Trade Secrets:
Why they matter and how we can protect them

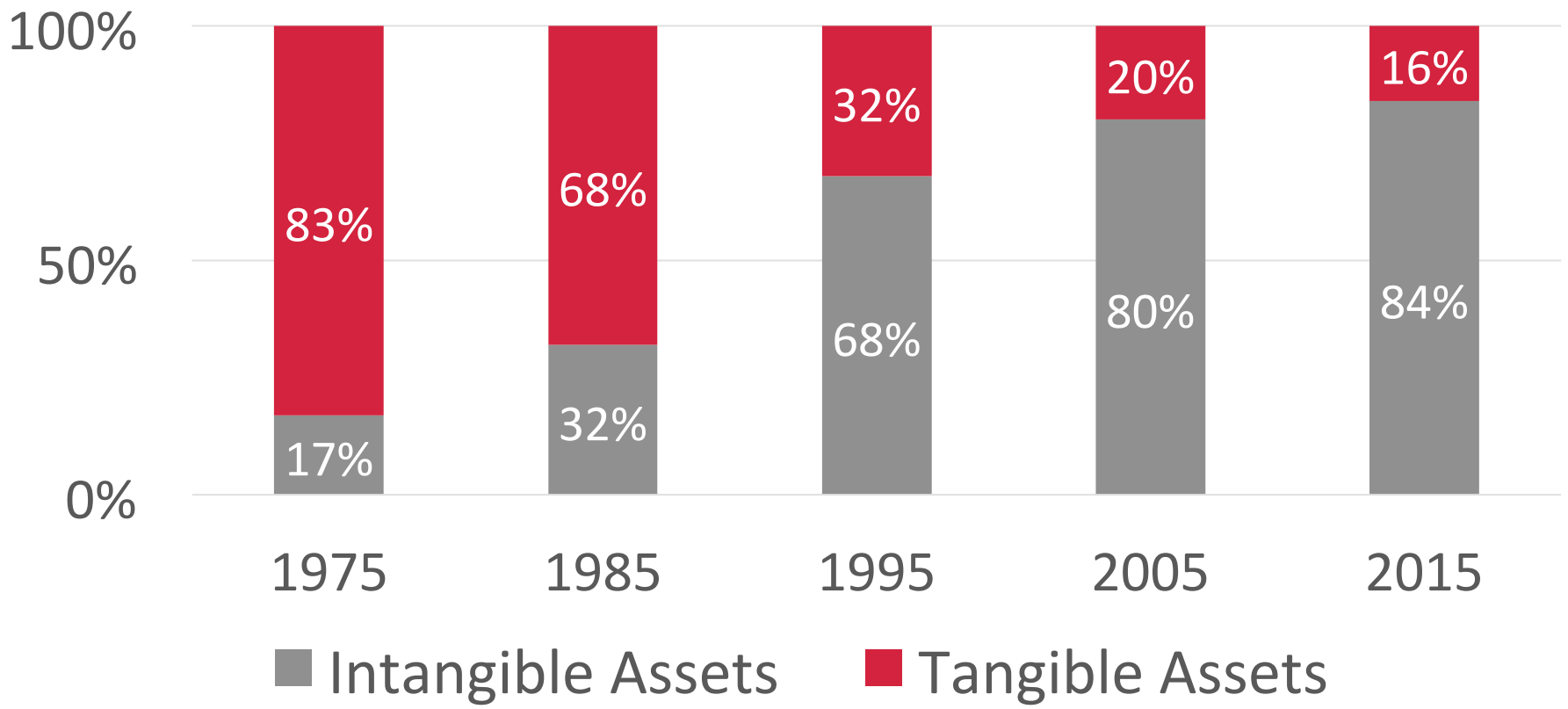
LES Silicon Valley

James Pooley
September 19, 2018

Agenda

- Why They Matter
- Trade Secret Law
- Managing Trade Secrets

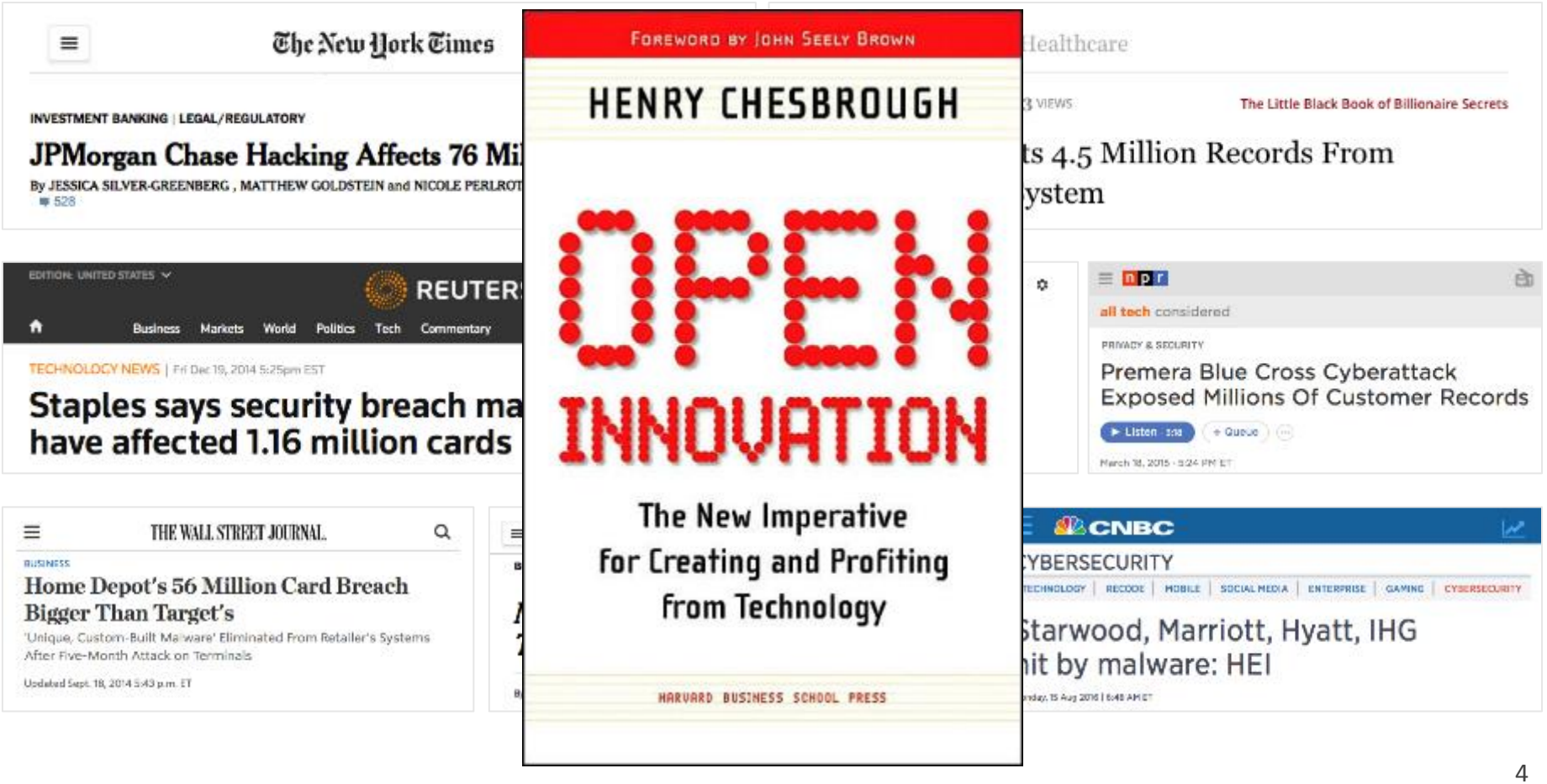
Industry's primary asset is data



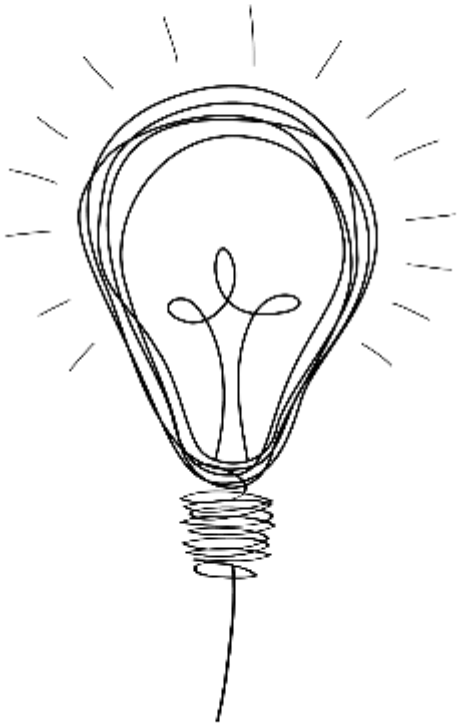
Source: Ocean Tomo, LLC
January 1, 2015

These valuable assets are also vulnerable

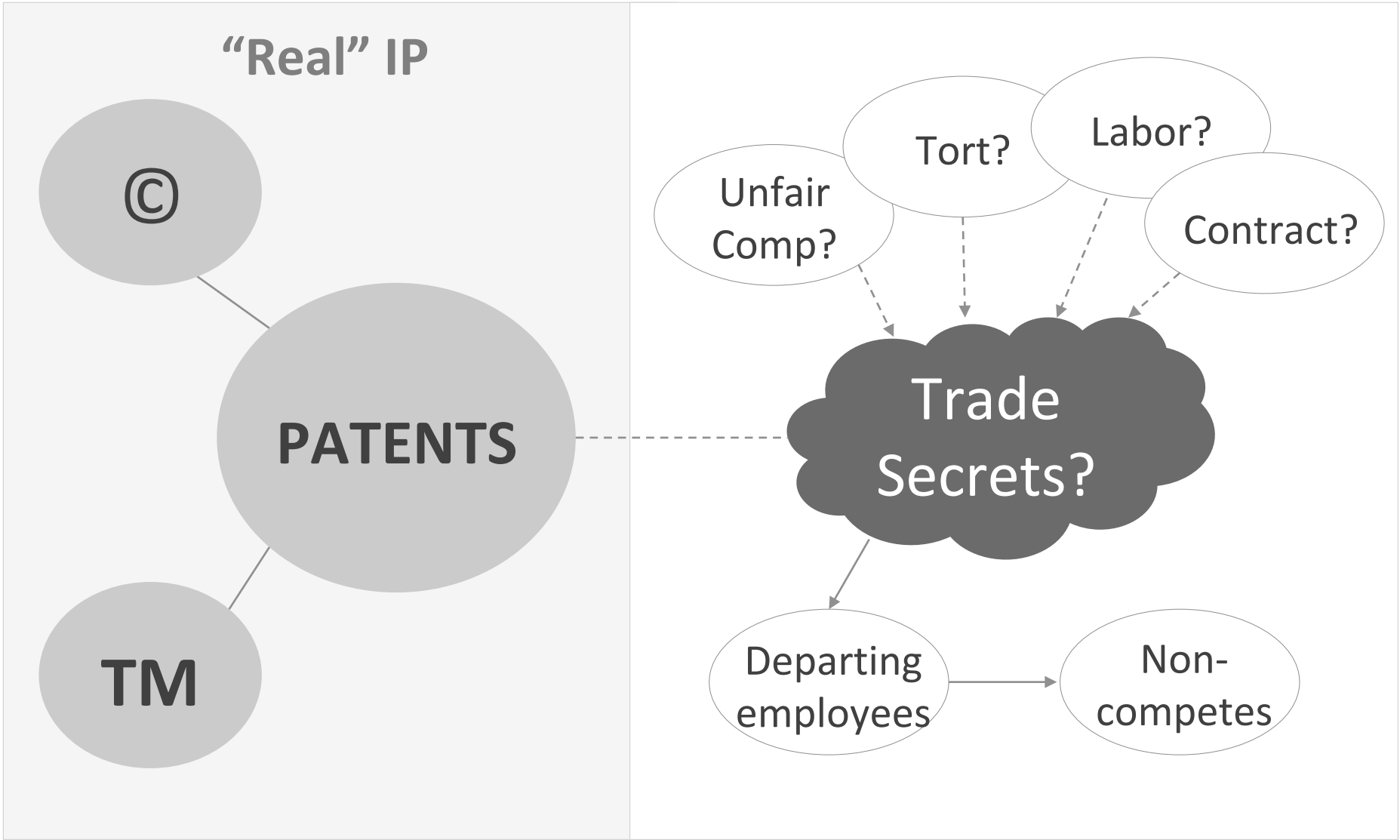
- **Cyberattacks make headlines, reinforcing external threats**
- **Open innovation, and a modern workforce, require close management**



Trade Secrets: The oldest form of IP



How Lawyers see Trade Secrets

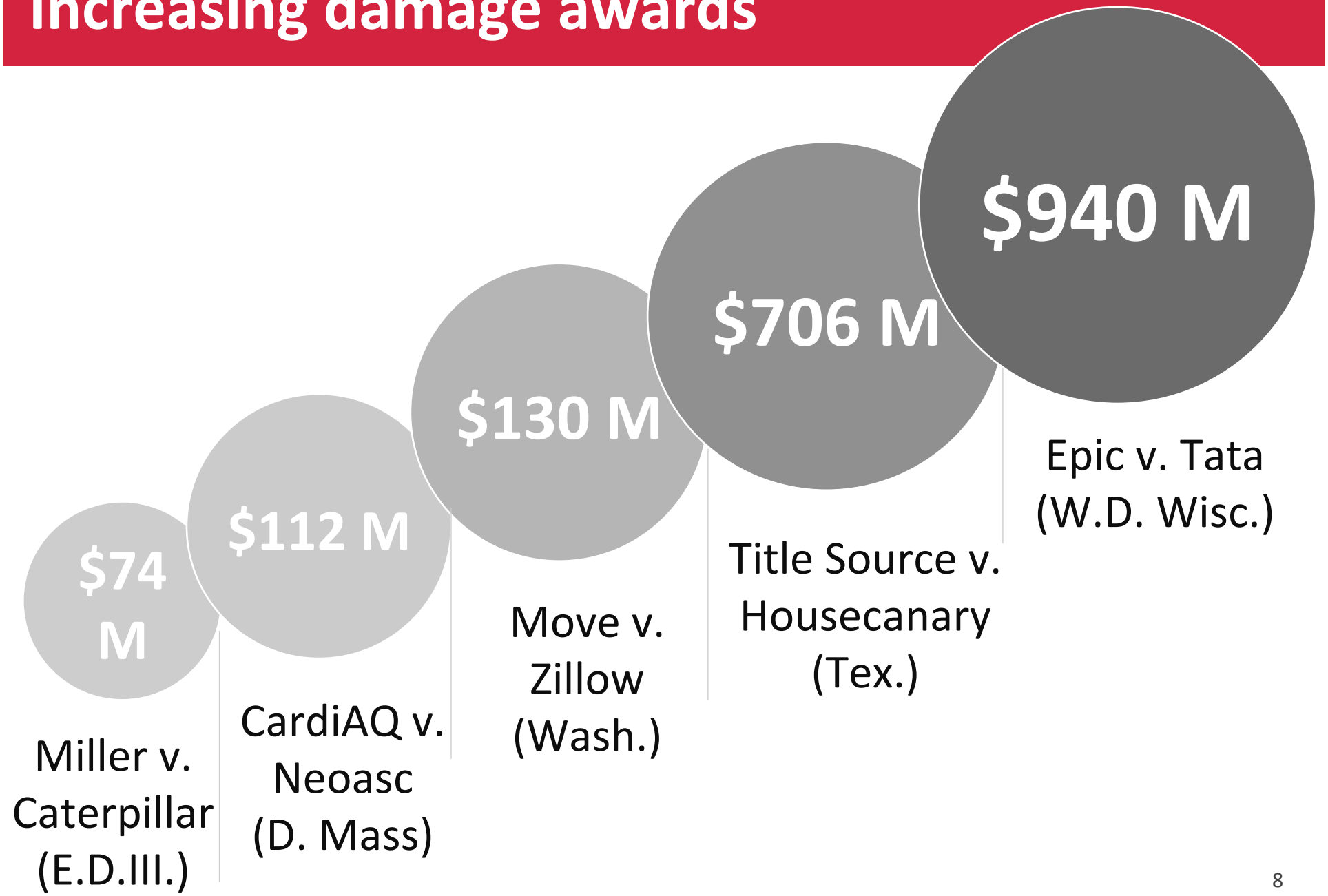


How Clients see Trade Secrets

- Big data/ IoT
- Market analysis
- Customer info
- Strategy for $$
- IP
- R&D
- Comp. intelligence
- Comp. advantage
- Acquisitions
- Licensing
- Partners

- Foreign operations
- Governance
- Risk management
- Compliance
- NDAs
- IT
- Lawsuits
- Government
- Cyber threats
- Employees

Increasing damage awards



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Broader than other forms of IP

Patent	Protects specific new technological solutions
Copyright	Protects form of expression
Trademark	Protects goodwill in brand
Design	Protects exterior appearance of product
Trade Secret	Protects **INFORMATION**

What qualifies as a trade secret?

- **Any information that is:**
  - Secret (not generally known)
  - Has competitive value
  - Is protected by "reasonable steps"
- Skill and general knowledge are **not covered**
- Potentially permanent, but **not exclusive**

Examples of protectable secrets

Raw data, extracted analytics, AI algorithms	Information about customers and suppliers
Unannounced products	Information entrusted to you by your customers
R&D, including failures and dead ends	Strategic, marketing, & financial plans

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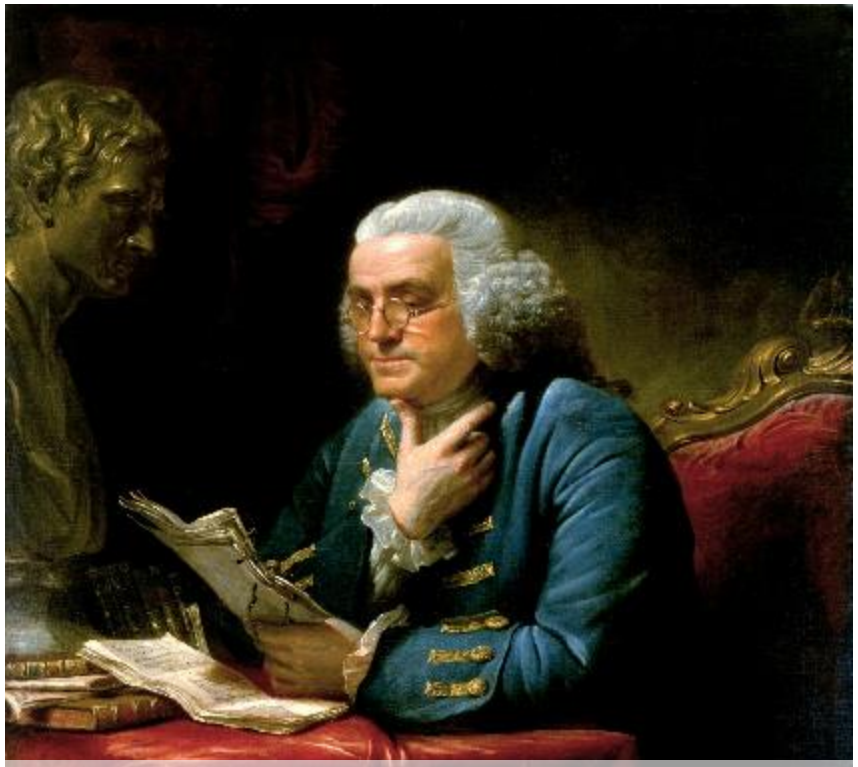
Management of trade secret assets

Strategic objectives of management

- Prevent loss of critical advantage
- Avoid contamination
- Comply with emerging standards
- Demonstrate “reasonable steps”



“Three may keep a secret, if two of them are dead.”
-Benjamin Franklin

Three factors for “reasonable steps”

1 Value of the information

- Focus on what is most important to keep from the competition
- Almost all secrets will eventually become known
- Many secrets, especially business data, degrade over time

2 Risk of loss or contamination

- What are the threat vectors?
- What is the likelihood that they will come to pass?

3 Consider mitigation measures

- What mitigation measures might reduce risk?
- What do they cost (money, administration and friction)?

Risk area #1: people

Recruiting and on-boarding

- Recognize the recruiter's dilemma: the best hire might be dangerous
- Review contracts that could constrain scope of work
- Create good record of warnings not to bring information
- Beware of groups: managers may have special responsibilities

Training

- Employees are the most common source of leaks
- Training is the cheapest form of prevention
- Effective training is continuous and varied, with tests

Termination

- Lock down access to systems, consider forensics
- Conduct a thorough exit interview

Risk area #2: processes

Policies

- Clear policies around protection of your data and respect for others'
- Reinforce through management response to any incident
- Pay special attention to social media policies

Access Controls

- Apply the need to know principle
- Coordinate with HR: as positions change, access changes
- Keep record classification systems simple

Endpoint controls

- Map where data travels and is stored: who has access and how
- Establish procedures for use of employee-owned devices
- Deploy robust tools for intrusion detection and response

Risk area #3: management

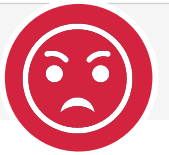
NDA Management

- The ubiquitous NDA gets little attention & is sometimes hidden
- It's not a form, but a contract; it deserves negotiation
- Most problems arise from lack of execution and follow-up

International Supply Chain (esp. Asia)

- Specify security expectations
- Get NDAs from individuals
- Carefully track ownership issues
- Provide for penalties
- Exercise audit rights vigorously
- Noncompete/circumvention

Litigation Avoidance & Control



- Trade secret litigation is costly in many ways
- Emotional issues require adult supervision

Creating a plan fit for purpose

"Audit" and "inventory" are not required	• Just know the categories of data and threats faced • Manage to the risk, not to the rules
Central authority with distributed responsibility	• Business unit leaders perform initial assessments • Central management must assure compliance and reviews
Regular reviews	• Threat environments are dynamic; plans need adjustment

Thank you!

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