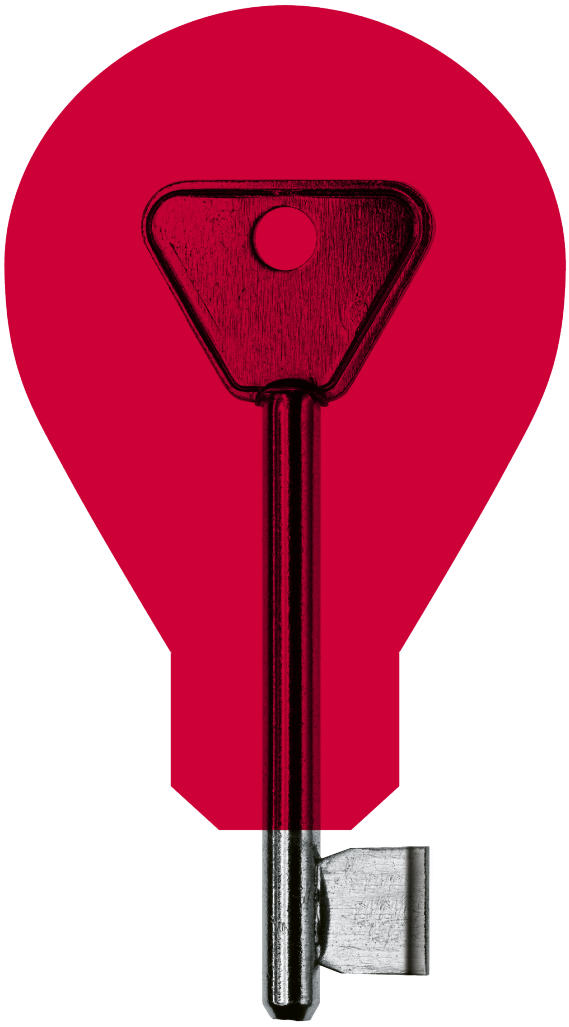
N

Monthly Newsletter May 2025

Intellectual Property

Schellenberg Wittmer



Trade Secrets: New Developments and Challenges

Lorenza Ferrari Hofer, Adrienne Hennemann, Stéphanie Chuffart-Finsterwald

Key Take-aways

1.
The importance of protecting trade secrets in today's business world is continually growing. Determining suitable mechanisms for protection has become a strategic decision every company must take.

2.
Switzerland does not yet have comprehensive legislation on trade secrets. Protection is provided by a number of scattered provisions, including in criminal law, sectoral and unfair competition law.

3.
The establishment of an overall framework, from the conclusion of Non-Disclosure Agreements to an enforcement strategy, is essential for the protection of trade secrets in the digital economy.

1 Introduction

Trade secrets, encompassing everything from proprietary formulas and processes to unique business strategies and customer lists, serve as invaluable assets that can distinguish companies from their competitors. Under Swiss civil and criminal law, to qualify for protection as a trade secret, information must be (1) not generally accessible, (2) of a business value, and the owner must have (3) an objectively justifiable interest in keeping it secret, as well as (4) the subjective will and intent to keep the information secret.

In today's fiercely competitive business environment, determining appropriate mechanisms to protect sensitive information has become a strategic decision that organisations must make. This Newsletter outlines the growing importance of protecting trade secrets in today's business world, the escalating threats that underscore the urgent need for robust protection, and the strategies companies can employ to protect their trade secrets and maintain a competitive edge.

2 Current Trends and Developments

2.1 Trade Secrets Become Even More Important

Patents have traditionally been used to protect inventions. Patent law is based on the principle that the patentee is granted exclusive rights for a limited period of time in exchange for a disclosure of the invention. The aim is to encourage innovation by making technical information available to the public. Conversely, **trade secret** protection can, in principle, be perpetual if confidentiality and commercial value are maintained. In recent years, trade secrets have become increasingly important.

Artificial Intelligence (AI) continues to make significant progress and plays an increasing role in the innovation process. However, under current patent laws, the prevailing view is that AI cannot be named as an inventor, because inventorship is limited to humans. As a result, inventions autonomously generated by AI are not eligible for patent protection. If a human inventor uses AI merely as a tool in the inventive process, the human can be named as the inventor, and AI-assisted inventions may be patentable. However, legal uncertainty remains and may discourage applicants from applying for patents and lead them to rely on trade secrets instead.

The **rapid pace of innovation** further underlines the importance of keeping critical technical information under wraps in industries where the rate of technological change is very high. In such a scenario, an invention is only marketable for a short period of time, and the relatively long term of protection afforded by a patent does not justify the time, expense, and risks that a patent application would entail.

Finally, modern digitization technology represents a paradigm shift in the generation and collection of vast amounts of **data**. Data generated in the course of business and technical activities is the basis for any development in the digital economy. Since data per se cannot be protected by patents, trade secret protection may serve as a robust shield against access and use of non-personal data.

Trade secrets serve today as invaluable assets of any company

2.2 Threats to Trade Secrets

At the same time, trade secrets are becoming increasingly vulnerable. International R&D and supply chain **collaborations** between companies, as well as **mergers and acquisitions** are commonplace. Both scenarios involve the disclosure of confidential information and carry the risk of misuse, especially if the venture is unsuccessful.

In addition, **co-working spaces** and, inspired by the pandemic, **(partially) remote working arrangements** are here to stay, putting trade secrets (e.g., customer lists) at risk of disclosure to third parties.

There is also a growing trend for employees to leave a company and start their own business in the same field, for example in industries such as software or medical devices. It is also the new normal for employees to change jobs more frequently. This increased **employee mobility** creates a risk for the former employer that its trade secrets will be disclosed to a competitor. But it also puts the new employer at risk of being accused of misappropriating trade secrets and suffering a loss of reputation. Not surprisingly, trade secret **litigation** is thus on the rise.

Finally, **cyber espionage** (e.g., unauthorized digital access to a company's data) also poses a serious threat to confidential information stored digitally.

These trends underscore the critical need for robust trade secret protection.

2.3 Legal Framework and Current Developments

At present, **Switzerland** has no specific and comprehensive legislation on trade secrets.

Protection is provided by a number of scattered provisions, including in criminal law (e.g., unauthorized appropriation of data, breach of manufacturing or trade secrets, industrial espionage), specific legislation (such as provisions applicable to financial services) and unfair competition law (incitement to betray/spy out, prohibition of exploitation/disclosure of unlawfully acquired secrets, see our (Newsletter 04/2020).

In contrast to the **EU Directive on the Protection of Trade Secrets** (2016/943) which aims to set minimum standards for EU member states, the concept of trade secrets under Swiss law is defined by requirements that are essentially determined by case law. Even if the EU legislation does not apply in Switzerland, Swiss companies can easily be affected by it, for example if they have branches in the EU, do business within the EU, and/or are a party to a trade secret litigation before an EU court (see our Newsletter 04/2020).

A practical issue of trade secret litigation is that relevant confidential information may have to be disclosed to the other party as part of the proceedings. Swiss law offers a range of measures to safeguard trade secrets during court litigation (e.g., by applying for protective measures). However, while protective measures can be applied in cases where trade secrets are only a side issue in the litigation (e.g., part of an offer of evidence), the matter becomes more complex when a trade secret itself is at the center of the dispute. This challenge arises from the inherent conflict between maintaining confidentiality and ensuring the other party's right to be heard. As a result, significant hurdles remain for companies seeking to enforce their rights with regard to trade secrets, particularly in cases of trade secret misappropriation.

Switzerland does currently not have specific and overall legislation on trade secrets

While the use of non-personal data is key to the deployment of AI and for the opening up of new research activities in the digital economy, the restriction of access by data owners and their claim to the protection of trade secrets has been on the minds of legislators for several years. To complement the Digital Services Act **(DSA)** and the Digital Market Act **(DMA)**, which were enacted to create a safer digital space that allows for more fair access and exchange of data, the EU Council has adopted the **EU Data Act** (2023/2854) which also provides for an adequate level of protection of trade secrets and intellectual property rights in case of disclosure of such data. No similar legislation or even legislative efforts exist for Switzerland today. In February 2025, the Swiss Federal Council recommended ratifying the Council of Europe Convention on AI, and making the necessary changes to Swiss law. Essentially, the Swiss approach to AI will be as sector-specific as possible (focusing, for example, on healthcare and transport), and will aim to avoid broad cross-sectoral regulation. It remains to be seen to what extent the protection of trade secrets for non-personal data will be taken into account.

3 What Companies Can Do

Establishing an overall framework ensuring the preservation of trade secrets is essential, encompassing policies that limit access, emphasize confidentiality, and regularly train employees to identify and mitigate risks. In this context, companies should also have a **trade secret policy** in place for incoming and outgoing employees (e.g., robust employment contracts, need-to-know principle, access controls). It is also helpful to have a briefing with each new employee on the company's trade secret policy and the risks associated with third-party trade secrets. In addition, separate post-contractual confidentiality and non-compete agreements may be considered with departing employees, to the extent permitted by law.

Companies should also not only ensure the protection of their own trade secrets, **but take appropriate measures to reduce the risk of litigation** (i.e. avoid contamination with third party trade secrets).

When collaborating with other companies, it is critical to formalize confidentiality through **Non-Disclosure Agreements (NDAs)** to protect trade secrets shared in partnerships or joint projects during and beyond such R&D collaborations. NDA's should be as specific as possible about the confidential information (e.g., customer lists etc.) and the limits of its permitted use to facilitate later enforcement. In the context of mergers and acquisitions, the use of a "**Clean Team**" approach can help ensure that sensitive information is shared in a controlled and secure manner only with authorised individuals. This is particularly important during the due diligence process, when a

large amount of data may be shared and it is still unclear whether the transaction will ultimately be completed.

Companies must embrace a well-rounded trade secrets protection strategy

Finally, having an **enforcement strategy** in place is critical to responding effectively to breaches, misappropriation, or threat of disclosures. In this context, a company would be advised to already have a person in place who is responsible for coordinating and supporting immediate internal measures and instructing external counsel to take immediate action (i.e., ex parte measures in court), if needed. Indeed, time is of the essence in such scenarios, and can prevent further harm.

4 Conclusion

The proper handling of trade secrets is a key issue for any company and requires a tailored legal strategy. With a proactive and responsive approach, companies can mitigate the risk of their trade secrets being misappropriated or disclosed to the public, while maintaining trust and cooperation in business endeavors. Agreeing and enforcing confidentiality obligations with employees and contractors in a timely manner is critical for any business.

Philipp Groz
Partner
philipp.groz@swlegal.ch

Dr. Lorenza Ferrari Hofer
Partner
lorenza.ferrarihofer@swlegal.ch

Adrienne Hennemann
Senior Associate
adrienne.hennemann@swlegal.ch

Dr. Stéphanie Chuffart-Finsterwald
Partner
stephanie.chuffart@swlegal.ch

Schellenberg Wittmer Ltd
Attorneys at Law

Zurich
Löwenstrasse 19
P.O. Box 2201
8021 Zurich / Switzerland
T +41 44 215 5252
www.swlegal.com

Geneva
15bis, rue des Alpes
P.O. Box 2088
1211 Geneva 1 / Switzerland
T +41 22 707 8000
www.swlegal.com

Singapore
Schellenberg Wittmer Pte Ltd
50 Raffles Place, #40-05
Singapore Land Tower
Singapore 048623
www.swlegal.sg