



American Intellectual Property Law Association

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The National People's Congress of the People's Republic of China
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中华人民共和国全国人民代表大会
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Re: AIPLA Comments on the 2017-2-26 Draft Anti-Unfair Competition Law of the People's Republic of China.

主题：美国知识产权法律协会(AIPLA)对2017年2月26日发布的《中华人民共和国反不正当竞争法》（修订草案）的意见

Dear members of National People's Congress:
尊敬的全国人民代表大会代表们：

The American Intellectual Property Law Association ("AIPLA") welcomes this opportunity to submit comments on the February 26, 2017 draft Anti-Unfair Competition Law of the People's Republic of China ("AUCL"). These comments supplement comments made last year in connection with a prior draft of this law.

美国知识产权法律协会（“AIPLA”）感谢此次全国人民代表大会（人大）给予我们机会就《中华人民共和国反不正当竞争法》（修订草案）（以下简称为《反不正当竞争法》或“AUCL”）提出我们的意见。这些意见对我们去年关于本法律先前草案的意见有所补充。

The American Intellectual Property Law Association is a national bar association of approximately 14,000 members who are primarily lawyers 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 global laws and policies that stimulate and reward invention while balancing the public's interest in healthy competition, reasonable costs, and basic fairness.

美国知识产权法律协会是一个全国性律师协会，拥有大约14,000名会员，主要由各界律师组成，来自律师事务所、企业团体、政府机构、及学术机构。AIPLA成员广泛代表各界

个人、企业及机构，其业务直接或间接涉及专利、商标、版权、商业秘密、及反不正当竞争法，以及影响知识产权的其它法律领域。我们的会员既代表知识产权所有权人，也代表知识产权使用者。我们的使命包括帮助建立和维护公平有效的全球法律政策，以促进奖励发明创造，同时平衡公众利益，达到良性竞争、费用合理、和基本公正。

Because of the limited time to prepare comments, AIPLA submits the following brief observations on the AUCL. AIPLA would welcome the opportunity to prepare more detailed comments in the future and to discuss with you the AUCL and any of these comments. We are grateful for this opportunity to submit these comments.

由于准备时间有限，AIPLA 对《反不正当竞争法》提出以下简短的意见。AIPLA 期待能有机会准备更详尽的意见，并能与贵方进一步探讨《反不正当竞争法》以及我们的观点。我们很感谢这次有机会提出以下意见。

AIPLA offers the following observations.

AIPLA 有下面几点看法。

Article 2

Article 2 directs business operators to “follow the principles of voluntariness, equality” and other principles in market transactions. While AIPLA agrees with the listed principles, it is concerned that the term “equality” could be interpreted to mean absolute equality without regard to how differing parties may be situated; in the context of IP rights, this would be irrespective of whether a party is an existing licensee or a willfully infringing party. AIPLA respectfully suggests replacing “equality” with “non-discriminatory as to similarly situated parties” to avoid this possibility.

第二条指导经营者在市场交易中“遵循自愿、平等的原则”以及其他原则。尽管 AIPLA 认同所列出的原则，但 AIPLA 担心“平等”一词可能被理解为绝对平等而不考虑不同方所处的境况；在知识产权的背景下，即为不考虑一方是被许可者还是故意侵权者。AIPLA 建议将“平等”替换为“不歧视处于相似境况的当事方”以避免上述可能存在的问题。

Article 2 defines the term “unfair competition” as using “unfair methods in market transactions, harming the lawful rights and interests of other business operators, disturbing market order.” AIPLA is concerned that the definition may be read as a series of three independent acts—(1) using unfair methods, (2) harming lawful rights, and (3) disturbing market order. This reading would suggest that harming lawful rights itself may suffice as an act of unfair competition, even if the methods used were not unfair and do not harm lawful rights. Most legal competitive acts will cause harm to other business operators in some manner. AIPLA thus respectfully requests a clarification that unfair competition requires the use of “unfair methods” to harm rights and disturb markets.

第 2 条将“不正当竞争”定义为“以不正当手段从事市场交易，损害其他经营者的合法权益，扰乱竞争秩序”的行为。AIPLA 担心此定义可能被解读为一系列三个独立的行为 -

(1) 使用不正当手段从事市场交易， (2) 损害合法权益， (3) 扰乱竞争秩序。 这种解读可能意味着，即使使用的手段并非不正当，也不扰乱竞争秩序， 损害合法权益本身就可能足以构成不公平竞争行为。大多数的合法竞争行为都会以一定形式损害到其他经营者。因此，AIPLA 建议在本条中澄清，不公平竞争需要使用“不正当手段”来损害权利和扰乱市场。

AIPLA is also concerned that the concept of “disturbing market order” is inconsistent and incompatible with the fundamental objectives of the Anti-Monopoly Law (“AML”) to safeguard competition and to promote the development of a market economy. Therefore, AIPLA also respectfully recommends that the phrase “disturb market order” be deleted, or replaced with “undermining fair market competition,” in the definition of “unfair competition.”

AIPLA 也担心“扰乱竞争秩序”的概念与反垄断法（“AML”）的既保护竞争又促进市场经济发展的根本目的既不一致也不相配。因此，AIPLA 还建议在“不正当竞争”的定义中删除“扰乱竞争秩序”的说法，或者用“损害正当市场竞争”来替代。

Articles 3 and 4

AIPLA is concerned that permitting multiple tiers of government to enforce the unfair competition law could result in inconsistent application of the law by various authorities, e.g., at the county level. AIPLA recommends leaving enforcement of the law to certain high level authorities, or providing some mechanism to ensure consistency in approach between different governmental authorities.

AIPLA 担心允许多级政府执行反不正当竞争法可能造成不同机构（例如县级机构）执法不一致。AIPLA 建议由一定级别的国家机关进行执法，或采取措施保证不同政府机关处理方式的一致性。

Article 6

In its preliminary statement, Article 6 attempts to identify “unfair tactics” to engage in the market transactions, which is laudable. AIPLA suggests that the term “well known” be defined with reference to well-known marks as determined under the trademark law. Further, not all uses of another’s name are unlawful or even commercially confusing. For example, fair use of a registered brand is recognized as not infringing and may be fair use of the mark. AIPLA thus suggests that Article 6 be revised to recognize that there are certain lawful ways to use another’s name (abbreviations, full names, pen names or stage names) when accurately referring to that company, such as for comparison purposes or commentary.

第六条的序言试图确定参与到市场交易中的“不正当策略”，这是值得赞扬的。AIPLA 建议对“驰名”一词根据商标法确定的驰名商标加以界定。此外，不是所有使用他人名称的行为都是不合法的或甚至都是在市场中令人混淆的。例如，合理使用注册品牌被认定为不侵权，并且是商标的合理使用。因此，AIPLA 建议将第六条加以修改，承认在准确提及及其他公司时，例如出于比较或评述目的，存在某些合法方式使用他人的名称（简称、全名、笔名或艺名）。

Article 7

Article 7 permits business operators to provide discounts to trade counterparts or commissions to intermediaries. AIPLA suggests clarifying the provision to ensure that such discounts or commissions must reflect lawful consideration for assisting in legitimate business purposes. Further, even if consideration is provided, it should be for a legitimate business purpose and not in furtherance of behavior that would restrain trade unlawfully.

第七条允许经营者向对方提供折扣或者给中间人佣金。AIPLA 建议明确此规定以确保该折扣或佣金必须反映出是对于协助合法交易目的的合法考虑。而且，即使提供考虑，它应该是为了合法的商业目的，而不是促进可能非法限制贸易的行为

Article 8

It is unclear what “false transactions” means. AIPLA suggests that the article would benefit from further clarification as to what “false transactions” means or at least provide an example of a false transaction.

“虚假交易”的意思不清楚。AIPLA 建议进一步明确该条款，提供“虚假交易”的含义或者至少举例说明什么是虚假交易。

Article 9

AIPLA commends these provisions prohibiting business operators from improperly acting to obtain, disclose, etc. “commercial secrets.” This recognizes the value and investment in advancing technology.

AIPLA 欣赏本法条款认识到经营者不应当以不当方式对“商业秘密”采取获取、公开等行为。这认可了发展技术的价值和投入。

To provide clearer protection in such instances, AIPLA supports a proper and clear allocation of the burden of proof in commercial secret matters. Accordingly, we support text from the prior version of the AUCL, which provides that once an entity shows that another is using and had access to the secret information: “the other party shall have the burden of proving that it received the secret from a legitimate source.” AIPLA also suggests appending the following text at the end of that sentence: “such as lawful activities of independent development or reverse engineering, and that its use or disclosure of the information, or allowing others to use or disclose the information, was authorized, such as by the lawful exercise of licensed acquisition or use rights.” Together, the full additional text that AIPLA suggests is: “the other party shall have the burden of proving that it received the secret from a legitimate source, such as lawful activities of independent development or reverse engineering, and that its use or disclosure of the information, or allowing others to use or disclose the information, was authorized, such as by the lawful exercise of licensed acquisition or use rights.”

为了在这种情况下提供更明确的保护，AIPLA 支持适当且合理地分配商业秘密纠纷中的举证责任。因此，我们支持 AUCL 的先前版本中的内容，其规定了一旦一方证明他人正在使用或已经获得了秘密信息，则“其他当事人应当有责任证明其是从合法途径取得该秘密的”。AIPLA 还建议将以下内容添加在上述语句之后：“例如自主开发或逆向工程的合法活动，以及该信息的使用或公开、或允许他人使用或公开该信息是经过授权的，比如通过合法的许可获得或者使用权利”。综上，AIPLA 所建议的完整的附加内容为：“其他当事人应当有责任证明其是从合法途径取得该秘密的，例如自主开发或逆向工程的合法活动，以及该信息的使用或公开、或允许他人使用或公开该信息是经过授权的，比如通过合法运用许可获得或者使用权”。

The user has the information to show that it developed the technology or received and used it rightfully without violating commercial secret rights. It is often impractical for the owner to establish the alleged misappropriation, particularly where compulsory discovery is not available to the rights owner.

使用者理应有证据显示其开发了该技术或者合法获得并使用该技术而没有违反商业秘密权。在实践中所有者常常很难证明所谓的盗用，特别在没有强制取证程序的情况下。

Article 10

See comments to Article 9.

请参见关于第 9 条的意见

Article 11

Article 11 of the draft amended AUCL reinserts Article 12 of the current AUCL with minor changes. It would prohibit bundling and tying of goods against the wishes of the buyers as well as prohibit any “unreasonable conditions” attached to the sale of those goods. This provision appears to overlap significantly with Article 17(5) of the Antimonopoly Law, which prohibits firms with a dominant market position from tying products or imposing other unreasonable trading conditions without valid justification. Proposed Article 11 of the amended AUCL would prohibit tying even when engaged in by firms that do not have a dominant market position and even where there is a valid justification for the tying.

AUCL 修正草案的第 11 条重新引入了稍微改动过的原 AUCL 的第 12 条。此条款禁止违背购买者的意愿搭售商品，并禁止在出售这些商品时附加其他“不合理的条件”。此条款似乎与反垄断法第 17（5）条有很大程度上的重复。反垄断法第 17（5）条禁止具有主导地位的企业在没有有效理由的情况下搭售商品或附加其他不合理的交易条件。AUCL 修正草案所建议的第 11 条扩大适用范围到即使是对于没有主导地位的企业，甚至在有正当理由的情况下，都禁止搭售。

AIPLA welcomes the decision to delete proposed Article 6 of the February 25, 2016 draft that was published for public consultation. That Article would have prohibited, among other conduct, tying

purchases of other commodities without justifiable reasons and attaching other unreasonable trading terms by firms with a “comparative advantage position.” AIPLA recommended in its March 2016 comments that Article 6 be deleted, pointing out that the lack of clarity in that provision and the introduction of a new standard of conduct for firms with a “comparative advantage position” could disrupt procompetitive business conduct and was inconsistent with China’s Antimonopoly Law and international practice.

AIPLA 支持删除公开征求意见的 2016 年 2 月 25 日草案中的第 6 条的决定。该草案第 6 条所禁止的行为包括：在没有正当理由的情况下搭售其他商品，以及拥有“相对优势地位”的公司附加其他不合理的贸易条款。AIPLA 在其 2016 年 3 月给发改委的意见中曾建议删除第 6 条，并指出由于该条款的不明确性及其对具有“相对优势地位”的企业引入的新的行为准则，可能会破坏促进竞争的商业行为，并与中国的反垄断法和国际惯例不一致。

The reinsertion of Article 11 into the amended AUCL suffers from these same problems and concerns. This is even more problematic than the deleted Article 6 of the February 2016 draft in that Article 11 would apply to all firms, regardless of their market position or comparative bargaining position. It would also prohibit tying and the attachment of other “unreasonable conditions” even where justified.

重新将第 11 条加入修改后的 AUCL 将会带来同样的问题，并且可能比删除了的 2016 年 2 月草案的第 6 条问题更大。原因是第 11 条适用于所有公司，不论其市场地位或相对议价地位。并且即使在有正当理由的情况下也禁止搭售和附加其他“不合理的条件”。

Article 11 appears to be inconsistent with the objectives set out in the Explanatory Note accompanying this draft amended AUCL to avoid overlap with the Antimonopoly Law and to maintain the coherence of the law.

第 11 条似乎不符合本 AUCL 修正草案所附的解释性说明中规定的目标——以避免与“反垄断法”重复，并保持法律的一致性。

The draft Guidelines for Anti-Monopoly Enforcement against Abuse of Intellectual Property Rights issued by the State Administration for Industry and Commerce (“SAIC”) in February 2016 recognize that tying may have beneficial and procompetitive effects in the market. SAIC makes clear in Article 25 of those draft Guidelines that tying “may produce positive influence on the competition and efficiency improvement on the relevant market, as it can ensure product quality and safety, reduce the cost of sale and management, and promote sales.” Those draft Guidelines provide that many factors should be taken into account before determining that particular tying practices have a harmful effect on market competition. Article 5 of those draft Guidelines set out a robust and useful analytical framework – similar to a Rule of Reason approach – for determining whether tying or certain unreasonable transaction terms listed in Article 27 of those Guidelines should be deemed to violate the Antimonopoly Law.

SAIC’s recognition of the potential benefits of tying and other transaction terms, and of the need to use an analytical framework based on the Rule of Reason before determining that such terms

should be found to be harmful and unlawful, is consistent with international norms. Unfortunately, these provisions are not reflected in the proposed Article 11 of the amended AUCL. In light of the open-ended prohibition against attaching “unreasonable conditions” in Article 11, the absence of a rule of reason-based analytical framework is likely to restrict the procompetitive use of auditing, reporting, cross-licensing, and a wide variety of other commercial terms that are generally accepted under international norms of business behavior.

国家工商总局（“SAIC”）于2016年2月发布的“关于滥用知识产权的反垄断执法指南”草案指出，搭售可能在市场上产生有益的并促进竞争的影响。国家工商总局在指南草案第25条中明确指出，“搭售也可能对相关市场的竞争和效率改进产生有利影响，主要表现为可以保证产品质量和安全、降低销售和管理成本、促进销售”。这些指南草案规定，在决定具体的搭售做法是否会对市场竞争产生有害影响之前，应考虑许多因素。2016年2月指南草案的第5条提出了一个强有力的并且实用的分析框架 - 类似于理性规则的方法 - 用于确定这些指南第27条所列的搭售或某些不合理交易条件是否应被视为违反“反垄断法”。

这些SAIC所意识的搭售和其它交易条款的潜在好处，以及对使用基于理性规则的分析框架来确定这些交易条款是否有害与非法的需要，是符合国际规范的。但是，这些条款却并未在所建议的AUCL修正草案第11条体现出来。鉴于本修改草案在第11条中不加限制地禁止了附加“不合理的条件”，缺乏一个基于理性规则的分析框架将有可能限制使用审计，报告，交叉许可，以及各种其他在国际商业行为准则下被普遍接受的商业条款来促进竞争。

The fact that there are no penalties provided for in the AUCL for violations of Article 11 does not eliminate AIPLA's concerns about this provision. Firms must still be concerned about private damages litigation, as provided for by Article 20 of the draft amended AUCL, which would include violations of Article 11. And the conflicting standards between Article 11 and its counterparts in Article 17 of the Antimonopoly Law will create uncertainty and disruption for enterprises in their efforts to avoid civil damages litigation.

虽然AUCL没有明确规定违反第11条的相关处罚，但这并未消除AIPLA对这一条款的顾虑。由于修正后的AUCL草案第20条包括了违反第11条所指出的行为，所以企业仍旧必须担心民事赔偿诉讼。第11条与其对应的“反垄断法”第17条之间不一致的标准将导致法律的不确定性，并将影响企业在避免民事赔偿诉讼方面的努力。

For the above reasons, AIPLA respectfully recommends that Article 11 be deleted from the draft AUCL.

基于上述原因，AIPLA建议从AUCL草案中删除第11条。

Article 12

AIPLA suggests that there should be a higher limit for the prize prohibition in subsection (3) for drawing-style prizes (20,000 RMB, which is a little under \$3,000 USD) or that there be a process to appeal the drawing-style prize limit to a board or judiciary prior to the initiation of the drawing.

AIPLA 建议，对于该条第三项中的抽奖式的有奖销售（最高奖的金额二万元人民币，即略低于三千美元），最高奖的金额应该有更高的限制，或者提供一个允许在开始抽奖销售之前到相关的委员会或司法机构申请提高最高奖限额的程序。

Article 13

AIPLA commends the prohibition against false advertising in Article 13.

Article 14

AIPLA is concerned that this provision is not clear. AIPLA suggests providing examples of acceptable and unacceptable “inserting links.”

AIPLA 担心本条款不是十分清楚，建议举例说明合法的“插入链接”和不合法的“插入链接”。

Article 15

Article 15 of the AUCL provides that the administrative department of industry and commerce under the State Council, alone or with other departments, will research and submit opinions to the State Council regarding whether to designate other unfair competition acts “which seriously disrupt the order of competition and truly need to be investigated.” The Article, however, does not identify any criteria that will be used to determine whether an act would “seriously disrupt” market order. AIPLA suggests including a provision for public comment on any proposed designation of new acts of unfair competition that would be deemed to violate the AUCL.

反不正当竞争法第 15 条规定，国务院工商行政管理部门可以单独或联合其他部门就特定的其他不正当竞争行为是否“严重破坏竞争秩序、确需查处的市场交易行为”进行研究而且向国务院提交意见。然而本条并未提供如何判定一项行为是否可被视为“严重破坏”市场秩序的标准。AIPLA 建议包括一条听取公众意见以对任何新提出的不正当竞争行为是否视为违反不正当竞争法进行评判的规定。

The Article creates the uncertainty that proper application of competition law seeks to avoid because otherwise procompetitive conduct could be subject to challenge, and competition will, in fact, be lessened by such a law. AIPLA respectfully submits that the proposed law is indefinite. Absent greater definition of the proscribed conduct, the law may inhibit parties from engaging in normal business activities under international norms of commerce. Moreover, it would tend to inhibit parties from trading in China out of the fear that liability would be imposed, particularly if it is to be applied retroactively and without advance notice.

本条会产生竞争法应避免的不确定性，因为原本促进竞争的行为也可能受到挑战，竞争实际上会被本法消减。AIPLA 谨指出目前的提案不够明确。缺乏对禁止行为更强的限定，可能会产生本法禁止企业在国际商业准则下参与正常商业活动的情况。此外，由于担心可能负担的责任，尤其是追加没有事先通知的责任，可能会抑制企业在华贸易。

Article 16

AIPLA is concerned that the proposed law, as written, could have a chilling effect on lawful business activity in China. This article could be interpreted as being harsher than current laws governing suspected criminal behavior in China. In either case, the accused should be afforded due process protections throughout the investigation while the suspected conduct is investigated.

AIPLA 担心按草案现在的写法，对中国境内合法商业活动可能会产生冷却效果。这个条款可以解释为比在中国关于涉嫌犯罪行为的现行法律更严厉。在任何情况下，在调查可疑行为的整个期间应为被调查者提供正当程序保护。

For example, “reproducing” agreements, account books, invoices, documents, records, business correspondence or other materials related to the suspected acts of unfair competition should either be by a court order (e.g., subpoena authority) or through discovery process between litigating parties. Also, the ability to seal or seize assets related to suspected acts of unfair competition should only be pursuant to a court order or a customs enforcement action. Such protections would be consistent with the protections afforded by the Administrative Punishment Law of PRC and the Administrative Compulsion Law of the PRC.

例如，复制与涉嫌不正当竞争行为有关的协议、帐册、单据、文件、记录、业务函电和其他资料时建议应当事先取得法院判令（如：传票）或经过诉讼双方调查取证程序。而且，查封或没收涉嫌不正当竞争的财物只能经由法院判令或海关执法。这种保护将符合“中华人民共和国行政处罚法”和“中华人民共和国行政强制法”规定的保护。

It is also unclear as to who or what comprises the “supervision and inspection departments.” Clarification is suggested as to the identity of such departments not only the use of the phrase in Article 16, but also for uses of the phrase in other Articles as well.

对于哪些部门是“监督检查部门”也不明确。建议在第16条及其他条款中阐明监督检查部门的身份。

AIPLA respectfully submits that the authority to act on mere suspicion creates uncertainty and is inconsistent with international norms. AIPLA believes it invites inconsistent enforcement actions that are not adequately based on evidence or a reasonable suspicion of wrongdoing. AIPLA suggests that requiring a court order or customs enforcement for seizure would provide appropriate predictability and ensure that seizures are based on competent evidence.

AIPLA 恭敬地指出，政府部门纯粹因为怀疑而采取行动会造成不确定性，也与国际惯例不相符。AIPLA认为，它会导致不一致的执法行动，这些行动不足以基于证据或合理怀疑不当行为。AIPLA建议要求法院命令或海关强制执行扣押将提供适当的可预测性，并确保扣押基于充分的证据。

Article 17

AIPLA commends the National Peoples' Congress for identifying controlling regulations. The proposal, however, identifies numerous regulations only by class and fails to resolve what rules apply and what rules apply, specifically, in the event of a conflict between various agencies that have jurisdiction. AIPLA recommends that one agency (for example, SIAIC) be given primary authority and its regulations govern.

AIPLA 赞同人大指定应当遵守的法规。然而，该草案仅仅通过类别指出许多规章，并未解决什么具体规则适用，特别是在有管辖权的各个部门之间发生冲突的情况下。AIPLA 建议给予一个部门（例如 SAIC）主管权，由其部门法规主导。

Article 18

Article 18 provides that supervision and inspection departments should “promptly disclose to the public the situations of the inspections and the results of the handling” resulting from randomly selected unfair competition inspection targets. AIPLA is concerned that this provision could yield an unintended consequence of providing for authorities to disclose a legitimate business operator's confidential information merely because it was the subject of a random inspection. As written, the law may inhibit parties from engaging in normal business activities under international norms of commerce and would tend to inhibit parties from trading in China out of the fear that confidential information may be disclosed. AIPLA suggests clarifying the provision to avoid this consequence.

第 18 条规定监督检查部门对于随机抽取的不正当竞争检查对象，其“抽查情况和查处结果”应当“及时向社会公开”。AIPLA 担心由于检查对象随机，此规定可能会带来披露合法商业经营者保密信息的意外后果。按草案现在写法，本法可能抑制企业按国际商业惯例参与正常商业活动且由于担心保密信息会泄露，可能会抑制企业在华贸易。AIPLA 建议澄清本规定以避免上述情况产生。

Article 20

AIPLA commends the availability of “civil responsibility.” The competitor that is most affected by the unfair competition has the best access to evidence and the motivation to enforce the applicable rules and regulations. AIPLA commends that the regulation is clear that the competitor who is adversely affected by the alleged unfair competition have the ability to do so by civil action and that civil administrative enforcement is not the only available civil remedy.

AIPLA 赞同要付“民事责任”。受不公平竞争影响最大的竞争对手有获得证据的最佳途径以及实施适用规则和法规的动力。AIPLA 赞同该条例明确规定，受到所谓不公平竞争影响的竞争对手有能力通过民事诉讼这样做，而且民事行政执法不是唯一可用的民事补救办法。

Article 21

Article 21 proscribes a fine that is based on a multiple of "illegal revenue," and that where the circumstances are "serious," a business license may be revoked. Both can be severe penalties for a company, especially when combined with potential civil remedies. It is unclear what the term "illegal revenues" refers to which makes the penalty uncertain, what time period for "illegal revenues" would be used to calculate the penalty, or how an "illegal" portion of revenues is determined. It is also not clear what standard will be applied to determine whether a circumstance is "serious," e.g., whether it requires a finding of intent.

第 21 条规定以违法经营额的倍数判以行政罚款，情节“严重”的，将吊销营业执照。两项处罚对经营者可能都很重，尤其当与潜在的民事补偿累加在一起时。什么是“违法经营额”也不是很清楚，致使惩罚数量不确定。如何确定“违法经营额”发生的时间以计算罚款金额以及如何确定经营额中的“违法”部分，也不清楚。还有不清楚的地方是界定“严重”情形的标准是什么，例如是否需要违法意图。

AIPLA recommends that Article 21 be amended to specify the specific factual findings that would trigger a fine or license revocation, and to clarify the meaning of the term "serious," in this Article and in others where the term is used. AIPLA also recommends amendment of the fine structure for Article 21 and clarification of "illegal revenues" as used in that provision. Further, AIPLA recommends that any revenues from the unfair competition are recoverable by the complainant only to the extent that the illegal revenues are attributable to the acts of unfair competition and not to other reasons.

AIPLA 建议修改第 21 条具体规定触发罚款或吊销营业执照的具体事实发现并澄清本条和其他条款中“严重”一词的含义。AIPLA 也建议修改第 21 条的罚款结构，澄清其中“违法经营额”的含意。此外，AIPLA 建议，不正当竞争的收入可以由申诉人收回，但是只有归因于不正当竞争行为而不是其他原因的非法收入。

Article 22

See comments to Article 21 regarding "serious."

见第 21 条关于“严重”的评论。

Article 24

See comments above to Article 9.

请参见上述关于第9条的意见。

* * *

AIPLA appreciates the opportunity to provide these comments in response to the Anti-Unfair Competition Law of the People's Republic of China. Please contact us if you would like us to provide additional information on any issues discussed above.

AIPLA 再次感谢这次对《中华人民共和国反不正当竞争法》提供上述意见的机会。如果您希望我们就以上所讨论的问题提供进一步信息和意见，请与我们联系。

Sincerely Yours,
此致

A handwritten signature in cursive script that reads "Mark L. Whitaker".

Mark L. Whitaker
President
American Intellectual Property Law Association
美国知识产权法律协会会长