SYLLABUS

1. Communication

Office: Room 222  
E-mail: mschultz@siu.edu  
Voice: 453-8750

Office Hours: Tuesday & Thursday, 3:30 – 5:00. I am generally around and available in the afternoons, but I have a lot of meetings, conference calls, etc. that make me effectively unavailable. Feel free to try me in the afternoons generally, but I make a special effort to keep my schedule open and to be present for walk-ins during office hours (but it’s not always possible). If my scheduled office hours do not work for you, then please call or e-mail to set up a mutually convenient appointment.

E-Mail: I will be happy to respond to questions sent via e-mail. Please put the words “TRADE SECRET CLASS” in the subject of your e-mail. I get lots of e-mail, and I set my filters to prioritize such emails, so doing this will make it much more likely that I will read and respond to your e-mail promptly.

2. Required Text and Reading Assignments

The reading list is posted on TWEN, as are all readings. There is no text for purchase in this class.

3. Assessment

a. Participation. 10% of final grade. (includes contribution to class discussion)

b. Memos or Short Research Papers. 75% of final grade. You may use this class to satisfy the Senior Writing Requirement. However, I am making that optional. You must declare your option by the time of the first due date and stick to it thereafter.

1. Option 1, Standard Memos, No Writing Credit: I will provide you with a fact pattern and client question and ask you to write a 5 page, double-spaced memorandum in response. There will be two memos. The first will be due at the end of Spring Break and the second at the beginning of finals week. The memos will be open book, take-home memos.

2. Option 2, Writing Credit: Two 3000 word papers. The topic should be an opinion piece about a current event related to the section of the course or chosen from a list of topics provided by me. The first will be due at the end of Spring Break and the second at the beginning of finals week.
c. Simulation. 15% - Near the end of the semester, you will draft and negotiate a basic and brief non-disclosure and non-compete agreement. (I will provide the basic form agreements). This will be a small group project, and you will be given ample time to complete it, although I do not expect it to be extremely time-consuming.

4. Course Description and Learning Objectives

The three primary legal mechanisms for securing property rights in commercially valuable information are trade secrets, patents, and copyrights. Of the three, trade secrecy is the least discussed and studied, but, ironically the one most relied upon by businesses, particularly small and medium sized enterprises. It is, however, growing in importance as a legal policy issue, as business and governments begin to realize the importance of trade secrets and have come to fear systematic, wide-spread industrial espionage sponsored by foreign governments (e.g., the Chinese government).

This course will study the ways in which trade secrets are created, used, maintained, and ultimately enforced against infringers. It will cover the two sources of trade secrecy in state law—the common law and statutes—as well as the relationship between these state law regimes and the overlapping protections provided by federal intellectual property law. The purpose of this class is to give students a working knowledge of trade secrets doctrine, as well as an understanding of the policies and economics that justifies the legal protection of valuable confidential information.

5. Absences

You are all familiar with the school’s attendance policy. Since this class meets once a week, you are permitted 3 absences. Absences can be excused. We do not need to discuss excuses until you have at least 2 absences.

Excessive absences without excuse will result in withdrawal from the class. On the one hand, I’m fairly liberal about excusing absences. On the other hand, for this class, there are certain classes for which I will be demanding about attendance. You will need to be in class to participate in our negotiation exercise. Unless you have an extraordinary excuse, I will not provide a makeup opportunity.

At my discretion, and in consultation with the Associate Dean, I may at my discretion and/or as required by law and school policy make exceptions to the foregoing to accommodate disabilities or other extraordinary circumstances, including, but not limited to illness or death in the family.

6. Bureaucratic Boilerplate

This class is routinely recorded. You may record this class. You may distribute such recordings to your classmates enrolled in this class this semester. You may not publicly transmit, distribute, or post such recordings.

Emergency Procedures:
Southern Illinois University Carbondale is committed to providing a safe and healthy
environment for study and work. Because some health and safety circumstances are beyond our control, we ask that you become familiar with the SIUC Emergency Response Plan and Building Emergency Response Team (Bert) program. Emergency response information is available on posters in buildings on campus, available on BERT's website at www.bert.siu.edu, Department of Safety's website at www.dps.siu.edu (disaster drop down) and in Emergency Response Guideline pamphlet. Know how to respond to each type of emergency.

Instructors will provide guidance and direction to students in the classroom in the event of an emergency affecting your location. It is important that you follow these instructions and stay with your instructor during an evacuation or sheltering emergency. The Building Emergency Response Team will provide assistance to your instructor in evacuating the building or sheltering within the facility.
Schedule

**Classes:**

Every Monday 4:00 – 6:30 PM

**Memo Schedule (IF YOU SELECT MEMO OPTION):**

2/26 – Memo 1 Posted
3/3 – In class Q&A re memo.
3/17 – Memo 1 due
4/14 – Memo 2 Posted
4/21 - In class Q&A re memo.
4/28 – Memo 2 due

**Paper Schedule (IF YOU SELECT PAPER OPTION):**

2/17 – Topic for Paper 1 chosen and approved
3/17 – Paper 1 due
3/31 – Topic for Paper 2 chosen and approved
4/28 – Paper 2 due

**Simulation Schedule:**

3/31 – Problem and materials provided
4/14 – Exchange negotiating drafts
4/21 – In class negotiation
READINGS

There is no casebook for this class. In lieu of a casebook, all reading assignments are available for download from the class TWEN site (in the section titled, “Reading Assignments”). You are responsible for downloading and reading all assigned material, regardless of whether we discuss them in class.

As in life as in law school, there are always trade-offs. You will notice that the opinions are unedited and unabridged. Thus, you are spared the necessity of purchasing a casebook, but you are not presented neat-and-tidy selections from opinions that are relevant to the particular legal issue we are discussing in class that day. In sum, you must start to practice the daily work of being an attorney, which means reading entire opinions in one’s legal research and culling from the opinions the particular factual and legal material relevant to the client’s dispute.

CLASS ASSIGNMENTS

If a reading is designated as “skim,” then this means that you should read it for basic understanding, and not with the usual analytical scrutiny and note taking employed in the regular reading assignments.

1/13 – NO CLASS WILL BE HELD

1/20 – MLK DAY – No School

CLASS 1 - 1/27

What is Trade Secret Law?

Restatement (Third) of Unfair Competition § 39 and cmts. a-e

*Electro-Craft Corp. v. Controlled Motion, Inc.*, 332 N.W.2d 890 (Minn. 1983)

Establishing Trade Secrecy: An Overview on Black Letter Law:

**Skim:** Restatement (First) of Torts § 757 and cmt. b

Illinois UTSA § 59.1-336 (definition of “trade secret”)

Restatement (Third) of Unfair Competition § 39

Re-read *Electro-Craft Corp.* seeking an answer to this question: Who bears the burden of proving a trade secret is a trade secret, and what suffices to make out this burden?

Establishing Trade Secrecy: Value & Competitive Advantage:

**Background:** Restatement (Third) of Unfair Competition § 39 & cmt. e

*Electro-Craft*, 332 N.W.2d at 900-01

*Metallurgical Indus. v. Fourtek*, 790 F.2d 1195, 1201 (5th Cir. 1986)
1. 

*Phillips v. Frey*, 20 F.3d 623, 628 (5th Cir. 1994)


**CLASS 2 - 2/3**

Establishing Trade Secrecy: Novelty

Restatement of Torts § 757 cmt. b
Illinois UTSA § 59.1-336
Restatement (Third) of Unfair Competition § 39

*Organic Chemicals* (from class 1), pp. 630-31 (discussion of the relationship between trade secrets and patents)

*Buffets, Inc. v. Klinke*, 73 F.3d 965 (9th Cir. 1996)

*Cataphote Corp. v. Hudson*, 422 F.2d 1290, 1293-94 (5th Cir. 1970)

Establishing Trade Secrecy: Secrecy

Restatement of Torts § 757 cmt. b
Illinois UTSA § 59.1-336
Restatement (Third) of Unfair Competition § 39 cmt. f


*Metallurgical Indus.* (from class 1), pp. 1199-1202


Establishing Trade Secrecy: Duration


**CLASS 3 - 2/10**

Establishing Trade Secrecy: Trade Secrets vs. Idea Submissions & Self-Disclosing Ideas:


Establishing Trade Secrecy: Use:

Restatement of Torts § 757 cmt. b
Illinois UTSA § 59.1-336
Restatement (Third) of Unfair Competition § 39
*Victor Chemical Works v. Iliff*, 132 N.E. 806 (Ill. 1921) (read what you need in order to follow the ¶ with keynotes 6-8 on p. 812)

*Dresser-Rand Co. v. Virtual Automation, Inc.*, 361 F.3d 831 (5th Cir. 2004) (read what you need to follow the discussion of the “no finished product” argument, keynotes 9 & 10 p. 839)

*Metallurgical Industries Inc.* (from class 1), pp. 1202-03 (the “negative know-how” argument)


**CLASS 4 – 2/17**

Establishing Trade Secrecy: Cost of Development & Sweat of the Brow:

Rest. Torts § 757 cmt. b (from class 1), factor 5.

*Metallurgical Industries Inc.* (from class 1), pp. 1201-02 (the discussion of the cost-of-development argument)

*Read Learning Curve Toys v. Plywood Toys*, 342 F.3d 714 (7th Cir. 2003)

Establishing Trade Secrecy: Reasonable Precautions:

Restatement of Torts § 757 cmt. b
Illinois UTSA § 59.1-336 (definition of “trade secret”)
Restatement (Third) of Unfair Competition § 39 and § 40(b)(4)

*Electro-Craft* (from class 1), 332 N.W.2d at 901-03 (focusing this time on part A.3(c))


In re Innovative Construction Sys., 701 F.2d 677 (7th Cir. 1983)


**CLASS 5 – 2/24**

Misappropriation: An Overview:

Restatement of Torts § 757
Illinois UTSA § 59.1-336 (definition of “misappropriation”)
Restatement (Third) of Unfair Competition § 40.
Double Misappropriation:

Restatement of Torts § 757(c)  
Illinois UTSA § 59.1-336 (“Misappropriation,” 2(a) & 2(c))  
Restatement (Third) of Unfair Competition § 40(b)(3)

Metallurgical Indus (from class 1), p. 1204-05 (parts V and VI)

Accidental Disclosures:

Restatement of Torts § 757 cmt. b
Illinois UTSA § 59.1-336 (definition of “misappropriation”) Restatement of Unfair Competition § 40(b)(4) (from the section on the Restatements and UTSA).

*B.C. Ziegler & Co. v. Ehren*, 414 N.W.2d 48 (Wis. 1987)


Express & Implied Duties of Confidentiality:

Restatement of Torts § 757(b)
Illinois UTSA (definition of “misappropriation,” § (b)(2))
Restatement (Third) of Unfair Comp. §§ 40(b)(1) & 41

Restatement (Third) of Unfair Competition § 41 cmt. b (be prepared to discuss the illustrations)

*Burten v. Milton Bradley Co.*, 763 F.2d 461 (1st Cir. 1985).

*Smith v. Snap-On Tools Corp.*, 833 F.2d 578 (5th Cir. 1988).

Misappropriation: Confidentiality and Allocation of Trade Secret Rights between Employer and Employee:

Restatement (Third) of Unfair Competition § 42 cmt. e


Misappropriation: An Employee’s Duty of Confidentiality:

Restatement (Third) of Unfair Competition § 42 cmts. b & c.


*Electro-Craft* (from class 1), p. 903 (the discussion of misappropriation) and more generally pp. 901-03 (the discussion of reasonable precautions)
Misappropriation: Confidentiality and an Employee’s Defense of Industry Skill:

Restatement (Third) of Unfair Competition § 42 cmt. d.

*AMP v. Fleischhacker*, 823 F.2d 1199 (7th Cir. 1987) (focus especially on pp. 1202-06)

*GTI Corp. v. Calhoon*, 309 F. Supp. 762 (S.D. Ohio 1969) (focus on the court’s discussion of the distinction between trade secrecy and employee general skill)

**CLASS 8 – 3/24**

Misappropriation: Non-Competition Agreements as an Alternative to Trade Secret Litigation:

Restatement (Third) of Unfair Competition § 42 cmt. g


*Calhoon* (from class 7) (focusing now on the court’s treatment of the non-compete agreement in the case)

Cal. Bus. & Prof. Code § 16,600


Fla. Stat. 542.335


**CLASS 9 – 3/31**

Misappropriation: Improper Means, Independent Discovery and Reverse Engineering:

Restatement (Third) of Unfair Competition § 43 & comments

*E.I. du Pont de Nemours & Co. v. Christopher*, 431 F.2d 1012 (5th Cir. 1970)

*Chicago Lock Co. v. Fanberg*, 676 F.2d 400 (9th Cir. 1982)

*Texas Urethane, Inc. v. Seacrest Marine Corp.*, 608 F.2d 136 (5th Cir. 1979)

**CLASS 10 – 4/7**

Remedies: Equity:

Restatement (Third) of Unfair Competition § 44
Illinois UTSA § 59.1-337

*Sperry Rand Corp. v. A-T-O, Inc.*, 447 F.2d 1387 (4th Cir. 1971). (For this class, read what you need only to follow part II.A at p. 1392)

*Winston Research Corp. v. Minnesota Min. Co.*, 350 F.2d 134 (9th Cir. 1965) (read what you need to follow part IV of the court’s opinion)

*Bimbo Bakeries, Inc. v. Botticella*, 613 F.3d 102 (3rd Cir. 2010)

**CLASS 11 – 4/14**

Remedies: Monetary Relief:

Illinois UTSA § 59.1-338
Restatement (Third) of Unfair Competition § 45 & comments

*Sperry Rand* (from class 10), only part II.B, pp. 1392-95

*University Computing Co. v. Lykes-Youngstown Corp.*, 504 F.2d 518 (5th Cir. 1974) (read what you need to follow the discussion pp. 535-40)

**CLASS 12 – 4/21**

No new reading – In class simulation

**Makeup classes for 1/13 & 1/20:** Given the out-of-class assignments and group meetings for the simulation, we will not need to hold makeups for these classes.