

# What is a Trade Secret?

Generally speaking, a trade secret may consist of any formula, pattern, physical device, idea, process or compilation of information. The precise language by which a trade secret is defined varies by jurisdiction. However, there are three factors that are common to all such definitions. First, a trade secret must not be generally known to the public. Second, it must confer some sort of economic benefit on its holder. Third, it must be the subject of reasonable efforts to maintain its secrecy. Establishing trade secret protection is therefore starkly different from obtaining other types of intellectual property protection. In contrast to patents, for example, government registration is not required in any way.

The third factor is often the most crucial element of trade secret protection. Trade secret holders often find it difficult to maintain secrets when large numbers of employees have access to the protected information. In response to this difficulty, a company can protect its confidential information through non-compete and non-disclosure contracts with its employees. Violations of these agreements generally carry the possibility of stiff financial penalties. These penalties operate as a disincentive to revealing trade secrets. Similar agreements are often signed by other companies with whom the trade secret holder is engaged, for example the trade secret holder's vendors, or third parties in licensing talks or other business negotiations. The standard for what a reasonable effort to maintain secrecy constitutes depends upon the specific circumstances present in each case.

A well-thought analysis must be employed when determining the means to protect information or technology. Specifically, a balancing approach must be taken between filing for patent protection and attempting to maintain the information or

technology confidential, thereby establishing trade secret protection. The key advantage to trade secret protection is the fact that it can, in principle, extend indefinitely. The potential for infinite duration is only affected by the ability to maintain secrecy. The moment secrecy is lost, so too is trade secret protection. This is in contrast to patent protection, which grants an absolute "negative" monopoly, but only for a limited and specified term. The determination typically can be made by focusing on the ability of others to "reverse engineer" or independently develop the subject matter which you are seeking to protect. If the likelihood of this possibility is high, then a patent is usually recommended. Conversely, if the likelihood is minimal, then trade secret protection may be the intelligent option.

The most often cited example of a successful trade secret has been the Coca-Cola formula. Despite many attempts to duplicate it by competitors, Coca-Cola has been successful in maintaining secrecy for a much longer period than patent protection would have provided.

The above-mentioned criteria to obtain trade secret protection, as well as the considerations briefly discussed, are merely a cursory overview of the factors that must be examined when deciding between the trade secret avenue of protection and the application process for a patent. Consultation with a patent attorney is the most reliable and efficient way to acquire the information necessary to make the best decision. After attaining the necessary information, the ultimate decision should be made based on how the technology fits into the overall business plan of the owner of the invention, as well as the ability to take the steps required for trade secret protection.