

Trade Secrets: How to Keep Your Enemies Close and Your Employees Closer So That They

Don't Turn into Market Rivals

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While it is generally accepted that intellectual property is an integral part of doing business, a trade secret is perhaps one of the most significant types of intellectual property determining business success. A trade secret stands for confidential information in the field of business, commerce, or trade that falls under several specific criteria. Trade secret law is a particular sub-branch of intellectual property law aimed at regulating trade secrets. Some of the limitations that stem from trade secret law lead to questioning whether it is best for businesses to interpret their confidential information as a trade secret. Trade secret law is expected to protect enterprises from a possible disclosure of data from rivals and employees. With the risks of confidential information considered, trade secrets can be an effective way of "keeping your enemies close and your employees closer" so that they do not turn into market rivals, as long as the information is correctly interpreted as a trade secret, and the responsibility of stakeholders, in case of a violation, is ensured.

When introducing the concept of trade secrets, one should note that for confidential information to be considered a trade secret, it has to meet specific criteria. First, the information is bound to be secretive in the sense of not being of free access to a large number of people ("Trade secrets," 2017). Moreover, confidential information has to have a specific commercial value. The final consideration about the nature of trade secrets issued in Art 2 (1) of the Directive (EU) 2016/943 of the European Parliament, which states that to be considered a trade secret, confidential information should be subjected to particular actions that would keep it a secret ("Trade secrets," 2017). Therefore, if responsible stakeholders do not commit any actions to

ensure that information is not disclosed to anyone, it cannot be considered a trade secret. As long as a trade secret answers the criteria mentioned above, its range can be vast, and some trade secrets can be considered more valuable than others depending on the context of the businesses in which they are used. Some of the common types of trade secrets include business methods, R&D data, computer databases, cost information, product technologies, and many others.

Trade secrets are known to have a significant economic value, as demonstrated by the impact of trade secret theft on the gross domestic product of a large number of countries. According to estimates, trade secret theft results in the loss of between one and three percent of the GDP in the United States and other developed industrial economies (Passman, Subramanian & Prokop, 2014). What is more, trade secrets constitute an essential part of protecting the returns on innovation. They are often available when other types of protection cannot be applied.

In the U.S., trade secrets were long regulated exclusively by The Uniform Trade Secrets Act created by the Uniform Law Commission (ULC). The document was initially aimed at unifying trade secret laws on a federal level. Before the introduction of this legislative act in 1979, trade secrets were mostly regulated on a state level. This legal act on trade secret protection has been adopted in 47 states and in the District of Columbia ("Trade Secret," 2019). The states were allowed to have minor modifications to the Uniform Trade Secrets Act upon its adaptation. The Defend Trade Secrets Act of 2016 furthered the existing legislation on trade secret protection by creating a private civil cause of action for trade secret misappropriation ("S.1890 - 114th Congress (2015-2016): Defend Trade Secrets Act of 2016"). Though the states continued to keep their modifications, this piece of legislation clarifies federal actions in case of a trade secret violation.

Holding trade secrets and protecting them results in both positive improvements and significant risks for companies. Many advantages of registering information as a trade secret include not having to pay registration costs, the absence of required disclosure, and the absence of time limits. However, a trade secret might not turn out to be a useful tool for protecting inventions. One of the main disadvantages of a trade secret is that it is considered legal to reverse engineer them, which is a thing that is often done by ex-employees of a company (Lobell, 2013). Therefore, companies that suffer from high rates of employee turnover and cooperate with many business partners who share knowledge of confidential information about their business operations might consider not protecting their confidential information as trade secrets.

There are, however, several legal ways that make it possible to protect trade secrets from dishonest employees and business partners. The most effective out of these methods is a confidentiality agreement that obliges parties not to disclose certain information and outlines the responsibility that the parties have to face in case of an agreement's violation. Businesses with employee turnover and all companies holding trade secrets should consider signing these contracts before disclosing trade secrets, as it appears to be the most efficient way to ensure legal protection.

The legal protection of trade secrets often overlaps with the legal protection of patents; therefore, businesses ought to decide on whether it is more useful for them to protect their confidential information as a trade secret or a patent or not. Patents have a 20-year limit on their legal protection, whereas the protection of trade secrets is not constrained by time (Lobell, 2013). Even though the lack of time constraints is attractive to most businesses, it comes with several limitations. For instance, the protection of trade secrets is generally weaker compared to the

protection of patents, and fewer legal remedies are available in case of a violation of a trade secret as opposed to a breach of a patent.

In general, the main difference between patents and trade secrets is that the former are protected through public disclosure while the latter has to remain secretive to be protected. Patent law is protected regardless of whether it has been violated or not, whereas laws on trade secrets become active only in the aftermath of a violation. Therefore, if business owners are choosing between a patent and trade secret, it is only wise to choose the latter in case the information it contains is expected to remain unknown 20 years into the future (Lobell, 2013). On the other hand, if the intellectual property in question is a new method of manufacturing that is expected to be exposed to the general public, it is wiser to choose patent protection, as it protects the object from being derived independently or reverse engineered.

To conclude, it is evident that a trade secret is an effective legal concept that helps to protect businesses under certain circumstances. Since trade secret law overlaps with patent law in more than one way, it is critical for stakeholders to accurately choose which law applies more effectively to the confidential information they are willing to protect. If trade secret law is their choice, the best way to ensure legal remedies is to sign a non-disclosure agreement with employees and business partners beforehand to define the limits of responsibility.

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