

Leveraging and Protecting Trade Secrets in the 21st Century

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How does the Colonel protect his '11 herbs and spices' recipe?

Why did Coca-Cola never patent its recipe?

Why won't the *New York Times* divulge its definition of a 'best seller'?

[Trade secrets](#) are integral to the competitive edge of many businesses, encompassing a wide array of confidential information such as customer lists, formulas, processes, and strategic plans. [Effectively managing and safeguarding these assets](#) is paramount in today's dynamic business environment. This article delves into the nuances of trade secrets, offering insights into their definition, protection strategies, and legal considerations.

Defining Trade Secrets

A trade secret is broadly defined as information that is not generally known or readily ascertainable, derives independent economic value from its secrecy, and is subject to reasonable efforts to maintain its confidentiality. This encompasses a wide range of information, including formulas, practices, designs, instruments, patterns, or compilations of information used in business to gain a competitive advantage.

[Allan Grafman](#) of Oberon Securities describes a trade secret as, "a business advantage you don't want anyone else to know about."

Legal Framework for Trade Secrets

Uniform Trade Secrets Act (UTSA)

The UTSA, adopted by the majority of US states, provides a [uniform legal framework for the protection of trade secrets](#). It defines key terms and outlines remedies for misappropriation, including injunctive relief and damages. The act emphasizes the necessity for businesses to take reasonable measures to maintain the secrecy of their information.

[Defend Trade Secrets Act \(DTSA\)](#)

Enacted in 2016, the DTSA establishes a federal cause of action for trade secret misappropriation, allowing companies to pursue legal remedies in federal court. Notably, it includes provisions for the seizure of property to prevent the dissemination of trade secrets and offers protections for whistleblowers.

[Nicole Galli](#), a seasoned trade secret litigator, emphasizes that many innovations deserve layered protection: patent, copyright, trade secret. It's not a binary choice, but a strategy. This underscores the importance of a comprehensive [intellectual property](#) strategy that considers multiple forms of protection.

Patent vs. Trade Secret: Making the Right Choice

Deciding between patenting an invention and maintaining it as a trade secret involves careful analysis. Patents provide exclusive rights but require public disclosure, whereas trade secrets can offer indefinite protection without disclosure, provided they remain confidential.

[Eric Curtin](#), a patent attorney at Crawford Maunu, notes that if the secret is easy to reverse-engineer — like a new gadget — a patent might make more sense, but for a formula or internal process that can be kept behind closed doors, a trade secret could offer longer-lasting protection.

This decision should be informed by factors such as the nature of the invention, the likelihood of independent discovery, and the competitive landscape.

Valuing Trade Secrets

Understanding the economic value of trade secrets is crucial for businesses. Several approaches are employed to assess this value:

- **Cost Approach:** Considers the cost incurred in developing the trade secret or the expense to recreate it.
- **Market Approach:** Evaluates comparable market transactions involving similar trade secrets.
- **Income Approach:** Estimates the present value of future economic benefits derived from the trade secret.

Determining the fair market value involves assessing its financial impact on the business, reflecting what the trade secret would be worth in an open market transaction.

Protecting Trade Secrets: Best Practices

To safeguard trade secrets effectively, businesses should implement a comprehensive strategy that includes the following:

1. **Identification:** Clearly identify and document what constitutes a trade secret within the organization.
2. **Access Control:** Limit access to trade secrets to essential personnel and implement robust security measures.
3. **Employee Training:** Educate employees about the importance of trade secrets and their role in protecting them.
4. **Legal Agreements:** Utilize [non-disclosure agreements \(NDAs\)](#) and confidentiality clauses to

legally bind employees and partners.

5. **Monitoring and Enforcement:** Regularly monitor the use of trade secrets and be prepared to enforce rights through legal action if necessary.

Eric Curtin emphasizes the importance of practicality. Policies should be clear and easy to follow to ensure that the business can continue to comply.

Legal Remedies for Misappropriation

In instances of trade secret misappropriation, several legal remedies are available including:

- **Injunctive Relief:** Courts can order the cessation of unauthorized use or disclosure of trade secrets.
- **Damages:** Compensation for actual losses and unjust enrichment resulting from the misappropriation.
- **Attorney's Fees:** In cases of willful and malicious misappropriation, courts may award attorney's fees to the prevailing party.

The UTSA and DTSA provide frameworks for these remedies, emphasizing the need for businesses to act promptly and decisively when misappropriation is discovered.

A notable example of the application of trade secret law is the case of *Motorola Solutions, Inc. v. Hytera Communications Corporation Ltd.* When Motorola alleged that Hytera misappropriated its trade secrets by hiring former employees who disclosed proprietary information, the court awarded Motorola significant damages, highlighting the seriousness with which courts view trade secret misappropriation and the substantial financial and reputational risks involved.

Conclusion

Trade secrets are invaluable assets that require diligent identification, protection, and enforcement. It's in a business's interest to figure out where it falls on the continuum. Not every company has major trade secrets — but many already do without even realizing it. Recognizing and safeguarding these assets is not just a legal obligation but a strategic imperative in today's business environment. By understanding the legal frameworks, implementing robust protection strategies, and staying vigilant against misappropriation, businesses can maintain their competitive edge in the marketplace.

To learn more about this topic view [Leveraging & Protecting Trade Secrets in the 21st Century](#). The quoted remarks referenced in this article were made either during this webinar or shortly thereafter during post-webinar interviews with the panelists. Readers may also be interested to read other [articles](#) about trade secrets and intellectual property.

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