

Innovative use of trade secrets – How to protect your business know-how

Only companies that guard business information and know-how like their crown jewels end up being successful in the market. Trade secrets are simply not revealed. This is no longer an unwritten law.

Effective April 2019, German legislation has significantly upgraded the existing protection of trade secrets. By adopting the Trade Secrets Act, it has now been placed on virtually equal terms with patent, trademark, and design protection. Innovative companies that place high importance on the protection of secret recipes, samples, or supply sources are set to benefit from the change in the law. And in cases where big data, algorithms, and all kinds of digital data sources are to be protected, the Trade Secrets Act now offers protection that is equivalent to classic and far-reaching IP rights.

Protection by registration or protection through secrecy? This is a decision that companies are frequently facing. In many cases, they were forced to accept that their valuable innovations could not be registered at all and therefore ended up being insufficiently protected even when they were trade secrets. Now, however, trade secrets such as data and information are legally protected more distinctly as well – provided that the company implements efficient means to protect the information and regularly monitors the appropriate measures. Consider someone getting hold of your valuable trade secrets and using them for their own purposes, or disclosing them: Now you have more options to defend your trade secrets, whether in the form of damages, product recalls, or cease and desist orders. Even criminal prosecution is possible.

What does this mean in concrete terms for your company?

To enjoy the protection of secrets, the valuable data and information must meet certain conditions. First of all, they may not be generally known. Secondly, they must be of economic value, and thirdly, they must be particularly important for the company. Real-world examples: Coca-Cola's recipe or the composition of Konnopke's Currywurst sauce would most definitely meet these requirements. But so would the amount of data collected by sensors in a digitally connected machine and the algorithms used to evaluate the data to replace wear parts before they force the machine to a standstill. All of these examples are now being covered by the new statutory provisions. While the legislator is expanding the protection of secrets with these adaptations, the hurdles to refer to it have also increased. Companies are now obligated to take reasonable measures to keep sensitive information confidential.

Compliance systems need to be adapted as well. Specifically, this involves organizational, technical, and legal steps. Examples include increasing IT security, limiting access rights, and implementing new non-disclosure agreements with employees and business partners. The methods to be used and their timing will depend on the importance of the information and the data to be protected. In internal guidelines, particular attention must be paid to the limits of the employer's right to issue instructions and to works council co-determination rights. In employment contracts, non-disclosure agreements must, among other things, observe the principle of transparency and the basic right of employees to choose their profession freely.

Once trade secrets have been made public, they give up their secret character and greatly lose in value. Further protection is then practically useless, since the information that has become public may now be used by anyone.

New compliance rules: We will assist you

This is why it is important to take preventive measures and to make the protection of trade secrets more efficient. It is the only way to ensure that the valuable data will also be covered by the newly defined legal scope of protection. Please do not hesitate to contact us if you need to adapt your compliance rules and readjust contractual agreements. In collaboration with SKW Schwarz @ Tech GmbH, we have developed a tool that makes it considerably easier to identify trade secrets and that offers intelligent solutions for the measures to be taken. Call or email us for details.

Our team of trade secrets protection experts with its expertise and experience in all relevant fields such as IT security law, IP law, and employment law is unrivaled in Germany and a reliable partner for practical advice to our clients and to any companies.

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