Ownit
Creative London
Intellectual Property
Advice Service

Confidentiality

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Confidentiality and the law of confidence is concerned with secrets of all kinds. Good business practice involves being aware of information you've produced that should be treated as confidential (for example, your new design or prototype) and taking the right steps to protect it.

Frequently Asked Questions

What is the 'law of confidence' and when is it useful?

The law of confidence gives protection to things not yet in the public domain. It can therefore be particularly useful during the development stages of new creative work which may later have a high commercial potential. This is because it can allow you to discuss ideas, designs or prototypes with others (such as potential business partners) whilst binding those people to total secrecy.

If your information has already been made public (such as published writing, software which has been awarded a patent or the release of a new music CD), other intellectual property rights (such as copyright and patents, also covered by an Own It factsheet) are the only methods that can offer you proper legal protection.

The law of confidence is expressed as an 'obligation'. This means that any people coming into contact with your protected idea **must** keep quiet about it or they will be acting unlawfully. An obligation of confidence can be imposed in a large number of situations. In some of these situations a 'confidentiality agreement' may be used - a legal document which is described in full below. Additionally, confidentiality is implied within many other relationships which may not be contractual. Examples of these are also described in detail below.

What is confidential information?

In order for information to be protected as confidential, two conditions must be fulfilled:

There are various paths to securing a patent abroad. These are as follows:

a) The information must not be in the public domain. No restrictions are placed on the subject matter that can be protected by the law of confidence, except for what can be considered to be trivial, immoral or vague information.

b) The information must have been imparted in circumstances suggesting an obligation of confidence; for example, where you have emphasised that your information should be kept confidential.

The term 'information' refers to any type of intellectual property that you may have produced, such as:

- drawings
- models
- prototypes
- techniques
- experimental methods and protocols
- technical information
- processes
- computer software
- formulae
- discoveries
- materials
- results
- data of all types
- calculations

The type of material protected may be of a technical, commercial or personal nature, and it does not have to be particularly special in any way. Even a compilation of already-known information, such as a list of customers, can, when taken as a whole, be regarded as confidential. What makes such information worth protecting is the fact that time and effort has been expended in gathering, selecting and arranging it.

With the law of confidence, you do not need to worry about the type of formats in which your information is stored. The law of confidence applies equally to information when embodied in writing, drawings, photographs, goods and products, or where it has been disclosed verbally (such as if it has been disclosed in a private meeting.) The information need not be fixed (such as a transcribed version of a conversation) or in a permanent form.

To determine whether information is confidential, an 'objective test' is applied. This means that a court of law will consider whether someone looking at the information and the circumstances of its disclosure would consider it to be confidential. As such, the belief of either party as to whether the information was confidential will largely be irrelevant, unless that belief was disclosed to the other party.

Remember that simply marking a document with words ‘PRIVATE AND CONFIDENTIAL’ is not enough if the contents are commonplace and already within the public domain.

What type of disclosure is not confidential?

Once information in any form is put into the public domain, it can't be considered to be confidential. If information has been published or disclosed to third parties in the absence of an obligation to keep it confidential, it also falls into the public domain, and the law of confidence cannot prevent its further disclosure or subsequent use.

The public domain is a very wide category, and includes:

- trade fairs, exhibitions or conferences in which people from outside your design, research or development group (i.e. the people involved in the development of the information) are present, especially where commercial representatives are in attendance;
- abstracts, thesis, grant reports and various registers;
- meetings, formal or otherwise; and
- anything in print or on the web, no matter how trivial it might seem at the time.

However, when you disclose information (such as showing your work to prospective financiers or manufacturers) using the protection of a valid confidentiality agreement, this is not regarded as a public disclosure, and the information would not be regarded as being in the public domain.

How does an obligation of confidentiality arise?

The obligation may arise by an agreement between two or more parties. It may also arise if you give prior notice to anyone you would like to discuss your information with. It may also be imposed by law. In more explicit terms, the obligation of confidence can arise via:

a) Contractual provisions as to confidentiality
   Parties to contracts are free to make whatever confidentiality provision is felt to be appropriate in relation to information passing between them. In some cases, a person may be under a contractual obligation not to use or disclose information (for example, this is sometimes stated in employee contracts if the employee is working with sensitive or commercially-valuable information). In many cases the obligation of confidentiality will be implicit rather than explicitly stated, since many contracts can only operate if information passed under their arrangements remains confidential

b) The nature of the relationship between the parties
   In some cases, an obligation of confidence arises as a result of the special relationship that exists between the parties. More specifically, an obligation of confidence might exist as part of what the law terms a 'fiduciary' relationship, in which one party has placed complete trust in the other. For example, the relationship between a lawyer and her/his client is a fiduciary relationship, as is the relationship between business partners. The law of confidence can be seen as giving rise to fiduciary duty: a duty to act in good faith, and not to disclose or misuse confidential information.

   Where a fiduciary relationship exists, it imposes a strong obligation on the recipient of confidential information to act in the interests of the person or people to whom she/he owes the duty, even where this conflicts with

her/his own interests. An example often given is of a lawyer who discovers information about an investment opportunity because of work carried out for her/his client. In such a situation, the lawyer may not take advantage of this opportunity without the client's consent.

A further example which is likely to be of great relevance to creative businesses is a situation in which sensitive information (such as unique designs or prototypes) is passed between the parties already in a close business relationship, such as in a meeting to discuss licensing or manufacturing. As such, information that is passed between the parties in such a relationship is likely to be regarded as confidential in the eyes of the law.

c) The manner of communication
In some cases, an obligation of confidence may arise from the way information is communicated between the parties. In these circumstances, the test for a duty of confidence is to ask whether the recipient could have been expected to have realized automatically that the information was given to them in confidence. Judging this depends on the specific facts of the case. Perhaps the most straightforward situation is where a party clearly expresses that the information is confidential. Such a statement makes it difficult for the recipient to argue to the contrary later on. Whilst a spoken statement may achieve this, a written statement is preferable as you may need it for the purposes of evidence later on.

The fact that confidential information is made difficult to access (for example releasing a digital document in encrypted form only) is enough to impose an obligation of confidence.

d) The circumstances
An obligation of confidence may also be inferred from certain circumstances, such as:

1) Where a person blurts out the information in public. In this case, there would be no further obligation to keep that information confidential as it could then be considered in the 'public domain'. Equally, where information is disclosed in an informal, social setting, no obligation of confidence could be claimed.
2) Where a person reveals information to someone for a specific purpose, it will give rise to the obligation that the information must be used solely for that purpose.

How can I protect information that I consider confidential?

If you want to keep information confidential, you should use a contract which clearly stipulates that the information in question is not to be passed beyond the parameters stated in the contract. The best way to do this is to sign a 'confidentiality agreement' with anyone to whom any confidential information is disclosed.

What is a confidentiality agreement?

A confidentiality agreement (often called a 'non-disclosure agreement') is a document that, when signed, will allow you to discuss confidential information with other interested parties. The agreement legally binds those parties to keep the information confidential, and not to disclose it to anyone else. Confidentiality agreements are particularly useful in situations in which you need to disclose information in order to seek financial backing. Using a confidentiality agreement means that no-one present within such discussions can discuss your work and ideas with anyone else without gaining your consent.

Why should I use a confidentiality agreement?

A confidentiality agreement can act as a deterrent against unauthorised use or disclosure of your information. It imposes a legal obligation of confidence on the recipient of the information, and provides you with a basis for a legal action (such as an injunction) for breach of confidentiality should the recipient breach the agreement.

What should be included in a confidentiality agreement?

A confidentiality agreement should give the reason for the disclosure of your information (such as a meeting to discuss finance). It should also clearly state that the recipient is not permitted to use the confidential information for any purpose except the one defined in the agreement.

The terms of any confidentiality agreement should cover the following points:

1) Definition of confidential information
   The most important part of any confidentiality agreement is the definition of the information that is to be kept confidential. Ideally, the contract should set the scope of information covered by the agreement using terms which are as specific as possible. A specific definition will accurately define the information which has the 'quality of confidence'. For example, a designer should ensure that the description covers any disclosures made as part of the creation of the work, including the process through which the design was created, the materials used in making the design, and the finished design itself. In the case of software, the description should include relevant techniques, the source code, the object code, the finished program and any other information that the developer wants to protect.
2) Explanation of the purpose for disclosure
   Confidential information should only be revealed to the intended recipient for a specific purpose. The confidentiality agreement you use should clearly set forth what this purpose is. For example, it may be 'for the purposes of discussing appropriate marketing and distribution' for your product or design.
3) Disclosure
   A disclosure provision will usually state that the recipient's right to receive the information depends on them agreeing to keep it confidential. Such a clause is used to identify the information that will be disclosed. Many confidentiality agreements do not have a disclosure provision. If such a

provision is used you need to carefully consider its wording as it will define the specific information which is to be treated as confidential.

4) No disclosure
   This means that the recipient must agree not to disclose any information to anyone else. The effectiveness and usefulness of your confidentiality agreement will be controlled to a great degree by the extent of the 'no disclosure' provision.
   a) whether or not to include a clause stating that the recipient of the information will use their best efforts to ensure the information remains confidential (rather than making them responsible for the information being made available to the public in any circumstances);
   b) whether to limit access of the confidential information to employees of the recipient who ‘need to know’ the information to carry out their jobs; and
   c) whether the recipient should merely agree to protect your confidential
   d) information in a manner similar to the way the recipient protects her/his own confidential information.
5) No use
   This clause should state that the recipient will not use the information for any purpose other than that set forth in the agreement.
6) Limits on the information deemed confidential
   Practically every confidentiality agreement puts some limits on the type of information that will be deemed confidential. For instance, if the recipient already knew the information before you revealed it to her/him, or if the information was revealed to the recipient by a third party, that information will not be treated as confidential under your agreement. Other possible limits include information that becomes publicly known, information that is requested by a government agency, or information that has been independently developed.
7) Term
   This clause describes the length of time that the confidential information should be protected, and Is often an extremely important element within a confidentiality agreement. The term *must* be long enough to protect your interests as the information holder. Nonetheless, it should not unduly burden the recipient, as covered in more detail below. A typical term would last one or five years; nevertheless the term can last indefinitely.
8) Other provisions
   Other provisions that are commonly found in confidentiality agreements include:
   - a provision allowing the remainder of an agreement to stay in effect even if a portion of the agreement is found to be unenforceable;
   - a provision stating that the agreement is binding on anyone who takes over the business;
   - a provision calling for a return of confidential materials from the recipient;
   - a provision specifically specifying that you own all confidential information disclosed;

- a provision specifying that disputes should be arbitrated; and
- a provision governing the controlling law for the contract, such as, for example, the laws of England and Wales.

How long will a confidentiality agreement last?

If you have used a confidentiality agreement, the length of time the duty of confidentiality lasts for can be included in the agreement. However, you should bear in mind that by creating an unnecessarily long term for the confidentiality to last, you may create an unfair contract term which the other party may later be able to dispute successfully in a court of law.

Are third parties bound by a confidentiality agreement?

The obligation of confidence binds the person to whom the information is confided (i.e. the recipient of confidential information). Difficulties may arise when a person who agrees to the terms of a confidentiality agreement passes confidential information to persons who did not sign the agreement (who would be called the 'third party'). In this situation, the existence of a duty of confidentiality will mostly depend on the relationship between the initial recipient and the third party. This can be difficult to assess. The best practice is to set out in the confidentiality agreement that any further disclosure of the information must be subject to a further confidentiality agreement. However, it is likely that a third party recipient who knows that information is passed to him in breach of a duty of confidence would be held liable to keep the information secret.

When is duty of confidentiality breached?

The duty of confidentiality is broken if the recipient of confidential information, uses the information for her/his own benefit or discloses it to any other person without your consent. It is considered irrelevant if the recipient claims that the use or disclosure was innocently made, for example, if it is claimed that the information was given to the recipient in confidence.

What happens when confidence has been breached?

The only legally acceptable defences to breach of confidence are:

a) to deny that the information was confidential; and
b) to claim that use or disclosure of the confidential information was justified.

Consent to the use or disclosure of information may arise through a specific licence or from a release from liability. If this is the case, the information cannot be considered to be confidential, and the recipient was not bound by a duty of confidence.

Disclosure may be justified where it is in the public interest (for example to disclose a wrongdoing or injustice.) This may justify disclosure to law enforcement or other authorities, or possibly to the media where the information relates to wrongdoing by authorities or other organisations. However, commercial exploitation of the protected information can never be justified in a court of law.

What can I do if the recipient breaches their obligation of confidentiality?

If you have passed information on in confidence following all the rules outlined about, but the recipient discloses the information, what can you do? In this case, a court of law may award you an injunction which forces the person who acts in breach of a duty of confidentiality to put a stop to a future breach of confidence. For example, this can be done by the court restraining publication or use of the information, or requiring that the person acting in breach of the duty returns the information (if it is in physical form) back to you. A court may also award you damages for losses caused by the disclosure of the information. Alternatively, you may be entitled to any profits the recipient has already made from your information.

What about email and confidentiality?

Email is not a confidential medium and sending confidential information via email should be discouraged. However, often this is not practical from a commercial standpoint. Therefore you should include a confidentiality statement in all your email messages. This is often found at the end of email messages (although from a legal perspective it is considered better practice to include it at the start of an email.)

A simple example of such a confidentiality statement is:

'The information in this e-mail is confidential and is intended solely for the addressee. If you are not the intended recipient please contact [name, address and telephone number of the sender of the email message]'.

What happens if I don't protect my ideas using the law of confidence?

If the law of confidence does not cover your ideas, you will not be able to prevent others from stealing your ideas. As can be seen from the Own It copyright factsheet, copyright can only apply to ideas expressed in a material form (for example, a written description or a prototype) and before the idea is expressed in this way it will not be protected. This means that anyone could use your idea without paying you anything or giving you any credit. As such, the law of confidentiality is vital to protect new ideas.

Glossary of Terms

Breach of confidence
Using or disclosing confidential information without the consent of the person you got it from.

Disclosure
Revealing the information received to another person or to the public without consent.

Encrypted
Information (often within computer files) that can only be accessed with a special code.

Injunction
An order made by a court forcing one party in a case to do something, or preventing them from doing something.

Third party
Where there is an agreement between people and/or organisations, a person and/or an organisation who has not agreed to the terms of that agreement is called a 'third party'.

Own It – the Creative London Intellectual Property Advice Service

Advice, events and information for London's creative people on:

- Design rights
- Patents
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- Confidentiality agreements
- Licensing
- Royalties
- Contracts
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