

Reflection on Burden of Proof in Trade Secret Infringement Dispute

— Written on the occasion of the addition of Article 32 of
the Anti-Unfair Competition Law

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Introduction

The revision of the Anti-Unfair Competition Law (AUCL) was completed on 4 November, 2017. Just one year later, the law was revised again in April 2019. Such unusually frequent revisions surely drew our attention to the revised contents. In the 2019 revision of the AUCL, an important amendment is the addition of Article 32, which stipulates that what a trade secret owner is required to prove is only limited to the ownership of the trade secret, measures taken to protect the trade secret, and the showing, to a reasonable extent, that the trade secret is infringed. This way to allocate the burden of proof greatly reduces the burden on the trade secret owner. Quite close to a *reverse onus* clause, this article nearly shifts the burden of proof in disputes over trade secret infringement onto the accused infringer, which means the accused infringer has the burden on proving non-infringement. As regards the allocation of the burden of proof, the core of Article 32 lies in “the showing, to a reasonable extent, that the trade secret is infringed”. In safeguarding a trade secret, the parties concerned, especially right holders, always keep a close watch on the issues of evidence, but feel helpless in dealing with them. Those who have experience in trade secret protection practices will sensitively realize the crucial value of such a change.

I. Facts to be proved for trade secret infringement

1. Attributes of trade secret rights and proof of tort liabilities

When the General Rules of the Civil Law of the People's Republic of China enumerate the types of intellectual property rights that can be enjoyed by right holders, trade secrets are listed together with patents, trademarks and copyrights.¹ Although this way is criticized for its failure to recognize the attributes of trade secret rights and putting trade secrets in a monopolistic position to some extent, there would not be such a question if trade secrets are considered as similar to copyrights and integrated circuit layout designs. Similar to copyrights and integrated circuit layout designs, trade secrets have no absolute exclusivity. Accordingly, different right holders may simultaneously own identical or substantially identical trade secrets legally without infringing the other's rights. It is just because of the attributes of trade secret rights that accused infringers may claim non-infringement on the grounds of independent acquisition, lawful transaction, or reverse engineering:² independent acquisition is the most moral one among the above defences because the accused infringer acquires relevant knowledge and information on its own; lawful transaction means the accused infringer obtains a trade secret through contract from other owners of identical or similar trade secrets; and reverse engineering reflects distinct characteristics of trade secrets, as the accused infringer can obtain relevant information in a certain way without being regarded as infringing, which is obviously different from copyright. In the copyright law, accessing and then copying a copyrighted work is prohibited and such an act is considered as typical infringement. As far as the existing legal provisions are concerned, the above three defences are main grounds used by accused infringers in disputes over trade secret in-

fringement.

When a right holder claims trade secret infringement, it must prove its ownership of the trade secret and the occurrence of infringement. Under normal circumstances, it is not hard for the right holder to prove the former because such evidence is in the hand of the right holder; while it is relatively difficult to prove the latter because relevant evidence is often under the control of the infringer or a third party and hardly accessible by the right holder. In judicial practice, this is the main reason that the right holder's claim is not supported.

One of the basic principles in civil litigation is that "the burden of proof always lies with him who alleges". The allocation of the burden of proof is in association with the balance between rights and obligations of the parties concerned. Unless otherwise specified in law, imposing the burden of proof that extends beyond the explicit legal provisions on any party will undoubtedly give rise to imbalance in the rights and obligations of the parties concerned, which is not conducive to the realization of fairness. In some fields where the parties' capabilities of producing evidence are obviously unmatched, the relevant Judicial Interpretation stipulates eight exceptional types of cases concerning the allocation of burden of proof, for example, methods for manufacturing new products, damages caused by highly dangerous operations, damages caused by environmental pollution, etc. In consideration of the factors such as the abilities of the parties to provide and control evidence, the law requires the accused infringer to bear the burden of proving a defence for liabilities, that is, the *reverse onus* clause.³ However, "the *reverse onus* clause breaks the balance between obligations allocated under the law, so special legislative authorization is required."⁴

Prior to the present revision of the AUCL, the *reverse onus* clause is apparently not applicable to disputes over trade secret infringement. Although judicial policies have repeatedly emphasized that more efforts shall be made to alleviate the trade secret owners' difficulty in safeguarding their rights,⁵ it would be a different story in judicial practice. In the absence of explicit legal provisions, abiding by the present rules, rather than judicial policies and jurisprudential spirit that provide trade secret owners with a flexible room beyond the law, is obviously more in line with the functional positioning of judicial authorities and practical operations, and less likely to lead to risks beyond laws.

2. Presumption of fact in trade secret infringement

In view of the situation that right holders have difficulty in producing evidence in disputes over trade secret infringement, judicial and administrative authorities have formulated judicial policies and departmental rules under the framework of the AUCL for offering institutional convenience for right holders and reducing the difficulty they faced in producing evidence with relatively clearly-worded provisions, that is, by shifting the relevant burden of proof onto an accused infringer under certain conditions.⁶ Both judicial policies of the judicial authorities and departmental rules of the administrative authorities allocate the burden of proof on the parties concerned according to the preponderance of evidence standard. Therefore, such allocation is premised on the preponderance of evidence submitted by the right holder; or otherwise, the shift of the burden of proof would not occur. Although the Supreme People's Court touched upon the shift of the burden of proof in the judicial policies and desired to incorporate it into a judicial interpretation, it was still deleted from the final draft by the Adjudication Committee of the Supreme People's Court and failed to be incorporated in the judicial interpretation.⁷ Nevertheless, there is still a room for presumption provided for judicial authorities and right holders legally, which is supported by the judicial interpretation of the Civil Procedure Law and the judicial interpretation of evidence in civil proceedings.⁸ Of course, in judicial practice, factual presumption is quite flexible no matter it is based on the legal provisions or based on known facts and empirical rules in daily life. In disputes over trade secret infringement, it is really hard for right holders to reach the standards that allow judicial authorities to presume facts, or it is so costly for safeguarding rights such that returns are incomparable with costs. As a result, right holders lack motive and confidence in safeguarding their trade secret rights.

Formulation and revision of laws are both valuable in re-allocating the rights and obligations of the parties concerned and assigning liabilities to both parties based on social realities, so that both parties are at an equal position in litigation when their legitimate rights and interests are infringed. Similar to other intellectual property rights, trade secrets are private rights by nature. Either economic benefits resulting from the rights or economic losses suffered from infringement shall be borne by right holders themselves. Thus, right holders shall be responsible for safeguarding their own rights while enjoying the benefits conferred by the rights. Neither the state organs such as judicial authorities

or administrative authorities, nor infringers could benefit or suffer direct economic losses because of the right holders' acts. The equivalence between rights and obligations is the basic value of legislation and the reason that the legislature and the judiciary did not allocate more burden of proof on the accused infringers in the previous laws. As regards the status of the parties in litigation, a right holder (or the plaintiff) and an accused infringer (or the defendant) are merely different in their legal status in civil disputes, and equal morally. And there is no difference between them in terms of management or technical strength. Meanwhile, it is not uncommon in practice to disturb the normal trade secret arrangements of the opposite party or obtain the trade secrets by means of litigation. If all those stated above are understood, the allocation of burden of proof can be understood from a more objective and rational perspective.

It is the truth in fact. Before the revision of the AUCL this year, except the situation that an accused infringer has the burden of proving its method for manufacturing a new product is different from the patented technology owned by the right holder, that is, the *reverse onus* clause should apply in that situation, other intellectual property or relevant right holders do not enjoy any special statutory support for the burden of proof. Although the difficulty of adducing evidence is quite prickly in disputes over trade secret infringement, it also exists in intellectual property disputes over patent infringement, trademark infringement and the like. Except for rare cases where the *reverse onus* clause applies, the basic principle that "the burden of proof always lies with him who alleges" should generally be followed. It is because, on the one hand, rights and obligations shall be equal, and on the other hand, the normal production and business operation of the accused infringer may be severely affected if it is imposed with the over-high burden of proof, due to the complexity of the society. Therefore, the legislature always adopts a cautious and prudent attitude towards the burden of proof in disputes over trade secret infringement. The shift of the burden of proof, if necessary, is premised on the weight of evidence produced by the right holder.⁹

II. Necessity and understanding of the *reverse onus* clause in disputes over trade secret infringement

1. Necessity of the *reverse onus* clause

As mentioned above, the spiritual declaration at the policy level and specific cases in judicial practice provide some support for right holders to safeguard their trade secrets rights, they are, after all, limited to individual cases, and not universally or compulsorily applicable on the part of right holders, infringers, judicial organs or administrative organs. The difficulty in evidence production for trade secret owners needs to be alleviated at the legislative level so as to systemically solve this widespread problem. The re-allocation of rights and obligations of the parties concerned in the legislation is premised on the necessity in practice. As a vital route for intellectual property creators to realize their own economic interests, trade secrets are as important as patents. Creators may choose to protect their rights through disclosing their achievements as patents or keeping them confidential as trade secrets depending on the social reality and their own needs. These two routes are different in terms of their contribution to the society and extent of protection conferred by law. Patents are strongly monopolistic, while trade secrets provide relative protection. Of course, it shall be appreciated that, in regard to the allocation of rights and obligations of the parties concerned, specifically, the allocation of the burden of proof between the right holder and the accused infringer, legislators had a clear understanding of certain type of disputes at the time of legislation, e.g. in disputes over patent infringement of methods for manufacturing new products, the accused infringer shall prove that its method for manufacturing the new product is different from the patented method; however,¹⁰ in more other types of disputes, deeper understandings can only be gained in judicial practice.

Specially referring to trade secret infringement in judicial practice, according to the statistics based on China Judgments Online, among the relevant cases concluded by the judicial authorities from 2013 to 2017, those in which the right holders lose amounted to 63.19%, those in which the right holders partially win made up 27.54%, and those in which the right holders win only occupied 9.27%.¹¹ Such a low winning rate may be attributed to, on the one hand, the limited capabilities of the right holders to adduce evidence so that their evidence does not suffice to establish infringement and, on the other hand, to the legislature's failure to provide sufficient legal protection for right holders or impose enough legal pressure on the accused infringers for proving non-infringement. Judging from the development of

judicial practice, the judicial authorities have successively stipulated investigation orders, property preservation, behaviour preservation and other legal means for right holders to protect their rights, which are effective to some extent. No matter in disputes over other intellectual property infringement or trade secret infringement, it is quite often that the defendants are reluctant to adduce evidence to prove that they do not infringe others' rights. This should also be viewed from an objective and rational perspective. The defendants' reluctance to adduce evidence should not be rashly regarded as a failure to meet the burden of proof, based on which the infringement shall be established.

2. Understanding of the *reverse onus* clause in disputes over trade secret infringement

In the light of Article 32.1 of the newly-revised AUCL, where the right holder has provided *prima facie* evidence showing that it has taken measures to keep its trade secret confidential and has reasonably showed that the trade secret has been infringed, the infringer shall bear the burden of proving that the accused information is derived legally or its content is different from the trade secret. Article 32.2 thereof provides that where the right holder provides *prima facie* evidence showing that its trade secret has been infringed to a reasonable extent,¹² the accused infringer shall bear the burden of proving non-infringement. Through comparing the current Article 32 with the relevant contents in the previous AUCL and judicial interpretations, it is found that as far as the burden of proof is concerned, the previous standard adopted in laws is "the ownership of the trade secret + protection measures that have been taken + substantial identicalness + access – lawful source", whereas Article 32.2 adopts the standard of "the ownership of the trade secret + protection measures that have been taken + reasonable evidence in support of infringement + access – lawful source/lack of substantial identicalness". In regard to the two standards, the right holder needs to prove the following matters: the ownership of the trade secret, protection measures that have been taken, substantial identicalness (before revision)/reasonable evidence in support of infringement (after revision), and access, while the infringer has to prove that the allegedly infringing information is lawfully obtained, in other words, it is not or substantially not identical with the trade secret, or it is obtained independently, through lawful transaction or by reverse engineering.

The distinction between the previous and present standards mainly lies in that whether the trade secret owner has

to prove that the allegedly infringing information is substantially identical with the trade secret or just provides reasonable evidence in support of infringement. As the owner of the trade secret, the right holder can readily adduce evidence proving its ownership and that it has taken measures to keep the trade secret confidential, but the hardest thing is to acquire the corresponding information from the accused infringer so as to prove that the accused information is identical or substantially identical with its trade secret. It should be apprehended that irrespective of whether it is commercial business information or technical information, since such information is regarded as confidential by the right holder, it is surely also important for the accused infringer as it may render the infringer competitively advantageous in the market. The defendant can hardly agree to show its information to the right holder only for the sake of proving non-infringement. This occurs in the disputes over trade secret infringement, as well as disputes over infringement of other intellectual property rights. Even if the accused infringer knows that without such kind evidence it may face the adverse legal consequences, it may still refuse to produce evidence. One reason may be that the damages amount is relatively low and there will be no other consequences than losing the case due to the refusal. Meanwhile, another important factor to be considered is that the defendant is unwilling to have its normal business operation affected or any its own trade secret disclosed due to the dispute.

In the previous standard, the burden of proof is mainly borne by the right holder. If the right holder cannot prove that the allegedly infringing information is identical or substantially identical with its trade secret, or fails to produce evidence to such an extent that the judicial authorities can make a presumption, its claims can hardly be supported. But in the new standard, the only thing the right holder needs to do is provide reasonable evidence showing that its trade secret has been infringed and the defendant is likely to have committed infringement. The burden of proving the non-existence of the trade secret and no infringing acts is shifted onto the accused infringer. Through making comparison between the two standards, it can be found that the re-allocation of the burden of proof produces an obvious legal advantage for the right holder who is previously at a disadvantageous position, as the right holder may become superior in litigation by bearing the burden of proving relatively easy matters. As can be seen, China has strengthened

the protection on the legitimate rights of trade secret owners.

III. The allocation of the burden of proof in disputes over trade secret infringement

1. Premise of Article 32

Article 32 of the newly-revised AUCL involves two aspects, wherein the first paragraph is related to the existence of trade secret rights, and the second paragraph is about the allegedly infringing act. The former is the basis of the latter, both of which require the right holder to provide the *prima facie* evidence. At the same time, it should be noted that the expression in both the paragraphs is ambiguous. The author opines that due to the complexity of trade secret issues, there should be a certain room left for preventing potential chaos caused by the re-allocation of the rights and obligations between the parties.

Special attention should be particularly paid to the wording of Article 32. Judging from the wording, Article 32 explicitly points out “in the trial of civil cases relating to trade secret infringement”, which means it is the judicial authorities, rather than the administrative authorities, which shall follow this article. Such a limitation does not appear in other provisions relating to trade secret in the newly-revised AUCL. Although such limitation on the scope of application seems unusual, it may be understandable in view with the shift of the burden of proof prescribed under Article 5 of Several Provisions on Prohibiting Infringements upon Trade Secrets issued by the administrative authority, namely, the former State Administration for Industry and Commerce (SAIC). Through comparison between the attitudes of judicial and administrative authorities on the burden of proof in trade secret cases, it can be found that judicial authorities are always more prudent and cautious to deal with the shift of burden or the *reverse onus* clause than administrative authorities. As stated above, even though the shift was touched upon in relevant judicial policies, it eventually failed to be incorporated in a judicial interpretation. Article 32 of the newly-revised AUCL explicitly provides the shift of the burden of proof in the civil procedure, which may be regarded as a turning point of legislators’ attitude towards this issue.

2. *Prima facie* evidence in support of the existence of

trade secrets

Business operators are capable of gaining a competitive advantage by a variety of manners, including, among other things, the improvement of their own products, technologies and services, as well as with commercial business information. Business operators will surely take certain measures to keep relevant information confidential, but the information does not necessarily constitute trade secrets in the legal sense. Ever since the establishment of the trade secret system in China, trade secret refers to information which is unknown to the public, which has commercial value and which the right owner has taken measures to keep confidential.¹³ Although the subsequent revisions and relevant judicial interpretations have gone through some amendment in terms of wording, there is no substantial change made, and the original constituent elements of a trade secret basically remain the same.¹⁴

Being unknown to the public, having commercial value and taking confidentiality measures are three constituent elements of a trade secret. The basic premise for claiming infringement is that the evidence provided by the right holder is sufficient to prove the claimed information is a trade secret. This originated from international laws and is in line with the international practice: (1) According to Article 39.2 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), the protection must be given to information that is secret, that has commercial value because it is confidential and that has been subject to reasonable steps to keep it confidential; (2) Article 117.1 of North American Free Trade Agreement (NAFTA) signed by the U.S., Mexico and Canada also stipulates that the protection must apply to information that is secret, that has commercial value because it is secret and that has been subject to reasonable steps to keep it secret; and (3) in the light of Article 6 of Model Provisions on Protection Against Unfair Competition, the constituent elements of a trade secret are being not known among persons within the circles that normally deal with the kind of information in question, having commercial value, and being subject to reasonable steps to keep it confidential.¹⁵ In addition, it should be noted that although the burden of proof on both parties in the disputes over trade secret infringement is adjusted through the revision to the AUCL, the definition of trade secrets has never changed for Article 9 thereof still reads “trade secret, in this Article, means commercial information, such as technical information and business information, which is not known to

the public, which has commercial value, and which the owner of rights has taken measures to keep confidential.” A legal provision should be understood from multiple perspectives, such as the history, legislation backgrounds and international law origins. Judging from the constituent elements of trade secrets and relevant judicial interpretations in China or from the sources of international law or comparative law, it is impossible to conclude that Article 32 does not require the right holder to prove that the claimed information constitutes the trade secret in the legal sense.

Taking confidentiality measures is one of the constituent elements of a trade secret. By requiring the adoption of confidentiality measures, together with the reasonable showing of trade secret infringement, when talking about the shifting the burden of proof, Article 32 intends to prevent judicial authorities from improper understanding by emphasizing these preconditions. In judicial practice, the right holder fails to adduce evidence proving that the information claimed constitutes a trade secret mostly because it fails to prove that confidentiality measures have been taken. The extent to which the *prima facie* evidence regarding confidentiality measures can be regarded as sufficient shall be determined by judicial authorities on a case-by-case basis. From the statutory perspective, judicial interpretations have made a relatively detailed list of confidentiality measures, such as limiting the scope of insiders, protecting information carriers, labelling confidentiality signs, and signing confidentiality agreements,¹⁶ all of which result from the summary and sublimation of trial experience of trade secret cases in China. Article 32 stipulates that the accused infringer is required to adduce evidence on the premise that the right holder has provided the *prima facie* evidence. However, in the absence of judicial practices, how to apply the law, specifically, how to allocate the burden of proof on both parties, shall be determined in the light of judicial interpretations which provide further guidelines for different situations. Accordingly, what the right holders should do is, in daily production and business operations, to strengthen its internal management, establish by-laws on confidentiality, and train staff's confidentiality awareness, so as to prevent the plight caused by the failure to provide evidence in potential trade secret disputes.

3. *Prima facie* evidence for suspected infringing acts

Similar to the first paragraph of Article 32, the second paragraph also requires the right holder to provide the *prima facie* evidence reasonably showing the infringement,

and in the presence of the said *prima facie* evidence, the burden of proof will be shifted onto the infringer by requiring the latter to prove non-infringement. The right holder needs to provide two types of evidence: one is the *prima facie* evidence reasonably showing that its trade secret has been infringed. The word “reasonable”, though a modifying adverb, indicates the function of the *prima facie* evidence and provides a room for judicial authorities in evidence evaluation and also prevents right holders from adducing perfunctory evidence that may put the infringer in an over-unfavourable situation. This provision matches with the first paragraph. The other is the specific evidence used to prove that the trade secret has been infringed. Although the second paragraph lists three items, the third is only a miscellaneous provision. The first two items read as follows respectively: the accused infringer has access or opportunity to acquire the trade secret, and the information used thereby is substantially the same as the trade secret; and the trade secret has been disclosed and used by the accused infringer or is in danger of being disclosed and used. The two items are placed in juxtaposition. As long as the right holder can prove one of the items, the accused infringer shall bear the burden of proving non-infringement. It should be noted that although the second paragraph of Article 32 alleviates the burden on the right holder to prove infringement, and demonstrates the same attitude by using such words as “*prima facie*” and “reasonable”, the judicial authorities still need to take comprehensive consideration of the evidence of both parties before making a decision on a case-by-case basis. Here are some matters that should be clarified:

(1) The subject that bears the burden of proof. Both the right holder and the accused infringer are obliged to adduce evidence under this Article, but the evidence has different probative value. The right holder needs to adduce “*prima facie*” evidence capable of “reasonably” showing that its trade secret has been infringed. The accused infringer has to prove that it does not commit any infringement on the premise that the right holder has proved the aforesaid facts. Compared with the right holder, the accused infringer is at an advantageous position in collecting evidence on the infringing acts. It should also be realized that not all business information can be demonstrated in a visible manner, and even for those who control relevant business information, in some cases, it is still very hard or even impossible for them to collect the evidence proving that their acts do not infringe any others' trade secrets. Un-

der such circumstances, if the adverse consequences due to the failure to produce evidence are solely borne by the accused infringer, it will inevitably result in the imbalance in the rights and obligations of both parties.

(2) The extent to which the evidence should be adduced. Although both the right holder and the accused infringer bear the burden of proof, i.e., the right holder produces evidence to prove the establishment of infringement and the accused infringer provides evidence for defence, they do so to different extents. In view of the wording of the second paragraph, the right holder only adduces *prima facie* and reasonable evidence to prove the existence of infringement, but the accused infringer has to produce substantive evidence to make defence. In this regard, the defendant's burden of proof is heavier. Although the second paragraph alleviates the burden of proof on the right holder, more explicit judicial interpretations are still in need in judicial practice to specify how to determine the *prima facie* evidence and how to determine the likelihood of infringement.¹⁷

(3) Legal liabilities. The party concerned shall adduce evidence to support its claims, which is the basic principle of civil litigation; or otherwise, it shall bear the corresponding legal consequences. In the disputes over trade secret infringement, the *reverse onus* clause changes not only the burden of proof but also the legal liabilities borne by the parties. If the right holder cannot provide the *prima facie* evidence to prove the infringement of its trade secret, it shall bear the consequences that its claims cannot be supported by the judicial authorities. In the case of reverse onus, if the accused infringer cannot provide sufficient evidence to prove the non-infringement or the legitimacy of its information, it shall bear the legal consequences of the cessation of infringement and compensation for economic losses. Reverse onus clause is a legal response to the difficulty of protecting trade secrets. In consideration of the ambiguity of this provision, both parties and the judicial authorities still need to make more efforts on the research and studies as to how to apply this article in judicial practice. Similar to the first paragraph of Article 32, infringement should still be determined according to the original relevant judicial interpretations. But according to the second paragraph, the right holder is only required to provide the *prima facie* evidence to prove the existence of infringement to a reasonable extent.

Although the second paragraph is aimed to alleviate

the difficulty of the right holder in proving the infringement, in the absence of sufficient precedents and clear guidance, it is difficult to avoid the following two harmful situations. One is to apply the original standards of proof. Although it is legally stipulated that the right holder just needs to provide the *prima facie* and reasonable evidence, the judicial authorities still adhere to the original principles in practice so that the right holder cannot enjoy the ease conferred by the law and the burden of proof on the right holder cannot be alleviated actually. The other is to excessively lower the standards of proof. The judicial authorities abandon the original standards of proof, fail to examine the evidence provided by the right holder strictly and allocate the burden of proof onto the accused infringer without any proof of infringing act or even the likelihood of infringement. In such circumstances, the law will be biased to the right holder.

Conclusion

To be honest, in the disputes over trade secrets, there are difficulties in adducing evidence due to various reasons. The first reason is related to the attributes of trade secrets. The right holder protects its right by keeping the trade secret confidential, so the relevant evidence can hardly be admitted by others. The second reason is the self-management of right holders. Although the constituent elements of the trade secret and the conditions for the establishment of infringement are explicitly stipulated in laws, it may still be hard to formulate and take legally sufficient confidentiality measures in the daily management. The third is the infringer's concealed acts, especially the difficulty in accessing the infringer's operation information, let alone proving them by evidence. All of those factors result in the difficulty in protecting trade secrets. Both the judicial and administrative authorities adopt effective measures, such as investigation orders, property preservation, and behaviour preservation to safeguard the legitimate rights of right holders, and in the application of law, provide possible measures to facilitate them within the present frame, such as alleviating the burden of proof on the right holders, shifting the burden of proof, and presuming relevant facts, by means of judicial interpretations and departmental rules.

It is anticipated that the burden of proof on the right holders may be greatly alleviated along with the latest revision of the AUCL, especially the *reverse onus* clause in Article 32. However, it should also be noted that there are still

several problems in Article 32 due to tight time limit and low social participation. The real meaning of pertinent expressions can be grasped only in the context of the legal provisions and by considering the logical relationships of relevant provisions or even referring to the legislation history. Nevertheless, Article 32 is of significance to the protection of trade secrets of right holders. Meanwhile, the life of the law lies in practice. With the efforts of both parties and judicial authorities in trials, doubts and difficulties in the application of law can be clarified and overcome. The judicial authorities will formulate clearer and guiding judicial interpretations in order to better solve the problems in the application of law. ■

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¹ Article 123 of the General Rules of the Civil Law of the People's Republic of China stipulates seven types of intellectual property rights.

² Article 12 of the Interpretation of the Supreme People's Court on Several Issues on the Application of Law in the Trial of Civil Cases Involving Unfair Competition.

³ Article 4 of Some Provisions of the Supreme People's Court on Evidence in Civil Procedures.

⁴ Huang Wushuang (2018). *On Reasonable Boundaries of Trade Secrets Protection* (p. 248). Law Press•China.

⁵ Notice of the Supreme People's Court on Issuing the Opinions on Issues Concerning Maximizing the Role of Intellectual Property Right Trials in Boosting the Great Development and Great Prosperity of Socialist Culture and Promoting the Independent and Coordinated Development of Economy (issued on 16 December, 2011, No. Fafa 18/2011).

⁶ Article 5 of Several Provisions of the SAIC on Prohibiting Infringement upon Trade Secrets reads: under certain conditions, if the accused infringer fails to adduce relevant evidence, the infringement establishes.

⁷ Kong Xiangjun (2019). *New Principles of AUCL • Sub-Theories* (p. 419). Law Press•China.

⁸ Article 93 of Interpretation of the Supreme People's Court of Several Issues Concerning the Enforcement Procedures in the Application of the Civil Procedure Law of the People's Republic of China. Article 9 of the Several Provisions of the Supreme People's Court on Evidence in Civil Proceedings.

⁹ See the Civil Judgment No. Huyizhongminwu(zhi)chuzi 200/2003 and the Civil Judgment No. Suminsanzhongzi 0103/2006. In both cases, the judicial authorities presumed the infringement on the conditions that the right holders proved the existence of trade secrets and that key

technical points of the infringing information were substantially the same as the trade secrets and the infringer had access to the trade secrets, and meanwhile the infringers failed to prove the acquisition of information through a legal route.

¹⁰ Article 61 of the China's Patent Law.

¹¹ Relevant data come from China Judgments Online.

¹² Article 32.2 of the newly-revised AUCL stipulates three circumstances: (1) there is evidence proving that the accused infringer has a route or opportunity to acquire the trade secret, and the information used thereby is substantially the same as the trade secret; (2) there is evidence proving that the trade secret has been disclosed and used by the accused infringer or is in danger of being disclosed and used; and (3) there is other evidence proving that the trade secret has been infringed by the accused infringer.

¹³ Article 9 of the newly-revised AUCL.

¹⁴ Article 10.3 of the AUCL 1993 stipulates that "trade secret" means commercial technical information and business information which is not known to the public, which is capable of bringing economic benefits to the right owner, which has practical applicability and which the owner of rights has taken measures to keep confidential.

¹⁵ See supra note 4, page 2.

¹⁶ See supra note 2, Article 11.3.

¹⁷ See supra note 2, Article 14.