

New trade secret insurance available- should your company have it?



Trade secrets, although very valuable to most companies, are often overlooked and misunderstood. This competitive know-how is often not formally identified, valued, and protected in such a way that would allow legal trade secret protection rights to be enforced if those assets are stolen. The asset owners, lenders, investors, and other stakeholders such as Directors & Officers hold the risk for the loss of tremendous value and market share if those “crown jewels” are stolen by a competitor.

What is a Trade Secret? Like the privacy laws that are different but similar from state to state, there are many different definitions of “trade secret”. But the Federal Statute, the DTSA uses the following:

All forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, that:

The owner thereof has taken "reasonable measures" to keep such information secret –and–

The information derives independent economic value, actual or potential, from not being generally known, and not being readily ascertainable through "proper means".

Some, but not all, of the above types of assets may also be patentable, but once they become public (via the patent application process), they lose their value as trade secrets and are no longer insurable. The only way to enforce patent rights is via litigation, which may or may not result in a positive outcome and is both time consuming and expensive. Therefore, how your IP assets are protected should be an important part of your risk management strategy.

- Simply by identifying your trade secrets, significant inherent legal protections are gained - Identification is done internally & via metadata, creating referential records which will stand up in court re: existence/age/ownership of trade secrets which is critical to enforcement actions.
- Valuing these assets will increase the company value and allow you to attract investors and lenders.
- There is a novel, Lloyds of London-back risk advisory and insurance solution available - which can identify, value, mitigate against theft, insure the assets for a pre-agreed value, and/or pay for the legal and forensic expenses associated with enforcement litigation.

How do you know if your organization has trade secrets? Start with these questions:

- How many patents does your company have? If a company holds a lot of patents, they are likely to have many trade secrets as well, as anything that is still in R&D and has not been filed yet (for patent protection) is almost certainly a trade secret if it is close to completion (or first release).
- What is your R&D budget annually? A significant R&D budget indicates a lot of trade secrets exist. The higher the R&D budget relative to other expenses, the more valuable these assets are to a company.
- What are the things that give you a competitive advantage?
- What know-how, if stolen, would cause you to have to share with the Board or other stakeholders?
- What know-how, if taken by a competitor, would cause you to lose market share immediately or give them a major leap forward in their own development?

Some examples of things that could be trade secrets include algorithms, chemical formulas, recipes, formulas, software code, designs, prototypes, methods, techniques, processes, procedures, programs, strategic sales and growth plans.

Examples of a trade secret are:

- The formula for Coca Cola
- Google’s search algorithm
- WD40 motor oil (a lot of its value is in the lessons learned during formulas 1-39)
- The UPS logistics process (this is a “combination” or parent trade secret that includes a lot of other trade secrets, such as the scanning of packages, sorting, packaging, loading, how they maneuver vehicle traffic patterns, etc.)