**TRADE SECRET LICENSING UNDER INTELLECTUAL PROPERTY LAW**

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**INTRODUCTION**

Nowadays, in globalized economy, Intellectual Property is being protected by organisations through adoption of available measures in form of patents, copyright, trademark etc. but in addition to these popular IP rights there are other IP rights not so popular but which are recently depicting attentions all over the world- Confidential Information and Trade Secret.

A trade secret denotes to information relating to the business which is not known to the public and which the owner rationally attempts to keep secret and confidential. Through trade secret, businesses get a competitive edge over their rivals. As long as any economic interest of the owner is involved and it is intended to be kept as secret, almost any type of data, processes or information can be referred to as trade secrets.

One of the key challenges for businesses today is to remain profitable in a slowing but increasingly global economy. They are under pressure to create new opportunities and new revenue streams from existing assets. Often businesses need new or original innovations and/or creative expressions to create new products, enhance existing products, and explore new markets. What is most importantly needed to be protected by the trade secret law or intellectual property system is these crucial innovations and expressions, which are increasingly valuable economic assets in today’s economy, before revealing or sharing them. Only then can a business leverage these economic assets as intellectual property (IP) assets for gaining and retaining competitive advantage[[4]](#footnote-4).

The primary route to commercialization of intellectual property (IP) is by licence. This will usually be in the form of a partnership where originators and IP owners will exchange commercialization rights with the partner successively in exchange for finance and development and then the marketing of the product. This exchange may be largely one sided with the originator taking no further part in the development of the product or, alternatively, the originator may become part of the development team accepting financial support and a share of the income from the completed product when it is sold[[5]](#footnote-5).

**CONCEPT OF INTELLECTUAL PROPERTY LICENSE**

An Intellectual Property license is a contract between two parties which permits the licensee to use at least a portion of the licensor’s intellectual property in exchange for some consideration[[6]](#footnote-6).

A license is, simply stated; permission to do something the granting party (the licensor) has the right to otherwise prohibit. In the context of intellectual property (IP) licensing, it is a grant, by the owner of the property, to another (the licensee) of this right to use the licensed rights free of suit by the property owner, pursuant to certain terms and conditions and subject to certain limitations[[7]](#footnote-7). The extent of the rights granted in a license may run the gamut from a mere permission to use the licensed property in some limited manner (a nonexclusive license) to all but ownership of the property (an exclusive license)[[8]](#footnote-8).

The word license simply means permission – one person grants permission to another to do something. A license agreement is a formal, preferably written document, recording the circumstances under which a promise shall be legally binding on the person making it. There are at least two essential parties: the licensor, the party who owns the IP and is agreeing to let it be used, and the licensee, the party who receives rights to use the IP in exchange for payment. Therefore, a license agreement is a partnership between an IP owner (licensor) and another who is authorized to use such rights (licensee) under certain conditions, usually for a monetary compensation in the form of a flat fee or running royalty that is often a percentage or share of the revenues gained from use of the invention. Simply put, a license grants the licensee rights in property without transferring ownership of the property[[9]](#footnote-9).

Webster’s Dictionary defines License as ‘Authority or liberty given to do or forbear any act; especially, a formal permission from the proper authorities to perform certain acts or to carry on a certain business, which without such permission would be illegal; a grant of permission; as a license to preach, to practice medicine, to sell gunpowder or intoxicating liquors, The document granting such permission[[10]](#footnote-10).’ Licensing IP can be used to learn about and use others’ technology. IP holders may exclude others from using their protected IP.

Licensing agreements are effectually grants made by the IP-holder to others that grant access to the protected technology and trade secret information, while creating a revenue stream for the IP-holder. For example, a high-technology consumer electronics company may need to license proprietary manufacturing equipment from others. Conversely, a company may consider licensing its product along with a trade name and marketing campaign to a third party to create a larger distribution network and generate revenue from a larger market[[11]](#footnote-11). For a license of IP to be effective, four basic conditions must be met:

• The ownership of relevant IP must be with the licensor or he must have authority from the owner to grant a license;

• The IP must be protected by law or at least qualified for protection;

• The license must specify what rights with respect to IP it grants to the licensee;

• IP assets to be given in exchange for the license must be clearly stated.

**WHAT IS TRADE SECRET LICENSING?**

In general, a trade secret license is a private agreement whereby the owner (licensor) grants the recipient (licensee) with permission to use some or all of the secret information. However, the licensor retains full title and all ownership rights associated with the trade secret. A license is typically issued by the licensor with the intent to benefit by maximizing their profit (in the form of royalties) on the trade secret. This benefit comes with the risk of disclosure from sharing their secret information with another party. A license may be exclusive, granting the licensee sole use of the trade secret, or nonexclusive, granting the licensee only shared use.

Under a non-exclusive license, the licensor retains the right to use the trade secret and/or to grant additional licenses to others. The licensee’s right to use the trade secret can be granted either for an indefinite period or for a defined period of time. The revocation of license is allowed, if the licensee fails to comply with the terms of the licensing agreement[[12]](#footnote-12). The owner of a trade secret has the exclusive right to use it in his business as long as the information remains secret and no one else discovers it independently by legitimate means. The owner’s disclosure of his trade secret is a de facto license to use the information, since apart from secrecy; the owner has no exclusive rights. Therefore when the trade secret owner licenses his trade secret, the consideration paid by the trade secret licensee is really in exchange for disclosure, not for use, as in the case of a patent license.[[13]](#footnote-13)

Information that has been disclosed to licensees, vendors, or third parties for limited purposes subject to nondisclosure or confidentiality agreements may remain protectable as trade secrets.[[14]](#footnote-14)

**ELEMENTS/FACTORS TO CONSIDER IN TRADE SECRET LICENSE**

Trade secrets are a cherished part of most licensing agreements. The best licensing practices require that steps be taken by the licensing executives involved in negotiating and drafting the license to identify the scope and value of the trade secrets, determine the controlling law, and clearly specify in the license the rights and liabilities of the parties, both before and after the agreement. A license that is conjointly beneficial to the licensor and the licensee is the ultimate goal[[15]](#footnote-15).

There are numerous factors that need to be considered in an IP license which are unique depending on the facts and circumstances presented and rarely, if ever, are two licensing deals the same. Such factors may include what rights to license, term, territory considerations, exclusivity, the amount and structure of the royalty, indemnification from damage caused by the other party, etc.[[16]](#footnote-16) Following factors need to consider in trade secret license.

1. Identification of Rights to be licensed

2. Maintenance of IP Rights/ secrecy

3. Consideration

4. Improvements under Trade secret licensing

5. Prohibitions /Restrictions

**IDENTIFICATION OF RIGHTS TO BE LICENSED**

Trade secrets and know-how can take a wide variety of forms, and a license on such property must define very clearly what is being licensed. The licensee may seek sufficient assistance from the licensor to enable it to utilize the licensed property effectively; the licensor, however, should take care not to include anything in the license that could be construed as a warranty of the suitability or effectiveness of the licensed property[[17]](#footnote-17). Know-how and trade secret licenses are global in scope, and they may have a limited term or may continue for as long as the licensee continues to utilize the licensed property. If the secret becomes publicly known and the license provides for the termination of the license in such an event, the licensee may invoke this provision to terminate the license and continue to use the information without paying any royalties; if the license does not include such a provision, the licensee may be compelled to pay royalties for using information that is now public knowledge[[18]](#footnote-18). In a patent license, the licensed property is fully defined in the patent document itself. The licensee receives rights in respect of the invention disclosed and claimed in the licensed patent. Trade secrets and knowhow are often not so readily defined. Rather, they may take the form of a vast collection of related materials, including plans, drawings, specifications, formulas, procedures, process descriptions, lists of materials, and lists of vendors, all of which should enable the licensee to accomplish some desired objective, and all of which are to be delivered to the licensee upon execution of the license[[19]](#footnote-19). Patent rights include the right to exclude others from making, using, selling or offering for sale a patented article or process. By licensing a patent, the patent holder is giving permission to the licensee to no longer be excluded from practicing the patented invention. Patent rights are territorial, and are limited to the country in which the patent is granted. Trademark rights are the right to use a trademark in connection with goods or services, and are also territorial by country. Other rights can provide access to a proprietary or trade secret technology or know-how[[20]](#footnote-20).

**MAINTENANCE OF IP RIGHTS/SECRECY**

Licensors put their trade secrets at great risk of being lost or misappropriated by either a licensee or a third party. Nevertheless, protecting this type of intellectual property in licensing transactions is often neglected and left for the boilerplate language of licensing agreements[[21]](#footnote-21). The complexities of licensing know-how and trade secrets arise, in large part, from the fragility of their existence. It is not the underlying information but the secrecy that creates the value of such properties. If the secrecy is lost, so too is the value. This is not to say that licensees (and others) would not continue to use such information after it became publicly known. They most certainly would; however, they would not continue to pay for that use[[22]](#footnote-22).

Maintenance of secrecy is critical to the value of trade secrets and knowhow. Therefore, any license of such property should include suitable provisions directed toward the preservation of confidentiality. At a minimum, a licensee should accord the licensed property the same degree of care and caution afforded its own confidential or proprietary information.

Ideally, access to the licensed property should be limited to those with a “need to know,” and all such individuals should execute agreements acknowledging the confidential nature of the information and their duty to maintain it in confidence[[23]](#footnote-23). There are a number of terms that should be included in a license agreement that relate to the maintenance of the licensed intellectual property rights. For patent rights, this should include the requirement that the licensee include the appropriate patent marking on any goods sold that are covered by the patent. Lack of patent marking can limit claims for damages against infringers. Depending on whether the license granted is an exclusive license, the licensor may also require the licensee to pay patent maintenance fees.

In some situations, a licensee may even take over prosecution of pending patent applications, which may benefit the licensor especially in the situation where the licensor is an individual or has limited resources to prosecute the patent application. Licenses of trade secrets and know-how should include provisions for the maintenance of secrecy. In both the licensee’s and licensor’s companies, only those employees with a “need to know” should be allowed access to confidential or proprietary information. For this reason, the obligation to maintain confidentiality should survive the termination of a license[[24]](#footnote-24). If the license includes a provision for termination in the event that the licensed information becomes publicly known, the licensor must be sure to qualify the term “publicly known.” Otherwise, an unscrupulous licensee may attempt to reconstruct the information from publicly available sources in order to terminate the license and enjoy the intellectual property royalty-free[[25]](#footnote-25).

Given the confidential nature of trade secrets, the safeguards to ensure continuous secrecy must be spelled out in the agreement. The security measures will depend largely on the value and sensitivity of the information provided, and may include[[26]](#footnote-26):

• Strict limitation of internal and external distribution;

• Assigning an employee or a committee to oversee compliance with applicable procedures;

• Marking all confidential information as “Confidential”;

• Maintaining document logs and tracking of confidential documents;

• Compartmentalizing (disclosure and access by employees on the “need-to-know” basis);

• Mandatory signing of a confidentiality agreement by every person getting access to the information;

• Putting all related personnel on notice that confidentiality must be maintained;

• Educating personnel on proper procedures and applicable policies;

• Developing a system to prevent inadvertent disclosure to public (through advertisement, speeches, publications);

• Off-site or off-network storage;

• Limited access and reproduction by the licensee’s personnel and thirdparty vendors and contractors;

• Restricting public accessibility and escorting visitors;

• Use for the purpose of the agreement only;

• Use only at a specific site or in specific jurisdiction;

• Conducting exit interviews with departing personnel;

• Prompt return of all confidential information upon termination of the agreement.

**CONSIDERATION ON CONTRACT FOR IP RIGHTS**

Consideration between parties to a contract regarding intellectual property rights can take many forms, but usually involves some form of payment. The most common are a lump sum payment, a stream of royalty payments (most commonly based on the number of products sold), as well as a combination of both. A lump sum payment can be used in a number of circumstances, such as settlement of past infringement, or when the technology is being transferred and the licensor is going to be working in the field. This type of royalty shifts the entire risk of success onto the licensee since the licensor receives payment no matter what happens.

As a result, an up-front lump sum payment is often discounted from the amount that could be obtained by taking a stream of royalty payments over time based on the sales volume of the product. A stream of royalty payments over time based on the sales volume mitigates the risk that the licensee must take, because no payments would be made by licensee unless the product is selling. The licensor stands to receive a greater stream of royalty revenue if the product does well in commerce[[27]](#footnote-27).

While the loss of secrecy may (actually, should) result in termination of a trade secret license, it should not be assumed that a licensee must pay royalties until such an event occurs. In those instances where the subject secret is susceptible to reverse engineering, a potential licensee has two choices:

(1) take a license and pay a royalty; or

(2) Reverse engineer the secret and pay no royalties. The existence of these choices serves to put a ceiling on the royalties a prospective licensee would be willing to pay.

Indeed, some trade secret licenses provide that royalties will be paid only in respect of use made during a period corresponding to the time that would have been required to reverse engineer the licensed trade secret[[28]](#footnote-28).

**IMPROVEMENTS UNDER TRADE SECRET LICENSING**

Intellectual property protects the expression of ideas. Ideas are not always formed in a vacuum. Inventions are often inspired by existing technology; a person may create and design a new improvement to that technology, or a feature that enhances the use or functionality of the technology. The new invention may come about as a result of an idea that relates to the use of the licensed technology, or it may actually be the result of modification of that technology in order to produce a derivative work or other enhancement[[29]](#footnote-29).

There is no widely accepted definition for “improvement” in the context of intellectual property licenses, but it is usually used to mean a development within the field of the licensed technology that enhances the usability, functionality, efficiency, performance or other characteristic of the original technology. If used in the Agreement, the parties should be certain to provide a clear definition as to what is contemplated as an improvement, to avoid disputes later on[[30]](#footnote-30). The decision to include a provision for improvements in a licensing agreement depends upon the overall objectives of the contracting partners. Generally improvement clauses can be an essential element of a license agreement. A well-crafted clause can provide clarity so as to avoid future disputes and can provide the benefit of the bargain in a licensing agreement. Unfortunately, such clauses are often overlooked or receive gloss treatment[[31]](#footnote-31).

Another problematic area is the ownership of improvements. A licensee will often improve upon a trade secret, raising the question of which party owns the resulting improvement. From a licensor’s perspective, the answer is clear: the licensor should own any improvement that utilizes the underlying trade secret[[32]](#footnote-32). From a licensee’s perspective, however, this arrangement potentially entangles the licensee in on-going obligations to the licensor even when the original underlying trade secret is no longer a trade secret. Ultimately, the issue is resolved by the parties’ relative bargaining power[[33]](#footnote-33).

**PROHIBITIONS/RESTRICTIONS**

A license allows the licensor to restrict a licensee’s activities to something less than an unlimited right to use the licensed intellectual property. For example, a patent licensor may choose to grant a licensee to make, use, sell or offer for sale a patented product. Another restriction is whether the licensor is granting an exclusive, sole or nonexclusive license. An exclusive license is similar to an assignment of the IP rights to the licensee, and the licensor foregoes the ability to use its own IP rights in favour of the licensee. An exclusive license presents the most value to the licensee because it prevents all competition from using the licensed IP rights, and is often granted by research institutions that have no intention of commercially exploiting an invention. A sole license, in contrast to an exclusive license, allows the licensor to continue to use the IP rights, but limits the licensor from granting any further licenses to third parties.

Thus, in a sole license agreement, both the licensor and the licensee may use the technology under license. What allows the licensor to grant multiple licenses to third parties is a non-exclusive license. It allows for multiple companies to use the licensed technology, which increases competition[[34]](#footnote-34). Various types of restrictions can also be included in a licensing agreement. For example, territorial restrictions are a common restriction in license agreements. A license should explicitly define the licensed territory or geographic area where the licensee may use the licensed technology. It is very common in licensing agreements for a company to only be permitted to service a limited geographic territory. In exchange for the territorial limitation, the licensor will not make a similar grant to any third party allowing the third party to compete in this same restricted area.

This is a very common practice in the operation of franchises. Field of use restrictions are also frequently included in licenses, and may limit the use of the equipment or components contained within the product to a specific type. Field of use restrictions could limit the use of the licensed technology to certain applications such as therapeutic applications, veterinary applications, industrial materials applications, etc. This allows a licensor to grant multiple licenses in various fields of use, enabling the licensor to exploit its IP more effectively. Product restrictions can also be included in a licensing agreement. This kind of limitation restricts the licensee’s use of the IP to a particular class of artefact.[[35]](#footnote-35)

**TYPICAL TRADE SECRET LICENSING RESTRICTIONS**

It is difficult to generalize with respect to the types of restrictions permitted and prohibited in patent and trade secret licenses. Again, the laws and regulations vary substantially from jurisdiction to jurisdiction. However, five general guidelines have been developed that apply to trade secret licensing in most jurisdictions[[36]](#footnote-36):

1. A license can stipulate payment for the use of trade secret information for as long as it remains secret.

2. The license can be limited to a particular field of use, or a particular limited area.

3. The license can also stipulate minimum production, sale, or use requirements and prohibit the handling of competing goods or using competing technology during the term of the license.

4. The mutual grant-back of non-exclusive licenses for improvements is usually permissible.

5. It is also permissible to continue the obligation of the licensee not to disclose the technology after the license expires, as long as it remains secret.

Restrictions can be used in trade secret licenses that are greater than permitted in patent licensing because a trade secret does not inherently create any monopoly rights in the owner. As already noted, all trade secret rights, whether licensed or not, are subject to independent development and reverse engineering by others that are not a party to the license[[37]](#footnote-37).

General observations can also be made with respect to restrictions that are prohibited in trade secret licenses. As with patents, a licensor should not attempt to regulate the sale or resale prices of the licensed products. Also, it is pertinent to take note of that the limitations cannot be placed on the use of competing goods by the licensee, or the use of competing technology, after the license is terminated. Exclusive grant-backs of improvements are also subject to question. In the United States, since trade secrets inherently do not convey monopoly power to the owner, such restrictions are reviewed and analysed under the Rule of Reason of the antitrust laws.[[38]](#footnote-38)

**VALIDITY OF A TRADE SECRET LICENSING AGREEMENT**

In general, a license may cover anything that is negotiated between the contracting parties. A license to use trade secret information, such as a formula, may address the use of all or part of the secret and may cover the following topics: • Subject matter of the trade secret • Installation procedures to effectuate use of the information • Methods of production • Machine operations • Compensation for use of the information • Security codes to access information

The licensing agreement may not violate the federal Antitrust Guidelines for the Licensing of Intellectual Property. These Guidelines recognize and promote the protection of all intellectual property but prohibit any licensing arrangements which “unreasonably” restrain competition in the marketplace (e.g., facilitating price fixing or market division). Generally, the license may not be “facially anticompetitive” and the parties involved may not account for more than 20% of the relevant market[[39]](#footnote-39). Trade secret licensing is more flexible because in effect what the licensee is paying for is the disclosure of the secret and parties has more freedom to construct the metrics that will be used to calculate that payment.

This flexibility is reflected in several ways. First, the royalty base can be more liberally defined to include revenues that are related to exploitation of the secret but that transcend the commodities that embody the secret. Second, payment obligations can also survive public disclosure (and thus destruction) of the trade secret[[40]](#footnote-40). Third, the obligation to pay royalty can be based on global sales or manufacturing activities. In contrast, patents are limited to specific jurisdictions and an astute patent licensee will object to payment of royalties on activities that fall completely outside those jurisdictions where licensed patents have been obtained.

**CONCLUSION AND SUGGESTIONS FOR ENFORCEMENT**

Because a licensee can destroy trade secret rights through mishandling of the licensed information, a licensor should insist on contractual provisions that will permit expeditious, cost-effective judicial relief if such mishandling is threatened[[41]](#footnote-41).

These provisions include typical dispute management clauses such as choice of law, jurisdiction and venue, and service of process. Licensors should also consider a provision awarding attorney’s fees to the prevailing party. From the licensor’s perspective, the agreement should specify that equitable relief is available. Rather than rely on a boilerplate clause, however, a licensor may want to enumerate specific types of relief such as destruction of inventory and return of documents that are tailored to the specific transaction[[42]](#footnote-42). When dealing with foreign licensees, arbitration can be an effective dispute resolution vehicle; however the arbitration clause should contemplate that the licensor may seek equitable relief in any forum having jurisdiction over the licensee. To deter breach, licensors can insist on immediate or automatic termination of license rights in the event of material breach.

If the licensee is permitted to disclose licensed information to third-party discloses, those discloses should be in private with the licensor, such as by signing a form of nondisclosure agreement that is attached to the license as an exhibit. A licensor might also insist on indemnification by the licensee for any misappropriation committed by third-party discloses to whom the licensee provides the licensed information. Finally, because it may be difficult to measure damages for misappropriation of a trade secret or other breaches (such as the failure to provide agreed-upon security measures), the parties can consider liquidated damages clauses.

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