

Entrepreneur's Guide to Intellectual Property – Blog Series: Trade Secrets: What Are They and How Do I Protect Them? (Part 2)

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When is a Trade Secret the Right Protection?

When considering maintaining an innovation as a trade secret, an innovator must ask a number of questions regarding the new technology, such as:

- Can the new technology be kept confidential and effectively used? For example, can the technology be effectively used in a closed and secure facility? If so, trade secret protection should be available and an appropriate form of IP protection.
- Is the new technology truly innovative or is it an obvious application of existing technology? If it's a modification of existing technology, patent protection may not be available.
- Will use of the new technology by others be easily detectable? If so, the technology may not be able to be kept as a trade secret and patent protection may be a better option, especially if infringement can be easily determined.

Innovators should work with their intellectual property counsel to address strategies for protection of their inventions to make sure the best form of intellectual property protection is implemented to protect the company's most precious assets, their innovations.

Keeping Trade Secrets Secret – 12 Protective Measures

The following checklist summarizes the key protective measures which a trade secret owner should take to ensure that the security of its trade secrets is maintained.

1. Only Disclose the Secret on a "Need to Know" Basis. Only those parties that have a need to know the trade secret information in order to perform their jobs should be given access to the trade secret information.
2. Maintain a Written Statement of a Business's Trade Secret Policy. A business's trade secret policy should be set forth in writing and provided to employees. The trade secret policy should

describe the type of information that the company safeguards as a trade secret. The absence of a written trade secret policy may be persuasive evidence that information was not in fact treated as a trade secret. A business should be certain that all employees with access to trade secrets are instructed in the actions they are to take to ensure the secrecy of the confidential information to which they have access.

3. Treat Trade Secret Information Differently from Other Information. If possible, trade secret information should be separated physically from other information and employees requiring access to the secret information should be prohibited from discussing the secret information outside the separate and secure areas.
4. Institute Physical Security Measures. A business should, if it has not done so already, implement security measures including passwords and locks to physically deter access to trade secrets. Such actions may provide critical demonstrative evidence to show a court that affirmative actions have been undertaken to safeguard confidential information. Computers containing proprietary information should be accessible only by means of a password. These passwords should be changed regularly and stored in a secure place. Additionally, information which is transmitted electronically should be transmitted in an encrypted or scrambled form to prevent its interception.
5. Trade Secret Documents Should Be Labeled. To help deter the improper dissemination of trade secret documents, all such documents should be labeled with a proprietary notice and employees should be instructed as to the meaning of such designation.
6. Written Documents Containing Trade Secrets Should Be Destroyed When They Are No Longer Needed. This measure will eliminate the need to physically safeguard items which no longer need to be maintained in written form. The destruction of these materials should be in a manner which eliminates their usefulness and prevents competitors from being able to reassemble the documents.
7. Remind Employees of Their Confidentiality Obligations. Employees should be reminded on a regular basis of the business's security procedures and their individual obligations to maintain the secrecy of trade secret information.
8. Employees Should Be Required to Sign a Written Pledge of Confidentiality. This pledge should acknowledge that the business has granted the employee access to trade secret information, that the business is protecting the information, that the employee agrees not to disclose or misappropriate the information, and that the employee will report to the business all unauthorized disclosures or uses of the trade secret information. This written pledge should define the trade secret information to which the employee is or will be granted access so that the employee cannot later claim that she was unaware of the scope of the information that the business sought to protect via trade secret law.
9. Hold Exit Interviews with Departing Employees Who Have Had Access to Confidential Information. An exit interview provides a business with an opportunity to remind a departing employee of his or her written pledge to refrain from misappropriating or disclosing trade secret information. This interview also provides an opportunity for the business to collect all documents, security passes, notes and other items that pertain to the trade secret information. Immediately following the exit interview, the business should send the former employee a written summary memorializing the issues discussed at the exit interview and instructing her to call the business if she has any questions regarding her continuing obligations of confidentiality.
10. Restrict Access to the Business Property. To help restrict trade secret dissemination, the business can limit the public's access to areas containing its trade secrets. A business should not allow visitors to meander through its facility unescorted. Rather, if it has not done so already, a business should institute a formal procedure regarding visitors which may include requiring visitors to sign a confidentiality pledge. Any tours of a business's facilities

should be careful to avoid the disclosure of proprietary information.

11. Screen Speeches to Eliminate Confidential Information. Publications, press releases, speeches, seminars, and trade show displays should be screened to ensure that competitors are not provided an opportunity to discover trade secrets.
12. Disclose Trade Secrets to Others Only After the Other Party Has Signed a Confidentiality Agreement. On occasion a trade secret owner must disclose a trade secret to a third-party such as in connection with entering into a license, joint enterprise, or sale of a business. The confidentiality agreement should clearly establish the responsibility of the third-party to keep the trade secret information confidential as well as the implications of a breach of the agreement.

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