

TRADE SECRETS LAW BASICS

An individual's or entity's valuable, proprietary information that it has developed, or that has been developed for it, represents part of its intellectual property assets and competitive advantage in its industry position is known as a "trade secret." Whereas copyrights, patents and trademarks are intellectual property assets placed in the public domain, under varying levels of protection through registration, trade secrets are "non-public assets" by their nature. As such, it is important that an individual or entity take necessary measures to maintain the information as a secret to prevent disclosure and entrance into the public domain. Unlike copyrights, patents and trademarks which are protected under specific federal laws and regulations, trade secrets are protected only under state law.

Under the Uniform Trade Secrets Act, a "trade secret" is: information, including a formula, pattern, compilation, program, device, method, technique or process, that: (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value for its disclosure use, and (ii) is the subject of efforts reasonable under the circumstances to maintain its secrecy. The Uniform Trade Secrets Act goes on to define misappropriation as, essentially, the acquisition of a trade secret of another by a person who acquires such trade secret by improper means, without express or implied consent by the owner. The laws of each state should be consulted to determine that jurisdiction's version of the trade secrets act.

Trade secrets exist in a number of industry contexts, particularly with regard to technical and business information, such as: customer lists, designs, geological and geophysical interpretations, manufacturing processes, and formulae or other compositions of matter. Consequently, an inventor may be faced with two options in protecting his or her invention: filing a patent application or maintaining the invention as a trade secret. Additionally, an inventor who is contemplating patenting while at the same time seeking markets or investors for the development of such invention may utilize trade secret protection prior to and during the filing of a patent application. See the discussion of patent law basics above, with regard to patenting.

Any information that has commercial value, i.e., gives rise to actual potential competitive advantage to its owner and is not in the public domain (generally not known by the public), is a trade secret which should be protected and kept secret through physical means and legal precautions, by the use of a confidentiality and non-disclosure agreement. Such an agreement is a contract between parties, such as a buyer and a seller, in which the buyer promises to protect the confidentiality of the seller's secret information disclosed during the review of such information in contemplation of entrance into a purchase agreement or other business relationship. A confidentiality and non-disclosure agreement may also be utilized in an employment agreement to ensure that a company keeps and maintains its trade secrets. Confidentiality and non-disclosure agreements should be considered with such individuals as employees, vendors, consultants and customers.

The confidentiality and non-disclosure agreement has certain elements including: information non-disclosure provisions, the definition of the information to remain confidential, how that information is to be utilized by the reviewing party, information to be excluded from the definition of confidential information, and the time period of the effectiveness of the agreement. The agreements can be very simple or highly complicated, creating varying degrees of requirements regarding the usage of confidential information, depending on the nature of the relationship between the parties. For example, an inventor may require a short-term trade secret agreement if it is contemplated that an invention patent will be applied for or issued in the near future.

Critical to protecting a trade secret is the maintenance of that trade secret information in the manner set forth above. Trade secret protection is lost, therefore, if an owner fails to take reasonable steps legally and physically, to keep the information secret and not becoming public. Trade secret security means not only utilizing well drafted confidentiality and non-disclosure agreements with buyers, employees, etc., but physical security on the owner's premises, such as "vaults" to secure the confidential information.