

TRADE SECRETS BASICS

A “Trade Secret” is information owned by a business which provides an economic advantage over competitors, and which is known only to that business. The recipe for Coca-Cola, Kentucky Fried Chicken’s “Original Recipe” herbs and spices blend, and the algorithm behind Google’s search function are all famous Trade Secrets.

A Trade Secret is usually something that cannot be trademarked or patented, but that is worth the effort for a business to keep secret. Trade Secrets may be protected against theft and misuse by competitors, but the enforcement process can be long and difficult.

There are three things that determine when something is a Trade Secret:

- (1) The information is secret (i.e., not known or readily available to parties who deal with the kind of information in question);
- (2) The information has a commercial value that depends on it remaining a secret; and
- (3) The person who keeps the secret takes reasonable steps to ensure that it remains a secret.

EXAMPLE

Imagine that you run a chain of doughnut shops. One day, you discover that freezing the dough for five days before sending it to each location to be fried produces a superior doughnut. Customers flock to your store over competitors, but no one knows why your doughnuts are so much better.

If your competitors figured out how you make your doughnuts, you would lose your special place in the doughnut market. You want to protect your preparation method somehow, but this information does not meet the standards for patent protection.* This is when you need to utilize Trade Secret protections.

There is no registration for a Trade Secret. Instead, it is up to you to take “reasonable steps” to protect your secret. In this case, “reasonable steps” might include making sure that only a limited number of employees know your freezer method. You may also have employees sign a confidentiality agreement, promising not to share this information with anyone. If the method involved several steps, you might teach employees only some of the steps, and never let anyone know the entire process.

* Alternatively, if you created a new doughnut-making machine, you might be able to get a patent for the machine itself that would give you an exclusive right to use or manufacture the machine. For more information on patents, see the Patents Handout.

Limits of Trade Secret Protection

You cannot prevent a competitor from independently discovering or “reverse engineering” the same information. That is, if the doughnut shop down the street experiments and discovers the freezing technique, you cannot do anything to stop them from using it. Think about how a competitor might figure out your secret, and whether it is worth it to you to do what is necessary to protect the secret.

If your idea can be patented, it is virtually always a better idea to seek a patent instead of relying on Trade Secret protections.

When do I need a lawyer?

Trade Secrets can be a complicated and difficult topic. In many cases, it is in your best interest to have a lawyer help you. A lawyer can help you determine whether your information can be patented, or whether it makes more sense to keep it as a Trade Secret.

Consult with a lawyer to make sure you are taking all necessary “reasonable steps” to protect your Trade Secret. A lawyer can also help you implement some of those steps, like drafting confidentiality agreements for your employees. With a properly protected Trade Secret, you can get legal remedies if an employee violates their confidentiality agreement and shares your secret, or if a competitor obtains your secret through improper means. In those situations, your remedies could include money damages, a court order preventing other people from using your secret, or both. A lawyer can help you decide whether you should pursue those remedies.

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