competitor and took trade secret information belonging to the former employer.\textsuperscript{141}

In \textit{Lexis-Nexis v. Beer}, an employee became dissatisfied with his compensation.\textsuperscript{142} After the employer refused several requests for a salary
increase by the employee, he resigned and accepted employment with a competitor. Before he returned all office equipment provided by his former employer, he copied emails and the customer information database previously stored on a company laptop onto a zip disk. He later transferred the information to a new laptop he received from his new employer.

In *Intellisports LLC v. Fitzgerald*, a departing editor offered to buy one of the divisions owned by his employer publishing company. After his employer refused to sell the division, he resigned and started his own competing publication business. He then obtained the employer’s subscriber list from a former co-worker, and used it to solicit customers of his former employer to his publication.

**C. Technology**

The wide use of computer technology in the workplace poses a grave threat to employers’ trade secrets because the trade secrets can be easily and quickly taken and disseminated to others. Coupled with these technological advances, however, is the decline of loyalty in the workplace discussed above. Accordingly, the opportunity created by computers combined with the motivation to be unfaithful to an employer has led to the prevalence of employees using technology to misappropriate trade secrets. A sampling of cases over the last four years shows how e-mail, laptops, zip drives, thumb drives, and CDs can be hazards to trade secrets, even by those without high-tech training.

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143 *Id.*

144 *Id.*

145 *Id.*


147 *Id.* at *1-*2.

148 *Id.*

149 See generally, Elizabeth A. Rowe, *Rethinking Reasonable Efforts to Protect Trade Secrets in a Digital World*, (working paper – ssrn CITe)

In *MicroStrategy, Inc. v. Bus. Objects, S.A.*, several employees emailed their employer’s trade secrets to a competitor for whom they wished to work.\(^{151}\) In one instance, a departing employee emailed numerous business documents belonging to his employer to his personal email account.\(^{152}\) He then copied the important materials onto a floppy disk and possibly a CD, and later transferred them to the competitor’s computer.\(^{153}\) Another employee emailed an internal sales document to the competitor, and suggested that the competitor could use this document to “make [his employer] look like fools with the technical decision makers.”\(^{154}\)

In *LeJuune v. Coin Acceptors, Inc.*, an employee who worked from his home and regularly received company documents gained employment with a primary competitor.\(^{155}\) Prior to his departure, he transferred digital copies of sensitive information including budgeting software and pricing information from his company laptop to a compact disc.\(^{156}\) He then erased the information to hide the downloading activity before he returned the company laptop.\(^{157}\) In *Anadarko Petroleum Corp. v. Davis & GeoSouthern Energy Corp.*, a departing senior engineer downloaded the equivalent of 1.5 million pages of raw text, from the company desktop computer to his personal computer.\(^{158}\) He used several USB thumb drives to store the information downloaded from the company desktop.\(^{159}\)

In *DuCom v. Georgia*, an employee planned to start her own business after she left her employer.\(^{160}\) On the day she resigned, she copied a

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\(^{152}\) *Id.* at 407.

\(^{153}\) *Id.*

\(^{154}\) *Id.* at 412.


\(^{156}\) *Id.* at 456.

\(^{157}\) *Id.*


\(^{159}\) *Id.*

\(^{160}\) *DuCom v. Georgia*, 654 S.E.2d 670, 672 (Ct. App. 2007).
“massive” amount of information from her employer’s hard drive onto a disk, including computer software programs and the entire associated business database.\textsuperscript{161} In United States \textit{v.} Zhang, a product development manager gained access to secret product information belonging to a customer of his former employer.\textsuperscript{162} He later accepted new employment from a competitor of that customer.\textsuperscript{163} Prior to his departure, he downloaded dozens of files containing confidential product information.\textsuperscript{164} He then loaded many of the files onto a laptop received from the new employer and emailed certain files to the new employer.\textsuperscript{165}

The final example shows that even those employees trusted with overseeing and implementing the company’s technology can misappropriate the employer’s trade secrets. In United States \textit{v.} Sun, an information technology specialist sold his employer’s trade secrets for $3 million.\textsuperscript{166} He delivered a laptop and a hard drive containing stolen trade secrets and confidential proprietary information to the competitor.\textsuperscript{167}

\textsuperscript{161} \textit{Id.}

\textsuperscript{162} \textsc{United States Dep’t of Justice, Intellectual Property Cases: Silicon Valley Engineer Indicted for Stealing Trade Secrets and Computer Fraud}, http://www.usdoj.gov/criminal/cybercrime/zhangIndict.htm (last visited July 4, 2008).

\textsuperscript{163} \textit{Id.}

\textsuperscript{164} \textit{Id.}

\textsuperscript{165} \textit{Id.}

\textsuperscript{166} \textsc{United States Dep’t of Justice, Intellectual Property Cases: Chicago, Illinois Man Pleads Guilty to Theft of Trade Secrets, Offered to Sell Online Interpreter’s Information}, http://www.usdoj.gov/criminal/cybercrime/sunPlea.htm (last visited July 14, 2008).

\textsuperscript{167} \textit{Id.}
V. EMPLOYEE THEFT GENERALLY

Approaches to trade secret protection might also benefit from some of the sociological theories about employee theft generally. While the phrase “employee theft” is not usually used in connection with trade secret misappropriation, the operational definition undoubtedly captures the conduct: “any unauthorized appropriation of company property by employees either for one’s own use or for sale to another. It includes, but is not limited to, the removal of products, supplies, materials, funds, data, information, or intellectual property.” Accordingly, an understanding of the research in that area might prove useful in examining and devising strategies for trade secret protection.

Researchers have developed several theories to explain why people steal from their employers. Equity theory, work climate, and societal change are three theories that appear to fit well within the context of this paper, and are briefly summarized here.

1) Equity theory suggests that people steal from their employers when they feel a sense of inequity in the workplace. They are motivated by a need to restore balance where, for instance, they feel underpaid for their efforts. In addition, when employees feel that they have poor opportunity for advancement or weak job security, it contributes to their sense of inequity and might lead to “compensatory theft.” Stealing from the company is thus an attempt to “reestablish equity between the parties involved in a social exchange relationship.”

2) Work Climate theory suggests that company policies as well as the attitudes of managers and coworkers about employee theft

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170 Appelbaum, supra note 169 at 176; Greenberg, supra note 168, at 96.


172 Greenberg, supra note 168, at 94.
may encourage the behavior. Where workplace norms condone theft, employees may actually feel the need to support that behavior, even if they would have otherwise chosen to act ethically. In one study, 33% of those surveyed felt pressured to violate company policies by their coworkers and their companies. Another study revealed that of the 80% of people who admitted to regularly stealing from their employers, virtually all of them felt that they had done nothing wrong.

3) Societal change theory suggests that ethical behavior is learned at home, taught by parents to their young children. However, this theory posits that the degradation of the family structure along with other societal influences has led to a “moral laxity” in children before they enter the work force. Thus, the focus is now on maximizing one’s self-interest, thus supporting questionable workplace ethics such as theft.

Since trade secret misappropriation is a kind of theft, these theories seem applicable to trade secret protection. The motivation to misappropriate may be very similar to that which encourages one to steal any other type of property which belongs to the employer. Accordingly, what follows is an initial attempt to introduce possible connections between sociological employee theft theories and trade secret law using New Generation Employees as the medium. However, the theories can also be applied more broadly using, for example, all employees or other patterns and trends in trade secret misappropriation. The attitudes and behaviors of New Generation Employees, however, seem particularly fitting.

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173 Appelbaum, supra note 169 at 176; see also Greenberg, supra note 168, at 89-90.
174 Greenberg, supra note 168, at 92.
175 See Arthur Gross-Schaefer et al, supra note 171, at 92.
176 Appelbaum, supra note 169 at 176.
177 Appelbaum, supra note 169 at 176
178 Appelbaum, supra note 169 at 176
179 Arthur Gross-Schaefer et al, supra note 171, at 92.
180 Arthur Gross-Schaefer et al, supra note 171, at 92.
181 Appelbaum, supra note 169 at 176
A. Application to New Generation Employees and Trade Secrets

Having introduced three general theories on employee theft, this section now integrates the attitudes and behaviors of New Generation Employees with these sociological theories in a framework that (a) offers some explanations about what motivates employees to misappropriate trade secrets and (b) offers corresponding general preventive measures to protect trade secrets in the workplace. No single theory offers a superior explanation for trade secret misappropriation. Instead, there is a good deal of overlap among the theories. Thus, it is the overall combination of these theories that might prove most useful to trade secret law.

1. Equity Theory: “How do you make me feel?”

New Generation Employees possess many attitudes that suggest they are likely to feel a sense of inequity in the workplace. (i) Weak job security means that they cannot trust companies to take care of them so they must take care of themselves.\(^{182}\) (ii) As a result of not trusting that long term rewards will come to fruition, they want it all today and want to be rewarded today.\(^{184}\) Incentives, feedback, and rewards are therefore very important, \(^{184}\) and when not received can lead to resentment. (iii) They want to feel valued by managers and do not respond well to a “do-it because I said so” management style.\(^ {185}\) (iv) They are very interested in career advancement and expect to be given opportunities to do so.\(^ {186}\) They “will

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\(^{182}\) See O’Bannon, supra, note 29, at 95; TULGAN & MARTIN, supra note 75, at 19-20.

\(^{183}\) TULGAN & MARTIN, supra note 75, at 21.

\(^{184}\) Researchers Bruce Tulgan and Carolyn Martin provide the following advice to meet the expectations of Generation Y: (1) provide challenging work that really matter (2) balance clearly delegated assignments with freedom and flexibility (3) offer increasing responsibility as a reward for accomplishments (4) spend time getting to know staff members and their capabilities (5) provide ongoing training and learning opportunities (6) establish mentoring relationships (7) create a comfortable, low-stress environment (8) allow some flexibility in scheduling (9) focus on work, but be personable and have a sense of humor (10) balance the roles of “boss” and “team player” (11) treat Gen Yers as colleagues, not as interns or “teenagers” (12) be respectful, and call forth respect in return (13) consistently provide constructive feedback (14) reward Gen Yers when they’ve done a good job. TULGAN & MARTIN, supra note 75, at 52-62.

\(^{185}\) O’Bannon, supra, note 29, at 95.

\(^{186}\) Martin & Tulgan, supra note 31, at 14.
sidestep rules and procedures that slow them down as they push for results.”

As applied to trade secret law, this theory seems apt for assessing how employees feel relative to their expectations. When they feel undercompensated, undervalued, underappreciated, they are likely to also feel resentful, and maybe even revengeful, toward the company that is perceived to be taking advantage of them. Thus, taken together, this creates circumstances where New Generation Employees could feel a need to restore balance to an inequitable situation. To compensate for that perceived inequity, they may take or use the employer’s trade secrets in a way that might further their own advancement or add to their value to other employers. This is a familiar story line in many trade secret cases.

Recall, for instance, that In *Anadarko Petroleum Corp. v. Davis & GeoSouthern Energy Corp.*, an engineer became dissatisfied, and felt that he had been passed over for promotions and “pushed to the side.” He also believed that his supervisors were making “poor decisions.” As a result, he left with trade secrets to join a competitor. Also, in *Lexis-Nexis v. Beer*, an employee who was dissatisfied with his compensation resigned and accepted employment with a competitor, but not without taking the former employer’s customer information database with him.

2. Work Climate Theory: “Everyone else is doing it.”

Workplace norms may unwittingly support trade secret misappropriation not only by the indirect messages that the company sends to its employees, but also by what the employees perceive to be acceptable behavior based on their peers’ actions. Individuals enter an organization

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188 *Id.*

189 *Id.*

190 *Id.* at *12.


192 *Id.*
with preconceived notions of what “ought” and what “ought not” be. As a result, values cloud objectivity and rationality and generally influence attitudes and behavior.” With that in mind, New Generation Employees’ attitudes about changing jobs as well as their allegiance to their coworkers could be problematic for trade secret owners.

Job-hopping is a normal, accepted method of career advancement for this group. That mobility threatens trade secrets in so far as employees are likely to use a former employer’s trade secrets to increase their value to a new employer. Indeed, they may see nothing wrong in doing so, perhaps believing that they are entitled to use information which they helped create or that the information is part of their professional tool kit. Given that New Generation Employees are so proficient and familiar with technology, coupled with the ease with which trade secrets can be e-mailed or downloaded may even make encourage misappropriation and reduce the guilt or stigma associated with that conduct.

New Generation Employees value creating relationships in the workplace, and may feel stronger connections to coworkers than they do to the company itself. Indeed, recall that Gen Yers “will choose a job just to be with their friends.” This suggests that a kind of “pack mentality” could develop where employees excuse (and perhaps even assist) their coworkers who take trade secrets, seeing it as an acceptable way to advance one’s career. They may also be less likely to report any misappropriation to the company deeming it more appropriate to protect a coworker than to assist an employer to whom they feel very little loyalty. From the trade secret owner’s perspective, this may emphasize the need to take action against misappropriators in order to raise awareness among employees about the risks of trade secret misappropriation, and to emphasize that the company takes protection of its secrets seriously.

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193 O’Bannon, supra, note 29, at 100-01.

194 Bova, supra note 32, at 57.

195 See generally discussion supra at section IV.C.

196 See Leigh Jones, supra note 88.

197 Trunk, supra note 30.

198 In Intellisports LLC v. Fitzgerald, for example, a departing editor who started a competing business received assistance from a former co-worker to obtain the former employer’s confidential customer list to solicit customers for his new venture. 2004 WL 794459, at *1 -*2.

A trait that is repeatedly associated with New Generation Employees is self-interest. Gen Yers, in particular, have been pointedly called an “overindulged, spoiled, and disengaged group that looks at the world through a prism of self interest.”\footnote{199} Social change theorists might associate that attitude to a degradation of the family structure which resulted in inadequate moral and ethical instruction at home. While Gen Xers might support that family life hypothesis, Gen Yers do not.

Some believe that Gen Xers were “the most unsupervised generation.”\footnote{200} They were latchkey kids, with television as babysitter, and grew up with divorced parents or in homes where both parents worked.\footnote{201} They did not develop strong connections to social institutions such as churches.\footnote{202} They came of age at a time when they were surrounded by stories of missing children, AIDS, sexual abuse, and police brutality.\footnote{203} As a result, Gen Xers had to learn at an early age to fend for themselves, and learned to be resourceful and independent along the way.\footnote{204} Gen Yers experience with family, on the other hand, was different.

Thus, it seems more appropriate to associate the self interest of both Gen Xers and Gen Yers to the aforementioned societal factors, both familial and economic, that shaped their consciousness and values, rather than to focus on ethical or moral upbringing. These factors appear to have fostered greater independence and entrepreneurism in the New Generation Employees. Accordingly, their being very entrepreneurial and viewing themselves “more as independent contractors rather than employees,”\footnote{205} could have serious implications for trade secret protection. It is also consistent with their general lack of loyalty to companies and with the theories described above, Equity and Work Climate.

\footnote{199} Gogoi, supra note 34.

\footnote{200} Martin & Tulgan, supra note 31, at 12.

\footnote{201} Kupperschmidt, supra note 42, at 38.

\footnote{202} Martin & Tulgan, supra note 31, at 12.

\footnote{203} Martin & Tulgan, supra note 31, at 12.

\footnote{204} Martin & Tulgan, supra note 31, at 12.

\footnote{205} O’Bannon, supra, note 29, at 100; see also Tulgan & Martin, supra note 75, at 17; Armour, supra note 32.
Self-interest is highly incompatible with trade secret protection to the extent that it encourages workers to care less about protecting the employer’s trade secrets and more about advancing their own careers. Indeed, research has demonstrated that “a climate focused on self-interest not only appears to promote unethical conduct, it also has a negative influence on organizational commitment.”\textsuperscript{206} Several of the cases discussed earlier serve to illustrate how employees’ self-interest, especially when combined with competitive entrepreneurial aspirations can lead to trade secret misappropriation.

For instance, in \textit{Hilb, Rogal \& Hamilton Co. of Atlanta v. Holley}, after an insurance agent merged his agency with another company\textsuperscript{207} and became dissatisfied with the vision and focus of the newly merged company,\textsuperscript{208} he left taking with him confidential client information and clients to his new employer.\textsuperscript{209} In \textit{Latuszewski v. Valic Fin. Advisors, Inc.}, several financial advisors, while still employed, formed their own competing business venture.\textsuperscript{210} They then left, and using trade secrets, transferred $10 million in assets from the former employer.\textsuperscript{211} Similarly, in \textit{DuCom v. Georgia}, an employee planning to start her own business copied and took a large amount of trade secret information to aid in her venture.\textsuperscript{212}

\textsuperscript{206} Linda Klebe Trevino, Kenneth D. Butterfield \& Donald L. McCabe, \textit{The Ethical Context in Organizations: Influences on Employee Attitudes and Behaviors}, 8 \textit{BUSINESS ETHICS QUARTERLY} 447, 470 (July 1998).

\textsuperscript{207} Hilb, Rogal \& Hamilton Co. of Atlanta v. Holley, 644 S.E.2d 862, 864 (Ga. Ct. App. 2007).

\textsuperscript{208} \textit{Id.} at 865.

\textsuperscript{209} \textit{Id.}


\textsuperscript{211} \textit{Id.} at *8.

\textsuperscript{212} DuCom v. Georgia, 654 S.E.2d 670, 672 (Ct. App. 2007).
B. Lessons in Prevention

The employee theft theories have led researchers to suggest various prevention measures against theft. Some of those measures that seem more applicable to trade secret protection include (a) changing corporate culture, (b) instituting internal controls, (c) punishing employees who steal, and (d) performing screening tests (including integrity tests). These measures may be interrelated and could be used together in a manner that best fits the particular company and the nature of its employees.

A corporate culture that includes a focus on honesty and the benefits of and respect for intellectual property, including trade secrets, could reinforce to all workers, both management and non-management personnel, the importance of intellectual property protection and the consequences for misappropriation. Research has demonstrated that when the work environment is egotistic or based on self-interest, employees are more likely to engage in unethical behavior. Thus, to the extent a large portion of the employees are New Generation Employees this could help influence their mindset about trade secret ownership, promoting values that focus less on self interest and competitive goals and more on the consequences of misappropriation.

The use of internal controls to track money and other kinds of business property often includes accounting controls, security systems, and centralization of processes to allow tighter controls. Similarly, appropriate systems should be implemented for trade secrets to control and track the secrets, and companies should perform risk assessments in order to develop affirmative and concrete steps to protect trade secrets. Internal controls relating to computers and other electronics, where trade secrets could be particularly vulnerable, might also be beneficial.

213 Appelbaum, supra note 169 at 176.
214 Appelbaum, supra note 169 at 176-78.
215 See Weber, supra note 169 at 365.
216 See id. at 365 (noting that a “work climate, based on universal ethical principles such as honesty, justice, and fairness, would support ethical actions by employees.”)
217 Appelbaum, supra note 169 at 177.
218 For a detailed discussion of the risks posed to trade secrets by the use of technology, see Elizabeth A. Rowe, Rethinking “Reasonable Efforts” to Protect Trade Secrets in a Digital World, -----------.
Punishment has a deterrent effect on other employees who might want to steal from an employer.\textsuperscript{219} Moreover, when punishment is inconsistent or unseen it might have the opposite effect, and encourage theft.\textsuperscript{220} Punishment for trade secret misappropriation generally involves two steps: first, termination from employment (frequently, however, the misappropriation is not discovered until the employee has left the company), and second, litigation against the employee, and possibly the new employer, for trade secret misappropriation. It is therefore consistent with the above theories about punishment, when many companies file trade secret misappropriation actions against former employees in order to “send a message” to remaining employees and to the new employer that such conduct will not be tolerated.\textsuperscript{221} It is also a highly visible way to raise awareness among employees about the risks of trade secret misappropriation, and to emphasize that the company takes protection of its secrets seriously.

The screening out of potential hires that might be most likely to steal trade secrets is intriguing. Indeed, there is a new measurement tool called an integrity test that purports to identify individual’s attitudes towards a variety of unacceptable behaviors, including stealing.\textsuperscript{222} Some researchers believe that integrity tests are a reliable and valid tool to determine who is likely to steal or display hostile tendencies.\textsuperscript{223} Others, however, question the validity of the tests.\textsuperscript{224}

Whether integrity tests will be a good predictor for trade secret theft is left to be seen. However, this kind of test in combination with appropriate information gathering about prospective employees, such as the reason for leaving their previous employment or even their offering to use their previous employer’s trade secrets in their new position, could be a useful predictive tool. It is worth a note of caution; however, that screening out broad classes of people is not advisable. For instance, a decision not to hire

\begin{footnotes}
\item[219] Appelbaum, supra note 169 at 177.
\item[220] Id.
\item[221] See Pooley, supra note 9 at 10.01[1].
\item[222] Appelbaum, supra note 169 at 177.
\item[223] Id.
\end{footnotes}
men because they tend to engage in more unethical behavior than women, not only eliminates a large portion of potential hire, but it could also subject an employer to liability.

VI. BENEFITS BEYOND THE WORKPLACE AND TRADE SECRETS

Whether or not one accepts wholesale the generational labels given to these New Generation Employees or the characteristics that have been ascribed to them, there is value in being mindful of how the human element effects compliance with workplace laws and policies. At the very least, it helps to ensure that the organization and employees understand each other. The organization’s rule may read “do not steal,” but to be effective, the employees must understand what it means to “steal.”

As employers learn more about these New Generation Employees and attempt to make changes in the workplace to accommodate their expectations and values, it also important to consider how the attitudes of these New Generation Employees might effect intellectual property protection. At a minimum, for instance, companies should understand that New Generation Employees cannot be expected to follow policies and procedures regarding intellectual property unless they understand why those policies are in place. They will not simply do as they are told. Understanding these generational differences is vital to the process of discovering the most effective methods to teach the kinds of values that are necessary for successful trade secret protection and the efficient operation of the business more generally.

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225 See Weber, supra note 169 at – (“most empirical business ethics studies find women to be more ethical in their decision making than men.”)

226 See Erin White, Age is as Age Does: Making the Generational Gap Work for You, THE WALL ST. J., June 20, 2008, at B6 (noting that Peter Cappelli of the University of Pennsylvania’s Wharton School of Business contends that some consultants confuse age attributes with generational attributes).

227 Companies are finding it difficult to retain Gen Yers and have instituted a wide range of efforts to attract and keep them happy. For instance, Aflac offers flexible work schedules, more recognition, and time off to award good employees. Xerox has adopted the slogan “Express Yourself” to appeal to Gen Yers’ desire for change and independent thinking. Armour, supra note 32. Deloitte has a person in charge or recruiting and retaining Gen Yers. Trunk, supra note 30. Sun Microsystems has instituted a telecommuting program

228 See Bova, supra note 32, at 59; Martin & Tulgan, supra note 31, at 15.

229 Martin & Tulgan, supra note 31, at 15.

230 Bova, supra note 32, at 57.
dysfunctional workplace “fraught with miscommunication, misunderstanding and harsh feelings,” but the loss of trade secrets and more trade secret misappropriation litigation. Even looking beyond the workplace and beyond trade secrets, it is beneficial to recognizing and acknowledging the challenges that arise when humans meet intellectual property.

A. Effect on Intellectual Property Generally

The socio-intellectual property approach used in this Article which considers human values may have broader usefulness to intellectual property protection generally. “[V]alues are important to the study of organizational behavior, because they lay the foundation for the understanding of attitudes and motivation, and because they influence our perceptions.”

Thus, changes in attitude about intellectual property in general might have implications for innovation, protection, compliance, and enforcement norms in the United States.

If one were to consider intellectual property on the Internet, for example, an interesting cultural pattern might appear. The Internet may have an ethical culture of its own which when merged with intellectual property norms in that forum could lead to a complex set of behaviors that effect intellectual property protection. The anonymity and convenience available on the Internet may support deviant behavior, as users believe there is little chance of detection. The enormous access to all kinds of information without charge, may also promote the view that everything on the Internet, including music, brand names, movies, content from other people’s materials, should be free.

231 O’Bannon, supra, note 29, at 97.

232 O’Bannon, supra, note 29, at 100-01.


The cultural influence on attitudes towards copyright infringement is a palpable example. The stories that have made headlines over the last few years involving piracy of software and over the Internet are indicative of the challenges that copyright holders have faced in reaching the younger generation. Indeed, Gen Yers justify software piracy by viewing it not as a crime, but as payback to an industry that sets unfair prices. Moreover, college students “reflect an overall attitude in favor of illegally downloading and/or sharing music files.” Accordingly, social norms can have a significant effect on compliance.

These kinds of changes in attitude about intellectual property are likely to affect not only protection, compliance, and enforcement norms, but may also have fundamental implications for innovation. In the long run, it would be interesting to evaluate whether such changes will lead to less innovation, what effect they may have on profit incentives, and the effect on relationships between those who invent or develop intellectual property and those who profit from them.


239 See Schultz, supra note 235 at 655 (discussing social norms and music piracy).
B. Foreign Cultures and American Intellectual Property

This kind of analysis might also provide guidance in thinking about the frustrations United States companies experience in dealing with the foreign enforcement of their intellectual property rights. In the developing world, for instance, where disregard for intellectual property rights is the rule rather than the exception, it is important to consider the cultural differences that create such barriers. The notion of intellectual property rights is “rooted in the culture, philosophy, and national character of the individual country.” The protection of intellectual property rights should not necessarily be viewed as merely an enforcement problem, but one of compliance as well. To the extent that there is a disconnect between western views of intellectual property rights and the values attendant in those laws, and the values of developing countries, strategies to obtaining compliance may ultimately be more useful and successful than reliance on enforcement.

Thus, in order for intellectual property rights to be meaningful in developing countries, it is important to understand the differences in their value systems, organizational structures, and heritage. While it is commonly known, for example, that pirated products are often sold throughout Asia, and that educational campaigns and enforcement methods have failed to curb the practice, a look at Asian culture provides some insight into the underlying reason why the anti-piracy effort has been so difficult. In Asian culture copying other people’s works is viewed as a form of flattery rather than dishonest behavior, and “the individual is

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Elizabeth A. Rowe  

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subservient to the community.”  

This might help explain why members of those cultures reject the notion of individual property rights in ideas.  

Their ideals are fundamentally incompatible with an Anglo-American system that “singles out the creative individual for reward, values original expression, and believes that products are capable of disassociation from the artist to be sent through commerce.”  

VII. CONCLUSION

Protecting trade secrets in today’s workplace is a complex endeavor for businesses. Appropriate policies, processes, and technologies can be helpful. However, this Article introduced another important element that has so far been overlooked – the people. Using New Generation Employees as the point of study, the Article examined ways in which the attitudes of these younger generations might effect trade secret protection, and concludes that the indications suggest a likely increase in trade secret misappropriation cases. Understanding these generational differences is therefore vital to the process of discovering the most effective methods to teach the kinds of values that are necessary for successful trade secret protection and the efficient operation of the business more generally.

The Article also applied sociological theories about employee theft to trade secret misappropriation to offer insights into what motivates employees to misappropriate trade secrets and to offer general preventative measures to protect trade secrets in the workplace. Finally, it explored the larger advantages of using a socio-intellectual property approach to address the challenges to protection, compliance, and enforcement of intellectual property rights generally. In short, the field of intellectual property law would do well to be more attentive to the relationship between the people and the property in intellectual property.

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246 Endeshaw, supra note 245 at 385; Smith, supra note 241 at 226-28 (discussing Confucian ideals in Asian countries).

247 Endeshaw, supra note 245 at 385.


249 Bova, supra note 32, at 57.