

商业秘密管理与信息保护强迫症

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“An approximate answer to the right problem is worth a good deal more than an exact answer to an approximate problem.”

— John Tukey

“答得妙不如问得巧”

— 约翰·图基

As I was participating in a recent conference of trade secret nerds (yes, we often refer to ourselves that way), I found myself thinking about the Titanic. More specifically, about the legend of the missing binoculars. It seems that on that tragic night in 1912 the lookout was unable to find a pair of binoculars that he thought had been stowed in the crow's nest. According to the story, they were in a locked box in the quarters of the former second officer, who had been transferred to another ship just before departure (lucky guy) and apparently took the key with him. In the immediate aftermath of the sinking, no one considered that the lack of binoculars had anything at all to do with the ship's failure to steer clear of the iceberg. It was pitch dark, and the obvious cause was excessive speed. The official report didn't even mention binoculars. But during the later inquest, the lookout testified about his futile search, and the “but for the binoculars” legend was born.

最近，我参加了一次商业秘密另类们（是的，我们经常这样称呼自己）的会议，在会上我突然想到了泰坦尼克号；更具体地说，是关于双筒望远镜失踪的传说。在 1912 年那个悲剧发生的夜晚，瞭望员以为双筒望远镜放在瞭望台上，但却似乎找不到了。据说，它们被放在前二副宿舍的一个带锁的盒子里，二副在出发前被调到另一艘船上（这是个幸运的家伙），显然他把钥匙也带走了。沉船事故发生后，没有人认为双筒望远镜的缺失与泰坦尼克号未能避开冰山有任何关联。当时的环境一片漆黑，沉船最显著的原因显然是船速过快。官方报告甚至没有提到双筒望远镜。但在后来的审讯中，瞭望员作证说他没有找到，于是就有了“如果有双筒望远镜结果可能不同”的说法。

1 Whether to 'List' Your Trade Secrets

是否要“列出”你的商业秘密

Why did this come to mind sitting in a meeting about trade secret management? We were debating a classic question: should a company create a “list” of its secrets, so that it can sensibly manage them and be ready if it has to go to court to protect them? The transactional lawyers in the group said yes, but many of the litigators were opposed. They worried that if a company committed to a list, it might later need to file an action to enforce a secret that wasn't on the list and lose the case as a result. Like the binoculars,

something that initially seemed fairly insignificant might become critical in a new context.

为什么坐在一次关于商业秘密管理的会议上，我们会想到泰坦尼克号上的双筒望远镜呢？当时我们正在讨论一个经典问题：一个公司是否应该列出一份商业秘密“清单”，以便切合实际地管理这些秘密，并为在需要诉诸法庭保护它们时做好准备？会议小组中的交易律师表示同意，但许多诉讼律师表示反对。他们担心，如果公司过分依赖一份清单，一旦未来要针对某项商业秘密提起诉讼来维权，但该秘密却没有被罗列在清单上，并且因此输掉诉讼。就像望远镜一样，最初看起来微不足道的东西，在新的情境下中可能会变得至关重要。

Proving trade secrets often requires focus on the impression that you're giving the judge or jury about what information really matters to you. Ideally, the owner offers compelling evidence that this specific design, or code, or process makes a big difference to the success of the company. But if you had failed to put this on the "list," it's hard to avoid the argument that you didn't care enough about it, or it just wasn't all that important. However, as we'll see it doesn't necessarily have to end up that way; a lot depends on how you go about "listing" what you have.

证明商业秘密通常需要给法官或陪审团留下哪些信息对你真正重要的印象。理想情况下，权利人需要提供令人信服的证据，证明特定设计、代码或流程对公司的成功意义非凡。但是如果你没有把这一信息列入“清单”，就很难避免对方抗辩说你没有给予信息足够关注，或者它并不那么重要。然而，正如我们所看到的，事情并不一定是这样；很大程度上取决于你如何“列举”你所拥有的东西。

At our meeting, the argument boiled down to a contest of competing perfections. The corporate lawyers wanted to maximize the company's ability to manage an asset that is as valuable as it is evanescent, so were willing to take some risk on a later dispute if in return the business could more effectively supervise its secrets. The litigators wanted to maximize flexibility to "adjust" the company's claimed secrets to later circumstances, without worrying about a previous catalog that may have missed something now considered to be important.

我们在会议上的争论，实际上成为了一场完美主义的较量。公司律师希望最大限度地提高公司管理资产的能力，而这些资产既有价值又容易被破坏。因此，如果公司能够更有效地监管其商业秘密，他们愿意为日后的纠纷承担一定的风险。诉讼律师则希望最大限度地提高灵活性，以便根据以后的情况“调整”公司所主张的商业秘密，而不必担心以前的目录清单可能会遗漏一些当前被认为是重要的内容。

2 There's No One Right Answer

没有唯一正确答案

Both sides in this debate were right and wrong. Yes, the law requires that a company trying to enforce its trade secret rights demonstrate that it has engaged in "reasonable efforts" to keep them secret; and knowing what they are is an obvious first step in that process. But the law requires only that the business act reasonably, not flawlessly. Similarly, in litigation where you have strong proof of theft, the jury is not likely to be too distracted by the fact that you didn't perfectly categorize all the secrets that you can now prove have value.

这场辩论的双方各有对错。是的，法律要求试图主张商业秘密的公司证明其已采取“合理措施”来保护商业秘密；当然，要采取保密措施首先要知道这些商业秘密是什么。但法律只要求企业合理行事，而不是完美无缺。同样，在商业秘密诉讼中，如果你有充分的证据证明你的商业秘密被盗窃，并且证明该秘密是有价值的，那么陪审团不会太在意你没有把它明确罗列出来。。

Of course, it certainly helps to show that you have always taken seriously the need to protect the information that gives your business a competitive edge. The judge or jury tends to equate the actual value of your secrets with the relative effort that you have put into caring for them. But that doesn't mean you have to inventory each and every bit of data. That's a fool's errand. Because trade secrets are so granular and pervasive throughout the enterprise, and because they – and their value – are always changing, you would have to

be updating the list daily, and you would never get it totally right.

当然，证明您一贯认真保护那些为企业带来竞争优势的信息对诉讼确有帮助。法官或陪审团倾向于认为，您的商业秘密的实际价值与您为保护它们所付出的努力是相对应的。但这并不意味着您必须将每一条数据都罗列出来，那是愚蠢的。由于商业秘密由很多微小单位构成，而且普遍存在于企业中，而且它们的范围及其价值总是在变化之中，如果您就不得不每天更新清单，您将永远无法做到完全正确。

There is a simpler way to identify your information assets, one that doesn't take inordinate resources or risk losing a lawsuit. It recognizes that there is no one "best practice," but only a range of practice that is "reasonable under the circumstances" for your business. As that phrase suggests, there are multiple potentially relevant factors.

有一种更简单的方法来识别信息资产，这种方法既不需要耗费过多的资源，也不需要冒着输掉官司的风险。这种方法的理念就是，没有一种“最佳的做法”，只有“在特定情况下合理”的做法。何为合理？这需要考虑多个可能相关的因素。

3 A Lot Depends on the Nature of the Business

很大程度上取决于业务性质

For example, if you run a small business that is relatively predictable, such as a restaurant or an insurance agency, you already have an appreciation for the secrets you need to protect, whether recipes or customer lists. And you know that the main risk you face is with employees who may be tempted to walk off with them. Having that in mind, your efforts will be focused on limiting access, perhaps with some training to help the workforce understand why those things are sensitive.

例如，如果你经营一家业务相对可预测的小企业，比如餐馆或保险代理，那么你已经知道哪些是需要保护的秘密，无论是食谱还是客户名单。你知道企业面临的主要风险是员工可能会试图带走这些秘密。考虑到这一点，你的工作重点将放在限制接触权限上，或许还可以进行一些培训，帮助员工了解为什么这些信息是保密信息。

At what might be the other extreme, if yours is a startup tech company with a mission to disrupt a market, you will be creating and discarding ideas and data as you quickly grow. Your dataset of valuable information is necessarily dynamic (as are the risks it faces). In that environment, trying to stop and get a useful handle on what your most important secrets are can be very difficult; everything is moving too fast.

另外一个完全相反的例子是，如果你的公司是一家初创科技公司，愿景是要颠覆市场，那么随着公司快速发展，你将不断产生新的想法和数据，然后又放弃，周而复始。因此，那些有价值的信息组合必然是动态的（所面临的风险也是动态的）。在这种情况下，要想停下来去有效处理最重要的商业秘密，可能会非常困难；因为一切都发展得太快了。

But that doesn't mean you should just throw up your hands and forget about trying to understand the nature of your competitive advantage. You may not have (yet) discovered something discrete on the order of the blockbuster drug molecule or the perfect search algorithm; but even in the early stages you learn a lot about what works and what doesn't. You develop an idea of what the ideal feature set for your upcoming product might be. You begin to understand what it is that your customer base would love to have, if only you could deliver it to them.

但这并不意味着就应该完全放弃去了解竞争优势在哪里。你可能还没有发现像重磅药物分子或完美搜索算法那样独特的东西；但即使在早期阶段，你也会学到很多：什么行得通、什么行不通。你想到即将上市产品应该具有哪些特征。你开始明白你的客户群最想要什么，如果你能向客户兑现他们的需求就好了。

Would you want your competitors to have access to all that information? Of course not. But if you don't pause from time to time to

think about what it is, then you won't be in a position to actively manage it, to protect it and use it to increase enterprise value. Remember, the "it" we're talking about here is the essence of what distinguishes your company, or will distinguish it going forward. What could be more important?

你希望竞争对手能够接触到所有上述这些信息吗？当然不希望。你应该时不时地停下来思考这些信息究竟是什么，否则你将无法积极地管理它、保护它并利用它来提高企业价值。请记住，我们在这里谈论的“它”，是你的公司与众不同的本质所在，或者说，它将在未来脱颖而出。还有什么比这更重要呢？

4 You Don't Need to Boil the Ocean

切莫事无巨细

The point is that you don't have to boil the ocean to know what you have at a sensible level of detail. For many companies, it will be enough to identify the categories of information that are (or will be) your "crown jewels," recorded and briefly described on a spreadsheet that is regularly updated. Other companies wanting to impose more discipline on the process may opt to use a trade secret management tool such as Tangibly. Whatever sort of system you adopt, its description or user notes should include the caveat that it is intended as a guide for management, and should not be seen as comprehensive or exhaustive. By doing that, and also describing your secrets in broad terms, you will decrease the risk that something omitted becomes a problem.

关键在于，您无需煞费苦心地了解您的商业秘密的每个细节。对于许多公司来说，只需确定重要（现在或将来像“皇冠上的宝石”一样重要）信息的类别，并在定期更新的电子表格中记录和简要描述这些类别就足够了。其他希望对流程施加更多约束的公司可能会选择使用Tangibly等商业秘密管理工具。无论您采用哪种系统，说明或用户须知都应包括如下提示：系统只是管理指南，而不是全面或详尽的管理手段。通过这样做，并对商业秘密进行概括性描述，您将降低遗漏某些内容而引发问题的风险。

On the positive side, you will have given yourself a solid basis for effective management of your information assets by assigning appropriate risk levels and considering mitigation measures. And you will be much more prepared for transactions like acquisitions or licenses, and also able to respond immediately with litigation when your rights are threatened.

从积极的一面来看，通过适当的风险分级并考虑相应的降低风险的措施，您将为自己有效管理信息资产奠定坚实的基础。而且，您将为收购或许可等交易做好更加充分的准备，并且能够在权利受到威胁时立即提起诉讼。

At least you won't be frantically searching for the keys to the binoculars case.

至少，你不用疯狂地寻找双筒望远镜盒的钥匙。

[1]由北京天驰君泰律师事务所国际业务专业委员会高级合伙人朱尉贤律师、陈哲远律师审校。

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