



EU-China Project
on the
Protection of Intellectual
Property Rights (IPR2)
中国-欧盟知识产权保护项目
(二期)

EU-China Workshop on Protection of
Trade Secrets

中国-欧盟 商业秘密保护研讨会

Legal and regulatory framework
International / Germany

法律与监管框架

国际/德国

CLIFFORD
CHANCE

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Major pros and cons compared to IP rights

主要优缺点（与知识产权相比）

General/ 总论

■ *“Give a man the secure possession of a bleak rock and he will turn it into a garden; give him a nine years’ lease of a garden, and he will convert it into a desert.” (Arthur Young, 1787)*

“保障一个人对一块不毛之地的所有权，他会把它变成花园；而给他花园九年的租赁权，他会把它变成沙漠。”（阿瑟·杨格，1787年）

Business secrets vs. IP rights/ 商业秘密与知识产权

■ Business secrets can be protected without limitation as to the time/ 商业秘密的保护不受时间限制

■ To prove that an information is a business secret is normally much more difficult than to prove the existence of an IP right/ 证明信息属于商业秘密通常比证明知识产权的存在更为困难

■ The administration of business secrets is normally more difficult than the administration of IP rights/ 商业秘密的管理通常比知识产权管理更为困难

■ A business secret is publicly unavailable and its protection will get lost if it becomes publicly available / 商业秘密不为公众所知；一旦为公众所知，则将失去保护

Legal reasons to protect business secrets/ 保护商业秘密的法律依据

■ E.g. US Sarbanes-Oxley Act provides for an obligation to put in place adequate controls of financial information; business secrets are financial information
如美国萨班斯-奥克斯利法案规定了适当控制财务信息的义务；商业秘密属于财务信息

■ German law also requires company management to protect company assets
德国法律也要求公司管理层保护公司资产

Terminology

术语

(Secret) Know-how

(秘密) 专有技术

Trade secret

商业秘密

Business secret

业务秘密

Undisclosed information

未披露信息

Confidential information

保密信息

⇒ Definition is of utmost importance

⇒ 定义至关重要

Paris Convention (“PC”) 巴黎公约

Art 1 PC

巴黎公约第一条

- Business secrets not mentioned

没有提及商业秘密

- However, “industrial property” also covers the protection against unfair competition

但是，“工业产权”的保护还包括反不正当竞争

Art 10*bis* PC

巴黎公约第十条之二

- Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition

工商业事务中违反诚实习惯做法的竞争行为均构成不正当竞争行为

TRIPs Agreement (cont'd)

与贸易有关的知识产权协议(TRIPs协议) (续)

Part I Section 7 TRIPs/TRIPs协议第一部分第七节

■ Protection of undisclosed information /保护未披露信息

Art 39 para 2 TRIPs/TRIPs协议第三十九条第二款

■ Provides protection against information lawfully under control from being disclosed to, acquired by, or used by others without consent in a manner contrary to honest commercial practices

防止他人未经许可而以违背诚实商业行为的方式披露、获得或使用处于合法控制下的信息

- *Contrary to honest commercial practices is at least any practice such as breach of contract, breach of confidence and inducement to breach, and includes the acquisition of undisclosed information by third parties who knew, or were grossly negligent in failing to know, that such practices were involved in the acquisition/ “以违背诚实商业行为的方式”，应至少包括诸如违约、泄密及诱使他人泄密的行为，还应包括通过第三方以获得未披露过的信息(无论该第三方已知或因严重过失而不知该信息的获得将违背诚实商业行为)*

■ ... as long as such information /...只要有有关信息

- *is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;/在一定意义上，其属于秘密，就是说，该信息作为整体或作为其中内容的确切组合，并非通常从事有关该信息工作之领域的人们所普遍了解或容易获得的；*

- *has commercial value because it is secret; and/因其属于秘密而具有商业价值；*

- *has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret./合法控制该信息之人，已经根据有关情况采取了合理的保密措施*

Art 39 para 3 TRIPs/(TRIPs协议)第三十九条第三款

■ Deals with the protection of undisclosed information in specific situations, e.g. obtaining an authorization for distributing a pharmaceutical/涉及特殊情况下未披露信息的保护，例如获得药品销售许可

TRIPs Agreement (cont'd) 与贸易有关的知识产权协议（续）

Enforcement and secrecy 强制执行与秘密

IP Procedures and secrecy (Art 42 TRIPs) 知识产权程序与秘密（TRIPs协议第四十二条）

■ In the context of fair and equitable procedures in enforcing IP rights the procedure shall provide means to identify and protect confidential information

在知识产权强制执行的公平合理程序的条文中规定该程序应提供措施以便识别和保护秘密信息

Evidence and secrecy (Art 43 para 1 TRIPs) 证据与秘密（TRIPs协议第四十三条第一款）

■ Where a party has presented reasonably available evidence sufficient to support its claims and has specified evidence relevant to substantiation of its

claims which lies in the control of the opposing party a court may order that such evidence has to be produced, subject to conditions which ensure the protection of confidential information/ 如果一方当事人已经提供足够支持其权利主张并能够合理取得的证据，同时指出了由另一方当事人控制的证明其权利主张的证据，则法院有权在适当场合确保对秘密信息给予保护的条件下责令另一方当事人提供证据。

Enforcement provisions and undisclosed information 强制执行与未披露信息

■ According to Art 1 para 2 TRIPs the enforcement provisions of the

Substantial and procedural aspects 实体保护与程序保护

Substantial law/实体法

- No laws generally defining what a business secrets is
法律没有就什么是商业秘密给出一般性界定
- “Regulation (EC) no. 772/2004 on the application of Article 81 para 3 of the Treaty to categories of technology transfer agreements” (“**Technology Transfer Regulation** “) does only contain rules as to the options to limit the use of know-how in technology transfer agreements
《关于技术转让协议适用条约第81条第3款的(EC)772/2004号条例》（技术转让条例）没有规定技术转让协议中专有技术的使用限制规则
- Pursuant to Art. 1 para. 1 lit. i) of the Technology Transfer Regulation know-how means
根据技术转让条例第一条第一款第i项的规定，专有技术是指：
 - a package of non-patented practical information, resulting from experience and testing, which is secret, that is to say, not generally known or easily accessible, substantial, that is to say, significant and useful for the production of the contract products, and identified, that is to say, described in a sufficiently comprehensive manner so as to make it possible to verify that it fulfils the criteria of secrecy and substantiality.
 - 经过经验或试验获得的、秘密的一揽子非专利实用信息，该信息不为一般人所知或容易获得，对于合同产品的生产非常关键（重要而且有益），以十分全面的方式进行表述，能够验证其符合保密性和实体性标准。

Substantial and procedural aspects (cont'd)

实体保护与程序保护（续）

Procedural law/程序法

- So-called enforcement directive (Directive 2004/48/EC)
所谓执法指令（2004/48/EC号指令）
 - directive vs. regulation/指令与条例

- In the light of TRIPs why was there a need for the enforcement directive?/
就TRIPs协议而言，为何需要执法指令？

- Persons entitled under the enforcement directive/ 执法指令中规定的权利人
 - right holders of intellectual property rights/ 知识产权权利人
 - all other persons authorized to use such rights, e.g. licensees/ 有权使用这些知识产权的其他人，如：被许可人
 - collective rights management bodies/集体权利管理机构
 - professional defense bodies which are regularly recognized as having a right to represent holders of intellectual property rights/被公认为有权代表知识产权权利人的专业保护机构

- Evidence and secrecy/证据和秘密
 - on application by a party which has presented reasonably available evidence sufficient to support its claims, and has, in substantiating those claims, specified evidence which lies in the control of the opposing party, the competent judicial authorities may order that such evidence be presented by the opposing party, subject to the protection of confidential information/ 申请人提交合理证据足以支持其权利主张，并在证实其权利主张时指出证据处于对方当事人控制之下，主管司法机关可以责令对方当事人提交作为保密信息进行保护的证据
 - under the same conditions, in the case of an infringement committed on a commercial scale such measures shall be taken as are necessary to enable the competent judicial authorities to order, where appropriate, on application by a party, the communication of banking, financial or commercial documents under the control of the opposing party, subject to the protection of confidential information /在同等条件下，如果是大规模商业侵权，一方当事人提出申请时，主管司法机关应采取该必要措施，在适当情况下责令对方当事人提交处于其控制之下作为保密信息进行保护的银行、财务或商业文件

Substantial and procedural aspects (cont'd)

实体保护和程序保护（续）

Procedural law (cont'd)/程序法（续）

■ Preservation of evidence and secrecy/证据保全和秘密

- on application by a party which has presented reasonably available evidence to support its claims that its intellectual property rights has been infringed or is about to be infringed, order prompt and effective provisional (ex-parte) measures to preserve relevant evidence in respect of the alleged infringement, subject to the protection of confidential information/ 申请人可以提出申请并出示合理取得的证据表明其知识产权受到侵犯或即将被侵犯，以便采取迅速有效的临时（单方）措施，保全涉嫌侵权的相关证据与受保护的保密信息。
- such measures may be subject to lodging by the applicant of adequate security or an equivalent assurance intended to ensure compensation for any prejudice suffered by the defendant
采取这些措施时，可以责令申请人提供适当或相当的担保，以确保被申请人遭受财产损失时可以获得赔偿
- upon request of the defendant and if the measure has to be revoked or automatically lapses, the applicant is obliged to provide for compensation for any injury
如果该措施应当被撤销或自动失效，应被申请人请求，申请人有责任为任何损害提供赔偿
- upon request of the defendant obligation of the applicant to commence proceeding on the merits (period to be determined by the judicial body if the law of a Member State does permit; otherwise the longer of 20 working days or 31 calendar days) /应被申请人请求，申请人有责任就该问题展开诉讼（如果成员国法律允许，时间由司法机关决定，否则应超过20个工作日或31个日历日）

■ Right of information/信息权

- the enforcement directive does provide for comprehensive information obligations of the infringer of an intellectual property right and under certain circumstances of third parties
- 执行指令规定了知识产权侵权人的综合信息义务以及某些情况下第三方的综合信息义务
- the information obligations apply without prejudice to other statutory provisions which [...] govern the protection of confidentiality sources [...] /信息义务的适用不影响[...]保护秘密信息的[...]其他法律规定的效力

■ The enforcement directive also includes, e.g., provisions on/执法指令还包括下列规定

- provisional and precautionary measures regarding an alleged infringement of an intellectual property right
涉嫌知识产权侵权的临时和预防措施
- the seizure of goods suspected of infringing an intellectual property right/扣押涉嫌侵犯知识产权的货物
- the seizure of moveable and immovable property, including the blocking of bank accounts
扣押动产和不动产，包括冻结银行帐户
- measures resulting from a decision on the merits such as recalls and removal from the channels of commerce and destruction of goods/该问题的裁决所产生的从销售渠道中召回、销毁货物等措施
- damages and legal costs /损害赔偿及法律费用

Substantial and procedural aspects (cont'd)

实体保护和程序保护（续）

Enforcement directive and business secrets? 执法指令与商业秘密？

- Art 1 enforcement directive (subject matter)

执法指令第一条（标的）

- “This Directive concerns the measures, procedures and remedies necessary to ensure the enforcement of intellectual property rights. For the purpose of this Directive the term ‘intellectual property rights’ includes industrial property rights.”

“该指令涉及确保知识产权执法所必需的措施、程序和补救措施。就本指令的宗旨而言，'知识产权'包括工业产权。”

Overview

概述

Section 404 of the German Stock Act (*Aktiengesetz*)
德国股份法第404条 (*Aktiengesetz 404*)

Sections 202 et seq. of the German Penal Act (*Strafgesetzbuch*)
德国刑法第202条及以下各条 (*Strafgesetzbuch*)

Section 823 of the Civil Code (*Bürgerliches Gesetzbuch*)
德国民法典第202条 (*Bürgerliches Gesetzbuch*)

Sections 17 et seq. of the Act against unfair Competition (*Gesetz gegen den unlauteren Wettbewerb, "AAUC"*)
德国反不正当竞争法第17条及以下各条 (*Gesetz gegen den unlauteren Wettbewerb, "AAUC"*)

The various German regimes for the protection of business secrets are quite different, e.g. civil law and penal law
德国保护商业秘密的各种制度之间有很大的差异，例如民法和刑法

Overview

概述

In practice section 17 AAUC is the most important legal provision for the protection of business secrets

在实践中AAUC第17条是有关商业秘密保护的最重要的法律规定

Protection of business secrets in particular provided by the AAUC/ AAUC专门规定了商业秘密保护

- Legal steps may be initiated against a conduct which took place in the course of business activities/ 可以对商业活动中的行为提起诉讼
- By a competitor or another authorized party, e.g., consumer protection organizations; however normally not by public authorities/ 起诉方为竞争对手或消费者保护组织等其他授权方，但通常不会是政府机构
- Against actions which are contrary to good faith, e.g./违背诚信原则的行为，例如，
 - deceptive advertisements/ 欺骗性广告
 - illegal comparative advertisements/ 非法比较广告
 - illegal use of trade and business secrets/ 非法利用商业秘密
 - other conduct inappropriate in the course of business, e.g., any marketing of a product which creates confusion with any products, trademarks, trade names or other distinguishing marks of a competitor (cf. German Federal Court of Justice, I ZR 198/04 and I ZR 123/05)/ 商业活动中的其他不当行为，例如，销售与其他竞争对手的产品、商标、商号或其他区别标记相混淆的产品（见德国联邦法院，I ZR 198/04 和123/05）
 - blacklist (B2C)/ 黑名单（B2C）
- Sections 17 et seq. AAUC comprise the provisions on the protection against the illegal use of business and trade secrets/ AUUC第17条及以下各条还规定了不得违法使用商业秘密
 - betrayal of business secrets/ 泄露商业秘密
 - industrial espionage/工业间谍活动
 - exploitation of business secrets/商业秘密的开发利用

Business and trade secrets

行业秘密与商业秘密

Trade and business secrets

商业秘密与行业秘密

- German legal provisions often differ between trade and business secrets/德国法律通常区分行业秘密和商业秘密
- The term trade secret does refer to a commercial information/商业秘密是指商业信息
- The business secret does refer to a technical information/行业秘密是指技术信息
- In practise however the distinction is useless since the legal prerequisites and consequences are identical
因为二者的法律前提条件和后果相同，在实践中区分二者作用不大

Definition of trade and business secrets/商业秘密与行业秘密的含义

- German law does not provide a definition of the term business and trade secret/德国法律没有规定行业秘密和商业秘密的含义
- According to the German precedents a business and trade secret is any information /根据德国先例，行业秘密和商业秘密是指某一信息
 - that has a connection to a business operation;/ 与商业运营有关;
 - that is not publicly available;/ 不为公众所知;
 - the owner of which has a legitimate interested to maintain confidentially from an objective point of view; and/ 该信息的所有人客观上有权对其保密;及
 - the owner of which wants to keep confidential./ 该信息的所有人想要对其保密。
 - A commercial value of the business secret is not required (difference to Art. 39 para 2 TRIPs).
行业秘密不需要具有商业价值（与TRIPs协议第三十九条第二款的规定不同）。

Business and trade secrets (cont'd)

行业秘密与商业秘密（续）

Connection to a business operation

与商业运营的关系

- An information has to be connected with a business operation. For example, the use of a production method by a company can be a business secret although the method as such is publicly known

信息必须与商业运营有关。例如，某公司的生产方法的使用可以是商业秘密，虽然该方法已经为公众所知

- A connection of an information and a business operation is not given if the information does only belong to the private sphere of the owner of a business operation or of third parties

如果某一信息只是属于第三方或所有人商业运营的私人领域，则该信息与商业运作无关。

Business and trade secrets (cont'd) 行业秘密与商业秘密（续）

The information may not be publicly available/该信息可能不为公众所知

■ If an information is generally known it is not a business secret. This does also apply if the information has been disclosed contrary to the wish of the owner of the information. A disclosure can take place, e.g.,

一般人都知道的信息不是业务秘密。违背了信息所有人的意愿已被披露的信息同样不是业务秘密。披露方式如下：

- via the media/通过媒体
- due to the publication of an IP right registration/application/ 由于知识产权注册/申请
- via a presentation at trade fairs/ 通过展会展示
- via advertising material/ 通过广告材料

■ An information is not publicly available if only a limited number of people are aware of the information/ 仅有少数人知道的信息视为不为公众所知

- disclosure to parties bound by legal or contractual non-disclosure obligations
向受到法律或合同保密义务约束的当事人披露
- disclosure to other parties/向其他各方当事人披露

■ An information is deemed to be publicly available if it can be accessed relatively easily by an expert of the relevant field (keywords: reverse engineering / state of the art)

相关领域的专家可以相对容易取得的信息视为为公众所知（关键词：反向工程/现有技术）

Business and trade secrets (cont'd)

行业秘密与商业秘密（续）

Legitimate interested to maintain confidentiality 有权保密

- The business operator must have a legitimate economic interest to maintain confidentiality/运营者对信息进行保密须有合法的经济利益
- Such interest is given if the information is of relevance for the competitiveness of the business operator/如果信息事关商业运营者的竞争力，则存在经济利益
- It is irrelevant for the determination of a business secret whether the information refers to an illegal conduct. However, the disclosing party might be justified or even obliged to disclose the illegal conduct.

信息是否涉及非法行为与其是否属于业务秘密无关。然而，披露方对非法行为的披露可能是正当的，甚至成为其义务。

Business and trade secrets (cont'd)

行业秘密与商业秘密（续）

Will to keep confidentiality

愿意保密

- The business operator must have the will to maintain confidentiality/ 运营者必须有保密的意愿
- It is sufficient if the respective will can reasonably be assumed (implicit will)

只需合理地假定具有保密意愿（隐含意愿）

- the will to maintain confidentiality can normally be assumed for any internal business information
通常假定对于任何内部业务信息都有保密的意愿
- therefore, the disclosing party must prove the a respective will did not exist/ 因此，披露方必须证明没有保密的意愿

- A hypothetical will to maintain confidentiality is sufficient in order to determine a business secret

假定具有保密的意愿便足以确定为行业秘密

Business and trade secrets (cont'd)

行业秘密与商业秘密（续）

Other aspects/ 其他方面

- An information must not have to have a financial value in order to be a business secret/ 行业秘密无需具有经济价值

Examples of confidential information

保密信息的范例

- Product configuration and composition/ 产品结构和组成
- Manufacturing processes/ 生产过程
- Drawings/ 图纸
- Calculation documents/ 计算文件
- Customer lists/ 客户名单
- Prices and payment conditions/ 价格和付款条件
- Distribution and sales methods/ 分销和销售方式

Betrayal of business and trade secrets

行业秘密与商业秘密的泄露

Section 17 para. 1 Act Against Unfair Competition

反不正当竞争法第17条及以下各条

Anyone who, without authorization, communicates business or operating secrets entrusted or made available to him in his capacity as a person acting for a business operation to other persons for purposes of competition, personal gain, for the benefit of a third party or with the intent to damage the proprietor of the undertaking while he is still a person acting for that business operation, shall be liable to imprisonment of up to three years or a fine.

任何经营活动的代理人在工作关系存续期间，为了竞争、个人利益、第三方利益或意图损害企业主的利益，未经授权向他人披露其因工作关系受托或所知的业务秘密或经营秘密，应处以三年以下的监禁或罚款。

Betrayal of business and trade secrets (cont'd) 行业秘密与商业秘密的泄露（续）

Offender/ 犯罪主体

- Only a person acting for a company/ 只能是公司的代理人
- Broad interpretation, e.g., all employees, managing directors, board members
应做广义理解，例如，所有雇员、总经理、董事会成员
- However, no shareholders, commercial agents, customers
然而，股东、商业代理人以及客户除外

Object/ 犯罪客体

- A business and trade secret which has been entrusted or made available to the offender/ 罪犯受托或知道的行业秘密和商业秘密
- A business secret has been entrusted if it has been disclosed to the offender under a confidentiality obligation
向负有保密义务的罪犯披露业务秘密，则认为将该秘密委托给该罪犯
- A business secret has been made available if the offender became aware of it no matter whether it has been disclosed to him or he made it (illegally) available himself
如果罪犯知道（向其披露或其非法获得）业务秘密，则认为该罪犯知道该秘密。

Betrayal of business and trade secrets (cont'd) 行业秘密与商业秘密的泄露（续）

Time during which the offence can be committed

实施犯罪的时间

- Only during the term of the contractual relationship between the offender and the business operator/限于罪犯和企业主契约关系存续期间

Criminal conduct/犯罪行为

- Disclosure of the business secret to third parties/向第三方披露行业秘密

Without authorization/未经授权

- The disclosure takes place without authorization if it is contrary to a confidentiality obligation/如果披露行为违反了保密义务，则认为未经授权

Subjective elements/主观要件

- For purposes of competition, /为了竞争
- personal gain, /个人利益
- for the benefit of a third party, or/为了第三方利益，或
- with the intent to damage the proprietor of the business operation/意图损害企业主利益

Betrayal of business and trade secrets (cont'd) 行业秘密与商业秘密的泄露（续）

The disclosure and exploitation of information legitimately obtained is legal, unless specific circumstances make it illegal
对合法取得信息的披露和利用是合法的，但特殊情况下非法的除外

Therefore the interests of the former employee and its employer have to be balanced/
因此必须平衡前任雇员及其雇主的利益

- Interest of the employee to improve his position/雇员提高其职位的利益
- Interest of the company to keep information confidential/公司对信息进行保密的利益
- Duration of the employment/雇佣期限
- Reason for ending the employment contract/终止雇佣合同的原因
- Position of the former employee/前任雇员的职务
- Amount of remuneration/报酬金额
- Way of becoming aware of the information/信息取得方式
- Time, circumstances and scope of the disclosure or use of the information by the former employee/前任员工披露或使用信息的时间、情况和范围
- Possible assistance in creating the business secret/可能有助于创造行业秘密
- Payment continues/继续发放薪酬
- Complete or partial use of the business secret/行业秘密的全部或部分使用

Industrial espionage

工业间谍活动

Section 17 para 2 no. 1 Act Against Unfair Competition/反不正当竞争法第17条第2款第1项

Anyone who, for purposes of competition, for personal gain, for the benefit of a third party or with the intent to damage the proprietor of the business operation, obtains or secures, without authorization,

为了竞争、个人利益、第三方利益或意图损害企业主的利益，未经授权，

1. business secrets through the use of technical means, the creation of an embodied reproduction of the secret, or the removal of an item in which the secret is embodied, or uses or communicates to another person, without authorization

未经许可，通过技术手段、复制秘密或移除包含秘密的物品、使用或向他人披露等方式擅自获得、取得行业秘密

2. [...]shall be punished in the same way as set forth in para 1.
应处以第1款规定的刑罚。

Industrial espionage (cont'd) 工业间谍活动（续）

Offender/犯罪主体

- Anybody/任何人

Object/犯罪客体

- Any business and trade secret/任何行业秘密和商业秘密

Time during which the offence can be committed/实施犯罪的时间

- At any time/任何时间

Criminal conduct/犯罪行为

- Obtaining or securing a business secret through

通过下列方式获得或取得行业秘密

- the use of technical means,/使用技术手段
- the creation of an embodied reproduction of the secret, or
复制秘密,或
- the removal of an item in which the secret is embodied, or
uses or communicates to another person, without
authorization

未经授权，移除包含秘密的物品，使用或向他人披露

Industrial espionage (cont'd) 工业间谍活动（续）

Without authorization/ 未经授权

- The disclosure takes place without authorization if it is contrary to a confidentiality obligation (of particular importance for employees)
如果披露行为违反了保密义务，则属于未经授权
- With regard to former employees: a use of information memorized is generally legal
关于前任员工：记忆信息的使用一般是合法的

Subjective elements/ 主观要件

- For purposes of competition,
为了竞争
- personal gain,
个人利益
- for the benefit of a third party, or
为了第三方利益，或
- with the intent to damage the proprietor of the business operation
意图损害企业主的利益

Exploitation of business and trade secrets

行业秘密和商业秘密的开发利用

Section 17 para 2 no. 2 Act Against Unfair Competition

反不正当竞争法第17条第2款第2项

Anyone who, for purposes of competition, for personal gain, for the benefit of a third party or with the intent to damage the proprietor of the business operation, exploits or discloses, without authorization, 为了竞争、个人利益、第三方利益或意图损害企业主的利益，未经授权，利用或披露

1. [...]
2. business secrets that he has obtained knowledge of by way of a communication as described in para 1 or through an act of his own or another person under para 2 no. 1, or otherwise obtained or secured without authorization,

通过第一款规定的方式或通过第二款第一项规定的自己或他人行为或以其他方式擅自获得或取得的业务秘密，

shall be punished in the same way as set forth in para 1.

应处以第1款规定的刑罚。

Exploitation of business and trade secrets (cont'd) 行业秘密和商业秘密的开发利用（续）

Offender/ 犯罪主体

- Anybody/ 任何人

Object/ 犯罪客体

- Any business and trade secret
任何行业秘密和商业秘密

Time during which the offence can be committed 实施犯罪的时间

- At any time/ 任何时间

Criminal conduct/ 犯罪行为

- Exploiting business secrets or
利用行业秘密或
- Disclosing business secrets
披露行业秘密

Exploitation of business and trade secrets (cont'd) 行业秘密和商业秘密的开发利用（续）

Without authorization/未经授权

Prerequisites/前提条件

■ Knowledge of the business secrets must have been obtained

通过下列方式取得的行业秘密

- by way of a communication as described in para 1 or
通过第一款规定的方式或
- through an act of his own or another person under para 2 no. 1,
通过第二款第一项规定的自己或他人行为
- or otherwise obtained or secured without authorization
或以其他方式擅自获得或取得

Subjective elements/ 主观要件

■ For purposes of competition, /为了竞争

■ personal gain, /个人利益

■ for the benefit of a third party, or /为了第三方利益，或

■ with the intent to damage the proprietor of the business operation 意图损害企业主的利益

Unfair Competition Claims 反不正当竞争诉讼请求

Cease and desist claim
停止和终止犯罪

Information claim
信息索赔

Damage claim
损害索赔

■ Normally, based on profits actually lost by the claimant
通常情况下，以索赔人的实际利润损失为基础

Correction of illegal statement
更正非法陈述

Publication of judicial decisions
公布司法判决

Appendix I: CV

附录一：个人简历

Marc L. Holtorf/郝韬福

Fachanwalt für Gewerblichen Rechtsschutz 知识产权律师

CV
个人简历



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郝韬福

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Marc Holtorf, Partner in the Düsseldorf office, advises national and international clients in and out of court in IP and IT matters, with a focus on trademark, copyright, design right and unfair competition law.

郝韬福，杜塞尔多夫办事处合伙人，为国内外客户就知识产权及信息技术事宜提供商标、著作权、设计权和不正当竞争法等法律咨询服务。

He is member of the firm's worldwide *Intellectual Property Rights* group as well as of the firm's global industry group *Healthcare, Life Sciences & Chemicals*. Marc Holtorf is a sought speaker, has published various articles and is co-author of various legal books regarding his areas of expertise. He is lecturer at the Düsseldorf Law School for unfair competition law and for the procedural specialities of intellectual property law. In addition, he is assistant chairman of the committee responsible for the appointment of expert lawyers in the field of intellectual property (a protected title in Germany) in the circuit of the Düsseldorf Court of Appeal. Marc Holtorf is admitted to all German local courts, district courts and courts of appeal.

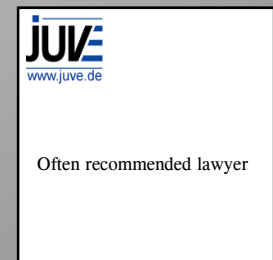
他是该律所全球知识产权小组以及全球医疗保健、生命科学、化工产品小组的成员。郝韬福是一个广受欢迎的演讲家，发表过各种文章，并就专业领域与他人合作出版了多部法律书籍。他是杜塞尔多夫法学院的不正当竞争法讲师。此外，他是杜塞尔多夫上诉法院知识产权专家律师任命委员会副主席。郝韬福可以参加德国所有的地方法院、地区法院和上诉法院的诉讼活动。

For many years he is an "often recommend expert" according to the "Juve" handbook on German commercial law firms.

多年来，他是德国商业律师事务所“尤文（Juve）”手册经常推荐的专家。

Languages: German and English

语言：德语和英语



Appendix II: Worldwide contact information

附录二：全球联系方式

29 offices in 21 countries

遍布二十一个国家的二十九个办事处

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EU-China Project on the Protection of Intellectual Property Rights (IPR2) 中国-欧盟知识产权保护项目 (二期)

EU-China Workshop on Protection of Trade Secrets
中国-欧盟 商业秘密保护研讨会

Qingdao, 20 - 21 May 2010

Marc L. Holtorf

2010年5月21日青岛

郝韬福

CLIFFORD
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