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Study on Judicial Determination of Trade Secret Infringement

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Abstract: The newly revised Anti-Unfair Competition Law in 2019 and the promulgation of related judicial interpretations have jointly updated the judgment standards for civil cases involving infringement of trade secrets. Although the judgment basis that can be invoked has become more abundant, courts at all levels still have different views on whether the information involved in the determination of trade secret infringement constitutes the "three elements" of trade secret, and on the two aspects of the "contact plus the same" proof rules for determining whether there is infringement. Therefore, starting from the concept and nature of trade secrets, it is emphasized that only those that meet the three statutory components of secrecy, value and confidentiality are trade secrets. Secondly, combined with specific cases, it clarifies the judicial identification of the "three essential elements" of trade secrets. Finally, the analysis of trade secret infringement should focus on the "contact plus identical" rules of proof. The order should be distinguished, first determining "identical" and then determining "contact". In judging the standard for "contact", it is relatively flexible. It involves comparing the information involved and applying a flexible application of both "general contact" and "contact possibility".

1. Introduction

At present, China is moving toward the goal of becoming a great modern socialist country. At the same time, the role of intellectual property as a strategic resource and the core element of national development and international competitiveness is becoming more prominent. The judicial work of intellectual property is also facing higher challenges[1]. It also pointed out the need to protect intellectual property rights, as it can motivate rights holders to further innovate. As a special kind of intellectual property rights, trade secrets are not known to the public, and have commercial value that brings business advantages to the right holder, and the right holder takes appropriate confidentiality measures to protect them. The scope of protection of trade secrets is not publicized, and correspondingly, the degree of "exclusivity" is not as strong as that of traditional intellectual property rights such as patents, trademarks and Copyrights, and the infringements are more hidden[2]. Therefore, the judicial practice of civil cases of infringement of trade secrets is relatively more difficult and complicated. In order to strengthen the judicial protection of trade secrets, China's Anti-Unfair Competition Law (hereinafter referred to as the Competition Law) amended on

April 23, 2019, has made revisions to the definition of trade secrets, the illegal acts considered as infringement of trade secrets, and the burden of proof of the infringer after the right holder provides a preliminary proof basis, expanding the scope of protection of trade secrets. Reflecting lawmakers' concerns about the protection of trade secrets, it further protects the intellectual property rights of all market entities. However, it is accompanied by the fact that judicial personnel have more room for free evidence in specific cases. How to properly implement the newly revised Competition Law still needs to be further studied and analyzed in practice. The judgment ideas of trade secret cases in intellectual property trial can be described as ingenious[3] .In this kind of legal dispute litigation, the judge usually summarizes the focus of the dispute related to the illegal behavior into two aspects: whether the information involved meets the provisions of the three elements of the trade secret and whether the defendant's behavior constitutes an infringement of the trade secret[4] .

Therefore, the pre-issue for the determination of trade secret infringement lies in whether the information involved in the case constitutes a trade secret. In this regard, judges often define the concept of trade secret by referring to the Competition Law[5]. Secondly, in determining whether the defendant constitutes an infringement of trade secrets, on the basis of summarizing judicial experience, the Supreme People's Court gradually concluded the judgment standard of "contact plus identical". Article 32 of the Competition Law specifically stipulates that when the right holder provides what kind of evidence, the remaining burden of proof shall be borne by the defendant. It is necessary to make clear the pre-issue of whether it constitutes a trade secret, and then discuss the proof rule of "contact plus identical", which is the core dispute in the determination of infringement.

2. Legal attributes of trade secrets

Trade secrets are one of the objects of intellectual property rights that encourage enterprises to carry out independent innovation. Article 123 of the Civil Code of the People's Republic of China clearly stipulates this. By their nature, compared with intellectual property rights such as patent rights, trade secrets are special in that they are only relatively exclusive. Since China recognizes the legality of self-research and development and reverse engineering, trade secrets are not effective against bona fide third parties. In infringement cases, if the third party obtains the trade secret through the above-mentioned legitimate means and implements the trade secret in good faith, then it is usually not deemed to constitute an infringement, which also leads to the possibility that most subjects have the same trade secret[6].

First of all, according to the definition at the legislative level, Article 9 of the Competition Law stipulates three components of trade secrets by summarizing key characteristics: First, confidentiality, that is, the information has not been publicly disclosed or widely disseminated, and only the right holder or a few people know the information; The second is value, which is clearly stipulated by the legislation as "having commercial value", that is, the information has certain economic interests or potential interests for commercial activities and can bring certain commercial competitive advantages to the enterprise; Third, confidentiality, that is, when some information is identified by the right holder as having commercial value, the right holder needs to take the appropriate confidentiality measures to ensure that the information will not be obtained by unauthorized third parties. The intellectual property rights of trade secrets are generated when the above three statutory constituent requirements are met. As far as the types of trade secrets are concerned, the Competition Law adopts open-ended provisions, which are "technical information, business information and other commercial information", that is, all kinds of information related to commercial activities involved in the production and operation process of an enterprise. In addition, Article 1 of the 2020 Judicial Interpretation of Trade Secrets further crystallizes technical information and business information by enumerating, making it clear that technology-related

factors such as structure and raw materials can be determined by the people's court to constitute technical information. Creativity, management and other factors related to business activities may be determined by the people's court to constitute business information. It also specifies several forms of customer information, such as customer names, addresses and trading habits. Secondly, for the definition of trade secret, there are some disputes in the academic circle to be further clarified. It can be seen from the literature that Qu Wenhong believes that trade secret is a commonly used legal term, which can also be called industrial and commercial secret. In a certain scope, it is not familiar and understood by many people. It can not only help enterprises maintain their original competitive advantages, but also bring some benefits to the confidential person [7]. According to scholar Lu Hong Xuyang, trade secrets are confidential information that can be sold or licensed[8]. Scholars Zheng Youde and Qian Xiangyang define trade secrets from the perspective of key elements of trade secrets. They believe that trade secrets can be protected by law as long as they are unknown to competitors and have obvious or potential economic value after reasonable confidentiality measures have been taken[9]. According to the above scholars, the reason why a certain information becomes a trade secret must have the characteristics of "confidentiality". The difference lies in the fact that Qu Wenhong and Lu Hong Xuanyang focus on the competitive advantages brought by the trade secret to the right holder, while Zheng Youde and Qian Xiangyang include the scope of information that can be defined as a trade secret from the perspective of three characteristics in an objective and comprehensive way. The author agrees with this view.

3. Judicial Determination of the Three Elements of Trade Secrets

In judicial practice, for the determination of trade secret infringement, it should first determine whether the information involved is a trade secret, that is, whether it falls within the scope of protection of trade secrets. In judicial practice, the court usually determines whether the information is a trade secret according to the provisions of Article 9 of the Competition Law mentioned above and with the help of relevant judicial interpretations. The court judges whether the information is a trade secret by hearing the three key elements of whether the information is secret, confidential and valuable.

3.1 The element of "secrecy"

First of all, secrecy is the basis of trade secret rights established legal elements[10], is the most fundamental attribute of trade secrets distinguished from other information, is to determine whether the information constitutes the most authoritative factors of trade secrets.

The determination of secrecy is an important step in the trial of trade secret infringement cases. Article 3 of the 2020 Judicial Interpretation of Trade Secrets specifically explains that the information that the right holder seeks to protect, when alleging that the defendant has committed an act of infringement, is not generally known and readily available to all relevant persons in the industry. That is to say, the information may only be known to a few specific people or require a certain technology, professional knowledge or threshold to obtain, rather than being publicly popular or widely circulated information. At the same time, "not readily available" means that it is relatively expensive for those who wish to obtain such information through legitimate means, such as a fee for obtaining authorization.

The author agrees with the above point of view that the subject of "public" stipulated in the Competition Law, according to the "2020 Interpretation of Trade Secrets," should be a specific category. This refers to the relevant personnel in the field of its industry, particularly those who have a direct connection or interest in the industry. For example, certain companies may limit their trade secrets to internal personnel or authorized specific individuals for access and understanding.

The status of "not knowing" refers to members of the public who do not have access to information and cannot obtain it through public knowledge channels alone for processing and use. To a certain extent, this has delineated the boundaries of the industry sectors to which it belongs, and also quantified the "general knowledge", rather than requiring that "absolutely" no one knows it. At the same time, through this relative secrecy can be for the protection of trade secrets to set a reasonable scope of protection, such as part of the enterprise should be public data information closely linked to the business information, involves the protection of trade secrets and the public interest of the balance of the problem[11] . In addition, since "not generally known" and "not readily available" are uncertain legal concepts, the Supreme Court adopted the method of reverse exclusion in the 2020 Trade Secrets Judicial Interpretation to enhance the accuracy of practical judgment in specific cases. In this interpretation, the Supreme Court used the reverse exclusion method to list five situations in which information is known to the public. For example, if information has been publicly disclosed in a publication or other media, it is considered to be known.To a certain extent, this allows the public to understand what "not in the public domain" means from the opposite perspective. Article 4, paragraph 5 of the trade secrets of the public knowledge of the situation also made the bottom of the provisions, clear that if the information has already been publicly released in certain books, periodicals, websites, microblogging and other public platforms to the public, it is not a secret information. This essentially emphasizes that "information constituting a trade secret must be obtained with a certain degree of difficulty" from the opposite side. If the relevant persons can obtain the information through certain public channels without the need for creative intellectual labour, the information is easy to obtain and does not meet the statutory requirement of secrecy.

Finally, according to the 2020 Judicial Interpretation of Trade Secrets, even if all the information constituting a trade secret is known to the public, if the processed information constituting the whole combination of the information meets the requirements of "information that can only be understood and grasped by professionals with corresponding background knowledge in a specific field" and "can only be obtained under specific conditions", the trade secret should still be deemed to meet the standard of "not known to the public". However, if the processed and combined information meets the requirements of "information that can only be understood and grasped by professionals with corresponding background knowledge in a specific field" and "can only be obtained under specific conditions", it should still be recognized that the trade secret meets the criterion of "not being known to the public". For example, in the case of (2010) Su Zhimin Final Word No. 0179, Jiangsu Higher People's Court held that, in the process of designing technical information, the standard manual can provide some basic data and reference values, but in fact, each mechanical product has its unique characteristics and requirements, so it can not simply look for the parameters from the standard manuals listed on the drawings. Only through the in-depth analysis and careful calculation of the designers can we get the optimal solution to determine the parameters in accordance with the requirements. Therefore, the intelligent electric actuator design results from the creative input of designers and the selection of standard parameters. This has changed the nature of the manual for all personnel to choose a reference from a public attribute to an exclusive attribute of a product object. The technical personnel of the plaintiff will process public information into unique intellectual achievements for personal use. Therefore, it belongs to the category of "not known to the public", constituting the element of secrecy.

3.2 The "confidentiality" element

Confidentiality means that the right holder has proactively taken reasonable measures to maintain the secrecy of the information. Confidentiality is the main difference between a trade secret and a patented or publicly known technology, as a trade secret needs to remain secret,

whereas a patented or publicly known technology can be used or accessed publicly. This is one of the most distinctive features of trade secrets identified.

In the confidentiality conditions stipulated in Article 5 of the 2020 Judicial Interpretation of Trade Secrets, the qualifier "corresponding" has been added before the "confidentiality measures" taken by the right holder, and "corresponding" can be interpreted as "the degree of correspondence between the confidentiality measures and the trade secrets". This "corresponding" can be understood as "the degree of correspondence between the confidentiality measures and the trade secrets". From the viewpoint of laws and practices at home and abroad, what is required is not perfect confidentiality measures, but reasonable confidentiality measures adopted by the right holder can be[12] . In addition, this article further clarifies that the confidentiality measures must have existed "before the infringement", so that it can be presumed that the confidentiality measures remedied afterwards will not be recognized by the court, which puts forward higher requirements for the burden of proof on the right holder.

The legislative intent of the Competition Act is to declare that the law punishes behaviour that undermines the ethical order of business. Regardless of the value of the information involved in a confidential relationship, once an actor chooses to enter into a confidential relationship, the duty of confidentiality should be strictly observed. Compliance with the duty of confidentiality is one of the basic requirements for upholding business ethics and legitimate interests. Breach of the duty of confidentiality is itself a breach of business ethics[13] . The importance of confidentiality measures and the duty of confidentiality on the part of the perpetrator can thus be seen. In particular, first, confidentiality measures is the existence of trade secrets of the external signs. The right holder adopts confidentiality measures to express his subjective intention of confidentiality to others, and inform others that the information is his trade secret. Second, confidentiality measures are necessary to maintain the secrecy of information, which means that, without the existence and implementation of confidentiality measures, trade secrets will be difficult to be effectively protected. Only under the premise of taking sufficient confidentiality measures, the right person can enjoy the natural benefits and legal rights brought about by trade secrets[14] .

It is worth noting that the confidentiality measures adopted by the claimant must be adaptive, i.e., the confidentiality measures and the content of the trade secrets claimed by the claimant should be adapted to achieve the best confidentiality effect. Specifically, in order to ensure the effective protection of trade secrets, the need for flexibility in selecting and adopting different confidentiality measures and means according to the value of trade secrets. The means of the right holder to dispose of the higher value of confidential information should be clearly differentiated from general information, and for the higher degree of importance of the trade secrets, it is also necessary to adopt more specific and substantial confidentiality measures to ensure the secrecy of the information, so as to be able to prove that the right holders have fulfilled the obligation of confidentiality due to themselves[15] . For example, in the case of (2020) Supreme Court Zhi Civil Final No. 1667, the court held that since the right holder had adopted a series of management documents, procedures and measures for the technical secrets of high-level technology, such as document control procedures, and managed the confidentiality of important documents and equipment of the company and stipulated that it would disclose them to the employees by way of training, etc, which demonstrated that the right holder had the intention to keep the secrets and had taken confidentiality measures. Various measures can be used as evidence to prove that the right holder in the protection of trade secrets has made reasonable efforts and responsibilities. Jiaxing Zhonghua Chemical Co., Ltd. confidentiality measures and the value of the technical information involved in the case is basically appropriate, objectively played a confidentiality effect, the court accordingly found that it meets the confidentiality requirements.

Secondly, confidentiality measures should be specific. That is to say, there should be consistency

between the target of confidentiality measures and the trade secrets claimed by the right holder. If an enterprise only adopts a general confidentiality measure to protect all commercial information, it may result in certain sensitive information not being adequately protected. At the same time, in the face of related disputes, the right holder also needs to prove that the commercial information claimed by him is indeed within the scope of the confidentiality measures taken. In view of the judicial practice, it is considered that the general confidentiality clauses contained in the employment contracts signed between the employer and the workers are only provisions of principle, without case-by-case analysis, and are not sufficient to constitute a reasonable measure to protect the confidentiality of specific technical information or business information. For example, in Supreme Court Civil Application No. 2161 (2016), the Supreme People's Court held that in terms of "confidentiality", Hubei Jieda did not provide evidence of other confidentiality measures for the technical and business information it claimed other than the confidentiality clauses stipulated in the employment contracts it signed with its employees. As the confidentiality clause in the employment contract in question was only a provision of principle, and was not sufficient to constitute a reasonable measure to keep specific technical or business information confidential, the Court found that it did not satisfy the confidentiality requirement.

In addition, "2020 commercial secret judicial interpretation" article 6 specifically enumerates the people's court shall determine the right to take corresponding confidentiality measures of the six circumstances, further refine the confidentiality measures of the specific way, due to these confidentiality measures for the relationship between the choice, the right to take only one of the circumstances can be, which reduces the confidentiality of trade secrets requirements. It can be deduced that in the future practice, the accused infringer if you want to a certain information does not take reasonable measures of confidentiality and thus does not constitute a trade secret as a defence, the difficulty may be greater.

3.3 The "value" element

The value of a trade secret is usually considered to mean that the trade secret can provide economic benefits or competitive advantages to the right holder, enabling the enterprise to occupy a more favourable position in market competition. According to actual adjudication cases, the value is usually judged on the basis of its application in business practice and actual benefits. If the trade secret has been applied in production practice and can bring certain economic benefits, then the value of the commercial information is obvious[16] . Professor Wang Xianlin uses the hermeneutic way, thinks that directly "economic benefit + practicality" is directly regarded as the specific expression of commercial value of trade secrets, at the same time, combined with the relevant provisions of the practicality of the interpretation of the actual practical and potential practical[17] . Among the three elements, it is easier to prove that the information in question has commercial value, and in the case where the information is "secret", there are very few cases in which the information is found not to constitute a trade secret.

Article 7 of the 2020 Judicial Interpretation of Trade Secrets specifies that the commercial value of a trade secret may be derived from the fact that it is not known to the public. Thus, the commercial value of a piece of information can be inferred by proving that it is secret. The revised content of this article is also in line with Article 39 of the TRIPS Agreement, which stipulates that "the information in question has commercial value because it is secret". In addition, this Article makes it clear that the value of trade secrets includes actual commercial value and potential commercial value. Regardless of the reality of the direct use of trade secrets, or in the process of research, trial production, development of information with potential or expected commercial value, can constitute trade secrets.

The value of trade secrets also has two external forms, one is the right holder of trade secrets to invest financial, human and material resources for the acquisition and protection of trade secrets. Thus, the trade secret itself has the value; the other is through the use of trade secrets in business activities to bring economic benefits or competitive advantage. Through the protection of trade secrets, enterprises can ensure that their unique technical information, customer information and other core resources are not disclosed to competitors, so as to maintain market advantage.

Finally, this article further clarifies that unfinished milestones can also be recognized as having commercial value. The milestones in the process of technological research and development, even including the results of failures, although not directly producing benefits, have important value for future research and therefore have commercial value. For example, in the case of (2012) Pu Criminal (Knowledge) No. 42, the court pointed out in the analysis of the element of "value" that structural formulae can be used directly by synthesizing compounds or for further research, and thus can be considered to have utility. Even if the compound synthesized from a part of the formula was used as an intermediate, the intermediate was a new compound, which could bring competitive advantage to the right holder and had considerable economic value and utility. As for the partial structural formula that fails to be synthesized, the direct application of such negative information in practice often fails to achieve real economic benefits, but it can help to broaden the research ideas, which is also of value.

4. Rules of proof for trade secret infringement: "contact plus identity"

First of all, as to the antecedent issue, in relevant legal disputes, the court will usually consider the three aspects of secrecy, confidentiality and value of commercial information to determine whether it constitutes a trade secret. For secrecy, the emphasis is on the unknown or difficult-to-obtain nature of commercial information; for confidentiality, the emphasis is on the right holder has taken the initiative to adopt certain confidentiality measures and with the value of the information; for value, the emphasis is on the actual value or potential value can be.

Secondly, in determining whether the defendant constitutes trade secret infringement, the legislator introduced the "contact plus identity" rule of proof, in order to better safeguard the legitimate rights and interests of trade secret right holders. The standard is once the trade secret right holder can prove that the suspected infringer has access to or contact with the channels or opportunities of trade secrets, and its use of information and the trade secret is substantially the same, the burden of proof should be transferred to the defendant. The application of this principle in the trade secret infringement litigation, to a certain extent, reduce the defects of the principle of fault responsibility, reduce the plaintiff's standard of proof, is conducive to a fair and reasonable balance of the interests of both parties.

To sum up, the "contact plus identity" rule of proof is a kind of system design in favour of the right holder of trade secrets, and also reduces its burden of proof to a large extent. When the trade secrets are illegally infringed upon, if the right holder can complete the proof of "contact plus identity" facts, its success rate will be greatly improved. However, despite the introduction of legislation and relevant judicial interpretations, in practice, trade secret infringement disputes, the plaintiff withdrawal rate and the high rate of failure still exists. I use the "Weike Advanced Legal Database" to select the "case" interface, and then click on the "case" index in order to enter the "civil", "intellectual property and intellectual property rights", "intellectual property rights", "intellectual property rights", "intellectual property rights", "intellectual property rights", "intellectual property rights", "intellectual property rights" and "intellectual property rights". Intellectual Property and Competition Disputes", "Unfair Competition Disputes" and "Infringement of Trade Secrets" disputes, and finally, "Date of Decision". Finally, the "judgement date" is limited

to 2022, and a total of 346 judgement documents were retrieved. By clicking into the "Visual Analysis" column of "Decision Results", it can be seen that only 2.18 per cent of the cases in the first instance fully or partially supported the plaintiff's claim, while the withdrawal rate was as high as 46.55 per cent.

The reason for this, of course, with trade secret infringement cases and other types of intellectual property infringement cases compared to the special trial ideas, but also exposed the "contact" and "identity" determination standard is not clear, "contact plus identity" rules of proof applicable logic relationship is unclear. The problem lies in the unclear application of the "contact" and "identical" rules of evidence.

4.1 Criteria for determining "contact" and "identical" and paths to improvement

First of all, there are different standards in theoretical and practical circles regarding whether it constitutes "contact", such as "possible contact", "general contact", "in-depth contact" and other different standards, which may cause some confusion for judicial trial personnel. If the "contact standard" is understood as "in-depth contact", it will, to a certain extent, aggravate the burden of proof of trade secret right holders, which is not conducive to the maintenance of their legitimate rights and interests.

As for "general access" and "possible access", this standard has an institutional basis in China, as reflected in Article 32 of the Competition Law of 2019, which defines it as "having access to trade secrets" and Article 12 of the 2020 Judicial Interpretation of Trade Secrets, which further stipulates the determination of the "access" element. "Article 12 of the 2020 Judicial Interpretation of Trade Secrets further stipulates the determination of the element of "access", and provides examples of situations that are taken into account when determining whether an employee or former employee has access to trade secrets, for example, the relevant personnel may come into contact with the trade secrets when undertaking their own duties or receiving tasks assigned by the unit. For example, the relevant person may come into contact with the trade secrets when undertaking his or her own work or accepting the tasks assigned by the unit, and so on. These are all conditions of "access" that are higher than those of the general public, and have a higher "possibility of access".

Therefore, the author is of the view that in judicial practice, the strict criterion of "intensive contact" should be excluded and the criterion of "general contact" or "possibility of contact" should be applied as appropriate in the light of the circumstances of a specific case. Judicial practice has already produced a wealth of practice on the "general contact" and "likelihood of contact" criteria. For example, in 2020, the supreme law recognized that the defendant had been in contact with software trade secrets during a certain period of time and was planning to establish a company. After leaving the original unit, they used the trade secrets for the newly established company. The judicial interpretation determined that this behavior constituted "contact" as part of their job. Therefore, the Supreme People's Court concluded that these three individuals were indeed involved in the "contact" element.Therefore, the Supreme People's Court found that the above three persons possessed the element of "contact". In Case No. (2020) Beijing 73 Civil Final 1959, the Court of First Instance held that the Defendant, as a former employee with a certain power relationship, had channels or opportunities to access the trade secrets, and that there was a "possibility of contact".

Secondly, as to whether it constitutes "identity", although Article 32 of the Competition Law has already stipulated the judgement standard of "substantially the same", however, in judicial practice, judicial officers still have criteria such as "substantially the same", "basically the same" and "exactly the same" when judging whether it constitutes "the same" or "the same". However, in judicial practice, when judging whether it constitutes "the same", there are still standards such as "substantially the same", "basically the same" and "exactly the same", and how to grasp the ultimate

case-by-case and person-by-person, can only depend on the free will of different judges. This can only be determined by the free will of different judges.

"Substantially the same", "basically the same" and "identical" are three concepts that gradually raise the standard of similarity, and the difficulty of proof also gradually increases. If the "same" is understood as "identical", that is, the infringing information and trade secrets completely no difference, if in this case can prove that the existence of the party being sued is to take the theft, bribery and other improper means to obtain the trade secrets, since the infringer is completely copying, then the infringer is the infringer, then the infringer is the infringer. The infringer is completely copying, so there is no comparison between the two pieces of information on the premise that they are "substantially the same".If there is no such situation, in the general situation that requires the right to bear the "identical" standard of proof, will have to increase the burden of proof of the right to the suspicion. If "same" is understood as "essentially the same", meaning that the two are roughly equivalent or basically similar, then classifying them as infringing behaviors will, to a certain extent, discourage individuals from gaining business advantages through legal means such as independent research and development and reverse engineering through public knowledge channels without comparing whether the core elements of the two are the same or not.

Therefore, the author believes that judges should strictly follow the determination standard of "information is substantially the same as the trade secret" stipulated in Article 32 of the Competition Law, and refer to the factors that can be considered when determining whether it constitutes "substantially the same" by referring to Article 13 of the Judicial Interpretation of Trade Secrets 2020, such as: The similarities and differences between the accused infringing information and the trade secret, and whether the practitioners in the relevant industries can easily associate the differences between the accused infringing information and the trade secret, and whether there are substantive differences in the use, mode, purpose and effect of the accused infringing information and the trade secret, so as to compare the similarity degree between the accused infringing information and the trade secret one by one.

And, "2020 Trade Secrets Judicial Interpretation" also pointed out that "the infringing information and trade secrets have no substantial difference in effect", the people's court can be deemed to be "substantially the same". For example, in the case of (2020) E Zhi Min Final No. 17, the Hubei Higher People's Court, in the analysis of the question of whether the design of the model room of the 188th project in the Guanggu Valley is the same or substantially the same as that of the model room of the Yuexiu Yifu project of the Deguan Dao Company, pointed out that the comparison between the design of the model room of the Yuexiu Yifu project and that of the 188th project in the Guanggu Valley was that the difference was a slight difference in the overall presentation effect, which is a "non-essential difference". These are "non-essential differences", and therefore the two designs should be considered to be "substantially the same" where the design elements - i.e., the selection of objects and the arrangement of their locations - are basically the same.

4.2 The logical relationship between the application of the "contact plus identity" rule of proof and the path to its improvement

Article 32, paragraph 2, of the Competition Law clearly stipulates that "there is evidence that the alleged infringer had access to or had the opportunity to obtain the trade secret, and that the information used by the alleged infringer is substantially the same as the trade secret". According to this legislative provision, the two elements of "access" and "substantially the same" are coexisting relationships, and need to be completed at the same time to prove that the right to trade secrets is considered to have completed the obligation to prove.

However, the judicial practice of infringers through hidden illegal means to obtain trade secrets is often diverse and complex, as the "Competition Law," Article 9, paragraph 1, "theft, bribery, fraud and other improper means to obtain the right to obtain trade secrets" and other behaviors. Especially in the context of the rapid development of Internet technology, when the infringer uses electronic technology means to crack the password and other network invasion means to obtain other people's trade secrets, for the right holder, it is difficult to prove that the "contact elements", in the defendant has proved that the "use of the information and the Trade secrets of the defendant has been proved to "use the information and the trade secrets are substantially the same" or even equivalent, the defendant's suspicion of infringement has increased dramatically. At this point, whether the right holder still need to prove that the defendant "contact" the fact of its trade secrets. If the judiciary applies the rule of proof that "contact plus substantial similarity" must be satisfied in any case, it will, to a certain extent, make it impossible to support the claim of the right holder, and it will also go against the legislative intent of the Competition Law.

Therefore, in order to address the above issues, in the process of hearing specific cases, the judge should have an overall understanding of the rule of evidence of "contact plus the same", and its application can be differentiated in order of priority, with "the same" followed by "contact". "And in determining the standard of "contact" is relatively flexible, "general contact" and "contact may be" according to the same degree of the two information to be used flexibly. (b) The use of "general exposure" and "likelihood of exposure" is flexible, depending on the degree to which the information is the same. In order to take "two steps" of the trial idea, priority consideration should be given to whether the infringing information is substantially the same as the trade secret. If they are very similar or even reach "full consistency," then it is not necessary for the plaintiff to prove "general contact." The standard of proof can be directly reduced from "general contact" to "possible contact." In cases where there is no exact match, the plaintiff's evidence must strictly adhere to conditions of "general contact."This approach can help to resolve some special circumstances. This practice can help to solve the problem of trade secret infringement in some special circumstances, and improve the normative nature of trade secret protection.

5. Conclusion

By re-understanding the legal attributes of trade secrets, combining with the judicial determination of the three elements of trade secret discovery in cases, and focusing on the "contact and identical" proof rules and perfect paths to determine whether the defendant has infringed, a new theoretical analysis paradigm is formed on the combination of the upsurge background of strengthening intellectual property trial work and specific trade secret cases. This paper expects to improve the standardization of the judicial protection of trade secrets through the improvement of the evidentiary rules, and further promote the innovation and development of trade secret right holders.

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