

# Discussion on the Protection System on Trade Secrets in China

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**Abstract.** This paper introduces the general situation of trade secrets, through the analysis of the present situation of the international trade secret legislation and the related laws of China's trade secret protection on listing in table 2, analysis of tort and tort liability to get the strategy of the enterprise to better manage the business secret in the current state of the law. This paper will discuss the prevalent right of trade secret, the right of privacy, the public right to know, and give suggestions on three rights to the separate legislation of trade secret in China.

**Keywords:** Trade secret, business, law, enterprise management.

## 1 Overview

With the rise of technology economy and knowledge economy, the value of trade secret as an intangible property is becoming more and more important, and its role in the development of modern economy and technology is becoming more and more important.

Trade Secrets refer to the technical information and business information that is unknown to the public and can bring economic benefits to the right holder. Trade secret is the property right of an enterprise. It is related to the competitiveness of an enterprise and it is of vital importance to the development of an enterprise.

In the field of economics and law, the research on trade secret system is significantly less than other forms of intellectual property system such as copyright and patent right. At present, the dispute on social market is that the commercial secret which is directly related to consumer information and knowledge should not be regarded as the privacy of the enterprise, and the consumer has the right to know the whole truth of the consumer goods, and the intensity of protection on commercial secrets should be greater than the copyright and patent system. However, the current trade secret system has greatly reduced the welfare level of consumers and the whole society.

## 2 Literature Review

Trade secret is a kind of commercial competitive intangible asset. If it does not provide enough protection for intangible assets, especially intellectual property of creation activities, society will not engage in creative labor. The property right of trade secrets is granted to the developers of trade secrets, and there is no difference between the legitimate income obtained from their trade secrets and from the copyright and patent protection. (Yongcheng Zheng, 2018)

With the acceleration of world economic integration and the increasingly frequent international economic and trade exchanges, international economic exchanges, scientific and technological exchanges and cooperation have raised the urgent requirement to protect trade secrets. At present, international organizations have formulated a series of conventions or agreements on the protection of trade secrets.

The international Protection of commercial secrets as a part of the Protection of industrial Property rights can be traced back to 1883--Paris Convention for the Protection of Industrial Property, which was signed on March 20, 1883 in Paris, and took effect on July 7, 1884.

TRIPS agreement was originated from the concept of the protection on undisclosed information, although it did not involve the business secret concrete definition and protection. However it is the definition of the concept of business secret protection in the broadest sense of the international treaty. The international bureau of the world intellectual property organization (WIPO) prepared *Anti Unfair*

*Competition* in international general in 1994-1995 and published them in the publication of WIPO publication 825 (e) in 1996.

Countries around the world also have special legislations regarding on trade secrets as shown in Table 1

**Table1.** Countries that legislates on trade secrets separately

Time	Country	Name
1979	America	Uniform of Trade Secret Act
1981	England	Draft on the protection of the right to trade secrets
1987	Canada	Uniform Trade Secret Act
1990	Sweden	Trade Secret Act
1995	Taiwan	Business Secret Act

This paper studies the relevant legislation system of commercial secrets law in China and puts forward some suggestions on the management of commercial secrets in the current commercial secrets legislation system. This paper discusses the hot right of trade secret, the right of privacy, the public right to know, and gives suggestions on three rights to the separate legislation of trade secret in China.

### 3 Legal Protection System of Trade Secrets in China

#### 3.1 Trade Secrets Related Legislation in China

**Table2.** Summary of relevant laws and regulations on the protection of trade secrets in China

Classification	Name	Clause
Constitution	The constitution of the People's Republic of China	20 in 2004 revision
Laws	The People's Republic of China against unfair competition	10;20
	Contract law of the People's Republic of China	42;43;60;92
	Law of the People's Republic of China on lawyers	33;40
	Law of the People's Republic of China on import and export commodity inspection	10;37
	Law of the People's Republic of China on the transformation of scientific and technological achievements	27;28
	Civil procedure law of the People's Republic of China	134
	Labor law of the People's Republic of China	22;102
	Criminal law of the People's Republic of China	219
Administrative rules	Regulations of the People's Republic of China on the administration of technology import and export	2
Regulation	Notice on strengthening the protection of trade secrets of state-owned enterprises	Part 1
	Certain provisions on prohibiting the violation of trade secrets	2
	Replies to questions raised by the state administration for industry and commerce on the components of trade secrets	Paragraph 1
	Measures for compensation in violation of labor law related to labor contract provisions	5
	Letter of the general office of the ministry of labor and social security on the infringement of trade secrets in the labor dispute case	2
Judicial interpretation	Summary of several issues concerning the examination of disputes over technical contracts	Part 2
International treaty	Agreement on trade-related intellectual property rights	Section 7

There is no specific separate legislation of trade secrets, in addition to joining the business secrets of the

generalized international treaty in China. But some of laws and regulations also widely reflect the generalized protection of commercial secrets in China. The relevant laws and regulations on the protection of trade secrets in China are summarized in table 2.

Clause 20 in the constitution of the People's Republic of China in 2004 revision :the award of scientific research results and technological inventions and creations; In The People's Republic of China against unfair competition, Clause 10 first: Three kinds of prohibitive norms about violation of commercial secrets are listed; second: An explanatory specification for the definition of unfair competition; Clause 20: liability for damages arising from infringement of trade secrets; In Contract law of the People's Republic of China, Clause 42, 43: Liability for contractual negligence; Clause 60 second: regarding collateral obligations; Clause 92: obligations under subsequent contracts; Chapter 18, section 2: the transfer of technical secrets in technology transfer contracts; In Law of the People's Republic of China on lawyers, Clause 33: lawyer shall keep the provisions on the trade secrets of the parties known in his practice activities; Clause 40 sixth: Administrative responsibility for disclosing the commercial secrets of the parties; In Law of the People's Republic of China on import and export commodity inspection, Clause 10 second: The staff of the state commodity inspection authorities and the commodity inspection authorities shall, in fulfilling their duties of inspecting import and export commodities, be obliged to keep confidential the trade secrets they have known; Clause 37: Administrative and criminal responsibility shall be borne by the staff of the state commodity inspection authorities and the commodity inspection authorities for disclosing the trade secrets they have known; In Law of the People's Republic of China on the transformation of scientific and technological achievements, Clause 27: Complete units and other units cooperation in scientific and technological achievements transformation of scientific and technological achievements, shall enter into an agreement on commercial secrets of the conservative and intermediaries in the business of acting as agent or intermediaries on providing knowledge of trade secrets should bear the obligation of confidentiality provisions; Clause 28: the establishment of a confidentiality system within an enterprise; In Civil procedure law of the People's Republic of China, Clause 134 second: A case involving trade secrets may be tried in private if the parties apply for a closed trial; In Labor law of the People's Republic of China, Clause 22: The parties to a Labour contract may agree to keep the business secrets of the enterprise; Clause 102: If the violation of confidentiality in the labor contract causes losses to the enterprise, it shall be liable for damages; In Criminal law of the People's Republic of China, Clause 219: Criminal responsibility for the offence of violating trade secrets; In Regulations of the People's Republic of China on the administration of technology import and export, Clause 2 second: Provisions on the transfer of technical secrets; There is content about the definition of correct understanding of trade secrets and reasonable determination of the scope of trade secrets in Notice on strengthening the protection of trade secrets of state-owned enterprises; There is a specific provision that has been made for the violation of trade secrets in Certain provisions on prohibiting the violation of trade secrets. There is content about constitutive elements of trade secret that are stipulated in Replies to questions raised by the state administration for industry and commerce on the components of trade secrets; In Measures for compensation in violation of labor law related to labor contract provisions, Clause 5: If the employee violates the confidentiality agreement in the labor contract and causes economic losses to the company, he shall pay the compensation fee to the company in accordance with the provisions of article 20 of the anti-unfair competition law; Clause 6: The employing company shall be jointly and severally liable for the economic losses caused to the company that originally hired the workers due to the acquisition of trade secrets by employing the workers who have not yet terminated their labor contracts. In Letter of the general office of the ministry of labor and social security on the infringement of trade secrets in the labor dispute case, Clause 2: Due to the fact that laborer fails to perform content of commercial secrets protection in the contract, causes commercial secrets infringement and labor dispute, both parties shall meet the labor dispute arbitration committee for arbitration, and the arbitration commission shall accept and make a decision, according to relevant regulations and the stipulations of the labor contract. There is about on judicial protection of trade secrets in Summary of several issues concerning the examination of disputes over technical contracts.

### 3.2 Tort and Liability of the above Clause in China

According to the above provisions on commercial secrets, this paper summarizes the legal tort behavior and tort liability of commercial secrets in detail, as shown in table 3.

**Table3.** Commercial secrets related legal tort behavior and tort liability provisions in China

Name	Clause	Tort behavior	Tort liability
Law of the People's Republic of China against unfair competition	10	1. Theft, inducement and coercion; 2. Disclosure; 3. Breach of agreement	A fine of more than 10,000 RMB but less than 200,000 RMB
Contract law of the People's Republic of China	43	Disclosure or improperly used	The amount of compensation for losses shall be equal to the losses caused by the breach of contract, including the benefits gained after the performance of the contract
Law of the People's Republic of China on lawyers	48	1. Accept the commission privately; 2. Refuse to reply after entrustment; 3. Seek the disputed rights and interests of the parties; 4. Disclosing trade secrets and privacy	To impose a fine of not more than 10,000 yuan; Where there is illegal income, the illegal income shall be confiscated. If the circumstances are serious, he shall be given a punishment of not more than three months but not more than six months on stop the business
Law of the People's Republic of China on import and export commodity inspection	10	Confidentiality obligations	If there is any illegal income, the illegal income shall be confiscated. Whoever commits a crime shall bear criminal responsibility according to law
Law of the People's Republic of China on the transformation of scientific and technological achievements	11, 134, 156	Confidentiality obligations	Revoke business license. Those who have caused economic losses to others shall bear civil liability for compensation according to law. Whoever commits a crime shall bear criminal responsibility according to law
Labor law of the People's Republic of China	22	Keep business secret	None
Criminal law of the People's Republic of China	219	1. Theft, inducement and coercion; 2. Disclosure; 3. Breach of agreement	It will be sentenced to fixed-term imprisonment of not more than three years or criminal detention and to be fined concurrently or separately; Whoever causes especially serious consequences shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years and shall also be fined
Regulations of the People's Republic of China on the administration of technology import and export	2	Confidentiality obligations	If the case constitutes a crime, he shall bear criminal responsibility according to law. If it is not enough for a criminal offence, administrative sanctions shall be imposed according to law
Certain provisions on prohibiting the violation of trade secrets	3	1. Theft, inducement and coercion; 2. Disclosure; 3. Breach of agreement 4. Allow others to use	A fine of between 10,000 RMB and 200,000 RMB shall be imposed
Summary of several issues concerning the examination of disputes over technical contracts	83	Confidentiality obligations	None
Measures for compensation in violation of labor law related to labor contract provisions	6	Get trade secrets	The present employment company shall be jointly and severally liable for violation of trade secrets. Its share of joint and several compensation shall not be less than 70 percent of the total economic loss caused to the original employing company

## 4 Hot right of Trade Secret

For the world famous brand Coca-Cola, as we all know, in addition to its public main ingredients (including: sugar, carbonated water, caramel, phosphoric acid, caffeine and "dead" coca leaves, etc.), the mysterious ingredients which accounts for less than 1% are protected by the law system of "Trade secrets (the Trade Secrecy)", that is to say, although countless consumers all over the world are drinking Coca Cola every day, but none of them has the right to ask the exact composition of the magic that accounts for less than 1% in the coke ingredients, just for the sake of profits of large companies, it is hidden artificially. Therefore, the privacy right of enterprises and the public right to know in trade secrets have attracted worldwide attention. (Liangrong Hu, Xiaohui Yi, 2013)

### 4.1 The Right of Privacy

One of the most common view of defending trade secret law is: to maintain commercial secrets is in the maintenance of the privacy rights of trade secret owners, violating commercial secrets is a violation of trade secret owners' right to privacy.

However, some scholars disagree with this view: "business secrets cannot be justified on the basis of privacy. A company is not an individual and therefore does not have the personal characteristics that privacy is intended to protect.

Bone (1998) summarized the view against the "privacy theory" from following three aspects: (1) the opponents believed that there was no general spiritual privacy right. All or most of the important interests involved in privacy have been included in other rights (such as personal right and property right), and privacy is only a derivative of these rights. (2) even if there is such a general sense of privacy, enterprises as the most common owners of trade secrets should not have such a right of privacy. Enterprises do not have the characteristics of personal freedom related to privacy, nor do they have the characteristics of intimate relationships or emotions related to privacy. As a result, most courts have refused to extend legal privacy rights to businesses, arguing that there is no emotional experience of being offended, emotionally distressed, or humiliated. (3) even if enterprises have the right of privacy, such right of privacy should not include the secrets of commercial or technical information in business activities. Most advocates of privacy associate this right with personal intimacy, which is intuitively obvious. However, enterprise business or technical information protected by trade secret law obviously does not belong to this category, they are not like a personal diary and letters belonging to the said information close relationship, or relationship. Even if the right to privacy can include commercial or technical information of enterprise's secret, the right of privacy is not included in the enterprise which should be included to the market to provide goods or services of or is directly related to the goods or services of content, information and knowledge. In a way, if this is directly related to health, safety and other interests of consumers of information and knowledge can also be classified as the privacy of the enterprise, so the so-called corporate privacy, you must obey the rights of consumers

### 4.2 The Public Right to Know

Enterprises provide goods or services or directly related to the goods or services products in the market, exact content and information was hidden by manufacturer or service enterprises, which should be the most important part of the business secret. (Wang Jun, 2013)

The trade secret law, like the patent law, forbids the free reproduction of "thought". However, it requires knowledge of technical invention patent law and information must be open to the society, which is conducive to the spread of knowledge, and the business is for commercial secrets, relevant knowledge and information is not open to the society. Patent protection has a time limit, and trade secrets are kept secret indefinitely as long as they are not disclosed. Although commercial secret law does not prohibit others in independent development and application of invention, others in the invention have existed as a commercial secret but there are not aware of the commercial secrets of the content on the invention of the resources and engage in independent activities, it is the repeated use of social resources and waste of social resources. (Xu Rui, 2015)

In a fair system, consumers should have the right to know about the consumer goods of all truth,

unfortunately, system of business secret, in fact, deprived of the rights of consumers. It is not hard to see from the above cases that consumers are deprived of this right, so consumers are very worried about health, information security and other aspects.

## **5 The Shortcomings and Suggestions of Chinese Trade Secret Law**

### **5.1 The Problems of Chinese Trade Secret Law**

From the analysis of the above legislation, this paper concludes that there are many problems in the current Chinese trade secret law, for example: the legislative form is scattered and not harmonious; the protection mechanism in the process of litigation is lacking; the protection of commercial secrets and the strength of the tort action still need to be strengthened; the multi-layer legislation coexist, the effect of the law is not good; The constitution of the tort is too strict, the scope of legal protection is limited; the civil relief is too single, the legal relief is slightly thin; The criminal legal norms are too abstract, the operability is not strong; the business secret appellations are not unified, the concept is confused; the main provisions of the commercial secret tort are too narrow; the scope of the protection of commercial secrets is not sufficient; the legislation still has a blank point.

### **5.2 Suggestions on Improving the Legal Protection of Chinese Commercial Secrets**

Accelerate the formulation and improvement of a special legal system for the protection of trade secrets. The establishment of a legal protection system is a long process, from the high point of view of the cost of safeguarding rights, if there is an authoritative third party organization that has a certificate of business secret registration, it can solve this problem well. Business secrets can be classified into two categories: can be patent application and cannot be patent application. Once the trade secret is disclosed, it will no longer be protected.

Improve the relevant litigation procedures of business secrets gradually; The newly revised Patent Law, copyright law and trademark law also increase the content of the pre suit injunction and the prior evidence preservation in the civil procedure, so the system of evidence preservation and the pre lawsuit injunction should be perfected.

Strengthen the punishment to the tort of business secret; First, through the actual measurement of the losses, the new standard of compensation and compensation system is implemented to maximize the losses; Secondly, the system of punitive damages should be gradually established, with a gradual increase in the cost of compensation. By doubling the compensation penalty or increasing the extra compensation system, the tortfeasor pays the victim extra high loss compensation, thus maximizing the loss of the parties, and can effectively reduce and prevent the occurrence of commercial secret infringement.

Increase the rights protection of the right holders; Adopting the definition of connotation, enlarging the scope of protection of commercial secrets, deleting the requirements of practical requirements, expanding the scope of protection of commercial secrets, expanding the subject of commercial secret infringement, and increasing the content of commercial secret rights, etc.

## **6 Business Secret Management Strategy of Chinese Enterprises**

### **6.1 Establish a Business Secret Management System**

In addition to the loss of business secret caused by the right holder's initiative disclosure or accident or infringement, a considerable part of the reason lies in the loss of business secret caused by the right holder's negligence. Therefore, it is a basic work in enterprises to improve internal rules and regulations and implement them. In establishing the system of trade secret, the scope of trade secret should be clearly defined in enterprises. For example, project approval report and implementation report; Production technology and process design; Development plan implementation progress; Product sales customer information and service information; Purchasing raw materials and parts supplier information; Patented technology and other technical information; Management operation and financial financing information belong to the scope of business secrets. The responsible departments of trade secrets, the responsibility of

disclosure and the dispute resolution are all embodied in the system of trade secrets. (Jieming Liu, Zhushun Yang, 2012)

## 6.2 Level Classification of Trade Secrets in Enterprise

After enterprises determine the scope of the business secret involved, dealing with commercial secrets content rules of different level, is mainly determined by the expected size of the enterprise economic benefit, that is, from the perspective of commercial secrets of the practicality, they are divided into several secret levels. Each level of the business secret according to their process needs to complete formalities for examination and approval. The first secret level document should be approved by the chairman. The second secret level document shall be approved by the general manager. The third secret level shall be approved by the department head.

## 6.3 Establish Trade Secret Management Committee

As an element of the trade secret management system, the reasonable establishment of the trade secret management committee is particularly important. Considering the special personnel management is a waste of human resources and physical resources of cash, so in business secret management agencies adopt the way of the management committee to manage the commercial secret to save manpower and material resources. The members of the management committee are composed of employees from departments involved in trade secrets. The employees of each department manage the trade secret work of their department on a part-time basis.

## 6.4 Establish Document Database Authority and Approval Process Management

With the development of computer information network technology, the protection of trade secrets is facing unprecedented new challenges. Especially in modern enterprises, the document database, enterprise mail and so on make the trade secret be always in a dangerous state. It is recommended to use the modern anti-hacker protection program to protect the document database in the document database involving commercial secrets. In the process of using the document database, we should improve the authorization of the use and approval authority of the commercial secret document database, and check and download the approval authorization work.

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