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# 商业秘密 主要法律规范指引

Guidelines for Laws and Regulations  
of Trade Secrets



上海市人民检察院第三分院  
No. 3 Branch of People's Procuratorate of Shanghai Municipality



上海市外商投资协会  
SHANGHAI FOREIGN INVESTMENT ASSOCIATION



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## 民事

### 1. 《中华人民共和国民法典》（2021年1月1日起施行）

**第一百二十三条** 民事主体依法享有知识产权。知识产权是权利人依法就下列客体享有的专有的权利：

- （一）作品；
- （二）发明、实用新型、外观设计；
- （三）商标；
- （四）地理标志；
- （五）商业秘密；
- （六）集成电路布图设计；
- （七）植物新品种；
- （八）法律规定的其他客体。

**第五百零一条** 当事人在订立合同过程中知悉的商业秘密或者其他应当保密的信息，无论合同是否成立，不得泄露或者不正当地使用；泄露、不正当地使用该商业秘密或者信息，造成对方损失的，应当承担赔偿责任。

**第八百五十条** 非法垄断技术或者侵害他人技术成果的技术合同无效。

**第八百六十一条** 委托开发或者合作开发完成的技术秘密成果的使用权、转让权以及收益的分配办法，由当事人约定；没有约定或者约定不明确，依据

本法第五百一十条的规定仍不能确定的，在没有相同技术方案被授予专利权前，当事人均有使用和转让的权利。但是，委托开发的研究开发人不得在向委托人交付研究开发成果之前，将研究开发成果转让给第三人。

**第八百六十二条** 技术转让合同是合法拥有技术的权利人，将现有特定的专利、专利申请、技术秘密的相关权利让与他人所订立的合同。

技术许可合同是合法拥有技术的权利人，将现有特定的专利、技术秘密的相关权利许可他人实施、使用所订立的合同。

技术转让合同和技术许可合同中关于提供实施技术的专用设备、原材料或者提供有关的技术咨询、技术服务的约定，属于合同的组成部分。

**第八百六十三条** 技术转让合同包括专利权转让、专利申请权转让、技术秘密转让等合同。

技术许可合同包括专利实施许可、技术秘密使用许可等合同。

技术转让合同和技术许可合同应当采用书面形式。

**第八百六十四条** 技术转让合同和技术许可合同可以约定实施专利或者使用技术秘密的范围，但是不得限制技术竞争和技术发展。

## 2. 《中华人民共和国反不正当竞争法》（2019年4月23日起施行）

**第九条** 经营者不得实施下列侵犯商业秘密的

行为：

（一）以盗窃、贿赂、欺诈、胁迫、电子侵入或者其他不正当手段获取权利人的商业秘密；

（二）披露、使用或者允许他人使用以前项手段获取的权利人的商业秘密；

（三）违反保密义务或者违反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；

（四）教唆、引诱、帮助他人违反保密义务或者违反权利人有关保守商业秘密的要求，获取、披露、使用或者允许他人使用权利人的商业秘密。

经营者以外的其他自然人、法人和非法人组织实施前款所列违法行为的，视为侵犯商业秘密。

第三人明知或者应知商业秘密权利人的员工、前员工或者其他单位、个人实施本条第一款所列违法行为，仍获取、披露、使用或者允许他人使用该商业秘密的，视为侵犯商业秘密。

本法所称的商业秘密，是指不为公众所知悉、具有商业价值并经权利人采取相应保密措施的技术信息、经营信息等商业信息。

**第十七条** 经营者违反本法规定，给他人造成损害的，应当依法承担民事责任。

经营者的合法权益受到不正当竞争行为损害的，可以向人民法院提起诉讼。

因不正当竞争行为受到损害的经营者的赔偿数额，按照其因被侵权所受到的实际损失确定；实际损

失难以计算的，按照侵权人因侵权所获得的利益确定。经营者恶意实施侵犯商业秘密行为，情节严重的，可以在按照上述方法确定数额的一倍以上五倍以下确定赔偿数额。赔偿数额还应当包括经营者为制止侵权行为所支付的合理开支。

经营者违反本法第六条、第九条规定，权利人因被侵权所受到的实际损失、侵权人因侵权所获得的利益难以确定的，由人民法院根据侵权行为的情节判决给予权利人五百万元以下的赔偿。

**第三十二条** 在侵犯商业秘密的民事审判程序中，商业秘密权利人提供初步证据，证明其已经对所主张的商业秘密采取保密措施，且合理表明商业秘密被侵犯，涉嫌侵权人应当证明权利人所主张的商业秘密不属于本法规定的商业秘密。

商业秘密权利人提供初步证据合理表明商业秘密被侵犯，且提供以下证据之一的，涉嫌侵权人应当证明其不存在侵犯商业秘密的行为：

（一）有证据表明涉嫌侵权人有渠道或者机会获取商业秘密，且其使用的信息与该商业秘密实质上相同；

（二）有证据表明商业秘密已经被涉嫌侵权人披露、使用或者有被披露、使用的风险；

（三）有其他证据表明商业秘密被涉嫌侵权人侵犯。

**3. 《最高人民法院关于适用〈中华人民共和国反不正当竞争法〉若干问题的解释》（法释〔2022〕9号，2022**

**年3月20日起施行）**

**第二十七条** 被诉不正当竞争行为发生在中华人民共和国领域外，但侵权结果发生在中华人民共和国领域内，当事人主张由该侵权结果发生地人民法院管辖的，人民法院应予支持。

**4. 《最高人民法院关于审理侵犯商业秘密民事案件适用法律若干问题的规定》（法释〔2020〕7号，2020年9月12日起施行）**

**第一条** 与技术有关的结构、原料、组分、配方、材料、样品、样式、植物新品种繁殖材料、工艺、方法或其步骤、算法、数据、计算机程序及其有关文档等信息，人民法院可以认定构成反不正当竞争法第九条第四款所称的技术信息。

与经营活动有关的创意、管理、销售、财务、计划、样本、招投标材料、客户信息、数据等信息，人民法院可以认定构成反不正当竞争法第九条第四款所称的经营信息。

前款所称的客户信息，包括客户的名称、地址、联系方式以及交易习惯、意向、内容等信息。

**第二条** 当事人仅以与特定客户保持长期稳定交易关系为由，主张该特定客户属于商业秘密的，人民法院不予支持。

客户基于对员工个人的信赖而与该员工所在单位进行交易，该员工离职后，能够证明客户自愿选择与该员工或者该员工所在的新单位进行交易的，人民法院应当认定该员工没有采用不正当手段获取权利

人的商业秘密。

**第三条** 权利人请求保护的信息在被诉侵权行为发生时不为所属领域的相关人员普遍知悉和容易获得的，人民法院应当认定为反不正当竞争法第九条第四款所称的不为公众所知悉。

**第四条** 具有下列情形之一的，人民法院可以认定有关信息为公众所知悉：

（一）该信息在所属领域属于一般常识或者行业惯例的；

（二）该信息仅涉及产品的尺寸、结构、材料、部件的简单组合等内容，所属领域的相关人员通过观察上市产品即可直接获得的；

（三）该信息已经在公开出版物或者其他媒体上公开披露的；

（四）该信息已通过公开的报告会、展览等方式公开的；

（五）所属领域的相关人员从其他公开渠道可以获得该信息的。

将为公众所知悉的信息进行整理、改进、加工后形成的新信息，符合本规定第三条规定的，应当认定该新信息不为公众所知悉。

**第五条** 权利人为防止商业秘密泄露，在被诉侵权行为发生以前所采取的合理保密措施，人民法院应当认定为反不正当竞争法第九条第四款所称的相应保密措施。

人民法院应当根据商业秘密及其载体的性质、商

业秘密的商业价值、保密措施的可识别程度、保密措施与商业秘密的对应程度以及权利人的保密意愿等因素，认定权利人是否采取了相应保密措施。

**第六条** 具有下列情形之一，在正常情况下足以防止商业秘密泄露的，人民法院应当认定权利人采取了相应保密措施：

（一）签订保密协议或者在合同中约定保密义务的；

（二）通过章程、培训、规章制度、书面告知等方式，对能够接触、获取商业秘密的员工、前员工、供应商、客户、来访者等提出保密要求的；

（三）对涉密的厂房、车间等生产经营场所限制来访者或者进行区分管理的；

（四）以标记、分类、隔离、加密、封存、限制能够接触或者获取的人员范围等方式，对商业秘密及其载体进行区分和管理的；

（五）对能够接触、获取商业秘密的计算机设备、电子设备、网络设备、存储设备、软件等，采取禁止或者限制使用、访问、存储、复制等措施的；

（六）要求离职员工登记、返还、清除、销毁其接触或者获取的商业秘密及其载体，继续承担保密义务的；

（七）采取其他合理保密措施的。

**第七条** 权利人请求保护的信息因不为公众所知悉而具有现实的或者潜在的商业价值的，人民法院经审查可以认定为反不正当竞争法第九条第四款所

称的具有商业价值。

生产经营活动中形成的阶段性成果符合前款规定的，人民法院经审查可以认定该成果具有商业价值。

**第八条** 被诉侵权人以违反法律规定或者公认的商业道德的方式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。

**第九条** 被诉侵权人在生产经营活动中直接使用商业秘密，或者对商业秘密进行修改、改进后使用，或者根据商业秘密调整、优化、改进有关生产经营活动的，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。

**第十条** 当事人根据法律规定或者合同约定所承担的保密义务，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保密义务。

当事人未在合同中约定保密义务，但根据诚信原则以及合同的性质、目的、缔约过程、交易习惯等，被诉侵权人知道或者应当知道其获取的信息属于权利人的商业秘密的，人民法院应当认定被诉侵权人对其获取的商业秘密承担保密义务。

**第十一条** 法人、非法人组织的经营、管理人员以及具有劳动关系的其他人员，人民法院可以认定为反不正当竞争法第九条第三款所称的员工、前员工。

**第十二条** 人民法院认定员工、前员工是否有渠道或者机会获取权利人的商业秘密，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) 是否保管、使用、存储、复制、控制或者以其他方式接触、获取商业秘密及其载体；
- (五) 需要考虑的其他因素。

**第十三条** 被诉侵权信息与商业秘密不存在实质性区别的，人民法院可以认定被诉侵权信息与商业秘密构成反不正当竞争法第三十二条第二款所称的实质上相同。

人民法院认定是否构成前款所称的实质上相同，可以考虑下列因素：

- (一) 被诉侵权信息与商业秘密的异同程度；
- (二) 所属领域的相关人员在被诉侵权行为发生时是否容易想到被诉侵权信息与商业秘密的区别；
- (三) 被诉侵权信息与商业秘密的用途、使用方式、目的、效果等是否具有实质性差异；
- (四) 公有领域中与商业秘密相关信息的情况；
- (五) 需要考虑的其他因素。

**第十四条** 通过自行开发研制或者反向工程获得被诉侵权信息的，人民法院应当认定不属于反不正当竞争法第九条规定的侵犯商业秘密行为。

前款所称的反向工程，是指通过技术手段对从公开渠道取得的产品进行拆卸、测绘、分析等而获得该产品的有关技术信息。

被诉侵权人以不正当手段获取权利人的商业秘密后，又以反向工程为由主张未侵犯商业秘密的，人民法院不予支持。

**第十五条** 被申请人试图或者已经以不正当手段获取、披露、使用或者允许他人使用权利人所主张的商业秘密，不采取行为保全措施会使判决难以执行或者造成当事人其他损害，或者将会使权利人的合法权益受到难以弥补的损害的，人民法院可以依法裁定采取行为保全措施。

前款规定的情形属于民事诉讼法第一百条、第一百零一条所称情况紧急的，人民法院应当在四十八小时内作出裁定。

**第十六条** 经营者以外的其他自然人、法人和非法人组织侵犯商业秘密，权利人依据反不正当竞争法第十七条的规定主张侵权人应当承担的民事责任的，人民法院应予支持。

**第十七条** 人民法院对于侵犯商业秘密行为判决停止侵害的民事责任时，停止侵害的时间一般应当持续到该商业秘密已为公众所知悉时为止。

依照前款规定判决停止侵害的时间明显不合理的，人民法院可以在依法保护权利人的商业秘密竞争优势的情况下，判决侵权人在一定期限或者范围内停止使用该商业秘密。

**第十八条** 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。

**第十九条** 因侵权行为导致商业秘密为公众所知悉的，人民法院依法确定赔偿数额时，可以考虑商业秘密的商业价值。

人民法院认定前款所称的商业价值，应当考虑研究开发成本、实施该项商业秘密的收益、可得利益、可保持竞争优势的时间等因素。

**第二十条** 权利人请求参照商业秘密许可使用费确定因被侵权所受到的实际损失的，人民法院可以根据许可的性质、内容、实际履行情况以及侵权行为的性质、情节、后果等因素确定。

人民法院依照反不正当竞争法第十七条第四款确定赔偿数额的，可以考虑商业秘密的性质、商业价值、研究开发成本、创新程度、能带来的竞争优势以及侵权人的主观过错、侵权行为的性质、情节、后果等因素。

**第二十一条** 对于涉及当事人或者案外人的商业秘密的证据、材料，当事人或者案外人书面申请人民法院采取保密措施的，人民法院应当在保全、证据交换、质证、委托鉴定、询问、庭审等诉讼活动中采取必要的保密措施。

违反前款所称的保密措施的要求，擅自披露商业秘密或者在诉讼活动之外使用或者允许他人使用在诉讼中接触、获取的商业秘密的，应当依法承担民事责任。构成民事诉讼法第一百一十一条规定情形的，人民法院可以依法采取强制措施。构成犯罪的，依法追究刑事责任。

**第二十二条** 人民法院审理侵犯商业秘密民事案件时，对在侵犯商业秘密犯罪刑事诉讼程序中形成的证据，应当按照法定程序，全面、客观地审查。

由公安机关、检察机关或者人民法院保存的与被诉侵权行为具有关联性的证据，侵犯商业秘密民事案件的当事人及其诉讼代理人因客观原因不能自行收集，申请调查收集的，人民法院应当准许，但可能影响正在进行的刑事诉讼程序的除外。

**第二十三条** 当事人主张依据生效刑事裁判认定的实际损失或者违法所得确定涉及同一侵犯商业秘密行为的民事案件赔偿数额的，人民法院应予支持。

**第二十四条** 权利人已经提供侵权人因侵权所获得的利益的初步证据，但与侵犯商业秘密行为相关的账簿、资料由侵权人掌握的，人民法院可以根据权利人的申请，责令侵权人提供该账簿、资料。侵权人无正当理由拒不提供或者不如实提供的，人民法院可以根据权利人的主张和提供的证据认定侵权人因侵权所获得的利益。

**第二十五条** 当事人以涉及同一被诉侵犯商业秘密行为的刑事案件尚未审结为由，请求中止审理侵犯商业秘密民事案件，人民法院在听取当事人意见后认为必须以该刑事案件的审理结果为依据的，应予支持。

**第二十六条** 对于侵犯商业秘密行为，商业秘密独占使用许可合同的被许可人提起诉讼的，人民法院应当依法受理。

排他使用许可合同的被许可人和权利人共同提起诉讼，或者在权利人不起诉的情况下自行提起诉讼的，人民法院应当依法受理。

普通使用许可合同的被许可人和权利人共同提起诉讼，或者经权利人书面授权单独提起诉讼的，人民法院应当依法受理。

**第二十七条** 权利人应当在一审法庭辩论结束前明确所主张的商业秘密具体内容。仅能明确部分的，人民法院对该明确的部分进行审理。

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的，第二审人民法院可以根据当事人自愿的原则就与该商业秘密具体内容有关的诉讼请求进行调解；调解不成的，告知当事人另行起诉。双方当事人均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。

**第二十八条** 人民法院审理侵犯商业秘密民事案件，适用被诉侵权行为发生时的法律。被诉侵权行为在法律修改之前已经发生且持续到法律修改之后的，适用修改后的法律。

**第二十九条** 本规定自 2020 年 9 月 12 日起施行。最高人民法院以前发布的相关司法解释与本规定不一致的，以本规定为准。

本规定施行后，人民法院正在审理的一审、二审案件适用本规定；施行前已经作出生效裁判的案件，不适用本规定再审。

## 5.《最高人民法院关于审理技术合同纠纷案件适

## 用法律若干问题的解释》（2021年1月1日起施行）

**第一条** 技术成果，是指利用科学技术知识、信息和经验作出的涉及产品、工艺、材料及其改进等的技术方案，包括专利、专利申请、技术秘密、计算机软件、集成电路布图设计、植物新品种等。

技术秘密，是指不为公众所知悉、具有商业价值并经权利人采取相应保密措施的技术信息。

**第十二条** 根据民法典第八百五十条的规定，侵害他人技术秘密的技术合同被确认无效后，除法律、行政法规另有规定的以外，善意取得该技术秘密的一方当事人可以在其取得时的范围内继续使用该技术秘密，但应当向权利人支付合理的使用费并承担保密义务。

当事人双方恶意串通或者一方知道或者应当知道另一方侵权仍与其订立或者履行合同的，属于共同侵权，人民法院应当判令侵权人承担连带赔偿责任和保密义务，因此取得技术秘密的当事人不得继续使用该技术秘密。

**第十三条** 依照前条第一款规定可以继续使用技术秘密的人与权利人就使用费支付发生纠纷的，当事人任何一方都可以请求人民法院予以处理。继续使用技术秘密但又拒不支付使用费的，人民法院可以根据权利人的请求判令使用人停止使用。

人民法院在确定使用费时，可以根据权利人通常对外许可该技术秘密的使用费或者使用人取得该技术秘密所支付的使用费，并考虑该技术秘密的研究开

发成本、成果转化和应用程度以及使用人的使用规模、经济效益等因素合理确定。

不论使用人是否继续使用技术秘密，人民法院均应当判令其向权利人支付已使用期间的使用费。使用人已向无效合同的让与人或者许可人支付的使用费应当由让与人或者许可人负责返还。

**第二十条** 民法典第八百六十一条所称“当事人均有使用和转让的权利”，包括当事人均有不经对方同意而自己使用或者以普通使用许可的方式许可他人使用技术秘密，并独占由此所获利益的权利。当事人一方将技术秘密成果的转让权让与他人，或者以独占或者排他使用许可的方式许可他人使用技术秘密，未经对方当事人同意或者追认的，应当认定该让与或者许可行为无效。

**第二十一条** 技术开发合同当事人依照民法典的规定或者约定自行实施专利或使用技术秘密，但因其不具备独立实施专利或者使用技术秘密的条件，以一个普通许可方式许可他人实施或者使用的，可以准许。

**第二十二条** 就尚待研究开发的技术成果或者不涉及专利、专利申请或者技术秘密的知识、技术、经验和信息所订立的合同，不属于民法典第八百六十二条规定的技术转让合同或者技术许可合同。

技术转让合同中关于让与人向受让人提供实施技术的专用设备、原材料或者提供有关的技术咨询、技术服务的约定，属于技术转让合同的组成部分。因

此发生的纠纷，按照技术转让合同处理。

当事人以技术入股方式订立联营合同，但技术入股人不参与联营体的经营管理，并且以保底条款形式约定联营体或者联营对方支付其技术价款或者使用费的，视为技术转让合同或者技术许可合同。

### **第二十五条 专利实施许可包括以下方式：**

（一）独占实施许可，是指许可人在约定许可实施专利的范围内，将该专利仅许可一个被许可人实施，许可人依约定不得实施该专利；

（二）排他实施许可，是指许可人在约定许可实施专利的范围内，将该专利仅许可一个被许可人实施，但许可人依约定可以自行实施该专利；

（三）普通实施许可，是指许可人在约定许可实施专利的范围内许可他人实施该专利，并且可以自行实施该专利。

当事人对专利实施许可方式没有约定或者约定不明确的，认定为普通实施许可。专利实施许可合同约定被许可人可以再许可他人实施专利的，认定该再许可为普通实施许可，但当事人另有约定的除外。

技术秘密的许可使用方式，参照本条第一、二款的规定确定。

**第二十八条** 民法典第八百六十四条所称“实施专利或者使用技术秘密的范围”，包括实施专利或者使用技术秘密的期限、地域、方式以及接触技术秘密的人员等。

当事人对实施专利或者使用技术秘密的期限没

有约定或者约定不明确的，受让人、被许可人实施专利或者使用技术秘密不受期限限制。

**第二十九条** 当事人之间就申请专利的技术成果所订立的许可使用合同，专利申请公开以前，适用技术秘密许可合同的有关规定；发明专利申请公开以后、授权以前，参照适用专利实施许可合同的有关规定；授权以后，原合同即为专利实施许可合同，适用专利实施许可合同的有关规定。

人民法院不以当事人就已经申请专利但尚未授权的技术订立专利实施许可合同为由，认定合同无效。

## **6.《中华人民共和国民事诉讼法》（2024年1月1日起施行）**

**第一百零三条** 人民法院对于可能因当事人一方的行为或者其他原因，使判决难以执行或者造成当事人其他损害的案件，根据对方当事人的申请，可以裁定对其财产进行保全、责令其作出一定行为或者禁止其作出一定行为；当事人没有提出申请的，人民法院在必要时也可以裁定采取保全措施。

人民法院采取保全措施，可以责令申请人提供担保，申请人不提供担保的，裁定驳回申请。

人民法院接受申请后，对情况紧急的，必须在四十八小时内作出裁定；裁定采取保全措施的，应当立即开始执行。

**第一百零四条** 利害关系人因情况紧急，不立即申请保全将会使其合法权益受到难以弥补的损害的，可以在提起诉讼或者申请仲裁前向被保全财产所在

地、被申请人住所地或者对案件有管辖权的人民法院申请采取保全措施。申请人应当提供担保，不提供担保的，裁定驳回申请。

人民法院接受申请后，必须在四十八小时内作出裁定；裁定采取保全措施的，应当立即开始执行。

申请人在人民法院采取保全措施后三十日内不依法提起诉讼或者申请仲裁的，人民法院应当解除保全。

### 7. 《最高人民法院关于知识产权民事诉讼证据的若干规定》（法释〔2020〕12号，2020年11月18日起施行）

**第十九条** 人民法院可以对下列待证事实的专门性问题委托鉴定：

（一）被诉侵权技术方案与专利技术方案、现有技术的对应技术特征在手段、功能、效果等方面的异同；

（二）被诉侵权作品与主张权利的作品的异同；

（三）当事人主张的商业秘密与所属领域已为公众所知悉的信息的异同、被诉侵权的信息与商业秘密的异同；

（四）被诉侵权物与授权品种在特征、特性方面的异同，其不同是否因非遗传变异所致；

（五）被诉侵权集成电路布图设计与请求保护的集成电路布图设计的异同；

（六）合同涉及的技术是否存在缺陷；

（七）电子数据的真实性、完整性；

（八）其他需要委托鉴定的专门性问题。

### 8. 《最高人民法院关于审查知识产权纠纷行为保全案件适用法律若干问题的规定》（法释〔2018〕21号，2019年1月1日起施行）

**第六条** 有下列情况之一，不立即采取行为保全措施即足以损害申请人利益的，应当认定属于民事诉讼法第一百条、第一百零一条<sup>1</sup>规定的“情况紧急”：

（一）申请人的商业秘密即将被非法披露；

（二）申请人的发表权、隐私权等人身权利即将受到侵害；

（三）诉争的知识产权即将被非法处分；

（四）申请人的知识产权在展销会等时效性较强的场合正在或者即将受到侵害；

（五）时效性较强的热播节目正在或者即将受到侵害；

（六）其他需要立即采取行为保全措施的情况。

<sup>1</sup> 对应 2022 年 1 月 1 日起施行的《中华人民共和国民事诉讼法》第一百零三条、第一百零四条

## 行政

### 1. 《中华人民共和国反不正当竞争法》（2019年4月23日起施行）

**第二十一条** 经营者以及其他自然人、法人和非法人组织违反本法第九条规定侵犯商业秘密的，由监督检查部门责令停止违法行为，没收违法所得，处十万元以上一百万元以下的罚款；情节严重的，处五十万元以上五百万元以下的罚款。

### 2. 《关于禁止侵犯商业秘密行为的若干规定》（国家工商行政管理局令第86号，1998年12月3日起施行）

**第一条** 为了制止侵犯商业秘密的行为，保护商业秘密权利人的合法权益，维护社会主义市场经济秩序，根据《中华人民共和国反不正当竞争法》（以下简称《反不正当竞争法》）的有关规定，制定本规定。

**第二条** 本规定所称商业秘密，是指不为公众所知悉、能为权利人带来经济利益、具有实用性并经权利人采取保密措施的技术信息和经营信息。

本规定所称不为公众所知悉，是指该信息是不能从公开渠道直接获取的。

本规定所称能为权利人带来经济利益、具有实用性，是指该信息具有确定的可应用性，能为权利人带来现实的或者潜在的经济利或者竞争优势。

本规定所称权利人采取保密措施，包括订立保密

协议，建立保密制度及采取其他合理的保密措施。

本规定所称技术信息和经营信息，包括设计、程序、产品配方、制作工艺、制作方法、管理诀窍、客户名单、货源情报、产销策略、招投标中的标底及标书内容等信息。

本规定所称权利人，是指依法对商业秘密享有所有权或者使用权的公民、法人或者其他组织。

**第三条** 禁止下列侵犯商业秘密的行为：

（一）以盗窃、利诱、胁迫或者其他不正当手段获取的权利人的商业秘密；

（二）披露、使用或者允许他人使用以前项手段获取的权利人的商业秘密；

（三）与权利人有业务关系的单位和个人违反合同约定或者违反权利人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权利人的商业秘密；

（四）权利人的职工违反合同约定或者违反权利人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权利人的商业秘密。

第三人明知或者应知前款所列违法行为，获取、使用或者披露他人的商业秘密，视为侵犯商业秘密。

**第四条** 侵犯商业秘密行为由县级以上工商行政管理机关认定处理。

**第五条** 权利人（申请人）认为其商业秘密受到侵害，向工商行政管理机关申请查处侵权行为时，应当提供商业秘密及侵权行为存在的有关证据。

被检查的单位和个人(被申请人)及利害关系人、证明人,应当如实向工商行政管理机关提供有关证据。

权利人能证明被申请人所使用的信息与自己的商业秘密具有一致性或者相同性,同时能证明被申请人有获取其商业秘密的条件,而被申请人不能提供或者拒不提供其所使用的信息是合法获得或者使用的证据的,工商行政管理机关可以根据有关证据,认定被申请人有侵权行为。

**第六条** 对被申请人违法披露、使用、允许他人使用商业秘密将给权利人造成不可挽回的损失,应权利人请求并由权利人出具自愿对强制措施后果承担责任的书面保证,工商行政管理机关可以责令被申请人停止销售使用权利人商业秘密生产的产品。

**第七条** 违反本规定第三条的,由工商行政管理机关依照《反不正当竞争法》第二十五条<sup>4</sup>的规定,责令停止违法行为,并可以根据情节处以一万元以上二十万元以下的罚款。

工商行政管理机关在依照前款规定予以处罚时,对侵权物品可以作如下处理:

(一) 责令并监督侵权人将载有商业秘密的图纸、软件及其有关资料返还权利人。

(二) 监督侵权人销毁使用权利人商业秘密生产的、流失市场将会造成商业秘密公开的产品。但权利

<sup>4</sup> 已被 2019 年 4 月 23 日施行的《中华人民共和国反不正当竞争法》第二十一条修改

人同意收购、销售等其他处理方式的除外。

**第八条** 对侵权人拒不执行处罚决定,继续实施本规定第三条所列行为的,视为新的违法行为,从重予以处罚。

**第九条** 权利人因损害赔偿问题向工商行政管理机关提出调解要求的,工商行政管理机关可以进行调解。

权利人也可以直接向人民法院起诉,请求损害赔偿。

**第十条** 国家机关及其公务人员在履行公务时,不得披露或者允许他人使用权利人的商业秘密。

工商行政管理机关的办案人员在监督检查侵犯商业秘密的不正当竞争行为时,应当对权利人的商业秘密予以保密。

**第十一条** 本规定由国家工商行政管理局负责解释。

**第十二条** 本规定自公布之日起施行。

**3. 《中华人民共和国外商投资法》(2020 年 1 月 1 日起施行)**

**第二十二条第一款** 国家保护外国投资者和外商投资企业的知识产权,保护知识产权权利人和相关权利人的合法权益;对知识产权侵权行为,严格依法追究法律责任。

**第二十三条** 行政机关及其工作人员对于履行职责过程中知悉的外国投资者、外商投资企业的商业秘密,应当依法予以保密,不得泄露或者非法向他人

提供。

#### 4.《中华人民共和国外商投资法实施条例》(2020年1月1日起施行)

**第二十三条第一款** 国家加大对知识产权侵权行为的惩处力度,持续强化知识产权执法,推动建立知识产权快速协同保护机制,健全知识产权纠纷多元化解决机制,平等保护外国投资者和外商投资企业的知识产权。

**第二十五条** 行政机关依法履行职责,确需外国投资者、外商投资企业提供涉及商业秘密的材料、信息的,应当限定在履行职责所必需的范围内,并严格控制知悉范围,与履行职责无关的人员不得接触有关材料、信息。

行政机关应当建立健全内部管理制度,采取有效措施保护履行职责过程中知悉的外国投资者、外商投资企业的商业秘密;依法需要与其他行政机关共享信息的,应当对信息中含有的商业秘密进行保密处理,防止泄露。

## 刑事

### 1.《刑法修正案(十一)》(2021年3月1日起施行)

**第二百一十九条【侵犯商业秘密罪】**有下列侵犯商业秘密行为之一,情节严重的,处三年以下有期徒刑,并处或者单处罚金;情节特别严重的,处三年以上十年以下有期徒刑,并处罚金:

(一)以盗窃、贿赂、欺诈、胁迫、电子侵入或者其他不正当手段获取权利人的商业秘密的;

(二)披露、使用或者允许他人使用以前项手段获取的权利人的商业秘密的;

(三)违反保密义务或者违反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。

明知前款所列行为,获取、披露、使用或者允许他人使用该商业秘密的,以侵犯商业秘密论。

本条所称权利人,是指商业秘密的所有人和经商业秘密所有人许可的商业秘密使用人。

**第二百一十九条之一【为境外窃取、刺探、收买、非法提供商业秘密罪】**为境外的机构、组织、人员窃取、刺探、收买、非法提供商业秘密的,处五年以下有期徒刑,并处或者单处罚金;情节严重的,处五年以上有期徒刑,并处罚金。

**第二百二十条【单位犯侵犯知识产权罪的处罚】**

**规定】**单位犯本节第二百一十三条至第二百一十九条之一规定之罪的，对单位判处罚金，并对其直接负责的主管人员和其他直接责任人员，依照本节各该条的规定处罚。

## 2. 《最高人民法院、最高人民检察院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）》（法释〔2020〕10号，2020年9月14日起施行）

**第三条** 采取非法复制、未经授权或者超越授权使用计算机信息系统等方式窃取商业秘密的，应当认定为刑法第二百一十九条第一款第一项规定的“盗窃”。

以贿赂、欺诈、电子侵入等方式获取权利人的商业秘密的，应当认定为刑法第二百一十九条第一款第一项规定的“其他不正当手段”。

**第四条** 实施刑法第二百一十九条规定的行为，具有下列情形之一的，应当认定为“给商业秘密的权利人造成重大损失”：

（一）给商业秘密的权利人造成损失数额或者因侵犯商业秘密违法所得数额在三十万元以上的；

（二）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；

（三）造成商业秘密的权利人其他重大损失的。

给商业秘密的权利人造成损失数额或者因侵犯商业秘密违法所得数额在二百五十万元以上的，应当认定为刑法第二百一十九条规定的“造成特别严重后果”。

**第五条** 实施刑法第二百一十九条规定的行为造成的损失数额或者违法所得数额，可以按照下列方式认定：

（一）以不正当手段获取权利人的商业秘密，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，披露、使用或者允许他人使用的，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，但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、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）明知商业秘密是不正当手段获取或者是违反约定、权利人有关保守商业秘密的要求披露、使用、允许使用，仍获取、使用或者披露的，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；

（五）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，损失数额可以根据该项商业秘密的商业价值确定。商业秘密的商业价值，可以根据该项商业秘密的研究开发成本、实施该项商业秘密的收益综合确定；

（六）因披露或者允许他人使用商业秘密而获得

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；权利人因被侵权造成销售量减少的总数和每件产品的合理利润均无法确定的，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。商业秘密系用于服务等其他经营活动的，损失数额可以根据权利人因被侵权而减少的合理利润确定。

商业秘密的权利人为减轻对商业运营、商业计划的损失或者重新恢复计算机信息系统安全、其他系统安全而支出的补救费用，应当计入给商业秘密的权利人造成的损失。

**第六条** 在刑事诉讼程序中，当事人、辩护人、诉讼代理人或者案外人书面申请对有关商业秘密或者其他需要保密的商业信息的证据、材料采取保密措施的，应当根据案件情况采取组织诉讼参与人签署保密承诺书等必要的保密措施。

违反前款有关保密措施的要求或者法律法规规定的保密义务的，依法承担相应责任。擅自披露、使用或者允许他人使用在刑事诉讼程序中接触、获取的商业秘密，符合刑法第二百一十九条规定的，依法追究刑事责任。

**第九条** 具有下列情形之一的，可以酌情从轻处

罚：

- (一) 认罪认罚的；
- (二) 取得权利人谅解的；
- (三) 具有悔罪表现的；
- (四) 以不正当手段获取权利人的商业秘密后尚未披露、使用或者允许他人使用的。

**第十条** 对于侵犯知识产权犯罪的，应当综合考虑犯罪违法所得数额、非法经营数额、给权利人造成的损失数额、侵权假冒物品数量及社会危害性等情节，依法处罚罚金。

罚金数额一般在违法所得数额的一倍以上五倍以下确定。违法所得数额无法查清的，罚金数额一般按照非法经营数额的百分之五十以上一倍以下确定。违法所得数额和非法经营数额均无法查清，判处三年以下有期徒刑、拘役、管制或者单处罚金的，一般在三万元以上一百万元以下确定罚金数额；判处三年以上有期徒刑的，一般在十五万元以上五百万元以下确定罚金数额。

**3. 《最高人民法院、公安部关于修改侵犯商业秘密刑事案件立案追诉标准的决定》(2020年9月17日起施行)**

为依法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，维护社会主义市场经济秩序，将《最高人民法院、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)》第七十三条侵犯商业秘密刑事案件立案追诉标准修改为：**【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：

- （一）给商业秘密权利人造成损失数额在三十万元以上的；
- （二）因侵犯商业秘密违法所得数额在三十万元以上的；
- （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，可以按照下列方式认定：

- （一）以不正当手段获取权利人的商业秘密，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，披露、使用或者允许他人使用的，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，但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、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）明知商业秘密是不正当手段获取或者是违反约定、权利人有关保守商业秘密的要求披露、使用、

允许使用，仍获取、使用或者披露的，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；

（五）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，损失数额可以根据该项商业秘密的商业价值确定。商业秘密的商业价值，可以根据该项商业秘密的研究开发成本、实施该项商业秘密的收益综合确定；

（六）因披露或者允许他人使用商业秘密而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；权利人因被侵权造成销售量减少的总数和每件产品的合理利润均无法确定的，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。商业秘密系用于服务等其他经营活动的，损失数额可以根据权利人因被侵权而减少的合理利润确定。

商业秘密的权利人为减轻对商业运营、商业计划的损失或者重新恢复计算机信息系统安全、其他系统安全而支出的补救费用，应当计入给商业秘密的权利人造成的损失。



## Civil Law

### 1.<Civil Code of the People's Republic of China> ( came into force on January 1, 2021 )

**Article 123** The parties to civil legal relations enjoy intellectual property rights in accordance with the law.

Intellectual property rights are the proprietary rights enjoyed by right holders in accordance with the law in respect of the following objects:

- (1) Works.
- (2) Inventions, utility models, and designs.
- (3) Trademarks.
- (4) Geographic indications.
- (5) Trade secrets.
- (6) Layout designs of integrated circuits.
- (7) New varieties of plants.
- (8) Other objects specified by laws.

**Article 501** A trade secret or any other confidential information that the parties have learned in contracting shall not be disclosed or improperly used, no matter the contract is formed or not; and if the party discloses or improperly uses such trade secret or information, causing loss to the other party, it shall be liable in damages.

**Article 850** A technology contract which illegally monopolizes technology or infringes on the technology of a third party is void.

**Article 861** The right to use and transfer the know-how resulting from a commissioned or cooperative development, and the method for allocation of income shall be agreed upon by the parties. Where such matters are not agreed or the agreement is not clear, nor can they be determined in accordance Article 510 of this Code, each party is entitled to use and transfer the technology, before a patent is granted on the same technical solution, provided that the developer in a commissioned development may not transfer the technology to a third party before it delivers the technology to the commissioning party.

**Article 862** A technology transfer contract is a contract by which a right holder that legally owns technology assigns rights related to an existing specific patent, patent application, or know-how to another person.

A technology licensing contract is a contract by which a right holder who legally owns technology licenses another person to exploit and use rights related to an existing specific patent and know-how.

The stipulations in a technology transfer contract or technology licensing contract regarding the provision of special equipment and raw materials for the exploitation of the technology, or that of related technical consulting and technical services are an integral part of the contract.

**Article 863** Technology transfer contracts include contracts for the assignment of patent, assignment of patent application right, and transfer of know-how, among

others.

Technology licensing contracts include patent licensing, know-how licensing, and other contracts.

Technology transfer contracts and technology licensing contracts shall be in written form.

**Article 864** A technology transfer contract or technology licensing contract may set forth the scope of exploitation of the patent or the use of the know-how by the transferor and the transferee, provided that it may not restrict technological competition and technological development.

## **2.<Anti-Unfair Competition Law of the People's Republic of China> ( came into force on April 23, 2019 )**

**Article 9** A business shall not commit the following acts of infringing upon trade secrets:

(1) Acquiring a trade secret from the right holder by theft, bribery, fraud, coercion, electronic intrusion, or any other illicit means.

(2) Disclosing, using, or allowing another person to use a trade secret acquired from the right holder by any means as specified in the preceding subparagraph.

(3) Disclosing, using, or allowing another person to use a trade secret in its possession, in violation of its confidentiality obligation or the requirements of the right holder for keeping the trade secret confidential.

(4) Abetting a person, or tempting, or aiding a person into or in acquiring, disclosing, using, or allowing another

person to use the trade secret of the right holder in violation of his or her non-disclosure obligation or the requirements of the right holder for keeping the trade secret confidential.

An illegal act as set forth in the preceding paragraph committed by a natural person, legal person or unincorporated organization other than a business shall be treated as infringement of the trade secret.

Where a third party knows or should have known that an employee or a former employee of the right holder of a trade secret or any other entity or individual has committed an illegal act as specified in paragraph 1 of this Article but still acquires, discloses, uses, or allows another person to use the trade secret, the third party shall be deemed to have infringed upon the trade secret.

For the purpose of this Law, "trade secret" means technical, operational or other commercial information unknown to the public and is of commercial value for which the right holder has taken corresponding confidentiality measures.

**Article 17** A business causing any damage to another person in violation of this Law shall assume civil liability according to the law.

A business whose lawful rights and interests are damaged by any act of unfair competition may institute an action in a people's court.

The amount of compensation for the damage caused

to a business by any act of unfair competition shall be determined as per the actual loss of the business incurred for the infringement or if it is difficult to calculate the actual loss, as per the benefits acquired by the tortfeasor from the infringement. If a business infringes upon a trade secret in bad faith with serious circumstances, the amount of compensation may be determined to be more than one time but not more than five times the amount determined by the aforesaid method. The amount of compensation shall also include reasonable disbursements made by the business to prevent the infringement.

Where a business violates Article 6 or Article 9 of this Law, and it is difficult to determine the actual loss suffered by the right holder due to the infringement or the benefits acquired by the tortfeasor from the infringement, a people's court may, based on the circumstances of the infringement, render a judgment to award compensation in the amount of not more than five million yuan to the right holder.

**Article 32** In the civil trial procedure for infringement of a trade secret, if the right holder of the trade secret provides prima facie evidence that it has taken confidentiality measures for the claimed trade secret and reasonably indicates that the trade secret has been infringed upon, the alleged tortfeasor shall prove that the trade secret claimed by the right holder is not a trade secret as described in this Law.

If the right holder of a trade secret provides prima facie evidence to reasonably indicate that the trade secret has been infringed upon, and provide any of the following evidence, the alleged tortfeasor shall prove the absence of such infringement:

(1) Evidence that the alleged tortfeasor has a channel or an opportunity to access the trade secret and that the information it uses is substantially the same as the trade secret.

(2) Evidence that the trade secret has been disclosed or used, or is at risk of disclosure or use, by the alleged tortfeasor.

(3) Evidence that the trade secret is otherwise infringed upon by the alleged tortfeasor.

**3.<Interpretation by the Supreme People's Court of Several Issues Concerning the Application of the Anti-Unfair Competition Law of the People's Republic of China>(No. 9 [2022] of the Supreme People's Court,came into force on March 20, 2020)**

**Article 27** When an alleged act of unfair competition occurs outside the territory of the People's Republic of China, but the infringement result occurs within such territory, if a party contends that the people's court in the place of infringement result should exercise jurisdiction, the people's court shall uphold the contention.

**4.<Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in**

## **the Trial of Civil Cases Involving Infringements upon Trade Secrets>**

**( Interpretation No. 7 [2020]of the Supreme People's Court,came into force on September 12, 2020 )**

**Article 1** A people's court may determine the information on structure, raw materials, components, formulas, materials, samples, styles, propagation materials of new plant varieties, processes, methods or their steps, algorithms, data, computer programs and their relevant documents, among others, relating to technology as technical information set forth in paragraph 4, Article 9 of the Anti-Unfair Competition Law.

A people's court may determine the information on creativity, management, sale, finance, plans, samples, bidding materials, clients' information and data, among others, relating to business activities as business information set forth in paragraph 4, Article 9 of the Anti-Unfair Competition Law.

For the purpose of the preceding paragraph, "clients' information" includes a client's name, address, contact information, and trading practices, intention, content, and other information.

**Article 2** Where a party claims that a specific client falls under a trade secret only on the ground that the party maintains long-term stable trading relationships with the client, the people's court shall not support the claim.

Where a client, based on the trust in an individual employee, conducts transactions with the entity to which the employee belongs, if the employee, after leaving his or her office, is able to prove that the client voluntarily chooses to conduct transactions with him or her or his or her new employer, the people's court shall determine that the employee has not obtained the trade secret of the right holder by improper means.

**Article 3** Where any information requested for protection by a right holder is not generally known and easily accessible by relevant personnel in the relevant field when an alleged infringement occurs, the people's court shall determine that the information is not known by the public as provided for in paragraph 4, Article 9 of the Anti-Unfair Competition Law.

**Article 4** Under any of the following circumstances, a people's court may determine that the relevant information is known by the public:

(1) The information falls under common sense or industry practices in the field to which it belongs.

(2) The information only involves such contents as the product size, structure, materials, and simple combination of components, which may be directly obtained by relevant personnel in the field to which the party belongs through the observation of products on the market.

(3) The information has been disclosed to the public in any open publication or any other media.

(4) The information has been disclosed to the public through public seminars, exhibitions, and other methods.

(5) The information may be obtained by relevant personnel in the field to which the party belongs through other public channels.

New information formed after reviewing, improving or processing the information known by the public shall be deemed as not known by the public, if such new information complies with Article 3 of these Provisions.

**Article 5** The people's court shall determine the reasonable confidentiality measures taken by a right holder to prevent the leakage of a trade secret prior to the occurrence of any alleged infringement as the corresponding confidentiality measures set forth in paragraph 4, Article 9 of the Anti-Unfair Competition Law.

A people's court shall determine whether a right holder has taken corresponding confidentiality measures based on such factors as the nature of the trade secret and its carrier, the commercial value of the trade secret, identification degree of confidentiality measures, degree of correspondence between confidentiality measures and the trade secret, and the right holder's willingness to keep the trade secret confidential.

**Article 6** Under any of the following circumstances, if it is sufficient to prevent the leakage of a trade secret under normal circumstances, a people's court shall

determine that the right holder has taken corresponding confidentiality measures:

(1) A confidentiality agreement has been signed or confidentiality obligations have been agreed upon in the contract.

(2) Confidentiality requirements are raised to employees, former employees, suppliers, clients, and visitors, who are able to access and obtain trade secrets in such forms as bylaws, training, rules and regulations, and written notification.

(3) Visitors' access to factory premises, workshops and other production or distribution premises involving the trade secret is restricted or such premises are differentiated for separate management.

(4) Trade secrets and their carriers are differentiated for separate management by such methods as marking, classification, isolation, encryption, sealing-up, limiting the scope of persons who are able to access or obtain the trade secrets and their carriers.

(5) Measures are taken to prohibit or restrict the use of, access to, storage in or reproduction from computer equipment, electronic equipment, network equipment, storage equipment, and software that can access or obtain trade secrets.

(6) Employees leaving their office are required to register, return, clear and destroy the trade secrets accessed or obtained by them and their carriers, and

continue to assume the confidentiality obligation.

(7) Taking other reasonable confidentiality measures.

**Article 7** Where any information for which protection is requested by a right holder has realistic or potential commercial value as it is not known by the public, the people's court may, upon examination, determine that the information has commercial value as provided for in paragraph 4, Article 9 of the Anti-Unfair Competition Law.

Where any periodic achievement formed in production and distribution activities complies with the provisions of the preceding paragraph, the people's court may determine upon examination that the achievement has commercial value.

**Article 8** Where an alleged infringer obtains a right holder's trade secret in a manner that violates legal provisions or recognized business ethics, the people's court shall determine that the alleged infringer has obtained the trade secret of the right holder by other improper means as set forth in paragraph 1, Article 9 of the Anti-Unfair Competition Law.

**Article 9** Where an alleged infringer directly uses any trade secret in its production and distribution activities, or uses any trade secret after the modification or improvement thereof, or adjusts, optimizes or improves relevant production and distribution activities based on any trade secret, the people's court shall determine that the alleged infringer has used the trade secret as set forth

in Article 9 of the Anti-Unfair Competition Law.

**Article 10** The people's court shall determine the confidentiality obligation assumed by a party in accordance with legal provisions or the confidentiality obligation agreed upon in a contract as a confidentiality obligation set forth in paragraph 1, Article 9 of the Anti-Unfair Competition Law.

Where the parties have not agreed on the confidentiality obligation in their contract, but the alleged infringer knows or should have known that the information obtained by it or him belongs to the trade secret of the right holder according to the principle of good faith and the contract nature, purpose, conclusion process, and trading practices, the people's court shall determine that the alleged infringer shall assume the obligation to keep confidential the trade secret obtained by it or him.

**Article 11** A people's court may determine operators and managers of and other personnel having labor relations with a legal person or an unincorporated organization as employees or former employees set forth in paragraph 3, Article 9 of the Anti-Unfair Competition Law.

**Article 12** A people's court may, when determining whether an employee or a former employee has channels or opportunities to obtain a right holder's trade secret, consider the following factors in relation thereto:

- (1) His or her duties, responsibilities and authority.
- (2) The job undertaken by him or her or task

assigned to him or her by the entity.

(3) Specific circumstances of his or her participation in production and distribution activities relating to the trade secret.

(4) Whether he or she keeps, uses, stores, reproduces, controls or otherwise accesses or obtains any trade secret and the carrier thereof.

(5) Other factors that need to be taken into consideration.

**Article 13** Where there is no substantial difference between any alleged infringing information and relevant trade secret, the people's court may determine that the alleged infringing information is substantially identical to the trade secret set forth in paragraph 2, Article 32 of the Anti-Unfair Competition Law.

A people's court may consider the following factors when determining whether it is "substantially identical" to that set forth in the preceding paragraph:

(1) The degree of similarity and difference between the alleged infringing information and the trade secret.

(2) Whether it is easy for the relevant personnel in the relevant field to think of the difference between the alleged infringing information and the trade secret when an alleged infringement occurs.

(3) Whether the alleged infringing information is substantially different from the trade secret in terms of purposes, use methods, objectives, and effects, among

others.

(4) Situation relating to the trade secret in public fields.

(5) Other factors that need to be taken into consideration.

**Article 14** The people's court shall determine the alleged infringing information obtained through independent development or reverse engineering as not constituting the infringement upon trade secrets as set forth in Article 9 of the Anti-Unfair Competition Law.

For the purpose of the preceding paragraph, "reverse engineering" means obtaining relevant technical information of a product obtained from any public channel by technical means through disassembling, survey and mapping, and analysis of the product.

Where an alleged infringer that has obtained the trade secret of the right holder by improper means claims no infringement upon the trade secret on the ground of reverse engineering, the people's court shall not support the claim.

**Article 15** Where the respondent is attempting to obtain, disclose, use or allow any other person to use, or has obtained, disclosed, used or allowed any other person to use the trade secret claimed by a right holder by improper means, the people's court may render a ruling to take preservation measures in accordance with the law, if the failure to take preservation measures will make it

difficult to enforce the relevant judgment or cause other damage to any party or cause irreparable damage to the right holder's lawful rights and interests.

Where any of the circumstances set forth in the preceding paragraph falls under emergency set forth in Article 100 or Article 101 of the Civil Procedure Law, the people's court shall render a ruling within 48 hours.

**Article 16** Where a natural person, legal person or unincorporated organization other than dealers infringes upon any trade secret, if the right holder claims that the infringer shall assume civil liability in accordance with Article 17 of the Anti-Unfair Competition Law, the people's court shall support the claim.

**Article 17** Where a people's court renders a judgment on the civil liability for ceasing the infringement upon a trade secret, the time for cessation of infringement shall generally last until the trade secret has been known by the public.

Where the time for cessation of infringement as determined in a judgment according to the provisions of the preceding paragraph is evidently irrational, the people's court may, under the premise of legally protecting the competitive advantages of the right holder in terms of the trade secret, render a judgment that the infringer shall cease using the trade secret within a certain period or scope.

**Article 18** Where a right holder requests a

judgment ordering an infringer to return or destroy the carrier of any trade secret, or clear any information on trade secret under the control of the infringer, the people's court shall generally support the request.

**Article 19** Where a trade secret is known by the public due to infringement, a people's court may take into consideration the commercial value of the trade secret when determining the amount of compensation in accordance with the law.

A people's court shall, when determining the commercial value set forth in the preceding paragraph, take into consideration such factors as research and development cost, income obtained from the exploitation of the trade secret, available benefits and period of time during which competitive advantages may be maintained.

**Article 20** Where a right holder requests the determination of actual loss caused due to infringement by reference to the royalty of the trade secret, the people's court may determine the actual loss based on such factors as the licensing nature, content, actual performance, as well as the nature, circumstances and consequences of the infringement.

A people's court may, when determining the amount of compensation in accordance with paragraph 4, Article 17 of the Anti-Unfair Competition Law, take into consideration such factors as the nature, commercial value, research and development cost, and degree of innovation of

the trade secret, competitive advantages it may bring, the infringer's subjective fault as well as the nature, circumstances and consequences of the infringement.

**Article 21** Where a party or a person that is not a party to the case applies in writing to the people's court for taking measures to keep confidential evidence and materials involving the trade secret of the party or the person that is not a party to the case, the people's court shall take necessary confidentiality measures during preservation, exchange of evidence, cross-examination, entrusted authentication, questioning, court trial and other legal proceedings.

Whoever, in violation of the requirements for confidentiality measures set forth in the preceding paragraph, discloses any trade secret without authorization or uses any trade secret other than in legal proceedings or allows any other person to use any trade secret accessed or obtained in legal proceedings shall assume civil liability in accordance with the law. If any of the circumstances set forth in Article 111 of the Civil Procedure Law is constituted, the people's court may take compulsory measures in accordance with the law. If it is criminally punishable, the offender shall be held criminally liable in accordance with the law.

**Article 22** A people's court shall, when trying a civil case concerning the infringement upon any trade secret, examine the evidence formed in criminal

proceedings for the crime involving the infringement upon trade secret in a comprehensive and objective manner according to legal procedures.

Where a party to a civil case concerning the infringement upon a trade secret and its agent ad litem are unable to collect on their own the evidence relating to an alleged infringement, which is kept by the public security authority, procuratorial authority or people's court due to any objective reason and apply for investigation and evidence collection, the people's court shall approve the application, except that it may affect ongoing criminal proceedings.

**Article 23** Where a party claims the determination of the amount of compensation in a civil case involving the same infringement upon trade secret based on the actual loss or illegal income determined by an effective criminal judgment, the people's court shall support the claim.

**Article 24** Where a right holder has provided prima facie evidence on the benefits obtained by the infringer from the infringement, but the account books and materials relating to the infringement upon trade secret are possessed by the infringer, the people's court may, upon the application of the right holder, order the infringer to provide such account books and materials. If the infringer refuses to provide such account books or materials without any justified reason or fails to provide them in a truthful manner, the people's court may determine the benefits

obtained by the infringer from the infringement based on the claim of and evidence provided by the right holder.

**Article 25** Where a party requests the suspension of trial of a civil case concerning the infringement upon any trade secret on the ground that a criminal case involving the same alleged infringement upon trade secret has not been concluded, the people's court shall support the request if it deems after soliciting the opinions of the parties that the trial result of the criminal case must be taken as the basis.

**Article 26** Where the licensee of a sole licensing contract on the exclusive use of a trade secret files a lawsuit against an infringement upon a trade secret, the people's court shall accept the lawsuit in accordance with the law.

Where the licensee of an exclusive license contract files a lawsuit jointly with the right holder, or separately under the circumstance that the right holder does not file any lawsuit, the people's court shall accept the lawsuit in accordance with the law.

Where the licensee of a simple license contract files a lawsuit jointly with the right holder, or separately upon the right holder's written authorization, the people's court shall accept the lawsuit in accordance with the law.

**Article 27** A right holder shall clarify the specific content of a trade secret claimed before the conclusion of first-instance court debate. If only certain aspects can be

specified, the people's court shall try the specified part.

Where a right holder separately claims in second-instance proceedings the specific content of a trade secret that are not clarified in first-instance proceedings, the people's court of second instance may conduct mediation regarding the claim related to the specific content of the trade secret on a voluntary basis, and shall inform the party to file a separate lawsuit if mediation fails. If both parties agree on the joint trial of the case by the people's court of second instance, the people's court of second instance may try the case on a consolidated basis.

**Article 28** Where a people's court tries a civil case concerning the infringement upon a trade secret, the law when the alleged infringement occurs shall apply. If the alleged infringement has occurred before the law is amended and continues after the law is amended, the amended law shall apply.

**Article 29** These Provisions shall come into force on September 12, 2020. For any discrepancies between these Provisions and any judicial interpretation previously issued by the Supreme People's Court, these Provisions shall prevail.

A pending case in a people's court of first or second instance after these Provisions come into force shall be governed by these Provisions after these Provisions come into force; but a case, for which an effective judgment has been rendered before these Provisions come into force

shall not be retried according to these Provisions.

**5.<Interpretation of the Supreme People's Court concerning Some Issues on Application of Law for the Trial of Cases on Disputes over Technology Contracts>(came into force on January 1, 2021 )**

**Article 1** Technological achievements shall mean the technological plans involving product, process, material and the improvements, etc. thereof, which are made with utilization of scientific and technological knowledge, information and experiences, including patents, patent applications, technical secrets, computer software, integrated circuit layout designs, new varieties of plant, and so on.

Technical secret shall mean the technical information which is unknown by the public, has commercial value, and also is maintained confidential by the obligee concerning which the obligee has taken corresponding confidential measures.

**Article 12** In accordance with Article 850 of the Civil Code, after a technology contract infringing upon other's technical secret is confirmed as invalid, the party who obtained the technical secret in good faith may, unless otherwise prescribed by laws or administrative regulations, continue using this technical secret within the same scope as that when he obtained it, provided that he shall pay the obligee reasonable royalties and bear confidential obligations.

Where both parties maliciously collude with each other to conclude or implement a contract, or one party who knows or ought to know the other party's infringement concludes a contract with such other party or implements the contract, such conclusion or implementation of the contract shall be joint infringement, and the people's court shall rule that the tortfeasors shall bear joint indemnity liabilities or confidential obligations, therefore the party who has obtained the technical secret may not continue using this technical secret.

**Article 13** Where a person who may continue using a technical secret in accordance with Paragraph 1 of the preceding article is in dispute with the obligee over the payment of royalties, either party may require the people's court for settlement. If the user continues using the technical secret but refuses to pay the royalties, the people's court may, upon the obligee's request, rule that the user cease using it.

The people's court may determine the royalties in a reasonable way on the basis of the royalties for the obligee to usually license this technical secret, or the royalties paid by the user to obtain the technical secret, as well as by taking into consideration such factors as the research and development cost of this technical secret, the extent of conversion and application of the achievement, the user's scale of use and his economic benefits, etc.

No matter whether the user continues using the

technical secret or not, the people's court shall rule that he shall pay the obligee royalties for the period when he has used the technical secret. The royalties which have been paid by the user to the transferor under the invalid contract shall be refunded by the transferor.

**Article 20** "Both parties' rights to use and transfer", which is mentioned in Article 861 of the Civil Code shall include the rights that either party does not have to be consented to by the other party before using the technical secret or licensing the technical secret to others by means of common license for use, and may solely occupy the benefits obtained therefrom. If one party assigns the right to transfer the technical secret achievement to others, or licenses the technical secret to others by means of sole or exclusive license for use, without the other party's consent or confirmation, the said assignment or license shall be ascertained to be invalid.

**Article 21** Where one party to a technology development contract discretionarily exploits a patent or uses a technical secret under the Civil Code or the contractual stipulations, but licenses it by means of common license to others for exploitation or use due to the fact that he cannot meet the conditions for independently exploiting the patent or using the technical secret, he may be permitted to do so.

**Article 22** The contracts concluded regarding the technological achievement to be researched and

developed or regarding the knowledge, technology, experiences or information involving no patent, patent application or technical secret shall be excluded from "technology transfer contract" or "technology licensing contract" mentioned in Article 862 of the Civil Code.

The stipulations in a technology transfer contract on the special equipment, raw materials provided by the transferor to the transferee for exploitation of the technology or on provision of relevant technical consulting or technical services, shall be a part of the technology transfer contract. Disputes arising out of these matters shall be settled in a way applicable to technology transfer contracts.

Where a party concludes a consortium contract by contributing his technology as shares, but does not participate in the management of the consortium, and stipulates the consortium in a form of floor clause, or stipulates that the other party to the consortium shall pay the price or royalties for the technology, it shall be deemed as a technology transfer contract or a technology licensing contract.

**Article 25** A license for exploitation of patent may be granted in the following ways:

(1) Sole license for exploitation, which means the licensor licenses a patent within the stipulated license scope for exploitation of the patent to only one licensee for exploitation, and the licensor shall not exploit this patent pursuant to the contractual stipulations;

(2) License for exclusive exploitation, which means the licensor licenses a patent within the stipulated license scope for exploitation of the patent to only one licensee for exploitation, but the licensor may discretionarily exploit this patent pursuant to the contractual stipulations;

(3) Common license for exploitation, which means the licensor licenses a patent within the stipulated license scope to others for exploitation, and may discretionarily exploit this patent.

Where there are no stipulations between the parties on the way of license for exploitation of patent or such stipulations are not clear, the said way of license shall be deemed as common license for exploitation. If the contract on license for exploitation of patent stipulates that the licensee may sublicense others to exploit the patent, such sublicense may be deemed as common license for exploitation, unless otherwise agreed upon between the parties.

The ways of license for using technical secrets shall be determined by referring to Paragraphs 1 and 2 of this Article.

**Article 28** "Scope of exploitation of patents or use of technical secrets" mentioned in Article 864 of the Civil Code shall include the duration, area, method of exploitation of patents or of use of technical secrets, as well as the persons who access to the technical secrets, and so on.

Where there are no stipulations between the parties

on the duration of exploiting a patent or of using a technical secret, or such stipulations are not clear, the transferee or the licensee shall not be restricted by duration from exploiting the patent or using the technical secret.

**Article 29** The contract on license for use, which is concluded between the parties regarding the technological achievement under application for a patent shall, before the patent application is publicized, be governed by the relevant provisions on contracts for licensing of technical secrets; or shall, after an application for invention patent is publicized and before it is patented, be governed by the relevant provisions on contracts on license for exploitation of patent for reference; or, after it is patented, the original contract shall be the contract on license for exploitation of patent, and be governed by the relevant provisions on contracts on license for exploitation of patent.

The people's court shall not ascertain a contract concluded between the parties on license for exploitation of patent under application to be ineffective with the reason that the technology has not been patented.

**6.<Civil Procedure Law of the People's Republic of China> ( came into force on January 1, 2024 )**

**Article 103** For a case where, for the conduct of a party or for other reasons, it may be difficult to execute a judgment or any other damage may be caused to a party,

a people's court may, upon application of the opposing party, issue a ruling on preservation of the party's property, order certain conduct of the party or prohibit the party from certain conduct; and if no party applies, the people's court may, when necessary, issue a ruling to take a preservative measure.

A people's court may order the applicant to provide security for taking a preservative measure and, if the applicant fails to provide security, shall issue a ruling to dismiss the application.

After accepting an application, a people's court must, if the circumstances are urgent, issue a ruling within 48 hours; and if it rules to take a preservative measure, the measure shall be executed immediately.

**Article 104** Where the lawful rights and interests of an interested party will be irreparable damaged if an application for preservation is not filed immediately under urgent circumstances, the interested party may, before instituting an action or applying for arbitration, apply to the people's court at the place where the property to be preserved is located or at the place of domicile of the respondent or a people's court having jurisdiction over the case for taking preservative measures. The applicant shall provide security and, if the applicant fails to provide security, the people's court shall issue a ruling to dismiss the application.

After accepting an application, a people's court must issue a ruling within 48 hours; and if it rules to take a preservative measure, the measure shall be executed immediately.

Where the applicant fails to institute an action or apply for arbitration in accordance with law within 30 days after the people's court takes a preservative measure, the people's court shall remove preservation.

**7.<Several Provisions of the Supreme People's Court on Evidence in Civil Procedures Involving Intellectual Property Rights> ( Interpretation No. 12 [2020] of the Supreme People's Court, came into force on November 18,2020 )**

**Article 19** A people's court may entrust the identification of specialized issues for the following facts to be proved:

(1) The similarities and differences between the infringing technical solutions involved in the litigation and patented technical solutions and the corresponding technical features of existing technologies in terms of means, functions, and effects, among others.

(2) The similarities and differences between the infringing works involved in the litigation and the works for which rights are claimed.

(3) The similarities and differences between the trade secrets claimed by the parties and the information

already known to the public in the corresponding fields, and the similarities and differences between the infringing information involved in the litigation and the trade secrets.

(4) The similarities and differences between the infringing articles involved in the litigation and the authorized varieties in terms of characteristics and features, and whether the differences are caused by non-genetic variation.

(5) The similarities and differences between the infringing layout designs of integrated circuits involved in the litigation and the layout designs of integrated circuits the protection of which is requested.

(6) Whether the technologies involved in the contracts are defective.

(7) The authenticity and integrity of electronic data.

(8) Other specialized issues that shall be subject to entrusted identification.

**8.<Provisions of the Supreme People's Court on Several Issues concerning the Application of Law in Cases Involving the Review of Act Preservation in Intellectual Property Disputes> ( No. 21 [2018] of the Supreme People's Court,came into force on January 1, 2019 )**

**Article 6** If, under any of the following situations, failure to take immediate act preservation measures is serious enough to harm the applicant's interests, such

situation shall be considered to be the "urgent situation" as mentioned in Article 100 or Article 101 <sup>6</sup>of the Civil Procedure Law:

1. trade secret of the applicant is to be illegally disclosed;
2. the applicant's right of publication or privacy and other personal rights are to be infringed;
3. the intellectual property in dispute is to be illegally disposed of ;
4. the applicant's intellectual property is being or will be infringed during a time-sensitive occasion such as a trade fair;
5. a time-sensitive popular show is being or will be infringed; and
6. other situations requiring immediate act preservation measures.

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<sup>6</sup> Corresponding to Article 103,Article 104 of <Civil Procedure Law of the People's Republic of China> which came into force on January 1,2024.

## Administration Law

### **1.<Anti-Unfair Competition Law of the People's Republic of China> ( came into force on April 23, 2019 )**

**Article 21** Where a business or any other natural person, legal person or unincorporated organization infringes upon a trade secret in violation of Article 9 of this Law, the supervisory inspection department shall order the violator to cease the illegal act, shall confiscate any illegal income, and impose a fine of not less than 100,000 yuan nor more than 1 million yuan, or, if the circumstances are serious, a fine of not less than 500,000 yuan nor more than 5 million yuan.

### **2. <Several Provisions on Prohibiting Infringements upon Trade Secrets> ( Order No. 86 of the State Administration for Industry and Commerce, <sup>8</sup>came into force on December 3,1998 )**

**Article 1** For the purposes of curbing infringements upon trade secrets, protecting the legitimate rights and interests of the owners of trade secrets and maintaining the order of the socialist market economy, these Provisions are formulated in accordance with the relevant provisions of the Unfair Competition Law of the People's

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<sup>8</sup> The official name of the State Administration for Industry and Commerce has been changed into the State Administration for Market Regulation.

Republic of China (hereinafter referred to as the Unfair Competition Law).

**Article 2** The term "trade secret" as mentioned in these Provisions refers to the practical information about technologies and business operations, which is unknown to the public and is able to bring economic benefits to the owner and for which the owner has taken confidentiality measures.

The phrase "unknown to the public" as mentioned in these Provisions refers to fact that the information is not directly available through public channels.

The phrase "practical information that can bring economic benefits to the owner" as mentioned in these Provisions refers to the information with definite practicability which can bring actual and potential economic benefits or competitive advantages to the owner.

The "confidentiality measures taken by the owner" as mentioned in these Provisions include signing a confidentiality agreement, setting up a confidentiality system and adopting other reasonable confidentiality measures.

The "information about technologies and business operations" as mentioned in these Provisions includes designs, procedures, formula of products, manufacturing techniques and methods, management secrets, name list of customers, information about resources, production and sales strategies, bottom price of a bid, contents of a

bidding document, etc.

The term "owner" as mentioned in these Provisions refers to citizens, corporate bodies or other organizations who own trade secrets.

**Article 3** It is forbidden to commit any of the following acts infringing upon trade secrets:

1. Acquiring trade secrets by stealing, luring by promise of gain, coercing or other improper means;

2. Disclosing, using or allowing others to use trade secrets acquired by means as mentioned in the previous sentence;

3. For an entity or individual who has business relationship with the owner of trade secrets, its or his breaching the contract or violating the owners' requirements about disclosing, using or allowing others to use the said trade secrets that it or he has access to; and

4. For an employee of the owner of trade secrets, his breaching the contract or violating the owners' requirements about disclosing, using or allowing others to use the trade secrets he has access to.

The act of acquiring, using or disclosing others' trade secrets conducted by a third person who knows or should know the illegal acts as listed in the previous paragraph shall be deemed as an infringement upon trade secrets.

**Article 4** Infringements upon trade secrets shall be determined and handled by the industry and commerce

administrative organs at or above the county level.

**Article 5** Where an owner of any trade secrets believes that any of its (his) trade secrets has been infringed, it (he) shall should provide evidence to prove the existence of the trade secret and its infringement when it (he) applies to the industry and commerce administrative organ for investigating and punishing the infringement.

The entity or individual under investigation (respondent), interested persons and testifiers shall faithfully provide relevant evidence to the industry and commerce administrative organ.

If the owner can prove that the information used by the respondents is identical with or similar to its (his) trade secret and that the respondent had access to its (his) trade secret, while the respondent is unable to provide or refuses to provide evidence to prove its (his) lawful acquisition or use of the information, the industry and commerce administrative organ shall determine the infringement of the respondent on the basis of the relevant evidence.

**Article 6** Where a respondent illegally discloses, uses or allows any other person to use a trade secret, and if such act results in irrecoverable losses to the owner, at the owner's request and upon its (his) written promise that it (he) will voluntarily bear the liability for the consequences of taking mandatory measures, the industry and commerce administrative organ may order the respondent

to stop selling the products produced with the said owner's trade secrets.

**Article 7** Where anyone violates Article 3 of these Provisions, the industry and commerce administrative organ may, under Article 25<sup>9</sup> of the Unfair Competition Law, order it (him) to stop the violation and fine it (him) not less than 10, 000 yuan but not more than 200, 000 yuan.

When the industry and commerce administrative organ punishes the infringer in accordance with the provisions of the preceding paragraph, it may dispose of the infringing articles as follows:

1. Ordering the infringer to return to the owner the drawings, software and other relevant data containing the trade secret;

2. Supervising the infringer's destroying the products produced with the owners' trade secret which will make the secrets known to the public once they are traded in markets, unless the owner agrees to take such measures as purchasing or selling those products.

**Article 8** If the infringer refuses to execute the punishment decision and continues its (his) act as mentioned in Article 3 of these Provisions, it shall be deemed

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<sup>9</sup> Amended by Article 21 of <Anti-Unfair Competition Law of the People's Republic of China> which came into force on April 23, 2019.

to have committed a new violation and shall be given a heavier punishment.

**Article 9** If the owner files a request for mediation of a damage claim with the industry and commerce administrative organ, the industry and commerce administrative organ may conduct a mediation.

The owner may directly bring an action in the people's court so as to make a claim for damages.

**Article 10** No state organ or none of its functionaries shall disclose or allow any other person to use any other person's trade secrets when it (he) performs its (his) official duties.

The case handlers of an industry and commerce administrative organ shall keep the owner's trade secrets confidential when supervising and inspecting unfair competition acts infringing upon trade secrets.

**Article 11** The power to interpret these Provisions shall remain with the SAIC.

**Article 12** These Provisions shall come into force as of the date of promulgation.

### **3.Foreign Investment Law of the People's Republic of China (came into force on January 1, 2020)**

**Article 22 Paragraph 1** The state protects the intellectual property rights of foreign investors and foreign-funded enterprises, and protects the lawful rights and interests of owners of intellectual property rights and

relevant right holders; and for infringements of intellectual property rights, strictly holds the infringers legally liable according to the law.

**Article 23** Administrative agencies and their employees shall keep confidential, according to the law, the trade secrets of foreign investors and foreign-funded enterprises to which they have access in performing their duties, and neither divulge nor illegally provide others with such secrets.

**4.Regulation for Implementing the Foreign Investment Law of the People's Republic of China (came into force on January 1, 2020)**

**Article 23 Paragraph 1** The state shall strengthen efforts to punish infringements upon intellectual property rights, continuously reinforce the law enforcement on intellectual property rights, promote the establishment of a rapid collaborative protection mechanism for intellectual property rights, improve the diversified mechanisms for the resolution of disputes over intellectual property rights, and equally protect the intellectual property rights of foreign investors and foreign-funded enterprises.

**Article 25** Where an administrative agency's performance of duties in accordance with the law requires a foreign investor or a foreign-funded enterprise to provide any materials and information relating to a trade secret, it shall be limited to the extent required for the performance

of duties, clearance shall be strictly controlled, and persons unrelated to the performance of duties shall not have any access to the relevant materials and information.

Administrative agencies shall establish and improve their internal management rules, and take effective measures to protect the trade secrets of foreign investors and foreign-funded enterprises to which they have access in the performance of duties; and if it is necessary to share information with any other administrative agency in accordance with the law, shall take confidentiality measures for the trade secrets involved in such information to prevent leakage.

## Criminal Law

### **1.<Amendment (XI) to the Criminal Law of the People's Republic of China>(came into force on March 1,2021)**

**Article 219** Whoever commits any of the following conduct to infringe upon a trade secret shall, if the circumstances are serious, be sentenced to imprisonment of not more than three years and a fine or be sentenced to a fine only; or if the circumstances are especially serious, be sentenced to imprisonment of not less than three years nor more ten years and a fine:

(1) Obtaining a right holder's trade secret by theft, bribery, fraud, coercion, electronic intrusion, or any other illicit means.

(2) Disclosing, using, or allowing any other person to use a trade secret obtained from a right holder by any means as mentioned in the preceding paragraph.

(3) Disclosing, using, or allowing any other person to use a trade secret known by him or her in violation of confidentiality obligations or the right holder's requirements for keeping the trade secret confidential.

Whoever knows any conduct set forth in the preceding paragraph but still acquires, discloses, uses, or allows any other person to use the trade secret shall be punished for infringing upon the trade secret.

For the purposes of this article, "right holder" means

the owner of a trade secret and any person permitted by the owner to use the trade secret.

**Article 219(I)** Whoever steals, pries into, buys, or illegally provides any trade secret for any overseas institution, organization, or individual shall be sentenced to imprisonment of not more than five years and a fine or be sentenced to a fine only; or if the circumstances are serious, be sentenced to imprisonment of not less than five years and a fine.

**Article 220** Where an entity commits a crime provided for in Article 213 through Article 219A of this Section, the entity shall be sentenced to a fine, and its directly liable executive in charge and other directly liable persons shall be punished in accordance with the provisions of the aforesaid articles of this Section respectively.

### **2.<Interpretation (III) of the Supreme People's Court and the Supreme People's Procuratorate of Several Issues Concerning the Specific Application of Law in the Handling of Criminal Cases Involving Infringements upon Intellectual Property Rights> ( Interpretation No. 10 [2020] of the Supreme People's Court, came into force on September 14, 2020 )**

**Article 3** Stealing any trade secret by such means as illegally reproducing and using without or beyond authorization a computer information system shall be determined as "theft"as provided for in subparagraph

(1), paragraph 1 of Article 219 of the Criminal Law.

Where any trade secret of a right holder is obtained by such means as bribery, fraud, and electronic intrusion, such means shall be determined as "other illicit means" set forth in subparagraph (1), paragraph 1 of Article 219 of the Criminal Law.

**Article 4** Any act prescribed in Article 219 of the Criminal Law committed under any of the following circumstances shall be determined as "causing heavy loss to the right holder of the trade secret":

(1) The amount of loss caused to the right holder of the trade secret or the amount of illegal income obtained from the infringement upon the trade secret is 300,000 yuan or more.

(2) It directly causes the bankruptcy or closure of the right holder of the trade secret due to great difficulty in operation.

(3) Any other heavy loss is caused to the right holder of the trade secret.

Where the amount of loss caused to the right holder of the trade secret or the amount of illegal income obtained from the infringement upon the trade secret is 2.5 million yuan or more, it shall be determined as "causing particularly serious consequences" as provided for in Article 219 of the Criminal Law.

**Article 5** The amount of loss caused by or the amount of illegal income obtained from committing any of the conduct set forth in Article 219 of the Criminal Law may be determined according to the following methods:

(1) Where any trade secret of the right holder obtained by improper means has not been disclosed, used or allowed to be used by any other person, the amount of loss may be determined based on the reasonable royalty of the trade secret.

(2) Where the trade secret of the right holder obtained by improper means is disclosed, used or allowed to be used by any other person, the amount of loss may be determined based on the loss of sales profit incurred by the right holder due to infringement, but the amount of loss shall be determined based on the reasonable royalty of the trade secret if it is lower than the reasonable royalty.

(3) Where the possessed trade secret is disclosed, used or allowed to be used by any other person in violation of the agreement or the requirements of the right holder for keeping the trade secret confidential, the amount of loss may be determined based on the loss of the sales profit incurred by the right holder due to the infringement.

(4) Where the trade secret is obtained, used or disclosed with clear knowledge that the trade secret is

obtained by improper means or in violation of the agreement or the requirements of the right holder on keeping the trade secret confidential, the amount of loss may be determined based on the loss of the sales profit incurred by the right holder due to the infringement.

(5) Where any trade secret has been known by the public or lost due to the infringement upon the trade secret, the amount of loss may be determined based on the commercial value of the trade secret. The commercial value of the trade secret may be determined comprehensively based on the research and development cost of the trade secret and the proceeds obtained from the exploitation of the trade secret.

(6) Property or any other property interest obtained from disclosing or permitting any other person to use the trade secret shall be determined as illegal income.

The loss of sales profit incurred by the right holder due to the infringement as set forth in subparagraph (2), (3) or (4) of the preceding paragraph may be determined based on the total decrease in sales volume of the right holder due to the infringement multiplied by the reasonable profit of the right holder from each product; if the total decrease in sales volume cannot be determined, the loss may be determined based on the sales volume of infringing products multiplied by the reasonable profit obtained by the right holder from each product; if neither the total

decrease in sales volume of the right holder due to the infringement nor the reasonable profit from each product can be determined, the loss may be determined based on the sales volume of infringing products multiplied by the reasonable profit of each infringing product. If the trade secret is used for services or any other business activities, the amount of loss may be determined based on the decrease in reasonable profit of the right holder due to the infringement.

The remedial expenses incurred by the right holder of a trade secret for the purpose of mitigating the damage to business operation or business plan or restoring the security of the computer information system or any other system shall be included in the loss caused to the right holder of the trade secret.

**Article 6** Where a party, a defender, an agent ad litem or a person that is not a party to the case applies in writing to keep confidential the evidence or materials on relevant trade secrets or other business information that needs to be kept confidential in criminal proceedings, necessary confidentiality measures such as arranging for participants in proceedings to sign a written confidentiality commitment shall be taken in light of case circumstances.

Whoever violates the requirements of the preceding paragraph regarding confidentiality measures or the confidentiality obligation as provided for by laws and

regulations shall assume corresponding liability in accordance with the law. Whoever discloses, uses or allows any other person to use any trade secret accessed or obtained in criminal proceedings without authorization shall be held criminally liable in accordance with the law if it complies with Article 219 of the Criminal Law.

**Article 9** Whoever falls under any of the following circumstances may be given a lighter punishment as the case may be:

- (1) Pleading guilty and accepting punishment.
- (2) Obtaining the forgiveness of the right holder.
- (3) Showing repentance.
- (4) Not disclosing, using or permitting any other person to use the trade secret of the right holder obtained by improper means.

**Article 10** Whoever commits a crime of infringement upon intellectual property rights shall be subject to a fine in accordance with the law by taking into comprehensive consideration such circumstances as the amount of criminal and illegal income, the amount of illegal operation, the amount of loss incurred by a right holder, the quantity of infringing and counterfeit articles and the severity of social harm.

The amount of fine shall generally be determined as not less than one time nor more than five times the amount of illegal income. If the amount of illegal income cannot

be ascertained, the amount of fine shall generally be determined as not less than 50% nor more than one time the amount of illegal operation. If neither the amount of illegal income nor the amount of illegal operation can be ascertained, and a sentence of fixed-term imprisonment of not more than three years, criminal detention, public surveillance or a separate fine is imposed, the amount of fine shall generally be determined as not less than 30,000 yuan nor more than one million yuan; and if a sentence of fixed-term imprisonment of not less than three years is imposed, the amount of fine shall generally be determined as not less than 150,000 yuan nor more than five million yuan.

**3.<the Decision on Amending the Criteria for Launching Formal Investigation into Criminal Cases of Infringement upon Trade Secrets by the Supreme People's Procuratorate and the Ministry of Public Security > ( came into force on September 17, 2020 )**

For the purposes of punishing crimes of infringement upon trade secrets in accordance with the law, intensifying the criminal judicial protection of intellectual property rights, and maintaining the economic order of the socialist market, Article 73 Criteria for Launching Formal Investigation into Criminal Cases of Infringement upon Trade Secrets of the Provisions of the Supreme People's Procuratorate and the Ministry of Public Security on the Criteria for Launching Formal Investigation into Criminal Cases

under the Jurisdiction of Public Security Organs (II) are amended to read: [Cases of Infringement upon Trade Secrets (Article 219 of the Criminal Law)] Infringement upon a trade secret being suspected of falling under one of the following circumstances shall be subject to formal investigation:

(1) The amount of losses caused to the right holder of a trade secret is more than 300,000 yuan.

(2) The amount of illegal gains from infringement of a trade secret is more than 300,000 yuan.

(3) Bankruptcy and closedown of the right holder of a trade secret due to major operation difficulty which is directly caused by the infringement.

(4) Other circumstances causing major losses to the right holders of trade secrets.

The amount of losses or illegal gains caused as specified in the preceding paragraph may be determined by the following means:

(1) Where the trade secret of a right holder is obtained by the violator by inappropriate means, and is not disclosed, used or allowed to be used by others, the amount of losses may be determined based on the reasonable licensing fees for the trade secret.

(2) Where, after the trade secret of a right holder is obtained by the violator by inappropriate means, it is disclosed, used or allowed to be used by others, the amount

of losses may be determined based on the losses of the right holder's sales profits caused by the infringement, but where the amount of losses is lower than the reasonable licensing fees for the trade secret, it shall be determined based on the reasonable licensing fees.

(3) Where a trade secret obtained is disclosed, used or allowed to be used by others in violation of the agreement and the requirements of the right holder for keeping trade secrets, the amount of losses may be determined based on the losses of the right holder's sales profits due to the infringement.

(4) Where it is known perfectly well that a trade secret is obtained by inappropriate means, or disclosed, used, or allowed to be used in violation of the agreement and the right holder's requirements for the protection of trade secrets, it is still obtained, used or disclosed, the amount of losses may be determined based on the losses of the right holder's sales profits due to the infringement.

(5) Where a trade secret has been known to the public or has been lost due to infringement upon a trade secret, the amount of losses may be determined based on the commercial value of the trade secret. The commercial value of a trade secret may be comprehensively determined based on the research and development costs of the trade secret and the benefits from the implementation of the trade secret.

(6) The property or other property benefits obtained by disclosing or allowing others to use trade secrets shall be deemed illegal gains.

The losses of sales profits caused by the infringement upon a right holder as specified in Items (2), (3) and (4) of the preceding paragraph may be determined by multiplying the total amount of sales reduction caused by the infringement upon the right holder by the reasonable profits of each product of the right holder. Where the total number of sales reductions cannot be determined, it may be determined by multiplying the sales volume of the infringed product by the right holder's reasonable profits per product. And where the right holder's total sales reduction due to infringement and the reasonable profits of each product cannot be determined, it can be determined by multiplying the sales volume of infringed products by the reasonable profits of each infringed product. Where a trade secret is used in other business activities such as services, the amount of losses may be determined based on the reasonable profits of the right holder reduced by the infringement.

The remedial expenses paid by the right holder of a trade secret for reducing the losses of business operation or business plans or restoring the security of computer information systems and other systems shall be included in the losses caused to the right holder of the trade secret.