



Strengthening Protection of Corporate Trade Secrets to Create a Favorable Environment for Innovation — Introduction of Revisions to Anti-Unfair Competition Law

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It has been less than two years since the last revisions in 2017 to the *Law of the People's Republic of China Against Unfair Competition* (the “**Anti-Unfair Competition Law**”), but Chinese legislators have adopted on April 23, 2019 a decision again revising the Anti-Unfair Competition Law¹. The revisions to the Anti-Unfair Competition Law took effect from the date of adoption.

These revisions only involve content related to trade secrets, and show China's ambition to strengthen protections and provide legal safeguards for innovators. The following is a brief introduction to the revisions.

I. Adding means considered as trade secrets infringement and expansion of persons subject to infringement

Current “Anti-Unfair Competition Law”	Revised “Anti-Unfair Competition Law”
<p>Article 9 A business operator shall not use any of the following means to infringe upon trade secrets:</p> <p>(1) obtaining an obligee's trade secrets by theft, bribery, fraud, intimidation or any other unfair means;</p> <p>(2) disclosing, using or allowing others to use an obligee's trade secrets obtained by the means mentioned in the preceding paragraph; or</p>	<p>Article 9 A business operator shall not use any of the following means to infringe upon trade secrets:</p> <p>(1) obtaining an obligee's trade secrets by theft, bribery, fraud, intimidation, electronic intrusion or any other unfair means;</p> <p>(2) disclosing, using or allowing others to use the trade secrets obtained from an obligee by the means mentioned in the preceding paragraph; or</p>

¹ 《全国人民代表大会常务委员会关于修改《中华人民共和国建筑法》等八部法律的决定》[Decision of the Standing Committee of the National People's Congress on Revising the Construction Law of the People's Republic of China and Eight Other Laws] (adopted by Standing Comm. Nat'l People's Cong. on April 23, 2019).

Current “Anti-Unfair Competition Law”	Revised “Anti-Unfair Competition Law”
<p>(3) disclosing, using or allowing others to use an obligee’s trade secrets in violation of an agreement or the obligee's requirements on keeping such trade secrets confidential.</p> <p>Where a third party knows or should know of the fact that an employee or former employee of the obligee of trade secrets or any other entity or individual conducts any of the illegal acts specified in the preceding paragraph, but still obtains, discloses, uses or allows others to use such secrets, such practice shall be deemed as infringement of trade secrets.</p> <p>For the purpose of this Law, trade secrets refer to any technical information or operational information which is not known to the public and has commercial value, and for which its obligee has adopted measures to ensure its confidentiality.</p>	<p>(3) disclosing, using or allowing others to use an obligee’s trade secrets in violation of confidentiality obligations or the obligee's requirements on keeping such trade secrets confidential.</p> <p>(4) Instigating, tempting, aiding others in violation of confidentiality obligations or the obligee’s requirements to keep trade secrets confidential, to obtain, disclose, use, or allow others to use the obligee's trade secrets.</p> <p>Any natural person, legal person or unincorporated organization other than the operator who conducts the illegal acts stated in the preceding paragraph shall be deemed to have infringed upon trade secrets.</p> <p>Where a third party knows or should know of the fact that an employee or former employee of the obligee of trade secrets or any other entity or individual conducts any of the illegal acts specified in the preceding paragraph, but still obtains, discloses, uses or allows others to use such secrets, such practice shall be deemed as infringement of trade secrets.</p> <p>For the purpose of this Law, trade secrets refer to any commercial information including technology information, business operation information and the like which is not known to the public and has commercial value, and for which its obligee has adopted measures to ensure its confidentiality.</p>

A. New means considered as trade secrets infringement

According to Article 9, the act of obtaining trade secrets of the obligee by means of electronic intrusion is regarded as trade secrets infringement. Also, instigating, inducing, or help others to obtain, disclose, use or allow others to use trade secrets by means of the above is considered infringement.

The above revisions clarify that, based on current technological developments, obtaining information illegitimately by electronic means is considered infringement of trade secrets, and they further provide a clear legal basis for enterprises to exercise their rights.

B. Expansion of persons subject to infringement

According to Article 9, persons subject to infringement is also expanded from only business operators to natural, legal persons or unincorporated organizations other than business operators.

This expansion of persons subject to infringement also directly combats a sore spot in modern trade secrets infringement—there is now a clear legal basis for determining eligible defendants, especially where trade secrets disputes arise due to employee departures.

II. Supplementing punitive damage provisions, increasing administrative penalties

A. Supplementing punitive damage provisions

Current “Anti-Unfair Competition Law”	Revised “Anti-Unfair Competition Law”
<p>Article 17 A business operator that violates this Law and thus causes damage to others shall bear civil liability for such damage in accordance with the law.</p> <p>A business operator whose lawful rights and interests are infringed by an unfair competition act may file a lawsuit with a people's court.</p> <p>The amount of compensation for damage caused by any unfair competition act to a business operator shall be determined depending on the actual losses suffered by such operator as a result of the infringement; where it is truly difficult to work out the actual losses, such amount shall be determined in accordance with the benefits obtained by the infringer from the infringement. The amount of compensation shall also include the reasonable expenses paid by the damaged business operator to stop the infringement.</p> <p>Where a business operator violates the provisions stipulated in Article 6 or Article 9 herein, and it is truly difficult to determine the</p>	<p>Article 17 A business operator that violates this Law and thus causes damage to others shall bear civil liability for such damage in accordance with the law.</p> <p>A business operator whose lawful rights and interests are infringed by an unfair competition act may file a lawsuit with a people's court.</p> <p>The amount of compensation for damage caused by any unfair competition act to a business operator shall be determined depending on the actual losses suffered by such operator as a result of the infringement; where it is truly difficult to work out the actual losses, such amount shall be determined in accordance with the benefits obtained by the infringer from the infringement. Where the business operator maliciously conducts an infringement upon trade secrets, and where the circumstances are serious, the amount of compensation may be determined as more than one time and less than five times the amount determined according to the above</p>

<p>actual losses suffered by the obligee as a result of the infringement or the benefits obtained by the infringer from the infringement, the people's court shall award the obligee less than RMB 3 million in damages, depending on the seriousness of the infringement.</p>	<p>method. The amount of compensation shall also include the reasonable expenses paid by the damaged business operator to stop the infringement.</p> <p>Where a business operator violates the provisions stipulated in Article 6 or Article 9 herein, and it is truly difficult to determine the actual losses suffered by the obligee as a result of the infringement or the benefits obtained by the infringer from the infringement, the people's court shall award the obligee less than RMB 5 million in damages, depending on the seriousness of the infringement.</p>
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In the past, the amount of compensation for trade secrets infringement was determined based on the actual loss to the infringed party or the benefit to the infringer. Now, if a business operator is found to have committed serious malicious infringement, the amount of compensation may be determined to be more than one time but less than five times the amount mentioned above. Further, in the past, if the loss to the infringed party was difficult to determine, the court could decide to award the infringed party less than RMB 3 million in damages. This discretionary amount has now been increased from RMB 3 million to 5 million.

Following the 2017 revision to the Anti-Unfair Competition Law, which increased the maximum amount of compensation for trade secrets infringement to RMB 3 million from an amount which may be determined by referring to provisions on patent infringement (the maximum amount of compensation for patent infringement is RMB 1 million), the statutory maximum amount of compensation for trade secrets infringement is now raised again to RMB 5 million, which greatly strengthens the protection of trade secrets.

B. Increasing administrative penalties

Current "Anti-Unfair Competition Law"	Revised "Anti-Unfair Competition Law"
<p>Article 21 Where a business operator infringes any trade secret in violation of Article 9 herein, the supervision and inspection authority shall order it to cease the illegal act and impose on it a fine of between RMB 100, 000 and RMB 500, 000; where the circumstance is serious, the fine shall be between RMB 500, 000 and RMB 3 million.</p>	<p>Article 21 Where a business operator and other natural person, legal person and unincorporated organization infringes any trade secret set forth in violation of Article 9 herein, the supervision and inspection authority shall order it to cease the illegal act, confiscate the illegal income and impose on it a fine of between RMB 100,000 and RMB 1,00,000; where the circumstance is serious, the fine shall be between RMB 500, 000 and RMB 5 million.</p>

First, for trade secrets infringement, persons subject to penalties has been expanded from “business operator[s]” to “business operator[s] and other natural person[s], legal person[s] and unincorporated organization[s]”.

Second, the amount of penalties has been increased. Confiscation of illegal gains has been added as a penalty for trade secrets infringement. Fines have been increased from between RMB 100,000 and RMB 500,000 to between RMB 100,000 and RMB 1 million. For serious circumstances, the fines have been increased from between RMB 500,000 and RMB 3 million to between RMB 100,000 and RMB 5 million. Punishments have been greatly increased.

III. Relaxing the burden of proof of obligees and shifting the burden of proof to defendants after the initial production of evidence.

Current “Anti-Unfair Competition Law”	Revised “Anti-Unfair Competition Law”
	<p>Article 32 (New) In civil trial procedures for infringing trade secrets, where the obligee of trade secrets provides primary evidence proving he has taken confidential measures against the claimed trade secrets and reasonably indicates that the trade secrets have been infringed, the alleged infringer shall prove that the trade secrets claimed by the obligee do not constitute trade secrets as set forth in this Law.</p> <p>Where the obligee of the trade secrets provides primary evidence reasonably indicating that the trade secrets are being infringed and provides one of the following as evidence, the alleged infringer shall prove that he has not infringed upon the trade secrets:</p> <p>(1) There is evidence indicating that the alleged infringer had access to the trade secrets or had an opportunity to obtain the trade secrets and that the information used is substantially the same as the trade secrets;</p> <p>(2) There is evidence indicating that the trade secrets have been disclosed, used or</p>

	are at risk of being disclosed, used by the alleged infringer; (3) There is other evidence indicating that the trade secrets have been infringed by the alleged infringer.
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A. Trade secrets constitute a shifting of the burden of proof

According to the new Article 32, where the trade secrets obligee initially proves that the claimed trade secrets are confidential and reasonably indicates that the trade secrets have been infringed, the alleged infringer must prove that the trade secrets claimed by the obligee do not constitute trade secrets under the Anti-Unfair Competition Law.

B. Trade secrets infringement shifts the burden of proof

According to the new Article 32, under certain circumstances, as long as the obligee provides primary evidence that his trade secrets have been infringed, the alleged infringer must prove that he has not infringed the trade secrets.

The production of evidence has long been a barrier and difficulty for trade secrets obligees to safeguard their legitimate rights and interests. In past cases of trade secrets infringement, obligees have borne the full burden of proof. Obligees had to prove that the information was secret, valuable, and confidential, and constituted trade secrets in a legal sense, and that the obligee was the owner of the trade secrets. The obligee also had to prove that the alleged infringer met the conditions for and used illegitimate means to obtain the trade secrets, and finally the obligee had to prove the losses caused by the disclosure of the trade secrets.

According to this new article, after an initial production of evidence by the trade secrets obligee, the burden of proof can be partially shifted to the alleged infringer. Thus, the burden of proof of the obligee can be greatly reduced. This will help obligees to effectively protect their legitimate rights and interests.

In summary, the foregoing revisions to the Anti-Unfair Competition Law increase punishments for trade secrets infringement, while also alleviating the burden on obligees to prove their claims. These are positive developments for the protection of trade secrets, which reflect the ambition and intensity of the government to strengthen the intellectual property rights protections for innovators.

Important Announcement

This Legal Commentary has been prepared for clients and professional associates of Han Kun Law Offices. Whilst every effort has been made to ensure accuracy, no responsibility can be accepted for errors and omissions, however caused. The information contained in this publication should not be relied on as legal advice and should not be regarded as a substitute for detailed advice in individual cases.

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