



The Fork on the Table: Patent or Trade Secret Protection for Food and Beverage Innovation?



RECIPES, FOOD PROCESSING METHODS, AND FOOD PROCESSING EQUIPMENT are a few examples of the technology commonly developed by companies in the food and beverage industry. In order to protect this technology, food and beverage companies have to choose between two tines on the fork: patent protection or trade secret protection.

THE DIFFERENCE BETWEEN PATENTS AND TRADE SECRETS

A patent provides a 20-year right to exclude others from making, using, or selling the patented technology. Seeking patent protection requires filing a patent application with the U.S. Patent Office, which assesses whether the invention is new and more than an obvious variation of existing technology. A party that copies patented technology can be sued for patent infringement.

Trade secrets, on the other hand, can last indefinitely and do not require a formal filing with a government entity. Instead, trade secret protection is created by internal corporate policy and procedure put in place to ensure that reasonable steps are taken to keep the secret from those outside of the company. A party that illegally obtains trade secret information can be sued for misappropriation of trade secrets.

DECIDING BETWEEN PATENT PROTECTION AND TRADE SECRET PROTECTION

Patent protection and trade secret protection are mutually exclusive and, therefore, a choice must be made as to which form of protection to use for a given technology. While other considerations may come into play, the decision typically boils down to whether the technology is easy to reverse engineer. The following table helps explain the reasons for this:

Invention	Use Trade Secret Protection?	Use Patent Protection?
Easy to Reverse Engineer	NO – Trade secret protection can be extinguished if an outside party independently figures out the technology, which includes the use of reverse engineering.	YES – A patent will last for 20 years regardless of whether an outside party independently develops the technology.
Difficult to Reverse Engineer	YES – The trade secret protection will last potentially indefinitely (provided it is kept secret within the company), and the trade secret protection will be difficult or impossible to extinguish via independent development by a competitor.	NO – The invention will have to be disclosed as part of seeking patent protection, meaning once the patent expires after 20 years, everyone will know the technology and be able to freely use it.

OTHER CONSIDERATIONS WHEN DECIDING BETWEEN PATENT PROTECTION AND TRADE SECRET PROTECTION

As mentioned above, the decision to pursue patent protection or trade secret protection may hinge on how easy or difficult it would be to reverse engineer the technology. That being said, there are other factors to consider. For example, if it would be difficult to show that a new technology meets the requirements for obtaining a patent, then trade secret protection may be the better fit, even if the technology is potentially easily reverse engineered. Similarly, a technology that would be difficult to reverse engineer may still be a better fit for patent protection if it would be difficult to keep secret within the company.

For additional information, please contact David Fournier (DFournier@perkinscoie.com, +1.312.324.8643).