

Intellectual Property: Using Confidentiality Agreements

By The Sloan Brothers - [StartupNation](#)

Related Articles in: [Legal > Patent & Trade Law](#)

The best way to protect your idea is not to disclose it at all. However, that's just not practical if your intention is to profit from your great idea. So at some point, you will be faced with that most frightening moment of actually disclosing your idea to one or many parties, each who represent a threat to tell the idea to others, or worse yet, to copy your idea and profit from it themselves. Using Confidentiality Agreements or Non-Disclosure Agreements (a.k.a. "NDA"s) are a step you can take to provide some level of protection and comfort. But frankly, NDAs are hard to enforce. Litigation is expensive and there are so many grey areas involved in making a case. The best approach to disclosing an idea is to get a signed NDA from the party in combination with the following measures:

1. Disclose your idea only reputable third parties. Do your homework on the person or company to whom you'll be disclosing before actually disclosing any information.
2. Disclose information in levels of detail. Start with a general disclosure first. If the party is interested at the completion of each level of disclosure, continue with the next level of detail, and so on. In the first most general disclosure, do not disclose the essence, the "secret sauce". Rather, first provide information about what the invention does, who the market is, how big the opportunity might be, and even discuss the nature of the relationship you are seeking with the company. If the party to whom you are disclosing your idea indicates, after the general description that they are not interested, then you have prevented an unnecessary disclosure of the essence of your invention.
3. In a similar manner, make sure you interview the third party before disclosing your idea to determine whether or not you will want to have them as a licensee of your invention. You may think that a particular company for example is a good choice to license your invention to but may find out after asking some key questions that indeed they are not. If you learn this prior to a detailed disclosure, again you have prevented an unnecessary exposure of valued information.

Many big companies will not use an NDA prepared by you and instead will only use their own. This can be just fine as long as the basic and generally accepted points are covered in the agreement. The most significant key points to protect you, the disclosing party, are as follows:

- the receiving party agrees not to make, use, or sell the disclosed information without first entering into an agreement with you to do so.
- the receiving party agrees not to disclose the information received to any third party without your prior written consent.
- the receiving party agrees to return any and all materials and information related to the disclosed information to you within a stated period of time.
- the receiving party agrees not to duplicate, copy or replicate in any manner the information and materials provided.

Be prepared to accept protections for the receiving party also. The following protections for the receiving party are generally deemed common and acceptable and, when applicable, releases the receiving party from certain or even all of the requirements of the NDA in cases as follows:

- the information at the time of the disclosure is in the public domain;
- the information becomes part of the public domain following the disclosure by any means other than a breach of this agreement by the receiving party;
- the information was known to the receiving party prior to receipt of it, provided such prior knowledge can be adequately substantiated;
- the information becomes known to the receiving party from an unrelated source without any restrictions on use and disclosure;

While the NDA is one component of a strategy to protect your idea, after reading the list of generally accepted protections for the receiving party, you can see why it's important to protect your disclosures in ways beyond simply relying on the NDA itself.

Our Bottom Line:

Confidentiality agreements are a significant part of an overall intellectual property protection strategy. However, in order to ensure that you give yourself the best possible protection, they should be used in a strategic approach to disclosure that includes other measures. And always use an agreement drafted by a skilled intellectual property attorney.

Note: The information provided above is not intended to be used in an actual agreement, rather it is intended for educational purposes only. Agreements that are intended to be used between the parties should be drafted by a reputable attorney skilled in the area of intellectual property law.

StartupNation provides expert advice, community forums and [resources for entrepreneurs starting a small business](#), from business plan and life plan development to marketing and sales techniques.

