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**Thomas R. Kingsbury**
Bridgestone Americas
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**Michael C. Lee**
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Executive Director
**Jessica K. Landacre**

二零二零年八月十日

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
沈春耀主任

***邮寄***

***主题：《中华人民共和国刑法修正案（十一）（草案）》的反馈意见***

尊敬的沈主任您好：

美国知识产权所有人协会（下称"IPO 协会"）感谢有这个机会对 2020 年 7 月 3 日公布的《中华人民共和国刑法修正案（十一）（草案）》（下称"《草案》"）提供意见。

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 协会感谢全国人大常委会法制工作委员会发布的刑法修正案草案，尤其是有关商业秘密保护的第 219 条。

我们提供意见如下：

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

## 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。

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。

## 第二百一十九条

第二百一十九条以更宽的“情节严重”标准（或“情节特别严重”加重处罚）替代“造成重大损失”标准。我们注意到在最高人民法院和最高人民检察院发布的《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》（征求意见稿）的第四条中，参照原来的“造成重大损失”标准提供了一些情形，这些情形原本是希望包括经济方面的主要考量因素。这一标准目前被变更为“情况特别严重”标准，我们理解这样做的目的是为了对更大范围的情节恶劣行为去追究刑事责任。

鉴于这一范围的扩大，我们注意到为判定刑事责任而设立了通用的“应知”标准，而没有结合商业秘密的情形做出进一步阐述或具体的指引。因为心理状态是一种主观因素，我们建议采用“故意无视明确的证据”替代“应知”，这样可以包括被诉侵权人以不正当方式获取商业秘密且故意无视该等证据却声称不知情试图逃避责任的情形。因此，我们谨建议修改如下：

> *明知或者~~应知~~**故意无视明确的证据表明**前款所列行为，获取、使用或者披露他人的商业秘密的，以侵犯商业秘密论。*

我们感谢全国人大常委会法制工作委员会对于 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

美国知识产权所有人协会谨启

Daniel J. Staudt
执行会长

附件：《中华人民共和国刑法修正案（十一）（草案）》的反馈意见 （英文版）

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10 August 2020

Mr. Shen Chunyao
Chairman, Legislative Affairs Commission, Standing Committee of 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

***Via Courier***

***Re: The Eleventh Amendment to Criminal Law of the People's Republic of China (Draft Revision)***

Dear Chairman Shen:

The Intellectual Property Owners Association (IPO) appreciates the opportunity to respond to the request for comments on the *Eleventh Amendment to Criminal Law of the People's Republic of China (Draft Revision)* ("Draft Revision") published on 3 July 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 issuance by the National People's Congress, Legislative Affairs Commission of the Standing Committee, of amendments to the Criminal Law, particularly as it relates to Article 219 on the protection of trade secrets.

We provide our comments below.

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

**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 or 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 219**

Article 219 replaces the standard "brings significant losses" with a broader "circumstances are serious" standard (or "circumstances are particularly serious" for greater punishment). We note from Article 4 of the current draft *Several Issues Concerning the Specific Application of Law in Handling Criminal Cases of Intellectual Property Infringement issued by Supreme People's Court and Supreme People's Procuratorate*, which provides examples in reference to the original "brings significant losses" standard, that the original language was intended to cover primarily economic considerations. With the change to the new "circumstances are particularly serious" language, we understand that the intention is to capture a broader range of egregious conduct to be subject to criminal liability.

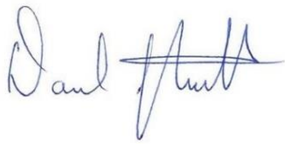
In view of this expanded scope, we are concerned about prescribing a general "should know" standard for determining criminal liability without further elaboration or specific guidelines in the trade secret context. Because mental state is a subjective determination, we recommend that "should know" be replaced with "intentionally disregards clear evidence" to capture instances where the accused infringer had clear evidence indicating that the trade secrets were improperly obtained but intentionally disregarded such evidence, and claims lack of actual knowledge in an attempt to avoid liability. Therefore, we respectfully suggest the following revision:

> *Whoever acquires, uses, or discloses other people's trade secrets, when he knows or* ~~***should know***~~ ***intentionally disregards clear evidence showing*** *that these trade secrets are acquired through the aforementioned means, is regarded as infringing trade secrets.*

We thank the National People's Congress, Legislative Affairs Commission of the Standing Committee, 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