

Determination of "Corresponding Confidentiality Measures" for Trade Secrets

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Abstract: The determination of "corresponding confidentiality measures" in trade secret disputes is a difficult issue in judicial practice, and different courts have inconsistent approaches to it. By analyzing relevant cases and combining with the amendment of Article 32 of the Anti-Unfair Competition Law, this paper argues that the determination of corresponding confidentiality measures can be made from the perspectives of effectiveness, identifiability, and appropriateness, while considering the nature of the carrier and the subjective will of the right holder.

1. Problems Highlighted in Judicial Practice

Trade secret infringement cases are characterized by concealment and complexity. Due to the principle of "who claims, who proves," the right holders of trade secrets are often in a weak position in litigation. Firstly, they cannot provide evidence to prove that the infringer has indeed used their trade secrets. Secondly, if evidence is fully disclosed in litigation, it may lead to a situation where the right holder "wins the lawsuit but loses the value brought by the trade secret." In 2019, the Anti-Unfair Competition Law (hereinafter referred to as the "Anti-Unfair Competition Law") was revised again. One of the highlights of this revision is the provision on the burden of proof for trade secrets. The newly added Article 32 specifically regulates the distribution of the burden of proof in civil trial procedures involving trade secrets.

The first paragraph stipulates the burden of proof regarding the constitution of trade secrets, clearly defining the scope of the burden of proof between the right holder and the accused infringer. The second paragraph stipulates the burden of proof regarding the existence of trade secret infringement acts [1]. The amendment of this article has alleviated the problem of "difficulty in burden of proof" for trade secret holders to a certain extent and strengthened the protection of right holders from a legislative perspective.

The current law does not clearly define whether a trade secret holder has taken confidentiality measures or the specific content of the measures adopted. The Supreme People's Court has provided a judgment framework in relevant judicial interpretations: courts shall comprehensively consider factors such as the characteristics of the trade secret and its carrier, commercial value, identifiability of confidentiality measures, the corresponding relationship between measures and secrets, and the right holder's intention to maintain confidentiality to determine whether the right holder has taken "corresponding" confidentiality measures [2].

Therefore, in specific cases, courts need to analyze the facts item by item based on the evidence

submitted by both the plaintiff and the defendant and in light of the above factors to conclude whether the confidentiality measures are reasonable.

2. Identification of Confidentiality Measures in China's Judicial Practice

Paragraph 1 of Article 32 of the Anti-Unfair Competition Law stipulates: "The right holder of a trade secret provides preliminary evidence reasonably indicating that the trade secret has been infringed." Paragraph 2 further defines the standard of preliminary evidence and lists some circumstances, requiring the right holder of the trade secret to provide preliminary evidence at the initial stage of the lawsuit to prove that they have taken confidentiality measures and explain that the infringer has committed infringement acts. After meeting this condition, the burden of proof shifts to the defendant, who shall prove that the information involved does not constitute a trade secret protected by the Anti-Unfair Competition Law. However, the law has not defined the connotation of "preliminary evidence," and there is no unified standard for identifying "preliminary evidence" and "reasonable proof" in judicial practice, leading to divergent applications.

The author searched on Pkulaw and found that there are 46 civil cases applying Article 32 of the Anti-Unfair Competition Law [3], including 16 first-instance cases and 46 second-instance cases. Among them, 26 cases upheld the original judgment, and 11 cases rejected all the plaintiff's claims. Generally speaking, what the plaintiff needs to prove in a trade secret lawsuit includes the fact that the trade secret exists and the fact that the alleged infringer has infringed the trade secret. Whether a trade secret exists mainly depends on whether it meets the requirements of "confidentiality," "secrecy," and "value." Different courts have inconsistent determinations on the elements of trade secrets during the trial process. Some courts will analyze each element of the trade secret one by one, while others will determine that the fact of the trade secret claimed by the plaintiff is not established after analyzing one of the elements and finding that it does not meet the corresponding requirements, thus rejecting the plaintiff's claim.

2.1 Cases Where the Plaintiff Failed to Take Corresponding Confidentiality Measures

In the case of dispute over infringement of trade secrets between Guangdong Kejielong Robot Co., Ltd., He Qian, and Dongguan Sanrentian Intelligent Technology Co., Ltd. [4], the plaintiff claimed that the defendants had used its customer information which constituted trade secrets, and provided a "Confidentiality Agreement" as evidence, along with proof that one of the defendants, after resigning, repeatedly visited, together with personnel and products of Sanrentian Company, the plaintiff's customers with whom the plaintiff had a transaction history and who had the intention to purchase again. Therefore, in accordance with Item 2 of Paragraph 2 of Article 32 of the Anti-Unfair Competition Law, since the plaintiff demonstrated that the trade secrets had been used by the alleged infringer, the burden of proof shifted to the defendant to prove that it had not infringed the trade secrets. In this case, the defendant argued that the trade secrets claimed by the plaintiff lacked secrecy and commercial value, and that the plaintiff had not taken specific, effective confidentiality measures commensurate with the commercial value of the information.

Additionally, the defendant provided evidence showing that it had conducted negotiations with one of the customers before the defendant He Qian joined the company. The court held that the sales plan containing the customer list claimed by the plaintiff was unilaterally produced by the plaintiff, and most of the relevant content was recorded in a rough manner, lacking in-depth information, thus failing to meet the secrecy requirement of trade secrets. Furthermore, the confidentiality measures taken by the plaintiff were merely a standardized confidentiality agreement signed with the defendant, which covered a broad scope of alleged trade secrets, including much information that did not qualify as trade secrets. Therefore, such measures could not be deemed as

corresponding reasonable protection measures. Ultimately, the court dismissed the plaintiff's claim.

In the case of unfair competition dispute involving Dingjie Company, Qide New Material Company, etc. [5], the court held that the plaintiff failed to prove the "secrecy" of the business information. The business information such as the customer list's industrial and commercial registration details and contact information was publicly available, and any entity intending to conduct transactions with these customers could contact them through such public information. The plaintiff also failed to prove the "value" of the customer list and the adoption of corresponding confidentiality measures. On the contrary, the defendant provided evidence to prove that the customer list lacked "secrecy". As the plaintiff failed to fulfill its burden of proof, the court ruled to dismiss all of the plaintiff's claims.

In the unfair competition case where Zhongguang Shangyang Company sued Sobey Digital Company [6], the court clearly stated that Zhongguang Shangyang Company only relied on the confidentiality clauses in its articles of association, without specifying the specific carriers of the claimed trade secrets or explaining the content of each secret and the corresponding confidentiality measures. Therefore, it could not be determined that the company had taken effective confidentiality measures. However, the court subsequently held that the defendant's conduct violated business ethics and, citing the general clause of the Anti-Unfair Competition Law, ruled that the defendant's actions constituted unfair competition.

The above cases where the plaintiff lost the lawsuit once again highlight that whether the right holder can prove that "corresponding confidentiality measures have been taken" often directly affects the court's support for its claims. Reasonable confidentiality measures not only corroborate the "secrecy" of trade secrets but also preliminarily prove that the information is kept confidential through legitimate means, thereby presuming that the defendant obtained the trade secrets through improper channels.

Although the Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Civil Cases Involving Infringement of Trade Secrets enumerates several situations that can be regarded as confidentiality measures, it fails to provide detailed guidance on "the intensity that such measures need to reach". Article 32 stipulates that the right holder only needs to provide "preliminary evidence reasonably indicating that the trade secret has been infringed" to lower the threshold for rights protection. However, from the perspective of interest balance, whether a higher standard should be set for this "preliminary evidence" and how to define "reasonably indicating" under the framework of the new law still need to be addressed through the accumulation of subsequent judicial precedents to form a unified judicial standard.

2.2 Cases Where Plaintiffs Adopted Corresponding Confidentiality Measures

Although the Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Civil Cases Involving Infringement of Trade Secrets enumerate scenarios qualifying as confidentiality measures, they do not specify the "required intensity" of such measures. Article 32 reduces the burden on right holders by requiring only "preliminary evidence reasonably indicating infringement," but balancing interests raises questions: Should "preliminary evidence" be held to a higher standard? How to define "reasonably indicating" under the new legal framework? These require further jurisprudential development to establish unified judicial standards.

In the trade secret infringement dispute between Zhongshan Lianhua Printing and Dyeing Co., Ltd. and Chengnuo Accounting Firm, et al. [7], the court noted that while the plaintiff provided no evidence of specific confidentiality measures, daily experience dictated that account information was typically restricted to financial staff and senior executives—weak though this evidence was.

Ultimately, the plaintiff failed to prove the commercial value or competitive advantage of the alleged trade secret, leading the court to reject its claim despite inferring confidentiality through common experience. The plaintiff also failed to prove the existence of infringement.

In the case between Deguan Daoyi (Wuhan) Architectural Decoration Engineering Co., Ltd. and Tong Yi, Wuhan Yilu Wanxiang Architectural Decoration Design Engineering Co., Ltd., the court held that the Labor Contract between the parties explicitly stipulated confidentiality obligations and their duration. Additionally, Deguan Daoyi included confidentiality clauses in its soft decoration engineering contracts with third parties, and marked its design proposals as "Confidential." These factors led the court to conclude that the plaintiff had adopted appropriate confidentiality measures [8].

These cases further underscore that the ability of right holders to discharge the burden of proof regarding "the implementation of confidentiality measures" frequently exerts a direct influence on the degree of judicial support accorded to their claims. Sound confidentiality measures not only serve to corroborate the "secrecy" attribute of trade secrets but also preliminarily substantiate that the information in question is maintained in a confidential state through legitimate means, thereby giving rise to a presumption that the defendant acquired the trade secrets via improper channels.

Although the Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Civil Cases Involving Infringement of Trade Secrets enumerates a number of scenarios that may be deemed as confidentiality measures, it fails to provide detailed guidance on "the level of intensity that such measures ought to attain". Article 32 stipulates that right holders are only required to furnish "preliminary evidence that reasonably indicates the infringement of trade secrets", with a view to lowering the threshold for rights protection. Nevertheless, from the perspective of interest balancing, whether a higher standard should be imposed on such "preliminary evidence" and how to define the concept of "reasonably indicating" within the framework of the new law remain issues that await resolution through the accumulation of subsequent judicial precedents, so as to formulate a unified judicial criterion.

3. Key Issues in the Implementation of Corresponding Confidentiality Measures

Synthesizing the aforementioned trade secret cases, there are several crucial issues that right holders must pay attention to when implementing corresponding confidentiality measures. Otherwise, in the event of trade secret disputes, judicial authorities may determine that they have not "implemented corresponding confidentiality measures".

3.1 Implementation of Reasonable Confidentiality Measures

One of the constituent elements of a trade secret is the "implementation of corresponding confidentiality measures". Relevant judicial interpretations further stipulate that reasonable confidentiality measures taken by right holders to prevent the leakage of trade secrets before the occurrence of the alleged infringing act shall be recognized as "corresponding confidentiality measures". What constitutes reasonable confidentiality measures is often a focus and difficulty in the trial of trade secret cases. According to the Guidelines for the Trial of Civil Dispute Cases Involving Infringement of Trade Secrets by the Jiangsu Higher People's Court, "For cases where the plaintiff takes confidentiality measures only after a period of time since the formation of the information, the review standards shall be strictly applied in combination with specific circumstances. If there is no contrary evidence proving that the information has been leaked, the confidentiality measures may be deemed valid." In addition, both this guideline and the Reference for Litigation Evidence in Civil Cases Involving Infringement of Trade Secrets by the Beijing Intellectual Property Court specify that reasonable confidentiality measures commensurate with the

trade secret must be taken before the occurrence of the alleged infringing act. Generally speaking, therefore, right holders are required to take confidentiality measures before the occurrence of the infringement. If confidentiality measures are taken only after the formation of the confidential information, judicial authorities will conduct a stricter review.

3.2 Confidentiality Agreements as a Form of Confidentiality Measure

For right holders who adopt confidentiality agreements as a form of confidentiality measure, from the aforementioned judicial cases, improper application of such measures may lead to the determination that they do not meet the requirements of "corresponding confidentiality measures". Therefore, when using confidentiality agreements as a means of confidentiality, right holders must define the scope of trade secrets (i.e., specific secret points) in the agreement, which should be consistent with the scope of the secrets they claim, so as to meet the reference factors and constituent standards of "corresponding confidentiality measures". Moreover, the confidentiality agreement should specify the specific content of confidentiality obligations, including but not limited to clauses on the duration of confidentiality, confidentiality responsibilities, and liability for breach of contract, to ensure the validity and enforceability of the agreement. If a confidentiality agreement only mentions confidentiality obligations in general terms without clearly specifying the specific scope of trade secrets and confidentiality requirements, it may result in the agreement being deemed insufficient to provide adequate confidentiality measures in case of disputes, thereby failing to meet the requirements of "corresponding confidentiality measures".

3.3 Confidentiality Measures for Trade Secrets Claimed in Sold Products

After a product is sold, a third party acquires ownership of the product through transactions or other acts. Based on the principle of exhaustion of basic rights, the third party may legally use, sell, or otherwise dispose of the product. If a right holder claims trade secrets in a sold product or certain technical information within the product, they must prove that corresponding confidentiality measures have been implemented for the product. At the same time, since reverse engineering is one of the exceptions to trade secret infringement, the right holder must also provide evidence to counter the third party's defense of reverse engineering. Merely relying on confidentiality clauses in product sales contracts is insufficient to meet the constituent elements of "implementing corresponding confidentiality measures".

4. Conclusions and Recommendations

With respect to the determination of the reasonableness of confidentiality measures, there exist only two fundamental consensuses in China's academic and judicial practice circles: first, confidentiality measures are not required to be "impregnable"; second, the reasonableness of confidentiality measures must be assessed from both subjective and objective dimensions [9]. Although Article 5 of the 2020 Judicial Interpretation enumerates factors for judicial consideration in evaluating whether confidentiality measures are "appropriate," it fails to provide a quantifiable threshold. In practice, the lower the burden of proof borne by trade secret proprietors, the more advantageous the position they occupy. Nevertheless, the principle of interest balance necessitates maintaining a necessary degree of stringency toward "preliminary evidence." Article 32 of the Anti-Unfair Competition Law simplifies the evidential threshold to "reasonably demonstrating" the adoption of confidentiality measures, yet it remains silent on the specific extent to which "reasonableness" should be satisfied.

Japan's regulatory approach merits reference: any individual accessing trade secrets must receive

a prompt sufficient to render them clearly aware that such information constitutes confidential material—the critical criterion lies in whether the alleged infringer has formed a clear cognition thereof. In contrast, Article 32 of China's Anti-Unfair Competition Law and its supporting judicial interpretations merely require that measures be "commensurate with the circumstances," and there currently exists no unified benchmark for determining the level of proof a plaintiff must adduce to meet the "reasonableness" requirement. Consequently, the issue of how to allocate and refine the burden of proof concerning confidentiality measures has become an urgent practical imperative.

Article 32 of the Anti-Unfair Competition Law mandates that plaintiffs "reasonably demonstrate" the implementation of confidentiality measures, while judicial interpretations only stipulate that measures must be "appropriate to specific circumstances." However, neither statutory provisions nor judicial interpretations further elaborate on the specific degree to which "reasonable demonstration" should be achieved, resulting in a lacuna in the standard of proof. It is therefore imperative to clarify the allocation of the burden of proof for confidentiality measures. The standards can be refined as follows:

Classification-based differentiation: For distinct categories such as technical information and commercial information, delineate the requisite standard of proof (whether higher or lower). For commercially accessible information prone to acquisition, such as customer lists, stricter confidentiality measures should be imposed. For highly technical information (e.g., chip-related data) that ordinary employees cannot easily obtain or comprehend, the reasonableness of confidentiality measures should be determined based on an assessment of whether they can preclude access by professionals.

Differentiation based on targeted subjects: The required threshold for confidentiality measures should vary according to the subjects targeted. Distinctions should be drawn between core R&D personnel, mid-to-senior management personnel with access to substantial key information, ordinary employees, and even cleaning staff. Correspondingly, the standards for judicial determination in practice should also differ.

Furthermore, in litigation proceedings, courts must render authoritative assessments of the confidentiality measures implemented by trade secret proprietors to adjudicate their reasonableness. Such assessments should first focus on the effectiveness of the measures: proprietors must implement confidentiality arrangements sufficient to prevent unauthorized information disclosure to satisfy the "reasonableness" criterion. These measures should be adequate to render it difficult for unauthorized individuals to obtain the information under normal circumstances.

Second, the identifiability of confidentiality measures: Trade secret proprietors must be able to explicitly demonstrate the implementation of specific confidentiality actions to prove their emphasis on information security. This includes, but is not limited to, the execution of confidentiality agreements, the conduct of confidentiality training, the affixing of confidentiality labels, and the formulation of confidentiality policies. Such actions should be objectively identifiable and documentable to serve as evidence in disputes.

Third, the appropriateness of confidentiality measures: Confidentiality measures should be commensurate with the nature, significance, and potential risk of leakage of the trade secret. This implies that the intensity of confidentiality measures should align with the value and sensitivity of the information in question.

References

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