

# Keep It Secret, Keep It Safe: Trade Secrets in Video Games and Esports

April 17, 2020



Steve, Nick, and new player Charles explore how trade secrets impact the video game industry. They explain how trade secrets work, discuss recent esports litigation over trade secrets, and share some best practices for protecting trade secrets.

# Transcript:

**Nick Brown:** Hello, and welcome to another episode of the LAN Party Lawyers podcast. My name is Nick Brown and I am joined as always by my colleague and cohost Steve Blickensderfer. To our regular listeners, welcome back. To our new listeners, on this podcast we tackle issues at the intersection of video games, law, and business. Through debate, discussion, and interviews, we focus on the legal issues but we also offer our takeaways and our thoughts. But, please do remember nothing we say here is legal advice. So Steve, why don't you get us started and tell us what we are going to be talking about today.

**Steve Blickensderfer:** Sounds good. So today's episode we are actually going to be talking about the topic of trade secrets and video games. And to do that we are going to be bringing in Charles Throckmorton, who is actually one of the other co-chairs of the firm's Carlton Fields' Esports and Electronic Gaming Practice Group. Charles specializes in commercial litigation which effectively means he helps business sort out their disputes sometimes in court and sometimes not. Charlie has litigated several cases involving trade secrets in the past and he is going to be joining us to talk about that today. Trade secrets specifically in the video game space and as it relates to Esports. So Charlie, why don't we start off with the basics. What are trade secrets, and let's go from there.

**Charles Throckmorton:** Sure, hey guys, first of all, thank you for having me. I have been a fan of this podcast for a long time. I am happy to be here getting involved with it. So talking about trade secrets. Big picture: what is a trade secret? Now this is oversimplifying it a little bit but, generally speaking a trade secret can be almost anything as long as it follows the following two rules: (1) its kept secret and (2) it has value because it is kept secret. So, a classic example of this would be the Coke formula, right? Which has been famously closely guarded forever. You know, kept secret, valuable, like the KFC recipe.

**Nick Brown:** Does that mean that Steve's skin care routine would qualify? I know that is notoriously guarded.

**Charles Throckmorton:** *[laughter]*.

**Steve Blickensderfer:** To you it is.

**Charles Throckmorton:** Steve, if you want to talk to me about that offline I can counsel you on that. It might be the answer is that it might be depending on what you have been doing and what you are up to over there.

**Steve Blickensderfer:** It is very valuable because it is secret. I will tell you that much.

**Nick Brown:** Yeah, please don't include me on that call.

**Charles Throckmorton:** So, other textbook examples of trade secrets that you see all the time in cases are things like customer lists, pricing information, proprietary methods or procedures, inventions, unique machinery, and then with respect to video games and esports, things like source code for software, game engines, right. And then also, we will talk about this a little bit more later with the real world example. Oftentimes, contracts themselves can be considered trade secrets if they are kept secret maybe have some sensitive pricing information or other language in there that the team or the player or the league in the franchise as the case may be try to keep it secret.

**Nick Brown:** Okay well thank you Charles for that overview. So, why does this stuff matter? Why should you, the listener, care? Well, if you are a company or an individual that has sensitive data or confidential information or processes or anything like that, it is probably very important to you to hold on to them and to retain them and to keep the value of those secrets and so, there is kind of two overarching reasons why you want to be aware of trade secret law that applies in your jurisdiction. The first one is because if you follow the rules, you take the necessary precautions, and you are able to convince the authorities that your sensitive information or your secret sauce is actually deemed it qualifies for trade secret protection, then you may have powerful legal rights against anyone who steals or misappropriates or otherwise gets your hands on your product or your data. That's a lot of value to begin with.

But, the flip side of that, is that if you don't know what the rules are here and you don't follow them, and you don't take the technical precautions that are necessary in your jurisdiction, you may be very vulnerable to losing your critical information or the protection of it under these statutes. And so, what does that mean practically, if someone steals your critical information and you go to the court and say "this was improper, I need to be made whole." A judge or jury if they make a determination that your sensitive information is not in fact a trade secret then it is fair game for anyone in the world to use that information and you no longer have your proprietary control over it.

So that is a make-or-break issue for a lot of entities and organizations. So what we are going to do into this episode is to talk a little bit about the trade secret laws and talk a little bit in general terms about the rules and the practical do's and don'ts to hopefully minimize the chance that you find yourself in that bad situation. For esports in particular, it is particularly critical because the industry itself is still developing. Esports, despite now being a major form of entertainment, is still pretty early in its lifespan, and so people all over the world are trying to carve out their pieces of the pie, they are creating new leagues, they are creating their niches, they are inventing things and in some cases they are developing what they and others may consider to be their own Coca Cola formula, their own secret that if it gets out could be very damaging but is very valuable while they have it. So this is a really important area for the industry as a whole.

**Steve Blickensderfer:** Right. Nick, I was going to jump in there and just kind of before we get into the do's and don'ts I think it is very important to mark out how trade secrets compare to other intellectual property rights such as copyrights and patents, right? There are big differences and I think it's important - we will hear the definition and then also understanding how these differ I think it is going to also make the definition more clear and what makes the trade secret different from a copyright. So let's jump right in. A copyright requires the material to be fixed in a tangible medium. That's what makes a copyright. That's what creates a copyright. The right itself. That's not necessarily the case for a trade secret. The federal statute which Charles is going to get to later in the show, includes intangible information within the definition of a trade secret so, that is one of the big differences right there. Another big difference with copyright is that trade secrets - you need to register your copyrights to enforce them, OK. But you don't have to do that with a trade secret in fact, that's actually the trademark to a trade secret is that you keep it secret which is what we discussed a moment ago.

**Nick Brown:** That would - not really support the notion of keeping it secret, right?

**Steve Blickensderfer:** Right, exactly, if you have to register it or disclose it, *ipso facto* it's no longer a secret. And that's right to register the trade secret you need to deposit a copy of, or to register anything for copyright protection you need to deposit a copy of it with a copyright office and that could destroy your trade secret. But also note there are special deposit provisions for programs where you can keep stuff redacted so there is if you can picture a Venn diagram where there are circles or concentric circles where there is a little overlap there could be some trade secrets that are also copyright protected. So they are not mutually exclusive. But, that's the difference with copyrights. For patents, if you have patent you get a legal monopoly, OK, on that particular widget, whatever it is.

But there are tradeoffs. First and foremost you have limited protection when it comes to patents. 20 years or so. Trade secrets by contrast you get unlimited protection for the duration of it being a trade secret. Second you need to publish the process to get a patent, much to the same you need to publish a copy of copyrighted work you don't have to do that with a trade secret. So that's just a general overview of the differences so one can appreciate whether or not you have something. Because often times you will see someone say oh, well this violates my trade secrets, my IP rights, so there are big differences there but there are also some similarities. So anyway, that was my tangent.

**Nick Brown:** So if you were to patent your skin care routine, you would have to disclose it is what you are saying.

**Steve Blickensderfer:** I see this is going to be a recurrent theme with you. You need to get off of that one. *[laughter]*

**Nick Brown:** Yeah, if you want just trade secret protection, you could still hold on to whatever it is that you do without disclosing it to the rest of us. Is that correct?

**Steve Blickensderfer:** That could be right, I think I am going to disclose at the end of this so it's no longer a trade secret. *[laughter]*

**Charles Throckmorton:** You are teasing it for the bigger reveal.

**Steve Blickensderfer:** That's it.

**Charles Throckmorton:** You make a really good point Steve, that - you know, I think certainly if you are not a lawyer, the idea of a trade secret and a trademark and a copyright can all sort of pan together as general concepts of privacy or protection but there are different things and if you do have sensitive information you need to be aware of these differences because they provide different protections, but importantly, at least in the case of trade secrets, if you don't do the things you are supposed to you can lose the opportunity to have those protections. So hopefully this is helpful to people who may not have familiarity with this specific concept.

**Steve Blickensderfer:** Yep. Well said.

**Charles Throckmorton:** And so I think what I would love to do now is sort of jump in at a high level instead of the legal framework, Steve you introduced me and like you said this is something that I work on a lot. I do a lot of these trade secrets lawsuits and you know obviously you don't want to be in court on these if you can avoid it but sometimes it is unavoidable. If a company comes to me or any litigator at the firm and thinks that they have a trade secret that has been stolen you know you have to do an assessment, right?

**Steve Blickensderfer:** What would it look like if someone stole a trade secret?

**Nick Brown:** Like a skin care routine.

**Charles Throckmorton:** The first thing that I would want to do if somebody came up to me and said this guy stole my trade secret. First question I would ask myself is, this thing really a trade secret, and that would go back again to these two basic rules. Is this something that you the client or the person talking to me actually kept secret or were you careless, did you not do the things you were supposed to? Were you not as strong with your privacy practices as you should be? And then two, and this is where a lot of it trips it up and this is probably Steve where your skin care routine is not going to get you where you want to be.

**Steve Blickensderfer:** Oh shucks. *[laughter]*



**Charles Throckmorton:** Sorry, you can still share it with us but sorry. *[laughter]*. Does it actually have value because it is a secret? So obviously, Coca Cola, you know all of the competitors would love to access to that formula so it has value because it is a secret. But in a lot of cases, you know people think they have trade secrets but they don't for that reason. So, a lot of it would be an initial analysis and then as far as was this stolen then you have to look at who took it, how did then take it. Did you leave the door unlocked and let them in, and the circumstances surrounding the theft, and then if you make the determination that, okay, it looks like there is a trade secret here and it looks like it was actually stolen, the decision is where am I going to sue and how am I going to do it. And that is where, just very high level, there are two different legal avenues that are available to people who have their trade secrets stolen and that is state statutes and a new federal statute. And, you know, very high level the state statutes have been in place for decades for a long, long time this was the only game in town. If you found yourself in this type of situation - 1979 group called the Uniform Law Commission published what is called the Uniform Trade Secrets Act. What that did in a nutshell was create a set of rules and that is where you get the keep-it-secret and value-due-to-its-secrecy rules. And what happened with that, almost every state around the country has adopted some version of that and it lets you sue at least in state court for a theft of trade secrets.

**Steve Blickensderfer:** So if I may interject, depending on where you sue, I understand this is a uniform law so that the goal of the uniform law is to try to make it as uniform across the different jurisdiction as possible. But we are talking about state laws so depending on where one person lives the definition of trade secrets could vary across state lines, is that correct?

**Charles Throckmorton:** Well it is going to - the definition will tend to stay the same because most states have adopted the same language and I have been saying "keep it secret" and "has value for secrecy." But the actual language is "the subject of reasonable efforts to maintain its secrecy and it derives independent economic value from not being readily ascertainable." So, that's going to be about the same for most states but the difference will be in how the courts in those states have interpreted it. So it's going to be very similar but there are going to be some difference state-to-state, which is why it is important and good that there is now a second option.

**Steve Blickensderfer:** But if I can sum that up in another way, so basically it has the same definition but the court that is interpreting that law and applying it to a certain set of facts will vary-jurisdiction-to-jurisdiction. Because you know, putting on my litigator hat, if I had a case here in Florida I would be looking up Florida cases pursuant to that Florida statute version of the Uniform Act and I would be citing to these cases here and a judge might be persuaded over cases in Ohio or California.

**Charles Throckmorton:** Exactly. So, for example, in Florida there could be 5 cases that say that skin routines are trade secrets and you are good. In Montana there might be five that say no actually they are not and you are in trouble. In that case we would be trying to find a way to sue in Florida on your behalf Steve.

**Steve Blickensderfer:** So what about the federal statute?

**Charles Throckmorton:** So the Federal statute is relatively new in the grand scheme of things. In 2016 the Obama administration and Congress passed the Defend Trade Secrets Act. What that did was it took the state statute and federalized it, right? The impact of that is it creates a federal cause of action. So now instead of having to sue in State Court if you had to you could sue in Federal Court and there are plenty of pros and cons, maybe that is the subject of a different pod.

**Steve Blickensderfer:** Give us one pro and one con. One pro to filing in federal court over state court and then maybe the flip side of that.

**Charles Throckmorton:** This comes up all the time and it depends a lot on your local practices but typically you have a little bit more control over the pace in a state court action and that can be to your advance or disadvantage, whereas in federal court the rules are fairly strict about, these are the deadlines, they are not moving, you do not get the time that you want. So that can be a major factor in deciding where you are going to file a case.

**Nick Brown:** You may also get more face time with the judge in state court than in federal; obviously it is going to differ by jurisdiction but, I think on balance federal courts do more resolving disputes on the papers than state courts do. And so, if your oral advocacy is not quite as strong maybe federal court would be better.

**Charles Throckmorton:** And like the flip side, if you love being in court and you really want to be in court, you might lean towards state court for that reason but there are plenty of others.

**Steve Blickensderfer:** What about this, typically I found that Plaintiffs like state Court, but plaintiffs who are people, right, persons. Here with trade secret claims I would imagine you have more businesses that are bringing actions against other businesses. Does that favor one side or the other in terms of going to state court or federal court if you are a business? I don't think so in this case but I might be wrong.

**Charles Throckmorton:** So I think sometimes it depends if you are the plaintiff or the defendant. Right, if you are being accused of stealing something or if you think someone stole your stuff it can make a difference where you want to be. If I were a business defendant I would probably rather be in federal court all things considered just to have my own sense of control over the pace and timing and maybe a little more certainty with the law. But, you know there are pros and cons to both.

**Steve Blickensderfer:** I guess at the end of the day it is a very complicated. It could be very complicated where you want this case. Sometimes it doesn't make sense to keep it or to remove it to federal court. Sometimes you want to keep it in state court so it is one of those things that I guess

we tend to sometimes default to while remand and remove to federal court but that isn't always the best tactic. So anyway I think that was too much of a digression so let's get back on track.

**Charles Throckmorton:** No, yeah and just for tying the knot on that, this Federal Act is very similar but the difference and Steve you mentioned before is in addition to having the two rules--keep it secret, and valuable due to its secrecy--there is a very, very robust definition in the federal statute of what can be a trade secret. I am not going to read the whole thing, it is very long but it includes things like, scientific and technical information, code programs, economic information, patterns, plans, and like you said Steve, this includes intangible information so you know that is written into the federal statute so that is helpful for the analysis and helpful for determining if you think you qualify.

**Steve Blickensderfer:** And I understand it is in some states statutes just not all of them. Its one of the variations to the Uniform Act that varies per jurisdiction but its just nice on the federal side you at least you know it involves the intangibles and electronics and the programs and the codes which is going to more often than not come up in this industry.

**Charles Throckmorton:** Right.

**Steve Blickensderfer:** Yeah, so let's bring it to the industry, why don't we? In video games what can be considered a trade secret? So if its public and it's what the players see's then it is not a secret and it pretty much is not going to be considered a trade secret. So what we are talking about here is the hidden game code, the product design, the customer lists and the information behind the scenes. That all can be considered a trade secret so long as it meets the definition. The computer programs can be sold and distributed without disclosing trade secrets contained therein, right? In the industry game companies frequently will license the rights to use engines that are developed by other companies and that doesn't necessarily mean they are getting all the background information as to how that engine works. To the extent the business is keeping that information secret and it has value because of its secrecy, that's a trade secret and it deserves protection and you can have a claim around that later if someone violates that. Also, let's think about if the game has a gold system. That itself wouldn't be a secret but how the gold is valued. How the system works behind the scenes and how it was developed and how much money to release. How much money to price certain products using the gold system or whatever currency system is in the game that can be considered a trade secret. And you know some game companies even employ economists to value their system and figure out what certain - how much to price things right so, that's itself can be considered a trade secret.

**Nick Brown:** To that point, you know the monetization schemes behind these games are a lot of time a big part of the business. We all see a lot of similar games out there and what often will make or break or be the difference between a successful company and one that is not is how they are monetizing the game. And the way that they do that--whether they are too greedy in monetizing it or



whether they are leaving stuff on the table or anywhere in between--that is often the absolute bread and butter of how the game companies are able to stay in business and fund their next game. So that is probably a major one I would expect.

**Charles Throckmorton:** Yeah, that is a really good example Nick because it sort of flies right together with what you commonly see across other industries which is that the stuff that companies want to protect its trade secrets is usually like you said earlier, the secret sauce, right. Whatever the pricing process is, whatever it is that is underlying you know their profits. So I think that is exactly right.

**Steve Blickensderfer:** And you can imagine it is a tightrope that they are walking because they want to be clear about what or how they make money to an extent because they don't want to look greedy or that they are taking advantage of folks but at the same time they need to keep some stuff secret because they need to protect their assets. And that's - it's a fine line that game companies need to walk. Let's think about another area of trade secrets in the video game space. You think about end game. You as a player could develop a very effective method of farming for example. Farming stalks in the stalk market in Animal Crossing for example. You can figure out a method and there are currently on the internet ways that you can manipulate the stalk market. The STALK if you like puns. So that can be an example of a trade secret. *[laughter]*. So that could be an example of a trade secret if you kept it secret.

**Nick Brown:** And we do. *[laughter]*.

**Steve Blickensderfer:** We love puns. Or if you developed a list of best players in the world that play a particular game and somehow found value in keeping that list secret that could be considered a trade secret. However, big asterisks here, many games come with End User License Agreements. In fact, I have never played one that didn't have one. And they say often time that the IP created in the game belongs to the game company the developer. There are some games that allow gamers to create and own some of their IP. Second life comes to mind although I haven't read their EULA in a while, but just think about that if you were creating IP assets within a game, creates a whole host of very complicated issues, and trade secrets is very much a part that. So anyway, I think that is enough about the video game industries intersection with trade secrets, what about esports, Charles?

**Charles Throckmorton:** So this is I think a good opportunity to talk about as far as I am concerned the most high profile lawsuit in the esports space and I know you guys have talked about this on a previous episode I am talking about the lawsuit between FAZE Clan and Turner Tenney, alias Tfue. That's been not only all over the esports news but all over mainstream news around the world right; it's this high-profile conflict between a prominent esports organization and a very prominent streamer. And what I want to talk about and this hasn't gotten as much of the coverage is there is a trade secret element to this case and that's a claim by FAZE that Tfue misappropriated trade secrets.

Now what are FAZE's trade secrets in this case. It is interesting they are claiming two different types of trade secrets; first, that the actual contract that they have with Tfue which they called Gamer Agreement was itself confidential in trade secrets, and second, and this ties in Steve with something you were just mentioning right, they say that some of the things that Tfue was doing to make his videos more popular were actually FAZE's trade secret processes that he had no right to utilize. So, those are there claims. And then now in response, Tfue's defenses were sort of the standard almost what I would do if we were doing this thing. Its standard defense is to his trade secrets case right which is one: no, that is not trade secret the information you are talking about the contract and the processes or you know public or could be figured out very easily. In other words you did keep secret. You didn't take the steps necessary. And then he also claimed that: no, for these processes on the streaming side those are not FAZE's processes they are Tfue's. He came up with them.

**Nick Brown:** Alright so that's the big 3, and it goes back to knocking from all directions the two definitions you raised earlier. (1) it's not a trade secret (2) you didn't keep it secret, (3) it wasn't yours to begin with.

**Charles Throckmorton:** Right, right, exactly. And so, where are we now with those claims? Where are we in the case, and it is interesting that the timing on this is very good because there has actually been a development in the last couple weeks, March 2020. The case progressed it went along as lawsuits do and they reached what is called the summary judgment phase which is where the parties make arguments before the judge and asks the judge to decide if either side is going to win or lose or if they are going to go ahead to a full trial. And at that phase, Tfue asked the judge.

**Nick Brown:** Pun intended.

**Charles Throckmorton:** Alright, right.

**Nick Brown:** Sorry, I couldn't help myself.

**Charles Throckmorton:** Yeah. No, *[laughter]* I will try to say "Faze" a little bit less, alright. Tfue asked the judge to throw out the trade secret claim right and now you can see all those papers they are publically available and in my opinion his best argument there was that at one point pretty early on in the case a high profile FAZE Clan member and apparently a part owner of FAZE Clan went on Twitter and said that for the gamer agreement which FAZE Clan was saying its confidential trade secret, he said, "oh no we had every intention on releasing the contract," right? Which is...

**Nick Brown:** Uh oh.

**Charles Throckmorton:** ...eventually, an admission that (1) they don't consider this thing secret. (2), they don't think there is value in secrecy if they are saying we were going to give that up. I mean

imagine if Coke said oh, no, no, we don't, this isn't a secret we will publish our formula in the New York Times tomorrow right, that's just [*laughter*] unthinkable.

**Steve Blickensderfer:** There was a very high profile back-and-forth going on Twitter when that lawsuit was just filed. And I guess the big lesson there is look to see there was an actual consequence of someone saying something that hurt their case later because they had a claim that was later had to be dropped because of something a person said earlier on - on Twitter, right. In Twitter sphere So that is a classic example there.

**Nick Brown:** Yeah, it's kind of like Steve promising to disclose his skin care routine. [*laughter*]

**Steve Blickensderfer:** Right. I will hold up my part. Promise, don't you worry.

**Nick Brown:** [*laugh*]

**Charles Throckmorton:** Right, I know we are going to talk about practical do's and don'ts but this is a great example of a don't, right? If you are going to call something a trade secret you need everybody top to bottom of your organization needs to be taking "reasonable steps to maintain secrecy." So that didn't happen here. So what was the impact on the case, well usually at summary judgment when the parties have filed their motions, you wait and you let the judge decide who wins and who loses. But that is not what happened in this case. So here instead, before the judge made a decision, FAZE and Tfue agreed, and we don't know the specifics, but they agreed that FAZE would dismiss the trade secret claim. In other words, drop it, make it go away, stop pursuing it. So, we can speculate and maybe we will but all we know is there was an agreement.

**Nick Brown:** Oh, we will.

**Charles Throckmorton:** Yeah, that FAZE wouldn't pursue this. But the case is still going on as to other claims so there are still plenty of action there but why would they have dropped the claim after litigating it for so long. Two things pop to mind right away for me. One is it may just be the case that they were persuaded by his motion.

**Steve Blickensderfer:** That sometimes happens.

**Charles Throckmorton:** Yeah, they thought he had a strong argument and they didn't love their argument anymore after

**Nick Brown:** That's not a good feeling reading your opponent's papers and agreeing with them.

**Charles Throckmorton:** Right. And you know it costs money to keep doing this so, they may have decided that, we are going to lose on this, it doesn't make sense to keep spending the money and the time, or relatedly they may have decided, uh oh, it looks like we are going to lose on this and we are going to have a judge or ultimately a jury say we did not have trade secret. In other words our contract is not a secret, our processes are not secrets and God knows what else are not trade secrets. And there is a very real downside in that. Because - and I think Nick you mentioned this early on. Once you get to that point and you have a judge or a jury making a finding that you did not have a trade secret that means that whatever your sensitive data was that you were trying to call a trade secret it is now open season. That has not been decided.

**Steve Blickensderfer:** That's different from opposing counsel saying in an argument that, oh, this is not trade secrets for X, Y, Z reasons. When you get a judge or jury making a determination, it has some effect going forward. And you're right. That is a great point. It would have a detrimental effect going forward as business if someone and the court said it's not a trade secret and that has some weight to it.

**Nick Brown:** Yeah, the difference between an accusation and a conviction.

**Charles Throckmorton:** Exactly, exactly right and you know we don't know that is what happened, it might have been. If that is what it was it was probably a good decision. But that's exactly right.

**Nick Brown:** So this brings us to the question what can or should somebody do to protect their trade secrets. Obviously all of this is going to depend on your jurisdiction and the advice of your counsel but just a few ideas that come to mind: really there are kind of 3 categories of do's here. There are physical measures, there are digital measures and there common sense measures. Just to start with physical measures, these are straightforward and they may seem simple and obvious even, but I can tell you they are often overlooked to the great detriment of litigating parties. So if you or your business, you have something sensitive, start simple. Put security measures in place, physical security measures. Make sure your work place or your office or your warehouse or wherever your good stuff is stored, make sure it has physical locks and consider physical security. The circumstances are going to vary based on the context but it may include security cameras, or security guards or key cards some sort of biometric security or fingerprint scanner, something like that. It sounds extraordinary but if your business or your livelihood depends on it, it may be worth the risks. It may be worth the expense to prevent losing it because you have accidentally let the cat out of the bag so to speak.

**Charles Throckmorton:** Right, and part of the reason this is so important is there is no rule that says you must have this, this, or this. Once you get in front of a judge or jury the question is did you keep it secret, but more than that were the steps that you took to keep this secret reasonable steps. So, you want to do whatever you can to add points to the reasonable step side of the ledger, right. And so,

anything you can do especially if you have something that is stored for example on a server, right. You need to protect that server you need to have you know, a private room. You need to have all sorts of protections right and the more that you can do the better chance you have of persuading a judge or a jury that this is a trade secret that you can prosecute.

**Nick Brown:** That is an excellent point Charles, and specifically that is that hindsight is 20/20. It is one thing to sit now and decide in the abstract what you are willing to pay to protect the secret. But if you are doing this later on, after it is out and your only hope is to convince someone that you did everything that you should have done, it is very easy for someone on the other side to come in and say "oh, well you know they didn't do this, they didn't do that," you know you can pick apart stuff very easily after-the-fact. So the more you can do ahead of time, like Charles said to put points on the board so to speak, not only will that security measure maybe prevent a disclosure in the first place, but if the worst happens then you will be in a better position to protect yourself.

**Steve Blickensderfer:** Well I know you are all wondering, and yes I do all those things to protect my skin care routine.

**Nick Brown:** *[laughter]* You do it in a secure room.

**Steve Blickensderfer:** And I also protect the digital copy and I include, embedded disclaimers that it is a trade secret: confidential do not disclose. *[laughter]* I put that secure server to limited access and put the appropriate controls in place. But, this doesn't apply.

**Nick Brown:** You got an Only Fans?

**Steve Blickensderfer:** Yeah. This doesn't apply to my product. However, for games, don't forget about the EULA and to include stuff that is forbidding the dissemination of information that is otherwise secret, sensitive, or proprietary. Whether it is marked or in context seems like that. You just want to make sure that EULA is not forgotten to also reflect the protection of trade secrets so I guess is the bottom line. So yeah, it is just common sense right.

**Charles Throckmorton:** Right, exactly, and so this ties in a little bit with FAZE's situation but you have got to make sure if you have an organization and with esports a lot of these we are talking about franchises, teams and leagues. You need to make sure that it's understood throughout your organization that these are your valuable - this is your valuable data, these are the rules. This is what you need to do. This is what you need to not do, so, one place where you see companies and individuals trip up here is they will have something sensitive but they need to contract with a third party to help them work on it or they need to have a relationship with somebody that exposes these trade secrets and they don't take the steps in those contract documents. So, it is sort of a Step One type of thing when you do - in the course of your business have to share the data with somebody you



need to make sure that you lock that up from a legal perspective with nondisclosure agreements, confidentiality provisions and all these things that are routine but if you don't do it you are in trouble.

**Steve Blickensderfer:** And what about anything to avoid doing?

**Charles Throckmorton:** Yeah, to some degree everything we just said you should do don't do the opposite of that right, so don't, and this goes back to the FAZE example. I think one of the reasons that argument was strong was it wasn't just an employee; it was a part owner. So that takes you into the management perspective and it takes you into was this person speaking for the company. But, some classic mistakes that defeat trade secret protection and sort of let the cat out of the bag, are things like inadvertently disclosing materials to third parties without protecting it and that is where you know if you are on Twitter and you...

**Steve Blickensderfer::** You promise to release the skin care - skin care routine?

**Charles Throckmorton:** Yeah, right, or you don't implement the basic securities measures; you have some secret code and you don't write into the source code comments that this is confidential, this is trade secret and this is proprietary you don't take those basic measures. So those are examples and like Nick said it is a question of if you get down the line and you are litigating these cases, did you do enough or did you not. And you want to be putting as many measures in place on the side of you did enough.

**Steve Blickensderfer::** I think that sort of...

**Charles Throckmorton:** ...go ahead.

**Steve Blickensderfer:** Yeah, I was going to say, yeah I think all of this is super important not just for companies but also people. Because we have a lot of folks who are investors and interested investors in the space. If you are evaluating a company that says that they have lots of trade secrets, lots of IP that makes them so valuable even for startups you can imagine, look for this kind of stuff. This is a good due diligence list did you do all these things that you say that protects what you say as a trade secret. Or are you doing the things that are the classic mistakes that you just mentioned in failing to do that otherwise, discloses what would be a really good trade secret.

**Charles Throckmorton:** Right and like Nick said even if you hopefully never find yourself with somebody stealing your trade secret these are all also just good common place security measures for your information, right. And so, it is sort of a win/win, right?

**Steve Blickensderfer:** Right. Well I think this brings us to the end of the episode. And I really hesitate to want to get to the end because this is kind of a sad moment. This is Nick's last episode on the

podcast unfortunately. Nick is hanging up his gamer headphones that he is recording this on and going off to greener pastures. In all seriousness Nick has a really good opportunity that is taking him outside private practice and we congratulate you Nick but we are sad to see you go.

**Nick Brown:** Yeah, thank you it is a bittersweet moment. As you noted I was presented with a fantastic opportunity that I could not say no to that takes me out of private practice and so this will probably be my last episode on the podcast but you know I really enjoyed doing this with you especially when I have gotten to give Steve a very hard time which is one of the greatest jobs in life as far as I am concerned. But you know keep looking out for more content because the podcast isn't done and I know without a doubt that you are in great hands with Steve and Charlie. They know what they are doing. And I will still be playing games so anyone who has reached out we can still play games from time to time and I look forward to that.

**Steve Blickensderfer:** What gamer or tag should people add to their various things so they can get in contact with you and follow up with you on your promise?

**Nick Brown:** On Blizzard games, *[laughter]* my tag is Progress, *[simultaneous laughter]*. That's the only one I can disclose, I think. The others might get us - they might only show up on Steve's Only Fans.

**Steve Blickensderfer:** Well Nick we will miss the banter but we appreciate all the time and all the effort you put into Seasons 1 and 2. All of those episodes still relevant and you should check them out. You can connect with us on our Instagram or our Twitter, or our webpage LANPartylawyers.com. We would love to hear your comments and opinions about topics we cover or just the fact that Nick is leaving let us know what you think. Please reach out we love hearing about that stuff so, unless anyone has any other comments I think that's it. And until next time Game On.

**Nick Brown:** Thank you for listening and Game On!

**Charles Throckmorton:** Game On! Was my timing off *[laugh]*.

**Steve Blickensderfer:** Just a little bit *[laugh]*.

## Presented By



Charles W. Throckmorton

# Related Practices

[Esports and Electronic Gaming](#)

[Media, Entertainment, Music & Sports](#)

©2024 Carlton Fields, P.A. Carlton Fields practices law in California through Carlton Fields, LLP. Carlton Fields publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information and educational purposes only, and should not be relied on as if it were advice about a particular fact situation. The distribution of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship with Carlton Fields. This publication may not be quoted or referred to in any other publication or proceeding without the prior written consent of the firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our Contact Us form via the link below. The views set forth herein are the personal views of the author and do not necessarily reflect those of the firm. This site may contain hypertext links to information created and maintained by other entities. Carlton Fields does not control or guarantee the accuracy or completeness of this outside information, nor is the inclusion of a link to be intended as an endorsement of those outside sites.