

TRADE SECRETS ESTABLISHMENT AND MAINTENANCE

A company's trade secrets are often among its major assets. However, trade secret status for proprietary information can be lost if not properly maintained. This brochure will outline important aspects of trade secret protection. Please retain it for reference when review of a trade secret maintenance program is planned.

WHAT IS A TRADE SECRET?

A **trade secret** can be generally defined as any proprietary device, machine, formula, pattern, process, technique, computer program, method or compilation of information (all of which we will refer to simply as **information**) which one uses in business and which can enable the user to obtain an advantage over competitors who do not know or use it. A specific definition in California law adds the requirement that it have actual or potential independent economic value.

Trade secrets can include many kinds of information, even that which is **not** itself patentable or copyrightable. Customer lists; proprietary processes; technical know-how; technical, financial or business data; computer software source codes; and even negative information (for instance, knowing what to avoid in a technical process) are all typical examples of potential trade secrets. However, information which is publicly available or known, or which is ascertainable from inspection of products, literature and other public materials, cannot be a trade secret.

ESTABLISHMENT AND MAINTENANCE OF TRADE SECRETS

Trade secrets are **established** by keeping information **confidential** from the time it is first created, compiled or installed. The fact that the company considers the information confidential must be communicated to all employees and others who will have access to it. A Gordon & Rees attorney can advise on the nature and use of employee handbooks, contracts and confidentiality agreements covering trade secret information, including those instances where some disclosure is necessary under licenses or government regulations.

Confidentiality must be **maintained** vigorously. Designation of restricted areas of company facilities; use of secure filing systems; labeling of documents, drawings, programs and the like as confidential; use of employee contracts identifying potential access to confidential information; and limited distribution of confidential materials are all techniques commonly used to protect proprietary assets.

LOSS OF TRADE SECRETS

A trade secret is lost by **disclosure**, whether or not authorized and whether deliberate or inadvertent. One who improperly discloses a trade secret can be punished, but the original degree of confidentiality of the disclosed information **cannot** be reinstated.

Usually at least some degree of trade secret status ends when a product is **commercialized**, since then anyone can inspect the product. However, those aspects of the product's composition, structure, production, financial performance and the like which cannot be ascertained from its inspection can remain as trade secrets.

Independent **discovery** or **detection** of a trade secret is permissible and can lead to loss of the trade secret. **Reverse engineering** of a lawfully obtained product (taking it apart to examine and test it) is common and legal. Making educated conclusions about sealed components, secret product compositions or operating parameters of secret processes from related published or patent information is also quite permissible. These legal methods are to be distinguished from industrial espionage, which is not permitted.

There are many steps an owner can take to safeguard proprietary company information and prevent, or at least limit, the loss of trade secrets through disclosure or commercialization of products. A Gordon & Rees attorney can discuss these steps in the context of specific types of technology and/or information.

DURATION OF TRADE SECRETS

A trade secret retains its status **as long as it stays confidential** and does not become known in the field, either by disclosure or by independent discovery by others. There are some trade secrets which have been maintained for many years. Further, disclosure or discovery of one aspect of a broad trade secret does not necessarily impair the status of other aspects of the trade secret. A Gordon & Rees attorney can advise about the effect of disclosure or discovery on overall trade secret status.

ENFORCEMENT OF TRADE SECRETS

It will be evident that **swift assertion and enforcement** of a trade secret before someone can improperly disclose or use it is imperative if the trade secret is not to be irretrievably lost. Frequently, immediate litigation seeking a temporary restraining order or preliminary injunction is required. A Gordon & Rees attorney can advise as to the appropriate procedures and estimated costs which will be involved in such enforcement efforts.

Copyright Gordon & Rees LLP. All Rights Reserved.

This brochure is intended to provide general information for clients and friends of Gordon & Rees. It should not be construed or relied upon as legal advice. Applicability of the legal principles discussed in this brochure may differ widely in specific situations. Please consult a Gordon & Rees attorney for advice regarding specific legal questions and matters.