2020 年 7 月 31 日

北京市东城区东交民巷 27 号最高人民法院
北京市东城区北河沿大街 147 号最高人民检察院

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主题：《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（三）》（征求意见稿）的反馈意见

致最高人民法院和最高人民检察院：

美国知识产权所有人协会(下称“IPO 协会”)感谢最高人民法院（简称“最高院”）和最高人民检察院（简称“最高检”）提供了对 2020 年 6 月 17 日发布的《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（三）（征求意见稿）》（简称“《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 协会感谢最高院和最高检联合公布意见明确了有关知识产权刑事案件的问题。我们提供如下意见：

总体意见

IPO 认可加强权利人知识产权刑事司法保护的重要性。因此，刑事手段的确是打击商业秘密侵权行为的一种震慑方式（即：判处罚金和/或有期徒刑）；但从知识产权权利人的角度看，刑事手段还不足以提供充分的威慑，也不足以替代(权利人通常请求的)临时限制令或者临时禁令等民事救济措施。

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我们也希望强调：商业秘密的民事救济和商业秘密的刑事手段同样需要加强，以确保给知识产权权利人提供合理的法律救济途径。考虑到证据发现是非常有限的，我们建议在下列情形下，在民事诉讼中将证明责任转移给被诉侵权人：

> 权利人提交初步证据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，和（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，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。

第九条

这一条是有关证据的保密措施。但是，其并未包括最近公布的《*关于知识产权民事诉讼证据的若干规定（征求意见稿）*》（简称“《民事诉讼规定》”）的第三十一条规定的所有措施。当刑事诉讼程序和民事诉讼程序背后的基本原则互相协调时，适用的规则应当是一致的。我们建议，正如《民事诉讼规定》第三十一条规定的，刑事诉讼程序采用同样的规定当事人不得查阅、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。IPO 因此建议做如下修改：

> 当事人、辩护人、诉讼代理人书面申请对相关商业秘密的证据、材料采取保密措施的，应当在诉讼程序中采取签署保密承诺书等必要的保密措施。**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。**

第十二条

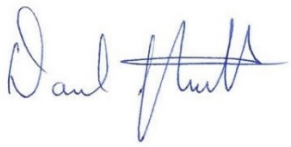
第十二条列举了一般应当从轻处罚的几种情形。其中，第十二条第（四）项规定了“（被诉侵权人）将权利人的商业秘密申请为专利、集成电路布图设计、植物新品种、商标等，相关知识产权已经归属权利人的”。谨建议删除第（四）项。

不能仅仅因为相关知识产权最终归属为权利人而减轻处罚。被诉侵权人因其被诉侵权行为（例如：披露商业秘密申请专利保护）使权利人维持商业秘密的秘密状态更加困难，甚至不可能再维持。被诉侵权人的这种行为损害了权利人从商业秘密获得商业价值的能力，因为该商业秘密已经不是一种秘密了。这种情形下被诉侵权人不应该获得从轻处罚。

感谢最高人民法院和最高人民检察院对于 IP0 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：《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（三）》（征求意见稿）的反馈意见-英文版

31 July 2020

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27 Jiaomin Alley
Dongcheng District
Beijing, P.R.China

Supreme People's Procuratorate
147 Beiheyan Street
Dongcheng District
Beijing, P.R.China

VIA EMAIL: xssfjs@163.com

Re: Interpretation III on Several Issues Concerning the Application of Law in Handling Criminal Cases of Infringement of Intellectual Property Rights

To the Supreme People's Court and the Supreme People's Procuratorate:

The Intellectual Property Owners Association (IPO) wishes to thank the Supreme People's Court (hereinafter referred to as the "SPC") and the Supreme People's Procuratorate (hereinafter referred to as the "SPP") for the opportunity to respond to the request for comments on the draft "*Interpretation III on Several Issues Concerning the Application of Law in Handling Criminal Cases of Infringement of Intellectual Property Rights*" (hereinafter referred to as the "Interpretations") published on 17 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 the SPC's and SPP's joint issuance of clarifications regarding criminal IP cases. We provide our comments below.

General Comment

IPO recognizes the importance of strengthening the criminal judicial protection of intellectual property rights afforded to rightful owners. As such, criminal actions certainly serve as a deterrent (*i.e.*, imposing fines and/or imprisonment) in combatting trade secret infringement; however, from the IP rights owner's standpoint, there are not enough criminal actions to serve as a sufficient deterrent nor as an adequate substitute for the civil remedies of a temporary restraining order or preliminary injunction (which are often sought by the trade secret owner).

We also wish to emphasize that not only criminal actions but also civil actions for trade secret infringement need to be further strengthened so as to provide the IP rights owner with a reasonable legal avenue of relief. Taking into consideration that discovery is very limited, we recommend shifting the burden of proof to the alleged infringer in civil actions under the following circumstances:

> If the right owner submits preliminary evidence that can reasonably indicate a plausible inference that a factual predicate exists that (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 was not infringed, or that the right owner failed to take appropriate confidentiality measures.

Article 9

This article concerns non-disclosure measures for evidence. However, it does not include all the measures provided for in Article 31 of the recently released draft "*Several Provisions of the Supreme People's Court on Evidence in Civil Procedures Involving Intellectual Property Rights*" ("Provisions in Civil Procedures"). Where principles behind the relevant criminal procedure and civil procedure are aligned, the applicable rules should be consistent. We recommend that, as is provided in Article 31 of the Provisions in Civil Procedures, the criminal procedure adopt equivalent provisions stating that "the party concerned shall not consult, extract, duplicate or take pictures of such evidence, but the attorneys and other persons with expertise approved by the people's court may consult such 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." IPO therefore proposes the following amendment:

> *Where the party concerned, the defender or the agent ad litem files a written application for taking measures to keep confidential the evidence and materials concerning the trade secret involved, necessary non-disclosure measures such as signing a letter of commitment on non-disclosure shall be taken in the proceeding.* ***The party concerned shall not consult, extract, duplicate or take pictures of such evidence, but the attorneys and other persons with expertise approved by the people's court may consult such 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 12

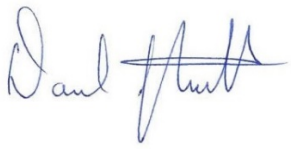
Article 12 lists four circumstances under which a lighter punishment shall be given. One of these circumstances is set forth under Article 12 (d), that is, when "use [by the alleged infringer] of the right holder's trade secret to apply for other types of intellectual property rights including patent, integrated circuit layout design, new varieties of plants, trademark, etc., and the relevant intellectual property rights have already belonged to the right holder." It is respectfully recommended that Article 12(d) be deleted.

Punishment should not be made lighter just because the relevant intellectual property rights end up belonging to the right holder. The alleged infringer has made it more difficult, if not impossible, for the right owner to maintain its trade secret as a trade secret because of the alleged infringer's conduct (e.g. disclosing the trade secret by seeking patent protection). Such conduct by the alleged infringer may impair the right owner's ability to reap any commercial value from the trade secret because it is no longer a secret. The alleged infringer should not be rewarded with a lighter punishment under such circumstances.

We thank the Supreme People's Court and the Supreme People's Procuratorate for the 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