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Protecting Trade Secrets | Eight Questions Businesses Need to Ask and Answer

By Walter Judge on January 12, 2012

If the Coca-Cola Company had used patent legislation to protect its secret formula, would it have become the most popular soda in the world? Possibly not. Coca-Cola would have had to make the formula known to the world when it filed the patent and would only have had exclusive rights to the formula for as few as 20 years. However, by following critical steps to protect the formula as a ***trade secret***, the company has kept it a secret for more than a century (maybe…). While Coca-Cola may have realized the value of its soda formula and thus took immediate steps to protect the information, unfortunately, the value of technology, information or processes often isn't recognized until it is compromised—at which point the information is no longer protectable as a trade secret (which may now include Coca-Cola's formula).

What is a Trade Secret?

Trade secrets are aspects of your company that, if discovered by a competitor, could significantly impact your bottom line or your ability to compete in the marketplace. To identify which of these aspects are potential trade secrets, ask and answer these eight questions (factors that most courts will look at to determine whether something is protectable as a trade secret).

1. What is the nature of the information?
2. How many players are there in the industry or field?
3. Within that context, how many of those players know your "secret"?
4. How many people inside your business know the information?
5. What measures do you use to guard the secrecy of the information?
6. What is the value of the information?
7. How much time and effort did it take to develop the information?
8. How ascertainable would the information be to others who try to develop it on their own?

The United States Supreme Court held that just because something could be patented doesn't mean it has to be in order to be legally protected. In the case of *Kewanee Oil Co. v. Bicron*, 416 U.S. 470 (1974), the Court recognized the doctrine of trade secrets as a valid way to protect unpatented and/or unpatentable information. Trade secrets, unlike patents, trademarks and copyrights, are defined and governed by individual state law and is currently recognized in every U.S. state.

In its simplest form, a trade secret is information that has economic value to someone because it is not known by his or her competitors and is the subject of reasonable efforts to keep it secret. The subject of a valid trade secret can range from something as complicated as the design for a microchip or a software program, to something as "simple" as a customer list. Each case will be very fact specific. For example, the Vermont Supreme Court decided in 2001 that a list of tour bus operators that regularly booked leafpeeping tours at a country inn in Vermont (i.e., a customer list) could be a

trade secret. But they denied the claim on the grounds that the inn had failed to show that it took any steps to keep the list secret. Dicks v. Jensen, 172 Vt. 43 (2001).

It is critical to understand what constitutes "reasonable efforts to maintain secrecy." We hope you'll subscribe to The IP Stone for future posts dedicated to practical pointers for maintaining secrecy. Or, if you have an immediate question, feel free to contact me directly.

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