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THE PROTECTION OF INDUSTRIAL TRADE SECRETS: promotion and advice for European companies developing their IP Portfolio in China.

Federica Costanza Fontani

PhD Candidate, Faculty of Law and Criminology, Vrije Universiteit Brussels, Belgium

federica.fontani@gmail.com

Abstract

In today's knowledge society, in particular for economies such as Europe whose competitiveness relies essentially on creativity and innovation, the effective protection and enforcement of Intellectual Property Rights (IPRs) is crucial. This applies not only to physical goods, but also to digital goods, considering the ease with which they are illegally copied and disseminated.

The acceleration of globalization and the world trade opening up have an asymmetric impact on EU Member States and on the emerging powers.

One of the effects of globalization is the relocation of production, from the technology-rich countries towards low labour cost countries. In the former, there is a vast pool of know-how waiting to be untapped; while, in emerging markets there is an enormous demand for know-how, waiting to be filled. This "trade in technology" could be one of the answers to a changing world: the rich countries need to improve the making process for this trade, particularly when it comes to the transfer of know-how and industrial trade secrets.

This study, inspired by recent works of the European Commission¹, approaches the topic of *Trade Secrets* as a form of IPRs; from one side, the European legal perspective and, on the other, analyzing the Europe-China dialogue and co-operation in commercial relations.

More and more concerns are being voiced that the EU is not doing enough to trade secrets. All the Member States (MS) offer some form of IPRs protection, although, in some countries this protection is still extremely limited. On the other side, the particular attention given to the European-Chinese commercial relations is justified by the role of China as one of the most important emerging power.

China remains the main challenge regarding IPRs enforcement, not only because attracts several concerns from European industries, but also because the 73% of all suspected imported goods detained at EU borders in 2011 and not released, came from China.

¹ In October 2012, *Protection of trade secrets/confidential business information from misappropriation and misuse by third parties* in February 2013, *Report on the Protection and enforcement of intellectual property rights in the third countries*, and in November 2013, *On the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure*.

Only in 2004, Europe and China started to establish a framework for the co-operation and dialogue in the area of IPR, especially developing the use of *EU-China IP Dialogue* and the *IP Working Group*.

The need for China to better protect IPRs is a constant message conveyed by the European Commission to Chinese authorities at all governmental levels, including the highest.

Nowadays, economic, social, political and technological developments have a fundamental impact on how IP is created, exploited and used. Existing systems of intellectual property protection are constantly adapting to accommodate these changes, as they have since their inception. As a consequence of that, intellectual property assets need to be effective especially in this evolving environment.

In this paper, the author explores the rapid evolution of intellectual property landscape focusing the research on trade secrets, as the most weak form of intellectual property protection, especially in cross-border commercial transaction between Europe and China.

The paper is organized in four main sections:

- I. Intellectual property definition and their benefit in a changing society;
- II. Importance of trade secrets and confidential business information as intellectual property rights;
- III. Europe – China dialogue and cooperation in commercial relations;
- IV. Incentive in developing IP portfolio to create added value for companies' assets

Key words: Confidential business information/trade secrets, Europe-China, commercial relations, Intellectual Property, IP China Helpdesk, IP Portfolio.

I. Use of Intellectual Property protection

Intellectual Property (IP) is a creation of the intellect that is owned by an individual or an organization in the private or public sector which can then choose to share it freely or to control its use in certain ways.

IP is found almost everywhere: in creative works like books, films, records, music, art and software, and in everyday objects like car, drugs, computer and varieties of plants, all of which have been developed with the aim to advance in science and technology R&D. Other distinctive features may help to choose the products we buy, like brand names and designs, can also fall within the scope of IP.

The IP system is designed to benefit society as a whole, striking a delicate balance to ensure that the needs of both creator and user are satisfied. IPR usually allow the rights-holder to exercise rights over the use of his or her work for a limited period of time.

In return for granting such rights, the IP system contributes to society in a number of ways, for example:

- Enriching the pool of public knowledge and culture;
- Maintaining fair competition and encouraging the production of a wide range of quality goods and services;
- Underpinning economic growth and employment;
- Sustaining innovation and creation;
- Promoting technological and cultural advances and expression.

Intellectual property rights have been defined as ideas, inventions, and creative expressions based on which there is a public willingness to bestow the status of property. Moreover, they provide exclusive rights to the inventors or creators of that property, in order to enable them to reap commercial benefits from their creative efforts or reputation.

Through a system of IPR, is possible not only to ensure that an innovation or creation is attributed to its creator or producer, but also to secure “ownership” of it and benefits as a result. By protecting intellectual property, society acknowledges the benefits it contributes and provides an incentive for people to invest time and resources to foster innovation and expand knowledge.

Analyzing the Intellectual property rights from a legislative point of view, they are usually granted under national laws, even if various international agreements on IPRs has the object to harmonize laws and procedures, or allow IPRs to be registered at the same time in several countries.

It important to briefly list the several kind of intellectual property protection. The most important are the following:

- a) *Copyright*. Protection for creations in the field of literature and arts, such as book, paintings, films, musical, compositions and recording, as well as software. Copyright protection gives an author exclusive right of certain duration, generally from the time of creation of the work until 50 or 70 years after the author's death.
- b) *Patents*. Protection for technological inventions: patents represent a social contract between society as a whole and inventors. In most countries, patent protection lasts for 20 years counted from the filing date, issued by national and regional government patent office, to which the inventor has to submit an application.
- c) *Trademark rights*. They protect almost any distinctive features attached to a product or a service, such as words, symbols, smells, sounds, etc., that distinguish one product or service from another. In most countries, registration of a trademark is for the protection of specific goods or services. Furthermore, in many countries, famous or well-known trademarks also enjoy protection against uses that disparage, dilute or take unfair advantage from the reputation of a famous trade mark.
- d) *Design protection*. May protect the specific external appearance given to objects, such as furniture, car body parts or jewellery. The regime for design protection differs from a country to another and in most countries design protection is subject to registration. Regarding the legislative panorama, harmonization has been achieved within the European Union with Regulation No 6/2002². This provide for a Community design right, effective in all 28 EU Member States, which gives protection up to 25 years for the registered design and for short term of 3 years for unregistered ones³.
- e) *Trade Secrets*. They are also considered to be type of Intellectual Property and most countries provide some form of legal protection for them, especially since they prevent unfair competition in the commercial world.

The same product can also be simultaneously protected by more than one type of intellectual property right in different countries.

² Council Regulation (EC) No 6/2002 on *Community designs*, 12 December 2001

³ In WIPO – World Intellectual Property Organization – discussion on a propose design Law Treaty are underway, with the objective of harmonizing administrative aspects of the entire filing procedure.

II. Growing importance of the trade secrets and confidential business information

Trade secrets represent one of the forms of intellectual property and are a key part of the innovation process. Furthermore, they are important to protect the development of new ideas as well as established information that derives value from not being publicly known.⁴

Every successful business has intellectual property, referred to as trade secrets – a method, formula, device, process or any information that gives the business a unique competitive advantage over its competition. Nearly all business in all industries and sectors possess trade secrets: they are a valuable and highly useful form of intellectual property rights.

Information and knowledge are generally said to be the most valuable assets of a company. Especially with regard to the globalizations of trade and interconnected supply chains, trade secrets encompass various types of business information, whether technical, commercial or financial, which is not known or readily ascertainable by the relevant public and which gives to business a competitive edge⁵.

All companies have secrets. Some are technical such as the detailed specification of a manufacturing process; some are business-related such as a list of customers' names and address, which would be useful to a competitor. Some are of enormous value⁶. Some are simple, even one word long, such as the name of a company takeover target, others are complex, such as the details of a planned advertising campaign.⁷

Confidential business information or trade secrets can ensure to the rights-holder, business advantage over the competitors and by being able to prove that their made effort to keep it secret.

The universe of what can be a trade secret is vast, but there are certain requirements identified by the article 39.2 of TRIPS Agreement. Thus, in order for the information to be a secret, it must be:

- a) *Not commonly known* – it must not be known by the general public or by the competitors.
- b) *Have actual or potential commercial values* – it must give the owner a competitive advantage or be capable of generating economic benefit.
- c) *Guarded by confidentiality measures* – the owner must take reasonable measures to protect the confidentiality of the information.

⁴ M.L.KROTOSKI, *Common Issues and Challenges in the Prosecuting Trade Secret and Economic Espionage Act Cases*, in *Economic Espionage and Trade Secrets*, United States Attorney's Bulletin, November 2009, vol.57 n. 5

⁵ For instance: undisclosed financial results, new product plans, bill of material, price calculation methods, distribution methods, food and beverage ingredients and chemical formulas, etc.

⁶ I.e. the recipe for Coca Cola.

⁷ http://www.wipo.int/sme/en/documents/disclosing_inf.htm

All three elements identify when information has to be considered a trade secrets: whether it is something a competitors would want to know or that would give them a commercial advantage.⁸

▪ **Infringement of Trade Secrets**

There is no harmonized system for the protection of trade secrets within the EU.

All the Member States offer some form of protection although in one or two Member states protection is extremely limited. The manner of protection varies from State to State and the law and procedure in some States is uncertain. It should be noted that the absence or existence of specific legislation dealing with trade secrets is not necessarily an indication of whether effective action can be taken in a country. For instance, in common law nations trade secrets are protected mainly under general contract and tort law (such as UK and Republic of Ireland have effective trade secrets protection despite having no specific trade secret legislation); while some Member States provide criminal penalties for theft of trade secrets others limit remedies to monetary damages (such as Germany, have trade secret provisions in legislation aimed at unfair competition, labour laws and criminal laws).⁹

In the illustrated scenario, needs to be identified the main features of the different legal frameworks in the EU Member States for the protection of trade secrets, considering the nature of the rights conferred, the juridical procedures and remedies available, perceived inadequacies in the current law and best practice.

Of late, more and more concerns are being voiced that the EU is not doing enough to protect trade secrets¹⁰.

This led the European Commission to request an external study on the protection of trade secrets in the various SMEs which was published in 2012.¹¹ The study drew attention to wide discrepancies in the existing approaches to trade secrets throughout Europe; moreover, in some Member States protection was found to be “extremely limited”.

There is a lack of consistency between States as to individuals against whom action can be taken.

In some countries action may be taken against anyone who has received confidential information; in others, against only those with whom some contractual relationship exist. Possible defendants may

⁸ <http://www.china-iprhelpdesk.eu>

⁹ Hogan Lovells International LLP, *Report on Trade Secrets for the European Commission, study on Trade Secrets and Parasitic Copyright*, MARKT/2012/20/D, European Commission 13 January 2012

¹⁰ Bronckers M. – Mcnelis N., *Is the EU Obligated to Improve the protection of Trade Secrets? An Inquiry into TRIPS, the European Convention on Human Rights and the EU Charter of Fundamental Right*, on European Intellectual property review, Vol. 34 issue 10 2012

¹¹ Hogan Lovells International LLP, *Report on Trade Secrets for the European Commission, study on Trade Secrets and Parasitic Copyright*, MARKT/2012/20/D, European Commission 13 January 2012

include, current and ex-employees, actual and potential licensees, competitors, independent third parties receiving information and those involved in industrial espionage. Public authorities also have responsibilities in relation to the information coming into their possession.

Protecting business/trade secrets is not a new problem. It is old as business, especially because trade secrets are particularly vulnerable to misappropriation that inhibits innovation and disadvantages individuals and companies that do not engage in such illicit trade practices.

Although the European Union has recognized the significance of intellectual property for its long-term economic development, it remains ambiguous as to whether trade secrets are classified as intellectual property. Moreover, enforcement of trade secrets rights is exceedingly difficult because of an inconsistent trade secrets regime across EU Member States. Trade secrets are not generally viewed as intellectual property rights and most member States legislation does not treat rights in trade secrets as intellectual property rights, but there is a close relationship between them.

▪ **New Technology developments vs trade secrets protections**

The development and commercial application of new technologies are constantly generating new types of products, services and process, many of which can be protected by IPR.

On the other hand, the new technologies development has as consequence the easier outsourcing of business information.

Thanks, in part, to digital communications, a great deal of sensitive information has become much more difficult to control, particularly when the sub-contractor is not located in the EU. The original owner of the trade secret enjoy market advantage until a competing product is launched. As commonly know, China is one of the first country involved in business secrets theft and hacking. One reason for the ascendancy of trade secrets is that technology is making their misappropriation easier. Before computers, trade secret information was usually stored in physical form. Now the theft of trade secret is quite easy for the today's digital world, above all for China. As noted by one commentator, "[...] the digital world is no friend to trade secrets"¹². As a consequence of that, the European investors in China have hampered by lack of trust that their information are safe, with the chance to use only the "second-best" standards dealing in their Chinese commercial operations.

With the European initiative aligned with Europe 2020 (flagship of the initiative is "*Innovative Union*") the EU Commission undertook to improve the framework conditions for business to innovate the optimization of Intellectual Property Protection. Europe 2020 sets forth sweeping goals for the European Union during the current decade, along with concrete recommendations for measures to recover from the economic malaise and attendant social setbacks of the past several

¹² J.R.THOMAS, *The Role of Trade Secrets in Innovation Policy*, Congress Research Service 2010

years to foster innovation in Europe, Europe 2020 urges the expansion – both at national and Union level- of mechanism for intellectual property protection.

III. Geographical developments having an impact on intellectual property protection: the role of China

Centers of technological and other innovation in different areas are now developing in different parts of the world and are no longer limited to the traditional innovation hubs in Europe, North America and Japan. The ten top-ranked countries in the 2013 *Global Innovation Index* include Hong Kong (China) and Singapore while the top 40 include Malaysia, China, the United Arab Emirates and Costa Rica.

The evolving geographical landscape of innovative activity is partly reflected by worldwide trends in IPR filing activity. For the period 2007 to 2012, filing activity for patents, trademarks and industrial designs has steadily shifted from high-income to middle-income countries.

For example, in 2012 residents of China accounted for the largest numbers of applications filed throughout the world for patents, utility models, trademarks and industrial designs, and the relevant Chinese patent and trademark offices were also the largest recipients of filings for these types of IP.

▪ Protect your secrets in China

To better focus European cooperation on IPR protection and enforcement with third countries, it is important to revisit the list of priority countries identify by the European Commission in 2006 and updated in 2009. At the outset, It should be noted that many countries (such as China, India, the Philippines and so on) are making substantial efforts to improve and strengthen their IPR protection and enforcement systems¹³.

The main purpose of this research is to focus the attention on Cooperation Europe-China.

As large territories with wide economic and social disparities, China and the European Union face many similar challenges and share similar goals in achieving more balanced regional development.

Today, these challenges take on many forms, the acceleration of Globalisation and the continuing opening of world trade, the effect of the technological revolution, the increasing role of the knowledge economy, the environment challenges, in particular climate change, the urban-rural divide, the increase in the social and economic disparities, migration and demographic trends. These

¹³ In example: by reviewing National legislation, increasing number of actions carried out by law enforcement bodies, and improving capacity in the administrations concerned.

challenges will have an asymmetric impact on EU and Chinese regions, tending to exacerbate existing differences and create new ones.¹⁴

China remains the main challenge regarding IPR enforcement, not only because it attracted the most responses and the strongest concerns from EU industry, but also because 73% of all suspect goods detained at EU borders in 2011 and not released came from China.¹⁵

In recent years, China has made important efforts to align its legal system with international IPR standards. It has clear objectives and a long term strategy in the field of IPR, with the overall ambition to become an innovation economy in 2020.¹⁶

More and more foreign companies are being sued for IP infringement in China. Additionally, more foreign companies are beginning to assert their IP rights there. And few foreign companies are resorting to Chinese courts in battling their foreign rivals as well.¹⁷

China's policies for regional development seek to stimulate growth in a number of specified urban centers at the same time as helping rural areas to raise their productivity and, thus, incomes.

It is widely understood, therefore, that the objective of economic and regional development policies in China is to reduce poverty. In the EU, there is less clarity about the objective of EU cohesion policy: sometimes it is expressed as creating more and better jobs; sometimes as economic convergence or closing the income gaps between the poorest and average regions; sometimes as seeking economic modernisation and greater competitiveness. EU cohesion policy would benefit from clarifying its goals (focus of the policy would be poverty reduction and increased employment) and thus making sure that they were widely understood. Their objectives could, therefore, be quantified so as to take account of the Union's 2020 objectives.¹⁸

In Chinese law the Misappropriation of Trade Secrets is covered by the Art. 10 of the Anti-Fair Competition Law, who further prescribes the following three forms of wrong liability for the misappropriation and misuse:

1. Acquiring trade secret of another by theft, inducement, duress, or other illegal means;

¹⁴ European Union, DG for regional policy, *Regional Policy in China and in the EU. A comparative perspective*, 2011

¹⁵ EU Commission, *Report on the protection and enforcement of intellectual property rights in third countries*, 5th February 2013

¹⁶ In this area the reference is still the *National IP Strategy* (NIPS) adopted in June 2008, which has been complemented by the 12th *Five Years Plan* released in March 2011 by the EU Commission, with the objective of developing an "innovative country".

¹⁷ J.B. BAI – G.DA, *Strategies for Trade Secrets Protection in China*, 2011

¹⁸ European Union, DG for regional policy, *Regional Policy in China and in the EU. A comparative perspective*, 2011

2. Disclosing, using, or allowing others to use trade secrets in breach of an agreement or a confidentiality obligation imposed by a legal owner.¹⁹
3. Disclosing, using, or allowing others to use trade secrets of another acquired by the above illegal means.

Furthermore, trade secrets may also be inadvertently disclosed by employees and in particular in China the employees may not have the same understanding of IP rights and proprietary information or expectations about protecting such information as European ones do.

Not only Europe complains about Chinese hacking. Also the American companies are victims of an “onslaught of computer network intrusion that have originated in China”²⁰. The report says China is trying to “build” its economy on U.S. technology, research and development, and other sensitive forms of intellectual property. As a consequence of that the impact on U.S. companies can be devastating.

In 2011, the Intellectual Property Division of the Supreme People’s Court accepted a total of 420 different types of new intellectual property cases, a 34.19% increase over the number in 2010.²¹ In particular, in unfair competition cases, the percentage of unfair competition disputes involving network technologies and new business models as well as trade secret disputes increased considerably.

▪ **Brussels: the meeting place for Chinese and European business**

The Region of Brussels-Capital, as the “heart of Europe” is the suitable scenario for establishing a EU-China Dialogue and co-operation. The need for China to better protect IPR is a constant message conveyed by the European Commission to Chinese authorities at all levels of government, including the highest level.

Europe complains about Chinese companies stealing the technology of European companies. Whether Europe can actually force China to enforce intellectual property rights is another matter, EU companies are often willing to do almost anything to retain access to the Chinese market, which is crucial for a host of European industries, such as automobiles, airplanes and services.

As a consequence of that, in 2004 Europe and China established a framework for co-operation and dialogue in the area of IPR, with two components: an *EU-China IP Dialogue*, which takes place once a year in Brussels or in Beijing and allows both sides to exchange information and prospective views on a wide range of IPR issues; and an *EU-China IP Working Group*, which takes place twice a year in

¹⁹ Zhong Hua Ren Min He Gou He Tong Fa, *Contract Law of the P.C.R.*, art 43

²⁰ Report of U.S. government’s National Counterintelligence Executive (NCE) on <http://www.ncix.gov/publications/reports/>

²¹ Supreme People’s Court, *Annual Report on Intellectual Property Cases*, on <http://www.chinalawandpractice.com>

Beijing, with the participation of European industry. Unlike the dialogue, the Working group focuses on more concrete issues or sectors and is more technical in nature.²²

In 2009, another positive development was the adoption of an EU-China Action plan concerning customs co-operation on IPR enforcement. This plan foresees the exchange of general risk consignments, strengthening cooperation with other law enforcement agencies, and the development of partnership between business communities and customs authorities both in China and in the EU.

Therefore, to help EU small and medium-sized enterprises (SMEs) understand the peculiarities of the Chinese IPR system, the EU Commission has been providing support since 2008 through the *China IPR SME Helpdesk*²³ : this service provides free-of-charge helpline, training and web-based self-help materials.

All the European actions aimed to promote and guarantee a fruitful and advantageous cooperation with the Chinese market, given its strong importance in a Globalised Economy. In particular the Brussels-Capital region does its utmost to promote business with strong potential in terms of technological development as well as university and higher education through support and awareness programs.

The potential impact of this cooperation needs to be analyzed under the:

1. *Economic development*: more competitiveness for Brussels' economy. The China IPR SME Helpdesk guarantee a better understanding between Brussels and Chinese companies, with the aim to facilitate co-operation and inward investments.
2. *Economic profit*: decrease of production costs. Dovetailed production with lower end, production and high-end finishing to facilitate R&D programs and cooperation project in Brussels.
3. *Employment increase*: less expensive manpower and more hiring of Brussels' employee from Chinese company working in Belgium.
4. *Expanding corporate environment and market*: the China IP Desk advises Chinese companies on how to design and implement their IP strategy when investing and operating in the Europe and assist them in the protection and exploitation of their know-how and trade secrets when conducting business in Belgium and in Europe.

Brussels is also involved on the occasion of the World Intellectual Property Day, which falls on the 26th April every year. In 2013, the Deputy Prime Minister and Minister for Foreign Affairs has underlined the importance that Belgium gives to the protection of intellectual property. This is why

²² EU Commission, *Report on the protection and enforcement of intellectual property rights in third countries*, February 2013

²³ <http://www.china-iprhelpdesk.eu>

this country has since October 2012 been fulfilling the role of chair of the industrialized countries within the World Intellectual Property Organization (WIPO), which is split up into seven regional groups.

Belgium is acting as coordinator, spokesperson and negotiator for the points of view of the industrialized WIPO member states in the plenary meetings.²⁴

IV. The prospect for commercial outcomes of the industrial recovery

Unlike some other forms of IP right such as patent and copyrights that have a finite term, trade secrets can theoretically enjoy an infinite term of protection so long as the trade secrets remain just that – a secret. It can indeed offer significant advantages if its owner succeeds in using the results of its innovation effort while competitors strive to catch up with the same, similar or alternative solution.

When trade secret is patentable know-how, the scope of legal protection respectively granted by patent law and trade secrets status has to be carefully compared before deciding whether to patent the invention or keep it secret. One of the key factors in this decision is that patents are public and require disclosure of the subject matter, while trade secrets are supposed to be secret.

A distinctive feature of a trade secret is the practical impossibility of erasing or overriding the effective transfer of knowledge, once it has happened. This is why, when transferring a trade secret, its holder usually pays great attention to confidentiality provisions and to the efficiency of interim court injunctions that can be obtained locally to prevent unauthorized dissemination.

Business need to set up effective information security policies, measures and training programs to effectively secure their intellectual property against the growing risks of trade secrets misappropriation.

Good information security practice is of utmost importance and a natural focal point for protection measures is the unauthorized disclosure of information by employees. Preventive measures in relation to current and past employees and business partners will help to reduce the misappropriation of trade secrets and confidential business information and allow companies to take full advantage of the global economy. These actions cannot be effectively replaced by legal actions, which usually take place after the fact.

²⁴ <http://diplomatie.belgium.be>

▪ **Managing intellectual property assets to create economic value**

One of the effects of globalization is the relocation of production from the technology-rich countries towards low labour cost countries. This is a threat for SME suppliers and manufacturers in technology-rich countries, whose customers turn their heads to low labour cost countries. On the other side of the globe, this trend creates opportunities for contract manufacturers and service industries.²⁵

In technology-rich countries, there is a vast pool of know-how waiting to be untapped, while in emerging markets there is an enormous demand for know-how, waiting to be filled. This “trade in technology” could well be one of the answers to a changing world. The rich countries need to improve the making process for this trade, particularly, when it comes to transfer of know-how and trade secrets which are hardly patentable – as in the case with most industrial know-how – both parties, licensor and licensee alike, still seem to be reluctant to cross the bridges.

There is a role for institutions and governments to facilitate this matching process by improving the environment of intellectual property rights, particularly in know-how and trade secrets.

As a consequence of that relevant disparity between technology-rich countries and “third countries”²⁶, is evident that the level of infringement²⁷ is higher than before, as can be noticed from the annual statistic regarding the detentions at EU borders of goods suspected of infringing IP rights.

The importance to protect IP is illustrated by the following data²⁷:

- IP as intangible assets now represent as much as 85% of companies’ corporate value;
- In 2011 the income from EU services exports of licenses (i.e. granted to non-EU economic operators) resulted in payments of royalties valued at € 39 billion;
- On top of that, an “IPR value” is present in many if not most of the goods exported by EU businesses;
- Moreover, regarding geographical indications (GIs), the total sales value of EU GI products was close to € 54 billion in 2010, with extra-EU trade representing about 20% of this amount.

These figures are only a few examples underlining the economic significance of IP rights and the potential impact infringements may have on the EU economy. EU companies need stable and safe IPR regimes, not only in Europe where this is already ensured to a large extent, but also abroad, where infringement of IPR causes significant financial losses for EU companies, to remain

²⁵ H.VERHULST, *International Trade in Technology – Licensing of Know-How and Trade Secrets*, www.wipo.int/sme/en/documents/trade.technology

²⁶ The EU Commission in the Report of 2013 take into consideration as third countries: China, India, Indonesia, the Philippines and Turkey, as “priority countries” for strengthening cooperation on intellectual property.

²⁷ EU Commission, *Report on the protection and enforcement of intellectual property rights in third countries*, 5th February 2013

competitive, must be able to pursue value chain specialization without jeopardizing their intellectual property.

This project approaches the topic of intellectual property from a commercial perspective, focusing on the legal steps and preventive security measures, which a business can take to protect them from theft of trade secrets and other sensitive information assets.

▪ **How companies manage and protect intellectual property rights**

An important element for the protection of trade secrets is proper management control. Managers should restrict the access to the staff who need to know them – the biggest loss of confidential information from a company occurs when its staff leave and move to another firm in the same area of business.²⁸

Most theft of trade secrets cases involve current or former employees, disgruntled or otherwise. It is simply the most common way trade secrets literally “walk out of the door”.²⁹ Other security precautions may be needed, such as imposing password protections on access to information. It is also important to mark documents with a word such as “confidential” if this is the case, but avoids the tempting mistake of marking every document, because such marking will have no real meaning and will be ignored.

Given today’s progress in communication technologies and the speed at which information can be duplicated and moved, maintaining a trade secret is an everyday challenge. To meet this challenge an enterprise must consider the following: a) identify all the valuable trade secrets, develop and put in a place a trade secret protection policy and program; b) educate employees about the importance of trade secrets; c) carefully decide and review periodically as to which employees “need to know or use”, the information and restrict access to trade secrets; d) apply physical and technological restriction to access trade secrets; e) limit and monitor public access to confidential information; f) mark “secret” or “confidential” all documents containing trade secrets so as to avoid accidental or inadvertent disclosure. As a consequence of that, a goal would be: organize an investigation on several companies to check how their level of protection is and how it works.

This wobbly defense of trade secrets will continue to be breached by unscrupulous competitors outside Europe, which will result in the bleeding of industrial innovation from the European Union, and ultimately, the compromising of the incentive to innovate and create that is the foundation of all forms of intellectual property.

²⁸<http://www.wipo.int>

²⁹ <http://www.china-iprhelpdesk.eu>

One of the ways to protect industrial trade secrets could be by using *Non-Disclosure Agreements*, but companies should not use it too often. The best way to keep safe a secret is to keep it secret.

The business has to consider the intellectual property rights as an asset which can be used to create value for the company, for customers and for society as a whole, and which has to be managed accordingly.

▪ **Business tools to manage your IPR in China.**

The increase in filings of different IPR worldwide gives rise to additional considerations for business; for instance in China, as utility models are considered prior art which can destroy novelty worldwide, the exponential increase in utility model registrations can pose challenges for businesses which seek to ensure that their inventions have not been anticipated.

Developments in communications and logistics are allowing business, even small ones, to operate and trade on an increasingly international scale. Thanks to the developments in information and communication technologies (ICT), many business collaborations take place across borders, thus stimulating the exchange of knowledge and expertise around the world.

These tendencies are resulting in more cross-border intellectual property transactions and may result in multi-jurisdictional intellectual property litigation becoming more common.

The European IPR Helpdesk offers free of charge, first-line support on IP and IPR matters to beneficiaries of EU funded research projects and EU SMEs involved in transnational partnership agreements. In order to make possible for the companies to built their IP Portfolio, the IP Helpdesk like some international law firm, has established two different kind of investments:

- *Inbound investments* to help foreign investors in designing and implementing their IP Strategy throughout the entire life cycle of their Chinese projects, from conception to implementation. In particular, the IP Helpdesk manage the subsequent operation: helps companies build their IP Portfolio in China; advises companies on how to best structure their investment in China in order to effectively secure their IP assets; advises companies on how to best exploit their IP Portfolio in view of their business objectives into the Chinese market; assists companies in enforcing their IP rights in China.
- *Outbound investment* since European companies are well aware that more and more Chinese companies focus on innovation, are expanding their activities worldwide and are developing a valuable IPR portfolio outside China. The Chinese domestic companies needs to be assisted with better clarification of all IP issues raised by their international expansions and business operation.

The idea to create and manage an IP Portfolio would be definitely useful for many foreign-invested small and medium-size enterprises operating in China to better deal with Chinese parties on pre-negotiation or non-disclosure agreement. In example, having this kind of agreement already drafted should helps to minimize the issue and make more safety business negotiations.

Conclusion

Trade secrets have become increasingly important to the success of industries worldwide. This is particularly true in the European Union, where most industries rely upon rapid, continuous and incremental innovation to add value to their product lines. In this may, these companies foster brand loyalty and compete for a share in mature markets. This accelerated pace innovation compels a significant reconsideration of trade secrets as a critical component of Intellectual Property.

One of the aim of the project is to analyze the urgent need for legislative protection of trade secrets in the European Union, from two different aspects:

a) *Weak trade secret protection threatens the viability of prestigious EU industries, especially for SMEs.* It implies not only economic losses and potential industrial demise, but also an insidious leeching of prestige long enjoyed by European industries. The growing significance of trade secrets for industries which, to remain competitive, must continually offer new goods reflecting incremental improvements.

b) *Effective EU-level legislation for protection of trade secrets will allow European industries to prosper.* Trade secrete is emerging as the most means to protect industrial innovation. Small and mid-size companies particularly, need affordable protection for product innovations , the acquisition of which should not take longer than marketable life of the innovation.

Improved rules and stringent policies are essential but will not solve the problem of global trade secret abuse alone. A realistic risk assessment it's necessary to determine the necessary level of information security to protect the trade secrets. In addition to the misappropriation of trade secrets by employees and parties to cooperation, increasing global sourcing and the expansion of business to high-growth markets further the risk of abusive use of trade secrets and confidential business information. Effective protection against misappropriation of trade secrets is therefore important to encourage sharing of knowledge and collaboration, mostly when they are referred to cross-borders investment.

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