25 March 2017

Li Shishi
Chairman, Legislative Affairs Commission
The National People's Congress of the People's Republic of China
No. 1, Qianmen Street W
Xicheng District
Beijing 100805
People's Republic of China

Re: IPO's Comments on Proposed Amendment to the Anti-Unfair Competition Law Published on 26 February 2017

Dear Chairman Li,

The Intellectual Property Owners Association ("IPO") respectfully submits comments to the Legislative Affairs Commission of the Standing Committee of the National People's Congress ("NPCLC") on the Proposed Amendment to the Anti-Unfair Competition Law ("Amendment") published on 26 February 2017.

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 roughly 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 50 countries. IPO advocates for effective and affordable IP ownership rights and offers a wide array of services, including supporting member interests relating to legislative and international issues; analyzing current intellectual property issues; providing information and educational services; and disseminating information to the general public on the importance of intellectual property rights.

IPO would like to commend the NPCLC for the attention being paid to strengthen unfair competition protections under the law. IPO generally supports the amendments and would like to make the following suggestions.

Article 6

IPO proposes using the "likelihood of confusion" standard to be consistent with Article 57(2) of the Trademark Law. We propose amending the Article with the underlined text as follows:

1501 M Street, NW, Suite 1150 ● Washington, DC 20005
T: 202-507-4500 ● F: 202-507-4501 ● E: info@ipo.org ● W: www.ipo.org

Article 6. Operators shall not adopt any of the following improper means to carry out market transactions:

1. Using, without authorization, the names, packaging or decoration unique to well-known goods or the names, packaging or decoration similar to those of well-known goods so that their goods are likely to be confused with the well-known goods of others, **to lead people** to mistake them for the well-known goods or services of others;

...

Article 7

IPO commends the NPCLC for imposing vicarious liability on the employer for the acts of commercial bribery by its employees. We believe this will motivate businesses to increase the control and monitoring of their employees and to steer them away from commercial bribery. We understand that for a business to avoid liability, the burden of proof is on the employer to prove that the bribery was an employee's "personal act." We believe clarification is needed on the standard of proof and what constitutes a "personal act."

Articles 9 and 10

IPO appreciates the broadening of the definition of "trade secret" in Article 9 and the provision regarding trade secret misappropriation by employees and former employees in Article 10. We propose clarifying that modifications of misappropriated trade secrets and use of such modified trade secrets shall constitute actionable trade secret misappropriation. We propose the following underlined addition in Article 10 of the Amendment:

Article 10. The following acts are deemed as acts of trade secrets misappropriation:

1. Employees or former employees of the right holders of trade secrets implementing acts described in paragraph 1 of Article 9;

2. Where a third party **still** obtains, uses or discloses the trade secrets or **allows others to use** the trade secretes when the third party knows or should have known that the **trade secrets come from illegal acts listed in paragraph 1 of Article 9**.

The word "use" in this Article and Article 9 includes modifying trade secrets acquired in violation of the Law or using the modified trade secrets.

Professional personnel, including staff members of the State organs, lawyers, and Certified Public Accountants, shall keep the trade secrets known in the tenure.

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 sometimes 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 wrongful use of 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 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 polices of encouraging self-reliant innovation.

Article 16

This Article gives the supervision and inspection departments the power to copy 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 copied documents from being disclosed to others. In addition, we believe this Article should clarify whether the victim of a trade secret misappropriation would be able to review the copied documents to assist the supervision and inspection departments in determining whether a violation has been committed.

Article 24

IPO supports the proposed increased penalties for trade secret misappropriation in Article 24.

We also support the proposal to allow the supervision and inspection departments to order businesses and third parties to cease the acts that constitute a violation of the provisions of Articles 9 and 10, respectively. We believe that Article 24 should make clear that such an order can be made to prevent a future violation of Article 9 or 10, and not only to remedy a past violation of Article 9 or 10. Including clarifying 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).

We note that language from prior versions regarding burden shifting has been deleted. This is an important option for rights holders to be able to exercise. We recommend adding the underlined language back to the Amendment as follows:

Article 24. Where an **operator** infringes on trade secrets in violation of the provisions of Article 9 of the Law or **a third party** infringes on trade secrets **in violation of the provisions of Article 10** of the Law, relevant supervision and inspection authority shall order the same to desist from the illegal act and impose a fine of not less than **CNY 100,000** but not more than **CNY 500,000**; **where the circumstances are serious, the said authority shall impose a fine of not less than CNY 500,000 but not more than CNY 3 million**.
…

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, the other party has the burden of proof to prove that information it uses was obtained legally.

IPO again thanks the Legislative Affairs Commission of the Standing Committee of the National People's Congress 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

Attachment: IPO's Comments on Proposed Amendment to the Anti-Unfair Competition Law, Chinese version

二零一七年三月二十五日

100805
北京市西城区前门西大街1号
全国人民代表大会常务委员会法制工作委员会办公室
李适时主任

主题: 美国知识产权所有人协会对《中华人民共和国反不正当竞争法(修订草案)》征求意见的回复

尊敬的李主任您好:

根据中华人民共和国全国人大常委会法制工作委员会(下称"人大法工委")就《中华人民共和国反不正当竞争法(修订草案)》(下称"《草案》")于2017年2月26日发布的征求意见的通知, 美国知识产权所有人协会(下称"IPO协会")谨此提交以下意见。

IPO协会是一家代表各行业、各技术领域内拥有知识产权或相关权益的公司和个人的国际性行业协会。它拥有大约两百家公司会员以及超过一万两千多名个人会员。这些个人会员有些从属于公司会员或律所成员, 有些是发明人、作者或律师会员。IPO协会的会员遍及五十个国家。它提倡有效和实惠的知识产权，为会员提供广泛的服务，包括支持会员在立法和国际事务中的利益、分析当前知识产权问题、提供教育和信息服务、以及向公众传播知识产权的重要性。

IPO协会感谢人大常委会对加强反不当竞争法律保护作出的关注。我们支持本草案，并提出以下建议。

一. 第六条

IPO 协会提议，在本条第一款使用"容易导致混淆"的标准，以与《中华人民共和国商标法法》 第五十七条二款相符合。在《草案》基础上，我们提出的建议修改以下划线标出如下：

1501 M Street, NW, Suite 1150 ● Washington, DC 20005
T: 202-507-4500 ● F: 202-507-4501 ● E: info@ipo.org ● W: www.ipo.org

第六条 经营者不得采用下列不正当手段从事市场交易:

（一）擅自使用知名商品特有的名称、包装、装潢,或者使用与知名商品近似的名称、包装、装潢,造成和他人的知名商品容易导致~~相~~混淆,**引人**误认为是该知名商品;

. . .

二. 第七条

IPO 协会盛赞在本条中加入的经营者对员工贿赂行为的替代责任。我们相信这会使得经营者加强对员工的监控，引导他们远离商业贿赂行为。本条也规定了经营者如果要避免替代责任，则对员工的“个人行为”负有举证责任。我们认为，对员工“个人行为”的定义和证明标准需要有更清晰的说明。

三. 第九、十条

IPO 协会很感谢《草案》第九条对“商业秘密”的更广泛的定义以及第十条中加入的对员工和前员工侵犯商业秘密的规定。我们提议，第十条应更清晰地表明侵犯商业秘密的范围包括改进商业秘密以及使用改进过的商业秘密，如下框中下划线增加部分所示:

第十条 下列行为视为侵犯商业秘密的行为:

（一）商业秘密权利人的员工、前员工实施本法第九条第一款规定的行为;

（二）第三人明知或者应知**商业秘密来源于本法第九条第一款规定的非法途径,仍**获取、披露、使用或者**允许他人使用**。

本条及第九条中的“使用”包括改进以不正当手段获取的商业秘密以及使用此改进过的商业秘密。

国家机关工作人员,律师、注册会计师等专业人员对其在履行职责过程中知悉的商业秘密应当予以保密。

我们相信提议增加的部分反映了侵犯商业秘密的一些现实状况。在实际生活中，侵犯者有时不会直接使用以不正当手段获取的商业秘密。举例而言，他们有时会对商业秘密加以改进以隐藏商业秘密的来源或允许他人使用改进过的商业秘密。这样的改进依然是对商业秘密的不正当使用，应被包括在侵权行为的定义中。另一种应被禁止的使用商业秘密实例则是从以不正当手段获取的商业秘密中获知某些实验失败了，在已知失败实验的基础上来设计新产品或新流程。

已有法院赞同将对商业秘密的改动视作侵犯商业秘密。如在重庆长寿新协力化工有限公司等诉胡宪堂等侵犯商业秘密纠纷案((2010)渝一中法民初字第 00055 号)中，法院认为：“被告东荣公司通过非法手段获取了涉案商业秘密，不管其是直接实施还是略加改进后再实施，其行为的侵权本质并未改变。即非法获取并实施商业秘密是侵权行为，

对非法获取的商业秘密进行改进同样是侵权行为。”这一判决确认了对非法获取的商业秘密进行改进是侵权行为。

从立法意图和政策性的角度来考虑，保护商业秘密的目的是为了保护知识产权和鼓励创新。现代商业秘密法的核心原则是将“使用”的定义定为很宽，甚至包括由保密信息中取得灵感以及其它能使侵权者获利的行为。使用通过非法手段取得的商业秘密，无论直接使用还是通过改进后使用，都属于对商业秘密的侵权，使得商业秘密所有权人的权利受到了损害。如果允许侵权人用改进作为侵权的抗辩，则会将这种不正当行为合法化，为偷窃商业秘密打开大门，使得商业秘密侵权人大获其利而真正的创新者大受损害。这将与反不正当竞争法促进公平竞争、打击不公平竞争、保护经营者正当利益的目的相违背。这同样也与中国鼓励自主创新的国家政策相违背。

四. 第十六条

《草案》第十六条规定，监督检查部门在调查不正当竞争行为时，有权复制与涉嫌不正当竞争行为有关的文件资料。我们希望对监督检查部门会采取什么样的方法来为这些复制文件保密能有更清晰的解释。我们也认为本条应清晰地表明，商业秘密被侵犯的受害者是否有权利查看这些复制文件以帮助监督检查部门判断是否有侵犯商业秘密的行为发生。

五. 第二十四条

IPO 协会支持《草案》第二十四条中对提高了违法侵犯商业秘密所处的最大罚款额。我们也支持本条中规定的监督检查部门可以责令违反第九条规定的经营者以及违反第十条规定的第三人停止违法行为。我们认为第二十四条应该清楚地规定，这种责令停止不仅仅限定于已经发生的违法行为，而是也包括责令制止即将发生的违反第九条和第十条规定的违法行为。这样的规定符合世界贸易组织《与贸易有关的知识产权协定》的第三十九条（规定了自然人和法人应有可能阻止由其合法掌握的信息在未得到其同意的情况下，被以违反诚信商业作法的方式泄露、获得或使用）和四十一条（规定了成员方应对知识产权侵犯行为采取及时阻止侵权的补救措施和对进一步侵权构成一种威慑的补救措施）的要求。

我们注意到，在国务院法制办公室 2016 年 2 月 25 日公布的《中华人民共和国反不正当竞争法（修订草案送审稿）》第二十二条中，有一段关于举证责任的规定。我们建议将这一规定加回《草案》第二十四条，如下框中下划线增加部分所示:

第二十四条 经营者违反本法第**九**条规定**、第三人违反本法第十条规定**侵犯商业秘密的**,由**监督检查部门责令停止违法行为,**处十**万元以上**五十**万元以下的罚款;**情节严重的,处五十万元以上三百万元以下的罚款。**

. . .

商业秘密权利人能够证明他人使用的信息与其商业秘密实质相同以及他人有获取其商业秘密条件的，他人应当对其使用的信息具有合法来源承担举证责任。

IPO 协会再次感谢全国人大常委会法制工作委员会给予此次机会提出意见。若有任何疑问、或需要进一步说明、或希望进一步讨论上述内容，欢迎随时联系我们。

此致

美国知识产权所有人协会谨启

Kevin H. Rhodes
IPO 协会主席

附件：IPO协会对《中华人民共和国反不正当竞争法(修订草案)》征求意见的回复，英文版