

Ninth Circuit Applies the “Continued Use” Doctrine to the Defend Trade Secrets Act Claims

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The Defend Trade Secrets Act (“DTSA”), enacted in 2016, created a federal right of action for misappropriation of trade secrets. The Ninth Circuit recently addressed for the first time whether a DTSA claim may be brought against misconduct predating the enactment of the DTSA. The Ninth Circuit held that it could, so long as the misappropriation continued until after the enactment of the DTSA. See [*Attia v. Google LLC*, — F.3d —, 2020 WL 7380256 \(9th Cir. 2020\)](#).

In *Attia*, plaintiff Eli Attia developed a new architecture technology called Engineered Architecture (“EA”). In July 2010, Google approached Attia about partnering to create a program to implement EA. Attia disclosed his alleged EA trade secrets with the understanding that Google would compensate him if the program was successful. In 2011, Google allegedly filed patent applications based on the EA trade secrets. After the patents published in 2012, Google allegedly excluded Attia from the project and used Attia’s EA technology to create a new venture, Flux Factory. Attia filed suit asserting, among other claims, a claim pursuant to the DTSA. The district court dismissed Attia’s DTSA claim in part due to the fact that the alleged misuse occurred years before the DTSA was enacted. Attia appealed to the Ninth Circuit, which reversed that aspect of the district court’s decision.

The Ninth Circuit considered, as an issue of first impression, whether the DTSA provides for a “continued use” theory of liability. The Ninth Circuit noted that the Uniform Trade Secrets Act, which many states have adopted, expressly states that “[w]ith respect to a continuing misappropriation that began prior to the effective date” of the legislation, it “does not apply to the continuing misappropriation that occurs” after the law is passed. The DTSA, in contrast, contained no such “anti-continued use provision.” The Ninth Circuit deemed this omission deliberate and significant: “That it did not include such a provision in the DTSA evinces congressional intent for the statute to apply also to post-enactment misappropriation that began prior to enactment.” As a result, the Ninth Circuit held that the misappropriation of a trade secret prior to the enactment of the DTSA does not preclude a claim arising from post-enactment misappropriation or continued use of the same trade secret.

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