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BALANCING PATENT DISCLOSURE AND TRADE SECRET PROTECTION

In today's innovation-driven economy, the real competitive advantage lies not only in creating new ideas but also in protecting the value embedded in them. For businesses in Kenya, every innovation raises a strategic question: whether to disclose the invention and secure patent protection or preserve it as a trade secret. This decision affects market position, commercial control and long-term value creation.

Patents and trade secrets offer different intellectual property protection models. One is built on disclosure in exchange for exclusivity, while the other depends entirely on secrecy. Understanding this tension is essential to any effective intellectual property strategy.

THE CORE TENSION: DISCLOSURE VS SECRECY

Patent protection is grounded in disclosure. On filing for registration, an invention must be described to enable a person skilled in the art to make, use or evaluate the invention. In return, the inventor receives a time-limited monopoly over the invention. This reflects the "quid pro quo" of patent law: knowledge is shared with the public in exchange for exclusive rights.

Trade secrets operate on the opposite principle. Protection exists only as long as the information remains confidential. Once secrecy is lost, legal protection is extinguished.

This difference shapes how businesses decide whether to patent or retain confidentiality.

PATENT PROTECTION

In Kenya, patents are governed by the [Industrial Property Act \(Cap. 509\)](#). To qualify for protection, an invention must be new, involve an inventive step and be industrially applicable. Once granted, a patent provides exclusive rights for twenty (20) years from the filing date, subject to the payment of maintenance fees. For a more detailed discussion on the scope, requirements and implications of patents in Kenya, see [our article](#) on patent protection in Kenya.

KEY ADVANTAGES AND LIMITATIONS OF PATENT PROTECTION

The key advantages include:

1. Exclusive rights to prevent unauthorized use, manufacture or sale of the invention;
2. Opportunities for commercialization through licensing or assignment of rights;
3. Enhanced investor confidence, as patents signal innovation and strengthen valuation; and
4. Competitive advantage through the creation of barriers to market entry.



However, these benefits must be weighed against inherent limitations, including:

1. Mandatory disclosure of the invention, which exposes technical information to competitors;
2. A finite protection period, limited to twenty (20) years with no possibility of extension;
3. Significant cost and time requirements for registration and maintenance;
4. Potential regulatory constraints, including compulsory licensing where third parties are authorized on approval to use a patented invention in the public interest. While intended to ensure access to essential goods or address market failures, such measures can reduce the patent holder's exclusivity and commercial control over the invention.

TRADE SECRET PROTECTION

Trade secrets protect confidential business information that derives commercial value from not being readily accessible to the public. This may include formulas, processes, algorithms and other proprietary methods that give a business a competitive edge.

Although Kenya does not have a standalone statute governing trade secret, protection is recognized through constitutional incorporation of international law, [the TRIPS Agreement](#) and common law principles of confidentiality.

For information to qualify as a trade secret, it must be confidential, possess commercial value because of its secrecy and be subject to reasonable measures to maintain that confidentiality. For a more detailed discussion on the scope and enforcement of trade secret protection, see our related [article](#) on trade secrets.

THE KEY ADVANTAGES AND LIMITATIONS OF TRADE SECRET PROTECTION

The key advantages include:

1. Indefinite protection, which continues for as long as the information remains confidential;
2. No registration requirement, with protection arising automatically once the information qualifies as a trade secret;
3. Lower cost structure, as it avoids filing and renewal expenses; and
4. Immediate protection, since no administrative process is required to secure rights.

These advantages are balanced by inherent risks, including:

1. Total loss of protection upon disclosure, whether intentional or accidental;
2. Enforcement difficulties, as the claimant must prove both the existence of secrecy and its wrongful acquisition or use;
3. Risk of internal leakage through employee movement or weak confidentiality controls; and
4. No protection against independent discovery or lawful reverse engineering by third parties.

CHOOSING BETWEEN PATENTS AND TRADE SECRETS

The choice between patent protection and trade secrecy depends on how an innovation creates value, how easily it can be replicated and the business's broader commercial strategy. It is therefore a commercial judgment as much as a legal one.

Patents are preferable where the invention is likely to be reverse-engineered, where the business needs enforceable rights against third parties or where disclosure will not significantly erode competitive advantage. In such cases, patent protection supports licensing, investment and enforcement, even though it requires public disclosure.

Trade secrets are preferable where the value of the innovation lies in its continued confidentiality. This is particularly so where the information can be effectively controlled internally and where long-term secrecy is more commercially useful than time-limited exclusivity.

The contrast is well illustrated by Coca-Cola and Tesla. Coca-Cola has preserved its formula as a trade secret for decades, using secrecy to maintain long-term competitive advantage. Tesla, by contrast, has used patent disclosure to promote wider adoption of its technology and strengthen its market position. Together, these examples show that the better option depends not on the invention alone, but on the business objective it is meant to serve.

HYBRID PROTECTION STRATEGY

In practice, many businesses adopt a combined approach. Essentially, externally visible aspects of an invention are patented while sensitive know-how is retained as a trade secret. This strategy allows businesses to secure legal exclusivity while preserving critical confidential information. However, once disclosed in a patent application, information can no longer be protected as a trade secret, making careful drafting essential.



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CONCLUSION

The choice between patent protection and trade secrecy is not binary but strategic. Patents offer legal certainty and enforceable exclusivity, but require disclosure and have a fixed lifespan. Trade secrets offer flexibility and potentially unlimited protection, but rely entirely on maintaining confidentiality.

An effective intellectual property strategy requires businesses to align legal protection with commercial realities that balance disclosure and secrecy to sustain long-term competitive advantage.

HOW WE CAN HELP YOU

At our Intellectual Property and Technology Practice, we advise businesses on structuring and protecting innovation through tailored IP strategies that align with their commercial objectives whether through patents, trade secrets or a combination of both.

We provide support across the full lifecycle of innovation protection, including:

- Patentability and risk assessment: Evaluating novelty, disclosure risks and enforceability before filing.
- Trade secret structuring: Designing confidentiality frameworks, including NDAs, internal controls and employee protections.
- IP portfolio management: Aligning protection strategies with business growth, investment and commercialization plans.
- Dispute and enforcement support: Assisting in infringement, misappropriation and breach of confidence matters.

If you would like to discuss how best to protect your innovation or require assistance with any intellectual property matter, please contact the contributor below or reach out to our **Intellectual Property and Technology team** at tmtpractice@cmadvocates.com.

CONTRIBUTOR:

Mercy Cheredi Chore

Associate Advocate

mchore@cmadvocates.com

CM Advocates LLP – Contact Details

Head Office Nairobi

I&M Bank House, 7th Floor, 2nd Ngong Avenue

T: +254 20 2210978 or +254 716 209673

P.O. Box 22588 – 00505, Nairobi Kenya

E: law@cmadvocates.com

Mombasa Office

Links Plaza, 4th Floor, Links Road, Nyali

T: +254 041 447 0758 / +254 41 447 0548

P.O. Box 90056 – 80100, Mombasa Kenya

E: mombasaoffice@cmadvocates.com

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