



DELBERT HOSEMANN
Secretary of State

**2010 Business Reform Study Groups
Minutes of the Technology and
Intellectual Property Laws Study Group, Meeting #3
August 24, 2010**

The third meeting of the Technology and Intellectual Property Laws Study Group (hereinafter the "Study Group") was called to order on Tuesday, August 24, 2010 at 11:10 A.M. at the Office of the Secretary of State, 700 North Street, Jackson, Mississippi. A list of attendees is attached as Exhibit A.

Welcome and Introduction

Cheryn Baker, Assistant Secretary of State for the Division of Policy and Research, welcomed everyone to the meeting and thanked Brunini Law Firm and Steve Carmody for sponsoring lunch for the Study Group.

A copy of the minutes from the second meeting was provided to the attendees. The attendees voted and approved the minutes to the second meeting.

Ms. Baker introduced Doug Jennings, Senior Attorney for the Policy and Research Division. Jennings announced that the three subgroups (trade secrets and the right of publicity; incentives; and software issues) would provide a report to the Study Group at this meeting.

(1) Trade Secrets and the Right of Publicity

Mr. Jennings reported to the Study Group on behalf of subgroup chair Whit Rayner. Jennings stated that the subgroup reviewed the Mississippi Uniform Trade Secrets Act (UTSA) and focused on non-uniform provisions to UTSA adopted in other states. The group then began considering whether Mississippi should adopt any non-uniform provisions, and if so, which provisions to adopt.

Jennings stated that a new draft of the proposed UTSA was contained in the materials for the meeting and that substantial revisions had taken place in light of suggestions made at a recent subgroup meeting. The new draft is attached to this document as Exhibit B.

Jennings stated that the subgroup would soon be meeting to discuss the proposed Mississippi Right of Publicity Act introduced in the study group's first meeting.

(2) Software Issues

Ms. Baker introduced subgroup chair Jerry Hafter to give a report to the Study Group. Hafter stated that the subgroup had met separately once since the second meeting of the full study group. Hafter also stated that the idea of having laws that apply to computer software contracts has been around for 20 years or more. Hafter briefly discussed several unsuccessful efforts of others to create laws dealing with computer software contracts.

Hafter discussed the recent creation of the Principles of the Law of Software Contracts (the Principles), an effort arising from the failure of the Uniform Computer Information Transactions Act to gain traction in the states. Hafter stated that he hoped to speak soon with Dean O'Rourke of the Boston University Law School, a colleague of his who has been involved with the drafting of the Principles, to discuss whether Mississippi should attempt to go its own way in adopting statutes dealing with computer software contracts. Hafter said it was unlikely that his subgroup would be able to write a comprehensive statute, but could perhaps address a few key areas of importance.

Hafter stated that Mississippi is more of a buyer than a seller and that the Study Group should focus on laws that apply to buyers rather than sellers. Hafter discussed the issues that should be addressed, including warranties, scope, and what is considered to be computer software.

Secretary Hosemann responded by saying that there are many computer companies in Mississippi producing software and that the Study Group should recommend the adoption of laws that would benefit these companies. Secretary Hosemann said he would like to take the lead in this area by drafting a comprehensive statute. Hosemann also agreed with a member who suggested the state's laws be changed to make it easier for programmer-subcontractors to collect pay owed to them.

(3) Incentives

Mr. Jennings provided this report to the Study Group on behalf of subgroup chair Angela Grayson, who was unable to attend the meeting.

Jennings stated that the subgroup had recently met via teleconference, and that Kathy Gelston, the Chief Financial Officer for the Mississippi Development Authority (MDA), participated in the call. Jennings said that Ms. Gelston gave an overview of all of the state's current incentives aimed at bringing technology and research and development companies to the state. Jennings passed along Gelston's view that Mississippi's existing incentives compare very favorably to those of other states, but that access to startup capital is hindering the creation of new businesses generally.

Jennings stated that the trade incentives discussed by the subgroup included access to capital, attracting and educating talent, encouraging people to move to Mississippi, and legal incentives. Jennings also stated that the subgroup would break down into sub-sub-groups to focus on these areas of interest.

At the end of this subgroup report, Ms. Baker concluded the Study Group meeting. There being no further business, the meeting was adjourned at 12:30 p.m.

Respectfully Submitted,



Doug Jennings

Mississippi Secretary of State

Senior Attorney, Division of Policy & Research

EXHIBIT A

Minutes of the Technology and Intellectual Property Laws Study Group,, Meeting # 3

August 24, 2010

Members and Guests in Attendance:

1. Paul Barnes
2. Bill Brabec
3. Steve Carmody
4. Danny Drake
5. Marcial Forester
6. Jerry Hafter
7. Scott Hamilton
8. Greg Hinkebein
9. Brandt Howell
10. Dr. Henry Jones
11. Anita Modak-Truran
12. Whit Rayner
13. Anne Turner
14. Caryn Quilter (guest)

Members Attending by Telephone:

1. Meaghin Burke
2. Stephen Clay
3. Michael Goggans
4. Johnny Healy
5. Wendy Mullins
6. Ravi Raju
7. Otis Tims
8. Will Wilkins
9. Tray Hairston

Secretary of State's Staff:

1. Delbert Hosemann, Secretary of State
2. Cory Wilson, Chief of Staff
3. Cheryn Baker, Assistant Secretary of State, Division of Policy & Research
4. Doug Jennings, Senior Attorney, Division of Policy & Research
5. Justin Fitch, Attorney for Elections & Policy

EXHIBIT B

Proposed Revised Mississippi Uniform Trade Secrets Act (UTSA)

I. Proposed amendments to UTSA:

Miss. Code Ann. § 75-26-3. Definitions.

As used in this chapter, unless the context requires otherwise:

(a) “Improper means” includes theft, ~~bribery,~~ ~~misrepresentation,~~ ~~breach or inducement of a breach of a~~ duty to maintain secrecy arising out of a fiduciary, employment, or other confidential relationship ~~duty to maintain secrecy, or,~~ espionage through electronic or other means; or breach or inducement of a breach of a duty imposed by common law, statute, contract, license, protective order, or other court or administrative order. Reverse engineering of a trade secret not acquired by conduct otherwise constituting misappropriation shall not be considered improper means.

(b) “Misappropriation” means:

(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:

1. Used improper means to acquire knowledge of the trade secret; or

2. At the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was:

a. Derived from or through a person who had utilized improper means to acquire it;

b. Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or

c. Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limits its use; or

3. Before a material change of his or her 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.

(c) "Person" means a natural person, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision or agency or any other legal or commercial entity.

(d) "Trade secret" means information, without regard to form, including, but not limited to, including a formula, pattern, compilation, program, computer software, computer programming instruction or code, prototype, composition of matter, device, method, technique, design, improvement, procedure, recipe, drawing, -or process, financial plan, product plan, list of actual or potential customers or suppliers, or technical and financial data that:

(i) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and

(ii) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

The existence of a trade secret is not negated merely because an employee or other person has acquired the trade secret without express or specific notice that it is a trade secret if, under all the circumstances, the employee or other person knows or has reason to know that the owner intends or expects the secrecy of the type of information comprising the trade secret to be maintained.

Miss. Code Ann. § 75-26-5. Injunctions; protective orders.

(1) Actual or threatened misappropriation may be enjoined. Upon application to the court, an injunction shall be terminated when the trade secret has ceased to exist, but the injunction may be continued for an additional reasonable period of time in appropriate circumstances for reasons including, but not limited to, an elimination of commercial advantage that otherwise would be derived from the misappropriation or where the trade

~~secret ceases to exist due to the fault of the enjoined party or others by improper means, in order to eliminate commercial advantage that otherwise would be derived from the misappropriation.~~

- (2) In exceptional circumstances, if the court determines that it would be unreasonable to prohibit future use, an injunction may condition future use upon payment of a reasonable royalty for no longer than the period of time for which use could have been prohibited. Exceptional circumstances include, but are not limited to, a material and prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation that renders a prohibitive injunction inequitable. The alleged wrongful user shall bear the burden of proof of exceptional circumstances.
- (3) In appropriate circumstances, affirmative acts to protect a trade secret may be compelled by court order.

Miss. Code Ann. § 75-26-7. Damages. (no changes)

- (1) Except to the extent that a material and prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation renders a monetary recovery inequitable, a complainant is entitled to recover damages for misappropriation. Damages can include both the actual loss caused by misappropriation and the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss. In lieu of damages measured by any other methods, the damages caused by misappropriation may be measured by imposition of liability for a reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret.
- (2) If willful and malicious misappropriation exists, the court may award exemplary damages.

Miss. Code Ann. § 75-26-9. Attorney's fees for prevailing party.

If (a) a claim of misappropriation is made in bad faith, (b) a motion to terminate an injunction is made or resisted in bad faith or (c) willful and malicious misappropriation exists, the court may award reasonable attorney's fees and expenses to the prevailing party.

Miss. Code Ann. § 75-26-11. Preservation of secrecy during litigation.

In ~~an action under this chapter~~any civil or criminal action, a court shall preserve the secrecy of an alleged trade secret by reasonable means, which may include granting protective orders in connection with discovery proceedings, holding in-camera hearings, sealing the records of the action and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval. The disclosure or publication of a trade secret in a court proceeding or as a result thereof shall not constitute an abandonment of the secret.

Miss. Code Ann. § 75-26-13. Limitations period. (no change)

An action for misappropriation must be brought within three (3) years after the misappropriation is discovered or by the exercise of reasonable diligence should have been discovered. For the purposes of this section, a continuing misappropriation constitutes a single claim.

Miss. Code Ann. § 75-26-15. Applicability of chapter. (no change)

- (1) Except as provided in subsection (2), this chapter displaces conflicting tort, restitutionary and other law of this state providing civil remedies for misappropriation of a trade secret.
- (2) This chapter does not affect:
 - (a) Contractual remedies, whether or not based upon misappropriation of a trade secret;
 - (b) Other civil remedies that are not based upon misappropriation of a trade secret; or
 - (c) Criminal remedies, whether or not based upon misappropriation of a trade secret.

Miss. Code Ann. § 75-26-19. Severability. (no change)

If any provision of this chapter or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are severable.