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What Is A Trade Secret?

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Trade Secret is often a nebulous term encompassing disparate facts and analyses to ascertain its existence and enforceability. For instance, Plaintiff's belief that some particular information is a trade secret does not necessarily render such information trade secret, per se. The Plaintiff's cogent belief could be a factor, but a not a dispositive fact. In this article, we explore in some depth the statutory definition of Trade Secret in California and some pertinent case law.

A) CALIFORNIA STATUTORY DEFINITION OF *TRADE SECRET*

The California Civil Code Section 3426, paraphrased, provides that a trade secret is:

- INFORMATION that is not generally known in the industry, to the public or to others who can realize economic value from its disclosure or use.
- INFORMATION that possesses its own monetary economic value stemming from its secrecy
- INFORMATION that requires efforts under the circumstances to maintain its secrecy.

B) WHAT IS *INFORMATION* IN THE CONTEXT OF *TRADE SECRET*?

Under Civil Code Section 3246, INFORMATION includes, among other things, formulas, patterns, compilations, programs, devices, methods, techniques and processes. See, *DVD COPY CONTROL V. BUNNER* (2003) 31 C4TH, 864, 867, 4 CR3D 69.

C) WHAT *INFORMATION* MIGHT BE *TRADE SECRET*?

It is not easy to ascertain conclusively what could constitute trade secret. Nonetheless, the case law provides a primer as to the information which might be found as trade secret.

1. CUSTOMER LISTS: Although Courts have treated customer lists to be trade secret by and large, not all customer lists are found to be trade secret. For instance, customer lists that are generally known to the general public and not particularly hard to acquire have not been found to be



trade secret. See, *American Paper & Packaging Prods. Inc. v. Kirgan* (1986) 183 CA3rd 1318, 1326, 228 CR 713.

The following provides SOME of the factors, COURTS look at to determine whether a particular customer list is a secret or not:

- Was the customer list acquired with considerable time, effort and expense?
- Was the customer list detailed?
- Was the customer list generally known to people or hard to obtain?
- Was the customer list included research on a particular demographics as to their income, buying habits, etc?

2. MARKETING STRATEGIES AND FINANCIAL PLANS: Marketing strategies and financial plans have been found to be trade secrets. Note, still such information should be secret to be found trade secret. See, *Whyte v. Schlage Lock Co.* (2002) 101 CA4th 1443, 125 CR2D 277.

D) WHAT IS *SECRECY*?

Given the ballooning use of social media, protecting a business trade secret has become more challenging as a business property may find itself on the Internet. In fact, a very brief posting online could be viewed by millions of people online. In addition, the ever emerging sophistication of web search engines makes it rather impossible to cogently argue a customer name or address is secret, as a simple Google search would, in most cases, unearth the purported secret information.

In fact, in *Sasqua Group, Inc. v Courtney* (ED NY, Aug. 2, 2010, No. CV 10-528(ADS)(AKT)) 2010 US Dist Lexis 93442, the Court found that the customer list was not a trade secret because the information could be found on Google and LinkedIn.

In addition, if such information is revealed, Courts, because of First Amendment limitations, are reluctant and hesitant to intervene to stop the publisher from disclosure. This would create a very uncomfortable situation for the business whose "trade secret" has been published.

Hence, it is incumbent upon businesses to ensure that their "trade secret" remain "secret" to the extent possible by instituting and enforcing well-designed and devised strategies and policies.

E) *REASONABLE EFFORTS FOR SECRECY BY BUSINESS OWNER*

In light of the salience of protecting "trade secrets", now the question arises as to the degree of protection employed by businesses owners. This latter point is important since Courts to treat a "Trade Secret" as "Secret" should observe the owner treated such information as "Secret".

In fact, case law elaborates on such requirement that heroic measures need not be taken to maintain the secrecy".



- *USM Corp. v Marson Fastener Corp.* (Mass 1979) 393 NE2d 895, 900: "A substantial element of secrecy must exist, so that except by the use of improper means, there would be difficulty in acquiring the information".
- But, see *Gemisys Corp. v Phoenix Am., Inc.* (ND Cal 1999) 186 FRD 551, 558: No Trade secret because plaintiff did NOT place CONFIDENTIALITY markings on the software.

The following are SOME of the steps, the business owner might do to preserve and protect the secrecy of the "trade secret":

- Use of Non-Disclosure Agreements
- Use of Shredders
- Use of Encryption in Electronic Transfer of Documents
- Use of Employee Handbooks with Specific Policies to Preserve and Protect "Trade Secrets"
- Use of Passwords

DISCLAIMER:

This article NEITHER supplants NOR supplements the breadth or depth of such rarefied topic. In fact, this article ONLY provides a rudimentary synopsis of such esoteric subject matter.

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