April 7, 2026

Patently Enabled April 2026 – Patents vs. Trade Secrets

Patent protection and trade secret protection are alternative methods used to secure and enforce intellectual property rights. While neither method grants affirmative rights to practice an invention, both allow the holder to exclude others from doing so and may open the door to courtroom enforcement.

Notably, the costs associated with these forms of protection vary significantly. Patent protection requires navigating a formal process before one or more patent offices. This process can take years, involves substantial expense, and carries an uncertain outcome. This raises an important question: If you seek intellectual property protection but wish to avoid the time and expense of obtaining a patent, is there an alternative?

For those considering patent protection or trade secret protection, each path has distinct eligibility criteria. For example, a patentable invention must be new and nonobvious, among other requirements. Under the Defend Trade Secrets Act, a trade secret can encompass a wide range of information—financial, business, scientific, technical, economic, or engineering—so long as the owner takes reasonable measures to keep it secret and the information derives independent economic value from not being generally known or readily ascertainable by proper means. In short, a trade secret can be almost anything of value that remains secret and is not easily discoverable.

One advantage of trade secret protection is that it is largely an internal undertaking. Trade secrets, which are "misappropriated" rather than "infringed," like patents, can be safeguarded through noncompete and nondisclosure agreements, as well as internal controls such as limiting access on a need-to-know basis.

Trade secret holders also have multiple enforcement options. Claims may be brought under applicable state and federal laws, including trade secret statutes, as well as related causes of action such as breach of contract and unfair competition. Trade secret protection lasts as long as the information remains secret, whereas patent protection generally expires about 20 years after the filing date.

However, these benefits come with drawbacks. Trade secrets, unlike patents, are often more difficult to define and are not presumed valid in court. Additionally, variations in state law can create inconsistencies, whereas patent law benefits from federal statutory uniformity and centralized appellate review in the Federal Circuit. Importantly, once a trade secret becomes public, the associated rights are lost.

In some cases, an invention may qualify for both patent protection and trade secret protection for a limited time. Before a patent application is published or granted, it remains confidential, allowing the invention to be treated as a trade secret during that period. Under certain conditions, the United States Patent and Trademark Office may permit an application to remain unpublished until issuance. This can allow an applicant to delay the decision to disclose trade secrets contained in the application until late in the process.

In summary, while there is some overlap between patentable subject matter and trade secrets, trade secrets are typically less expensive to maintain. However, they may present more challenges in enforcement. Deciding which form of intellectual property protection to pursue is a complex determination, and consulting with an attorney is the best place to begin.

Authors



George Chaclas

Partner

Providence, RI | (401) 283-1226

gchaclas@daypitney.com