

INTELLECTUAL  
PROPERTY RIGHTS  
IN A NUTSHELL

# Trade Secrets

Rights in trade secrets are not intellectual property rights. Nevertheless, in view of their importance, they also deserve mentioning.

## 01. What do trade secrets protect?

“Trade secret” is a broad term and encompasses **any information**, no matter the type (commercial, technical, etc.), mode of expression or medium, **that meets the protection requirements** (e.g. unpatented/unpatentable inventions, recipes, chemical formulas, production processes, technical drawings, documents with product information, client lists, offers, audit rapports, prices, etc.).



## 02. What are the requirements for trade secret protection?

In order to obtain trade secret protection information must qualify as a ‘**trade secret**’, i.e. be secret, have a commercial value and be the subject of reasonable measures to keep it secret by the person lawfully in possession thereof:

- The information is considered to be **secret** if the information in question is not generally known to, or easily accessible by, persons in the circles normally dealing with the same type of information. Secrecy must therefore be assessed from the point of view of the “interested circle” concerned. When different parts of certain information are individually known or easily accessible, but not the information as a whole, the information as a whole will be considered secret. It is not required that the information is used/applied.
  - ✓ E.g. a specific way of connecting/assembling standard machines in a manufacturing line was considered to be **secret**.
  - ✗ E.g. general accounting data fed into an online application was **not** considered to be **secret** since the data was also included in invoices sent to clients and could easily be reconstructed by competitors.
- The information is considered to have **commercial value because of its secrecy** if the information is likely to improve a company’s competitive position. The commercial value can be real or potential. For example, information will be considered to have commercial value due to its secrecy if the unlawful acquisition, use or disclosure of the information could harm the interests of the person who lawfully controls it, by undermining his scientific and technical potential, business or financial interests, strategic positions or competitiveness.
  - ✓ E.g. the unique set-up of a manufacturing line and the secret character of the detailed information in that respect was considered to entail commercial value.

✗ E.g. information concerning the CEO's harassment of his employees does **not** have any **commercial value** and can, therefore, never be considered as a trade secret.

- The owner of the information must have taken **reasonable measures to keep it secret and protect it**. These measures can take different forms. These can, for example, be legal measures (e.g. **clauses in work regulations or contractual provisions such as confidentiality clauses**), as well as physical, technical, computer or virtual security mechanisms (e.g. **marking of confidential information, monitoring of company premises, access restriction, identity verification or encryption of files or emails**). Whether or not there are "reasonable measures to keep the information secret", must be assessed on a case-by-case basis, taking into account the specific circumstances of the case.

### 03. How can you obtain trade secret protection?

Trade secret protection comes into existence **automatically** as soon as there is a 'trade secret'. **No administrative formality** (registration) is required.

**Tip:** We highly recommend documenting and dating your trade secrets (possibly through I-Depot<sup>42</sup>, see further)

There is also **no duration limit** of the trade secret protection. As long as the requirements are fulfilled, the protection remains.

### 04. What rights do you have as trade secret owner?

The owner of a trade secret is granted protection against the "**abuse**" of the trade secret. The "**owner**" of a trade secret is any natural or legal person lawfully controlling a trade secret. This can thus for example also be a license holder.

The owner of a trade secret more specifically (only) has **the right to prohibit third parties to unlawfully acquiesce, disclose and/or use the trade secret**. The owner of a trade secret can thus not prohibit the lawful acquisition, disclosure and/or use of a trade secret (e.g. **independent discovery/creation**):

- Will be considered **unlawful acquisition**, the acquisition of a trade secret without consent by means of unauthorized access or copying of documents, objects, articles, materials, electronic files, etc., that contain the secret or from which the secret may be inferred, or other conduct that, given the circumstances, is considered contrary to fair business practices.
- Will be considered **unlawful use or disclosure**, the use or disclosure of a trade secret carried out, without the consent of the owner of the trade secret, by a person fulfilling any of the following conditions:
  - > He or she has unlawfully acquired the trade secret;
  - > He or she is in breach of a non-disclosure agreement or other obligation not to disclose the trade secret;
  - > He or she is in breach of a contractual or other obligation restricting the use of the trade secret.

The owner of a trade secret furthermore also has the right to prohibit "**indirect abuse**" of his trade secret, i.e. when a person at the time of acquiring, using or disclosing a trade secret, knew or should have known that the trade secret was obtained directly or indirectly from another person who unlawfully used or disclosed the trade secret.

Finally, also the production, offering or placing on the market of infringing goods, or the import, export or storage of infringing goods for those purposes, will be considered as an unlawful use of a trade secret when the person carrying out such activities knew or should have known that the trade secret was being “unlawfully used”.

**Goods** will be **infringing** if their design, characteristics, operation, production process or placing on the market benefit significantly from trade secrets which have been unlawfully acquired, used or disclosed.

It should be noted that **in practice** it is usually **very difficult to prove a trade secret infringement**.

**Tip:** To avoid the difficulties that exist in enforcing trade secret rights, we recommend establishing **policies** and **internal procedures to protect trade secrets** (e.g. inventorying and documenting trade secrets, tracking access to trade secrets, and educating and raising awareness among employees).

Once a judge has established that there has been an unlawful acquisition, use or disclosure of a trade secret and, thus, an infringement, the judge can order a.o. the **following measures**:

- The **cessation** of, or as the case may be the prohibition of the acquisition, use or disclosure of the trade secret;
- The **prohibition** of producing, offering, placing on the market or using infringing goods, or of importing, exporting or storing infringing goods for these purposes;
- The **recall** and/or **destruction** of the infringing goods;
- The **stripping** of the infringing goods of their **infringing capacity**;
- The **destruction**, in whole or in part, of the documents, articles, materials, substances or electronic files which contain or embody the trade secret or, where applicable, the handing over of all or part of such documents, articles, materials, substances or electronic files to the holder of the trade secret.

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