

# Protecting your know-how

Formulas, processes, algorithms, customer data: a decisive share of your competitive edge cannot be filed, it must be kept. Trade secrecy protects this invisible capital without any time limit, provided you give yourself the means.



## TERM

Unlimited, for as long as secrecy holds

## FORMALITY

No filing, protection measures

## FRAMEWORK

Act of 30 July 2018 (EU Dir. 2016/943)

## WATCH OUT

No remedy against independent discovery

## The notion of know-how: secret, substantial, identified

Know-how is not defined by French statute; its reference definition, drawn from the European regulations on technology transfer and adopted by the Cour de cassation, rests on three characters. It is a body of practical information, not patented, born of experience: secret, taken as a whole or in the arrangement of its elements, it is neither generally known nor readily accessible; substantial, it is of real utility, technical or commercial, for production or sale; identified, it is described comprehensively enough for the first two characters to be verified. A manufacturing process, a formula, machine settings, an algorithm, but equally a commercial method or a logistics organisation: know-how is commercial as much as technical.

Its legal nature governs the whole subject: know-how is not an exclusive right. No title, no filing confers a monopoly over it; it is a competitive advantage, which the law protects only against unlawful conduct. Its protection results from a combination: the trade-secrets regime, its principal vehicle; the contracts that organise its circulation; the action for unfair competition; and, for industrial processes, the criminal protection of manufacturing secrets.

## The trade-secrets regime

Trade secrets have enjoyed, since the Act of 30 July 2018 transposing the 2016 European directive, a complete statutory regime (Articles L. 151-1 et seq. of the Commercial Code). Three conditions open access to it: the information is not generally known or readily accessible to persons familiar with this kind of information; it has commercial value, actual or potential, because it is secret; and its lawful holder subjects it to reasonable protection measures. That last requirement is not a recommendation but a statutory condition: information left unprotected, open access, no confidentiality clause, falls outside the definition, whatever its value.

The regime thus opened sanctions the unlawful acquisition, use and disclosure of the secret. Its limits are those of its nature: absent any monopoly, independent discovery and the reverse engineering of a lawfully acquired product remain lawful, the competitor who reaches the same result by their own means commits no wrong, and a secret once disclosed, even by accident, is lost for good. Strength and fragility go together: immediate protection, without formality or fee, unlimited in time for as long as secrecy is preserved.

## Protection measures and proof of possession

The reasonable protection measures, a condition of access to the regime, are the first thing a court will verify. They are organised on three planes. Organisational: mapping and classification of sensitive information, access reserved to those who need it, confidentiality markings, joiner and leaver procedures. Contractual: a non-disclosure agreement before any negotiation, confidentiality and return clauses in employment and service contracts, a framework for subcontracting. Technical: systems security, data compartmentalisation, access traceability.

To these is added proof of possession. The identified character of know-how requires it to be formalised, description, versioning, and that formalisation serves two ends: it conditions transmission, since one only assigns or licenses what one has described, and it prepares litigation, where it will be necessary to establish what was held, on what date and in what form. Dated laboratory notebooks, timestamping, the INPI's e-Soleau envelopes, methodical archiving: the same evidentiary strategy as for copyright, built before any dispute.

## Strategy: patent or secrecy, contracts, actions

Faced with an innovation, the trade-off with the patent is a structuring decision. A patent confers twenty years of monopoly, enforceable even against an independent inventor, at the price of full disclosure; secrecy is immediate and open-ended, but powerless against reverse engineering. The choice is reasoned: can the invention be detected in the final product? Could infringement be demonstrated? What is the technology's life cycle? Can the secret physically be kept? The two protections also combine, patent what shows, keep the operating parameters secret; preserve confidentiality during development, then file, without a disclosure having destroyed novelty in the meantime.

Know-how is transmitted by contract: licences, know-how communication agreements, contributions to industrial partnerships, franchises, whose validity requires precisely know-how that is secret, substantial and identified. These agreements are drafted with care: definition of what is communicated, staged transmission, confidentiality obligations surviving the contract, treatment of improvements.

In the event of a breach, unlawful acquisition, use or disclosure engages its author's liability, including the third party who exploited the secret knowing its origin, and opens the way, where needed through interim proceedings, to injunctions, recall or destruction, and compensation. The proceedings themselves protect the secret: hearings held away from the public, restricted access to exhibits. The disclosure of a manufacturing secret by a director or employee is moreover criminally sanctioned, and the action for unfair competition and parasitism takes over where the facts fall outside these regimes.

## Our services

- ✓ Mapping and classification of sensitive information
- ✓ Internal confidentiality policies and team awareness
- ✓ Patent / secrecy trade-off
- ✓ NDAs and confidentiality clauses (employees, providers, partners)
- ✓ Evidentiary strategy (e-Soleau, timestamping, deposits)
- ✓ Exploitation agreements: licensing, technology transfer, franchising
- ✓ Actions against unlawful acquisition, use or disclosure
- ✓ Unfair competition and parasitism as a complement

## Weinstein Services & Conseils

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