2020 年 8 月 21 日

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主题：《关于修改<最高人民检察院公安部关于公安机关管辖的刑事案件立案追诉标准的规定（二）>侵犯商业秘密案立案追诉标准的补充规定（征求意见稿）》

致最高人民检察院和公安部：

美国知识产权所有人协会(下称“IPO 协会”)感谢有机会对 2020 年 7 月 10 日发布的《关于修改<最高人民检察院公安部关于公安机关管辖的刑事案件立案追诉标准的规定（二）>侵犯商业秘密案立案追诉标准的补充规定（征求意见稿）》(下称“《征求意见稿》”)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 协会感谢《征求意见稿》提出的惩治侵犯商业秘密犯罪，加大对知识产权的刑事司法保护力度的目标。我们尤其高兴地看到，第 73 条对确定侵犯商业秘密造成的损失，以指导刑事起诉的决定给予了重视。我们希望，我们下面的评论将有助于最后确定该条款。

总体意见

《征求意见稿》第 73 条规定了商业秘密侵权损失的评估方法，并规定了确定是否应提起刑事诉讼的经济损失门槛。我们感谢这一条所作的以提供详细的指导的大量努力。然而，我们总体上认为，最好让检察官酌情考虑一些与每个具体案件有关的因素。我们担心的是，对检察官的决策采

用一套非常具体、可能僵硬的标准，可能会在适宜刑事起诉时减少或阻碍刑事起诉。

我们注意到，《征求意见稿》第 73 条下的方法意味着类似专利的分析，即假定侵犯商业秘密的行为将是显而易见的，而且很容易被发现，并进一步假定，在一开始就有足够的信息可供进行详细的损失评估之用。然而，与专利侵权不同的是，在调查或查封之前，商业秘密侵权往往-很难被发现。这一方面是因为被告的行为通常是秘密进行的，另一方面也是因为被告的产品可能没有显示直接复制相关信息的证据。

商业秘密侵权通常是间接发生的，通过确定应避免的方法和应采取的一般方法。实际上，被告产品的外观通常不是商业秘密侵权的指标，而是被告在获得商业秘密后能够以多快的速度生产产品。这意味着，《征求意见稿》第 73 条中许多详细结构背后的假设—即检察官将能够将被偷的东西与被告产品中的东西相匹配—在大多数情况下是不可行的。

因此，我们认为，与看抄袭比，看开发时间的加快同等重要，这应该构成侵权人的“非法所得”。如目前所写，第 73 条的重点是受害人的损失。我们建议侵权人的利益的影响应给予更大的重视。在我们的提案中，IPO 协会建议将“侵权人的非法所得”计入 50 万元人民币的起诉起点。为此，我们进一步提出一个特定的概念，即侵权人加速发展以致提早进入市场从而剥夺商业秘密所有人全面“领先”进入市场的优势。

此外，我们建议在确定侵权人的非法所得和/或商业秘密所有人的损失时，考虑其他可能的侵权方面，例如附属销售。这是因为在侵犯商业秘密的案件中，被告不仅可能从与受商业秘密保护的产品有关的销售中获得不公平的利益，而且还可能从与受商业秘密保护的产品一起销售的补充或辅助产品中获得不公平的利益。同样，商业秘密所有人的损失可能不限于受商业秘密保护的产品，也可能来自附属产品。

在 IPO 协会的提案中，我们建议检察官在评估商业秘密侵权赔偿总额时，审查三种普遍可用的方法，包括：（1）实际损失（通常是利润损失，以及开发成本，和价格或市场侵蚀）；（2）非法所得（不当得利），包括非法收入，对侵权人的不公平利益，例如但不限于，加快开发时间和避免开发成本；以及（3）合理许可使用费。这些方法中的每一种都可以与其他方法结合使用，前提是对同一损害的组合损害不是重复的。总额超过 50 万元起点的，由检察官认定起诉。

关于“直接导致商业秘密的权利人因重大经营困难而破产、倒闭的”作为单独的刑事诉讼理由的情形（3），我们注意到许多不相关的经营因素可以是企业破产的部分或全部原因。我们担心的是，如果指控侵犯商业秘密导致破产，被告很难在没有原告透露证据的情况下证明破产原因与其他原因无关。我们还认为，业主损失、侵权人非法所得、合理使用费（无重复损害）相结合更为合适。因此，我们建议删除“直接导致商业秘密的权利人因重大经营困难而破产、倒闭的”的情形（三）作为单独的刑事追诉事由。

我们还担心，“其他给商业秘密权利人造成重大损失的情形”的第（四）项过于含糊，不足以作为起诉的依据。相反，50 万元人民币的起点提供了明确的通知，说明何时可以提起刑事诉讼。

我们还告诫不要假定，例如，检察官将有足够的证据作出分摊决定。《征求意见稿》第 73 条将商业秘密描述为“技术信息”时，要求将“侵权部分”与整个产品或计划生产的数字进行比较。基于商业秘密所有人已知的信息，这种比较通常是不可能的，而且这种表述方式并不能解释窃取的秘密使产品的整个制造或计划的实施加速开发的可能性。IPO 协会担心检察官在做出这样的决定时将面临巨大困难，从而导致检察官在起诉时有顾虑，或者干脆放弃起诉。

因此，我们建议删除关于“技术资料”和分摊的这一段。另一种选择，我们提议澄清这一段的措辞。以下是我们对《征求意见稿》第 73 条的修订建议。

对第 73 条的拟议修订

将《立案追诉标准（二）》第七十三条修改为：【侵犯商业秘密案（刑法第二百一十九条）】侵犯商业秘密，涉嫌下列情形之一的，应予立案追诉：

（1）**合并**金额：

（a）给商业秘密所有人造成损失~~50 万元以上的~~；

(b) 侵犯商业秘密违法所得数额；及

(c) 合理许可使用费

在同一商业秘密侵权损害赔偿总额不重复的前提下，超过 50 万元。

~~（二）因侵犯商业秘密违法所得数额在五十万元以上的；~~

~~（三）直接导致商业秘密的权利人因重大经营困难而破产、倒闭的；~~

~~（四）其他给商业秘密权利人造成重大损失的情形。~~

前款规定的造~~成损失数额或者违法所得数额~~**商业秘密所有人的损失、侵权人的非法所得以及合理的权利使用费的合并**金额，可以按照下列方式确定：

（一）侵权人以不正当手段获取权利人的商业秘密，**侵权人**尚未披露、使用或者允许他人使用的，损失数额可以根据该项商业秘密的合理许可使用费确定；

（二）以不正当手段获取权利人的商业秘密后（**包括违反协议或者权利人规定的保守商业秘密的要求**），披露、使用或者允许他人使用的，总损失数额

可以根据权利人因被侵权造成销售利润的损失确定，**许可使用该商业秘密的合理许可使用费，以及侵权人的非法所得确定，前提是同一商业秘密侵权行为的损害赔偿总额不重复** ~~该损失数额低于商业秘密合理许可使用费的，根据合理许可使用费确定~~；

~~（三）违反约定或者权利人有关保守商业秘密的要求，披露、使用或者允许他人使用其所掌握的商业秘密的，损失数额可以根据权利人因被侵权造成销售利润的损失确定；~~

（~~四~~三）侵权人明知商业秘密是不正当手段获取的，或者违反约定或者权利人有关保守商业秘密的要求披露、允许使用的，**侵权人**仍获取、使用或者披露商业秘密造~~成的损失数额~~，**总额**可以根据权利人因被侵权造成销售利润的损失确定，**允许使用该商业秘密的合理许可使用费，以及侵权人的非法所得确定，前提是同一商业秘密侵权的损害赔偿总额不重复**。

（~~五~~四）因披露或者允许他人使用商业秘密获得的财物或者其他财产性利益，应当认定为违法所得。

前款第二项、第三项~~、第四项~~规定的权利人因被侵权造成销售利润的损失，可以根据权利人因被侵权造成销售量减少的总数乘以权利人每件产品的合理利润确定；销售量减少的总数无法确定的，可以根据侵权产品销售量乘以权利人每件产品的合理利润确定。权利人的损失数额无法确定的，可以根据侵权产品销售量乘以每件侵权产品的合理利润确定。

建议 1：完全删除以下段落。

~~商业秘密系技术信息，如果被侵犯的技术信息系权利人技术方案的一部分或者侵犯商业秘密的产品系另一产品的零部件的，应当根据被侵犯的技术信息在整个技术方案中的所占比例、作用或者该侵犯商业秘密的产品本身价值及其在实现整个成品利润中的所占比例、作用等因素确定损失数额或者违法所得。~~

建议 2：将关于“技术资料”的段落改为以下段落。

商业秘密是属于总体技术方案的技术信息或者是成品的组成部分的，侵权人给权利人造成的损失或者非法所得的数额，应当根据已经识别出代表整体技术方案或成品中的商业秘密的要素、方面或者技术方案或者成品的那

一部分，作用（即，目的或功能）和价值及其在实现整体技术方案或成品利润中的比例和作用。

商业秘密系经营信息的，应当根据**因素比如，但不限于**该项经营信息在经营活动所获利润中的作用等因素确定损失数额或者违法所得。

因侵犯商业秘密行为导致商业秘密已为公众所知悉或者灭失的，可以根据该项商业秘密的商业价值确定损失数额。商业秘密的商业价值，可以综合考虑研究开发成本、实施该项商业秘密的收益等因素确定。

权利持有人的损失金额还包括附属销售、价格或市场侵蚀。

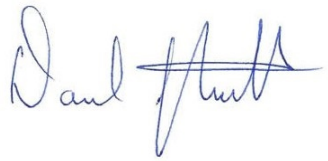
侵权人的非法所得还可以包括由于侵权人获得商业秘密而获得的非法收入（包括附属销售）、加快开发时间、提前进入市场或降低开发成本。

商业秘密的权利人为减轻侵犯商业秘密行为直接造成的商业损失或者重新恢复计算机信息系统安全等保密措施所支出的必要补救费用，应当一并计入商业秘密权利人的损失数额。

感谢最高人民检察院、公安部对于 IPO 协会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：《关于修改〈最高人民检察院 公安部关于公安机关管辖的刑事案件立案追诉标准的规定（二）〉侵犯商业秘密案立案追诉标准的补充规定（征求意见稿）》的反馈意见—英文版

21 August 2020

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Public Security Ministry
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Re: Supplementary Provisions on Revising the Standards for Prosecution of Criminal Cases Under the Jurisdiction of Public Security Organs of the Supreme People's Procuratorate (2) (Draft for Comment)

Dear Supreme People's Procuratorate and Public Security Ministry:

The Intellectual Property Owners Association (IPO) appreciates the opportunity to respond to the request for comments on the *Supplementary Provisions on Revising the Standards for Prosecution of Criminal Cases Under the Jurisdiction of Public Security Organs of the Supreme People's Procuratorate (2)* ("Draft Provisions") published on 10 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 Draft Provisions' stated objectives to strengthen criminal justice protection of intellectual property rights and punish trade secret infringement. In particular, we are glad to see the attention given in Article 73 to determining losses due to trade secret infringement in order to guide criminal prosecution decisions. We hope that our comments below will be helpful during the process of finalizing the Draft Provisions.

General Comment

The Article 73 draft sets forth methods for assessing loss due to trade secret infringement, and specifies a financial threshold for purposes of determining whether criminal action should be initiated. We appreciate the substantial efforts made under this article to provide detailed guidelines. However, we also believe, in general, that it is better to give prosecutors discretion to consider a number of factors that are contextual to each specific case. We are concerned that the application of a very specific, and potentially rigid, set of criteria to the prosecutor's decision-making could potentially reduce or discourage criminal prosecution when it would be appropriate.

We note that the approach under the Article 73 draft implies a patent-like analysis, which assumes that infringement of trade secret will be apparent and easily detected, and further assumes that enough information will be available at the outset to inform a detailed damage assessment. However, trade secret infringement, unlike patent infringement, often can be difficult to discern before there has been an investigation or seizure. This is in part because the defendant's actions typically occur in secret, and also in part because the defendant's products likely don't show evidence of direct copying of the relevant information.

Trade secret infringement typically occurs indirectly, by identifying which approaches to avoid and which general approaches to take. In effect, what the defendant's product looks like is usually less of an indicator of trade secret infringement than how quickly the defendant was able to produce its product after having access to the trade secret. This means that the assumption behind much of the detailed structure under the Article 73 draft – that the prosecutor will be able to match what was stolen to what is "in" the defendant's product – is not feasible in most cases.

Therefore, instead of looking at copying, we believe it is equally important to look for acceleration of development time, which should constitute "illegal gain" by the infringer. As currently written, the focus of Article 73 is on the loss to the victim. We recommend that the impact of benefit conferred on the infringer should be given greater weight. In our proposal, IPO recommends that "illegal gain to the infringer" be counted towards the 500,000 RMB threshold for prosecution. To this end, we further propose a specific reference to the notion of acceleration of development that allows early entry into a market (which deprives the trade secret owner of its full "head start" advantage).

Moreover, we recommend that other possible aspects of infringement, such as convoyed sales, be considered in determining illegal gain to the infringer and/or loss to the trade secret owner. This is because, in a trade secret infringement case, a defendant may unfairly benefit not only from sales associated with a product protected by the trade secret, but also from sales of complementary or ancillary products sold together with the product protected by the trade secret. Likewise, the trade secret owner's losses may not be limited to the product protected by the trade secret, but also arise from convoyed products.

In IPO's proposal, we recommend that in assessing total compensation for trade secret infringement, the prosecutor examine three generally available methods, including: (1) actual loss (typically lost profits, as well as development costs and price or market erosion); (2) illegal gains (unjust enrichment), which include illegal income, unfair benefits to the infringer such as, but not limited to, acceleration of development time and avoided

development costs; and (3) reasonable royalty. Each of these methods may be used in combination with others, provided the combined damages are not duplicative for the same harm. Where the total amount exceeds the threshold of 500,000 RMB, then the prosecutor should determine that the case should be prosecuted.

Turning to circumstance (3) ("directly leading to bankruptcy due to major business difficulties") as a stand-alone cause for criminal prosecution, we note that many unrelated business factors can be a partial or complete cause of bankruptcy of a business. We are concerned that, where there is an accusation of trade secret infringement leading to bankruptcy, it will be very difficult for the defendant, without discovery from the accuser, to prove that the cause of the bankruptcy was for unrelated reasons. We also believe that the combination of loss to the owner, illegal gains to the infringer, and reasonable royalty (without duplicative damages) constitutes more appropriate criteria. Thus, we recommend deleting the circumstance (3) of "directly leading to bankruptcy due to major business difficulties" as a stand-alone cause for criminal prosecution.

We are also concerned that circumstance (4) ("[o]ther circumstances that cause major losses to the owner of the trade secret") is too vague and ambiguous to serve as a basis for prosecution. Rather, a 500,000 RMB threshold provides clear notice as to when criminal prosecution can be filed.

We also caution against assuming, for example, that the prosecutor will have sufficient evidence available to make an apportionment determination. The Article 73 draft in describing trade secrets as "technical information" requires that the "infringing portion" be compared to the entire product or plan to produce a number. Such a comparison is typically not possible based on information known to the trade secret owner, and this formulation does not account for the possibility that the stolen secret may have enabled the entire manufacture of a product or implementation of a plan just by accelerating the development. IPO is concerned that prosecutors will face significant difficulties in making such a determination, thus causing the prosecutors to hesitate to prosecute, or to forego prosecution altogether.

Therefore, we recommend that this paragraph on "technical information" and apportionment be deleted. As an alternative, we have proposed clarifying language to this paragraph. We provide below our suggested revisions to the Article 73 draft.

Proposed Revision to Article 73

Article 73 of the "Case for Prosecution (2)" is revised to: [Infringement of Trade Secrets (Criminal Law Article 219)] Infringement of trade secrets, and any of the suspected following circumstances should be filed for prosecution:

(1) The **combined** amount of:

(a) loss caused to the owner of a trade secret ~~is more than 500,000 yuan~~;

(b) amount of illegal gain from infringement of trade secrets; and

(c) reasonable royalty

is more than 500,000 yuan**, provided that the combined amount is not duplicative in damages for the same trade secret infringement.**~~;~~

~~(2) The amount of illegal income from infringement of trade secrets is more than 500,000 yuan;~~

~~(3) Directly leading to the bankruptcy or bankruptcy of the owner of the trade secret due to major business difficulties;~~

~~(4) Other circumstances that cause major losses to the owner of the trade secret~~.

The **combined** amount ~~of loss or the amount of illegal income~~ **due to loss to the trade secret owner, illegal gain by the infringer, and reasonable royalty** provided in the preceding paragraph may be determined in the following ways:

(1) Where the infringer obtains the trade secret from the right holder by improper means and **the infringer** has not disclosed, used or allowed others to use the trade secret, the amount of losses may be determined based on the reasonable royalty for the trade secret;

(2) After obtaining the right holder's trade secrets by improper means **(including in violation of an agreement or the requirements for keeping trade secrets confidential specified by the right holder)**, and disclosing, using or allowing others to use them, the **combined** amount of loss can be determined based on the loss of the right holder's sales profits due to the infringement**, reasonable royalty for permission to use the trade secret, and illegal gain by the infringer, provided that the combined amount is not duplicative in damages for the same trade secret infringement,** ~~and the amount of loss is lower than the trade secret's reasonable permission to use The fee shall be determined according to the reasonable license fee~~;

~~(3) In violation of the agreement or the right holder's requirements on keeping trade secrets, the amount of loss may be determined based on the loss of the right holder's sales profits due to the infringement of the right holder's trade secrets that he has or is allowed to use;~~

~~(4)~~ **(3)** Where the infringer, knowing that the trade secret is obtained by improper means or disclosed or allowed to be used in violation of an agreement or the requirements for keeping trade secrets confidential specified by the right holder, and **the infringer** still obtains, uses or discloses the trade secret, the **combined** amount ~~of the losses resulting from obtaining, using or disclosing in such way~~ may be determined based on the loss in sales profit the right holder has suffered from the infringement**, reasonable royalty for permission to use the trade secret, and illegal gains by the infringer, provided that the combined amount is not duplicative in damages for the same trade secret infringement.**

~~(5)~~ **(4)** The properties or other property interests obtained through disclosing or allowing others to use the trade secret shall be identified as illegal gain.

The loss of sales profits caused by the infringement of the right holder as specified in the second **and**~~,~~ third~~, and fourth~~ items of the preceding paragraph can be determined by multiplying the total amount of sales reduction caused by the infringement by the right holder by the reasonable profit of each product of the right holder. If the total reduction in sales volume cannot be determined, it can be determined by multiplying the sales volume of the infringing product by the reasonable profit of each product of

the right holder. If the loss amount of the right holder cannot be determined, it can be determined by multiplying the sales volume of the infringing product by the reasonable profit of each infringing product.

Recommendation 1 (Preferred): Delete the below paragraph entirely.

~~Trade secrets are technical information. If the infringed technical information is part of the technical plan of the right holder or the product that infringes the trade secrets is a component of another product, it shall be based on the proportion of the infringed technical information in the entire technical plan. , Role or the value of the product that infringes on trade secrets and its proportion and role in realizing the profit of the entire finished product determine the amount of loss or illegal gains.~~

Recommendation 2: Replace the paragraph on "technical information" with the below paragraph.

Where a trade secret is technical information that is part of the overall technical plan or a component of a finished product, the amount of loss to the right holder or illegal gain by the infringer shall be determined based on having identified those elements or aspects or that portion of the technical plan or finished product representing the trade secret within the overall technical plan or finished product, the role (*i.e.*, purpose or function) and value of the trade secret and its proportion and role in realizing the profit of the overall technical plan or finished product.

Where a trade secret is business information, the amount of loss or illegal gains shall be determined based on factors such as**, but not limited to,** the role of the business information in the profits obtained from business activities.

If a trade secret has become known to the public or has been lost due to an infringement of a trade secret, the amount of loss may be determined based on the commercial value of the trade secret. The commercial value of a trade secret can be determined by comprehensively considering factors such as research and development costs and the benefits of implementing the trade secret.

The amount of loss to the right holder can also include convoyed sales, and price or market erosion.

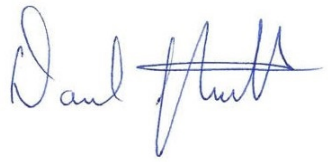
Illegal gain by the infringer can also include illegal income (including from convoyed sales), acceleration of development time, earlier entry to market, or reduced development costs, due to the infringer's access to the trade secret.

The necessary remedial expenses paid by the owner of the trade secret to reduce the business losses directly caused by the infringement of the trade secret or to restore the security of the computer information system shall be included in the amount of the loss of the trade secret owner.

We thank the Supreme People's Procuratorate and Public Security Ministry 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