

Sometimes Secrets Are Worth Keeping

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What is the secret of Coca-Cola's great taste?

The recipe for this iconic soft-drink has been zealously guarded for over a century. Recently, there have been unconfirmed reports that the formula has been revealed publicly. But given the ubiquity of this drink, how is it that the formula could have remained hidden for so long?

Casual observers may – incorrectly – assume that the makers of Coca-Cola hold a patent for the recipe. Patents, by virtue of the time-limited monopoly they confer, require their subject matter to be publicly known. In contrast, secret recipes such as that for Coca-Cola belong to an entirely different class of intellectual property: trade secrets.

Although there are differing definitions, depending on jurisdiction, a trade secret can be characterized as information that is not generally known and that is valuable because it is not generally known. Moreover, owners of trade secrets must make reasonable efforts to protect the information.

There is no registration system for trade secrets. In general, any information that meets the above criteria can form the basis of a trade secret. Some common examples include formulas and recipes, blueprints, and compilations of information (such as customer lists).

The principle factor is the secrecy of the information. Unlike the protection available to patent holders, there is no accompanying right of a trade secret owner to prevent others from fairly discovering or learning the information. Indeed, defendants in a trade secrets case can escape liability by establishing that they discovered the information independently.

However, the law may offer protection to parties whose trade secrets have been unfairly revealed or stolen. In particular, courts can provide various forms of relief if the secret information has been disclosed improperly to a third party, and the third party is aware that the information should not have been disclosed. In particular, owners of trade secrets can seek relief if their secret information was revealed through theft, bribery, misrepresentation, breach of a duty to maintain secrecy (e.g., under a confidentiality agreement), espionage, or other such means.

Somewhat ironically, the lack of formal requirements concerning the establishment of a trade secret can make it difficult to make a claim at a later date. Accordingly, companies should be pro-active both in identifying appropriate parts of their current technologies, and in establishing policies and procedures to safeguard them. A documented paper trail can be critical if a trade secrets case is ever launched.

The specific policies and procedures that should be implemented will vary according to industry and resources. But trade secrets are no exception to the mantra: forewarned is forearmed.

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