

OVERVIEW OF NATIONAL AND REGIONAL TRADE SECRET SYSTEMS

CHINA

1. Sources of Law

The Anti-Unfair Competition Law of the People's Republic of China (AUCL)¹ is the primary trade secret law in China. Further regulations may be found in the Criminal law, the Civil Code, as well as in individual civil and commercial laws including Labor Law, Labor Contract Law, and Corporate Law.² In addition, various statutes protect trade secrets.

In this context, the Supreme People's Court and the Supreme People's Procuratorate of the People's Republic of China promulgated judicial interpretations for the application of the statutes, relating to protection of trade secrets. Examples of such judicial interpretations include:

- Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Civil Cases Involving Trade Secret Infringement (hereinafter referred to as the "Provisions of the Supreme People's Court on Civil Trade Secret Cases"), effective September 12, 2020;³ and
- Interpretations (III) of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues Concerning Specific Application of Law in Handling Criminal Cases of Intellectual Property Infringement (hereinafter referred to as the "Interpretation [III] of the Supreme People's Court on IP Criminal Cases"), effective September 14, 2020.⁴

Further, China's State Administration for Market Regulation ("SAMR") that is responsible for the supervision of local offices' administrative IP enforcement recently released the Draft Provisions on the Protection of Trade Secrets on September 4, 2020 for public comments ("SAMR Draft Provisions"). The revised draft was released for comments in November, 2022.⁵

2. Definition of a trade secret

Article 9 AUCL defines a trade secret as

- any commercial information unknown to the public, including but not limited to technical or business information;
- with commercial value; and
- for which its lawful holder has taken proper confidentiality measures.

3. Scope of trade secret protection

Article 9 of the AUCL defines the unlawful acts as:

- obtaining trade secrets of a lawful holder through theft, bribery, fraud, coercion, hacking into the electronic information system, or any other illicit means;

¹ Available at: <https://www.wipo.int/wipolex/en/legislation/details/19557>.

² This document aims to provide an overview (June 2024). It is not a complete review of the legal situation and case law. For further information, interested readers may consult: Qinghong Xu (April 22, 2021). *les Nouvelles - Journal of the Licensing Executives Society*, Volume LVI No. 2, June 2021, Available at SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3832078; Chiang Ling Li in *Trade Secrets throughout the World* (Jager *et al.*), 2023, Chapter 8. China.

³ <https://chinaipr.com/wp-content/uploads/2020/06/spc-ji-application-of-law-in-the-trial-of-civil-cases-involving-trade-secrets-embassy-translation.pdf>.

⁴ <https://www.wipo.int/wipolex/en/legislation/details/22212> (in Chinese),

⁵ See for a short English overview, Aaron Wininger, *China's State Administration for Market Regulation Releases Draft of Amendments to the Anti-Unfair Competition Law*, 25.11.2022, available at: <https://www.chinaiplawupdate.com/2022/11/chinas-state-administration-for-market-regulation-releases-draft-of-amendments-to-the-anti-unfair-competition-law/>; full text of the amendment in Chinese: <https://www.samr.gov.cn/>.

- disclosing, using, or allowing another to use trade secrets of a right holder through the aforesaid means;
- violating confidentiality obligations or violating a right holder's requirements on keeping confidentiality of trade secrets, and disclosing, using, or allowing others to use such trade secrets they obtained; and
- soliciting, persuading, or assisting others to violate confidentiality obligations or to violate a right holder's requirements on keeping confidentiality of trade secrets, so as to disclose, use, or allow others to use such trade secrets of the right holder.

Article 9 of the AUCL further outlines a third-person liability by stating that where a third party knows or should have known that an employee or a former employee of the lawful holder of a trade secret or any other unit or individual has committed an illegal act as specified in the first paragraph of the same Article, but still obtains, discloses, uses, or permits another to use the trade secret in question, the third party shall be deemed to infringe the trade secret.

4. Exceptions

The AUCL does not provide any explicit provisions regarding exceptions to trade secret protection.

5. Civil remedies

Article 179 of the Civil Code⁶ provides for civil liability, including cessation of the infringement. Further, according to Article 21 AUCL, any business entity, natural person, legal person, or unincorporated organization infringes upon a trade secret of another in violation of Article 9 of this Law, shall be ordered by the regulatory authorities to cease such illegal activity, confiscate any illegal gains, and impose a fine.

In accordance with Article 17 AUCL, any business entity that causes damage to another person through trade secret misappropriation as an act of unfair competition according to Article 9 AUCL must bear civil liability. Damage is calculated either on the actual loss caused by the infringement or, if it is difficult to calculate, the actual loss, based on the benefits obtained by the infringer from its infringement. If it is difficult to determine such actual loss of the trade secret holder and improper gain by the infringer, a competent people's court may, at its discretion, award damages not exceeding RMB five million yuan to the right holder based on the circumstances of the infringement.

If the business entity has maliciously infringed upon the trade secret with flagrant circumstances, the amount of damages shall be no less than one time but no more than five times of the amount determined by the aforementioned method, whereby the amount of damages to a business entity shall include its reasonable costs for stopping the infringement.

6. Criminal sanctions

According to Article 219 of the Criminal Law,⁷ criminal sanctions apply to the following acts of trade secret misappropriation that causes significant losses to an obligee⁸:

- obtaining a trade secret of the right holder by stealing, luring, coercion or any other illegitimate means;
- disclosing, using or allowing another to use the trade secrets obtained from the right holder by the means mentioned in the preceding paragraph; or
- in violation of the agreement on or against the right holder's demand for keeping trade secrets, disclosing, using or allowing another person to use the trade secrets he has.

⁶ Civil Code of the People's Republic of China as adopted at the Third Session of the Thirteenth National People's Congress on May 28, 2020. Available at: <https://www.wipo.int/wipolex/en/legislation/details/21757>.

⁷ English translation available at: http://www.npc.gov.cn/zgrdw/englishnpc/Law/2007-12/13/content_1384075.htm.

⁸ Defined by Article 219 of the Criminal Law as the owner of trade secrets and the person who is permitted by the owner to use the trade secrets.

In that case, the infringer shall be sentenced to fixed-term imprisonment of not more than three years or criminal detention and shall also, or shall only, be fined. If the consequences are especially serious, a sentence to fixed-term imprisonment of not less than three years but not more than seven years together with a fine shall apply.

According to Article 4 of the Interpretation (III) on Criminal Cases issued by the Supreme People's Court, causing "significant losses" to the right holder under Article 219 of the Criminal Law refers to any of the following circumstances:

- The amount of losses to the right holder or the amount of illegal gain is more than RMB 300,000 yuan;
- The misappropriation directly causes the right holder to go bankrupt or close down the business due to major business difficulties;
- The misappropriation causes the right holder any other major losses.

Causing "exceptionally serious consequences" under Article 219 of the Criminal Law, on the other hand, refers to when the amount of losses to the right holder or the amount of illegal gain is more than RMB 2,500,000 yuan.

7. Trade secret protection in judicial proceedings

According to Article 27 of the Interpretation of the Supreme People's Court on Civil Trade Secret Cases, a party or any third party concerned may request in writing to the court to take confidentiality measures for evidence or materials involving any trade secrets of the party concerned or the third party, the people's court shall take necessary confidentiality measures during such litigation activities as evidence exchange, cross-examination, court trial, etc.

8. Procedural provisions

Article 28 and Article 29 of the Interpretation of the Supreme People's Court on Civil Trade Secret Cases provide provisions as to competent courts and jurisdiction in trade secret infringement cases.

Article 32 of the AUCL provides a specific rule as to burden of proof in civil proceedings on the infringement of trade secret by stating the following.

- The lawful holder of the trade secret shall submit *prima facie* evidence to prove that it has taken confidentiality measures for the claimed trade secret, and to reasonably indicate that the trade secret has been infringed upon.
- The alleged infringer shall then prove that the trade secret claimed by the lawful holder does not constitute a "trade secret" under this Law.
- The alleged infringer shall prove the absence of the infringement, if the lawful holder of a trade secret submits *prima facie* evidence reasonably indicating that the trade secret has been infringed upon, and submits any of the following evidence:
 - (1) Evidence indicating that the alleged infringer has the method or opportunity to obtain the trade secret, and the information it used is substantially the same with such trade secret;
 - (2) Evidence indicating that the trade secret has been disclosed or used, or is at risk of disclosure or use, by the alleged infringer; or
 - (3) Other evidence indicating that the trade secret has been infringed upon by the alleged infringer.