

English Translation¹ of Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Civil Cases of Disputes over Infringements on Trade Secrets

For the proper trial of civil cases of disputes over infringements on trade secrets, this Interpretation is formulated according to the *Anti-Unfair Competition Law of the People's Republic of China*, *Civil Procedure Law of the People's Republic of China* and other relevant laws in consideration of trial practices.

Article 1 The right holder shall specify the specific content of any trade secret asserted by it before the end of court debate of the first instance. Where the right holder fails to do so, the people's court may rule to dismiss the action; and where the right holder can only specify part of the specific content, the court may rule to dismiss any claims for the part that the right holder fails to specify.

Where the right holder requests change in or addition to any specific content of the trade secret asserted by it before the end of court debate of the first instance, the people's court shall permit such request. Where the right holder additionally asserts, in the second instance, any specific content of the trade secret not specified in the first instance and the opposing party agrees for it to be tried by the people's court of the second instance, the people's court of the second instance may make a joint judgment accordingly.

¹ THE USPTO IS PROVIDING THIS TRANSLATION SOLELY AS A CONVENIENCE TO THE ENGLISH-READING PUBLIC. WE HAVE ATTEMPTED TO PROVIDE AN ACCURATE ENGLISH TRANSLATION OF THE CHINESE DOCUMENT, BUT DUE TO THE NUANCES IN TRANSLATING FROM CHINESE TO ENGLISH, SLIGHT DIFFERENCES MAY EXIST. WE WILL MAKE EVERY EFFORT TO CORRECT ERRORS BROUGHT TO OUR ATTENTION.

Where the alleged infringer requests carrying out evidence exchange and cross examination after the right holder specifies the specific content of the trade secret asserted by it, the people's court shall permit such request.

Article 2 Where the trade secret asserted by the right holder is not widely known and easily accessible to those relevant in the field when the alleged infringing act occurs, the people's court shall determine that the trade secret is not known to the public as referred to in paragraph 4 of Article 9 of the *Anti-Unfair Competition Law*.

Where any new information formed by sorting out and perfecting information known to the public or any information disclosed by publications or through media, exhibitions, networks and other means conforms to the provisions of the preceding paragraph, the people's court shall determine that such information is not known to the public.

Article 3 Where the trade secret asserted by the right holder has practical or potential market value that can bring about competitive advantage, the people's court shall determine that the trade secret has the commercial value referred to in paragraph 4 of Article 9 of the *Anti-Unfair Competition Law*.

Where a periodical achievement formed in the course of production and business operation activities falls under the provisions of the preceding paragraph, the people's court shall determine that the achievement is of commercial value.

Article 4 Information concerning structure, raw materials, components, formulas, materials, patterns, processes, methods or steps thereof, algorithms, data, computer programs in relation to science and technology and relevant documents may constitute the technical information referred to in paragraph 4 of Article 9 of the *Anti-Unfair Competition Law*.

Creativity, management, marketing, financing, planning, samples, bidding materials, data, customer information, etc. in relation to business operation activities may constitute the business operation information referred to in paragraph 4 of Article 9 of the *Anti-Unfair Competition Law*.

Article 5 Customer information formed through sorting out and processing the names, addresses, contact information, transaction practices, transaction contents, particular needs and other information of specific customers may constitute the business operation information referred to in paragraph 4 of Article 9 of the *Anti-Unfair Competition Law*.

Where the party concerned asserts that the information of a specific customer constitutes a trade secret only on the basis of any contract with or any invoice, receipt, voucher, etc. from and to the customer or only on the ground that it has maintained a stable long-term trading relationship with the customer, the people's court shall not support such assertion.

Article 6 The right holder shall provide evidences of corresponding confidentiality measures taken before the alleged infringing act occurs. Confidentiality measures shall be compatible with the commercial value and degree of importance, etc. of the trade secret.

For any trade secret under joint ownership, every co-owner shall take corresponding confidentiality measures.

When determining corresponding confidentiality measures, the people's court may comprehensively consider the following factors:

- (I) The nature of the carrier of the trade secret;
- (II) The right holder's confidentiality intention;
- (III) The identifiable degree of confidentiality measures;
- (IV) The matching degree between confidentiality measures and the trade secret;
- (V) The degree of difficulty for others to obtain the trade secret by improper means.

Article 7 Corresponding confidentiality measures taken by the right holder may include:

- (I) Signing a confidentiality agreement or stipulating confidentiality obligation in the contract;
- (II) Providing confidentiality requirements through articles of association, rules and regulations, trainings, etc.;
- (III) Providing confidentiality requirements on suppliers, customers, visitors, etc. who can access or obtain trade secrets;
- (IV) Distinguishing and managing trade secrets and carriers thereof by means of marking, classification, separation and sealing, etc.;
- (V) Taking measures of prohibition or restriction of access, storage, duplication, etc. on computer equipment, electronic equipment, network equipment, storage equipment, software, etc. that can access or obtain trade secrets;
- (VI) Requiring employees about to leave their jobs to register, return, delete and destroy any trade secrets and the carriers thereof that they have accessed or obtained and to continue to bear the confidentiality obligation.

Article 8 Where the right holder submits preliminary evidences to prove that corresponding confidentiality measures have been taken for the asserted trade secret and

that the alleged infringer has means or opportunities to obtain the trade secret and is rather likely to infringe on the trade secret, the alleged infringer shall bear the burden of proof that the trade secret is known to the public or that it does not commit any act infringing on the trade secret.

Where the alleged infringer asserts that it has obtained the alleged infringing information by means of research and development, transferee, license, reverse engineering, inheritance, etc., the alleged infringer shall provide evidences to prove so.

Article 9 The employees and ex-employees referred to in paragraph 3 of Article 9 of the *Anti- Unfair Competition Law* include the business operation and management personnel of legal persons and unincorporated organizations as well as those having labor or personnel relations therewith.

Article 10 The confidentiality obligation referred to in Article 9 of the *Anti-Unfair Competition Law* includes the confidentiality obligation undertaken by the parties concerned in accordance with the provisions of law or contract during the conclusion and performance of contract and after dissolution or termination of contract.

Where confidentiality obligation is not stipulated in contract, but the alleged infringer knows or should have known that any information obtained during the conclusion and performance of contract constitutes a trade secret of the right holder based on the principle of good faith, the nature and purpose of contract, transaction practices, contracting process, etc., the people's court may determine that the alleged infringer is subject to the confidentiality obligation referred to in paragraph 1 of Article 9 of the *Anti-Unfair Competition Law*.

Article 11 Where the alleged infringer obtains any trade secret of the right holder in violation of provisions of law or in clear violation of recognized business rules, the people's court shall determine that the alleged infringer has obtained the trade secret of the right holder by improper means as referred to in paragraph 1 of Article 9 of the *Anti-Unfair Competition Law*.

Article 12 Where any trade secret that has been obtained by the alleged infringer through legal authorization from the right holder is obtained afterwards by others due to willful misconduct or gross negligence of the alleged infringer during its custody or use of the trade secret, the people's court shall determine that the alleged infringer has disclosed the trade secret in its possession as referred to in Article 9 of the *Anti-Unfair Competition Law*.

Article 13 When the people's court determines whether an employees or ex-employee has means or opportunities to access the trade secret asserted by the right holder, it may consider relevant factors listed below:

(I) His/her position, responsibility and authority;

(II) His/her own work or other assigned tasks;

(III) Specific circumstances of participating in production and business operation activities in relation to the trade secret;

(IV) Whether he/she is able to visit, access, obtain, control, safeguard, store, copy, or has ever visited, accessed, obtained, controlled, safeguarded, stored and copied the trade secret or the carrier thereof;

(V) Other factors to be considered.

Article 14 Where the alleged infringing information has no substantive difference from the trade secret asserted by the right holder and has no substantive impact on the use of the trade secret, the people's court may determine that the alleged infringing information and the trade secret are substantively identical as referred to in paragraph 2 of Article 32 of the *Anti-Unfair Competition Law*.

The people's court shall comprehensively consider the following factors when determining whether the alleged infringing information and the trade secret are substantively identical:

(I) The degree of similarity between the alleged infringing information and the trade secret;

(II) Whether it's easy for those relevant in the field to think of the difference when the alleged infringing act occurs;

(III) Status of information in relation to the trade secret in the public domain;

(IV) Other factors to be considered.

Article 15 Where any trade secret is used directly or after modification for production and business operation activities, or relevant production and business activities are adjusted according to the trade secret, the people's court shall determine that such use falls under the scope of the use of trade secret as referred to in Article 9 of the *Anti-Unfair Competition Law*.

Article 16 Where any natural persons, legal persons or unincorporated organizations other than business operators infringe upon any trade secret and the right holder asserts that the civil liability of infringers shall be determined in accordance with Article 17 of the *Anti-Unfair Competition Law*, the people's court shall support such assertion.

Where an employee or ex-employee breaches any agreement on keeping confidentiality of any trade secret and infringes on the trade secret asserted by the right holder, the right holder may choose to assert liability for breach of contract or liability for tort according to law.

Article 17 Where any party concerned requests suspending the trial of a civil case of disputes over infringement on any trade secret on the ground that a criminal case of infringement on the trade secret involving the same alleged infringing act is under trial, the people's court shall support such request in principle, unless the information requested by the right holder for protection does not constitute a trade secret or the evidences on record are sufficient to determine that the alleged infringer does not infringe on the trade secret.

Article 18 The people's court trying a civil case of disputes over infringement on a trade secret shall examine and verify, according to law, evidences formed in the criminal procedure of the crime of infringement on the trade secret.

Where the party concerned and its attorney is unable to collect evidences related to the alleged infringing act that are preserved by any public security organs, procuratorial organs or other people's courts due to objective reasons, and they apply to the people's court for investigation and collection of the evidences, the people's court shall permit such application unless any ongoing criminal procedure might be affected.

Article 19 Where the alleged infringer has disclosed relevant trade secrets to any administrative authority, judicial organ, etc. in order to safeguard public interests and stop criminal acts, the people's court does not support in principle any assertion of the right holder that the alleged infringer should assume liability for tort.

Article 20 The people's court may rule to take measures of act preservation after the right holder provides security where the respondent attempts to disclose, use or allow any other person to use, or has disclosed, used or allowed any other person to use the trade secret asserted by the right holder, and it will become difficult to enforce judgment or other damages will be caused to the party concerned if the measures of act preservation are not taken.

Where the circumstances stipulated in the preceding paragraph are urgent as referred to in Article 100 and Article 101 of the *Civil Procedure Law*, the people's court shall make a ruling within 48 hours.

Article 21 Where the right holder applies for taking measures of act preservation, it shall specify the specific content of its asserted trade secret at the time of application and provide evidences to prove that corresponding confidentiality measures have been taken for the trade secret.

Article 22 Where the alleged infringer proves that the information requested by the right holder for protection does not constitute a trade secret or that it does not commit any act infringing on the trade secret, the people's court shall rule to rescind the measures of act preservation according to the request of the alleged infringer.

Where the trade secret is known to the public due to the infringing act and the ruling of rescinding the measures of act preservation is insufficient to remove the unfair competitive advantage gained by the infringer from the infringing act, the people's court may not rescind the preservation.

Article 23 Where the right holder requests for a judgment that the infringer shall return or destroy any carrier of the trade secret and eliminate the trade secret information under its control, the people's court shall support such request in principle.

Article 24 Where the technical information is part of a technical solution of the right holder or the product infringing on the trade secret is a component of another product, the amount of compensation for infringement shall be reasonably determined according to such factors as the proportion and function of the infringed technical information in the whole technical solution or the value of the product infringing on the trade secret and its proportion and function in the realization of the profit of the whole finished product, etc. Where the trade secret is business information, the amount of compensation for infringement shall be reasonably determined according to such factors as the function of the business information on the profit obtained from the act infringing on the trade secret.

Where the right holder requests determining the amount of compensation for infringement with reference to a reasonable multiple of the licensing fee of the trade secret, the people's court may determine the amount according to the nature, content and actual performance of the license, fault of the infringer, and the nature and seriousness of the infringing act, etc.

Article 25 Where the right holder requests determining the amount of compensation for the damage suffered by it from the act infringing on the trade secret in the civil case of a

dispute over infringement on the trade secret according to the loss or illegal gains due to the same act infringing on the trade secret as determined in an effective criminal judgment, the people's court shall examine and handle such request.

Article 26 Where the right holder has provided preliminary evidences of the gains of the infringer from infringement, and the account books and materials related to the act infringing on the trade secret are mainly in the possession of the infringer, the people's court may order the infringer to provide such account books and materials. Where the infringer refuses to provide or fails to truthfully provide them without justification, the people's court may determine the gains of the infringer from the infringement based on the claims of the right holder and the evidences on record.

Article 27 Where any party concerned or any third party applies to the people's court in writing to take confidentiality measures for evidences 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.

Where the party concerned, in violation of the confidentiality measures prescribed in the preceding paragraph, discloses any trade secret without authorization or uses or allows any other person to use the trade secret accessed or obtained by it in the litigation, the party concerned shall bear liability for tort. Where the case falls under the scope of the circumstances prescribed in Article 111 of the *Civil Procedure Law*, the people's court may take compulsory measures according to law.

Article 28 Civil cases of the first instance of disputes over infringement on trade secrets shall be within the jurisdiction of intermediate people's courts at the places where the people's governments of provinces, autonomous regions or municipalities directly under the Central Government are located and the intermediate people's courts designated by the Supreme People's Court unless otherwise stipulated by laws or judicial interpretations.

Article 29 Civil cases of the first instance of disputes over infringement on trade secrets shall be within the jurisdiction of the people's courts at the places where the alleged infringing acts are committed or where the defendants reside.

Where the alleged infringer infringes on any trade secret through information networks by means of electronic intrusion, etc., the people's court at the location of the terminal or server for committing the alleged infringing act, or at the location of the terminal or server for keeping the trade secret, or at the location where the defendant resides shall have jurisdiction over the infringement.

Where it's difficult to determine the place where the alleged infringing act is committed, the location of the server and the location where the defendant resides as stipulated in paragraphs 1 and 2 of this article, the people's court at the location where the right holder resides shall have the jurisdiction.

Article 30 The people's court shall determine the ownership and content of any trade secret asserted by the right holder, the infringing act and the liability for tort in accordance with laws of *People's Republic of China* in the trial of any foreign-related civil case of a dispute over infringement on the trade secret.

Article 31 The people's court shall apply, for the trial of any civil case of a dispute over infringement on a trade secret, the laws current at the time when the alleged infringing act occurs. Where the alleged infringing act occurs before any amendment of any applicable law and continues after the law has been amended, it shall be governed by the amended law.

Article 32 Where relevant judicial interpretation previously issued by the Supreme People's Court are inconsistent with this Interpretation, this Interpretation shall prevail.

Article 33 This Interpretation shall come into force from YY MM DD.