
CULTIVATING CONFIDENTIALITY: THE LEGAL SAFEGUARDS OF TRADE SECRETS THROUGH NON-DISCLOSURE AGREEMENTS

Yuvan Sriram R K & Sivaraman K R, SASTRA Deemed University

ABSTRACT

Use of Non-Disclosure Agreement as Legal Protection in Trade Secrets, explores the importance of protecting trade secrets through non-disclosure agreements. Due to the rapidly growing world of investment and business both nationally and internationally, investors often want to keep the secrecy of the products or services they trade. However, to foster business success, trade secret owners must share their secrets with collaborators or investors, making it necessary to protect these secrets with a Non-Disclosure Agreement (NDA). This paper defines essential terms related to trade secrets, including trade secrets themselves, and describes the difference between registered and unregistered trade secrets. This paper examines the role of non-disclosure agreements in protecting trade secrets and securing investment, making recommendations for how to draft an effective non-disclosure agreement. This paper also covers various legal aspects of trade secret protection, including trade secret law protocol, registration of trade secrets, and the legal validity of NDA in various countries. In conclusion, this paper emphasizes the protection of trade secrets as a necessary aspect of promoting business success and discusses how non-disclosure agreements can achieve this goal.

Keywords: Trade secrets, Non-Disclosure Agreement, Confidentiality, Agreements, Invention and Innovation.

1. INTRODUCTION

Confidentiality Agreements or Proprietary Information Agreement or popularly known as Non-Disclosure Agreements (NDA's) are legally binding contracts between two or more parties which therein establishes a confidential relationship between those parties. Those parties agree not to disclose or disseminate any sensitive information shared between those parties to a third party or entity. Such Contracts are signed commonly between companies, individuals. Some NDA's are also signed between employer and employee, which is called NDA for employees.

The role of NDA's in this fast paced society is pivotal, For instance, when two entities enter into an agreement, where either of the entities or both the entities shall initiate an NDA in order to ensure that the key-information or the secret information shared between those

entities don't pass onto the competitors and also when it comes to NDA for employees, Similarly, the employer may ask the employee to sign an NDA so as to protect the secret information from being disseminated to a third party or the competitors in the market.

With respect to the participation of number of parties to the Agreement, the NDA can be classified into 3 types- (i) unilateral NDAs'; (ii) Bilateral NDAs'; (iii) Multilateral NDAs'. Unilateral NDA's is where only one of the two parties share certain information and therefore wants to protect it from it being spread to others, Bilateral NDA's are Agreements where there is a mutual sharing of key information, the parties to Bilateral NDA's disclose information to each other and enter into a NDA to protect such information from being disclosed to a third party to the Agreement. Also, Multilateral Agreement is where three or more parties come into agreeing not to disseminate the information shared between those parties, Instead of entering into multiple unilateral/ Bilateral NDA's, a single Multilateral NDA is preferred.

In the modern era, The MNC's have become more dynamic and therefore looks into things which may showcase them as a unique company from the rest of their competitors in the market, in order to attain this uniqueness, Entities employ intellectual property. Intellectual property includes trademarks, patents and copyrights shall highlight the uniqueness and quality of the entity.

NDA's are often associated and used in conjunction with intellectual properties as mentioned above. Popularly NDA's are used in protecting Trade Secrets, A trade Secret is a classified information that has exceptional commercial value which may be sold or licensed, therefore efforts should be taken to protect it one important step towards such protection is NDA.

2. METHOD

In this study, the normative juridical research method was used, and the main ingredients were legislative rules, which were then analysed with various literature to examine the legal protection in using trade secrets in business so that the data could continue to develop in business.

3. CONFIDENTIALITY FOR INTELLECTUAL PROPERTY AND USING NDA AS A TOOL TO PROTECT IPR

Many companies' intellectual property (IP) is one of their most valuable assets. There may be numerous reasons for exposing intellectual property and granting another legal body and/or people access to the necessary information. It is occasionally required in regular business to share a trade secret with another company or to discuss new discoveries with possible investors.¹ A manufacturer may need to have testing performed on a prototype and does not want competitors to know details of the new product; employers must involve their employee(s) in the development of their firm's intellectual property; and a start-up company cannot keep inventions hidden from investors. The question of confidentiality of given information emerges in such instances.²

One method of protecting intellectual property is to register IPR. Despite this, there are numerous occasions where IP is exploited without registration. When you do not officially register your IPR, you should work hard to keep trade secrets confidential, protect a company's valuable know-how and business information,³ create a protection system for a company's IP strategy, have employees sign a nondisclosure agreement, and pursue legal action when necessary.⁴

NDAs are often required and allow you to expand your business by having larger interactions.⁵ A well-drafted NDA should serve the best interests of new product developers and intellectual property owners, especially if the intellectual property is publicly disclosed.⁶ During employment, there is an implied duty in all employment contracts that an employee would act with fidelity and good faith. This duty includes the requirement to keep the employer's commercial and business information secret.⁷ As a result, contracts prohibiting

¹Katie Gordon, NDA and IP deals, available at <https://sites-penningtons.vuturevx.com/50/2205/landingpages/nda-and-ip-deals.asp>;

²Vivien Irish, Director of Intellectual Property, NXT plc, September 2003, available at https://www.wipo.int/sme/en/documents/disclosing_inf_fulltext.html;

³Joanelle O' Cleirigh and Colm Maguire, Ireland: Know How To Protect Your Know-How, July 18, 2018, available at <https://www.mondaq.com/ireland/trade-secrets/720336/know-how-to-protect-your-know-how>;

⁴Erik J. Martin, Contributor, Everything You Need to Know About Intellectual Property, Published April 29, 2019, available at <https://www.uschamber.com/co/start/strategy/how-to-protect-intellectual-property>;

⁵Ariel Soiffer, NDAs, Confidentiality Provisions And How To Make Sure Your IP Stays Yours, May 15, 2015, available at <https://techcrunch.com/2015/05/15/ndas-confidentiality-provisions-and-how-to-make-sure-your-ip-stays-yours/?guccounter=1>;

⁶STA Law Firm, United Arab Emirates: Non-Disclosure Agreements for the Protection of Business, available at <https://www.mondaq.com/Intellectual-Property/854048/Non-Disclosure-Agreements-ForThe-Protection-Of-Business>;

employees from disclosing a company's trade secrets have become standard practise in today's business world.⁸

4. ARE LEGAL FENCES NECESSARY TO MOTIVATE PEOPLE TO INVENT AND INNOVATE?

4.1 INVENTION AND INNOVATION DEFINED

To understand the impact of legal barriers on invention and innovation, we must first define the terms. What kind of knowledge are people attempting to protect through legal means? Nobel Laureate economist Kenneth Arrow defines invention as "the production of knowledge,"⁹ but distinguishes it from discovery (the creation of new knowledge, science) and invention (a new combination of existing knowledge to create something useful, technology).¹⁰ Moser defines innovation as "a new product, or a better or cheaper practise that produces an existing product."¹¹ Drucker distinguishes between a new invention and a new application of existing technology, and he believes that entrepreneurs should focus on the latter.¹² According to the business press, innovation is a critical component of entrepreneurship.¹³ According to Scott Berkun, the best definition of innovation is "significant positive change."¹⁴ While each scholar defines invention and innovation in his or her own way, there are at least three senses of the words that run through the research: a fundamental scientific discovery, a concrete technology, and a novel application of that technology by an entrepreneur who recognises a market niche. We intend to express all of these meanings because they all appear to have positive social utility.

⁷Confidentiality for intellectual property development, January 14, 2019, available at <https://hjsolicitors.co.uk/article/confidentiality-for-intellectual-property-developments/#section-6>;

⁸ Karla C. Shippey, A short course in international intellectual property rights, 3rd edition, page 14;

⁹ Kenneth Arrow, Economic Welfare and the Allocation of Resources for Invention, in THE RATE AND DIRECTION OF INVENTIVE ACTIVITY: ECONOMIC AND SOCIAL FACTORS 609, 615 (Universities-National Bureau Committee for Economic Research & Committee on Economic Growth of the Social Science Research Council eds., 1962), <https://www.nber.org/chapters/c2144>.

¹⁰ Kenneth Arrow, The Economics of Inventive Activity over Fifty Years, in THE RATE AND DIRECTION OF INVENTIVE ACTIVITY REVISITED 43, 44-45 (Josh Lerner & Scott Stern eds., 2012), <https://www.nber.org/chapters/cl2347.pdf>

¹¹ Eryn Brown, Do Patents Invent Innovation?. KNOWABLE MAG. (Mar. 13, 2018), <https://www.knowablemagazine.org/article/society/2018/do-patents-invent-innovation>.

¹² PETER F. DRUCKER, INNOVATION AND ENTREPRENEURSHIP 26 (Routledge 2015) (1985).

¹³ Anand Rajendran, Why Innovation Is Increasingly Becoming Critical to Entrepreneurship, ENTREPRENEUR (Jul. 7, 2017);

¹⁴ Scorr BERKUN, THE MYTHS OF INNOVATION loc. 42 (Mary Tressler ed., 2010) (ebook).

4.2 INNOVATION AND INVENTION ARE GOOD

Human welfare and happiness are thought to benefit from innovation. Productivity and efficiency improve as a result of innovation.¹⁵ It enables us to purchase higher-value or lower-cost goods and services.¹⁶ More leisure time has been made possible by the affordability and accessibility of new technology. Microwaves, dishwashers, and clothes dryers, for example, have made household chores easier and less time consuming, freeing up time for leisure activities.¹⁷ Recent computer innovations have given people unprecedented access to information and the ability to communicate cheaply with people all over the world.¹⁸ Medical and public health advancements have increased life expectancy.¹⁹ While, on the whole, innovation has been a force for good, this is not always the case. Some innovations have been extremely harmful to humanity. No innovator can predict every possible application or outcome of an innovation, and many innovations can have both positive and negative long-term consequences.²⁰ For example, while some economists believe that derivatives have a net positive effect on economic growth,²¹ many others believe that the creation of new financial derivatives contributed to the 2008 financial crash.²² The development of opioids has allowed us to more effectively treat patients with severe and chronic pain, but it has also contributed to the rise of the opioid crisis.²³ The Wright brothers' invention of planes was a significant positive change for the world, resulting in incredible growth and opportunity in travel, commerce, and communication.²⁴ However, the invention of the aeroplane also enabled 9/11 to take place.²⁵ Nonetheless, many economists have focused on the relationship between

¹⁵ MICHAEL GREENSTONE & ADAM LOONEY, A DOZEN ECONOMIC FACTS ABOUT INNOVATION 1-2 (Aug. 2011), https://www.brookings.edu/wp-content/uploads/2016/06/08_innovation-greenstoneilooney.pdf.

¹⁶ JOSH LERNER & SCOTT STERN, RATE AND DIRECTION OF INVENTIVE ACTIVITY REVISITED 1 (Josh Lerner & Scott Stern eds., 2012);

¹⁷ Alberto Galasso & Mark Schankerman, Patents and Cumulative Innovation: Causal Evidence from the Courts, 130 Q.J. ECON. 317, 318 (2015).

¹⁸ Baker & McKenzie, Study on Trade Secrets and Confidential Business Information in the Internal Market 86 (Apr. 2013);

¹⁹ *Boulanger v. Dunkin' Donuts, Inc.*, 442 Mass. 635 (2004) (protection of CBI involving new products).

²⁰ SCOTT BERKUN, THE MYTHS OF INNOVATION loc. 42 (Mary Tressler ed., 2010) (ebook).

²¹ Duc Hong Vo et. al., The Importance of the Financial Derivatives Markets to Economic Development in the World's Four Major Economies, 12(1) J. OF RISK FINANCIAL MGMT. 35 (2019).

²² JOSH LERNER & SCOTT STERN, RATE AND DIRECTION OF INVENTIVE ACTIVITY REVISITED 1 (Josh Lerner & Scott Stern eds., 2012);

²³ Kelly K. Dineen & James M. DuBois, Between a Rock and a Hard Place: Can Physicians Prescribe Opioids to Treat Pain Adequately While Avoiding Legal Sanction?, 42(1) AM. J. LAW & MED. 7 (2016).

²⁴ SCOTT BERKUN, THE MYTHS OF INNOVATION loc. 42 (Mary Tressler ed., 2010) (ebook).

innovation and economic growth. According to Lerner, "innovation is critical to economic growth".²⁶ According to Moser, "innovation is widely regarded as the primary driver of sustained improvements in human welfare and economic growth."²⁷ "America has long had a culture and an economic system that has spurred innovation and scientific advance, creating vast new industries, enormous numbers of jobs, and a powerful competitive position in the global economy," said Robert E. Rubin, CoChair of the Council on Foreign Relations and Former US Treasury Secretary.²⁸ Given the substantial economic and social benefits of innovation, an ideal legal system would encourage maximum innovation. While many areas of the law have an impact on innovation (for example, patents and regulations), we chose to focus our analysis on non-disclosure agreements, which allow individuals or businesses to prevent the dissemination and use of information without their consent.

4.3 WHAT IS THE EFFECT OF LEGAL FENCES UPON INNOVATION AND INVENTION?

In order to attract investment in R&D, an inventor must be able to "appropriate" information about the invention, i.e., put a legal fence around it to prevent unauthorised use by others. Patents, trade secrets, non-compete agreements, and non-disclosure agreements are some of the legal barriers that inventors and entrepreneurs use to protect their innovations. An inventor turns information into a commodity or private property that can be sold on the open market by protecting it with legal barriers.²⁹ However, there is reason to doubt this theory. For example, there is some debate about the value of patent incentives. Switzerland and Denmark invented a plethora of scientific instruments using 19th century World's Fairs as an alternative source of data, but provided no patent protection.³⁰ Conversely, the U.S. Plant Patent Act of 1930 seems not to have encouraged innovation in rose breeding.³¹ Arrow discovered that patents were only important for a small number of products in informal conversations with

²⁵ *Id.*

²⁶ JOSH LERNER & SCOTT STERN, RATE AND DIRECTION OF INVENTIVE ACTIVITY REVISITED 1 (Josh Lerner & Scott Stern eds., 2012);

²⁷ Petra Moser, Patents and Innovation in Economic History, 8 ANN. REV. Econ. 241, 242 (2016).

²⁸ MICHAEL GREENSTONE & ADAM LOONEY, A DOZEN ECONOMIC FACTS ABOUT INNOVATION 1-2 (Aug. 2011), https://www.brookings.edu/wp-content/uploads/2016/06/08_innovation-greenstoneilooney.pdf.

²⁹ Kenneth Arrow, Economic Welfare and the Allocation of Resources for Invention, in THE RATE AND DIRECTION OF INVENTIVE ACTIVITY: ECONOMIC AND SOCIAL FACTORS 609, 615 (Universities-National Bureau Committee for Economic Research & Committee on Economic Growth of the Social Science Research Council eds., 1962), <https://www.nber.org/chapters/c2144>. 35. Petra Moser, Patents and Innovation in Economic History, 8 ANN. REV. Econ. 241, 242 (2016).

³⁰ Petra Moser & Paul W. Rhode, Did Plant Patents Create the American Rose?, in THE RATE AND DIRECTION OF INVENTIVE ACTIVITY RE-VISITED 413, 414 (Josh Lerner & Scott Stern eds., 2012).

businesspeople and lawyers.³² In other cases, privately held information may allow an inventor to be sufficiently compensated without a patent.³³ There is also evidence that patents and other formal IPR are only important for early stage ventures, whereas more mature companies have other tools to prevent idea misappropriation, such as reputation, bargaining power, or network effects.³⁴ When assessing how legal barriers affect innovation, it is necessary to consider the motivations of those seeking such safeguards. Economists have expressed reservations about what truly motivates inventors.³⁵

Some believe that technologists are motivated by money, whereas scientists are motivated by fame or curiosity. Others believe that curiosity motivates both groups.³⁶ If an information creator is motivated by curiosity or fame, there may be no need for a legal barrier to protect their information. This is due to the fact that a legal barrier is only required for monetization, not for gaining notoriety for a discovery or satisfying their own curiosity. On a national level, the 1969 moon landing that ended the space race resulted in many innovations, but the project as a whole was motivated by a desire for dominance rather than profit. While the information creator may be satisfied with making a discovery and becoming known for it, it is also important to consider the role of funding in innovation. Who funds the research and development of a creator? Would the individuals, institutions, or businesses that provide the resources continue to do so if legal barriers were erected or made unavailable, and monetization was not an option?³⁷ The inability to protect innovation through legal barriers may limit initial innovation. Restricting information dissemination, whether through legal

³¹ Kenneth Arrow, *The Economics of Inventive Activity over Fifty Years*, in *THE RATE AND DIRECTION OF INVENTIVE ACTIVITY REVISITED* 43, 44-45 (Josh Lerner & Scott Stern eds., 2012), <https://www.nber.org/chapters/cl2347.pdf>

³² Alberto Galasso & Mark Schankerman, *Patents and Cumulative Innovation: Causal Evidence from the Courts*, 130 Q.J. ECON. 317, 318 (2015).

³³ Gili Greenberg, *Small Firms, Big Patents? Estimating Patent Value Using Data on Israeli Start-ups' Financing Rounds*, 10 EUR. MGMT. REV. 183 (2013).

³⁴ Arrow; LERNER & STERN (citing Petra Moser & Paul W. Rhode, *Did Plant Patents Create the American Rose?*, in *THE RATE AND DIRECTION OF INVENTIVE ACTIVITY REVISITED* 413 (Josh Lerner & Scott Stern eds., 2012)).

³⁵ Kenneth Arrow, *The Economics of Inventive Activity over Fifty Years*, in *THE RATE AND DIRECTION OF INVENTIVE ACTIVITY REVISITED* 43, 44-45 (Josh Lerner & Scott Stern eds., 2012), <https://www.nber.org/chapters/cl2347.pdf>

³⁶ "This study provides new evidence on the positive effect of patent applications and grants on start-up companies' valuations by investors.....[t]his finding is consistent with the view that the mitigation of uncertainty about the scope of IPR protection enhances information disclosure by entrepreneurs and reduces asymmetric information and adverse selection in the market for entrepreneurial finance (e.g., Arrow 1962; Amit et al., 1998)."

³⁷ Kenneth Arrow, *Economic Welfare and the Allocation of Resources for Invention*, in *THE RATE AND DIRECTION OF INVENTIVE ACTIVITY: ECONOMIC AND SOCIAL FACTORS* 609, 615 (Universities-National Bureau Committee for Economic Research & Committee on Economic Growth of the Social Science Research Council eds., 1962), <https://www.nber.org/chapters/c2144>.

barriers or other means, has an immediate social cost because it hinders follow-on innovation.³⁸ Many economists have investigated whether patent rights help or hinder follow-on innovation. According to some, "stronger patents can discourage innovation by reducing the payoffs to later innovators who rely on previous inventions as an input for their work."³⁹ Others, however, have discovered that the impact of legal fences varies by field.⁴⁰ Only in the fields of computers and communications, electronics, and medical instruments (including biotechnology) has patent invalidation been found to have a significant effect on cumulative innovation; there is no discernible effect for drugs, chemicals, or mechanical technologies.⁴¹ According to Galasso and Schankerman's research, "patent rights stifle cumulative innovation only in very specific environments."⁴² On the other hand, anecdotal evidence suggests that inventors are more willing to discuss ideas and innovation information because intellectual property rights are available to protect those innovations.⁴³ Thus, the "availability of intellectual property rights may encourage the diffusion of new ideas, enabling follow-on invention."⁴⁴ According to a 2019 empirical study, valid patents actively promote follow-on innovation during their terms of exclusivity.⁴⁵ The patent studies are thus a mixed bag, and in any case, they are of limited relevance to our investigation into NDAs. This is due to the fact that a patent publicly discloses information about the invention, which may spur further innovation, whereas an NDA keeps the information confidential. Non-compete agreements are the focus of much of the research on the impact of legal barriers on innovation.

There has been much discussion about the impact of employee non-compete agreements on innovation and employee spinout creation.⁴⁶ There is some evidence that barriers to scientific mobility are socially harmful because they prevent knowledge gains from idea cross-pollination.⁴⁷ Furthermore, the entrepreneurship spillover theory suggests that

³⁸ James Bessen & Eric Maskin, *Sequential Innovation, Patents, and Imitation*, 40 *RAND J. ECON.* 611 (2009));

³⁹ Bhaven Sampat & Heidi L. Williams, *How Do Patents Affect Follow-On Innovation? Evidence from the Human Genome*, 109 *AM. ECON. REV.* 203 (2019) (finding that gene patents have no significant effect on follow-on innovation).

⁴⁰ Alberto Galasso & Mark Schankerman, *Patents and Cumulative Innovation: Causal Evidence from the Courts*, 130 *Q.J. ECON.* 317, 318 (2015).

⁴¹ *Id.*

⁴² Petra Moser, *Patents and Innovation in Economic History*, 8 *ANN. REV. ECON.* 241, 242 (2016).

⁴³ *Id.*

⁴⁴ Jonathan H. Ashtor, *Does Patented Information Promote the Progress of Technology?*, 113 *Nw. U. L. REV.* 943, 945 (2019) ("Patents with a greater quantity of information content are more likely to secure valid exclusive rights to their owners. In turn, these patents contribute to the development of more future inventions by other inventors.").

⁴⁵ Sharon Belenzon & Mark Schankerman, *Spreading the Word: Geography, Policy, and Knowledge Spillovers*, 95 *REV. ECON. & STAT.* 884 (2013) (impact of non-competes on knowledge spillovers);

⁴⁶ JOSH LERNER & SCOTT STERN, *RATE AND DIRECTION OF INVENTIVE ACTIVITY REVISITED 1* (Josh Lerner & Scott Stern eds., 2012);

founders frequently use ideas they encountered at previous employers.⁴⁸ As a result, "many entrepreneurs, whether or not their activity is officially sanctioned, start firms in similar fields to those of their ex-employer."⁴⁹ Non-compete agreements have gotten a lot of attention from business and technology media outlets, as well as lobbying groups.⁵⁰ Many believe that the fact that non-compete agreements are not enforceable in California is part of what has allowed Silicon Valley to become a leader in technology and innovation. Proponents of removing non-compete clauses argue that increased employee mobility allows for more cross-pollination of ideas, which leads to greater innovation. Non-compete agreements are supported by those who believe they are necessary to protect a company's assets and investment in employee training and development. To some extent, new evidence supports both arguments:

"To a large extent, the research has confirmed the fundamental prediction of both traditional economic analysis and new wisdom." Non-compete laws encourage businesses to invest in training while discouraging employees from investing in their own human capital. The empirical evidence points to a vicious cycle. Employers invest less in human capital and innovation if employee mobility is not limited. However, once the initial investment has been made, the same mobility restriction has a chilling effect on future development".⁵¹

In other words, if a company does not have a non-disclosure or non-compete agreement with its employees, it is less likely to share cutting-edge information with them.⁵² There will be fewer mass-produced innovations. Initially, labour mobility restrictions benefit both the firm and the nation as a whole. However, in some fields (computers, electronics, medical instruments, etc.)⁵³, what is good for the firm is no longer good for the nation because it limits follow-on innovation.

All of this implies that a court asked to enforce an NDA should consider whether the defendant has used the information to engage in cumulative or follow-on innovation, and if

⁴⁷ Supra note 31

⁴⁸ Matt Marx & Lee Fleming, Non-compete Agreements: Barriers to Entry and Exit? in 12 INNOVATION POL'Y & ECON. 39, 60 (Josh Lerner & Scott Stern eds., 2012), <http://www.nber.org/chapters/cl2452> (first citing Amar V. Bhide, THE ORIGIN AND EVOLUTION OF NEW BUSINESS (2000));

⁴⁹ *Id*

⁵⁰ Chris DeVore, Silicon Valley Keeps Winning Because Non-Competes Limit Innovation, TECHCRUNCH (Feb. 18, 2016), <https://techcrunch.com/2016/02/18/silicon-valley-keeps-winning-because-non-competes-limit-innovation/>.

⁵¹ Yifat Aran, Note, Beyond Covenants Not to Compete: Equilibrium in HighTech Startup Labor Markets, 70 STAN. L. REV. 1235, 1257-60 (2018).

⁵² *Id.* at 1250.

⁵³ Alberto Galasso & Mark Schankerman, Patents and Cumulative Innovation: Causal Evidence from the Courts, 130 Q.J. ECON. 317, 318 (2015).

so, the public benefit of allowing the defendant to continue its activity. The rules, on the other hand, should not discourage initial innovation. There is no innovation on which to build follow-on innovation unless time and resources are invested in creating new innovation and inventions. The strategy outlined below attempts to meet both policy objectives.

5. USE OF NON-DISCLOSURE AGREEMENTS AS PROTECTION OF TRADE SECRETS

To safeguard sensitive information, employers can include a clause in their employment agreement that prohibits employees from sharing or exploiting their "trade secrets" during their tenure as an employee and in the aftermath of termination. With respect to Trade Secrets, NDA are used in the following manner

- Non-disclosure agreements (NDAs) are often employed to protect trade secrets by forbidding the disclosure of sensitive and confidential data with outside parties. Formulas, procedures, client lists, marketing plans, and any other important data that offers a competitive edge could potentially be included in this.
- NDAs specify the responsibilities of the party (referred to as the "recipient") who receives the sensitive information. These duties usually consist of keeping the information private, not sharing it with third parties, and utilizing it only for the intended business connection. They also involve taking appropriate measures to maintain the information secure.
- Duration and Scope: The NDA outlines the length of the confidentiality limitations as well as the spectrum of information protected. It might stipulate that the duties which are to be fulfilled for a predetermined period of time or until a specific occasion, such as the information becoming publicly known. In the case of trade secrets, it's also critical to ensure that even after the NDA expires, the receiving party is still obligated to keep trade secret information confidential; a trade secret is only considered such if it's kept "secret".
- Parties Involved: The "discloser" and the "recipient" are the two parties who usually exchange information in a non-disclosure agreement (NDA). The terms and conditions governing the sharing of private information between these parties are outlined in the NDA. This clause will often also specify associated third parties, such as employees, associates, and advisors who are covered by the agreement. For example, the agreement might specify that the information is only to be shared with the executive level of a corporate entity whereas other agreements might allow for information to be shared with professional advisors or service providers, such as insurers, lenders, or counsel.⁵⁴

⁵⁴ The Hidden Risks of Nondisclosure Agreements by Crowley law LLC

- **Confidentiality:** An NDA must be specific as to what information is considered "confidential" by the agreement, typically by listing specific items or defining the types of information that are covered. Some contracts require confidential information to be explicitly marked or identified as such with a stamp or watermark.
- **Permitted Disclosures:** Nondisclosure agreements (NDAs) may contain clauses that allow the recipient to disclose confidential information in certain situations. For instance, the NDA may specify that disclosure is required by law or a court order.
- **Repercussions of Breach:** Nondisclosure agreements (NDAs) frequently include the consequences of a breach, which may include monetary compensation, injunctive relief (court orders to stop future disclosure), or other legal remedies. These consequences serve as a deterrent for unauthorized disclosure.
- **Duties of Recipient Following Termination:** The NDA may outline the obligations of the recipient following the agreement's termination. This could entail giving back or destroying any confidential information.
- **Customization:** NDAs can be customized to meet the unique demands and specifications of the holder of a trade secret. They are tailored to a certain industry or kind of trade secret and can be unilateral or bilateral or multilateral.

As Non-Disclosure Agreements are legally binding agreements, breach of such NDA shall result in the other party to initiate legal action as against the party who breached the Agreement. The breach of NDA shall often result in substantial monetary fines or injunctive relief or both against such party in accordance to the clauses of the Non-Disclosure Agreement.

6. NDA AND RESTRAINT OF TRADE

NDAs, on the other hand, may be deemed void if they are deemed to be a trade restraint. A trade restraint occurs when the covenantor's future freedom to trade with other individuals or in similar businesses who are not parties to the contract is confined. A trade restraint is prima facie void because it is contrary to public policy and can only be discredited by evidence that such restraint is reasonable.⁵⁵

⁵⁵ Stephens v Gulf Oil Canada Ltd, 11 OR (2d) 129, 25 CPR (2d) 64, 65 DLR (3d) 193

The burden of proving reasonableness falls on the covenantee, who must show that the restraint is in the public's and the contracting parties' best interests. The covenantee must also show that the restraint is not excessive than what is required to protect their interests. Expiry dates are commonly used in NDAs to limit the scope of the restraint

The Bombay High Court in *VFS Global Services Pvt Ltd*⁵⁶ held that a clause prohibiting an employee from disclosing commercial or trade secrets is not in restraint of trade. Such a clause has no effect on the employee's ability to engage in a lawful profession, trade, or business, as defined by Section 27 of the Contract Act.

An expiration date in an NDA would be considered a restriction on trade and create a situation in which a business owner would not be able to carry out any business operations due to some trade secrets being revealed. Such circumstances could make the NDA null and void.

In *DB Riley, Inc. v. AB Engineering Corp.*,⁵⁷ at the US District Court for the District of Massachusetts, the plaintiff claimed that the defendant had unfairly acquired the plaintiff's trade secret information, and that in spite of contractual agreements that prohibited disclosure by any means that existed between them prior to the suit, the defendant used the trade secret information. Despite this finding, the court ruled in favor of the defendant, stating that it was the plaintiff's fault for failing to take reasonable precautions to maintain confidentiality.

A similar case, *Silicon Image, Inc. v. Analogix Semiconductor, Inc.*⁵⁸ was decided on November 21, 2008, at the US District Court for the Northern District of California, and concerned a plaintiff's claim that the defendant had wrongfully misappropriated the plaintiff's trade secrets, and thus the plaintiff sought to prevent the defendant from selling copies of its work.

The court also ruled that the information in question would only be qualified as a trade secret if the plaintiff took reasonable steps to ensure its confidentiality, which, according to the court, did not have to include expensive measures, but rather simple measures such as, but not limited to, informing employees about the materiality of the trade secret and restricting access to it within employment. Because the agreement was only for two years, the defendant was

⁵⁶ *Vfs Global Services Private vs Mr. Suprit Roy* 2008 (2) BomCR 446

⁵⁷ case ref. no. 977 F. Supp. 84 (D. Mass. 1997)

⁵⁸ case ref. no. 642 F. Supp. 2d 957(2008)

free to continue the aforementioned practices after that time period expired. In both cases, the time-limited confidentiality terms resulted in the loss of trade secret protection.

7. CONCLUSION

After all, intellectual property is the most valuable asset of a successful business, so it must be protected. It makes no difference whether the company believes that the party to whom it discloses its trade secrets, confidential information, or the subject matter of its intellectual property will respect confidentiality. If the company wants to protect its intellectual property and take appropriate precautions, it should be aware of the risks and carefully define terms and conditions in the contract prior to disclosing any IP subject matter. If the NDA on intellectual property protection is well-drafted, the company's benefits will outweigh its risks. Furthermore, this will contribute to the parties' strong, healthy, and dependable collaboration.