

13.4.1: Trade Secret Protections

Learning Objectives

After completing this section, you will be able to

- Define trade secrets.
- Identify the advantages and disadvantages of protecting intellectual property through trade secrets.

What Is a Trade Secret?

Trade secret law is a source of protection for intellectual property that serves as an alternative to patent or trademark law. Whereas patent and trademark law require that the intellectual property to be protected be publicly “disclosed” (for example, through a patent application), trade secret law requires precisely the opposite—that is, that the intellectual property to be protected *not* be publicly disclosed. The subject matter of a trade secret may be virtually any information that is of value as a result of not being generally known.

There is enormous **economic value** in trade secrets—for companies and countries. A study released in March of 2014 estimated that trade secret misappropriation costs the world’s top 40 economies between 1 percent and 3 percent of their gross domestic product each year.ⁱ

Unlike copyright and patent law, there is no formal requirement of “novelty” or “tangibility” under trade secret law. Rather, trade secret protection is extended to information that has independent economic value by virtue of not being generally known or readily ascertainable by others, and which has been subject to reasonable efforts to avoid public disclosure.

Advantages and Disadvantages of Trade Secret Law

There are both advantages and disadvantages to protecting intellectual property through the use of trade secret law. The decision of whether to use trade secret law as opposed to other legal means of protecting knowledge or information is governed primarily by the nature of the intellectual property to be protected.

Advantages

One of the main advantages of trade secret law is that it provides indefinite future protection. Unlike the 20-year time limit that underlies the protection granted to a patent holder, there is no definite time limit placed on the protection granted to a trade secret owner. This indefinite future protection granted to trade secrets is appealing, assuming that the intellectual property to be protected is likely to remain generally unknown well into the future. For example, if the intellectual property to be protected is a method of manufacturing a product that can be determined from examining the product, then the best way to protect the new method of manufacture might be through a patent. On the other hand, if the new method of manufacturing the product cannot be determined from examination of the product, then the best way to protect the intellectual property might be to treat it as a trade secret.

Disadvantages

Although there is no definite expiration of the protection granted to trade secrets, the protection prohibits only the disclosure or use of the trade secret by one to whom the secret was disclosed in confidence. Unlike patent law, trade secret law does not offer any affirmative protection against the use of the same intellectual property that is independently derived or reverse engineered by a competitor. Consequently, if the intellectual property to be protected is a new method of manufacturing a product, and if that method of manufacture is ascertainable from an examination of the product, then the best form of protection for the intellectual property is most likely that offered by patent law.

The same analysis applies to intellectual property that is likely to be independently derived by a competitor. For as the U.S. Supreme Court noted in *Bonito Boats v. Thunder Craft Boats*,ⁱⁱ state trade secret law has never given the holder of a trade secret protection against reverse engineering by the public or a competitor. The Supreme Court commented that in order to receive protection from reverse engineering, the holder of the intellectual property must seek the protection of federal patent law.

Pros and Cons of Trade Secret Law

Pros	Cons

Pros	Cons
Trade secret law provides indefinite future protection, so long as the trade secret stays a secret. Trade secret protection has no expiration date.	If someone came up with the same idea on their own, the trade secret is no longer protected by law.
Trade secret protection prevents the disclosure or use of the trade secret by one to whom the secret was disclosed in confidence.	Trade secret law does not give the holder of a trade secret protection from reverse engineering by the public or a competitor.

Table 5.1

Whereas patent and trademark law involve an affirmative assertion of an intellectual property right, trade secret law only actively operates after a misappropriation or threatened misappropriation of the trade secret has occurred. Due to this difference in the way trade secret law protects intellectual property, the protections given to trade secrets are largely dependent on classifications of information made by courts. Thus, the foundation and development of trade secret law in the United States is inherently tied to the statutes protecting trade secrets, and the court decisions defining and interpreting the statutory protections created for trade secrets.

Footnotes

- 1. “*Economic Impact of Trade Secret Theft*,” PricewaterhouseCoopers, retrieved from: <http://pwc.to/1sVx3AP>
- 2. 489 U.S. 141 (1989).

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