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China's Supreme People's Court issues draft judicial interpretation on trade secrets, seeking to strengthen trade secret protection

On June 10, 2020, the Supreme People's Court for the People's Republic of China issued the [Interpretation on Several Issues Concerning the Application of Laws in the Trial of Civil Cases Infringing on Trade Secrets](#), seeking to strength trade secret protection under Chinese law. Those changes are consistent with the Economic and Trade Agreement between the U.S. and the People's Republic of China (Phase-one Agreement). Public comments can be filed on the interpretation by July 27, 2020.

Highlights of the interpretation that are generally of concern by companies doing business in China or with Chinese companies include the following:

Expanded coverage of trade secret definition

Under Article 9 of the current Anti-unfair Competition Law, a trade secret is comprised of any commercial information, including technical information and business information. The interpretation proposes to expressly include algorithms as a type of technical information and customer information as a type of business information within the definition of trade secret. To qualify as customer information provided by the interpretation, the holder claiming rights to the trade secret must spend efforts compiling and processing specific information, such as customers' names, addresses, contacts, usual practice, trading content, specific needs and so on. The mere contracts, invoices, receipts and vouchers with specific customers are insufficient for trade secret protection as customer information.

Shifting certain burden of proof to defendants

Under the current interpretation issued by the China Supreme People's Court in 2007, the plaintiffs bear the burden of proof to establish that the existence of a trade secret, as well as any alleged misappropriations by the defendants. This requirement has been subject to criticism and discussion in the last decade.

To make the interpretation consistent with the amended Anti-unfair Competition Law of 2019 and Article 1.5 of the Phase-one Agreement, the proposed interpretation shifts the burden of proof to the defendant in certain circumstances. Specifically, after the plaintiff has provided evidence to establish its prima facie case that it has taken the appropriate measures to preserve the confidentiality of the trade secrets and that the defendant had access to the trade secrets and was more likely to appropriate them, the burden of proof shifts to the defendant to prove that either the trade secrets were already known to the public or that it did not engage in misappropriation. Additionally, the burden of proof is on the defendants to prove that it obtained the trade secret through non-infringement measures such as research, transfer, licensing, reverse engineering and succession.

Clarifying what counts as misappropriation

The amended Anti-unfair Competition Law of 2019 prohibits illicit acquisition, unauthorized disclosure and use of trade secrets through means such as theft, bribery, fraud and electronic intrusion, as well as the abetting and aiding of such conduct. However, what constitutes misappropriation is difficult to decide in practice, particularly where the plaintiff did not expressly inform the defendant that the information provided are trade secrets. The interpretation addressed this problem. Under Article 10, when the parties know or should know that the relevant information amounts to the right holders' trade secrets based on the principle of good faith, the nature and purpose of the contract, trade practice and negotiation process, the duty of confidentiality can arise even without a specific confidentiality agreement. Additionally, it is now expressly prohibited for anyone to obtain trade secrets, not only in violation of the law, but also in violation of well-recognized business practices. Moreover, even if a party's receipt of trade secrets was lawful, if the party's intentional or gross negligent behavior has resulted in another's acquisition of trade secrets, the person releasing the trade secrets would be deemed to have engaged in misappropriation. Finally, the interpretation provides that the use of modified trade secrets in business activities also constitutes misappropriation of trade secrets.

Easing the requirements for preliminary injunction

The current Supreme People's Court's judicial interpretation on applying injunctions in general intellectual property cases requires the People's Court to consider whether the claimed intellectual property right is stable enough before granting an injunction. Consistent with the Phase-one Trade Agreement, such requirement has been removed under the interpretation,

and the right holders are required to prove only the contents of the claimed trade secrets and evidence that the appropriate confidentiality measures were taken, without having to establish that the trade secret is stable enough. Additionally, the interpretation expressly permits the continuance of injunctions against the defendants, even if the trade secrets have already been released to the public. Those changes would make the preliminary injunction a much more powerful tool to stop trade secret misappropriation.

Damages

Under the amendment of the Anti-unfair Competition Law in 2019, the damages for trade secrets misappropriation was increased to statutory damages to RMB 5 million (approximately \$0.72 million U.S. dollars), and up to five times that amount as punitive damages. The interpretation clarified that in calculating damages, the People's Court should consider the profits derived from the trade secret's misappropriation, as well as reasonable royalties. The People's Court is additionally authorized to order the defendants to produce documents containing such information.

Interplay between criminal proceeding and civil proceeding

Depending on the extent of misappropriation, trade secrets misappropriation can both be a civil matter and a criminal matter. To the extent that a criminal proceeding has been initiated against the defendants arising out of the same misappropriating conduct, the interpretation provides that the parallel civil proceeding should cease pending resolution of the criminal matter, except where there is sufficient evidence of non-infringement in civil proceedings. The interpretation additionally permits the use of evidence in the criminal proceeding to be used in the civil proceeding, and that the actual loss and unjust enrichment calculated in criminal proceedings should generally be reviewed closely in civil proceedings.

Adding whistleblower protection

For the first time, the interpretation added whistleblower protection to provide full immunity for those disclosing trade secrets to government authorities or judicial branches for the purpose of reporting a crime. While the application of this provision is still to be determined, the recognition of whistleblower protection marks an important step of trade secrets protection in China.

Higher hierarchy level jurisdiction

While trade secret cases involving only business information (i.e., not technical secrets) are typically heard by the basic People's Court under the current law, the interpretation has increased the level of jurisdiction for such cases, and allows the intermediate courts to hear such cases, regardless of whether the case contains any technical secrets. The proper venue is the court where the misappropriating conduct took place or where the defendant is domiciled.

Take away

This interpretation, together with the draft reply of the Supreme People's Court on the Application of Laws Concerning Internet Intellectual Property Infringement Disputes, and the draft Guiding Opinions of the Supreme People's Court on the Trial of Intellectual Property Disputes Related to E-commerce Platforms, takes important steps for China's intellectual property protection, and further signals China's willingness to comply with the Phase One Trade Agreement to strengthen the intellectual property protection in China. While it remains to be seen how the interpretation will be enforced in practice, this interpretation should help to ease certain concerns related to doing business in China or with Chinese companies, and is generally considered to be good news for those companies.

For more information please contact [Yuanyou Yang](#) or any member of Porter Wright's [International Business & Trade practice group](#).