# Trade Secret

The Q and A of Intellectual Property

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## 1 What Is a Trade Secret?

The federal Defend Trade Secrets Act (DTSA) defines a trade secret as "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, whether tangible or intangible, and whether or how stored, compiled or memorialized physically, electronically, graphically, photographically, or in writing." In order for information to qualify as a trade secret, you must take reasonable measures to maintain the secrecy of the information, and it must also be of economic value to your competitors. In other words, a trade secret is typically something that is not publicly known and that gives your business a competitive advantage.

## 2 What Constitutes Misappropriation?

In order to prove misappropriation of a trade secret, you must prove not only that the information at issue meets the legal definition of a trade secret but also that it was wrongfully obtained by the accused party. The Uniform Trade Secrets Act (UTSA) includes a lengthy definition of "misappropriation," which boils down to (i) acquisition of a trade secret by a person who knows or has reason to know that the trade secret was acquired by improper means or (ii) disclosure or use of a trade secret of another without express or implied consent by a person who used improper means to acquire knowledge of the trade secret. Misappropriation of trade secrets claims are often accompanied by breach of contract claims—breach of confidentiality or nondisclosure agreements being the most common among them. Confidentiality provisions are routinely included in a whole host of commercial contracts, including employment agreements, manufacturing agreements, distribution agreements, and supply agreements.

## 3 Are Trademark Secrets Protected by Federal or State Law?

Trade secrets are protected by state and federal law. Until recently, trade secrets were only protected by state law; however, in 2016, Congress enacted the Defend Trade Secrets Act, which establishes a federal case of action for misappropriation of trade secrets. The federal act provides an ex parte seizure remedy, which gives courts the authority to issue seizure orders for stolen trade secrets without hearing from the defendant. Federal law also provides immunity to whistleblowers who disclose trade secrets to attorneys and government officials "solely for the purpose of reporting or investigating a suspected violation of law."

The Uniform Trade Secrets Act has been adopted in nearly every state, including Montana. The definitions of "trade secret" and "misappropriation" are largely the same under the UTSA and the DTSA, but the DTSA expressly excludes "reverse engineering, independent derivation, or any other lawful means of acquisition" from the definition of misappropriation.

## 4 What Are Examples of Trade Secrets?

A trade secret includes anything that would be of value to a competitor, for example, manufacturing processes, scientific formulations, and computer source code. It may also be something as mundane as how much you pay your employees, who your suppliers are, and the terms and conditions of your customer agreements. The Google search algorithm and Coca-Cola's recipe for its signature beverage are two common examples of trade secrets.

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## 5 Is There a Registration Process for Trade Secrets?

No. There is no registration process for trade secrets. In order to protect something as a trade secret, you must have appropriate confidentiality agreements in place with everyone (including employees, vendors, manufacturers, etc.) who has access to the trade secret, and you must also restrict access — physically or electronically, depending on the nature of the trade secret — to the information that you are claiming is a trade secret. For example, if the trade secret is a manufacturing process, then you would require anyone visiting your factory to sign a written confidentiality agreement, and you would not show them certain highly confidential aspects of your operation. Because there is no registration process for a trade secret, there is no definitive way to determine in advance of litigation whether something is or is not a trade secret.

Although there is no international registration system for trade secrets, the World Trade Organization's General Agreement Tariffs and Trade 1947 (the "TRIPs Agreement") officially recognizes trade secrets as a protectable form of intellectual property and requires member states (countries) to adopt certain substantive and procedural protections for trade secrets.

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