

Protecting your secret sauce

From the cultivation method, to the fermentation process, to the distribution strategy, winegrowers make a number of important decisions to get their wine from vine to shelf. However, protecting your business's recipe for success is equally important, to make sure your innovative method, long guarded family technique, or 'secret ingredient' doesn't make its way to your biggest competitor. We lay out what sorts of IP you may have in your business, and how best to protect those valuable assets.

Keeping secrets

Know how, trade secrets, confidential information – these are different words for the same thing. They all cover information relating to any part of your business, that is truly confidential. This sort of IP cannot be registered, but it can last forever, provided the information is kept secret and not disclosed. If you do discuss or share your know how or trade secrets with others (without a confidentiality agreement), the information won't be confidential anymore and its value could be seriously compromised.

This means you need to make a conscious decision about how to manage your confidential information, and put a process in place to keep it secret. While this can prove challenging, if done successfully it can be a very effective and cost efficient way of protecting your IP moving forward.

Things to think about

When making creative decisions including about your winemaking method, process, and even your marketing strategy, it is important to keep control of the information as best you can. It is always a good idea to require those contributing creative input to record it, so it doesn't live only in their heads. Know how that lives only in your team member's head can walk out the door along with that team member and be gone for good.

If you are an employer, it is important to have an employment contract that deals with the ownership of IP in recipes, products and processes created on the job. If you're an employee, make sure you address these issues up front and at the beginning of a new work relationship. There's a fine line between the "tools of trade" an employee is entitled to reuse from job to job and the IP he or she creates that is owned by an employer. The line between the two can be unclear, but a good contract will help draw that line. The same applies when outsourcing to contract manufacturers or anyone having input into an end product.

Professional employment and / or contractor agreements are key. It is important that confidentiality and IP clauses are carefully drafted with the specific business needs and duties of employees / contractors in mind, to establish the parties' rights and obligations at the outset. Time spent on this at the outset can save many a heartache (not to mention a lawyer's bill) later when it becomes clear that parties had a different understanding of who owned the valuable IP created for a business.

There is also benefit in clauses which require employees to return company property (including any documents and files) when their employment comes to an end, and restrictions on use of personal devices, accounts and social media which may pose a security risk to an employer's confidential information and IP (social media and surveillance policies are also useful in this regard). It is good practice to check older agreement templates with long standing employees, and update these if the provisions no longer appear adequate or relevant.

Unfortunately, theft of confidential information can be difficult to prove, but having strong policies in place means that expectations are clear, helping to avoid any future arguments in relation to what an employee did or did not understand to be confidential or employer information / property. Where appropriate, enforceable restraint of trade provisions (protecting an employer's legitimate proprietary interests), including a valid non-compete and non-dealing clause, may also assist. These can ensure that, when employees and / or contractors are ready to move on from a business, an employer will have time to ensure appropriate protection is in place, and an employee will know exactly where he or she stands in terms of the next role.

Practical measures, like strict internal policies and security protocols, are also helpful. If you have external suppliers, you may want to consider non-disclosure agreements, particularly if what they are supplying is unique to you or your product.

How can you keep your secrets secret?

- Identify what is special about your methods or processes, and whether they can be kept secret.
- Only share your confidential information with those who need to know it, and if possible, only the part relevant to them.
- Use confidentiality agreements with contractors, suppliers and others.
- Have robust employment agreements with staff that cover confidential information and ownership of IP.
- Control access to your cellar and any areas where your IP is freely available.
- Make sure your employees understand your policies and their responsibilities.
- Investigate all breaches of confidentiality.
- Resist the urge to tell others about your special process or secret ingredient.
- If you invent something truly new, or think you may have, talk to an IP lawyer or patent attorney before sharing it with anyone not subject to a confidentiality agreement.

Written by Lauren Royers and Stacey Fletcher



Lauren Royers

Associate
D +64 9 375 1140
M +64 27 464 8266
E lauren.royers@dentons.com



Stacey Fletcher

Associate
D +64 9 375 1134
M +64 21 576 960
E stacey.fletcher@dentons.com



Jenni Rutter

Partner
D +64 9 914 7251
M +64 21 225 9474
E jenni.rutter@dentons.com



James Warren

Partner
D +64 9 375 1199
M +64 21 773 682
E james.warren@dentons.com

Published in NZ Winegrowers magazine, June/July 2020

dentons.co.nz

© 2020 Dentons. Dentons is a global legal practice providing client services worldwide through its member firms and affiliates. This publication is not designed to provide legal or other advice and you should not take, or refrain from taking, action based on its content. Please see dentons.com for Legal Notices.