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PERSPECTIVE

Trade Secrets: Is litigating infringement worth it? What can be done instead?

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According to the U.S. Patent and Trademark Office, a trade secret is any information “that has either actual or potential independent economic value by not being generally well known.” It is intellectual property that is not widely known but is valuable to those who possess it and those who would like to acquire it. By allowing owners and inventors to set their products apart from others, trade secrets are a critical factor in many businesses’ uniqueness and ongoing consumer loyalty.

However, information deemed a trade secret is not protected by a patent, copyright, or trademark. Such information is protected by keeping it under wraps. Unlike patents, which require the inventor or owner “to provide a detailed and enabling disclosure about the invention in exchange for the right to exclude others from practicing the invention for a limited period,” trade secrets are rarely shared with individuals outside of those with an absolute need to know, and there is no time limit as to how long the owner or inventor can keep it a secret.

Coca-Cola, for example, has protected its soda recipe since its inception in 1886. They opted to maintain absolute secrecy, sharing the formulation with only a small group of people. This strategy, unlike a patent, ensured that their recipe was not revealed to other soda brands upon the expiration of a fixed-term and

has allowed them to maintain a competitive advantage in the marketplace to date.

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Opting to treat intellectual property as a trade secret could allow a person or company to prevent others from duplicating it. However, it is essential to understand that doing so inherently creates a significant risk of loss if that secret is ever exposed. If a trade secret is not adequately protected and thus exposed, there is nothing preventing others from using that information. On the flip side, if reasonable efforts were made to maintain the information’s secrecy, and the information was exposed or obtained by another through improper means, the victim could seek legal remedies.

Many trade secret infringement victims may seek to litigate; however, it is essential to consider litigation’s potential adverse effects. Court records are generally available to the public. That is, everything discussed in the case can be accessed and inspected by the public. This would essentially negate the purpose of seeking legal remedies in a trade secret infringement case because the information, and all other data

about it which may be brought up in court, would be easily accessible by anyone seeking

to find it. As such, rather than helping to minimize the damage caused by the exposure of a trade secret, litigation may instead cause more harm to the victim.

A more helpful method of resolution would be mediation or arbitration. Both of these alternatives are private dispute resolution options. In other words, they are not a matter of public record and can thus aid in preventing trade secret information from being exposed further. These alternatives also allow the parties involved to set their own rules regarding acceptable forms of evidence, expert witnesses, and the general concepts upon which a decision is based. Also, these options are far less costly than litigation, which could be a key factor if the trade secret infringement has impacted the victim financially.

The best way to avoid trade secret litigation and ensure an

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alternative dispute resolution method is to build mediation and arbitration requirements into all applicable contracts. While trade secrets should be carefully guarded and not shared unless necessary, sometimes, disclosure may be needed. In such instances, ensuring that contractual language requires the other party to maintain secrecy (e.g., nondisclosure agreements, con-

fidentiality agreements, etc.) and including clauses requiring mediation or arbitration as the means for resolution could be incredibly beneficial to the trade secret owner.

A massive factor in the value of a trade secret ultimately lies in the owner's ability to keep it hidden from outsiders. Without the secrecy factor, the information is not a "trade secret," and any

market advantage the owner or inventor could have had is minimized significantly. Even in cases of a potential breach where the secret is exposed, owners/inventors must think of preventing that information from being exposed further. Mediation and arbitration offer a cost-effective, private and confidential approach for those seeking a remedy without having to put

their valuable information on a publicly accessible record. As such, trade secret owners facing an infringement issue should seek resolution through one of these means rather than through litigation. ■

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