



March 24, 2016

Officer
Legislative Affairs Office of the State Council
Post Office 2067
Beijing 100035
People's Republic of China

Via e-mail: fbzdjz@chinalaw.gov.cn

Re: Comments re the Proposed Amendment to the Anti-Unfair Competition Law Published on February 25, 2016

Dear Officer,

The Intellectual Property Owners Association (“IPO”) respectfully submits comments to the Legislative Affairs Office of the State Council on the Proposed Amendment to the Anti-Unfair Competition Law (“Amendment”) published on February 25, 2016.

IPO is an international trade association representing companies and individuals in all industries and fields of technology who own, or are interested in, intellectual property rights. IPO’s membership includes more than 200 companies and more than 12,000 individuals who are involved in the association either through their companies or as inventor, author, law firm, or attorney members. IPO membership spans 43 countries.

IPO would like to commend the Legislative Affairs Office for the attention being paid to strengthen trade secret protection under the law. IPO generally supports the amendments relating to trade secrets and would like to make the following suggestions.

Article 9

IPO proposes clarifying in the Amendment that modifications of misappropriated trade secrets and use of such modified trade secrets shall constitute actionable trade secret misappropriation. We propose adding in Article 9 of the Amendment the addition underlined below.

Article 9: Business operators are prohibited from engaging in the following acts of trade secrets misappropriation:

- (1) acquiring trade secrets of a legal owner by theft, inducement, duress, fraud, or other illegitimate means;
- (2) disclosing, using, or allowing others to use trade secrets of a legal owner acquired by the means mentioned in the preceding section;
- (3) disclosing, using, or allowing others to use trade secrets in breach of an agreement or a confidentiality obligation imposed by a legal owner.

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INTELLECTUAL PROPERTY OWNERS ASSOCIATION

If a third party acquires, discloses, uses, or allows others to use trade secrets of a legal owner when he has or should have knowledge of the illegal acts mentioned above, he shall be liable for trade secret misappropriation.

The word “use” in this article includes modifying trade secrets acquired in violation of the Law or using the modified trade secrets.

Trade secrets refer to technical or business information that is unknown to the public and that has commercial value, for which the trade secret owner has undertaken measures to keep confidential.

We believe this addition is appropriate to reflect certain realities regarding trade secret misappropriation. In practice, misappropriators sometimes do not use trade secrets acquired by illegal means directly; for example, they might modify the trade secrets to conceal the sources, or allow others to use the modified information. Such modification of a misappropriated trade secret is still wrongfully using the trade secret and should be deemed trade secret misappropriation. Another example of a use that should be prohibited is creating the design for a product or process based upon the misappropriated trade secret knowledge that certain experiments have failed.

At least one court in China agrees and has concluded that modification of misappropriated trade secrets constitutes misappropriation. For example, in the case of *Chongqing Changshou Xinxieli Chemical Engineering Co. v. Hu Xiantang* ((2010) Yu Yi Zhong Fa Min Chu Zi No. 0055), the Court held that “regardless if the defendant was using [the trade secrets] directly or after making minor improvements, the defendant acquired the trade secrets by illegal means, and the nature of the defendant’s misappropriation acts does not change.” The judgment confirmed that modification of trade secrets was an act of misappropriation.

From a perspective of legislative intent and policy consideration, the goal of protecting trade secrets is to protect intellectual property and encourage innovation. The core principle of modern trade secret law is that “use” is very broadly interpreted to include any behavior that was even inspired by access to the secret information, or that otherwise advantages the misappropriator to begin their own work. With or without modification, using trade secrets acquired by illegal means constitutes misappropriation, and it causes damage to legal owners. Allowing misappropriators to rely on modification as a defense to legitimize their wrongful acts would open the door to trade secret theft, permitting trade secret misappropriators to benefit and true innovators to suffer. This anomaly clearly contravenes the objectives of the Anti-Unfair Competition Law to promote fair competition, counter unfair competition, and protect businesses’ legitimate interests. It is also inconsistent with China’s national policies of encouraging self-reliant innovation.

Neither the current Anti-Unfair Competition Law nor the Amendment, however, expressly specifies that such acts of modification constitute trade secret misappropriation. We suggest writing this principle into the Anti-Unfair Competition Law.

Article 15

This Article gives the supervision and inspection departments the power to seize documents during an investigation. We believe it would be helpful to explain what types of measures the supervision and inspection departments should use to prevent the seized documents from being disclosed to others. In addition, we believe this Article clarify whether the victim of a trade secret theft would be able to review the seized documents to assist the supervision and inspection departments in determining whether a violation has been committed.

Article 22

We appreciate the inclusion of language in the draft to allow “burden shifting” in instances when a trade secret rights owner can prove that the information used by the other party is substantively the same as its own trade secrets and the other party had the access to such trade secrets. This is an important option for rights holders to be able to exercise, and we recommend maintaining the current draft language in the final version of the Law.

This Article would allow the supervision and inspection departments to order business operations to cease the acts that constitute a violation of the provisions of Article 9. We believe that the language used in this Article should make clear that such an order can be made to prevent a future violation of Article 9, and not only to remedy a past violation of Article 9. Including such language would comply with Article 39 of the TRIPS agreement (which provides that persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent) and Article 41 of the TRIPS agreement (which provides that members shall include expeditious remedies to prevent infringements in the IP enforcement procedures).

IPO again thanks the Legislative Affairs Office of the State Council for the opportunity to provide these comments. We invite you to contact us if you have any questions, require additional clarification, or would otherwise wish to further discuss the foregoing.

Sincerely,



Kevin H. Rhodes
President