Studies on Sale and Use of Products Infringing Technical Secrets [1]

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I. Introduction

Trade secrets of business operators are protected by law. Article 9 of the Anti-Unfair Competition Law of the People's Republic of China (hereinafter referred to as the AUCL) stipulates that "[f]or the purpose of this Law, trade secret refers to any technical, operational or other commercial information which is not known to the public and has commercial value, and for which the right holder has taken corresponding confidentiality measures." Article 1.1 of the Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Civil Cases Involving Infringement upon Trade Secret (hereinafter referred to as the Judicial Interpretation of Trade Secrets) clarifies the scope of technical information that can be qualified as a trade secret: "[a] people's court may determine the information on structure, raw materials, components, formulas, materials, samples, styles, propagation materials of new plant varieties, processes, methods or their steps, algorithms, data, computer programs and their relevant documents, among others, relating to technology as technical information set forth in Article 9.4 of the Anti-Unfair Competition Law." Technical secrets are usually of huge business value. Infringers acquire technical secrets improperly, disclose them to others or use them for their own production or operation for the purpose of better product quality or lower manufacturing costs and ultimately for commercial profits and market share. Regardless of the result of trade secret infringement, technical secrets are closely associated with the manufacturing, selling or using acts of business operators. The AUCL enumerates the types of infringing acts prohibited due to technical secret infringement, including acquiring a technical secret through improper means, disclosing, using or allowing another person to use a technical secret acquired through any improper means, and the like. In circulation process, the selling of products that infringe others' technical secrets (hereinafter referred to as the infringing products) [2] by business operators other than the manufacturers, and the use of the infringing products by end consumers are natural continuations of the unlawful acquisition or use of others' technical secrets. Do these acts constitute infringement? How do the courts examine and judge these acts in judicial practice? This article looks into these issues based on the judgments [3] made by courts at various levels in recent years and in the light of the relevant provisions of the AUCL and the Tort Liability Law.

II. The act of use in technical secret infringement disputes

In order to accurately identify and regulate the acts infringing technical secrets, it is necessary to clarify the legal interests and legislative objectives of the AUCL and the Tort Liability Law respectively.

"The AUCL is in nature a behavior regulating law, which is in sharp contrast with the regulating mode of laws on tort liability. The Tort Liability Law is mainly to protect the legitimate rights and interests of the civil subjects and provide adequate remedies for injured parties. Its underlying rationale is that 'impairment of right is illegal' and there is no need to make value judgments on the acts or weigh the interests." [4] "The legal interests protected by the AUCL are civil interests, the determination on unfair competition acts is mostly concerned with the legitimacy thereof, and the legal interests involved are only one of the factors to be considered. Thus, other characteristics of the acts are required for the establishment of unfair competition." [5] Therefore, different from the Tort Liability Law which aims to protect the

legal interests by compensating for the damage suffered by the injured parties, the AUCL protects the legal interests by regulating unfair competition acts.

1. Acts infringing technical secrets and their regulation under the AUCL

China confers multi-lateral protection on trade secrets mainly under the AUCL and supplemented by other relevant laws and regulations. "Right protection and behavioral characteristics are the two fulcrums of the AUCL, and the determination of unfair competition acts depends on the identification and weighing of both." [6] Therefore, when dealing with disputes over infringement of technical secrets, efforts shall be made to accurately understand and grasp the nature of technical secrets, i.e. they are civil rights and interests, and properly balance the protection of technical secrets and the lawful acquisition, disclosure and use of technical secrets. In addition, on account of the close relationship between the AUCL and the Tort Liability Law, in the adjudication of technical secrets infringement disputes, it is necessary to pay full attention to the inherent nature of unfair competition acts while considering them from the perspective of infringement, so as to prevent the confusion between unfair competition acts and common infringing acts, and avoid the lowering of the threshold for unfair competition acts or erroneously extending the scope thereof.

Enacted in 1993, the AUCL stipulated the unfair use of technical secrets for the first time, and the related provisions were followed and further improved in its 2017 and 2019 revisions. The Judicial Interpretation of Trade Secrets issued in 2020 further clarified the types of improper use of technical secrets. These provisions enumerate the using acts in technical secret infringement disputes, including: (1) using or allowing others to use a technical secret acquired from the right holder by theft, bribery, fraud, coercion, electronic intrusion, means that violates the provisions on unfair competition or widely accepted business ethics, or any other unlawful means; (2) using or allowing others to use a technical secret in its possession, in violation of its confidentiality obligation or the requirements of the right holder for keeping the technical secret confidential; (3) abetting, or inducing, or aiding a person into or in using or allowing others to use the technical secret of the right holder in violation of his or her non-disclosure obligation or the requirements of the right holder for keeping the technical secret confidential; and (4) using or allowing others to use a technical secret by a third party who knows or should have known that an employee or a former employee of the right holder of a technical secret or any other entity or individual has committed the illegal acts as mentioned above. [7] The above provisions clarify the specific circumstances of improper use of technical secrets and provide guidance for identifying such acts in judicial practice.

2. Using acts in disputes over infringement of technical secrets

(1) Subjects of the acts

In the light of Article 9 of the AUCL revised in 2019, the subjects that infringe upon technical secrets include a natural person, a legal person and an unincorporated organization. It shall be noted that Article 9.2 stipulates for the first time that "a natural person, legal person or unincorporated organization other than a business operator" can be considered as the subject of infringement. In practice, infringers often involve an employee or a former employee of a business operator, in addition to the latter itself. This revision breaks through the previous limit on infringing subjects under the AUCL and is conducive to better protection of technical secrets.

(2) Using acts

Article 9 of the AUCL enumerates the types of unfair competition acts that infringe technical secrets, which mainly include unlawful acquisition and unlawful disclosure or use, unlawful disclosure or use of lawfully acquired technical secrets, and abetting, inducing and aiding others to act as mentioned above. Generally speaking, acts of unlawful disclosure or use are the continuation of the (lawful or unlawful) acquisition of technical secrets, and are often the infringing acts that cause the greatest damage to the right holder, because "improper disclosure may render the trade secret of the right holder lose confidentiality if it is made public, such that the right holder permanently loses the trade secret, the attached property rights and interest, as well as competitive advantage contained therein." [8] Unlawful use means that the actor uses by itself or allows others to use the technical secret acquired through improper means in business activities (including the unauthorized use of lawfully acquired technical secret). Since the infringer and the right holder are generally in the same competitive market, the improper use will inevitably impair the competitive advantage or economic interests on the part of the right holder. "Such a use exists in a variety of forms, with no restrictions on nature." [9]

The Understanding and Application of the Provisions of

the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Civil Cases Involving Infringement upon Trade Secret clarifies that pursuant to Article 9 of the AUCL, "using" or "allowing others to use" a technical secret is a statutory infringement of trade secret. The "use" of trade secrets mainly includes three types of acts: first, the direct use of trade secrets in production, operation and other activities, e.g., the direct use of formulas, methods and processes that constitute trade secrets for manufacturing the same products; second, the use of trade secrets that have been further modified or improved, e.g., the use of an improved secret formula for manufacturing a particular product; and third, the adjustment, optimization and improvement of related business activities according to the trade secret of the right holder, e.g., the optimization and adjustment of the R&D direction according to the trade secret such as data and technical materials resulting from the right holder's research failure, as well as interim achievements formed during the R&D process, or the adjustment of marketing strategies, prices and the like according to the trade secret regarding business information. Unlawfully "using" or "allowing others to use" trade secrets by infringers will directly lead to unfair competitive advantage, including alternative products or services, or reduced costs, saved time and improved efficiency, etc. [10] It can thus be seen that direct causality exists between the use of technical secrets and the competitive advantage.

Furthermore, the act of "abetting, or inducing, or aiding a person into or in using or allowing others to use the technical secret of the right holder in violation of his or her non-disclosure obligation or the requirements of the right holder for keeping the technical secret confidential" is to explicitly incorporate some specific abetting, inducing or aiding acts as a type of technical secret infringement by applying general rules for contributory infringement in the field of technical secret infringement, which enriches and develops the acts of use in disputes over technical secret infringement.

(3) Third party

Article 9.3 of the AUCL stipulates that "where a third party knows or should have known that an employee or a former employee of the right holder of a trade secret or any other entity or individual has committed an illegal act as specified in paragraph 1 of this Article but still acquires, discloses, uses, or allows another person to use the trade secret, the third party shall be deemed to have infringed upon the trade secret." This provision relates to the definition of a third party and the determination of its subjective "malice". The third party herein is meant with respect to the right holder of technical secret as the first party or the second party who infringes the technical secret as stipulated in items (1), (2) and (3) of Article 9.1 of the AUCL. "'Know' is a malicious (intentional) state, and 'should have known (should have known but did not know due to negligence)' is a subjective state of gross negligence." [11] "Gross negligence is the severest negligence representing an extreme departure from the ordinary standard of diligence or a deviation from due care in an 'unusual way'." [12] Therefore, two basic elements must be found for the third party's infringement of technical secret: first, the third party knows or should have known that the second party committed infringement; and second, from the objective aspect, the third party has acquired, used or disclosed other's technical secret. For a *bona fide* third party, another related issue is the "disappearance of good faith", which occurs when the third party continues to acquire or use the technical secret after being informed by the right holder of the second party's infringement. Most countries provide the abovementioned informing act with destructive power against the subjective state of "good will" of the third party. [13]

3. Infringing acts in relation to use of technical secrets

Through statistics and analysis of disputes over technical secrets infringement, infringing acts in relation to the use of technical secrets in judicial practice can be roughly divided into the following four types: first, using a technical secret acquired through improper means by the accused infringer itself; second, using a technical secret by the third party who clearly knows that the technical secret is unlawfully acquired by another party; third, selling infringing products; and fourth, using the infringing products.

For instance, in *Sachi Huachen Machinery (Suzhou) Co., Ltd. and Sachi Mechanical Engineering (Shanghai) Co., Ltd. v. VMI Holland B.V., Anhui Giti Tire Co., Ltd., and Anhui Giti Passenger Car Radial Tire Co., Ltd.*, an appeal case concerning jurisdictional objection [14], the right holder, VMI Holland, claimed that Sachi Suzhou and Sachi Shanghai improperly acquired its technical secret and applied it to their HPC-105 molding machines and later sold the molding machines carrying the technical secret to Giti Tire and Giti Passenger Car Radial Tire. The latter still used the infringing molding machines to manufacture tires in spite of knowing that the technical secret of VMI Holland was acquired through improper means. The infringing acts as

claimed by the right holder in this case include the act of directly using the technical secret improperly acquired by the accused infringer, selling infringing products, and using the infringing products by end consumers.

In *Beijing Lizheng Software Corporation v. Beijing Dacheng Huazhi Software Technology Co., Ltd. and T.Y. Lin International Engineering Consulting (China) Co., Ltd.*, an appeal case concerning infringement of technical secret [15], Beijing Lizheng claimed that Dacheng acquired, disclosed and used the software disclosed by its shareholder in breach of a nondisclosure agreement to develop software for T.Y. Lin. The latter knew or should have known the trade secret infringement, but still commissioned Dacheng to develop the software and used the same. The infringing acts as claimed by the right holder in this case include using the technical secret by a third party who clearly knows that the technical secret was acquired by another party through improper means, selling infringing products, and using the infringing products by end consumers.

In *Guangzhou Tinci Materials Technology Co., Ltd. and Jiujiang Tinci Materials Technology Co., Ltd. v. Anhui Newman Fine Chemicals Co., Ltd., Hua M., Liu H., Hu S.C., Zhu Z.L., and others*, an appeal case concerning infringement of technical secret [16], Guangzhou Tinci and Jiujiang Tinci claimed that Hua M. disclosed the technical secret they owned to Anuhui Newman during his employment with Guangzhou Tinci, Liu H. and Anhui Newman acquired and used the technical secret while knowing that the technical secret of Guangzhou Tinci and Jiujiang Tinci was illegally disclosed by Hua M., and Hu S.C. and Zhu Z.L. knowingly aided the aforesaid improper disclosure, acquisition and use. The infringing acts as claimed by the right holder mainly include disclosing or allowing others to use a trade secret by an employee of the trade secret holder in violation of his confidentiality obligation or the requirements of the right holder for keeping the trade secret confidential, and using the technical secret by a third party who clearly knows that the technical secret was acquired by another party through improper means.

Under the above-mentioned circumstances, the infringer's act of using the technical secret it acquired through improper means and the third party's act of knowingly using the technical secret acquired by another party through improper means are both subject to regulation of the AUCL. However, the existing laws do not clearly stipulate whether the act of selling infringing products and the act of using infringing products by end consumers constitute infringement, which will be analyzed and discussed based on jurisprudence and the enlightenment of current judicial practice.

III. Determination of the act of selling infringing products

In common disputes over infringement of technical secrets, the use of technical secrets by infringers often involve multiple acts such as manufacturing, selling and so on, and the selling is the natural continuation of manufacturing. The act of manufacturing undoubtedly constitutes the use of trade secret as stipulated by Article 9.1 of the AUCL and is its usual form. The actor's liability for infringement can be determined accordingly with no obstacle. The selling act as discussed below has its specialties: the actors are only limited to operators other than manufacturers, and the act is only limited to selling infringing products as a result of technical secret infringement.

The nature of the act of selling infringing products is not specified in laws. Article 13.2 of the Judicial Interpretation of Trade Secrets (First Draft for Comments) published in October 2018 once stipulated that "where the third party knows or should have known that the accused product is directly acquired by infringing the technical secret but still sells or offers to sell the product, the people's court may order it to stop the act of selling or offering to sell the product and bear the liability for any damage caused by infringement." This provision, however, was not incorporated into the final Judicial Interpretation of Trade Secrets.

Due to the lack of law and judicial interpretation, there are various views and rationales about whether such an act constitutes infringement in judicial practice. The first one starts from Article 9 of the AUCL and focuses on whether the selling act falls within the three statutory types of infringing acts, namely, unlawfully acquiring technical secrets, unlawfully disclosing or using technical secrets, unlawfully disclosing or using lawfully acquired technical secrets. Since selling is not listed as one of the infringing acts, it is deemed that selling infringing products does not constitute infringement. The second view tries to regulate the selling act from the perspective of tort liability by comprehensively considering the subjective and objective elements of the actor. To be specific, the third party's act of knowingly purchasing and selling an infringing product manufactured and sold by another party may constitute infringement un-

der particular circumstances. The third view is that the selling act constitutes infringement and should be regulated by the general provisions of the AUCL. [17] The first view and the latter two are not mutually exclusive, but can co-exist. Even if selling infringing products by business operators other than manufacturers do not fall within the types of acts listed in Article 9 of the AUCL, the judgment on whether such an act constitutes infringement can still be made in the light of the Tort Liability Law or the principle provisions of the AUCL.

1. The act of selling infringing products does not belong to the act of "using" technical secrets under the AUCL

Judging from the seller's subjective state, it does not intend to acquire and use the technical secret. Although both the seller and the manufacturer aim to gain profits, they do so by obviously different means.

Judging from the characteristics of the selling act, it does not actually touch upon the contents of the technical secret, but only involves the circulation of carriers of the technical secret or products not even carrying the technical secret. In this process, sellers, who play a role as channels, do not implement the technical secret. Nor do they objectively allow buyers to implement the technical secret or have the subjective intent to do so. The selling act alone does not fall within the scope of acts that are subject to regulation under Article 9 of the AUCL.

In *Avery Dennison Corporation, Avery Dennison (Guangzhou) Co., Ltd., Avery Dennison (Kunshan) Co., Ltd. and Avery Dennison (China) Co., Ltd. v. Siwei Enterprise Holding Co., Ltd. and Siwei Industrial (Shenzhen) Co., Ltd.*, a case concerning jurisdictional objection [18], the Supreme People's Court held that the act of selling infringing products manufactured by infringing trade secrets does not belong to the act of infringing listed in the AUCL. The use of trade secrets usually means the manufacturing of the infringing products. Upon the completion of manufacturing infringing products, the infringement occurs.

In *Shanghai Tianxiang & Chentai Pharmaceutical Machinery Co., Ltd. v. Shanghai Tofflon Science & Technology Co., Ltd., Guangzhou Baiyunshan Mingxing Pharmaceutical Co., Ltd. and others*, a dispute over technical secrets infringement [19], the Shanghai Intellectual Property Court held that "using" as stipulated in Article 9 of the AUCL shall refer to using the trade secret directly, and does not include the subsequent sales by other distributors or the use by purchasers after the infringing products have been manufactured and sold.

2. Regulation of the act of selling infringing products by Tort Liability Law

As mentioned above, the selling act is the natural continuation of the manufacturing act. Where the actor committed multiple infringing acts including both manufacturing and selling, it will be liable solely because of the manufacturing act. Where an actor only sells infringing products, the selling act is, in principle, not subject to the regulation of the AUCL. However, in judicial practice, there are still cases in which such an act is regulated by the Tort Liability Law.

In *Kunshan Isotope Chemical Co., Ltd., Jiangsu Huihong International Group Specialty Products Import and Export (Suzhou) Co., Ltd. and others v. Shanghai Chemical Research Institute*, a dispute over trade secret infringement [20], the first-instance court found that before the founding of the infringer Isotope, the legal representative of Huihong has participated in the preparation for Isotope; and when Isotope was set up, Huihong and Isotope cooperated by means of manufacturing infringing products by Isotope and selling the same by Huihong. Moreover, the legal representative of Isotope was the shareholder and director of Huihong. Hence, Huihong and other defendants showed the intent of joint infringement. Huihong knowingly sold the infringing products manufactured by Isotope, and therefore committed trade secret infringement together with the other four defendants, all of which should bear joint and several civil liabilities for damages. The Shanghai High People's Court upheld the first-instance judgment at second instance.

In *Shanghai Tianxiang & Chentai Pharmaceutical Machinery Co., Ltd. v. Shanghai Tofflon Science & Technology Co., Ltd., Guangzhou Baiyunshan Mingxing Pharmaceutical Co., Ltd. and others*, a dispute over technical secret infringement [21], the Shanghai Intellectual Property Court held the act of selling products that infringe the trade secret by sellers other than the manufacturer does not belong to the act of using other's trade secret without authorization, but objectively contributes to the use of trade secret, since it is the subsequent sale that causes the trade secret infringement. Therefore, only when the sellers clearly know that the product they sell infringes the trade secret can they be liable for contributory infringement.

After comprehensive analysis of the above cases, it is found that the act of selling infringing products may constitute joint infringement or contributory infringement under the Tort Liability Law under the following circumstances: one is that there is a particular connection between the sell-

ers and the manufacturer that uses the technical secret. For example, the sellers and the manufacturer have common shareholders, senior managers or actual controllers, or the division of labor and cooperation exist between the sellers and the manufacturer. Under such circumstances, the sellers and the manufacturer have the same intent and perform acts cooperatively. The other is that the sellers know that the infringing products were manufactured by the manufacturer using the technical secret of another party acquired through improper means, but still sell the infringing products. Under such circumstances, it is required that the selling act of the sellers objectively contributes to the use of technical secrets, and the sellers know or should have known that the products they sell infringe on the technical secret.

IV. Determination of the act of using infringing products by end consumers

The existing laws and judicial interpretations have not provided a clear answer to whether the use of infringing products by end consumers constitutes infringement, but this issue has been raised quite a lot in judicial practice. By analyzing those cases, it can be seen that the use of infringing products by end consumers generally does not constitute infringement under the AUCL.

In *Youkai (Shanghai) Machinery Co., Ltd. v. Shanghai Woodsea Machinery Co., Ltd. and others*, an appeal case concerning a dispute over technical secret infringement [22], the Supreme People's Court held that since the sale of infringing products as a result of trade secret infringement does not constitute infringement, the use of infringing products by consumers in no way constitutes infringement as listed in Article 10 of the AUCL. Upon the completion of manufacturing the accused infringing product, the use of trade secret occurred.

In *Shanghai Tianxiang & Chentai Pharmaceutical Machinery Co., Ltd. v. Shanghai Tofflon Science & Technology Co., Ltd., Guangzhou Baiyunshan Mingxing Pharmaceutical Co., Ltd. and others*, a dispute over technical secret infringement [23], the Shanghai Intellectual Property Court held that where an operator uses a purchased product that infringes a trade secret, since the infringing product has been withdrawn from the market, the competition with other market entities does not occur. Thus, the use of the infringing product is not subject to regulation under the AUCL irrespective of whether the user of the infringing product knows that the product is potentially infringing.

In addition to judicial practice, the conclusion of non-infringement can also be confirmed from the distinction between using infringing products and using technical secrets, the characteristics of the act of using infringing products by end consumers, the maintenance of market competition order, the expected consequences and the like.

1. Clarification of using infringing products and using technical secrets

The definition of using infringing products and that of using technical secrets directly affect the determination as to whether the act of selling infringing products by an operator other than their manufacturer and the act of using infringing products by end consumers constitute infringement. Thus, it is necessary to analyze and clarify the above two concepts.

Obviously, the production of the infringing products by using the technical secret are not equivalent to the use of the technical secret, and during the use of the aforementioned infringing products the technical secret is not necessarily used. In this sense, the use of a product infringing a technical secret is not necessarily equivalent to the use of the technical secret. [24] In other words, the use of technical secret and the use of products must be differentiated in disputes over technical secret infringement. If they were considered as the same, the selling act as stated above would formally meet the requirements for allowing others to use technical secrets, and the use of infringing products by end consumers would directly fall within the scope of improper use of technical secrets, which means technical secrets would become an absolute right similar to patent right. This is obviously not in line with the original legislative intent.

In *Qingdao Public Architecture Design Institute Co., Ltd. v. Beijing Lizheng Software Corporation and Beijing Dacheng Huazhi Software Technology Co., Ltd.*, a dispute over technical secret infringement [25], the Beijing Intellectual Property Court held that first, judging from the subject, Qingdao Public Architecture Design Institute is not the direct user of the technical secret, but the end consumer of the products manufactured by using the secret. It acquired the ownership of the software in suit in good faith, and shall not be regarded as the "third party" as stipulated in Article 10.2 of the AUCL. Second, judging from subjective intent, Qingdao Public Architecture Design Institute fulfilled the duty of due care during the transaction and made no fault.

Qingdao Public Architecture Design Institute should not be deemed to have known the software in suit developed by Dacheng used the technical secret of Beijing Lizheng just because Qingdao Public Architecture Design Institute was once the client of Beijing Lizheng. Third, judging from consequence, the further use of the software by Qingdao Public Architecture Design Institute will not affect the anticipated profits of Beijing Lizheng. As the buyer and consumer of the software in suit, Qingdao Public Architecture Design Institute did not know or should not have known that the software in suit infringed other's technical secret at the time of buying, obtained the product from a normal commercial channel through the bidding process and paid reasonable consideration, and thus is not liable for infringement.

2. The use of infringing products by end consumers generally does not constitute the "use" in the sense of the AUCL

According to the current laws and regulations, in view of the characteristics of using infringing products by end consumers, the maintenance of market competition order, the expected consequences and the like, the use of technical secrets shall be defined in a narrow sense, that is, the use of technical secrets refers to the use of technical secrets for manufacturing products, and the use of infringing products by end consumers generally does not constitute the use of technical secrets.

First of all, pursuant to the provisions of the current AUCL, the use of technical secrets cannot be extensively interpreted as covering the use of infringing products by end consumers. If a judicial judgment determines that the end consumer shall bear the liability for using infringing products, it involves legal fiction, which is a legislative, not a judicial, technique.

Second, judging from the characteristics of using infringing products by end consumers, the right attached to technical secrets has been exhausted in the manufacturing process, and the subsequent sale and use of the infringing products generally do not constitute the use in the sense of the AUCL, as mentioned above. There is no direct legal causality between the use of infringing products by end consumers and the use of technical secrets by the manufacturer. The use of infringing products by consumers does not contribute to the act of manufacturing by the manufacturer, and there is no direct causality between the use of infringing products by consumers and the unfair competitive advantage gained by the manufacturer. In other words, the use of infringing products by end consumers leads to the use of technical secret, which does not meet the requirements of contributory infringement, and there is no direct causality therebetween.

Third, judging from the maintenance of market competition order, when the end consumer uses the purchased infringing product, the infringing product has been withdrawn from the market and does not compete with those of other market entities. The use of infringing products by end consumers is not subject to the regulation under the AUCL irrespective of whether the user of the infringing product knows that the product is potentially infringing. [26]

In the end, judging from the expected consequences, if the end consumers are liable for infringement, they will have to bear high-level duty of care due to the confidentiality of technical secret, which is obviously unreasonable. Moreover, under the current legal framework, the lost trading opportunities for the right holder due to the consumers' purchase of infringing products can be completely remedied by damages from the manufacturer and/or seller.

Hence, under the current legal framework and in view of the above factors, the use of technical secrets generally should not be extensively interpreted as covering the use of infringing products by end consumers.

3. The types of technical secrets generally do not affect the determination of the use of infringing products by end consumers

Generally speaking, different types of technical secrets will result in different forms of using acts. With reference to the product patents and process patents in the Patent Law, technical secrets can also be classified similarly, namely, technical secrets embodied in product structures, raw materials, components, formulas, materials, samples, styles, etc. (hereinafter referred to as "product technical secrets"), and technical secrets embodied in the processes, methods or steps of manufacturing (hereinafter referred to as "process technical secrets"). Obviously, the use of process technical secrets is only limited to the product manufacturing process, and the subsequent sale and use of the manufactured products do not involve the reproduction of the technical secrets. Infringing products do not carry any particular technical secrets, which means they are not the carriers of technical secrets. However, if technical secrets are in the form of information such as algorithms, data, computer programs and related files, the resulted products are often the carriers of relevant technical secrets, and the substan-

tial part of the technical secrets may be exposed during the subsequent use of the products.

However, if the determination on the use of technical secrets varies depending on the type of technical secrets, it is very likely that the determination on whether the use of infringing products by end consumers constitutes infringement will vary accordingly. In practice, due to the non-public nature of technical secrets, it is usually unreasonable to require end consumers to judge whether a product infringes others' technical secrets, except under particular circumstances like they had business dealings before. It is even more ridiculous, when the scope of technical secrets is not clear and needs to be clarified and amended step-by-step with the guidance of courts in lawsuits.

Thus, differentiating the use of technical secrets according to the types of technical secrets on a case-by-case basis not only overburdens end consumers, but also is impractical due to the difficulty in accurately distinguishing technical secret types in judicial practice. Hence, the same rules on infringement determination regarding the use of technical secrets, in principle, should be followed no matter if the disputed technical secrets are about products or process, such as algorithms, data and computer files.

V. Conclusion

This article sorts out and summarizes the rationales and views about the sale and use of infringing products in disputes over technical secret infringement, and delves into the differences in the requirements and judging methods regarding such acts between the AUCL and the Tort Liability Law in light of laws, judicial interpretations and relevant theories.

1. The sale of infringing products does not, in principle, constitute infringement in the sense of the AUCL, but may still be regulated by the Tort Liability Law. Although the act of selling infringing products is the natural continuation of the act of manufacturing the same, the selling act does not involve the technical secret or even the circulation of the product carrying the technical secret, but only involves the circulation of the carrier of the technical secret. Judging from the provisions of the AUCL and its protected legal interests, the selling act does not, in principle, belong to the use of technical secrets under the ACUL, and does not constitute infringement. However, such an act can be regulated by the Tort Liability Law. Sellers may be liable for joint infringement or contributory infringement under the Tort Liability Law when there is a particular connection between the sellers and the manufacturer that uses the technical secret, or when the sellers still sell the infringing products even though they have the clear knowledge that the infringing products were manufactured by the manufacturer using the technical secret improperly acquired from another party.

2. The use of infringing products does not constitute infringement. The use of a product infringing a technical secret obviously does not equal to the use of technical secret itself. The use of the technical secret has been exhausted in the manufacturing process, and the subsequent use of the infringing products, in principle, do not constitute the use of technical secret in the sense of the AUCL. Since the infringing products have been withdrawn from the market and will not compete with other market entities any longer, the use of the infringing products is not subject to the regulation under the AUCL irrespective of whether the user of the infringing products knows that the products are potentially infringing or not. If the end consumers were made liable for infringement, they would have to bear a high-level duty of care, which is obviously unreasonable. ■

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[1] The research project of the Intellectual Property Court of the Supreme People's Court in 2021, the members of which include Fu Lei, Zuo Jinhe, Chen Lv and Zheng Wensi.

[2] The infringing products herein refer to the products manufactured by infringing others' technical secrets, and when the infringing products are sold and used, the infringed technical secrets have not been disclosed to the public. And the infringing products herein themselves are not technical serects. If the infringement has directly made relevant secrets public, and the sale of the products manufactured by using relevant disclosed technical process occurs after the disclosure, the products are not the direct consequences of infringement of technical secrets and will not be discussed herein. For related cases, please refer to the Civil Ruling No. Jing73minchu 1717/2019, the Civil Ruling No. Yu05minchu 855/2020 and the Civil Ruling No. Jing73minchu 96/2020. In disputes over jurisdictional objection, several rulings followed the above view, that is, if a trade secret loses its confidentiality due to prior acquisition, disclosure and use thereof, the subsequent use of technical information in the public domain by others does not constitute infringement of the technical secret.

[3] Searches were conducted with the key words "技術秘密" (technical secret), "商業秘密" (trade secret) and "侵權" (infringement) for judicial documents on wenshu.court.gov.cn and www.faxin.cn.

[4] Wang Wenmin (2021). The status and application of fault in the Anti-Unfair Competition Law. *Science of Law (Journal of Northwest University of Political Science and Law), 2, 178*.

[5] Kong Xiangjun (2019). *New Principles of Anti-Unfair Competition Law* (p.88). Law Press·China.

[6] *Ibid*, p. 101.

[7] Article 9 of the AUCL (2019), and Articles 8 and 9 of the Judicial Interpretation of Trade Secrets.

[8] Kong Xiangjun (editor-in-chief) (2012). *Judicial Practice of Trade Secret Protection* (p. 150). China Legal Publishing House.

[9] Zhang Yurui (1999). *Trade Secret Law* (p. 510). China Legal Publishing House.

[10] The Supreme People's Court. *The Understanding and Application of the Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in the Trial of Civil Cases Involving Infringement upon Trade Secret*, published on 20 April 2021.

[11] Kong Xiangjun (2019). *New Principles of Anti-Unfair Competition Law (Centavo)* (p. 453). Law Press·China.

[12] Cheng Xiao (2017). *Textbook of Tort Liability Law* (3rd edition, p. 116). China Renmin University Press.

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[19] The Civil Judgment No. Hu73minchu 808/2016.

[20] The Civil Judgment No. Hugaominsan(zhi)zhongzi 40/2005.

[21] See supra note 19.

[22] The Civil Judgment No. Zuigaofazhiminzhong 7/2019.

[23] See supra note 19.

[24] For instance, in *Beijing Xingguang Catering Administration, Ltd. v. Baotou Market Supervision Administration and Changsha Haide Catering Administration, Ltd.*, an administrative dispute over other intellectual property rights, the Supreme People's Court held that pursuant to Article 10 of the AUCL, the acts of infringing trade secrets include the acts of acquiring through improper means, disclosing, using or allowing others to use trade secrets. Accordingly, the use of infringing products in business operations does not constitute the infringement of trade secrets regulated by the AUCL. See the Administrative Judgment No. Zuigaofazhixingzhong 101/2020.

[25] The Civil Judgment No. Jing73minzhong 1249/2018.

[26] See supra note 19.

Import Expo Seals Big Deals, Bright Future

Combined intent transactions over the span of a year amassed 73.52 billion USD, up 3.9% compared to the previous edition. Over 2,800 companies from 127 countries and regions attended the business exhibition. A record-high 438 new products/technologies/services made their global debut. The Fifth China International Import Expo (CIIE) drew to an end at the National Exhibition and Convention Center (NECC) Shanghai on 10 November 2022 accomplishing the set objectives with flying colors and exhibiting the charisma of the Chinese market and China's determination on opening up to the world.

As the first national-level exhibition dedicated to export, the CIIE has become a gathering of global good stuff in the past five years with high-level opening-up and a window for China to construct a new development scheme. Highlights could be found all over this year's event with high-profile cutting-edge innovations, world-renowned brands, attractive traditional handicrafts known as intangible cultural heritage and potent on-site IPR services, injecting vigor for constantly boosting China's high-level opening-up.

The number of Fortune 500 companies attending the business exhibiton hit 284, higher than the previous edition, and 90% were repeat patrons. The online country exhibition of the expo showcased products of 69 countries/international organizations, up 13%. It is not difficult to see with 145 countries, regions and international organizations in attendance, this year's friend network of CIIE is growing bigger along with more international influences.

Source: China IP News