

OVERVIEW OF NATIONAL AND REGIONAL TRADE SECRET SYSTEMS

JAPAN

1. Sources of Law

Under the Unfair Competition Prevention Act (U CPA)¹, misappropriation of trade secrets is considered as a specific type of acts that constitute unfair competition, subject to civil and/or criminal remedies.²

2. Definition of a trade secret

According to Article 2(6) of the U CPA, the term “trade secret” as used in that Act means technical or business information that is:

- kept secret;
- useful for business activities, such as manufacturing or marketing methods; and
- not publicly known.

3. Scope of trade secret protection

According to Article 2(1)(iv) to (ix) U CPA, certain ways of acquiring, disclosing, and using trade secrets are considered as acts of unfair competition:

- (a) acquiring trade secrets by theft, fraud, duress, or other wrongful means (hereafter referred to as an “act of wrongful acquisition of trade secrets”);³
- (b) using or disclosing trade secrets acquired through an act of wrongful acquisition (including their disclosure in confidence to a specific person);⁴
- (c) acquiring trade secrets with the knowledge, or gross negligence in not knowing, that there has been an intervening act of wrongful acquisition of those trade secrets;⁵
- (d) using or disclosing trade secrets acquired in a manner as described in item (c), above;⁶
- (e) acquiring trade secrets with the knowledge, or with gross negligence in not knowing, that there has been an act of improper disclosure of those trade secrets or an intervening act of improper disclosure of those trade secrets;⁷
- (f) using or disclosing trade secrets acquired in a manner as described in item (e), above;⁸

¹ See legislation (up to the amendment by Act No. 48 of May 28, 2022) in original language and translation at: <https://www.wipo.int/wipolex/en/legislation/details/19229>. The U CPA was last amended by Act on Partial Revision of the Unfair Competition Prevention Act and Other Acts (Act No. 51 of June 14, 2023).

² This document aims to provide an overview (June 2024). It is not a complete review of the legal situation and case law. For further information, interested readers may consult: Iida, Kei, Trade Secrets - Japan (2021), *les Nouvelles - Journal of the Licensing Executives Society*, Volume LVI No. 2, June 2021, Available at SSRN: <https://ssrn.com/abstract=3832107>; Kazuko Matsuo, in Trade Secrets throughout the World (Jager, *et al.*), 2023, Chapter 23 Japan.

³ See Article 2(1)(iv) U CPA.

⁴ See Article 2(1)(iv) U CPA.

⁵ See Article 2(1)(v) U CPA.

⁶ See Article 2(1)(v) U CPA.

⁷ See Article 2(1)(viii) U CPA.

⁸ See Article 2(1)(viii) U CPA.

- (g) using or disclosing trade secrets, after having acquired those trade secrets and thereafter learning, or with gross negligence in not learning, that there had been an intervening act of wrongful acquisition of those trade secrets;⁹
- (h) using or disclosing trade secrets, after having acquired those trade secrets and thereafter learning, or with gross negligence in not learning, that there had been an act of improper disclosure of those trade secrets or an intervening act of improper disclosure of those trade secrets.¹⁰
- (i) using or disclosing trade secrets disclosed by the trade secret holders, for the purpose of wrongful gain or causing damage to the trade secret holders;¹¹

In addition, with respect to trade secrets that constitute technical information, the act of transferring, delivering, displaying for the purpose of transfer or delivery, exporting, importing, or providing through a telecommunications line, things created by the acts referred to in items (a) to (i), above, consists of an act of unfair competition. However, it is not an act of unfair competition if a person who received such things by transfer etc. had, at the time of reception, no knowledge that they were created by an act of unauthorized use and such lack of knowledge was not due to gross negligence.¹²

As an exception to the above principle, in accordance with Article 19(vii), if good-faith recipients acquired trade secrets through a business transaction (such as a license), they are allowed to use or disclose those trade secrets within the scope of that transaction, for example, the execution of that license, regardless of their knowledge of previous misappropriation of the trade secret so acquired.

4. Exceptions

Freedom of expression, employees' rights and trade union activities, qualified privilege, statutory duty or authority, for example, are regulated in other laws or protected under the Constitution.

5. Civil remedies

Against certain acquisition, disclosure and use of trade secrets that are considered as acts of unfair competition,¹³ an injunction may be claimed. In accordance with Article 3(1) UCPA, a person whose business interests have been misappropriated, or are likely to be misappropriated, through unfair competition may claim injunctions in order to prevent or suspend the misappropriation. The injunction claim can be combined with a claim of destruction, removal of things that constitute the misappropriation, or other actions necessary for suspending or preventing the misappropriation.¹⁴

A preliminary injunction is possible according to the Civil Provisional Remedies Act.¹⁵

According to Article 4 UCPA, a trade secret holder may claim damages from a person that intentionally or negligently misappropriates the business interests of another person through unfair competition. Specificities on the calculation of the damages are found in Article 5 UCPA.

⁹ See Article 2(1)(vi) UCPA.

¹⁰ See Article 2(1)(ix) UCPA.

¹¹ See Article 2(1)(vii) UCPA.

¹² Article 2(1)(x) UCPA.

¹³ See Article 2(1)(iv) to (x) UCPA.

¹⁴ With further details in Article 3(2) UCPA.

¹⁵ Available in English at. <https://www.japaneselawtranslation.go.jp/en/laws/view/3928/en>.

A trade secret holder whose business reputation has been harmed due to misappropriation may require the infringer to take necessary measures to restore holder's business reputation, either in place of or in addition to compensation for damages.¹⁶

6. Criminal sanctions

Article 21(1) UCPA provides for criminal sanctions regarding certain act of trade secret misappropriation. The punishment will either be imprisonment with the required labor for not more than ten years or a fine of not more than twenty million yen, or both. It is noted that certain acts of trade secret misappropriation are also punished by either imprisonment with the required labor for not more than ten years or a fine of not more than thirty million yen or both, if done for the purpose of use outside Japan, or knowing that the receiving party has the purpose of use outside Japan.¹⁷ Certain attempts at trade secret misappropriation are also punishable.¹⁸

7. Trade secret protection in judicial proceedings

According to Article 10 UCPA, a party holding a trade secret may request the court, in certain circumstances, to order another party, counsel, or an assistant in court not to use the trade secrets contained in briefs or evidence for any purpose other than conducting the litigation, or to disclose them to any person other than one subject to the order. Such court orders are not granted, if the party/attorney or assistant in court, at the time of the request, had already acquired or owned the trade secret by means other than the reading of the brief or the examination or disclosure of evidence prescribed in Article 10(1)(i).

The court may, under the circumstances described in Article 13 UCPA, hold a non-public examination of a party as a party, a statutory representative, or a witness with regard to matters that relate to trade secrets and misappropriation thereof.

In addition, under general civil procedure law, a party may file a request to the court to permit only the parties to the case to inspect or copy the case record that contains his/her trade secrets.¹⁹

Protective rulings assure trade secret protection in criminal proceedings (Article 23 UCPA).

8. Procedural provisions

According to Article 5-2 of the UCPA, misappropriation is presumed for trade secrets consisting of technological information, if the trade secret holder (plaintiff) proves certain facts prescribed in that Article. Specifically, of this presumption applies when the plaintiff's trade secret is technical information, such as manufacturing methods, and the defendant produces things that could be produced by using such technical trade secrets. In addition, to shift the burden of proof, the plaintiff shall prove one of the following facts:

- (i) The defendant conducts an act of wrongful acquisition of the trade secret referred to in Article 2(1)(iv), (v) or (viii);
- (ii) Following the disclosure of the trade secret from the trade secret holder to the defendant, the defendant misappropriates the trade secret for the purpose of obtaining wrongful gain or to cause damage to the trade secret holder, the defendant misappropriates the trade secret information in breach of the duties

¹⁶ Article 14 UCPA.

¹⁷ See with further details in Article 21(3) UCPA.

¹⁸ Article 21(4) UCPA.

¹⁹ Article 92 of the Code of Civil Procedure. Available in English at:
https://www.japaneselawtranslation.go.jp/en/laws/view/2834/en#je_pt1ch5sc1at6.

pertaining to the management of that trade secret, by means of:

- misappropriation of a medium containing the trade secret;
 - reproducing a description or a record from a medium containing the trade secret or an object that represents the trade secret;
 - not deleting a description or a record that should be deleted from a medium containing the trade secret, and disguising such act as if it had been deleted;
- (iii) The defendant retains a device storing the trade secret, or a product, or a source identification code relating to the trade secret, after having learned, or through gross negligence in not having learned, subsequent to the acquisition of the trade secret, that there had been:
- an intervening act of wrongful acquisition of the trade secret;
 - an improper disclosure of the trade secret; or
 - an intervening act of improper disclosure of the trade secret.

Regarding the statute of limitations, Article 15 of the UCPA specifies that injunction and/or damages claims can be brought to court within three years from the time when the trade secret holder came to know of the misappropriation. Further, the trade secret holder cannot exercise their right when 20 years have elapsed from the time when the misappropriation began.²⁰

Article 19-2 UCPA addresses international jurisdiction for trade secret misappropriation cases. Where a trade secret holder operates in Japan and controls its trade secrets in Japan, an action against misappropriation of such trade secrets referred to in Article 2(1)(iv), (v), (vii) and (viii) may be filed before a Japanese court in accordance with Article 19-2 UCPA and the relevant provisions²¹ concerning international jurisdiction under the Code of Civil Procedure.

²⁰ Article 19(1)(viii) UCPA also clarifies that the statute of limitation also applies to improper transfer, delivery, export etc. of things created by using misappropriated trade secrets.

²¹ See the Code of Civil Procedure, Part I, Chapter 2, Section 1.