

Trade Secrets Law

商业秘密法

I. TRADE SECRETS LAW IN CHINA

1. 中国的商业秘密保护法

In China, trade secrets law is covered by Chapter II, section 10, of the *Law Against Unfair Competition of the People's Republic of China*.¹ China created this law after the ratification of the international TRIPS agreement, which set out a minimum standard of protection, for member countries of the treaty, governing intellectual property rights.² The *Unfair Competition Law* was China's response to the ratifying of the treaty, but goes beyond the minimum requirements set out by the TRIPS agreement.³

在中国，关于商业秘密的法律包含在《中华人民共和国反不正当竞争法》第二章第十条之中。中国是在批准了国际协议《与贸易有关的知识产权协议》后颁布该法律的，该国际协议为成员国设定了知识产权保护的最低标准。反不正当竞争法是中国对批准该国际协议的反应，但其保护的标准远远高于该国际协议规定的最低标准。

Trade secrets are defined in the *Unfair Competition Law* as technical or operational information that is not known to the public, has economic potential, and has “practical applicability.”⁴ Practical applicability means the information has some positive use to society. Moreover, in order to maintain the information as a trade secret, the information must be kept under a reasonable level of secrecy and not released to the public.⁵

在反不正当竞争法中，商业秘密被定义为不为公众所知悉、能为权利人带来经济利益、经权利人采取保密措施的并具有“实用性”的技术信息和经营信息。实用性是指对社会有积极的效用。另外，为了使该信息成为商业秘密，该信息须被采取了合理的保密措施，不为公众所知悉。

After defining the necessary requirements for a trade secret, the *Unfair Competition Law* explains how trade secrets can be infringed upon. Under the law, infringement results when person or company illegally obtains and uses a trade secret from another party.⁶ Illegal activities can include stealing, coercion and other “improper means.”⁷ Breaking a confidence agreement to utilize a trade secret will also be construed as infringement.⁸ Finally, if a third party has full awareness of the illegal acts, they can be deemed to have infringed on the trade secret, if they use the illegally obtained information.⁹

在规定了商业秘密的要件之后，反不正当竞争法列举了侵犯商业秘密的行为。依照该法律，当个人或者公司非法获取和使用他人的商业秘密即构成侵犯商业秘密的行为。非法行为包括盗窃、胁迫或者其他不正当手段。违反保密约定使用其

所掌握的商业秘密也是侵犯商业秘密的行为。最后，第三人明知违法行为而使用违法获得的商业秘密，会被视为侵犯商业秘密的行为。

II. TRADE SECRETS LAW IN THE UNITED STATES

II. 美国的商业秘密保护法

Trade secrets law in the United States is covered by two major sets of laws, and follows the TRIPS agreement. The Uniform Trade Secrets Act (UTSA) is a model rule that can be modified and adopted as a state sees fit. The Economic Espionage Act is a federal statute enacted to protect trade secrets.

在美国，商业秘密主要是由二套法律来保护的，并遵循《与贸易有关的知识产权协议》。《统一商业秘密法》是一部范本，由各州自由采纳使用。《商业间谍法》是一部保护商业秘密的联邦法律。

Most states have adopted the UTSA in some form; Illinois legislature has created the Illinois Trade Secrets Act (ITSA), which closely follows the original UTSA.¹⁰ The ITSA defines a trade secret as any information, including non-technical data, techniques, etc., which derives economic value from not being generally known and is maintained with a reasonable level of secrecy.¹¹ To determine whether information was kept secret, a court will look at numerous factors such as the extent the information is known, the ease of acquiring the information, and the measures taken to protect that information.¹²

大多数州已或多或少采纳了《统一商业秘密法》。伊利诺伊的立法机构颁布了《伊利诺伊商业秘密法》，该法与统一商业秘密法范本很相近。《伊利诺伊商业秘密法》定义商业秘密为任何因为不为公众所知而能够给权利人带来经济利益，

并且被采取了合理措施以维持其秘密性的信息，包括非技术性数据，技术，等等。为认定某信息是否秘密，法院会参考各种事实，比方说信息知悉的范围，获取信息的容易程度，和采取的保密措施。

While the UTSA deals entirely with state issues, the Economic Espionage Act is a federal law that takes into account foreign as well as domestic trade secret violations.¹³ The federal government can impose criminal penalties, such as fines and imprisonment, on whoever utilizes a trade secret for economic benefit and knowingly harms the original owner of the trade secret.¹⁴ However, the Economic Espionage Act is used mostly when all other remedies are exhausted and is dependent on the federal government bringing an action.¹⁵

《统一商业秘密法》主要是处理关于一州之内的法律问题，《商业间谍法》是一部处理国际和国内的侵犯商业秘密行为的联邦法律。联邦政府可以对任何使用商业秘密牟利并故意侵害他人的商业秘密的人处以刑事处罚，比如罚款和监禁。然而，《商业间谍法》多数是在其他各项救济措施穷尽后使用并取决于联邦政府是否提起指控。

III. PROTECT YOURSELF

III. 自我保护

It is important for a person or business to take steps to protect themselves from any harmful disclosure of confidential trade secrets. First and foremost, an employer should always have employees sign confidentiality agreements with non-disclosure clauses, and also define what is considered confidential. An employer should also always limit access to confidential information by having password protection for

electronic information and locks for physical information. All sensitive information should be labeled confidential and physical copies of the information should be shredded after use. This is not a comprehensive list as numerous other strategies can be used to protect secrets. Most importantly, trade secrets must be maintained with a high level of secrecy or else they will not be protected.

不管对公司还是个人，采取措施保护自己的商业秘密不被泄漏非常重要。首先和最重要的是，一个用人单位必须和雇佣的员工签订有保密条款的保密合同，并明确什么是要保密的信息。一个用人单位要通过对电子信息设立密码保护或者对书面信息上锁来限制员工对秘密信息接触的机会。所有敏感的信息要标明秘密字样，书面版本要在使用后销毁。这不是一个综合的列表，还有无数的其他措施可以采用。最重要的是，对商业秘密必须要采取严密的保密措施，否则它们将无法受到法律的保护。

IV. CONCLUSION

IV. 结论

Both China and the United States have an established set of laws to protect trade secrets and define trade secret information similarly. These laws provide for remedies against parties who illegally obtain and use confidential information. Most importantly, both systems of laws stress the necessity of keeping information secret so that protection can apply.

中国和美国都颁布了相应的法律来保护商业秘密，并且很相似地界定了商业秘密的概念。这些法律规定了那些非法获取和使用秘密信息的人应当承担相应的责

任。最重要的是，两国法律体系都强调了在法律可予以保护之前采取保密措施的必要性。

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1. *Law Against Unfair Competition of the People's Republic of China*. 1993.
 2. World Intellectual Property Organization, *Understanding the WTO*, http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm.
 3. *Id.*
 4. *Eighth National People's Congress. Law Against Unfair Competition of the People's Republic of China*. 1993.
 5. *Id.*
 6. *Id.*
 7. *Id.*
 8. *Id.*
 9. *Id.*
 10. 765 ILCS § 1065, *Illinois Trade Secrets Act*.
 11. *Id.*
 12. Joseph Nabor and Karl Fink, *ISBA Trade Secret Law Essentials*, 2008, What Every Lawyer Should Know About Intellectual Property Binder.
 13. 18 U.S.C.A. § 1832, *Theft of Trade Secrets*
 14. *Id.*
 15. *Id.*