

# Under wraps

How trade secrets can help a company protect its vital intellectual property **Interviewed by Troy Sympson**

In today's innovative and fast-paced business world, companies have to do all they can to protect their assets, processes and products. This is why the protection of trade secrets is such a vital issue.

There are laws in most states that provide a legal definition of a trade secret. All are essentially the same; the main point is that trade secrets consist of information that derives independent, economic value from not being known to competitors or others that could use that information.

"In other words, a trade secret gets its value from not being known by someone who could benefit economically from knowing it," says Allan Gabriel, a partner in the Los Angeles office of Dykema Gossett PLLC. "A trade secret gives you protection against others disclosing or using information that has value to your company."

*Smart Business* spoke with Gabriel about what constitutes a trade secret and how a company can protect its vital intellectual property.

## How do trade secrets differ from patents, trademarks and copyrights?

They differ in a number of ways, most of it having to do with what they protect. A trade secret protects know-how — how you do something. The classic example of this is the formula for Coca-Cola. Other examples include our recent success in protecting software code that processes online employment tests and a sophisticated process to design automotive components.

Patents protect inventions that are useful, not obvious, and novel or new. Trademarks protect brand names — the name the public identifies with the product. Coca-Cola is the brand name for a cola-flavored beverage. Copyrights protect the expression of ideas authored by someone and fixed in something tangible — a book, a movie, or a song, for example.

## What elements of a business are eligible for trade secret protection?

A trade secret can cover a formula, a process, a method of doing something, certain customer and pricing information and manufacturing techniques. There's no exclusive list of what can be covered — if information has independent economic value that is gained by keeping it private, it could be protectable as a trade secret.



**Allan Gabriel**  
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## How long does trade secret protection last?

Simply put, for as long as the information remains a secret. Take again the Coca-Cola example. The formula has been around for a long time and it's never been disclosed, so it will remain a trade secret for as long as it's kept private. There are stories about how the formula is locked in a vault somewhere and only a handful of people actually know it. As long as this is the case, that trade secret protection will last.

This is different from a copyright, which lasts for the life of the author plus 50 years. Eventually, books and movies go into the public domain and are no longer protected by copyrights. Take for example, the holiday movie "It's a Wonderful Life" — no one owns the exclusive rights to it anymore, which is why you see it all over television in December. Patents, on the other hand, last at most for 20 years after the patent is filed, approved and granted.

## How do the courts interpret trade secrets?

In order to establish that a business has a trade secret, it has to prove that it meets the legal definition of one. You can't register for a trade secret and get a stamp of approval from the trade secret office. To prove that you

have a trade secret, you have to show that the information in question derives independent, economic value from not being known and that the information is maintained in a secret and confidential manner. You can't just claim something is secret if it truly isn't.

Consider a company that claims that the identities of its customers are trade secrets. If that company posts a list of its biggest and best customers on its website, then the information is public and therefore not eligible to be a trade secret. On the other hand, if a company makes an esoteric product — maybe a particular part or electronic component — and it's hard to tell exactly who would buy it or be able to use it, then the identities of those customers could be protected as a trade secret, since a competitor could benefit economically from knowing who those customers are.

Another interesting aspect of trade secrets is that they can be negative information, meaning they can cover what not to do. For example, if a company manufactures a particular device and has a facility that's closed to the public, and that company has spent years figuring out what manufacturing techniques do and don't work, information regarding the techniques that don't work could be trade secrets.

## How should confidentiality agreements be crafted to protect trade secrets?

While it's always a good idea to have confidentiality agreements to ensure that employees keep information secret, trade secret law independent of confidentiality agreements provides such protection. For example, if I worked for Coca-Cola and was one of the few that knew the secret formula, I couldn't legally just go to Pepsi and reveal that formula, regardless of whether or not I had signed a confidentiality agreement.

Still, confidentiality agreements are important because having them represents evidence that you truly have a trade secret. You are taking reasonable steps to designate, define and protect what you feel is a trade secret. However, make sure that your confidentiality agreements are not too overreaching — you can't say everything is a secret, like an accounting firm saying that its use of Excel spreadsheets is a trade secret. Confidentiality agreements should be narrowly drawn, specific and understandable. <<

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