

# Cannabis Companies - Don't Let Your Valuable Trade Secrets Go Up in Smoke

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*In the race to grow, many companies lose sight of the need to protect the competitive advantages they have spent years refining.*

The cannabis green rush continues across the United States. Companies operating in this space are grabbing market share. They are looking for advantages and ways to distinguish their product or service from the growing field of competitors. In the process, cannabis companies are developing trade secrets. Many companies do not know they are doing so, or have not had the time to think about what measures they need to implement to protect them.

Trade secrets were historically a creature of individual state laws (with some uniformity as states adopted uniform or model provisions), until the federal Defend Trade Secrets Act took effect in 2016. That law gave a federal cause of action to those seeking to defend their secrets.

OK, that's great, but what exactly are trade secrets? Trade secrets are, simply put, that special secret that makes your company different. What secret formula makes Coke different from Pepsi? What makes that Big Mac sauce so special? Why can one company manufacture more units more profitably than the competitor down the street? The answers to these questions lie at the heart of trade secret law. These secrets can make the difference between boom and bust for a company.

As the U.S. Patent and Trademark Office continues to deny intellectual property protections to those in the cannabis industry, trade secret protection is a valuable tool to protect intangible company assets. This article outlines three concepts that those operating in the cannabis industry should consider as part of their plan to protect the business advantage driven by their trade secrets.

## 1. Identification

Before you can protect trade secrets, you have to know what they are. There is no exhaustive list of what constitutes a trade secret. The law will recognize processes, formulations, patterns, information compilations, designs, strategies, techniques, customer or leads lists, pricing strategies, and many other forms of information that derive independent economic value, actual or potential, from not being generally known to the public.

Startup cannabis companies with a small budget can satisfy this step by writing down everything that makes their company better than their closest competitor. Companies with a more robust budget can hire inside professionals or outside firms to audit their trade secrets. These audits identify trade secrets known to the company. They often identify additional secrets that only a fresh eye can see.

In the cannabis industry, examples of trade secrets include the usual suspects that exist in all businesses - pricing information and strategies, information about margins and profitability, customer lists, and business plans. But trade secrets also include industry-specific information such as formulations of hybrid plant varieties, combinations of terpenes to create that special entourage effect, methods for manufacturing synthetic cannabinoids, and special methods for manufacturing or harvesting product that increase quantity or quality. The list goes on, and it is limited only by the imagination.

## 2. Protection

It should surprise no one that a trade secret has to be, well, a secret. Thus, any information that a company identifies as a trade secret must be the subject of reasonable efforts to protect its secrecy.

The key to this requirement is that the efforts are "reasonable." This funny little term keeps lawyers, like me, employed. It can mean one thing in one context, and something different in another. Many litigation dollars have been spent fighting over whether reasonable efforts were used to protect trade secret information.

Suffice it to say, a startup company is not required to spend the resources to protect a trade secret that a multibillion-dollar conglomerate may spend to protect the same secret. Instead, courts assessing reasonable measures often look to the list of steps that a company can identify to show that it has made at least some effort to protect the secret.

Written nondisclosure agreements and noncompetition agreements (enforceability varies by jurisdiction) with anyone who has access to the secret information are a good start. It is also important to lock down access rights to the secret.

For smaller companies, this may be as simple as locking a file cabinet to prevent access to written plans, or placing digital information on a secured server. For major corporations, the efforts often include all these things, plus heightened security controls to document each interaction that an employee, vendor, or contractor has with the information. Each step that a company takes to document the protections around and access to trade secrets will benefit a later argument over whether the company used reasonable protection efforts. The better the document trail cataloguing who had access, when, and why, the better positioned a company will be to identify and prosecute trade secret theft.

Focus on trade secret protection is particularly acute for those cannabis companies submitting information to government agencies for regulatory or other purposes. Without due care, inclusion of information in applications and registrations can lose its protection. Moreover, companies entering into government contracts must outline whether information provided through a government partnership will lose trade secret protection, and, if not, what efforts the government will undertake to either defend the secret, or alert the company that someone is seeking it.

## 3. Prosecution

As with anything else of value, the effort to protect trade secrets does not stop with preventative measures. In the face of a security breach or an identified theft, companies must undertake efforts to prosecute responsible parties or, again, face loss of the secret.

Prosecution includes undertaking internal investigations, hiring outside consultants (lawyers, accountants, forensic experts) to find the perpetrator, and plugging the security leak that caused the loss in the first instance. It can also trigger insurance disclosure obligations and the need to consult with government authorities to document the theft. Of course, this last measure should be done in careful consultation with legal counsel for the obvious reason that it is impossible to disinvite the government to a party once you extend an invitation, but it is also very difficult to control the government's use and publication of secret information once it is placed out of your control. Once you disclose a trade secret in a manner that makes it subject to a public record request, or public viewing (like a court file), you can waive trade secret protection.

The three principles above give a broad overview of trade secret considerations that cannabis companies should have in mind from the start. In the race to grow, many companies lose sight of the need to protect the competitive advantages they have spent years refining. A focused plan that includes strategies to identify, protect, and prosecute trade secret issues could mean the difference between a business that will thrive and one that goes up in smoke.

# Authored By

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