

AIPLA

American Intellectual Property Law Association

美国知识产权法协会

December 21, 2022

2022 年 12 月--日

State Administration for Market Regulation
Regulations Department
No. 8 Sanlihe East Road, Xicheng District,
Beijing, People's Republic of China
100820

中华人民共和国北京市西城区三里河东路 8 号

国家市场监督管理总局

法规司

100820

Via Email: fgs@samr.gov.cn

通过电子邮件: fgs@samr.gov.cn

Re: Comments regarding “Draft Amendment of the Anti-Unfair Competition Law of the People's Republic of China” (November 22, 2022)

关于《中华人民共和国反不正当竞争法（修订草案）》（2022 年 11 月 22 日）的意见

Dear Sir or Madam,

亲爱的先生或女士：

The American Intellectual Property Law Association (AIPLA) appreciates the opportunity to comment on the Draft Amendment of the Anti-Unfair Competition Law of the People's Republic of China (November 22, 2022). AIPLA comments are provided in the attached table.

美国知识产权法协会 (AIPLA) 很高兴有机会对《中华人民共和国反不正当竞争法（修订草案）》（2022 年 11 月 22 日）发表意见。意见的截止日期为 2022 年 12 月 22 日。AIPLA 的建议参见附表。

AIPLA is a national bar association of approximately 7,500 members engaged in private or corporate practice, in government service, and in the academic community. AIPLA members represent a wide and diverse spectrum of individuals, companies, and institutions involved directly or indirectly in the practice of patent, trademark, copyright, trade secret, and unfair competition law, as well as other fields of law affecting intellectual property. Our members represent both owners and users of intellectual property. Our mission includes helping establish and maintain fair and effective laws and policies that stimulate and reward invention while balancing the public's interest in healthy competition, reasonable costs, and basic fairness.

AIPLA 是一个全国性律师协会，拥有大约 7500 名成员，从事私人或公司业务、政府服务和学术界。AIPLA 成员代表广泛多样的个人、公司和机构，他们直接或间接参与专利、商标、版权、商业秘密和不正当竞争法以及影响知识产权的其他法律领域的实践。我们的成员同时代表知识产权的所有者和使用者。我们的使命包括帮助建立和

维护公平有效的法律和政策，以刺激和奖励发明，同时平衡公众对健康竞争、合理成本和基本公平的利益。

AIPLA commends SAMR on its continued efforts to combat intellectual property infringement in China. AIPLA appreciates the opportunity to provide comments to the Draft Anti-Unfair Competition Law of the People's Republic of China. AIPLA would also welcome the opportunity to provide additional comments on any specific revisions to the language of the Draft Anti-Unfair Competition Law of the People's Republic of China that may be drafted and proposed in response to the last round of comments. Additionally, AIPLA recommends that SAMR provide the public with more time to thoroughly review and carefully submit comments as only one month was provided.

AIPLA 对国家市场监督管理总局（SAMR）在中国打击知识产权侵权行为的持续努力表示赞赏。AIPLA 很高兴有机会对中华人民共和国反不正当竞争法草案提出意见。AIPLA 也欢迎有机会就针对上一轮意见而可能起草和提出的中华人民共和国反不正当竞争法草案的语言的任何具体修订提供进一步的建议。此外，因为只提供了一个月的时间，AIPLA 建议国家市场监督管理总局给公众更多的时间来更透彻地审视和认真地提交意见。

The absence of comments on any part does not reflect support or lack of support of this part by AIPLA.

任何部分未发表意见并不代表 AIPLA 支持或不支持该部分。

We appreciate the opportunity to provide these comments on the Draft Amendment of the Anti-Unfair Competition Law of the People's Republic of China, and we would be happy to answer any questions that our comments may raise.

我们很高兴有机会就《中华人民共和国反不正当竞争法（修订草案）》提出这些意见，我们很乐意回答就我们的意见可能提出的任何问题。

Sincerely,
诚挚感谢！



Brian H. Batzli

President

American Intellectual Property Law Association

布赖恩·H·巴茨利

主席

美国知识产权法协会

<p>中华人民共和国反不正当竞争法 Current Law</p>	<p>中华人民共和国反不正当竞争法（修订草案征求意见稿） Draft Revised Law</p>	<p>AIPLA comments</p>
<p>第三条 各级人民政府应当采取措施，制止不正当竞争行为，为公平竞争创造良好的环境和条件。</p> <p>国务院建立反不正当竞争工作协调机制，研究决定反不正当竞争重大政策，协调处理维护市场竞争秩序的重大问题。</p>	<p>第三条 <u>反不正当竞争工作坚持中国共产党的领导。</u></p> <p>国务院建立反不正当竞争工作协调机制，研究决定反不正当竞争重大政策，协调处理维护市场竞争秩序的重大问题。</p> <p><u>各级人民政府应当采取措施，制止不正当竞争行为，为公平竞争创造良好的环境和条件。</u></p>	<p>"The people's governments at all levels shall adopt measures..." was added to the Article 3. In this law, there are corresponding regulations on the jurisdiction level and authorization (such as, Articles 5 and 23). At the same time, according to the general principles of administrative laws, governments at all levels shall adopt measures as authorized by laws. This overlapping jurisdiction could lead to conflicts. Therefore, it is suggested to change this language to "The people's governments at all levels shall adopt measures <u>as authorized by laws...</u>".</p>

<p>N/A</p>	<p><u>第十三条 具有相对优势地位的经营者无正当理由不得实施下列行为，对交易相对方的经营活动进行不合理限制或者附加不合理条件，影响公平交易，扰乱市场公平竞争秩序：</u></p> <p><u>（一）强迫交易相对方签订排他性协议；</u></p> <p><u>（二）不合理限定交易相对方的交易对象或者交易条件；</u></p> <p><u>（三）提供商品时强制搭配其他商品；</u></p> <p><u>（四）不合理限定商品的价格、销售对象、销售区域、销售时间或者参与促销推广活动；</u></p> <p><u>（五）不合理设定扣取保证金，削减补贴、优惠和流量资源等限制；</u></p> <p><u>（六）通过影响用户选择、限流、屏蔽、搜索降权、商品下架等方式，干扰正常交易；</u></p> <p><u>（七）其他进行不合理限制或者附加不合理条件，影响公平交易的行为。</u></p>	<p>New Article 13 has been amended to provide that "Without justifiable reasons, an operator with comparative advantage position shall not commit" certain listed acts. Article 22 of the Anti-Monopoly Law contains similar provisions that prohibit operators from abusing a dominant market position. It is unclear how Article 13 of the revised draft corresponds to Article 22 of the Anti-Monopoly Law. In addition, intellectual property rights by their nature provide an owner with certain comparative advantages, and normal enforcement activity by the owner of intellectual property may fall into the regulation of Article 13 of the revised draft. For example, package licensing is a common practice and it is not clear the extent to which such activity falls within Article 13(3) of the revised draft, which is directed to "Tying other goods by force when providing certain goods"? Introducing new restrictions on enforcing intellectual property rights, based on Article 13 of the revised draft, would be unwarranted and is not recommended, especially if the restrictions are not clearly understood. We recommend careful consideration of Article 13 of the revised draft, which seems inappropriate without a broad consensus. If Article 13 is continued in the final draft, it is best to provide explicit exceptions for normal intellectual</p>
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		property enforcement activities.
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<p>N/A</p>	<p><u>第十八条 经营者不得实施下列行为，不正当获取或者使用其他经营者的商业数据，损害其他经营者和消费者的合法权益，扰乱市场公平竞争秩序：</u></p> <p><u>（一）以盗窃、胁迫、欺诈、电子侵入等方式，破坏技术管理措施，不正当获取其他经营者的商业数据，不合理地增加其他经营者的运营成本、影响其他经营者的正常经营；</u></p> <p><u>（二）违反约定或者合理、正当的数据抓取协议，获取和使用他人商业数据，并足以实质性替代其他经营者提供的相关产品或者服务；</u></p> <p><u>（三）披露、转让或者使用以不正当手段获取的其他经营者的商业数据，并足以实质性替代其他经营者提供的相关产品或者服务；</u></p> <p><u>（四）以违反诚实信用和商业道德的其他方式不正当获取和使用他人商业数据，严重损害其他经营者和消费者的合法权益，扰乱市场公平竞争秩序。</u></p>	<p>New Article 18 provides new rights to commercial data. It is unclear whether this is a new sui generis database right, or intended to address hacking violations or economic espionage. Accordingly, AIPLA requests clarification of the purpose of this new Article and an explanation why it is needed in light of the trade secret protection already provided for in renumbered Article 10 (previously Article 9).</p>
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	<p><u>本法所称商业数据，是指经营者依法收集、具有商业价值并采取相应技术管理措施的数据。</u></p> <p><u>获取、使用或者披露与公众可以无偿利用的信息相同的数据，不属于本条第一款所称不正当获取或者使用其他经营者商业数据。</u></p>	
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<p>第十三条 监督检查部门调查涉嫌不正当竞争行为，可以采取下列措施：</p> <p>（一）进入涉嫌不正当竞争行为的经营场所进行检查；</p> <p>（二）询问被调查的经营者、利害关系人及其他有关单位、个人，要求其说明有关情况或者提供与被调查行为有关的其他资料；</p> <p>（三）查询、复制与涉嫌不正当竞争行为有关的协议、账簿、单据、文件、记录、业务函电和其他资料；</p> <p>（四）查封、扣押与涉嫌不正当竞争行为有关的财物；</p> <p>（五）查询涉嫌不正当竞争行为的经营者的银行账户。</p> <p>采取前款规定的措施，应当向监督检查部门主要负责人书面报告，并经批准。采取前款第四项、第五项规定的措施，应当向设区的市级以上人民政府监督检查部门主要负责人书面报告，并经批准。</p> <p>监督检查部门调查涉嫌不正当竞争行为，应当遵守《中华人民共和国行政</p>	<p>第二十三条 监督检查部门调查涉嫌不正当竞争行为，可以采取下列措施：</p> <p>（一）进入涉嫌不正当竞争行为的经营场所进行检查；</p> <p>（二）询问被调查的经营者、利害关系人及其他有关单位、个人，要求其说明有关情况或者提供与被调查行为有关的其他资料；</p> <p>（三）查询、复制与涉嫌不正当竞争行为有关的协议、账簿、单据、文件、记录、业务函电和其他资料；</p> <p>（四）查封、扣押与涉嫌不正当竞争行为有关的财物；</p> <p>（五）查询涉嫌不正当竞争行为的经营者的银行账户和<u>第三方支付账户以及支付记录</u>。</p> <p>采取前款<u>第四项、第五项</u>规定的措施，应当向县级以上监督检查部门主要负责人书面报告，并经批准。</p> <p>监督检查部门调查涉嫌不正当竞争行为，应当遵守《中华人民共和国行政强制法》和其他有关法律、行政法规</p>	<p>Compared with the current Anti-Unfair Competition Law, Article 23 of the revised draft lowers the requirements for measures that supervision and inspection authorities can take to investigate suspected unfair competition. In addition, Item 3 provides for "Reviewing and duplicating the agreements, account books, bills, documents, records, business communications and other materials related to the suspected unfair competition act." Yet, agreements, account books, etc., are typically confidential information. To the extent it allows any member of the supervision and inspection authority to review and copy confidential business information, this provision could have a substantial adverse effect on normal business operations . Therefore, it is suggested that item 3 of Article 23 have the same requirements as items 4 and 5, specifically, that the last paragraph of Article 23 be amended to refer to item (3) as follows: "In the case where the measures specified in item (3), (4) and item (5) of the preceding paragraph are taken, a written report shall be submitted to the head of the supervision and inspection authority at or above the county level for approval."</p>
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<p>强制法》和其他有关法律、行政法规的规定，并应当将查处结果及时向社会公开。</p>	<p>的规定，并依法将查处结果及时向社会公开。</p>	
<p>N/A</p>	<p><u>第三十四条 经营者违反本法第十三条规定实施不合理限制或者附加不合理条件的，由监督检查部门责令停止违法行为，没收违法所得，处十万元以上一百万元以下的罚款；情节严重的，处一百万元以上五百万元以下的罚款。</u></p>	<p>Article 34 provides penalties for violation of Article 13. For the reasons we mentioned above in our discussion of Article 13, we recommend careful consideration of Article 34 because it seems inappropriate without a broad consensus. If Article 34 is continued in the final draft, we recommend providing explicit exceptions for normal intellectual property enforcement activities.</p>

N/A	<p><u>第三十八条 经营者违反本法第十三条、第十六条、第十七条、第十八条、第十九条、第二十条规定，实施不正当竞争行为，情节特别严重，性质特别恶劣，严重损害公平竞争秩序或者社会公共利益的，由省级以上人民政府监督检查部门责令停止违法行为，没收违法所得，处上一年度销售额百分之一以上百分之五以下的罚款，<u>并可以责令停业、吊销相关业务许可证或者吊销营业执照；经营者的法定代表人、主要负责人和直接责任人员对不正当竞争行为负有个人责任的，处十万元以上一百万元以下的罚款。</u></u></p>	<p>Article 38 imposes a fine of 1% – 5% of the previous year’s sales for violating Articles 13, 16, 17, 18, 19, and 20. AIPLA recommends clarifying that the 1% - 5% is of sales only in China as the violations of the Law will have occurred only in China.</p>
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