



# IP ESSENTIALS

A Toolkit for Entrepreneurs,  
Innovators, and Business Owners

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## TRADE SECRETS



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**Trade secrets include any and all technical or business proprietary information that gives the holder an advantage over competitors**

who do not possess the information. For example, trade secrets may include technical formulas, manufacturing techniques, processes, programs, business methods, customer and supplier lists, and other business information.

**Q What makes something a trade secret?**

**A** The information has independent economic value, actual or potential, and it is not readily known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.

**Q In which cases may trade secret protection be beneficial?**

**A** This varies on a case-by-case basis, but trade secrets may generally be beneficial in the following circumstances:

- the subject matter of the trade secret cannot be protected by patents, copyrights, and/or trademarks,
- the likelihood is high the information can be kept secret,
- the subject matter is not readily ascertainable,
- the secret is related to a manufacturing process.

**Q Can a trade secret lose its value?**

**A** Yes. The value of a trade secret may easily be lost if steps are not taken to maintain proprietary information as confidential. Trade secrets require the use of “reasonable efforts” under their unique circumstances to maintain secrecy.

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**Q** *What are some reasonable procedures for protecting a trade secret?*

**A** Standard agreements and procedures include the use of confidentiality, non-competition, non-disclosure, consultant and independent contractor agreements, exit policy, which should always be in writing and include specific obligations. Other reasonable procedures to protect trade secrets include employee separation checklists, letters to former employees and new employers, labeling documents accordingly, providing access on a need-to-know basis, and creating an unsolicited idea policy.

**Q** *How do I formulate a trade secret protection plan?*

**A** Some considerations when developing a trade secret plan include: creating a written trade secret policy, informing and educating employees about the plan, identifying and restricting access to trade secrets, maintaining computer secrecy, eliminating all disclosure of trade secret information to the public, using confidentiality and non-disclosure agreements when dealing with third parties, and appointing a custodian of trade secrets to monitor policy and communications.

**Q** *Can I register or file my trade secret with the government for protection?*

**A** No. Unlike patents, trademarks, and copyrights, trade secrets cannot be filed or registered with any government body or agency for protection. A trade secret remains a “secret” based on the fact that others do not “need-to-know” about it. And a trade secret remains protected as long as it remains unknown to others.

**Q** *What kind of laws protect trade secrets?*

**A** Forty-seven states enacted the Uniform Trade Secrets Act (UTSA) that governs trade secrets in those states. However, some states such as Massachusetts, New York, and Texas still apply common law. The Defend Trade Secrets Act enacted in 2016 allows an owner of a trade secret to sue in federal court when its trade secrets have been misappropriated.

*"Unlike patents, trademarks, and copyrights, trade secrets cannot be filed or registered with any government body or agency for protection."*

**Q** *Should I worry about trade secret misappropriation?*

**A** Yes. Trade secret misappropriation may include anything that gives a competitor an unfair advantage or head start by improperly accessing information they knew to be confidential and proprietary to another. In most instances, this information comes from former employees including key personnel such as directors, officers, and key employees (engineers, scientists, managers, and sales professionals).

**Q** *What if my trade secret can be reverse-engineered?*

**A** Trade secret law does not prevent discovery by fair and honest means in business competition. Reverse engineering must be well documented to defend against a future claim of trade secret misappropriation (likewise, for independent development). Owners of trade secrets should consider patent and/or copyright protection if the information may be reverse-engineered from your product or service.

**Q** *Can I license/sell my trade secret?*

**A** Yes. You can freely transfer your trade secret to others in any way you choose. This is because a trade secret is viewed as a piece of property in the eyes of the law—just like patents, trademarks, and copyrights. In other words, a trade secret owner owns the rights to sell, license, lease, or otherwise transfer the asset to others for commercial reasons.

**Q** *How long does my trade secret last?*

**A** *Trade secrets can last in perpetuity—if they are properly maintained and protected.*



This IP Essentials Topic is one of a series:

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