



二零二零年七月二十七日

中国北京市东城区东交民巷 27 号  
中华人民共和国最高人民法院

电子邮箱地址: [spcip2020@163.com](mailto:spcip2020@163.com)

**主题: 《最高人民法院关于审理侵犯商业秘密纠纷民事案件应用法律若干问题的解释》(公开征求意见稿)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”)感谢最高人民法院(下称“最高院”)提供了对 2020 年 6 月 10 日发布的《最高人民法院关于审理侵犯商业秘密纠纷民事案件应用法律若干问题的解释》(公开征求意见稿)(下称“《解释》”)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超过一万两千多名个人会员。这些个人会员有些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 认识到《解释》似乎是对《中美第一阶段经贸协议》中商业秘密相关条款的反映。实际上, IPO 把这次征求意见的邀请视为两国之间落实加强商业秘密保护共识的一项重要而且有用的方式,正如在《中美第一阶段经贸协议》第 1.4(3)条中提出的那样。我们也很高兴看到在本次征求意见稿中最高院非常重视法律的实际落实情况,希望我们的意见能够有助于《解释》的最终定稿和中国商业秘密法律的进一步发展。

我们谨对《解释》提供如下意见:

President  
**Daniel J. Staudt**  
Siemens

Vice President  
**Karen Cochran**  
Shell Oil Company

Treasurer  
**Krish Gupta**  
Dell Technologies

Directors  
**Eric Aaronson**  
Pfizer Inc.  
**Brett Alten**  
Hewlett Packard Enterprise  
**Ron Antush**  
Nokia of America Corp.  
**Estelle Bakun**  
Exxon Mobil Corp.  
**Scott Barker**  
Micron Technology, Inc.  
**Thomas Beall**  
Corning Inc.  
**Brian Bolam**  
Procter & Gamble Co.  
**Gregory Brown**  
Ford Global Technologies LLC  
**Steven Caltrider**  
Eli Lilly and Co.  
**John Cheek**  
Tenneco Inc.  
**Cara Coburn**  
Roche, Inc.  
**Johanna Corbin**  
AbbVie  
**Robert DeBerardine**  
Johnson & Johnson  
**Buckmaster de Wolf**  
General Electric Co.  
**Anthony DiBartolomeo**  
SAP AG  
**Bradley Ditty**  
InterDigital Holdings, Inc.  
**Daniel Enebo**  
Cargill, Incorporated  
**Yen Florczak**  
3M Innovative Properties Inc.  
**Louis Foreman**  
Enventys  
**Scott M. Frank**  
AT&T  
**Darryl P. Frickey**  
Dow Chemical Co.  
**Isabella Fu**  
Microsoft Corp.  
**Gary C. Ganzi**  
Evoqua Water  
Technologies LLC  
**Tanuja Garde**  
Raytheon Co.  
**Henry Hadad**  
Bristol-Myers Squibb Co.  
**Bill Harmon**  
Uber  
**Heath Hoglund**  
Dolby Laboratories  
**Thomas R. Kingsbury**  
Bridgestone Americas  
Holding Co.  
**Laurie Kowalsky**  
Koninklijke Philips N.V.  
**William Krovatin**  
Merck & Co., Inc.  
**Michael C. Lee**  
Google Inc.  
**William Miller**  
General Mills, Inc.  
**Kelsey Milman**  
Caterpillar Inc.  
**Jeffrey Myers**  
Apple Inc.  
**Ross Oehler**  
Johnson Matthey  
**KaRan Reed**  
BP America, Inc.  
**Paik Saber**  
Medtronic, Inc.  
**Matthew Sarboraria**  
Oracle Corp.  
**Manny Schecter**  
IBM, Corp.  
**Jessica Sinnott**  
DuPont  
**Thomas Smith**  
GlaxoSmithKline  
**John Stewart**  
Intellectual Ventures  
Management, LLC  
**Gillian Thackray**  
Thermo Fisher Scientific  
**Joerg Thomaier**  
Bayer Intellectual Property GmbH  
**Mark Wadzyk**  
Qualcomm, Inc.  
**Stuart Watt**  
Amgen, Inc.  
**Ariana Woods**  
Capital One

General Counsel  
**Jeffrey Kochian**  
Akin Gump Strauss Hauer & Feld  
LLP

Executive Director  
**Jessica K. Landacre**

## 第一条

正如最高法院认识到的，商业秘密，不同于其它类型的知识产权，不能通过一份由政府审批后授予的文件进行精确的界定，因此商业秘密的定义是一项非常重要的课题。应该平衡被告和法庭的利益从而对商业秘密的客体提供一份及时而又准确的说明，以及原告的利益要求仅披露与争议相关的信息。同时，在诉讼过程中，原告明确哪些商业秘密被侵犯通常是一个伴随着另外信息的出现而一步步推进的过程，而且原告应该有机会基于新的信息或被告的主张修改其主张的商业秘密。关于时间节点，IPO 建议原告应当在被告提交答辩之前明确所主张的商业秘密具体内容，或者至少在被告做出最终答辩意见之前。这样使得被告能够了解其抗辩的商业秘密的权利基础，从而有效地做出答复。程序正当的原则要求被告应当知晓其抗辩的主张。因此 IPO 谨建议做如下修改：

*权利人应当在一审法庭辩论终结前被告提交答辩意见前明确所主张的商业秘密具体内容。不能明确的，人民法院可以裁定驳回起诉；仅能明确部分的，可以判决驳回有关不能明确部分的诉讼请求。*

*权利人在一审法庭辩论终结前被告提交最终答辩意见前请求变更、增加其主张的商业秘密具体内容的，人民法院可以准许。权利人在第二审程序中另行主张其在一审中未明确的商业秘密具体内容，对方当事人同意由第二审人民法院一并审理的，第二审人民法院可以一并裁判。*

## 第二条

构成商业秘密的信息，按照《中华人民共和国反不正当竞争法》（简称“反不正当竞争法”）第 9.4 条的要求，必须是不为公众所知悉的。《解释》中将公众界定为所属领域的相关人员。为了进一步明确所属领域的相关人员，根据《与贸易有关的知识产权协定》（简称“TRIPS”）第 7 章第 39 条，谨建议该等人员应当被定义为通常处理所述信息范围内的人员，另外建议商业秘密是不为该等人员所普遍知悉或者不容易获取。据此，我们建议对第二条第一段做出如下修改：

*权利人主张的商业秘密在被诉侵权行为发生时不为通常处理所述信息范围内的所属领域的相关人员普遍知悉或者不容易获得的且不容易获取的，人民法院应当认定属于反不正当竞争法第九条第四款所称的不为公众所知悉。*

## 第三条

第三条是关于信息作为商业秘密具有现实的或者潜在的价值。谨建议所述价值要在侵权行为发生时衡量，而且权利人具有竞争优势是因为权利人把该信息作为商业秘密保护。据此，我们建议对第三条第一段做如下修改：

*权利人主张的商业秘密，在被诉侵权行为发生时具有现实的或者潜在的市场价值，因为已经作为商业秘密保护而能带来竞争优势的，*

人民法院应当认定属于反不正当竞争法第九条第四款所称的具有商业价值。

#### **第四条**

第四条列举了哪些类型的信息可以构成反不正当竞争法第 9.4 条所保护的“技术信息”和“经营信息”。我们建议在“技术信息”中增加“样品、原型”，在“经营信息”中增加“销售”信息。

#### **第五条**

IPO 谨建议把“合同”从不能单独作为依据来支持特定的客户信息是商业秘密的那些证据中删除。合同包含的信息通常包括：客户、供应商的联系方式，价格，以及交易相关其它的关键信息，这些信息是交易当事人以外的人员无法知晓的。如果“合同”不能单独做为支持商业秘密请求的证据，那么以合同形式保护的商业秘密实质上是不充分的。因此，IPO 建议对第五条第二段做如下修改：

*当事人仅依据与特定客户之间的合同、发票、单据、凭证等或者仅以与特定客户保持长期稳定交易关系为由，主张该特定客户信息属于商业秘密的，人民法院不予支持。*

#### **第六条**

第六条规定了权利人的举证责任。反不正当竞争法第三十二条规定权利人对于保密措施的举证责任是提供初步证据。在举证责任方面，谨建议第六条应当与反不正当竞争法第三十二条的规定保持一致。

此外，要求保密措施与商业秘密的商业价值和重要程度相适应可能实际上并不可行。因为商业秘密具有广泛的价值，要求权利人采取相应的、广泛的保密措施是不切实际的。当不同类型的商业秘密具有不尽相同的商业价值时，权利人可能会对商业秘密采用一套适当的标准规范进行保护，而不会逐一评估和区分每个技术诀窍。当商业秘密具有很高的商业价值时，一套严格的标准规范在这些情形中也是合理的，即使这个标准规范与商业价值并不直接相关。因此，IPO 建议做如下修改：

*权利人应当提供初步证据举证证明在被诉侵权行为发生以前所采取的相应保密措施。保密措施应当与从商业秘密的商业价值、重要程度等相适应角度看应该是合理的。*

#### **第八条**

根据第八条，如果权利人能够通过初步证据证明侵犯商业秘密所需要的要件，证明不存在侵权行为的举证责任则转移到被诉侵权人。这一问题是《第一阶段经贸协议》第 1.5 条的主题，IPO 相信应该予以特别的关注，因为信息不对称是大多数商业秘密纠纷的特点。合理怀疑商业秘密被侵犯的权利人通常对被告的行为知之甚

少，也就不能希望其根据有限的信息来证明整个案件事实。为修正这种信息不平衡，建立机制使商业秘密权利人可以基于有限的信息去提出其权利主张是很关键的。

我们认识到第八条为解决这一问题而规定原告提供初步证据证明其主张的要件就足够了，然后举证责任将转移到被诉侵权人。IPO 谨建议进一步描述哪些情形可以构成“初步证据”，并建议进一步明确这是指“能够合理表明基于事实认定的可信的推断以证明商业秘密被侵犯的初步证据”。“事实认定”在此处指证明的要件（例如被诉侵权人之前有渠道获取信息的证明）。因此我们建议修改第八条第一款如下：

权利人提交初步证据证明，能够合理表明基于下列事实认定做出的合乎情理的推断：(1) 权利人对所主张的商业秘密采取了相应保密措施，且 (2) 被诉侵权人有渠道或者机会获取所主张的商业秘密，和 (3) 法院认为侵犯商业秘密的可能性较大的，然后被诉侵权人应当对该商业秘密不属于反不正当竞争法规定的商业秘密承担举证责任，例如：因为已为公众所知悉，或者其不存在侵犯商业秘密的行为，或者权利人未能采取适当的保密措施承担举证责任。

## 第十一条

IPO 谨建议，根据程序正当的原则，应当对“公认的商业规则”进行修改从而使得当事人更好地知道哪些行为被认为是侵权的。反不正当竞争法第二条提供了更加清楚的表述：“经营者在生产经营活动中，应当遵循自愿、平等、公平、诚信的原则，遵守法律和**商业道德**”。同时，我们建议从认定民事责任（而非刑事责任）角度，违反权利人的信息保护规章制度也应该认定属于反不正当竞争法第九条第一款所称的以其他不正当手段获取。因此 IPO 谨建议做如下修改：

被诉侵权人违反法律规定或者明显违反公认的商业规则道德或者违反权利人的信息保护规章制度，获取权利人的商业秘密的，人民法院应当认定属于反不正当竞争法第九条第一款所称的以其他不正当手段获取权利人的商业秘密。

此外，IPO 建议规定员工未经授权将商业秘密传输至权利人控制以外的任何载体时如何处理。IPO 提议在第十一条增加第二段如下：

员工或者前员工未经权利人授权，将工作期间接触或者获取的商业秘密擅自复制、存储、传输或者转移至权利人控制以外或者违反权利人的规章制度任何载体上的，人民法院应当认定属于反不正当竞争法第九条第一款所称的以其他不正当手段获取权利人的商业秘密。

## 第十三条

第十三条列举了认定员工或前员工是否有渠道或者机会获取所主张的商业秘密的考虑因素。IPO 谨建议修改“需要考虑的其他因素”使得当事人更清楚地知道

法院在判定被告有渠道或机会获取商业秘密时会考虑哪些因素。因此 IPO 谨建议做如下修改：

*第十三条 人民法院认定员工、前员工是否现在或者曾经有渠道或者机会获取权利人所主张的商业秘密的，可以考虑与其有关的下列因素：*

- (一) 职务、职责、权限；*
- (二) 承担的本职工作或者单位分配的任务；*
- (三) 参与和商业秘密有关的生产经营活动的具体情形；*
- (四) 是否能够或者曾经访问、接触、获取、控制、保管、存储、复制商业秘密及其载体；*
- (五) ~~需要考虑的其他因素。~~员工或前员工与权利人的关系。*

#### **第十四条**

第十四条是有关如何认定被诉侵权信息与商业秘密是否属于反不正当竞争法第三十二条所规定的“实质上相同”。但是，反不正当竞争法第三十二条第二款既没有要求也没有提到被诉侵权信息对权利人商业秘密使用的实质性影响。需要提请注意的是这种影响存在与否对于判断被诉侵权信息与商业秘密是否“实质上相同”并不重要。据此建议在判断被诉侵权信息与商业秘密是否“实质性上相同”时不需要考虑这种影响。

第十四条也列举了人民法院认定被诉侵权信息与商业秘密是否实质上相同时考虑的四个因素。其中一个因素是“所属领域”的相关人员在被诉侵权行为发生时是否容易考虑到该区别点。为进一步明确所属领域的相关人员，根据 TRIPS 协议第七章第三十九条谨建议将该等人员定义为通常处理所述信息范围内的人员。另外，“需要考虑的其他因素”语句有些模糊不清，为了更加清楚明确，我们谨建议将这一条进行修改从而关注被诉侵权信息与商业秘密的关系。IPO 因此建议对第十四条做出如下修改：

*被诉侵权信息与权利人所主张的商业秘密不存在实质性区别，且对商业秘密的使用没有实质性影响的，~~一~~人民法院可以认定被诉侵权信息与商业秘密属于反不正当竞争法第三十二条第二款所称的实质上相同。*

*人民法院认定是否实质上相同时，应当综合考虑下列因素：*

- (一) 被诉侵权信息与商业秘密的异同程度；*
- (二) 所属领域通常处理所述信息范围内的相关人员在被诉侵权行为发生时是否容易想到该区别点；*
- (三) 公有领域中与商业秘密相关信息的情况；*
- (四) ~~需要考虑的其他因素~~ 被诉侵权信息和商业秘密的关系。*

## 第十五条

第十五条规定被告将商业秘密直接或修改后用于生产经营活动或者根据商业秘密调整有关生产经营活动的，认定属于反不正当竞争法第九条所称的使用商业秘密。但是除了这些不当行为，即便商业秘密没有在产品或生产经营中实际使用，商业秘密也经常用来预测或者加速被告产品或工艺的开发，比如利用商业秘密的知识简化反复试验的过程，减少本应花费在试验和验证的资源，以此来加快被告的开发进程。因此 IPO 建议对第十五条做如下修改：

*将商业秘密直接或者经修改后用于生产经营活动，或者根据商业秘密调整有关生产经营活动的，或者将商业秘密用于预测或者加速产品或者工艺研究开发的，人民法院应当认定属于反不正当竞争法第九条所称的使用商业秘密。*

## 第十六条

第十六条规定当员工或前员工违反保密协议并且侵犯权利人的商业秘密时，权利人有权选择对员工或前员工主张违约责任或者侵权责任。IPO 建议增加商业秘密权利人在行使这种选择权的时候，应当允许其在同一法律程序中同时主张这两项诉讼理由，条件是权利人仅能就其中的一项诉讼理由（违约或者侵权，但不是两者）主张损害赔偿。我们建议做如下修改：

*员工、前员工违反有关保守商业秘密的约定，侵犯权利人主张的商业秘密的，权利人可以选择依法主张违约责任或者侵权责任。权利人也可以选择在同一诉讼程序中同时主张违约责任和侵权责任；但是权利人只能基于违约责任或者侵权责任两者之一请求损害赔偿，不能两者都请求。*

## 第十九条

在第十九条当中，被诉侵权人为维护公共利益、制止犯罪行为，向行政主管部门、司法机关等披露相关商业秘密的，被诉侵权人不承担侵权责任。谨建议在第十九条中增加如下内容使收到商业秘密的行政主管部门、司法机关等对该等商业秘密进行保密。

*商业秘密的接收方应当对披露的商业秘密进行保密。*

## 第二十三条

第二十三条规定人民法院应当支持权利人提出的要求侵权人返还或者销毁商业秘密的请求。IPO 建议法院应当有权指派独立的检测服务提供方检查并确认商业秘密已由侵权人删除。因此 IPO 建议增加内容如下：

权利人请求判决侵权人返还或者销毁商业秘密载体，清除其控制  
的商业秘密信息的，人民法院一般应予支持。根据权利人的要求，人民  
法院可以指派独立的检测服务方检查载体并确认商业秘密已经删除。

## 第二十四条

第二十四条规定了在判定赔偿数额时的考虑因素。根据反不正当竞争法第十七条因被侵权受到的实际损失是优先考虑的因素之一。因此，由于侵犯商业秘密造成的损失也应该是此处考虑的因素之一。此外，当因被侵权受到的实际损失和侵权所获利润不同时，应该优先适用赔偿数额较大的方式，以使得权利人获得充分的合法赔偿。IPO 因此提议对第二十四条做如下修改：

商业秘密系经营信息的，应当根据该经营信息对侵犯商业秘密行为  
所受到的损失和所获利润的作用等因素，合理确定侵权赔偿数额，  
且应优先适用赔偿金额较大的方式。

## 第二十七条

第二十七条提到根据当事人或者案外人的请求，人民法院应采取适当的保护令（比如必要的保密措施）以保护案件中相关的证据和材料。保护令在知识产权纠纷中尤其重要，因为若没有强有力的防范措施，知识产权很容易被破坏。比如，人民法院可考虑采取的具体保密措施包括：封存某些文件或证言使公众无法获取，限定参与诉讼程序的人员，以及对有权接触人员签发保密和使用限制令。

通过对有权接触人员签发这种保密和使用限制令，谨建议人民法院可以设置不同级别的权限（例如，证据和材料只有律师可以查看，还是律师以外的诉讼人员也可以查看）。例如，案外人通常提供的保密证据和材料应当适用最高级别的保密（即：只有律师可以查看）。

当违反第二十七条的保密措施时，我们建议最高院在民事案件中也考虑施加制裁，比如，采用最高院 2020 年 6 月 17 日公开的《关于办理侵犯知识产权刑事案件具体应用法律若干问题的解释》（征求意见稿）第九条的相关制裁手段。

考虑到上述原因，为了能够充分涵盖可能提供的各种不同类型的证据和材料，以及这些证据和材料是由当事人还是案外人提供的，谨建议对第二十七条做如下修改：

对于涉及当事人或者案外人商业秘密案件当事人或者案外人提供的  
证据、材料，当事人或者案外人如果该当事人或者案外人书面申请  
人民法院采取保密措施的，人民法院应当在证据交换、质证、庭审等  
诉讼活动中采取必要的保密措施。必要的保密措施可以包括：封存  
特定的文件或证言使公众无法获取，限定参与诉讼程序人员的接触  
权限，以及对有权接触人员签发保密和使用限制令以使其知晓证据  
和材料在技术上和商业上的敏感性，以及该等证据和材料是由案件  
当事人还是案外人提供的。

## 第二十八条

第二十八条规定了商业秘密侵权案件由中级人民法院管辖。我们注意到涉及技术秘密的商业秘密案件由相应的知识产权法院（法庭）专属管辖。在一个商业秘密侵权案件中，同时包含经营秘密和技术秘密是很普遍的，IPO 谨建议最高院出台指导意见明确这类案件的管辖权。否则，权利人将会面临一个艰难的选择：（1）只主张经营秘密或技术秘密；或（2）不得不在中级人民法院和知识产权法院分别申请立案；或（3）如果同时主张经营秘密和技术秘密则可能面临被法院驳回的风险。IPO 因此建议增加如下内容：

当商业秘密权利人同时主张经营秘密和技术秘密时，在适当的中级人民法院或知识产权法院申请立案的，中级人民法院或知识产权法院不能基于同时主张了经营秘密和技术秘密的理由驳回。

## 第二十九条

第二十九条规定当侵权行为实施地、终端或服务器所在地、或者被告住所地难以确定时，权利人住所地人民法院具有管辖。IPO 相信增加权利人住所地的管辖权对保护权利人维护其知识产权是很重要的，我们对于增加了这一选择深表感谢。IPO 建议明确终端或服务器所在地：

被诉侵权人以电子入侵等信息网络手段侵犯商业秘密的，由实施被诉侵权行为的终端或者服务器所在地，**权利人**保存商业秘密的终端或者服务器所在地或者被告住所地人民法院管辖。

感谢最高人民法院对于 IPO 提交的这份意见的重视，我们也非常愿意进一步交流或者能有机会提供更多的信息。

在此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：《最高人民法院关于审理侵犯商业秘密纠纷民事案件应用法律若干问题的解释》（公开征求意见稿）的反馈意见——英文版





27 July 2020

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

VIA EMAIL: [spcip2020@163.com](mailto:spcip2020@163.com)

**Re: *Interpretations on Several Issues Concerning the Application of Law in the Trial of Civil Cases of Trade Secret Infringement Disputes***

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 "*Interpretations on Several Issues Concerning the Application of Law in the Trial of Civil Cases of Trade Secret Infringement Disputes*" (hereinafter referred to as the "Interpretations") published on 10 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 Interpretations appear to reflect certain trade secret-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 trade secret protection, as memorialized in Article 1.4(3) of the Phase 1 Intellectual Property Agreement. We are pleased to see in this draft the SPC's strong focus on matters of practical implementation of the laws, and we hope that our comments will be helpful to the process of making the Interpretations final, as well as informing future developments in Chinese trade secret law. We provide below our comments on the Interpretations.

President  
**Daniel J. Staudt**  
Siemens

Vice President  
**Karen Cochran**  
Shell Oil Company

Treasurer  
**Krish Gupta**  
Dell Technologies

Directors  
**Eric Aaronson**  
Pfizer Inc.  
**Brett Allen**  
Hewlett Packard Enterprise  
**Ron Antush**  
Nokia of America Corp.  
**Estelle Bakun**  
Exxon Mobil Corp.  
**Scott Barker**  
Micron Technology, Inc.  
**Thomas Beall**  
Corning Inc.  
**Brian Bolam**  
Procter & Gamble Co.  
**Gregory Brown**  
Ford Global Technologies LLC  
**Steven Caltrider**  
Eli Lilly and Co.  
**John Cheek**  
Tenneco Inc.  
**Cara Coburn**  
Roche, Inc.  
**Johanna Corbin**  
AbbVie  
**Robert DeBerardine**  
Johnson & Johnson  
**Buckmaster de Wolf**  
General Electric Co.  
**Anthony DiBartolomeo**  
SAP AG  
**Bradley Ditty**  
InterDigital Holdings, Inc.  
**Daniel Enebo**  
Cargill, Incorporated  
**Yen Florczak**  
3M Innovative Properties Inc.  
**Louis Foreman**  
Enventys  
**Scott M. Frank**  
AT&T  
**Darryl P. Frickey**  
Dow Chemical Co.  
**Isabella Fu**  
Microsoft Corp.  
**Gary C. Ganzi**  
Evoqua Water  
Technologies LLC  
**Tanuja Garde**  
Raytheon Co.  
**Henry Hadad**  
Bristol-Myers Squibb Co.  
**Bill Harmon**  
Uber  
**Heath Hoglund**  
Dolby Laboratories  
**Thomas R. Kingsbury**  
Bridgestone Americas  
Holding Co.  
**Laurie Kowalsky**  
Koninklijke Philips N.V.  
**William Krovatin**  
Merck & Co., Inc.  
**Michael C. Lee**  
Google Inc.  
**William Miller**  
General Mills, Inc.  
**Kelsey Milman**  
Caterpillar Inc.  
**Jeffrey Myers**  
Apple Inc.  
**Ross Oehler**  
Johnson Matthey  
**KaRan Reed**  
BP America, Inc.  
**Paik Saber**  
Medtronic, Inc.  
**Matthew Sarboraria**  
Oracle Corp.  
**Manny Schecter**  
IBM, Corp.  
**Jessica Sinnott**  
DuPont  
**Thomas Smith**  
GlaxoSmithKline  
**John Stewart**  
Intellectual Ventures  
Management, LLC  
**Gillian Thackray**  
Thermo Fisher Scientific  
**Joerg Thomaier**  
Bayer Intellectual Property GmbH  
**Mark Wadzryk**  
Qualcomm, Inc.  
**Stuart Watt**  
Amgen, Inc.  
**Ariana Woods**  
Capital One

General Counsel  
**Jeffrey Kochian**  
Akin Gump Strauss Hauer & Feld  
LLP

Executive Director  
**Jessica K. Landacre**

## Article 1

As the SPC will appreciate, trade secrets, unlike other forms of intellectual property, are not defined precisely by a document issued after government review, thus its definition is a subject of great importance. There should be a balance between the interests of the defendant and the Court to have a timely and clear statement of the subject matter, and the interest of the plaintiff to expose only information relevant to the dispute. At the same time, identification by the plaintiff of what trade secret is infringed is often a step-by-step process during litigation as additional information emerges, and the plaintiff should have the opportunity to revise the asserted trade secret based on new information or claims by the defendant. In terms of timing, IPO recommends that the specific contents of the claimed trade secret be required to be disclosed before the response by the defendant, or at least before the defendant's final response. This allows the defendant to know the basis of the trade secret claim against it so that the defendant is able to effectively respond. Principles of due process require that the defendant be put on notice of the claim it is defending against. IPO therefore proposes the following revisions:

*The right owner shall specify the specific contents of the claimed trade secret before the ~~end-of-debate~~ **defendant's response** in the court of first instance. Where it fails to specify, the people's court may rule to dismiss the lawsuit; where only part of the specific contents is specified, the people's court may rule to dismiss the unspecified part of the claim.*

*Where the right owner requests any change or addition to the specific contents of the claimed trade secret before the ~~end-of-debate~~ **defendant's final response** in the court of first instance, the people's court may approve such request. Where, in the trial of second instance, the right owner makes another claim on the specific contents of the trade secret it has failed to specify in the first-instance proceeding, and the other party agrees to a combined trial by the people's court of second instance, the people's court of second instance may make a combined judgment.*

## Article 2

In order to qualify as a trade secret, the information must not be known to the public, as mentioned under Article 9.4 of the Anti-Unfair Competition Law of the People's Republic of China (hereinafter referred to as the "AUCL"). The draft defines the public as "relevant personnel in the field." In seeking further clarity as to personnel within the field, and pursuant to The Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter referred to as the "TRIPS"), Section 7, Article 39, it is respectfully submitted that such personnel should be defined as those within circles that normally deal with the kind of information in question. It is also respectfully submitted that the trade secret be either not generally known or not otherwise easy to obtain by such personnel. Accordingly, we recommend that the first paragraph of Article 2 be amended as follows:

*If the trade secret claimed by the right owner is not generally known to **or otherwise not easy to obtain by** the relevant personnel **within the circles that normally deal with the kind of information in question** ~~in the field at the time of the alleged infringement and is not easy to obtain~~, the people's*

*court shall determine that is “not known to the public” as mentioned in Article 9.4 of the Anti-Unfair Competition Law of the People’s Republic of China.*

### **Article 3**

Article 3 is directed to the current or potential value of the information as a trade secret. It is respectfully submitted that such value needs to be measured at the time of infringement and that the right owner has a competitive advantage because such information has been kept as a secret by the right owner. Accordingly, we recommend that the first paragraph of Article 3 be amended as follows:

*Where, **at the time of infringement**, the trade secret claimed by the right owner has current or potential market value and can bring right owner competitive advantage **because it has been kept as a secret**, the people’s court shall determine that the trade secret has “commercial value” mentioned in Article 9.4 of the Anti-Unfair Competition Law of the People’s Republic of China.*

### **Article 4**

Article 4 lists types of information that can constitute “technical information” and “business information” to be protected under Article 9.4 of the AUCL. We suggest the additions of “**samples, prototypes**,” as to what constitutes “technical information,” and “**sales**” as to what constitutes “business information.”

### **Article 5**

IPO recommends that “contract” be removed from those items that cannot be used, as the sole basis, to support the claim that specific customer information is trade secret. The information contained in a contract usually includes contact details of a customer/vendor, and pricing and other key information in a deal that would not otherwise be known to those other than the parties. If “contract” is not able to be used as sole evidence in support of a trade secret claim, the protection of the trade secret in the form of contract will be substantially insufficient. Therefore, IPO proposes the following revision in the second paragraph:

*The people’s court shall not support the claim that the information of specific customers belongs to trade secret only based on the ~~contract~~, invoice, document, voucher, etc. between the litigant and the specific customers or on the ground that the litigant maintains a long-term and stable trading relationship with the specific customers.*

### **Article 6**

Article 6 defines the burden of proof of the right owner. Article 32 of the AUCL requires that the right owner’s burden of proof on the confidentiality measures establish a showing of “prima facie” evidence. It is respectfully submitted that, in view of the burden of proof, this Article 6 should be in line with what is reflected in Article 32 of the AUCL.

Additionally, requiring that confidentiality measures be compatible with the commercial value and importance of the asserted trade secret may not be practically feasible. Since trade secrets can have a wide range of value, it is impractical for owners to implement a correspondingly broad range of confidentiality measures. Where different types of trade secrets have varying commercial values, the owner may adopt an appropriate set of standard protocols across the board, without individually evaluating and differentiating each piece of know-how. It is also acceptable that, where a trade secret has very high commercial value, a strict set of protocols would be reasonable in the circumstances, even if they do not directly correlate with the commercial value. Therefore, IPO proposes the following revisions:

*The right owner shall provide prima facie evidence to prove the corresponding confidentiality measures taken before the defendant's infringement. Confidentiality measures shall be ~~compatible~~ reasonable in view of ~~with~~ the commercial value and importance of trade secrets.*

### **Article 8**

Under Article 8, if the right owner can establish through preliminary evidence the required elements of trade secret infringement, then the burden of proof shifts to the defendant to prove there was no infringement. This issue was the subject of Article 1.5 of the Phase 1 Intellectual Property Agreement, and IPO believes that it deserves special attention because of the information asymmetry that characterizes most trade secret disputes. A trade secret holder that reasonably suspects that its trade secrets have been infringed typically has very little information about the defendant's actions and cannot hope to prove its entire case based on that information. To correct this information imbalance, it is critical that some mechanism exist to allow a trade secret owner to make a claim with limited information.

We appreciate that Article 8 addresses this concern by providing that it is sufficient for the plaintiff to present preliminary evidence to prove each of the elements of its claim, which then shifts the burden of proof onto the alleged infringer. IPO respectfully suggests further elaboration on what constitutes "preliminary evidence," and recommends an addition to specify that this means "preliminary evidence that can reasonably indicate a plausible inference that a factual predicate exists that the trade secret has been infringed." Examples of a "factual predicate" in this context refer to the elements of proof (for example, proof of prior access to the information by the alleged infringer). We therefore propose that the first paragraph of Article 8 be rewritten as follows:

*If the right owner submits preliminary evidence ~~to prove~~ that can reasonably indicate a plausible inference that a factual predicate exists that ~~is~~ (1) the right owner has taken corresponding confidentiality measures for the claimed trade secret, and (2) the defendant has access or opportunity to obtain the claimed trade secret, and (3) the court holds that the possibility of infringing the trade secret is relatively high, then the defendant shall prove that the claimed trade secret is not a trade secret under the Anti-Unfair Competition Law of the People's Republic of China because, for example, the claimed trade secret was already known by the public or ~~that he was not infringed~~ or that the right owner failed to take*

*appropriate confidentiality measures.*

**Article 11**

IPO recommends that “generally accepted business rules” be amended to provide better notice to the parties of the kinds of actions that shall be deemed infringement, as required by principles of due process. Article 2 of the AUCL provides some more clarity by reciting that “business operators shall follow the principles of voluntariness, equality, fairness and good faith, abide by laws and *business ethics* in carrying out production and business activities.” We further propose that, for purposes of determining civil liability (but not criminal liability), violation of the right owner’s employment policies on information protection should also constitute “improper means” under the AUCL. IPO therefore proposes the following revisions:

*Where the accused infringer obtains a trade secret owned by the right owner in violation of the law or explicitly in violation of generally accepted business ~~rules~~ ethics or in violation of the right owner’s employment policies on information protection, the people’s court shall determine that such act constitutes “obtain the trade secret of the right owner by other improper means” as specified in the first paragraph of Article 9 of the Anti-Unfair Competition Law.*

In addition, IPO recommends that the unauthorized transmission of trade secrets by employees in their possession onto any medium beyond the control of the right owner be addressed. IPO therefore proposes adding a second paragraph for Article 11 as follows:

*Where employees or former employees of the right owner, without the right owner’s authorization, copy, store, transmit or transfer a trade secret assessable or obtained in the course of employment onto any medium beyond the control of the right owner or in violation of the right owner’s employment policies, the people’s court shall determine that such acts constitute “obtaining the trade secret of the right owner by other improper means” as specified in the first paragraph of Article 9 of the Anti-Unfair Competition Law.*

**Article 13**

Article 13 lists factors to consider in whether or not an employee or a former employee has access or opportunity to obtain the trade secret at issue. IPO recommends that “other factors to be considered” be amended to provide better notice to the parties of the factors that will be used by the court to determine the defendant’s access or opportunity to obtain the trade secret, as principles of due process require such notice to the parties. IPO therefore proposes the following revisions:

*When determining whether or not an employee or a former employee has or had access or opportunity to obtain the trade secret claimed by the right owner, the people’s court may take the following factors into consideration:*

- (1) The position, responsibility and authority of the employee or former employee;*

- (2) *The duties undertaken or the tasks assigned by the employer;*
- (3) *Specific information on the participation in production or business activities involving the trade secret;*
- (4) *Whether or not the employee/former employee is able to access, obtain, control, keep in custody, store or reproduce the trade secret and the carrier thereof, or has done so;*
- (5) ~~*Other factors to be considered.*~~ ***The relationship between the employee or former employee and the right owner.***

#### **Article 14**

Article 14 is directed to determining whether the alleged infringing information and the trade secret are “substantively the same” as specified in the second paragraph of Article 32 of the AUCL. However, the second paragraph of Article 32 of the AUCL does not require nor address whether the alleged infringing information has any substantive influence on use of the trade secret by the right owner. It is also respectfully noted that consideration of whether such influence exists is immaterial as to whether the alleged infringing information and the trade secret are “substantively the same”. Accordingly, it is respectfully submitted that such influence need not be considered in determining whether the alleged infringing information and the trade secret are “substantively the same”.

Article 14 also lists four factors for the people’s court to consider when determining whether the alleged infringing information is substantively the same as the trade secret at issue. One of these factors concerns whether relevant persons “in the field” can easily think of such differences when the alleged infringement occurs. In seeking further clarity as to personnel within the field, and pursuant to TRIPS Section 7, Article 39, it is respectfully submitted that such personnel should be defined as those within circles that normally deal with the kind of information in question. Another one of these factors, namely, “other factors to be considered,” is somewhat vague and ambiguous. In order to provide greater clarity and insight, we recommend that this factor be rewritten so as to focus on the relationship between the alleged infringing information and the trade secret. IPO therefore proposes amending Article 14 as follows:

*Where the alleged infringing information has no substantive difference with the trade secret claimed by the right owner, ~~and has no substantive influence on the use of the trade secret,~~ the people’s court may determine that the alleged infringing information and the trade secret are “substantively the same” as specified in the second paragraph of Article 32 of the Anti-Unfair Competition Law.*

*When determining whether the alleged infringing information is substantively the same as the trade secret, the people’s court shall take the following factors into consideration:*

- (1) *The similarity between the alleged infringing information and the trade secret;*

- (2) Whether the relevant persons ~~in the field~~ **within the circles that normally deal with the kind of information in question** can easily think of such differences when the alleged infringement occurs;
- (3) Information in the public domain that is related to the trade secret;
- (4) ~~Other factors to be considered.~~ **The relationship between the alleged infringing information and the trade secret.**

### **Article 15**

Article 15 provides that the defendant's direct use or use after modification of a trade secret in its production and business activities, or use of a trade secret as a basis to adjust relevant production and business activities, constitutes a use of the trade secret as specified under Article 9 of the AUCL. However, in addition to such improper acts, it is common that the trade secret may be used in some way to support or accelerate the defendant's development of its product or process, which should also constitute use of the trade secret, even if the trade secret is not actually used in its production and business operation. For example, knowledge of the trade secret can accelerate a defendant's development by short-cutting the trial and error process and reducing resources that would otherwise be expended on experimentation and validation. IPO therefore proposes amending Article 15 as follows:

*Where a trade secret is directly used or used after modification in production and business activities, or is used as a basis to adjust relevant production and business activities, **or is used to inform or accelerate development of a product or process,** the people's court shall determine that it constitute the "use of trade secrets" mentioned in Article 9 of the Anti-Unfair Competition Law of the People's Republic of China.*

### **Article 16**

Article 16 provides a trade secret owner the right to choose to claim breach of contract or tort liability where an employee or former employee violates a confidentiality agreement and infringes the owner's trade secret. IPO would like to add that the trade secret owner, in exercising the right to make this election, should be permitted to assert both causes of action in the same legal proceeding, with the proviso that the owner can only recover in damages on the basis of one of the claims (breach of contract or trade secret, but not both). We therefore propose the following:

*If an employee or former employee violates the agreement on keeping trade secrets and infringes the trade secrets claimed by the right owner, the right owner can choose to claim the liability for breach of contract or tort liability according to law. **In making the election, the right owner may assert both breach of contract and tort liability in the same proceeding; however, the owner may only recover damages on the basis of either breach of contract or tort liability, not both.***

### **Article 19**

Under Article 19, an alleged infringer that discloses trade secrets to the competent administrative department, judicial authority, or others for the purpose of safeguarding the public interest and stopping criminal acts shall generally not bear liability for infringement. It is respectfully suggested that Article 19 be amended by adding the following sentence so that such trade secrets are maintained in confidence as a trade secret by the administrative authority, judicial authority, or others who are in receipt of such trade secret.

*The disclosed trade secret shall be maintained in confidence as a trade secret by the recipient.*

### **Article 23**

Article 23 provides that the court shall support the owner's request for the return or deletion of the trade secrets by the infringer. IPO recommends that the court should also have the power to order an independent service provider to inspect and verify the deletion of trade secrets from the infringer's possession. Thus, IPO recommends the following addition:

*The people's court shall generally support the right owner's request that the infringer return or destroy the carriers of trade secrets and delete the trade secrets under his control. Upon the right owner's request, the people's court may order that an independent service provider inspect the carriers and verify the deletion of trade secrets.*

### **Article 24**

Article 24 addresses the factors that shall be considered when determining the compensation. According to Article 17 of the AUCL, the actual loss due to the infringement is one of the factors with priority. Therefore, loss due to the infringement of trade secrets should also be a factor considered here. Further, in the case where loss and profit are not the same, greater weight shall be placed on whichever is greater, so that the right owner is sufficiently and legitimately compensated. IPO therefore proposes amending Article 24 as follows:

*If the trade secret is business information, the people's court shall reasonably determine the amount of compensation for infringement according to the factors such as the effect of the business information on the loss due to and the profits gained from infringement of trade secret. Greater weight shall be placed on those factors that maximize compensation.*

### **Article 27**

Article 27 addresses, at the request of either the parties or non-parties to the case, that the people's court fashion an appropriate protective order (*i.e.*, necessary confidentiality measures) so as to cover evidence and materials that may be involved in the case. Protective



orders are particularly important in an intellectual property rights dispute inasmuch as IP can easily be destroyed without robust preventive measures in place. In this respect, we respectfully seek greater clarity regarding the “necessary confidentiality measures” as used in Article 27. For example, specific confidentiality measures for consideration by a people’s court can include the sealing of certain documents and testimony from public access, limiting access to the persons who participate in the proceedings, and issuing confidentiality and use orders to those who are permitted access.

In issuing such confidentiality and use orders to those who are permitted access, it is respectfully noted that different levels of access may be provided by the people’s court (for example, evidence and materials only to be seen by the attorneys vs. the non-attorney litigants). For example, non-parties to a case typically produce their confidential evidence and materials subject to the highest forms of confidential protection (*i.e.*, attorney eyes only).

We also suggest that the SPC consider imposing sanctions in civil cases where there has been a violation of confidentiality measures issued under this Article 27 including, for example, imposing sanctions as provided for in Article 9 of the “Interpretation on Several Issues Concerning the Specific Application of Law in Handling Criminal Cases of Infringement of Intellectual Property (Draft for Comment),” which the SPC published on June 17, 2020.

Taking into account the foregoing and in order to be sufficiently inclusive of the different types of evidence and materials that may be produced and whether such evidence and materials are being produced by a party or a non-party to the case, it is respectfully recommended that Article 27 be amended as follows:

*For the evidence and materials ~~involving the trade secrets of the parties or those who are not parties to the case~~ **that are produced by either a party or a non-party to the trade secret case, if they apply such party or non-party applies** in writing to the people’s court to take confidentiality measures, the people’s court shall take necessary confidentiality measures in litigation activities such as evidence exchange, cross examination, court trial, etc. **Necessary confidentiality measures may include the sealing of certain documents and testimony from public access, limiting access to the persons who participate in the proceedings, and issuing confidentiality and use orders to those who are permitted access to the evidence and materials keeping in mind the technical and business sensitivity of the evidence and materials and whether such evidence and materials are being produced by a party or non-party to the case.***

## **Article 28**

Article 28 addresses the jurisdiction of intermediate people’s courts for trade secret infringement cases. We note that for trade secret cases involving technical secrets, jurisdiction vests exclusively in the respective IP Courts. In a trade secret infringement case, it is common for both business secrets and technical secrets to be involved, and IPO respectfully requests that the SPC issue guidance on which court shall have jurisdiction in such cases. Otherwise, owners face a difficult situation of having to choose between: (1) asserting the business secrets only or technical secrets only; or (2) having to file two

separate actions in the relevant intermediate court and IP court; or (3) risk having either court dismiss the case if both business and technical secrets are asserted. IPO therefore suggests the following addition:

*Where the trade secret owner asserts both business secrets and technical secrets and files an action in either the appropriate intermediate court or IP court, the intermediate court or IP court shall not dismiss the action solely on the basis that both business secrets and technical secrets are involved.*

### **Article 29**

Article 29 provides that where it is difficult to determine the place where the tort occurs, the place of the terminal or server, or the place of domicile of the defendant, then jurisdiction shall be under the people's court at the place of the right owner's domicile. IPO believes that the addition of the right owner's domicile as an alternative venue for jurisdiction is important to protect the owner's ability to enforce its rights, and we greatly appreciate this addition. IPO recommends one clarification regarding the location of the terminal or server:

*The case of defendant's infringement of trade secret by means of information network such as electronic intrusion shall be under the jurisdiction of the people's court at the place of the terminal or server where the tort occurs, the place of the terminal or server where the trade secrets are kept **by the right owner**, or the place of domicile of the defendant.*

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,



Daniel J. Staudt  
President

Attachment