Mesmer & Deleault, PLLC
41 Brook Street, Manchester, NH 03104
Seacoast Office: One New Hampshire Ave., Suite 125
Portsmouth, NH 03801

"Tip of the Month"

Trade Secret or Patent: What Should a Business Do?

Maintaining company information as a trade secret or seeking patent protection is a decision that depends on various factors.

Trade secrets generally fall into two categories. Trade secrets may be information that does not meet the criteria for patentability and can only be protected as a trade secret. Examples are customer lists, formulas, patterns, compilations, programs, devices, techniques, processes, or ideas. Trade secrets may also include inventions that would be patentable.

A patent is a federal grant of exclusive rights given in exchange for the public disclosure of a new and non-obvious invention. This requires the inventor to fully disclose what might otherwise be treated as a trade secret. The exclusive rights are to make, use, sell, offer to sell, or import the invention. Any useful process, method, machine, or substance can be patented provided it is new, nonobvious in view of what's been done before, and not an abstract law of nature.

Trade secrets and patent protection have distinct advantages over each other. If the benefit of the invention is of short duration and will become obsolete in less time than it takes for a patent to issue or if a competitive advantage is gained by being first in the market, then trade secret protection may be favorable. Additionally, trade secret protection is not limited in time and can continue indefinitely so long as it continues to meet the definition of a trade secret. Trade secrets, however, may be expensive to maintain. Typical costs include physically restricting access to the grounds and building where the secret is kept or used, restricting information to individuals who need to know the trade secret, labeling information as confidential, protecting electronic forms of trade secrets by way of encryption, firewalls, and password protection as well as drafting contracts for employees, suppliers, customers, and others to clarify the existence of the trade secrets and the duty not to disclose them.

A patent, on the other hand, protects your rights regardless of what anyone subsequently develops. For example, a technological breakthrough in a highly competitive area usually warrants patent protection. Also, patent protection is more secure than trade secrets because the law of trade secrets does not prevent others from acquiring and using trade secrets. It merely prevents the acquisition by improper means. Patent protection grants the right to exclude third parties from making or using the invention for a limited time. Trade secrets protection, however, can be lost overnight if the secret is publicly disclosed; even if the disclosure was unintentional. If the invention is susceptible to reverse engineering, keeping it as a trade secret is of little or no value.

Whether to opt for trade secret protection or patent protection is an extremely important decision. The attorneys at Mesmer & Deleault have the experience and ability to help you sort out the best option for your situation. For a free initial consultation, call today at 603-668-1971 or send an email to *mailbox@biz-patlaw.com*.

Frank B. Mesmer, Jr.
Robert R. Deleault
Sarita L. Pickett
Joshua N. Mesmer

(603) 668-1971
Fax (603) 622-1445
E-mail: mailbox@biz-patlaw.com
Website: www.biz-patlaw.com