

Trade secrets

Trade secrets can also be defined as **any formula, pattern, device or compilation of information which is used in a business, and which gives the business an opportunity to obtain an advantage over competitors who do not know or use it** (Besen and Raskind, 1991). Trade secrets can provide protection for innovations. Trade secret protection is available in most jurisdictions and can be obtained without registration. However, the degree of protection provided is weaker than that provided by other types of IP since it cannot be opposed to independent invention.

What is a trade secret?

In broad terms, any confidential business information which provides an enterprise a competitive advantage could be considered a trade secret. The term “trade secret” refers to specific business information transmitted by persons, firms, and markets. Trade secrets can also be defined as any formula, pattern, device or compilation of information which is used in one's business and which gives the business an opportunity to obtain an advantage over competitors who do not know or use it (Besen and Raskind, 1991).

Natural and legal persons have the possibility of preventing information from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices so long as such information: (a) **is secret** in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question; (b) **has commercial value because it is secret**; and (c) **has been subject to reasonable steps under the circumstances**, by the person lawfully in control of the information, **to keep it secret** (TRIPS, Article 39(2), WTO, 1994). Minimum standards for trade secrets have been defined within the Trade-Related Intellectual Property Rights Agreement (TRIPS, WTO 1994) (see [International dimensions of IP systems](#) [1]).

The unauthorized use of such information by persons other than the holder is regarded as an unfair practice and a violation of the trade secret. Trade secrets cases come up in three sets of circumstances: competitive intelligence, business transactions and departing employees. Depending on the legal system, the protection of trade secrets forms part of the general concept of protection against unfair competition, or it is based on specific provisions or case law on the protection of confidential information. In general, unfair practices with respect to secret information include industrial or commercial espionage, breach of contract and breach of confidence.

In contrast to patents, **trade secrets are protected without registration**, that is, trade secrets are protected without any procedural formalities. Consequently, a trade secret can be **protected for an unlimited period of time**.

How are trade secrets related to innovation?

While protection is granted only for subject matter that represents some creative efforts under the copyright and patent regimes, **trade secret protection rests solely on the commercial value of the matter to the claimant**. Therefore, trade secrets are not necessarily related to innovation.

However, they often have a connection in practice by applying to original, hence innovative business models. By providing a cheap and quick way to obtain protection compared to patents and other registered types of IP, this designation might help support innovative activities for a wider group of innovators for a wider set of products (Lemley, 2008). Trade secret applies also, along with a number of non IP means of protection, to inventions that the inventors want to implement but not to disclose, which are usually process related (e.g. the user or a particular catalyzer in a chemical reaction).

Other limitations of trade secrets in contributing to innovation is that they do not provide access to

knowledge regarding the invention and thus do not help raise the stock of knowledge based on which new innovations could be created.

How are trade secrets used in practice?

There is a general perception that SMEs (small and medium enterprises) often use trade secret protection by default, for example as a way of avoiding the expenditure and administrative procedures involved in patent protection. However, very little is known about how SMEs protect their trade secrets and to what extent they are aware of the protection offered by specific national laws on trade secrets and/or laws on unfair competition that also deal with protection of trade secrets. Some have suggested that trade secrets can be a relatively more effective form of IP protection than patents on processes (Harabi, 1995; Arundel and Kabla, 1998).

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