Trade Secrets v. Patents: How they are similar, how they are different, and is one better than the other?

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Sometimes clients and businesspeople conflate Trade Secrets and Patents, as though they are the same thing (or at least, similar things). Of course, both generally and usually pertain to innovations, inventions, or proprietary information. Both are ways to protect intellectual property. Both are utilized to give a company an advantage over its competitors.

But, in reality, they are in many ways the opposite of one another.

Under U.S. Patent law, an inventor can obtain a patent on something that is new, useful, and non-obvious. If an inventor obtains a patent, he obtains the "right to exclude." As it sounds, this means that the holder of the patent can exclude others from making, using, selling, offering for sale, importing, inducing others to infringe, and/or offering a product specifically adapted from that patent. Put simply, during the life of the patent, nobody else can use what is claimed in the patent unless you give them permission. In exchange for that right to exclude, however, the patent holder must disclose their new technology to the world, explaining it with enough detail to allow for someone with the requisite skill to make or use the invention. In exchange for the monopoly to exclusively use that invention for a period of time—roughly 20 years in the United States for most types of patents—the owner tells the rest of the world how to use it. And once the exclusive period for that patent runs out, anyone else can use that information without restriction.

A trade secret, on the other hand, is only protectable if it is kept secret and confidential. In this way, it is the exact opposite of the public disclosure inherent in patents. Others can use that same information and/or product, so long as they came up with it on their own or discovered it legally. If, however, they improperly or illegally steal your information, you can bring a suit to recover damages, including lost profits, a potential royalty fee, and

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potentially the amount by which the misappropriating company was unjustly enriched. In essence, you are strategically *not* gaining the right to exclude others by strategically *not* disclosing the information to others. You can, however, seek an injunctive order stopping a party from using your trade secret if they illegally misappropriated it; but not if they have lawfully created it themselves.

So, rather than being two parts of the same whole, trade secrets and patents are sometimes opposites. Or, at least, they are two different ways in which a company may choose to protect its information. A company can have its information patented (if patentable), and therefore be the only one permitted to use it, but at the cost of disclosing it to the world. Or, it can keep it a secret, but run the risk that someone else discovers, develops, or comes up with something similar and is able to use it.

Which means that companies will often have to make a choice. Some companies, like Coca-Cola or Kentucky Fried Chicken, choose to keep their information secret. So long as nobody learns of their secrets, nobody can use them. In that way, Coke's or KFC's "exclusive use" can last perpetually (though not legally enforceable absent evidence of actual theft). Others in the tech industries, of course, opt for patenting their innovations so that they can keep anyone else from using them—or permitting them to extract lucrative fees from those who wish to use them.

Interestingly, a recent article in the Washington Examiner attempts to pit the two business methods against one another, claiming that trade secrets have "contributed to the erosion of the patent system" because more and more companies are turning to trade secrets instead of formal patents. The author of that article even claims that more and more companies turning to trade secrets instead of formal patents "is hurting business now—and will hurt the whole economy in the future." While this is interesting and, perhaps, would be a good discussion point on this topic, the author fails to provide any evidence, data, or much of anything else to back up his assertion. Though, his feelings are made clear when he refers to trade secrets as "shady trade secrets."

The author complains that there have been large jury verdicts in recent trade secret cases, and more may follow. He does not note whether there have also been equally large verdicts in patent cases, which of course there have been. His solution, however, is that "it only makes sense for government policies to favor patents." This, he posits, will "support innovators" and lead to a "brighter future." The author, as we learn from his byline, "advocates on behalf of business and limited government." Yet his solution is that we need more government to force—or "incentivize," as he puts it—companies to publically disclose their innovations, competitive advantages, and trade secrets and, presumably, weaken their ability to stop those who have stolen their confidential information if it is not publically disclosed through the patent system. All in the name of "supporting" the innovators.

While this debate may be worth having or may be intriguing from an academic point of view, the fact remains that companies and individuals do have a choice. They can seek the right to exclusive use under the valid and enforceable patent laws, or they can seek to protect their confidential trade secrets via injunctions when they are illegally misappropriated or seeking damages when they are wrongly stolen and used. And they may do so under the equally valid and enforceable trade secret

statutes passed by nearly every single state legislature as well as under the federal trade secret statute that the U.S. Congress passed several years ago. In addition, jurisdictions throughout the country have also allowed companies and individuals to use both forms of protection simultaneously —the Fifth Circuit, for example, has determined that a trade secret which is composed of different elements, each available within a public source (including patent applications), can still exist so long as the combination itself is not disclosed.

What is right for you or your company may be different from what is right for another company. If you are interested in what the right course is for your innovations, you may want to talk to a trade secret attorney or a patent attorney and explore all options. But rest assured, whichever route you go is better than not securing your information at all. And whichever option you choose is equally valid and equally enforceable.

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