

# Know-how, trade secrets and the additional protection by copyright

By [Tyrone Walker](#)

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Know-how can be described as the knowledge of how to do something, which is typically acquired through experience. Know-how can be acquired by an employee whilst working within an organisation and will travel with the employee when he/she leaves as the information has become part of its knowledge. If a company wishes to restrain the use of know-how, contractual restraints are required, but it can be difficult to enforce.



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A company can own trade secrets, which are a more specialised type of commercially valuable information. Factors that will be taken into account when assessing whether information may be deemed a trade secret include:

- whether the information is known outside of the company;
- whether the information is valuable to the company and competitors outside the company; and
- what measures has the company taken to protect the information.

## Trade secrets

Examples of trade secrets include the Google search algorithm and the recipe for Coca-Cola. The Coca-Cola recipe may have qualified for patent protection at the time, but a decision to keep it confidential means that the recipe remains confidential today, as opposed to its protection expiring and the recipe falling into the public domain after 20 years, which would have been the case if a patent had been registered. Therefore, there are instances where a trade secret or confidentiality is more valuable than a registered IP approach.



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South Africa does not have specific legislation governing trade secrets or know-how, though they can be effectively protected under South African common law.

As previously discussed, know-how and trade secrets can be protected if it can be established that the information is not generally known to the public, that it has the necessary quality of confidence, and that anyone with access to the information owes its owner a duty of confidence. A given recipient is not required to enter into a non-disclosure agreement, though it is indicative of a relationship of confidence. If a recipient then discloses that information in breach of that confidence, the owner can take legal action.

## Material form

Parties will often enter into agreements to reduce know-how or trade secrets into a material form to protect the valuable information in a tangible form, or alternatively to transfer trade secrets or know-how between each other. The agreement will confirm ownership, protect the information's use and handling, and set out the indemnities in respect of their loss or misuse. It is also common in such agreements to include an express reference granting the right to seek an interdict/injunction as the first recourse if the information is lost or misused. The courts have been willing to grant injunctions to recognise the importance of trade secrets.



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If the know-how, which is unique to the company, can be reduced to writing or comprised of the original text (including descriptions or detailed information of the know-how) as well as original drawings (including diagrams, charts and plans), this will fall within the ambit of copyright protection.

Know-how will be protected under the South African common law and through the parties' commercial agreements. However, reducing the know-how into a material form can assist in establishing the know-how being protected and will provide copyright protection to the original text and drawings contained within the document/s. A competitor or third party cannot copy the layout and artistic works contained within the document/s — for example, the layout of the product, app, program, website, etc. The owner of the copyright (and this should be governed in the agreement between the parties) can institute copyright infringement proceedings should a third party make unauthorised use or reproduction of the original text and drawings contained within the document without the required permission.

## ABOUT THE AUTHOR

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