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主题: 《最高人民法院关于知识产权民事诉讼证据的若干规定(征求意见稿)》的反馈意见

致最高人民法院:

美国知识产权所有人协会(下称“IPO协会”)感谢中华人民共和国最高人民法院(下称“最高院”)提供了对 2020 年 6 月 15 日发布的《最高人民法院关于知识产权民事诉讼证据的若干规定(征求意见稿)》(下称“规定”)提交意见的机会。

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。它拥有一百七十五家公司会员以及大约一万两千名个人会员。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 协会的会员遍及三十多个国家。

IPO 协会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 协会赞赏《规定》似乎反映了中美两国最近签订的第一阶段知识产权协议中与证据相关的某些规定。事实上,对于加强两国在知识产权民事案件事实调查方面的合作,IPO 协会认为此次公开征求意见是重要且有益的落实。我们很高兴地看到在该征求意见稿中,最高院非常重视举证责任、证据的收集、保全、质证和核实等问题,我们希望我们的意见将有助于《规定》的定稿过程,并为中国证据规则的未来发展提供信息。以下是我们对《规定》的具体反馈意见。

第五条

第五条列举了可以作为确定侵害知识产权的赔偿数额证据的有关记录。为了澄清所列出的是一些但并非唯一可以作为证据的有关记录的类型，谨建议将第五条修改如下：

财务账簿、会计凭证、上市公司年报、公司网站或者宣传册等有关记载，行业利润，评估报告，知识产权许可使用合同以及工商、税务、金融部门的记录、**以及与侵权所引起损害相关的其他有关记录**等，可以作为确定侵害知识产权的赔偿数额的证据。

第六条

第六条列举了知识产权纠纷中不适用《最高人民法院关于适用〈中华人民共和国民事诉讼法〉的解释》第九十二条有关自认的规定的几项内容，包括权利主体、权利状态和侵害专利权纠纷中技术特征的比对。但是，“权利主体”的定义并不清楚，可能有以下两种解释：“权利所有人”或者“权利的类型”。因此，IPO 协会提出了以下两种备选修改方案：

选项一：

知识产权纠纷中的**权利主体权利所有人**、权利状态、侵害专利权纠纷中技术特征的比对不适用《最高人民法院关于适用〈中华人民共和国民事诉讼法〉的解释》第九十二条有关自认的规定。

选项二：

知识产权纠纷中的**权利主体权利类型**、权利状态、侵害专利权纠纷中技术特征的比对不适用《最高人民法院关于适用〈中华人民共和国民事诉讼法〉的解释》第九十二条有关自认的规定。

第七条

第七条规定了某些事实可以在知识产权民事诉讼中免于举证。诉讼中免于举证的事实属于民事诉讼中的例外情况，因此建议在本条款中对这些免于举证的事实进行明确清晰的定义。但是，目前条款中使用的“基本事实”一词所涵盖的内容并不确定。因此，IPO 协会建议最高院列明无需举证的事实，而不是范范的使用“基本事实”一词。

第九条

有关证据的公证、认证，2020年5月1日起施行的《最高人民法院关于民事诉讼证据的若干规定》第十六条中规定“中华人民共和国领域外形成的涉及身份关系的证据¹，应当经所在国公证机关证明并经中华人民共和国驻该国使领馆认证，或者履行中华人民共和国与该所在国订立的有关条约中规定的证明手续”。

该第十六条是就先前2002年4月1日施行（现已废止）的《最高人民法院关于民事诉讼证据的若干规定》第十一条“当事人向人民法院提供的证据系在中华人民共和国领域外形成的，该证据应当经所在国公证机关予以证明，并经中华人民共和国驻该国使领馆予以认证，或者履行中华人民共和国与该所在国订立的有关条约中规定的证明手续”修改而来。比较可知，当前一般应是仅针对中华人民共和国域外形成的涉及身份关系的证据要求公证后进行认证，而对其他类型的证据放宽了限制，不再将“认证”作为必要条件之一。

而上述征求意见稿中的第九条似仍允许对方当事人对除（一）、（二）款项规定外的情形就未办理认证手续为由提出异议，这与当前施行的《最高人民法院关于民事诉讼证据的若干规定》第十六条有不协调之处，建议对上述征求意见稿中的第九条进行修改以与当前施行的民事证据规定相契合。

如果对方当事人对证据的真实性明确认可，或者证人明确表示如作伪证愿意接受处罚的，则意味着证据的真实性已经可以得到确认。因此，公证和认证手续均已经没有必要。因此，IPO协会建议以下修改：

中华人民共和国领域外形成的证据，存在下列情形之一的，知识产权民事诉讼的对方当事人仅以该证据未办理公证和/或认证手续为由提出异议的，对于存在下列任何情形的，人民法院不予支持：

（一）对方当事人对证据的真实性明确认可的；

（二）当事人提供证人证言对证据的真实性予以确认，且证人明确表示如作伪证愿意接受处罚的；

（三）该证据不是涉及身份关系的。

第十一条

第十一条规定，如果在一审程序中出具的授权委托书已经过公证和认证，则在后续诉讼程序中可以不办理公证和认证。按照目前的表述，法院可以自由裁量决定是否要求当事人提交一套新的授权委托书。授权委托书（特别是来自国外的授权委托书）的取得、公证和认证过程对于外国诉讼当事人来说是一套耗时且繁重的行政程序，而其延误往往又不是诉讼当事人所能控制的。为了平衡此类证据的效率和可靠性，并使法院的工作实践一致和统一，IPO协会建议将第十一条第二款中的自由裁量的表述“可以”更改为“应当”。

¹ 我们理解，在证据规定（2020年5月1日实施）中提及的“涉及身份关系的证据”可以包括，例如，当事人的主体资格文件、授权代表人证明或者授权委托书。

在一审程序中已经根据民事诉讼法第五十九条、第二百六十四条的规定办理授权委托书公证、认证或者其他证明手续的，在后续诉讼程序中，人民法院**可以应当**不再要求办理该授权委托书的公证、认证或者其他证明手续。

第十二条

第十二条列举了法院在对证据保全申请做决定时应考虑的因素。但是，证据可以采用多种形式的，其中某些形式比其它形式更容易保全。本条所列举的因素应考虑这些差异，以平衡当事人和法院的利益，并促进有效的证据保全。更具体地说，法院决定的指导原则应包括证据的识别、收集和储存，以及根据所涉媒介类型而采用的适当收集方法。因此，IPO 协会建议增加以下内容：

(五) 拟保全的证据类型 (例如，证据是文件或是物品，例如机器)；

(六) 证据的格式 (例如，证据是否包括元数据)；

(七) 证据可进行保全的难易程度 (例如，是否可以复制或以其它方式记录在可移动介质中，是否需要特殊的储存条件)；

(八) 记录证据的媒介 (例如，纸张、电子存储、生物材料)；

(九) 如果有请求，保全证据的方法 (例如，拍照、录像或录音采集；适用于司法的声音电子数据复制)。

第十四条

第十四条述及了制定保全措施的几项指导原则，包括有效固定证据，保存证据证明力，尽量减少对保全标的物价值的损害和对证据持有人正常生产经营的影响。对此谨提出，在第十四条末尾增加以下内容，以进一步阐述这些指导原则：

人民法院在制定保全措施时，应切实考虑以下因素：

(一) 拟保全的证据与任一方当事人的主张或抗辩的相关程度；

(二) 拟保全的证据与案件的需要相称；

(三) 案件中诉争问题的重要程度；

(四) 争议金额；

(五) 当事人对拟保全的证据的相对可及性；

(六) 当事人的资源；

(七) 拟保全的证据在解决问题时的重要程度；以及

(八) 所提议的保全措施的负担或费用是否超过其可能的收益。

在审理时，在这些保全措施中保全的证据不必须作为证据引入。

第十五条

第十五条要求证据持有人遵守法院的证据保全裁定书。但是，该条款并不要求将裁定书送达证据持有人，仅规定了“可以”在保全时当场送达证据持有人。为了使证据持有人配合本条所要求的证据保全，应合理的告知证据持有人其必须采取的行动；为此，该条款应改为裁定书“应当”交付给证据持有人。因此，IPO 协会建议以如下方式修改第十五条：

证据保全裁定书可以应当在保全时当场送达证据持有人，或者按照人民法院确定的时间和方式送达，使得证据持有人及时获得有关其义务的通知。证据持有人拒不配合或者妨碍证据保全的，人民法院可以依照民事诉讼法第一百一十一条和第一百一十四条的规定进行处罚。

第二十二條

第二十二條規定，當事人可以申請人民法院鑑定。為了澄清當事人選擇專業鑑定機構進行鑑定的機制，IPO 協會建議在第二十二條第一款最後添加如下內容：

經人民法院批准，雙方當事人可以協商聘請專業鑑定機構或者專業人員，並且如果當事人不能達成協議，則由法院指定。

第二十三條

第二十三條涉及與查明事實有關的可委託鑑定的專門性問題。我們注意到，關於第（三）項，該判斷不應僅適用於涉嫌侵權的技術信息（比照於技術秘密），還應適用於涉嫌侵權的經營信息（比照於業務秘密）。這符合《反不正當競爭法》中的原則。因此，IPO 協會建議以下修改：

（三）當事人主張的技術商業秘密與公有領域技術的異同、被訴侵權的技術或商業信息与商業秘密的異同；

此外，我們建議法院對如下事項進行澄清，即，查明某技術是否“存在缺陷”應僅僅是出於確定該技術是否滿足訴爭問題（例如，充分公開、損害賠償計算等）的相關法律要求的目的。特別是，由於作為可商業秘密保護的構成要素與可專利保護的要素有很大不同，因此，此澄清旨在確保第（四）項不對“存在缺陷”的標準提出額外的法律要求，以使得商業秘密或專利權得到保護。因此，IPO 協會建議以下修改：

(四) 在满足与诉争诉求相关的法律要求方面，涉案技术是否存在缺陷；

第二十五条

第二十五条规定，在没有适当的制度或机构以进行鉴定的情况下，人民法院可以指定专业机构和人员进行证据鉴定。为了促进鉴定过程中的公平性，应要求专业机构、专业人员独立于当事人，并且人民法院应考虑可能影响其可信度的因素。因此，IPO 协会建议对第二十五条做如下修改：

鉴定业务领域未实行鉴定人和鉴定机构统一登记管理制度的，可以依照《最高人民法院关于民事诉讼证据的若干规定》第三十二条的规定确定具有相应技术水平的专业机构、专业人员鉴定。该专业机构、专业人员应当具有相关技术领域的较高知识水平、技能和必要的鉴定设备、条件，并且应当独立于当事人。人民法院应当考虑那些根据证据可能影响机构或人员观点和证言可信度的任何偏见、成见、利益或任何其它情况。

第二十八条

与第二十五条类似，第二十八条规定了可以由人民法院指定专业机构和人员，以针对案件中的专门性问题做出报告。为了促进报告的公正性和客观性，专业机构、专业人员应当独立于当事人，并且法院应考虑可能影响其可信度的因素。因此，IPO 协会建议对第二十八条做如下修改：

知识产权民事诉讼当事人可以向人民法院申请委托专业机构或者专业人员就案件的专门性问题作出评估报告、经济分析报告或者市场调查报告。经人民法院同意，双方当事人可以协商确定专业机构或者专业人员，协商不成的，由人民法院指定。在任何情况下，专业机构、专业人员应独立于当事人，并且人民法院应当考虑那些根据证据可能影响机构或人员观点和证言可信度的任何偏见、成见、利益或任何其它情况。

第三十一条

特定证据是否属于商业秘密，首先应考虑诉讼当事人或证据所有人的立场。为了促使具有透明度，并使公众能够知悉司法裁定的依据，在没有当事人或证据所

有人的请求时，法院不应依职权做出秘密保持裁定。另外，在诉讼当事人不是所涉证据的所有人的情况下，则证据所有人应当有权利对该证据申请秘密保持。因此，IPO 协会建议以下修改：

人民法院可以根据当事人申请或者依职权证据所有人申请作出秘密保持的裁定、责令证据接触者签署保密承诺书或者组织诉讼参加人签订保密协议。

此外，基于实践的考虑，我们建议对第三十一条第一款进行澄清，使得代表当事人的律师、专利代理师或有专门知识的他人不仅可以被允许查阅证据，还可以被允许为代理案件当事人的目的进行复制。因此，我们建议添加以下内容：

交换和质证的证据涉及商业秘密的，当事人不得查阅、摘抄、复制、拍照，但经人民法院准许的代理律师、专利代理师、有专门知识的他人可以查阅仅为代理案件当事人的目的且确保上述保密措施能够防止信息公开披露的前提下可以查阅或复制。

第三十八条

与第二十五条和第二十八条中阐述的原则相关，为了促进报告的公正性和客观性，IPO 协会建议法院应考虑可能影响有专门知识的人就专门性问题所提供意见的可信度的因素。我们建议以下修改：

当事人可以申请有专门知识的人出庭，就有关专门性问题提出意见。人民法院根据案件审理情况，也可以依职权通知有专门知识的人出庭。人民法院应当考虑那些根据证据可能影响有专门知识的人的观点和证言可信度的任何偏见、成见、利益或任何其他情况。

第四十二条

本条规定有专门知识的人出庭的费用应由“败诉一方”承担。但是，尚不清楚“败诉一方”是就专家提出意见的具体问题而言还是指诉讼结果方面。下面的情况并不少见，即，一方当事人在要求有专门知识的人作证的专门性问题（例如，解释特定权利要求要素或作出特定权利要求解释）上处于“败诉一方”，但最终在侵权责任方面获胜。此外，哪一方被认为是“败诉一方”可能是模棱两可的。一方当事人可以在确定侵权责任和损害赔偿方面胜诉，但法院不发布永久禁令；或者，一方当事人可以成功地确立侵权责任，但法院大幅减少其要求的损害赔偿。聘请有专门知识的人出庭的费用往往很高，而且每一方当事人都可决定是否希望聘请有专门知识的人以及要聘请哪些有专门知识的人。我们建议每一方当事人自行承担聘请有

专门知识的人的费用，并且在人民法院依职权指定有专门知识的人出庭时，各方当事人均等分担费用。因此，IPO 协会建议以下修改：

有专门知识的人因出庭而支出的交通、住宿、就餐等必要费用，由**败诉一方申请该有专门知识的人出庭的一方**当事人负担。当事人申请有专门知识的人出庭的，由该当事人先行垫付**并负担所有相关费用**；人民法院依职权通知有专门知识的人出庭的，由人民法院先行垫付**并由各方当事人均等负担相关费用**。

第五十条

许可合同的备案只是中华人民共和国法律规定的的一个可选程序要求，对合同的内容或效力不具有法律效力。因此，IPO 协会建议，许可合同是否备案不应成为确定许可使用费的因素。此外，应考虑其他与许可使用费证据相关的因素。因此，IPO 建议以下修改：

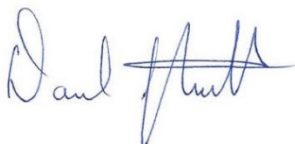
以知识产权许可使用费的合理倍数确定赔偿数额的，人民法院应当综合考虑下列因素对许可使用费证据进行审核认定：

- (一) 被许可人与许可人是否存在利害关系；
- (二) 许可使用费是否支付及实际支付方式，许可合同是否实际履行、**备案**；
- (三) 许可使用的权项、范围、方式、期间和地域。
- (四) 任何其它与许可使用费证据相关的因素。**

IPO 协会再次感谢贵院对反馈意见的关注。我们也非常愿意与贵院进一步交流或能有机会为贵院提供更多的信息。

随信附上本信的翻译版本。

此致



Daniel J. Staudt
美国知识产权所有人协会主席

附件：IPO 协会对《最高人民法院关于知识产权民事诉讼证据的若干规定（征求意见稿）》的反馈意见（英文版）



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31 July 2020

Supreme People's Court
27 Jiaomin Alley
Dongcheng District
Beijing, P.R.China

VIA EMAIL: spcip611@163.com

Re: Certain Provisions of the Supreme People's Court on Evidences in Civil Intellectual Property Litigation

To the Supreme People's Court:

The Intellectual Property Owners Association (IPO) wishes to thank the Supreme People's Court (hereinafter referred to as the "SPC") for the opportunity to respond to the request for comments on the draft "*Certain Provisions of the Supreme People's Court on Evidences in Civil Intellectual Property Litigation*" (hereinafter referred to as the "Provisions") published on 15 June 2020.

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 175 companies and close to 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 over 30 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 IP issues; providing information and educational services; and disseminating information to the public on the importance of IP rights.

IPO appreciates that the Provisions appear to reflect certain evidence-related provisions of the recent Phase 1 Intellectual Property Agreement between China and the U.S. Indeed, IPO views this invitation for comments as an important and useful implementation of the two countries' agreement to strengthen their cooperation regarding the fact-finding process in civil IP cases. We are pleased to see in this draft the SPC's strong focus on matters of burden of proof, collection, preservation, cross-examination and verification of evidence, and we hope that our comments will be helpful to the process of making the Provisions final, as well as inform future developments in Chinese evidence law. We provide below our comments on the Provisions.

Article 5

Article 5 provides a list of relevant records that may be used as evidence to determine the amount of compensation for infringement of intellectual property rights. In order to clarify that this list identifies some but not the only types of relevant records that may be considered as evidence, it is respectfully suggested that Article 5 be amended as follows:

*Relevant records in financial books, accounting vouchers, annual reports of listed companies, and company websites or brochures, industry margin, appraisal reports, contracts for licensed use of intellectual property rights and records of administration for industry and commerce, tax authorities and financial departments, **and other relevant records relating to damages associated with the infringement** may be used as evidence to determine the amount of compensation for infringement of intellectual property rights.*

Article 6

Article 6 lists several items that are not subject to Article 92 of the *Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China*. These items include the right subject, right status, and the comparison of technical features. However, the definition of "right subject" is not clear, with two possible explanations: "the right owner" or "the type of the right." IPO therefore proposes two alternative options for revisions:

Option 1

*The ~~right subject~~ **right owner** and right status in disputes over intellectual property rights and the comparison of technical features in disputes over infringement of patent rights are not subject to the provisions on admission of facts in Article 92 of the Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China.*

Option 2

*The ~~right subject~~ **the type of the right** and right status in disputes over intellectual property rights and the comparison of technical features in disputes over infringement of patent rights are not subject to the provisions on admission of facts in Article 92 of the Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China.*

Article 7

Article 7 stipulates that, in civil litigation of intellectual property rights, certain facts can be exempt from evidence production. Exemption from evidence production shall be exceptions in civil litigations. It is respectfully submitted that those facts that can be exempt from evidence production should be defined in a clear and definite manner. IPO therefore suggests that the SPC specify those facts that can be exempt from evidence production, instead of referring to "basic facts" in general.

Article 9

For notarization and legalization of evidence, Article 16 of *Some Provisions of the Supreme People's Court on Evidence in Civil Proceedings*, effective May 1, 2020, provides that: Evidence of identity relationships¹ formed outside the territory of the People's Republic of China shall be notarized by a notary public of the host country and legalized by the embassy or consulate of the People's Republic of China in that country, or perform the certification procedures stipulated in the relevant treaties concluded between the People's Republic of China and the host country.

This Article 16 is amended from Article 11 of the previous version of *Some Provisions of the Supreme People's Court on Evidence in Civil Proceedings*. The previous Article 11 provides "For evidence provided by the parties to the people's court that was formed outside the territory of the People's Republic of China, the evidence shall be notarized by a notary public of the host country and legalized by the Embassy or Consulate of the People's Republic of China in that country, or perform the certification procedures stipulated in the relevant treaties concluded between the People's Republic of China and the host country." Upon comparison, one can see that now it seems that the notarization plus legalization procedures are only required for evidence of identity relationships formed outside the territory of the People's Republic of China, but for other types of evidence, "going through the legalization process" no longer is a prerequisite.

Article 9 of the draft seems to still allow the other party to object to the circumstances, other than as provided in provisions (1) and (2), for failing to legalize a piece of evidence, which is inconsistent with Article 16 of *Some Provisions of the Supreme People's Court on Evidence in Civil Proceedings*.

If the other party clearly approves the authenticity of the evidence, or the witness clearly states their willingness to accept punishment for providing false testimony, then it is respectfully submitted that the authenticity of evidence has been confirmed. As such, neither notarization nor legalization should be necessary. IPO therefore recommends modifying Article 9 in the draft to be consistent with the current civil evidence regulations:

*For evidence formed outside the territory of the People's Republic of China, ~~in one of the following circumstances~~, if the other party in the intellectual property civil litigation filed an objection to a piece of evidence only on the ground that the evidence has not gone through the **notarization and/or legalization process**, the people's court will not support it **in case of any of the following circumstances**:*

- (1) The other party clearly approves the authenticity of the evidence;*
- (2) The party concerned has provided witness testimony to confirm the authenticity of the evidence, and the witness clearly states that he is willing to accept punishment if he gave false testimony;*
- (3) the evidence does not relate to identity relationships.***

¹ We understand that "evidence of identity relationships" as referenced in the Evidence Law (amended May 1, 2020) may include, for example, a party's qualification document, Certificate of Authorized Representative, or power of attorney.

Article 11

Article 11 provides that notarization and legalization may be waived in subsequent proceedings if the power of attorney (“POA”) issued for the first-instance proceeding has been notarized and legalized. Under the current language, courts have discretion as to whether to require the parties to submit a new set of POA. The process to obtain, notarize, and legalize powers of attorney (particularly of foreign origin) is a time-consuming and burdensome administrative hurdle for foreign litigants, with delays that are often beyond the litigant’s control. In order to balance between efficiency and reliability of such evidence, and to provide uniformity and consistency in court practices, IPO recommends changing the discretionary term “may” in the last sentence of this article to “shall”.

*If notarized and legalized POA has been submitted in the 1st instance court, the appellate court ~~may~~ **shall not** require the parties to submit a new set of power of attorney documents.*

Article 12

This article enumerates factors that courts should consider when making decisions on applications for evidence preservation. However, evidence can take many forms, some of which are easier to preserve than others. The factors listed in the article should account for those differences, in order to balance the interests of the parties and the court, and promote efficient evidence preservation. More particularly, guiding principles for the courts’ decisions should include the identification, collection, and storage of evidence, and appropriate methods for collection based on the type of media involved. IPO therefore adding the following factors to Article 12:

- v. The type of evidence to be preserved (for example, whether the evidence is a document or an article, such as a machine);*
- vi. The format of the evidence (for example, does the evidence include metadata);*
- vii. The ease or difficulty with which the evidence may be preserved (for example, can it be copied or otherwise recorded in a transportable medium, does it require special storage conditions);*
- viii. The medium on which the evidence is recorded (for example, paper, electronic storage, biological material);*
- ix. Where requested, the method for preserving the evidence (for example, photographic, videographic, or audiographic capture; forensically sound electronic data replication).*

Article 14

Article 14 addresses several guiding principles in crafting protective measures, including effective fixation of the evidence, preservation of the probative force of the evidence, minimizing damage to the value of the preserved subject matter, and minimizing impact on the normal production and operation of the evidence holder. In this regard, it is respectfully submitted that these guiding principles be further elaborated upon by adding the following to the end of Article 14:

In crafting the preservation measures, the people’s court shall keep in mind:

- (i) how relevant the evidence to be preserved is to any party's claim or defense,
- (ii) that the evidence to be preserved is proportional to the needs of the case,
- (iii) the importance of the issues at stake in the case,
- (iv) the amount in controversy,
- (v) the parties' relative access to the evidence sought to be preserved,
- (vi) the parties' resources,
- (vii) the importance of the evidence to be preserved in resolving the issues,
and
- (viii) whether the burden or expense of the proposed preservation measures outweigh its likely benefit.

Evidence to be preserved within these preservation measures need not be admissible as evidence at trial.

Article 15

This article requires compliance by the evidence holder with the courts' evidence preservation orders. However, the article does not require that the order be delivered to the evidence holder, providing only that the order "may be" delivered to the evidence holder on the spot and at the time of preservation. In order to provide the evidence holder with fair notice of what the holder must do in order to cooperate with the preservation of evidence as required by the article, the article should instead provide that the order "shall" be delivered to the evidence holder. IPO therefore proposes modifying Article 15 as shown below:

*The written ruling of evidence preservation ~~may~~ **shall** be delivered to the evidence holder on the spot at the time of preservation, **or at a time and in a manner to be determined by the people's court in order to provide timely notice to the evidence holder of its obligations.** If the evidence holder refuses to cooperate or obstructs the preservation of evidence, the people's court may punish him/her in accordance with the provisions of Articles 111 and 114 of the Civil Procedure Law.*

Article 22

Article 22 provides that the parties can file a request to the court for authentication. To clarify the mechanism for the parties' selection of a professional appraisal institution for the authentication, IPO recommends to add the following sentence at the end of the first paragraph of Article 22.

Upon the approval of the people's court, both parties may engage a professional appraisal institution or professional personnel through consultation, and if the parties cannot reach an agreement, then the court shall designate one.

Article 23

Article 23 addresses specialized issues pertaining to ascertaining of facts that may be entrusted for authentication. We note that, with regards to item (3), the determination

should be applied not only to the alleged infringing technical information (compared to the technical secrets), but also to the alleged infringing business information (compared to business secrets), as shown below. This would be consistent with the principles in the Anti-Unfair Competition Law.

- (3) *The similarities and differences between the ~~technical~~ **trade secrets** claimed by the party concerned and those in public domain, and the similarities and differences between the alleged infringing technical **or business** information and trade secrets;*

In addition, we suggest that the court clarify that ascertaining whether a technology is “defective” should only be for purposes of determining whether it meets the relevant legal requirement for the issue at stake (for example, enablement, calculation of damages, etc.). In particular, because the elements constituting what is protectable as a trade secret are very different from those relating to a patent, this clarification is to ensure that item (4) does not impose additional legal requirements under the “defective” standard in order for a trade secret or patent right to be protected. Accordingly, we recommend the following amendments:

- (4) *Whether the technology involved in the case is defective **in meeting the applicable legal requirements relevant to the claim at issue**;*

Article 25

This article provides that expert institutions and individuals may be appointed by the courts in order to authenticate evidence where there is no system or institution in place for doing so. In order to promote fairness in the authentication process, the experts should be required to be independent of the parties, and the court should take into account factors that could affect their credibility. IPO therefore proposes that Article 25 be revised as follows:

*For the identification in business area that did not implement unified registration and management of identifiers and identification institutions, the people's court may, in accordance with the provisions of Article 32 of the Rules of the Supreme People's Court on Evidence in Civil Litigation, designate the professional institutions and persons with relevant technical skills for the identification. The professional institutions and persons shall have a high level of knowledge and skills in the relevant technical fields and necessary identification equipment and conditions, **and further shall be independent of the parties . The people's court shall take into account any biases, prejudices, interests or any other circumstances that according to the evidence could affect the credibility of the opinions and testimony of the institutions or persons.***

Article 28

Similarly to Article 25, this article provides that expert institutions and individuals may be appointed by the courts in order to prepare reports concerning specialized issues in the case. In order to promote fairness and objectivity in their reports, the experts should be

required to be independent of the parties, and the court should take into account factors that could affect their credibility. IPO therefore proposes that Article 28 be revised as follows:

*Article 28 The litigants in the civil litigation of intellectual property rights may apply to the people's court for entrusting professional institutions or persons with the preparation of appraisal reports, economic analysis reports or market investigation reports on specialized issues of a case. With the consent of the people's court, the two litigants may designate such professional institutions or persons through consultation. If consultation fails, the people's court shall designate them. **In any event, the institutions and individuals shall be independent of the parties, and the people's court shall take into account any biases, prejudices, interests or any other circumstances that, according to the evidence, could affect the credibility of the opinions and testimony of the institutions or persons.***

Article 31

When determining whether particular evidence is a trade secret, the position of the litigant or the owner of the evidence should be considered first. To encourage transparency, and to enable the public's access to the bases for judicial rulings, absent a request from the litigant or owner of the evidence, the court should not rule that evidence be kept confidential. In addition, where a litigant is not the owner of the evidence at issue, it is respectfully submitted that such owner shall have the right to request that the evidence be kept confidential. IPO therefore proposes the following revisions:

*The people's court may, upon the application by the litigants or ~~according to its authority~~ **the application by the owner of the evidence**, rule that the evidence shall be kept confidential, or order the persons to whom the evidence is accessible to sign a letter of confidentiality undertaking, or require the litigation participants to sign a confidentiality agreement.*

In addition, and as a practical matter, we recommend clarifying the first paragraph of Article 31 so that attorneys, patent agents, or other persons with expertise representing a party not only are permitted to consult the evidence, but also to make copies for the purpose of representing the party in the proceeding. Therefore, we recommend the following addition:

*Where exchanged or cross-examined evidence involves trade secrets, the parties concerned shall not consult, extract, duplicate or take photos of the evidence, but the attorney, patent agent or other person with expertise that is approved by the people's court may consult the evidence **or duplicate it for the sole purpose of representing the party in the proceedings subject to such confidentiality measures that will keep the information protected from public disclosure.***

Article 38

Related to the principles stated in relation to Articles 25 and 28, in order to promote fairness and objectivity in their reports, IPO proposes that the court should take into account factors that could affect the credibility of those with expertise providing opinions on specialized issues. We recommend:

*The parties concerned may apply for persons with expertise to appear in court to put forward their opinions on relevant specialized issues. The people's court may also notify persons with expertise to appear in court in accordance with its own authority depending on the status of the trial. **The people's court shall take into account any biases, prejudices, interests or any other circumstances that according to the evidence could affect the credibility of the opinions and testimony of the persons with expertise.***

Article 42

This article prescribes that expenses incurred by experts to appear in court shall be borne by the “losing party.” However, it is not clear whether this refers to the “losing side” with regards to the specific issue the expert is being called to opine on, or to the outcome of the litigation. It is not uncommon to see a party be on the “losing side” on a specific issue that an expert was called to testify on (e.g., to explain a particular claim element, or propose a specific claim interpretation), but ultimately prevail as to whether there is infringement liability. Moreover, which side is considered a “losing party” can be ambiguous. A party may prevail in establishing infringement liability and damages, but be denied a granting of permanent injunction by the court; or, a party may succeed in establishing infringement liability, but the damages it requested are significantly reduced by the court. The expenses for having an expert appear in court can often be significant, and each party has control over whether and which expert they wish to call upon. We recommend that each party pay for the expenses of its own expert, and when the court appoints an expert that each party share the expenses equally.

*The necessary expenses such as transportation, accommodation, dining, etc. incurred by a person with expertise due to appearance in court shall be borne by the ~~losing party~~ **party applying for the appearance of such person.** Where a party concerned applies for a person with expertise to appear in court, the party shall disburse the expenses in advance **and bear all associated expenses;** where the people's court notifies a person with expertise to appear in court in accordance with its own authority, the people's court shall disburse the expenses in advance **and each party shall bear the associated expenses equally.***

Article 50

Recordation of a license contract is merely an optional procedural requirement under PRC laws, and has no legal effect on the content or effectiveness of the contract. Therefore, IPO submits that whether or not a license contract is recorded shall not be a factor in the determination of royalties. Additionally, other relevant factors associated with the evidence of royalties should be considered. IPO therefore proposes the following revisions:

If the amount of compensation shall be a reasonable multiple of the royalties for licensed use of intellectual property rights, the people's courts shall take the following factors into account in examining and identifying the evidence of the royalties:

i. Whether there is an interest relationship between the licensee and the licensor;

ii. Whether the royalties have been paid, how were they paid, and whether the license contract has been performed ~~and recorded~~;

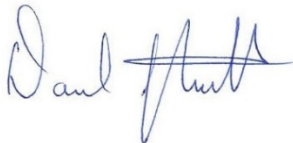
iii. The right, scope, way, period and territory of the licensed use;

iv. Any other relevant factor associated with the evidence of royalties.

We thank the Supreme People's Court for its attention to IPO's comments submitted herein, and we welcome further dialogue and opportunity to provide additional comments.

We have enclosed this letter as translated herewith.

Sincerely,

A handwritten signature in blue ink, appearing to read "Daniel J. Staudt". The signature is fluid and cursive, with the first name "Daniel" written in a larger, more prominent script than the last name "Staudt".

Daniel J. Staudt
President

Attachment