

China's Infringement of Trade Secrets in the Aggravating Circumstances Proof Ideas

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Abstract

The perpetrator of the infringement of trade secrets to the right of the trade secrets caused by the seriousness of the circumstances is one of the elements of the crime of infringement of trade secrets, seriousness of the circumstances is also considered to be an important judgment of the crime of infringement of trade secrets and non-crime the basis. In this paper, through the crime of infringement of trade secrets for empirical research, the infringement of trade secrets in the judicial application of the widely concerned about the value of the determination of trade secrets, seriousness of the calculation method, the judicial identification of trade secrets and other issues to discuss.

Keywords: trade secret offences, aggravated circumstances, ideas for proof

1. Judicial Determination of Aggravating Circumstances in the Crime of Infringement of Trade Secrets

According to Article 219 of the Criminal Law of the People's Republic of China, the implementation of trade secret infringement, the circumstances are serious, constitutes the crime of infringement of trade secrets. Can be determined is that the crime of infringement of trade secrets is the result of the crime, serious circumstances is the composition of the elements of the crime of trade secrets. At the same time, article 219 of the trade secrets and the *unfair competition law* of the trade secrets definition is identical, for the infringement of trade secrets of the act also basically the same. In this way, the amount of serious circumstances becomes the only standard for the division of civil infringement and criminal offences. In other words, the calculation of the amount of aggravating circumstances in Article 219 assumes the function of distinguishing between crimes and non-crimes.

In early 2020, China and the United States signed the *Economic and Trade Agreement between the Government of the People's Republic of China and the Government of the United States of America* (the 2020 U.S.-China Economic and Trade Agreement), which requires China to lower the threshold of criminalization for the crime of infringement of trade secrets. The agreement requires China to lower the threshold for trade secret infringement. The Supreme People's Court and the Supreme People's Procuratorate then issued the *Interpretation of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues Concerning the Specific Application of Law in Handling Criminal Cases of Infringement of Intellectual Property Rights (III)* (the *Judicial Interpretation of Criminal Intellectual Property Rights (III)*) on September 12, 2020, which lowered the criminal threshold for infringement of trade secrets. The interpretation of the infringement of trade secrets—significant loss amount, from 500,000 yuan down to 300,000 yuan, but also provides that the direct cause of trade secret rights holders The bankruptcy, closure due to significant operational difficulties and cause other significant losses to the trade secret rights holders and other two circumstances, constituting a significant loss to the trade secret rights holders.

After the introduction of the *Intellectual Property Criminal Interpretation (III)*, the amount of loss or the amount

of illegal income for the criminal offence of infringement of trade secrets, the people's court to determine whether the infringer caused significant loss, can be based on the implementation of the Criminal Law Article 219 of the amount of loss caused by the act or the amount of illegal income to determine. In the civil dispute of infringement of commercial secrets, the main basis for the determination of seriousness is the relevant provisions of the *Provisions of the Supreme People's Court on the Application of Law to the Trial of Civil Cases of Infringement of Commercial Secrets* (hereinafter referred to as *Commercial Secrets Provisions*), namely, when the people's court determines the amount of compensation, it shall refer to the commercial secret's The commercial value of the commercial secret or the license fee of the commercial secret, where the commercial value of the commercial secret reference factors include research and development costs, the implementation of the proceeds of the commercial secret, the available benefits, the time to maintain a competitive advantage, etc.

2. The Aggravating Circumstances of the Crime of Infringement of Trade Secrets

This paper retrieved 183 legal documents by searching the key words infringement of trade secrets through judicial cases of Beihang University, excluding the ruling, decision and other legal documents that did not form the substantive judgment, a total of 78 criminal judgments were retrieved, and through the study of 78 criminal judgments of infringement of trade secrets, the following conclusions were drawn.

Table 1. Infringement of trade secrets aggravating circumstances judicial determination of the case excerpt.

NO	Case number	Trial court	Review level	Referee gist	Sentencing fines
1	(2020) Su 0411 Xing Chu No. 68	People's Court of Changzhou High-tech Industrial Development Zone, Jiangsu Province	first instance	Calculated by loss: The production cost of a single centrifuge was calculated to be RMB 33,847.30, and a total of 134 centrifuges were sold, resulting in a total sales revenue of RMB 19,230,000. To sum up, it can be concluded that the sales behavior of Bai heng Company caused a total loss of RMB 1,425,582.08 to Jin yuan Company.	Fixed-term imprisonment and a fine of RMB 650,000.
2	(2020) No. 151, Xing Chu, Xiang 0408	People's Court of Zhengxiang District, Hengyang City, Hunan Province	first instance	Calculated in terms of losses: The company's official labor cost loss in August 2019 was RMB 1,407,039 due to the company's salary adjustment due to trade secret violations.	Because the loss of labor costs was not related to the criminal suspect, the court did not recognize it and sentenced him to fixed-term imprisonment and a fine of 10,000 yuan.
3	(2019) Yu 1502 Xing Chu No. 250	People's Court of Laihe District, Xinyang City, Henan Province	first instance	Calculated by profit: The two defendants used the acquisition of the victim's laptop to obtain the source code, database table structure and related customer information of the victim's confidential measures by improper means, and then applied the technical information and business information to build their own network. The platform, which	1. Defendant 1: fixed-term imprisonment and a fine of 3 million yuan. 2. Defendant 2: fixed-term imprisonment and a fine of 2.7 million yuan. 3. The total illegal

				sells the same products as the victim unit, makes a profit of 2.625807 million yuan when it is seized.	proceeds of 2.6258 million yuan were recovered and returned to the victim.
4	(2021) Jing 01 No. 255 Xingzhong	Beijing Higher People's Court	second instance	By profit: The sincere money paid by Life Menu Company to Mr. Sun in this case should be identified as the illegal income of Mr. Sun infringing business secrets, and the illegal income of Mr. Sun should be determined to be at least 2.99 million yuan. In addition, the salary of 470,000 yuan paid by Life Menu Company to Sun Moumou was included in Sun Moumou's illegal income.	Imprisoned and fined 3 million yuan.
5	(2021) Zhejiang 02 Xingchu No. 35	Ningbo Intermediate People's Court, Zhejiang Province	first instance	1. Calculated by gross profit: The amount of loss is: the sales volume of the infringing digital mixer (1205) × the unit price of the sound king company product (3736) × the sound king company gross profit rate (52.43 %) × the technical contribution (38.74 %) = 914,300 yuan. 2. Calculated according to the license value: The appraisal report of this case uses the cost method and the income method to evaluate the virtual license value, which are 11.435 million yuan and 1.82 million yuan respectively. Finally, the income method is used to determine the virtual license value of 1.82 million yuan. as an opinion.	The two defendants were sentenced to fixed-term imprisonment and fined a total of RMB 2.1 million.
6	(2013) Zhu Zhong Fa Xing Zhong Zi No. 87	Intermediate People's Court of Zhuhai City, Guangdong Province	second instance	1. Calculated by expected profit Because Jiangxi Yibo Company refused to provide the company's production and sales financial information, the public security organs were unable to obtain relevant evidence of the illegal interests obtained by the appellant Jiangxi Yibo Company and Zhongshan Ward Company infringing trade secrets. For this reason, the economic loss of the trade secret owner can be	The six defendants were sentenced to fixed-term imprisonment and fined a total of 36 million yuan.

				calculated based on the expected profit lost by the owner of the trade secret. The number of products sold by Jiangxi Yibo Company of the same model as that of Zhuhai Senna Company × the average gross profit margin of the corresponding model products of Zhuhai Senna Company and the economic loss of Zhuhai Senna Company.	
7	(2021) Hu 03 Xing Zhong No. 60	Shanghai Third Intermediate People's Court	second instance	1. Calculated by sales amount Defendant Zhang Yan violated the requirements of the right company to keep trade secrets. After leaving the company, he set up a company with others, disclosed and used the trade secrets he had, and developed infringing software, with a sales amount of more than 4.3 million yuan.	The defendant was sentenced to fixed-term imprisonment and fined 2 million yuan.

2.1 The Infringer's Infringement of Profits to Determine the Aggravating Circumstances

The most used calculation method in practice is to determine the aggravation of the infringement by the infringer's profits. Due to the complexity and diversity of actual cases, there are three main ways to calculate the benefit in different courts:

2.1.1 To the Infringer's Direct Profit to Determine the Seriousness of the Circumstances

To sun moumou infringement of trade secrets case (2021) Beijing 01 sentence end 255 as an example, the Beijing high people's court that life menu company in this case paid to sun moumou's good faith money should be identified as sun moumou infringement of trade secrets illegal income, found that sun moumou illegal income of at least 2.99 million yuan, in addition, also will Life menu company to Sun paid 470,000 yuan of wages into Sun's illegal income, the two parts of the amount together constitute Sun's infringement amount. It can be seen that the Beijing High People's Court in the process of determining the loss of this case, did not provide the digital exchange technology platform of Sunmoumou for licensing fees and other value appraisal, but directly Sunmoumou in the cooperation agreement agreed to good faith money and salary part as the basis for determining the actual profit Sunmoumou, which in this case This is clearly reflected in the amount of fines imposed in this case (a total of 3 million RMB was imposed on Sun).

2.1.2. Determine the Aggravating Circumstances by the Profits from the Sales of the Infringing Products Involved

When the infringer's direct profit amount is not clear, the court will also determine the seriousness of the circumstances by multiplying the sales of infringing products by the average profit rate of the relevant products of the right holder during the same period. For example, in the criminal case of infringement of trade secrets by Jiangxi YiPo Electronic Technology Co., Ltd. and Yu Zhihong, the infringers privately brought into their own companies the information on the procurement of products, sales price system, product costs, etc. of the right holder Zhuhai Saina Company due to their working relationship, thus developing the U.S. price system and European price system for some of the products of the two companies, and to the price lower than that of the right holder Zhuhai Saina Company. The court held that the infringers infringed on the rights of the infringing parties. Therefore, the court in the view that the infringer infringement of trade secrets caused by the loss, in addition to the consideration of the right to the cost of research and development and input, but also includes the right caused by the depreciation of the value of intangible property and the occupation of the product sales market, the latter is specifically reflected in the right to the reduction of profits under normal circumstances. Therefore, when calculating the amount involved in this case, the People's Court referred to the sales amount of the same model of products sold by the infringer to the original customers of the right holder company and the

average sales gross profit rate of the same model of products produced by the right holder company.

2.1.3. The Defendant's Product Sales Revenue Minus Reasonable Costs Was Used to Determine the Aggravating Circumstances

In the case that the victim could not prove the loss and could not account for the cost of research and development, the procuratorial authorities determined that the amount of the crime was determined by the fact that the illegal income of the infringer was the illegal income that the defendant had obtained or deserved. At the same time, considering the defendant's reasonable costs spent in production and sales, the portion was deducted from the sales amount, i.e., the illegal income = gross profit from sales = product sales amount - product sales costs (materials, wages, manufacturing expenses, electricity). The company's management personnel wages, social security, welfare, rent, depreciation of fixed assets and other administrative expenses, even if no production of infringing products also need to spend, the company's overall operating costs, rather than the necessary costs arising from the infringement, not deductible.

For example, Zhejiang Jinmoumou infringement of trade secrets case, because the case is a typical breach of contract infringement of trade secrets, and the defendant did not admit guilt, factual identification and characterization is difficult. The people's procuratorate carefully sorted out the evidence of the whole case, the suspect to the economic loss caused by the company 1.2 million as the base, on the basis of the deduction of the production of the products involved, sales and other reasonable costs of the amount of the final amount of the infringement, according to which the suspect was sentenced to a fixed-term imprisonment and a fine of 700,000 yuan.

In addition, some courts will take the infringer's expected proceeds as the economic loss of the right holder. For example, in the case of (2019) Hubei 05 the criminal case of the first trial procedure No. 2 Qin Moumou infringement of trade secrets, the court held that the corn parent involved belonged to a new plant variety, and the trade secrets embedded in the new plant variety were necessarily of high investment and high risk in the process of its formation. Therefore, the scope of loss caused by the criminal act of infringement of relevant trade secrets should be beneficial to the understanding of the right holder, and should be integrated with the behavior of the infringer and the comprehensive input of the right holder, the cost of confidentiality, the market share and reputation of the trade secret, the possibility of losing competitive advantage, etc. The final people's court to appraise the agency identified the expected revenue should be recognized as the direct economic loss of the right holder. But the practice has not been generally adopted, that is, although the commercial secret can bring economic benefits to the right holder, but the size of the benefit depends not only on whether to use the commercial secret, but also with the sales, promotion and other commercial activities, different commercial subjects use the same commercial secret brought about by the interests of different.

2.2 Determination of Aggravating Circumstances by the Loss of the Right Holder

2.2.1. The Direct Economic Loss of the Right Holder to Determine the Seriousness of the Circumstances

For example, Jin Yiyang infringement of trade secrets, the people's court directly based on the suspect Jin Yiyang violation of confidentiality obligations, the use of its knowledge of the right to the right to the three suppliers to buy the same right to the company's rubber plate, mold and hydraulic press and other materials, equipment, the use of the same process with the right to the company to produce the same magnifying glass into the market sales, resulting in economic losses of the Mingfa company RMB more than 1.22 million yuan to determine the amount of losses caused by this case. Another example is (2016) Guizhou Criminal Case Final No. 593 Peng infringement of trade secrets crime, Ye, Song, Zhao and others in possession of the right holder's supply and sales channels, customer lists, prices and other business secrets and LP/ULPPVA formulation formula, process parameters, scraping film, lamination drawings and other technical secrets, and others colluded to jointly set up a company, violating the confidentiality agreement, relying on the three mastered company technology, The People's Court found that the amount of damages in the case was not sufficient to cover the costs of the products. In this case, the People's Court found that the amount of loss was the same as the economic loss caused by the defendant to Guiyang a technology company 3,754,680,000 yuan.

2.2.2 To the Tortfeasor's Contribution to the Use of Trade Secrets Than to Determine the Seriousness of the Circumstances

For example, the plaintiff originally claimed that the amount of loss caused by the defendant's infringement of its trade secrets was 25,191,642.79 yuan, based on the criminal judgment of the Ganjingzi Court (2013) Gansu Criminal Trial No. 184, which identified the Dalian Kehua Judicial Identification Center The appraisal conclusion made on March 25, 2010, the claimed loss is the infringement loss caused to the defendant during the existence of infringement. The court held that the appraisal conclusion identified the profit as gross profit, the cost deducted is only the cost of materials, is not yet deducted other expenses (such as enterprise marketing and management costs, commodity circulation costs, taxes, etc.) when the profit, so determine the defendant for

infringement of the plaintiff's trade secrets, should also consider the profits obtained by the defendant, the use of the plaintiff's trade secrets obtained by the profits of the case. In which the proportion of the final confirmation of the four plaintiffs for the defendant's infringement of the loss of 2.2 million yuan.

2.2.3. To the Rights of the Trade Secrets of the Research and Development Costs of the Right to Determine the Seriousness of the Circumstances

In the case of the infringement of trade secrets, the People's Court held that the necessary cost loss suffered by the victim company due to the leakage behavior of the three defendants can be calculated according to the necessary cost of re-developing the trade secret involved in the case under the same conditions. The necessary cost calculation of the case is mainly the workload of the developer, support staff and research and development costs.

2.2.4 The License Fee of the Trade Secret is Deemed to be Serious

In most cases, the victim company often difficult to use or disclose the loss caused by the infringer to prove the loss, resulting in the people's court in determining the specific amount of benefits obtained by the infringer use of trade secrets can not be clear, so the people's court that the amount of infringement can be determined through the form of technical cooperation transfer fees of trade secrets, such as in (2007) North Criminal Final Word No. 101 Li Zhiting infringement. The defendant Li Zhiting, as an employee of the victim company, privately signed technical service contracts with other companies during his tenure at the victim work, and the technical service fee was 190,000 yuan. The court considered that the victim company was infringed by the loss or the defendant company because of the use of Li Zhiting disclosure of trade secrets obtained by the benefit is difficult to determine, so the trial court referred to the company's technical cooperation transfer fees and training fees spent for the introduction of technology used to calculate the economic loss of Hongyan company is not inappropriate, the technology transfer fees in this case for 1.86 million yuan, and eventually used to confirm the infringement of trade secrets caused by the victim company. The loss caused by the infringement of trade secrets of the victim company.

2.2.5 The Value of the General Right to Use Trade Secrets to Determine the Seriousness of the Circumstances

In the determination of serious some scholars suggested that the value of the trade secret as the loss of the right holder, in some judgments, the court did adopt this method of identification. For example, in the case of infringement of trade secrets by Yang Bin, the defendant illegally disclosed the trade secrets of the right holder, the court of first instance held that in the absence of evidence to prove that the defendant illegally produced and processed the technology products involved in the case for profit, the value of the general right to use the product know-how as the right holder caused serious circumstances. The reference basis of the seriousness of the circumstances was in accordance with the law.

On the whole, the court determined that the seriousness of the mode of diversified trends, some courts will also be a combination of the above-mentioned ways to determine the infringement of trade secrets caused by the seriousness of the amount. At the same time, the diversification of the identification mode also objectively led to the difficulty of the crime of infringement of trade secrets.

3. Proof of the Crime of Infringement of Trade Secrets Caused by Aggravating Circumstances of the Idea of Proof

3.1 Showing the Reasonable Development Cost of Trade Secrets

For the value of the trade secret itself, the cost of developing and operating the trade secret is the commercial value of the trade secret. The most direct damage suffered by the right holder is the commercial value depreciation caused by the leakage of trade secrets, which eventually leads to the development of trade secrets of the right holder's investment wasted. However, if only refers to the loss of the value of the trade secret itself, and can not cover other actual losses of the right holder. The reasonable cost of the right holder should also include at least four parts: the cost of development, that is, the investment of time, money, labor, salaries, equipment and consumables; the advantages of the product, that is, the use of trade secrets to the real advantages of the right holder, such as technology products brought about by the reduction of labor costs and efficiency improvements; future earnings, that is, the right holder enjoys the advantageous position of trade secrets to The future benefits, i.e., the reasonable expectation of future benefits under the advantageous position of the right holder; and the extra costs for investigating or stopping the infringement of trade secrets, including attorney's fees, notary fees, etc.

3.2 Showing the Sales Data of Infringing Trade Secrets

The Supreme People's Court, the Supreme People's Procuratorate on the handling of criminal cases of infringement of intellectual property rights on the specific application of the law of the interpretation of Article 5 (III) will be clearly the amount of illegal income as the basis for conviction and sentencing of cases of

infringement of trade secrets, but the determination of illegal income in practice there is controversy. Illegal income is a common concept in the criminal law, the current criminal law provisions are involved in the illegal income expression, respectively, from the conviction and sentence, the calculation of the amount of fines, the disposal of stolen money and stolen goods, etc., there is no uniform provision on the calculation of illegal income. In judicial practice, there are two methods to determine the scope of illegal income, one is the amount of profit of the infringer, and the other is the amount of sales of the infringer. Accordingly, the right holder for the infringer directly use trade secrets and began to sell products, can be around the above two methods to show its product-related evidence, such as the product cost, sales amount, order records, accounting statements, gross sales rate and other evidence to prove that the infringer infringement crime amount. In addition, some products may involve a number of technical combinations, this time to make certain distinctions, that is, to calculate the technical secrets involved in the infringing products in the degree of contribution, can be shown through the product profitability, trade secrets to the product's technical contribution rate, sales of infringing products, the right to previous product sales and other evidence to reach a comprehensive conclusion.

3.3 Cite the Value of Trade Secrets Identification Materials

The value of trade secrets identification is mainly the amount of trade secret loss identification, especially for trade secrets have been disclosed or used by the infringer, sales data difficult to determine the case, you can entrust the appraisal agency to assess the commercial value of trade secrets. Judicial appraisal institutions can be calculated according to the infringer's infringement profits and other data to the infringer to the economic loss caused by the right, the economic loss identified should include the perpetrator of the illegal use of other people's trade secrets to obtain the benefits and in business activities directly with the victim unit competition caused by the victim's loss of profits. In addition, can also hire the relevant appraisal institutions from the perspective of technology licensing fees to determine the loss of the right holder, appraisal institutions will generally refer to the asset evaluation market methods, combined with the technology in question in the capacity, product and comprehensive cost perspective to select the same or similar transactions, combined with the relevant patents and patent technology licensing contract, the amount of technology licensing fees.

4. Conclusions

Infringement of trade secrets aggravating circumstances in judicial practice has been a difficult problem in the identification of the problem. Even after the implementation of the *Criminal Law Amendment (XI)*, the problem is still not properly resolved. Among them, the right to trade secrets relative to the infringer often bear a high burden of proof, so that the right often due to the burden of proof is too high and lead to the difficulty of proof, the right is not effectively protected, the author combined with the practical case experience and relevant case study, the above evidence ideas, in order to further strengthen the protection of trade secrets of the right.

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