Probe into Independence of Trade Secret-Related Civil and Criminal Proceedings

— Reflections on the Vanillin Case

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I. Background

For a long time, it has become a convention that criminal proceedings go before civil proceedings ("criminal proceedings first") in judicial protection of trade secrets, that is to say, after the closing of criminal cases on the crime of trade secret infringement, trade secret owners then file civil lawsuits for damages. For instance, the Carbomer case [1] concluded by the Supreme People's Court on 24 November 2020 was a typical one where the above-mentioned sequence was followed. In that case, before the filing of a civil lawsuit, defendants had been convicted of crime of trade secret infringement and sentenced respectively in an effective criminal judgment. For simplicity's sake, a criminal judgment effected before the launching of civil proceedings relating to the same circumstances will be referred to as the "prior criminal judgment". In practice, cases where the criminal proceedings concluded before the civil proceedings make up a major portion. It is mainly because the trade secret owners have difficulty in producing evidence proving the infringement, and often need to turn to criminal investigation in order to obtain it. In addition, due to limitations in law application, civil suits incidental to criminal proceedings involving trade secret infringement are rare. Trade secret owners usually seek protection by criminal proceedings and then file a civil claim for damages.

It is worth noting that in the Vanillin case [2] concluded by the Supreme People's Court on 29 February 2021, the second-instance court not only changed the judgment by ordering the accused infringers to compensate the trade secret owner for economic losses of RMB 156 million and reasonable expenses of RMB 3.5 million (RMB 159 million in total), but also provided clear guidance regarding civil proceedings prior to criminal proceedings ("civil proceedings first"): "the accused infringement in this case has been suspected of constituting the crime of trade secret infringement, and the court will transfer relevant clues to the public security department according to law." This is the first time that the Supreme People's Court has expressed its judicial attitude towards the practice that civil proceedings go before criminal proceedings in intellectual property related cases, which has provoked expectations for such practice in the IP circle, and aroused great attention to the relevance, especially the independence, of proceedings in cases involving both civil and criminal issues. Thus, it is quite necessary to delve into these issues.

II. Comparative analysis of pros and cons of civil and criminal protection of trade secrets

Views are divided as to whether "criminal proceedings first", "civil proceedings first", or "parallel civil and criminal proceedings" shall be selected for trade secret protection. In general, it is prevailed that criminal proceedings shall be the priority in a case involving both civil and criminal issues, because criminal proceedings focus on protecting legal interests of the society, while civil proceedings focus on protecting those of the individuals; and criminal liabilities involve confinement and deprivation of property, personal liberty or even life, which are much severer than civil liabilities. [3] Another view is that the crime of trade secret infringement is a statutory offense, while trade secret is a private

right and the determination of infringement is quite complicated. Civil proceedings first can avoid the judicial conflict between a prior guilty sentence and a latter civil judgment of non-infringement.

Although in China the "criminal proceedings first" principle [4] has been followed in most of the cases involving both civil and criminal issues in a long run, in the special field of trade secrets, the right owners usually decide which proceedings are initiated due to the objective difficulty in producing evidence and determining trade secret infringement. Theoretical discussion in this regard is of less significance in practice, and parallel civil and criminal proceedings are rarely seen. [5] It can be seen that there is no practical basis for the view [6] against "criminal proceedings first" that "the 'criminal proceedings first' mode means that when a private right seeking relief is in conflict with the public power maintaining a public order, the former must give way to the latter, which goes against the private right nature of trade secrets, and directly harms the right of a party concerned to select proceedings." As stated above, the advantages of criminal protection of trade secrets lie in that the right owner can obtain evidence of infringement during criminal investigation, thereby effectively reducing the difficulty in evidence collection. Furthermore, criminal penalties provide an effective deterrent to infringement. However, the "pain point" of criminal protection cannot be ignored, that is, the burden of proof in criminal proceedings rests on the public prosecution authority, and once it fails to produce evidence, the court has to acquit the defendant according to the principle of *in dubio pro reo* (Latin for "[when] in doubt, for the accused") under the criminal law, as the defendant cannot be compelled to self-incriminate himself. [7] It means that when the right owner decides to protect its trade secret under the criminal law, though finding a potential solution to evidence production, it may also end up facing the risk of not being able to obtain protection if the evidence produced by the public prosecution authority cannot meet the standard of proof of beyond a reasonable doubt.

On the contrary, the advantage of civil protection of trade secrets is that, in civil cases, with regard to the determination of whether a trade secret is unknown to the public and whether the infringement exists, the difficulty in evidence production has been effectively eased according to the existing laws and regulations. Specifically, after providing *prima facie* evidence, the burden of proof will be directly shifted from the right owner to the defendant, and the defendant will lose the case unless it adduces sufficient evidence to prove the contrary, in such a way that the right holder can effectively avoid the risk in criminal proceedings that the public prosecution authority fails to produce evidence.

The above analysis demonstrated that civil protection and criminal protection of trade secrets have their respective advantages. Criminal protection is conducive to obtaining evidence of infringement by means of public power, while in civil protection the standard of proof for the right owners is significantly lower. Therefore, which proceedings go first, and how to "link up" the fact-finding and use of evidence in the civil and criminal proceedings depend on the judgment of the right owner on a case-by-case basis. Furthermore, there are also cases where the right owners initiate the civil infringement proceedings with the evidence obtained during criminal investigation, which manifests how the right owners effectively utilize different advantages of the civil and criminal proceedings to maximize their interests in lawsuits. [8]

III. Analysis on the independence of trade secret-related civil and criminal proceedings

1. Independence of civil and criminal proceedings

It is generally understood that trade secret cases involving both civil and criminal issues are mutually related. In other words, the related civil and criminal trade secret cases are all directed to the same trade secrets and the same infringing acts with the only difference lying in the nature of the proceedings and the applicable substantive and procedural laws. By comparison, Article 9 of the 2019 Anti-Unfair Competition Law (Second Amendment) and Article 219 of the Criminal Law revised in the 2020 Criminal Law Amendment (XI) set forth the same requirements for constituent elements of trade secrets and infringement types. However, Article 219 of the Criminal Law sets the "serious circumstances" as the threshold for the crime of trade secret infringement, and a judicial interpretation further clarifies that the circumstances under which the right owner suffers a loss of RMB 300,000 are considered as serious. [9] It can be seen that the relevance between the civil and criminal proceedings lies in that the trade secret infringement will become a crime only when it is serious to such an extent

that violates the criminal law.

Thought being interrelated, the trade secret-related civil and criminal proceedings are greatly independent. To be specific, trade secret cases involving both civil and criminal issues result from the same trade secrets and infringing acts, but they are significantly different in terms of objects and functions of the actions, standards of proof and judging rationale, thereby forming differentiated procedural systems and evidence rules. They are parallel and mutually independent. [10]

The concerns for the independence of trade secret-related civil and criminal proceedings stem from the changes in law, development of judicial practice and the impact of different standards of proof in recent years.

First, changes in law: the 2019 Anti-Unfair Competition Law (Second Amendment) is added with Article 32 (hereinafter referred to as Article 32 of the AUCL), [11] which specifically sets forth the provision on "*prima facie* evidence" in regard to the constituent elements of a trade secret and the determination of infringement, that is, after the trade secret owner has provided *prima facie* evidence as required, the court shall timely shift to the infringer the burden of proving that the claimed trade secret does not constitute a trade secret as defined under the AUCL and the accused infringing act does not exist.

Second, the development of judicial practice: Article 32 of the AUCL directly gave rise to the adjustment of conventional rationale for judging trade secret cases. [12] It is noticed that in the Carbomer case as mentioned above, the first-instance court analyzed the application of Article 32 of the AUCL in reasoning section of the judgment that: "First of all, Article 32 requires the right owner to bear the burden of proving the three constituent elements [13] (of a trade secret), but it does not require the party to produce evidence on each element one by one. According to the said provision, the right owner may produce evidence for all the three elements together. Second, the said provision does not require the evidence produced by the right owner to be sufficient to prove its claim, but only requires *prima facie* evidence to reasonably show (the infringement). Third, the said provision requires the shifting of the burden of proof. Accordingly, where the right owner has adduced *prima facie* evidence and reasonably shown (the infringement), the burden of proof shifts to the accused infringer. It can thus be seen that in comparison with the relevant provisions of the earlier implemented (judicial) interpretation, paragraph 1 of Article 32 of the AUCL significantly lowered the requirements for the right owner of proving the three constituent elements of the technical secret." [14] Furthermore, in the Vanillin Case, the presiding judge at the second instance also clearly stated that where the right owner reasonably explains the differences between key secret points and well-known information, it can be preliminarily considered that the key points of the trade secret can be briefly determined (as a secret), and then the accused infringer should adduce counterevidence to prove that the presumption regarding the secret points is not true. [15] All of the above demonstrate that under the macro background of strict protection of intellectual property rights, the application of Article 32 of the AUCL has shown the prominent procedural advantages of civil protection of trade secrets. It is predictable that civil trade secret cases and high compensation cases will gradually increase in the future.

Third, the impact of different standards of proof: In the past judicial practice, the question discussed in the case involving both civil and criminal issues is whether the prior criminal judgment in which the defendant was found guilty can be directly admitted in the later civil lawsuit. An associated question is whether the right owner in the later civil lawsuit can claim the amount of actual losses that far exceeds the amount determined by the criminal judgment and further seek for a favourable judgment awarding corresponding higher damages? After the Vanillin Case, a further question is whether the criminal proceedings can be directly initiated based on the civil judgment on trade secret infringement and whether a criminal judgment should be made accordingly. The above questions are of utmost importance, but have not aroused adequate attention due to the relatively small number of civil and criminal trade secret cases in judicial practice.

2. Different standards of proof in civil and criminal proceedings

In China, the high probability standard of proof is applied in civil lawsuits. High probability refers to high degree of possibility, i.e., facts to be proved in a civil lawsuit are very likely to be true. In this regard, the high probability standard of proof [16] was established in Article 73 of the Several Provisions of the Supreme People's Court on Evidence in Civil Proceedings (No. Fashi 33/2001) released in 2001, and further clarified in Article 108 of the Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China (No. Fashi 5/

2015) (hereinafter referred to as the Judicial Interpretation of the CPL), i.e., "for evidence provided by a party who bears the burden of proof, where a people's court finds out high possibility of existence of the facts to be investigated upon examination in combination with relevant facts, it shall be deemed that the facts exist. For evidence provided by a party for the purpose of refuting the facts claimed by the party who bears the burden of proof, where a people's court believes whether the facts to be proved are true or false is not clear upon examination in combination with relevant facts, it shall be deemed that the facts do not exist. Where a law provides otherwise for the standards of proof for the facts to be proved, such standards shall prevail." In addition, Article 95 of Some Provisions of the Supreme People's Court on Evidence in Civil Proceedings (No. Fashi 19/2019) revised in 2019 reads that "if a party controls the evidence and refuses to submit it without justifiable reasons, and the party who bears the burden of proving the facts of the evidence claims that the said evidence is unfavourable to the controller, the people's court may determine that the claim is established." This article is referred to as the rule of unfavourable evidence presumption, or in other words, in a trade secret civil case, if the accused infringer refuses to submit the evidence in relation to the infringement, the court can directly presume that the accused infringement is established according to the high probability standard of proof and the rule of unfavourable evidence presumption.

In China, a rigorous standard of proof, namely the standard of "beyond a reasonable doubt", shall apply in criminal proceedings. "Beyond a reasonable doubt" means that the facts related to the conviction and sentence in a criminal case must prove that the defendant is guilty beyond all reasonable doubts. According to Article 55 of the Criminal Procedure Law, [17] a defendant may be convicted and sentenced based on "hard and sufficient" evidence and, to be specific, the following standards shall be met: (1) "all facts in relation to conviction and sentence are supported by evidence"; (2) "all evidence admitted has been verified to be authentic under legal procedures"; and (3) "all facts found are beyond a reasonable doubt based on all evidence of the case". In this regard, paragraph 2 of Article 72 of the Interpretation of the Supreme People's Court on the Application of the Criminal Procedure Law of the People's Republic of China (No. Fashi 1/2021) provides that "the standard of proof, namely the evidence is 'hard and sufficient', shall apply when convicting a defendant of a crime and sentencing the defendant convicted with a heavier punishment". This demonstrates that the standard of proof in criminal proceedings of "beyond a reasonable doubt" is in line with the standard that "the evidence is hard and sufficient" as stipulated in Article 55 of the Criminal Procedure Law. As stated above, criminal proceedings are provided with a higher standard of proof than the high probability standard in civil proceedings because criminal liabilities are related to property, personal freedom and even life, while civil liabilities are mostly related to property, and civil rights remedies can still be obtained through recovery of execution if civil judgments are revoked.

3. The impact of earlier effective judgment on subsequent proceedings

The impact of an earlier effective judgment (hereinafter referred to as the "earlier judgment") on the subsequent proceedings juristically means whether the earlier judgment has the pre-determination effect on the subsequent proceedings, in other words, whether the fact-finding in the earlier judgment can be admitted directly in subsequent proceedings? This article will delve into such an issue in two scenarios: "criminal proceedings first" and "civil proceedings first".

(1) "Criminal proceedings first". If the prior criminal judgment has convicted the defendant of the crime of trade secret infringement, as what the general public normally understand, the criminal act certainly constitutes civil infringement, and the later civil proceedings can directly adopt the prior criminal judgment. For instance, in the abovementioned Carbomer case, the trade secret owner claimed that "the facts ascertained by the effective criminal judgment should be directly affirmed". In this regard, views are always divided in the field of trade secrets. Among them, some believe that in order to prevent the conflict between a prior criminal conviction and a later civil non-infringement judgment, the court shall still examine independently on whether a trade secret exists and whether an infringement occurs in the subsequent civil trial even though the defendant has been convicted in the criminal proceedings. Article 22 of the Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Civil Cases Involving Trade Secret Infringement (No. Fashi 7/2020) implemented on 12 September 2020 provides that "when trying a civil trade secret infringement case, the people's court shall fully and objectively examine the evidence formed in corresponding criminal proceed-

ings according to statutory procedures." This provision actually implies a certain concern about the quality of trade secret related criminal cases. In my opinion, Article 22 shall be understood from the following two aspects.

On the one hand, although the China's civil procedure law does not explicitly provide for the pre-determination effect of effective judgments, including criminal judgments, in civil lawsuits, Article 93.1(5) of the Judicial Interpretation of the CPL reads that "a party does not need to prove by presenting evidence" "facts confirmed in judgment of the people's court that has taken effect" "unless they can be overthrown by contrary evidence of the parties concerned". [18] This showed that, as for the pre-determination effect of the earlier judgment, the China's civil procedure law allows judges to take judicial notice of facts confirmed by an effective judgment, which means the effective judgment has the pre-determination effect on findings only. [19] For instance, even if the defendant was found guilty in the prior criminal judgment, the court cannot directly determine infringement according to it in subsequent civil proceedings because the prior criminal judgment involves facts without requiring proof under the evidence law and the facts at issue can be overturned by counterevidence provided by a party concerned. It should be noted that the prior criminal judgment has a greater probative value than "presumed facts" as stipulated in items (2) to (4) concerning "facts without requiring proof" under Paragraph 1 of Article 93 of the Judicial Interpretation of the CPL because the facts in criminal proceedings are ascertained in accordance with the strict standard of proof "beyond a reasonable doubt" and with more effective means. Thus, as for the facts confirmed by the prior criminal judgment, according to the judicial interpretation they should be treated as established "unless they can be overthrown by contrary evidence provided by the party concerned", which sets more stringent conditions for overturning the facts confirmed by the effective criminal judgment. [20]

On the other hand, based on the understanding of "facts without requiring proof", whether the evidence used in the earlier criminal proceedings needs to be "fully and objectively examined" in the light of the above-mentioned Article 22 in the subsequent civil proceedings shall be premised on whether a party concerned can produce counterevidence to prove the contrary, regardless the prior criminal judgment is a verdict of "guilty" or "not guilty". Especially, more attention shall be paid to the following three situations:

First, where the counterevidence provided by the party is sufficient to overturn the factual findings in support of trade secret infringement in the prior criminal judgment, the evidence admitted in the earlier criminal proceedings shall be "examined and evaluated fully and objectively according to statutory procedures", the judgment shall be made based on facts ascertained under the standard of proof applied in civil proceedings, and the conflicts between criminal and civil proceedings shall be coordinated and handled properly. [21] To be specific, the coordination can be achieved by revoking the criminal judgment before making a civil judgment, or *vice versa*. In short, the coordination and handling of the conflicts between civil and criminal judgments are the basic requirements to maintain judicial unity and authority.

Second, where the counterevidence provided by the party is insufficient to overturn the factual findings in support of trade secret infringement in the prior criminal judgment, the factual findings confirmed by the prior criminal judgment shall be directly accepted, and there is no need in the civil procedures to re-examine and re-determine the evidence used in the earlier criminal proceedings. Such a practice completely complies with the spirit of Article 32 of the AUCL. Specifically, as Article 32 of the AUCL reads, where the plaintiff has produced required "*prima facie* evidence", the burden of proof shall be directly shifted to the defendant. According to the principle of "*argumentum a minore ad maius*", where the defendant has been found guilty in the prior criminal judgment, the burden of proving facts that can overturn the conviction shall be born by the defendant in the subsequent civil proceedings. And as required by the consistency of standards of proof, where the defendant provides counterevidence in an attempt to overturn the earlier conviction, the standard of proof shall be the "hard and sufficient" evidence and proves beyond a reasonable doubt.

Third, where the prior criminal judgment finds the defendant not guilty and the right holder launches a separate civil infringement lawsuit, considering the different standards of proof in civil and criminal proceedings, even if the plaintiff cannot overturn the non-conviction as determined in the prior criminal judgment, the plaintiff can still file claims based on civil infringement and the court can then decide whether the claims are established according to the standard of "high probability" in the civil proceedings.

(2) "Civil proceedings first". As stated above, after the Vanillin case, the number of cases where civil proceedings go ahead before criminal proceedings is expected to increase. However, this is not likely to fundamentally change the traditional criminal proceedings. First, in the criminal proceedings, the earlier civil judgment only serves as a proof in the subsequent criminal proceedings and has no pre-determination effect because the civil standard of proof "high probability" is significantly lower than the criminal standard "beyond a reasonable doubt". Therefore, the earlier civil judgment, as an official document, forms only a part of the evidence in the criminal proceedings. Whether it will be admitted shall be determined after evidence production, cross examination and debate under criminal procedure rules, and its admissibility shall be reasoned in the judgment. This is a common practice of the criminal procedures at home and abroad. Second, Article 52 of the Criminal Procedure Law reads that "judges, procurators and investigators must, in accordance with the statutory procedures, collect various kinds of evidence that can prove the criminal suspect's or defendant's guilt or innocence and the gravity of his crime." Accordingly, in the criminal proceedings, facts and evidence related to the infringement as ascertained in the civil judgment still need to be collected, examined, verified and ascertained again in accordance with the legal procedures as stipulated in the criminal procedure law. Second, civil infringement established according to Article 32 of the AUCL, especially through the shifting of burden of proof, only satisfies the standard of "high probability", and can hardly meet the strict standard of "beyond a reasonable doubt" in criminal proceedings. Based on the above analysis, turning back to the Vanillin case, although the Supreme People's Court stated in the second judgment that crime-related clues will be transferred to the public security department, it is still unknown whether there will be a criminal case. Nevertheless, if, in the civil case, the facts concerning the defendant's infringement have been clearly proved with sufficient evidence, it is surely helpful for the criminal departments to collect evidence according to the statutory procedures and find criminal facts therefrom so as to promote the progress of the criminal proceedings.

To sum up, in cases involving both civil and criminal issues, civil and criminal proceedings are independent due to different standards of proof: first, the facts ascertained in the prior criminal judgment are not absolutely true. They only have the probative value of "facts without requiring proof" and can be overturned by the parties concerned with counterevidence in civil proceedings. Second, the earlier civil judgment has no probative value of "facts without requiring proof" and is only a type of evidence, i.e. an official document, in criminal proceedings. What needs to be emphasized is the obvious great significance of jurisprudentially recognizing independence of trade secret-related civil and criminal proceedings, which means that, according to different standards of proof, completely different factual findings about the constituent elements of trade secrets, infringement and the amount of losses may be made in civil and criminal proceedings. That is to say, the facts that cannot be proved "beyond a reasonable doubt" in criminal proceedings may be established in civil proceedings under the standard of "high probability" . This not only changes the old way of thinking that once the right owner fails to protect its right in a chosen way, there will be no other legal remedy available, but also complies with the basic judicial orientation of strict intellectual property protection. To be specific: (a) where the defendant has been convicted in the prior criminal judgment, infringement in the civil case may be most likely established; however, where the defendant has been acquitted, it does not necessarily mean that no infringement will be found in the civil case. Of course, it is possible that trade secret infringement is not established in either proceedings. (b) The infringement established in the earlier civil judgment does not necessarily render the defendant guilty under the criminal law; and the non-infringement result of the earlier civil case surely suggests the defendant's innocence according to the principle of "*argumentum a minore ad maius*". And (c) as for the amount of loss suffered by the right owner, the court shall award the damages calculated on the basis of the actual loss or illegal income determined in the effective criminal judgment if it is claimed so; but if the right owner has proved with evidence that the actual loss or illegal income exceeds that in the criminal judgment, the court may also grant the claim for higher damages based on the finding of facts in the civil proceedings. [22]

IV. Another discussion

This article focuses on the independence of trade secret-related civil and criminal proceedings. Besides, civil action incidental to criminal proceedings also needs further discussion. It is noticed that on 9 March 2021, the Zhejiang

Yuyao Court concluded *Ningbo Lushi Chain Technolgoy Co., Ltd. v. Lu Pengjun and others*, a case of registered trademark counterfeiting. In this case, the public prosecution authority supported the owner of the registered trademark "STIHL" to bring an incidental civil action during criminal proceedings. The court sentenced the defendants to fixed-term imprisonment, along with pecuniary penalty, and incidentally awarded a civil damage of RMB 500,000. [23] Hearing the incidental civil actions on compensation contributes to litigation efficiency, but there are different views as to the civil claims for damages incidental to criminal intellectual property cases. Article 101 of the Criminal Procedure Law provides that "where a victim has suffered any material loss as a result of the defendant's crime, the victim shall have the right to institute an incidental civil action during criminal procedures." As for the scope of application of civil action incidental to criminal proceedings, the Supreme People's Court makes a restrictive explanation in the Interpretation on the Application of the Criminal Procedure Law of the People's Republic of China (No. Fashi 21/2012) released in 2012, wherein Article 138 reads that "a victim who suffers material loss as a result of a criminal violation of their personal rights or as a result of property damage by a criminal offender, shall have the right to file a collateral civil action during a criminal prosecution." This provision seems to rule out its application in criminal cases involving intellectual property infringement. This is also the major reason why incidental civil action claiming compensation for intellectual property infringement is rare in related criminal proceedings in China after a civil action incidental to criminal proceedings concerning the crime of registered trademark counterfeiting, which is the forty-ninth of the fifty typical cases concerning judicial protection of intellectual property rights published by the Supreme People's Court in 2011 [24]. The Supreme People's Court reiterated the above-mentioned provision in Article 175 of the Interpretation on the Application of the Criminal Procedure Law of the People's Republic of China (No. Fashi 1/2021) revised on 1 March 2021. However, with the development of strict intellectual property protection in China, judging from the demands in judicial practice, the over-narrow interpretation of the scope of application of civil action incidental to criminal proceedings cannot meet the current judicial requirements for comprehensive and strict intellectual property protection. At present, under the framework of Article 101 of the Criminal Procedure Law, some local courts are actively promoting the development of the civil compensation suits incidental to intellectual property related criminal proceedings. For instance, the courts in Zhejiang Province [25] and in Jiangsu Province [26] are exploring ways to guide private prosecutors or victims to bring incidental civil actions in a timely manner so as to try civil compensation during criminal proceedings, and have concluded some influential typical cases. These cases are proactive exploration in civil action incidental to criminal proceedings, and of positive significance in strengthening the punishment of infringement, ensuring the timely award of damages to the right owner, effectively controlling and reducing the cost for right protection, saving precious judicial resources, and promoting further reform and improvement of the civil action incidental to criminal proceedings in China. ■

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* The views and opinions expressed in this article are those of the author.

[1] *Guangzhou Tinci Materials Technology Co., Ltd. and Jiujiang Tinci Material Technology Co., Ltd. v. Hua Man, Liu Hong, and Anhui Newman Fine Chemicals Co., Ltd.*, a trade secret infringement case. First instance: Judgment No. Yue73minchu 2163/2017. Second instance: Judgment No. Zuigaofazhiminzhong 562/2019.

[2] *Jiaxing Zhonghua Chemical Co., Ltd., Shanghai Xinchen New Technology Co., Ltd. v. Wanglong Group Co., Ltd., Fu Xianggen, Wang Guojun and others*, a trade secret infringement case. First instance: Judgment No. Zheminchu 25/2018. Second instance: Judgment No. Zuigaofazhiminzhong 1667/2020.

[3] "If a criminal offense and a civil tort or breach of contract are based on the same legal facts, criminal proceedings should be proceeded first - this is the principle of 'criminal proceedings first in cases involving both civil and criminal issues' confirmed by judicial interpretation and practice". Long Zongzhi (2018). Factual findings and use of evidence in cases involving both civil and criminal issues. *Chinese Journal of Law, 6* (as cited in Long Zongzhi (2021). *On Evidence in Litigation* (p. 417). Law Press·China).

[4] Article 11 of the Provisions of the Supreme People's Court on Several Issues Concerning Suspicion of Economic Crimes in the Trial of Economic Disputes Cases (as adopted at the 974th Session of the Judicial Committee of the Supreme People's Court on 9 April 1998 and revised at 1823rd Session of Judicial Committee of the Supreme People's Court on 23 December 2020) reads that "where the people's court ac-

cepts a case as an economic dispute and finds after trial that it is not an economic dispute and there is a suspicion of an economic crime, the people's court shall rule to dismiss the action and transfer the relevant materials to the public security authority or procuratorial authority", and Article 12 thereof reads that "where the public security authority or procuratorial authority considers that there is a suspicion of an economic crime in an economic dispute case that has been accepted by the people's court, and has explained the reasons and informed the people's court accepting the case with relevant materials by letter, the relevant people's court shall carefully examine it. After examination, if it is considered to be a suspected economic crime, the case shall be transferred to the public security authority or procuratorial authority, the parties shall be notified in writing, and the case acceptance fee shall be refunded; and if it is deemed that the case is an economic dispute, the trial shall continue according to law, and the result shall be notified to the public security authority or procuratorial authority by letter."

[5] Of course, in case of parallel civil and criminal proceedings, the criminal proceedings usually go before the civil proceedings except when a dispute on ownership needs to be resolved ahead. There is also a view that if civil infringement can be established, a judgment can be made in civil proceedings without waiting for the close of the criminal proceedings.

[6] Ning Lizhi and Gong Tao (20 December 2020). Defects and improvements of China's trade secret protection system after law revision. *Scientific Technology·IP Economy, 6* (as cited in Sun Ying. Predicament and solution of "criminal proceedings going before civil proceedings" in trade secret protection. *China IP News*, published on 9 January 2013).

[7] See the Judgment No. Suzhixingzhongzi 00012/2015.

[8] Song Jian (2018). Probe into some issues relating to civil and criminal judicial protection of trade secrets. *China Patents & Trademarks, 3*.

[9] Article 4.1(1) of the Interpretation (III) of the Supreme People's Court and the Supreme People's Procuratorate of Several Issues Concerning the Specific Application of Law in the Handling of Criminal Cases Involving Infringement upon Intellectual Property Rights reads "the amount of losses caused to the trade secret owner or the amount of illegal gains as a result of trade secret infringement is more than RMB 300,000".

[10] "Civil and criminal cases are caused by the same legal facts, so civil and criminal cases are in a parallel relationship". See supra note 5.

[11] Article 32 of the AUCL reads that "in the civil trial procedure for infringement of a trade secret, if the right holder of the trade secret provides *prima facie* evidence that it has taken confidentiality measures for the claimed trade secret and reasonably indicates that the trade secret has been infringed upon, the accused infringer shall prove that the trade secret claimed by the right holder is not a trade secret as described in this Law. If the right holder of a trade secret provides *prima facie* evidence to reasonably indicate that the trade secret has been infringed upon, and provides any of the following evidence, the accused infringer shall prove the absence of such infringement: (1) Evidence that the accused infringer has a channel or an opportunity to access the trade secret and that the information it uses is substantially the same as the trade secret. (2) Evidence that the trade secret has been disclosed or used, or is at risk of disclosure or use, by the accused infringer. (3) Evidence that the trade secret is otherwise infringed upon by the accused infringer."

[12] Song Jian (2020). Impact of Article 32 of the Anti-Unfair Competition Law 2019 on trial rationale for trade secret infringement cases. *China Patents & Trademarks, 4*. WeChat Account: IP Economy, posted on 24 December 2020.

[13] Three constituent elements of a trade secret specifically include being unknown to the public, having commercial value and having taken corresponding confidentiality measures.

[14] See supra note 1.

[15] Judge Zhu Li met the reporter of IP Economy for the appeal of the dispute over infringement of "Vanillin" technical secret – Why is RMB 159 million awarded. WeChat Account: IP Economy, posted on 26 February 2021.

[16] Article 73 of the Several Provisions of the Supreme People's Court on Evidence in Civil Proceedings reads that "if both parties have presented contradictory evidence for the same fact, but neither of them has sufficient support to deny the other party's evidence, the people's court shall, in light of the circumstances of the case, judge whether the probative value of the evidence provided by one party is significantly greater than that of the evidence provided by the other party, and confirm the evidence with greater probative value. Where it is difficult to find the disputed facts due to the inability to access the probative value of the evidences, the people's court shall make a judgment in accordance with the rules for the allocation of the burden of proof."

[17] Article 55 of the Criminal Procedure Law reads that "in deciding each case, a people's court shall focus on evidence, investigation, and research, and credence shall not be readily provided for confessions. A defendant shall not be convicted and sentenced to a criminal punishment merely based on the defendant's confession without other evidence; a defendant may be convicted and sentenced to a criminal punishment based on hard and sufficient evidence even without his or her confession. Evidence is hard and sufficient when the following conditions are met: (1) all facts for conviction and sentencing are supported by evidence; (2) all evidence used to decide a case has been verified under legal procedures; and (3) all facts found are beyond a reasonable

doubt based on all evidence of the case."

[18] Article 93 of the Judicial Interpretation of CPL reads that "A party need not provide evidence for the following facts:

(1) Natural laws and theorems.

(2) Facts known to all.

(3) Facts deduced from legal provisions.

(4) Facts established on the basis of known facts and daily life experience.

(5) Facts confirmed by effective rulings issued by people's courts.

(6) Facts confirmed by effective awards rendered by arbitration agencies.

(7) Facts proven by effective notarization documents.

The facts mentioned in items (2) through (4) shall be excluded if the party has counterevidence which suffices to refute, and the facts mentioned in items (5) through (7) shall be excluded if the party has counterevidence which suffices to overturn."

[19] Long Zongzhi (2018). Factual findings and use of evidence in cases involving both civil and criminal issues. *Chinese Journal of Law, 6* (as cited in Long Zongzhi (2021). *On Evidence in Litigation* (p. 417). Law Press·China).

[20] Ibid.

[21] Article 6.1 of the Guidelines for the Trial of Civil Disputes over Trade Secret Infringement Issued by the Jiangsu High People's Court (Revised Edition) reads "Examination of evidence and facts in earlier criminal proceedings. Where the plaintiff claims that the defendant commits trade secret infringement based on the effective criminal judgment, the defendant shall provide counterevidence. If the counterevidence is sufficient to overturn the criminal judgment, the court shall fully and objectively examine and determine the evidence formed in the criminal proceedings for the crime of trade secret infringement according to statutory procedures, and coordinate and resolve the conflicts between civil and criminal proceedings." WeChat Account: Jiangsu High Court, posted on 15 April 2021.

[22] Paragraphs 1 and 2 of Article 6.2 of the Guidelines for the Trial of Civil Disputes over Trade Secret Infringement Issued by the Jiangsu High People's Court (Revised Edition) reads that "For cases involving both civil and criminal issues relating to the same trade secret infringement, where the party concerned claims to determine the amount of damages in the civil case based on the actual losses or illegal gains determined in the effective criminal judgment, the people's court shall grant the claim. In view of the different standards of proof in civil and criminal proceedings, where the plaintiff has evidence to prove that the actual losses or illegal gains are greater than the amount determined in the prior criminal judgment, the people's court shall grant the plaintiff's claim."

[23] Typical Cases tried by Chinese courts: Civil action incidental to criminal proceedings concerning STIHL registered trademark counterfeiting. WeChat Account: Chinaipmagazine, posted on 13 October 2021.

[24] The Hubei High People's Court held in the case that as an intangible property right, an intellectual property right belongs to an intangible object in the sense of civil law. The property losses as a result of infringement of intellectual property right are material losses, so intellectual property related criminal cases fall within the application scope of incidental civil lawsuits. Solving the issue of civil compensation during the trial of criminal case can avoid the possible conflicting judgments on the same facts of the case caused by separate trials by the criminal tribunal and the civil tribunal, and is conducive to maintaining the consistency of the trial results of the people's courts.

Zou Wen and Zhang Jiaxin. A brief analysis of the coexisting civil and criminal issues in intellectual property cases. WeChat Account: Zhichanli, posted on 21 October 2021.

The Notice of Printing and Distributing Top 10 Cases and 50 Typical Cases of Intellectual Property Judicial Protection Tried by Chinese Courts in 2011 (11 April 2012). WeChat Account: Criminal law classroom, posted on 11 November 2019.

[25] Article 15 of the Opinions of the Zhejiang High People's Court on the Comprehensive Strengthening of Intellectual Property Judicial Protection reads "the right owner shall be guided to bring a civil action incidental to criminal proceedings according to law." WeChat Account: Zhejiang scale, posted on 18 January 2021.

[26] Paragraph 3 of Article 6.2 of the Guidelines for the Trial of Civil Disputes over Trade Secret Infringement Issued by the Jiangsu High People's Court (Revised Edition) reads that "in the criminal private and public prosecution for crime of trade secret infringement, efforts shall be made to explore and guide private prosecutors or victims to bring a civil action during criminal proceedings in a timely manner." WeChat Account: Jiangsu High Court, posted on 15 April 2021.