



Clearing Your Name against U.S. Civil Trade Secret Theft Claims

Below is the first of a three-part series on how Chinese companies can navigate complex cross-border disputes with U.S. companies over accusations of trade secret misappropriation. Here, select members of Kobre & Kim's PRC and global intellectual property teams discuss key strategies for companies that find themselves on the wrong end of such an accusation.

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Trade secret theft accusations are a “go-to” legal weapon for U.S. parties in the ongoing trade war between the U.S. and China. Considering the different legal and cultural norms between the two countries, civil trade secret misappropriation cases in U.S. courts can be particularly complex and high-stakes for Chinese companies on the defensive end of these disputes.

In late September, the U.S. Department of Justice (DOJ) warned that trade secret theft cases from China are “on the rise,” offering a potential explanation that U.S. entities “may be more comfortable reporting to law enforcement.” Two factors at play are the DOJ China Initiative, which has added support and resources to U.S. businesses with trade secret claims against Chinese competitors, and the Defend Trade Secrets Act (DTSA), which has contributed to a 30% increase in civil trade secrets cases filed in U.S. federal courts since its passing in 2016.

These civil claims from the U.S. will not be going away anytime soon. Chinese companies, their executives and their legal representatives should familiarize themselves with U.S. IP protection standards in the face of pending cross-border litigation.

For Chinese companies, several strategies can help weaken a U.S. plaintiff’s allegations of trade secret theft:

Draw Clear Lines Between What Is and Is Not a Trade Secret.

For information to qualify as a trade secret, it cannot be generally known either to the public or industry insiders. If a defendant can prove that the information is either publicly available or widely known throughout the industry, they can argue that the information was not actually a trade secret.

Point Out the Other Side’s Failure to Protect the Information.

A defendant will strengthen their case by showing that the plaintiff did not take proper steps to protect the secrecy of what they are deeming a “trade secret.” For instance, the defense could point out a lack of employee training on confidentiality or examine whether employees were granted unfettered access to “secret” information.

Map Out Where You Get Your Information.

Showing that the intellectual property was not misappropriated is key to any defense. By using its own documents, financial records and electronic files, the defendant can put together an “independent-development” defense, showing that it relied entirely on its own information. Moreover, this approach will grant the defendant more control over the evidence used in court, and could weaken the plaintiff’s third required showing.

Highlight Your Secure Recruitment Practices.

Exercising caution when recruiting new employees is crucial to preventing and defending against trade secret theft accusations. A defendant’s convincing a court that they adopt these sorts of preventative measures – whether it is through confidentiality agreements or any other method to ensure employees don’t pass along intellectual property – can go a long way towards establishing their credibility.

In light of the ongoing PRC-U.S. trade dispute, Chinese companies are more likely to face charges in U.S. courts against civil claims of trade secret theft. Meeting the challenge will require an understanding of information protection standards in both China and the U.S.

About Kobre & Kim's Intellectual Property Disputes Team

KOBRE & KIM

Kobre & Kim is a global law firm focused on cross-border disputes and investigations, often involving fraud and misconduct. Our conflict-free model allows us to advocate aggressively on behalf of our clients, even in the face of the industry-wide opposition common in trade secret cases.

Our Intellectual Property & Technology Litigation team understands the complex technologies that are often at the center of these types of disputes, and is well-versed in advocating for clients in complex disputes in the U.S. courts and other English-law-based jurisdictions.

Frequently working with other law firms as special counsel, Kobre & Kim regularly represents China-based clients in cross-border government enforcement actions. The Shanghai-based team includes the only former U.S. prosecutor in China from the Department of Justice's National Security division. The team also offers native language support including Mandarin, Cantonese and Shanghainese.