



CRA Insights:

Risk, Investigations & Analytics

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December 2020

China refines trade secret protections

In September 2020, important amendments to trade secret protection were made in administrative, civil, and criminal law in China. These amendments clarify terms used in the definition of trade secrets and relevant provisions to enhance enforcement actions. In this *Insights*, we summarize the provisions and discuss their significance for intellectual property rights in China.

Background

In China, the main legislation that covers trade secrets is the Anti-Unfair Competition Law (AUCL), established in 1993 by the Standing Committee of the National People's Congress (NPC). The AUCL was amended in November 2017 and again, in April 2019. Provisions related to trade secret protection are also contained in the civil code, criminal law, labor law, contract law, and other laws and regulations. Trade secret holders in China have three ways to enforce their rights: filing a complaint to the administrative authorities, filing a civil lawsuit, and filing a criminal lawsuit.

SAMR Draft Trade Secret Protection Rules for Public Comment

On September 4, 2020, the State Administration for Market Regulation (SAMR) released Draft Trade Secret Protection Rules for Public Comment.¹ The new rules will supersede Certain Rules to Prohibit the Trade Secret Misappropriation, issued in 1995 and amended in 1998 by the State Administration for Industry and Commerce, the predecessor to SAMR.

One of the goals of the new rules is to ensure consistency between the administrative rules and the amended AUCL and provide clarification regarding the relevant provisions in the AUCL to enhance application in administrative enforcement actions. For example, the new rules amend the definition of trade secrets to be the same as the definition in the amended AUCL (i.e., “technical information, business operation information, and other commercial information that is not known to the public, has commercial value, and has been subject to appropriate confidentiality measures taken by the right holder.”) The new rules are intended to provide more explanation of the terms used to define trade secrets, such as technical information, operation information, business information, not known to the public, commercial value, appropriate confidentiality measures, and right holder.

¹ See China's Ministry of Justice, at http://www.moj.gov.cn/news/content/2020-09/04/zlk_3255345.html.

Notably, the new rules do not limit the right holder to Chinese citizens, and therefore extend protection to foreigners doing business in China. The new rules also provide more detailed discussion of conduct that is considered to be misappropriation of trade secrets. For example, obtaining trade secrets through theft and other improper means, the concepts of “disclosure” and “use,” third party trade secrets misappropriation, protected client lists, and conduct that does not constitute trade secrets misappropriation, such as reverse engineering.

SPC Provisions on Several Issues Concerning the Application of Law in Handling Civil Cases of Trade Secret Misappropriation (Judicial Interpretation [2020] No. 7)

China’s Supreme People’s Court (SPC) judicial interpretation on civil enforcement of trade secrets took effect on September 12, 2020.² It is the first SPC judicial interpretation that covers solely civil trade secret cases. The 2007 judicial interpretation covered all unfair competition cases.

This new interpretation provides clarification on certain provisions of the AUCL concerning protection of trade secrets. For example, it lists examples of technical information, business operation information, and other commercial information that fall under the definition of trade secrets provided by AUCL. It also elaborates on the elements of the AUCL trade secret definition, including: “not known to the public;” “commercial value;” and “appropriate confidentiality measures.” Further, the new interpretation clarifies the use of trade secrets, the responsibility of maintaining confidentiality, and employees and former employees.

Article 2 of the new judicial interpretation states that if the party claims that a particular customer is a trade secret solely based on the party’s long-term stable business relationship with that customer, the Court will not uphold it. Article 14 states that the Court will not consider obtaining information through research and development or reverse engineering as trade secret misappropriation, but if the misappropriator obtained trade secrets through improper means and later denied misappropriation based on a reverse engineering claim, the Court will not uphold it.

SPC and SPP, Explanations of Several Issues Concerning the Specific Application of Laws in Deciding Criminal Cases Involving Infringement of Intellectual Property Rights (III) (Judicial Interpretation [2020] No. 10)

On September 12, 2020, China’s SPC and Supreme People’s Procuratorate (SPP) issued the third judicial interpretation on criminal enforcement of intellectual property, which took effect on September 14, 2020.³ Like the previous two interpretations, the new interpretation clarifies certain provisions of the PRC Criminal Law concerning punishment for intellectual property infringement. The new judicial interpretation includes 12 articles, five of which cover trade secrets. The new interpretation lowered the incriminating standards for misappropriation of trade secrets and expanded the conviction situation to include the amount of losses by the right holder (or illegal gains of the misappropriator) over RMB 300,000, and bankruptcy of the right holder due to misappropriation.

Another significant development is the stipulation of different standards to determine losses according to the degree of social harm. For the acts of obtaining trade secrets by theft and other improper means, economic damages can be determined based on a reasonable royalty, without requiring

² See China’s Supreme People’s Court, at <http://www.court.gov.cn/fabu-gengduo-16.html>.

³ Ibid.

actual loss; and for contractual violations of trade secrets, economic damages are based on the right owner's profit loss.

These administrative, civil, and criminal amendments to China's trade secret protections are a noticeable improvement in enforcement of IP rights and indicate that China, at least on paper and in policy pronouncements, is moving towards building a more robust trade secret protection system. Public comments on the new SAMR rules were due by October 18, 2020. We will provide an update on the finalized rules in another issue of *Insights*.

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