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A Guide to Protecting Your Recipes

When it comes to food businesses, preventing others from using your recipes and processes is an important aspect to ensuring a competitive edge. Intellectual property law can play a role in protecting recipes and processes.

However, there are some challenges to protecting recipes as intellectual property. Some protections you may have heard of, like patents and copyrights, can be difficult to apply to recipes. But a concept in the law called a **trade secret** may offer protection for recipes and food production processes. Many companies have trade secrets that are essential to their operation and success. Below is a guide that will introduce you to what a trade secret is, what must be done to establish it, and how it is protected.

I. An Overview of Trade Secrets

While there is no universal definition for trade secrets, they have several identifying factors. **Generally, a trade secret is any innovation, information, or idea that (1) is not generally known or readily determined by the public, (2) provides value to a business, and (3) is something that the owner makes reasonable efforts to keep secret.** Trade secrets can apply to a wide variety of business processes or information, including formulas, data, processes, or tools. Recipes are common examples of trade secrets!

a. Benefits of trade secrets

Protection is immediate, and it can last forever (as long as it remains a secret). There is no registration process for a trade secret. What does matter are the steps you take to establish it and prevent disclosure. Further, you can tweak and modify a trade secret without the need for formal revision or registration.



b. Rights of the trade secret owner

The owner of a trade secret has the right to its exclusive use and to license or sell it. The law also provides protection to trade secret owners. For example, if someone improperly obtains or uses your trade secret, you can recover monetary damages and legally prohibit use of your trade secret.

c. Governing laws

Trade secrets receive legal protection under both state and federal law. The [Uniform Trade Secrets Act](#) has been adopted by most states. Further, the recent [Federal Defend Trade Secrets Act of 2016](#) provides protection if you engage in interstate commerce (buying or selling across state lines). These laws recognize the value of trade secrets and provide a way to obtain recourse and compensation when someone wrongfully uses your trade secret.

II. Identifying Your Trade Secret

Start by identifying the aspects of the recipe you need to protect. Is there a secret ingredient or special proportion unique to the food product? Is there a process or technique that makes the product special? These are important questions and can be a high bar to clear when considering whether the recipe is in fact a trade secret and how it can be protected.

a. What products and processes are already out there?

Before making efforts to establish and protect a trade secret, it is important to research other products or processes that already exist. Your ingredients and process should not be generally known to the public. If your recipe is substantially the same as another, it might not be worthwhile to pursue trade secret protection. For example, if the ‘secret ingredient’ used in your recipe is commonly used, e.g., adding freshly-squeezed lime juice to salsa, it will not be a strong trade secret – even if it makes your salsa delicious.

b. How “secret” must it be?

Absolute secrecy is not required to establish a trade secret. It is okay to share a trade secret with employees or agents if they know to keep it confidential. You should limit disclosure only to individuals who need to know. It is a good practice

to take contractual precautions with employees, which is discussed in the next section.

III. Protecting Your Trade Secret

Federal and state law require that a holder of a trade secret take certain measures to maintain its protection.

a. Internal procedures

There are several steps you can take to help keep your recipe a secret, such as:

- Keeping documentation of the recipe in a secure location;
- Marking all information about a recipe as confidential or proprietary;
- Educating your employees on the importance of secrecy;
- Requiring employees and suppliers to sign confidentiality or non-disclosure agreements; and/or
- Having employees sign non-compete clauses to prevent them from sharing the recipe later on (some states limit what can be included in a non-compete clause, so be sure to check on specific restrictions).

Requiring employees or agents with access to the trade secret to sign a non-disclosure or confidentiality agreement is one of the most important steps to take. You should record these procedures and their implementation so that, in case of any legal action, you can demonstrate how you protected your trade secret.

b. Making a trade secret hard to discover

You should also take steps to make the trade secret difficult to discover. For example, you could:

- Limit employee access to the trade secret;
- Make the trade secret difficult to learn by using code names for ingredients or repacking products into generic packages at the supplier level;
- Keep the supplier of important ingredients a secret; and/or
- Break up manufacturing into different locations.

c. Losing a trade secret

Simply put, a trade secret is lost when it is no longer a secret. It can be lost by an accidental or intentional disclosure, independent discovery, or reverse engineering. For example, if a competitor used your ingredient label to test or successfully recreate your recipe or product, protection would be lost, and others could freely use it.

There is legal recourse, however, when a trade secret is obtained improperly through bribery, fraud, misrepresentation, or wrongful disclosure. For example, if a former employee who signed a confidentiality agreement or non-compete clause discloses the secret to a competitor, you can seek civil remedies in court in the form of money damages or an injunction (a legal order restraining a party from beginning or continuing a certain action). While judicial remedies are a major benefit, they can be expensive because of attorney and court fees.

IV. Trademarks

Trademark law is another branch of intellectual property that serves to protect brands. A trademark is different from a trade secret because it protects a name or brand used publicly, while a trade secret protects ideas or process that must be kept confidential. Many businesses use trademarks to protect a name, logo, or packaging of a product. Using a trademark in addition to trade secret protections will help give your business a competitive advantage. It is important to develop a strong mark that is associated only with the goods or services you provide.

a. Benefits of trademarks

While a trademark will not protect the ingredients or method of creating a particular food or drink product, it will prevent other companies from selling a similar item under the original name you created. Developing a unique name and brand helps customers to readily recognize and build trust in the product. A trademark directly informs consumers about the source, value, and use of the product.

b. Acquiring trademark rights

You can acquire basic trademark rights simply by using a unique name or brand. But you must make sure someone else in your area is not already using the same,

or similar, name. If you wish to receive additional, more widespread protection, you can also register a trademark at the state and/or federal level. There is a modest fee for registering trademarks, but it is usually a worthwhile step to take. For more information on trademarks, see our [Legal Guide on Trademark Law](#).

V. Using Recipes of Others

Many food entrepreneurs enjoy testing recipes and learning from others. At a basic level, you can cook whatever you want without worry, even if you use another's (publicly available) recipe. You may also post recipes as long as you are not publishing or selling another person's intellectual property, e.g., you are not violating the copyrights of the original recipe. For example, you could repost a recipe by reciting only the ingredient basics and standard directions. It is best to not include additional descriptions or language from the original recipe. **You should not copy any photos or illustrations from the original recipe.** Lastly, attributing the original creator (e.g., "adapted from" the original recipe) is recommended to reduce risk of potential trouble.

Summary

Trade secret protections are effective, and companies value them as part of their business operations. By identifying the uniqueness of your trade secret and implementing confidentiality procedures to keep those unique features secret, your trade secret can help provide a competitive advantage in the marketplace. If feasible, creating and registering a trademark for your product will help boost recognition and provide other protections for your business.

References and Resources

- CLF Webinar – Protecting Your Recipes
<https://www.youtube.com/watch?v=dPGuy8sdzBk>
- Federal Law Overview - <https://www.idsupra.com/legalnews/the-defend-trade-secrets-act-an-39692/>
- National Law Review – Trade Secrets: What You Need to Know
<https://www.natlawreview.com/article/trade-secrets-what-you-need-to-know>

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Looking for legal help?

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