

Setting up in Business – Protecting your Rights (The Third of a Series of Three Articles)

TRADE SECRETS AND CONFIDENTIALITY



Not all forms of intellectual property are automatically protected by the general law or registration. Those that are not include confidential information such as trade secrets, know-how, ideas, concepts, formats, schemes etc, and the question arises how these can be protected in law. The answer is secrecy, and, when there is a need to disclose in the course of your business, putting a confidentiality agreement in place.

To be protected the confidential information must not be trivial and must be something that is not common knowledge. Disclosure to a wide group of people may bring something into the public domain, even if it is marked “confidential”. Even if information comes into the public domain, a person under a confidentiality agreement may still not use information that was disclosed to him in confidence to gain an unfair advantage.

Even though in some instances an duty of confidentiality will arise automatically by the nature of the relationship (e.g. employees) or be implied by the circumstances (e.g. the commission of the building of a prototype), it is always worthwhile a business putting a written confidentiality undertaking in place to make sure the position is clear and minimise the ground for dispute later.

A more difficult area is ideas, concepts, formats and schemes, where commercial exploitation will automatically bring them into the public domain. Copyright protects the expression of ideas rather than the ideas themselves. Although works that are said to be “inspired by” or a parody of others have been subject to successful legal challenge in the past.

However the best remedy here is to bring the idea to as exact a form as possible (the plot of a play, for instance, is protected by copyright) and to make sure that there are elements that need not be brought into the public domain at all, so that a duty of confidentiality can be imposed on recipients. It will also help to introduce as many novel or distinctive features as possible into the idea or format and to put as much as possible in writing.

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