

# Development of Law on Trade Secret Protection in China

Hanpo Wang, Beijing Huayi Law Firm

## I. Significance of Strategy for Trade Secret Protection

Trade secret protection is an eternal topic both in competition law and intellectual property law. At all times and in all over the world, as long as human being have innovative ideas and the competitive drive, obstacle factors, such as greed and grasping, is inevitable. Maybe, it is impossible to completely eradicate this phenomenon; however, we should try our best to curb its spreading and its impact on our economy. The only effective way to do so is law.

*Anti- unjust Competition Law* in 1993 is a milestone in trade secret protection in China. Before that, there was lots of confusion in the definition, standard and punishment of trade secret protection, for example the mixed use of such terms as technical know-how, patent technology and non-patent technology. The legal system of trade secret protection started to integrate since the promulgation of the *Anti- Unjust Competition Law*. It not only set clear administrative protection by relevant authorities, but also laid a foundation for civil protection and criminal protection. Over the past 20 years, no matter how fierce the Sino-US negotiation on IP was, how complicated the process to sign

TRIPS with WTO was, and how complexly IP laws amended and revised every seven or eight years, only *Anti- unjust Competition Law* did not change. Facts show that China's *Anti- unjust Competition Law* is a good law, in according with international practice and China's national condition.

We have to admit that in some area, some region or some time, there are considerable trade secret infringement cases. *Trade secret law* cannot entirely prohibit trade secret infringement, just like there is no country dare to claim that after promulgated the *Criminal Law*, criminal cases have been eliminated. Some criticized that China's economic development violated their intellectual property right. However, as a matter of fact, China's economy and market is the biggest victim of trade secret infringement. From traditional techniques such as cloisonné and rice paper to recent Rio case, we can say that tort cases of trade secret are terrible tragedies.

China today has become World's second largest economy. This achievement is resulted from fair competition in the international economic arena, from the effective operation of China's legal system, and from strict law enforcement. If there is a "Chinese Model" for trade secret protection existed, which can be summarized as integrating with international standards; taking the initiative; administrative methods,

judicial methods, comprehensive management; case study as basis; and strategic promotion.

## **II History of Law on Trade Secret Protection in China**

Trade secret is a magic key for competition in the market, an important intangible asset, and a special kind of intellectual property rights. Trade secret protection has a very long history. It should be one of the earliest protections to intellectual work and competition in market. In China, trade secret was legally protected since the reform and opening up policy. It can be demonstrated as follows:

1. *Regulation on Joint Ventures Income Tax of People's Republic of China* in 1980 stipulated that technique know-how can be invested. In 1980s, *Detailed Rules for the Implementation of the Regulations on Administration of Technology Import Contracts of the People's Republic of China* defined technique know-how. This had its own historical background: on one hand, there was urgent need for foreign investment; on the other hand, there was no Patent Law in China.

2. Intellectual property rights were provided in Section 3, Chapter 5 of *General Principle of Civil Law* of People's Republic of China in 1986. IP included copyright, patent right, trademark right, and right of discovery and so on.

3. Non-patent technology was provided in *Technology Contract Law*. *Technology Contract law* and its *Rules for Implementation* did not give

the definition of non-patent law, but provided the scope of non-patent technology. In Contract Law of People's Republic of China, non-patent technology renamed as trade secret.

4. *Civil Procedure Law* in 1991 first used the phrase "trade secret" as a law term.

5. In Article 4 of *Sino- US Memorandum of Understanding on Intellectual Property Right*, the provision said: (1) For the purpose of ensuring effective protection against unfair competition as provided for in Article 10 of the Paris Convention for the Protection of Industrial Property, the Chinese Government will prevent trade secrets from being disclosed to, acquired by, or used by others without the consent of the trade secret owner in a manner contrary to honest commercial practices including the acquisition, use or disclosure of trade secrets by third parties who knew, or had reasonable grounds to know, that such practices were involved in their acquisition of such information. (2) The term of protection for trade secrets shall continue so long as the conditions for protection are met. (3) The competent authorities of the Chinese Government will submit the bill necessary to provide the levels of protection specified in this Article to its legislative body by July 1, 1993 and will exert its best efforts to enact and implement this bill before January 1, 1994.

6. The Article 10 of *Anti-unjust Competition Law* in 1993 provided the definition of trade secret and the types of infringement. *Anti-unjust Competition Law* is the most important law on trade secret protection. One thing should be noted is that there are several branch laws growing off the *Anti-unjust Competition Law*: they are branch of Labor Law, branch of science and technology, branch of State secret protection and branch of company law.

7. *Labor Law* of 1994 and *Labor Contract Law* in 2007

8. *Science and Technology (S&T) Progress Law* in 1993

9. *Law on Promoting the Transformation of Scientific and Technological Achievements* in 1996

10. *The Law on Guarding State Secret* in 1988

11. In *Commercial Banking Law of the People's Republic of China*, Article 84 writes :where an employee of a commercial bank seeks for or accepts bribery by availing himself of his position or accepts discounts or service charges of any kind as in violation of state provisions, which constitutes a crime, he shall be subject to criminal liabilities according to law; or shall be imposed disciplinary punishment if his acts are not serious enough to constitute a crime. Article 149 of *Company Law of People's Republic of China* provides no director or senior manager may have any of the following acts:...(7) Disclosing the company's secrets without permit;(8) Other acts that are inconsistent with the obligation of

fidelity to the company. The income of any director or senior manager from any act in violation of the preceding paragraph shall belong to the company.

12. *Criminal Law of People's Republic of China*, Article 219 is an important mark of trade secret protection development in China.

13. A number of local statutes, departmental regulations and judicial interpretations

-- *Provisional rules on Resignation of Technician and administrative Staff working in public institute* in 1990, issued by Ministry of Personnel;

-- *SPC Judicial Interpretation on Several Issues regarding Hearing of Science and Technology Disputes* in 1995

-- *Regulation for the Protection of Technical Secret in Shenzhen* issued by Standing Committee of Shenzhen Municipal People's Congress in 1995

-- *Provisional Rules on Talent Market Management*, issued by Ministry of Personnel in 1996

-- *Regulation for the Protection of Technical Secret in Zhuhai* , issued by Standing Committee of Zhuhai Municipal People's Congress in 1997

-- *Regulation for the Protection of Technical Secret in Guangdong Province* issued by Standing Committee of Guangdong People's Congress in 1999

-- *Regulation for the Protection of Technical Secret in Ningbo* issued by Standing Committee of Ningbo Municipal People's Congress in 2000

-- *Regulation of Shanghai Municipality on Labor Contract* in 2002

-- *Regulation for the Protection of Technical Secret in Zhejiang Province* issued by Standing Committee of Zhejiang People's Congress in 2000 and *Measures for the protection of technical secret in Zhejiang Province* issued by Zhejiang government in 2005

-- *SPC Judicial Interpretation on Several Issues regarding Hearing of Anti-unjust Competition Case in 2006*. China should pay attention to the law enforcement of *Anti-monopoly Law*, giving a fair and free environment to companies for its innovation and development.

The latest *Interim Provisions on the Protection of Trade Secrets of Central Enterprises*, issued by State-owned Asset Supervision and Administration Commission of State Council. It is comprehensive, but it is too similar to *Trade Secret Law* made before.

### **III. Trade Secret---Hidden Weapon in Competition**

There is a saying: better the devil you know than the devil you don't. When coming to the unavoidable confrontation and stalemate, swordsman can get the final victory by using hidden weapon. We can find similar situation in almost every kongfu fiction. In the increasingly fierce market competition, trade secret is a hidden weapon of the intellectual property innovation game. In the arsenal of IP, there are many weapons, such as patent, trademark, copyright, computer software, new varieties of plant and so on. Meanwhile, trade secret is the most effective hidden weapon in IP arsenal.

Trade secret enjoys a long history. Because of increasing need, market expansion, intensifying competition and difficulty in trade secret protection, people are tending to seek state power to protect trade secret; therefore, the modern IP law was born. Nowadays, with the rule of international IP convention, such as WIPO and TRIPS, and continuing effort of amendments and enforcement of IP laws and regulation, our government, public organizations, business entities and individual citizens gradually know the concept of IP, the necessity to protect IP, and legal consequences of violating IP laws. However, how to protect IP and apply the law is another story, rarely known by people.

In the arsenal of IP, all the IP rights such as trademark, copyright and patent, are expressed. However, trade secret is totally different. It is

implied. Your counterparts do not know what you have, and you will never let them know that. You cannot limit the development of your competitor's trade secret and no one can limit anyone. Trade secret as hidden weapon is neither unique, nor exclusive. Trade secret, as a special kind of information, it must be confidential and also can be asymmetric. That is exactly the value of trade secret.

As a hidden weapon, trade secret has two features---self-management and self-protection. Of course, as a kind of IP, trade secret should be legally protected. However, the precondition for legal protection is that the holder has already adopted necessary self- protection measures. The form of protection is different from other kinds of IP. Take patent for example. To some extent, patent is exchanging technical disclosure for legal monopoly. Trade secret is an afterward protection, because state power did not know the secret as well. According to the rule of game, player can use hidden weapon, while the judge have no way to know what kind of hidden weapon players are using. Only when the weapon stolen by the opposite side, can the judge sort it out. Of course, it is no longer a hidden weapon anymore. If the rival gets the hidden weapon legally, the rule should permit. However, the rule does not allow any player steal or spy others hidden weapon. The secret holder should appeal to judge to cease the acts of infringement and punish the rival. By then, the judge will investigate whether your hidden weapon is unique and

what measures you take to protect it from being stolen. Besides, the hidden weapon should be created by intellectual work. If you grab a handful of sand to attack opponents readily, the sand is not hidden weapon.

#### **IV. Strengthen Law Enforcement concerning Trade Secret**

##### **Protection**

A trade secret is information that is not generally known to the public, confers some sort of economic benefit on its holder (where this benefit must derive *specifically* from its not being generally known, not just from the value of the information itself); and is the subject of reasonable efforts to maintain its secrecy. Therefore, I think trade secret protection has the following features:

##### **1. Instability of existence**

Unlike patent, copyright and trademark, there isn't a clear time for the birth of trade secret. Trade secret should be protected by the holders. Besides, trade secret should also exist in contractual relationship of trade secret transfer and labour relation of secret related personal turnover. Confidentiality is the basic condition for trade secrets. However, in special occasion, such as transaction and judiciary, trade secret has to be told to specific group of people. It only needs to be proven after litigation.

“Dead on arrival” may be the best word to describe the characteristic of trade secret.

## **2. Non-exclusion of rights**

Legally, ownership is exclusive. When one subject enjoys ownership of one thing according to law, other subjects have no right to the thing.

Patent is an example. However, trade secret is different. If the trade secret is not known to the public, both sides can keep their own trade secret, even if those two trade secrets have the same content, even if the trade secret is generated from reverse engineering and even if one trade secret is far earlier than the other one.

## **2. Diversity of forms**

Legal manifestation of trade secret is information, including business information and technology information. It covered very broad range and is consisted with varied forms. *Interim Provisions on the Protection of Trade Secrets of Central Enterprises* provided the extent of trade secret protection, which includes business information, such as strategic planning, management approaches, business mode, mergers & acquisitions, equity transaction, financial information, financial tactics, resource reserves, client information, and tendering& biding, and technical information such as design, program, formula, production process, and know-how. This list shows the board range and varied forms of trade secret. Meanwhile, trade secret should be specific. Most part of

technology should be patenting, with only few nodes which is confidential. Those nodes are trade secret.

### **3. Self-effectiveness of protection methods.**

Another basic condition for trade secrets is that the holder of trade secret has taken confidentiality measures. In legal practice of China, many confidentiality measures turn out to be a mere formality without a targeted and efficient approach. The judiciary only checks whether the holder takes confidentiality measures or not, while neglecting the effectiveness of the measures. The trade secret protection is premised on self protection. Otherwise, what's patent system for?

Thank You!