Trade secrets: The unsung hero of IP strategy

January 05, 2022

Trade secrets are a critical and valuable – yet often underused – asset for many businesses. They are a crucial part of any intellectual property (IP) strategy and a common form of protection.

Maintaining trade secrets can help a business generate significant value. Some famous examples include the Coca-Cola® recipe, the Google® algorithm for ranking search results, and the formula for WD-40®.

Businesses large and small have and use trade secrets every day. These include how they deliver a service, information about key relationships (including consumer data), source code, recipes, proprietary pricing models, algorithms, business methods, key product features and manufacturing processes.

Industries that see the development and use of trade secrets include information technology, healthcare, consumer products, and emerging technology areas such as climate tech, agtech, medtech and artificial intelligence.

For confidential information to qualify as a trade secret, a business has to take some measures to protect it from competitors.

Each form of IP (patents, trademarks, copyright, industrial design and others) protects different rights and has different limitations. Trade secrets are no different – maintaining them has advantages over other forms of intellectual property, as well as unique restrictions.

1. Advantage: trade secrets can be more affordable to obtain and maintain. Trade secrets provide a financially efficient and readily obtainable form of IP protection. Unlike other forms of IP, such as patents, there is no requirement or associated costs to register trade secret rights and government approval is not required.

Businesses with more valuable trade secrets have a robust trade secret protection program, which requires investment to develop and implement.

2. Advantage: trade secrets do not expire and can be commercialized on a long-term basis. Unlike seeking patent protection for inventions, with trade secrets you do not have to publicly disclose the invention.

To obtain a valid patent in Canada, the patent applicant has to disclose the details of the invention and how to make or use it in enough detail for someone else to replicate the work. Patent applications are typically made available to the public about 18 months after they are filed.

This means competitors will be able to read about and understand the invention. If a patent is granted this is not a problem, as patent protection is available, but if a patent is not granted competitors can freely make use of the disclosed technology. Competitors can also recreate your invention once the patent expires, usually after about 20 years. Trade secrets, by contrast, remain out of the hands of competitors for as long as the secret is kept confidential.

As for copyright protection, it cannot protect inventions like trade secret or patent protection can. Copyright is meant to protect literary, musical, dramatic or artistic works. Copyright also has an expiry date, 50 years after the author of the work passes away.

These expiry horizons limit a business' market exclusivity for inventions and works that could be protected over a long timeframe. While business seems to develop and change quickly, there are examples of trade secrets that have lasted much longer than these time limits.

3. Advantage: trade secrets can protect information that other forms of IP cannot protect. Trade secrets do not have the same requirements of other forms of intellectual property. Inventions have to be new, non-obvious, and useful to be patentable. Trademarks have to be distinctive, and copyrightable works have to be original. However, these requirements do not apply to trade secrets.

If keeping secret an invention, idea, or business method makes it valuable, and steps are taken to maintain its secrecy, then at least some portion of it can be a trade secret – even if it does not qualify for protection under another form of intellectual property. For example, some data sets and simple facts are extremely valuable, but may not be protectable under any other form of intellectual property.

4. Complication: trade secrets must be kept confidential. If a trade secret is not kept confidential, it has no value.

The more people that use a trade secret, the higher the risk of disclosure. It can be difficult to maintain trade secrets when lots of people have access to them.

Trade secrets work best when the secret is difficult to reverse engineer or create independently, and when it can be distributed into different parts such that no one person knows the whole secret.

5. Complication: trade secrets can be independently developed. Independent development or discovery of a trade secret by another party is a constant threat when trying to maintain a trade secret. If another party can devise the trade secret or develop the same information, they are entitled to use it (and possibly even patent it), as long as they are not breaching a contract or otherwise misappropriating the original party's trade secret.

Reach out to any of the key contacts below if you have questions about trade secrets or other aspects of IP strategy.

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