

Determination of “Disclosure by Use” Under the Patent Law and Case Analysis (I)

— From the Perspective of Ultimate Facts

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I. Introduction

Invalidation cases involving “disclosure by use” are notable for the difficulty in examination and low petitioner win rate. This is attributed to the fact that “first, the disclosure time that needs to be proved is far before the evidence collection, and the evidence collection and adduction by both parties will be affected as several months or even years have passed since the time of the filing and examination of an invalidation case; second, evidence concerning disclosure by use is extremely complicated and few experiences can be drawn in relation to the authenticity of evidence and to the form of a complete chain of evidence; and third, the legal attributes of various acts of use are difficult to define so that whether they are public use cannot be determined”.¹ This article endorses the above viewpoint, and

meanwhile believes that the first and second reasons also render the asserted facts more complicated, aim of proof more ambiguous and chain of evidence longer, and further make the finding of facts harder, increase the number of issues and add the difficulty in determining the trial direction in the process of examination.

This, however, does not mean that all the invalidation petitioners are poorly capable in terms of evidence collection and adduction. Generally speaking, the petitioners desire to integrally and authentically restore the life fact for the sake of probative value. In addition, the petitioners usually believe that any missing links in the chain of evidence can be avoided as much as possible by way of “adequate evidence adduction” such as asserting multiple facts and producing multiple pieces of evidence². The causes of the above problems are manifold. Anyway, this undoubtedly

實的具體事實為主要事實。本文所稱主要事實與要件事實基本同義，但主要事實更偏向於具體案件層面，要件事實是從法律適用角度對主要事實的理論界定。

¹⁸ 何家弘、劉品新：《證據法學（第七版）》，法律出版社。

¹⁹ 第50181號無效宣告請求審查決定。

²⁰ 但也有觀點認為，這種公開方式更近似於出版物公開。囿於篇幅，本文不再展開這方面的討論。

²¹ 第14848號無效宣告請求審查決定。

²² 此處不對各類行為所對應的公開狀態認定作以具體展開，詳見下文。

²³ 同註14。

²⁴ 李新芝：“從案例看美國專利新穎性審查中的使用公開”，《審查業

務通訊》第22卷2期。

²⁵ (2018)京73行初5086號行政判決書。

²⁶ 祖侃：“使用公開現有技術舉證時需關注的問題”，《中國知識產權》總第125期。

²⁷ 同註3，“無論是專利複審委員會還是北京知識產權法院均認為，旋耕機的某些部件在使用過程中容易損壞，而某些易損部件的維修、更換也相對簡單容易，故僅憑這些照片難以確定該旋耕機出廠時的結構組成、部件連接關係和工作方式。所以，如何證明公證時結構就是產品售出時的結構成為認定使用公開是否成立的關鍵因素”。

²⁸ (2019)京73行初3115號行政判決書。

²⁹ (2021)最高法知行終442號行政判決書。

costs the parties concerned more time and money. Further, too much claims do not necessarily help to achieve their goals and precise attack is definitely a more feasible way. As far as the collegial panel is concerned, excessive facts and evidence will unnecessarily increase the difficulty in investigation and examination, which in turn affect the examination quality and efficiency. Similarly, it is not rare to come across cases in which evidence and factual allegations are too few to establish an complete chain of evidence. The parties in many cases are often distressed by the vexatious question “the patented products certainly have been publicly sold before the filing date, but why the panel or judge refuses to find so”.

Moreover, life facts and facts on which judgments are based are two concepts.³ Between the life facts and legal norms or the constituent elements thereof is the concept “ultimate fact”, which links the life facts and the legal norms⁴. Ultimate facts generally refer to specific facts that are in line with the elements of the law serving as adjudicative norms⁵, wherein “in line with” means “completely conform to”. In the logical reasoning syllogism, where the case facts are in line with the constituent elements of the legal norm, the legal consequence of the legal norm shall be triggered as the conclusion⁶ in this case. From the perspective of the methodology for law application, ultimate facts are the facts that must be found for just adjudication, and are the basis indispensable for the application of law. For instance, there is a view that from the perspective of evidence, the finding of facts in civil litigation generally follows the progressive process⁷ of “evidence - indirect fact - principal fact - ultimate fact - basis of claim”. How to apply laws⁸ or judicature⁹ based on ultimate fact is the new research topic or practice direction in the field of civil law and civil procedure law at home and abroad in recent years. Some researchers have put forward a related theory on the ultimate fact, which holds that even the parties concerned have collected all the information in relation to what actually happened in the case, the information cannot be directly used in civil proceedings, rather, a basic framework that can lead to legal judgments must be constructed based on the above information. This is the purpose of the theory on ultimate fact¹⁰.

Based on the above theory,¹¹ this article will first analyze the constituent elements of “disclosure by use” in law, and clarify a model on ultimate fact¹² and examination rationale accordingly, and then construct a more comprehensive case fact model by using the ultimate facts as an out-

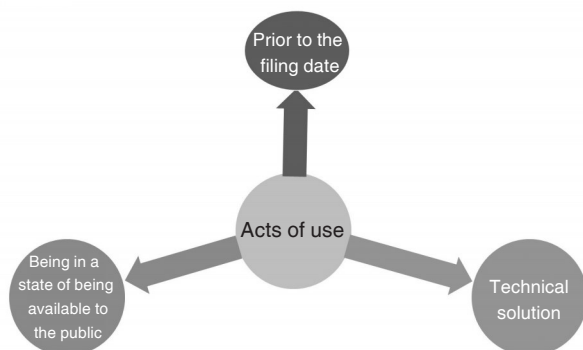
line and based on in - depth analysis of each of the elements. Furthermore, this article will also delve into the role of the case fact model in guiding the parties in proof and improving the examination quality and efficiency of cases concerning “disclosure by use” and the methods for doing the same.

II. Definition and constituent elements of “disclosure by use”

Article 22.5 of the China’s Patent Law provides for the definition of prior art, and the Guidelines for Patent Examination set forth specific provisions on the three means to disclose prior art and the determination rules thereof¹³. As for the definition of disclosure by use, the Guidelines for Patent Examination stipulate that disclosure by use means that by use the technical solution is disclosed or placed in the state of being available to the public¹⁴. There is also a view that “disclosure by use that can destroy the novelty of a patent or patent application under the patent law means that a related technology is placed in the state of being available to the public by related acts”¹⁵. In the light of relevant provisions and examination experience, the juristic elements on disclosure by use include: prior to the filing date, acts of use, technical solution, and the technical solution being in a state of being available to the public.

Among the four juristic elements, the technical solution usually attracts the most attention because it is the basis for technical comparison. Technical solution is the common constituent element of all the three means of disclosure, whereas the most essential feature that distinguishes the disclosure by use from the other two means is that the former results from the acts of use. Therefore, the acts of use should be considered as the most essential constituent element of disclosure by use and the starting point for examination and determination. There is an inherent logical connection between the acts of use and the other three elements. To be specific, it is the technical solution that is used and it is also the object of acts; the technical solution being in a publicly available state is caused by the acts of use and is the consequence of the acts; and the time when the acts of use occur is usually associated with the time of disclosure and is the main factor to be considered in determine whether the disclosure time is prior to the filing date. In short, the chain of evidence for disclosure by use can be

established much more easily by taking the acts of use as the starting point.



III. Constructing the reasoning process for determination and basic chain of evidence based on ultimate facts

Juristic elements are necessary conditions for a particular legal consequence as prescribed by law, which are a normative concept and a “major premise” in the “syllogism of judgment”¹⁶. Whether the jural relation constituted by juristic elements is established needs to be proved by evidence or presumption. From the perspective of evidence, it is more efficient to take the ultimate facts as the central link of proof and conduct proving activities, including evidence collection and adduction, cross-examination and admissibility, on the basis of the ultimate facts. Therefore, the model on ultimate fact for disclosure by use is of great significance in guiding petitioners’ evidence collection and adduction, improving the patentees’ ability in cross-examination and improving the examination quality and efficiency of cases concerning “disclosure by use”.

On the basis of the definition and constituent elements of disclosure by use, this article summarizes a model on ultimate facts and the following reasoning process for determination. First, judge whether the use of a technology, including sale, use and display (“facts related to the element of acts of use”), occurs prior to the filing date. Second, judge when the acts of use have been found, then whether the used technology contains substantial technical contents that are sufficient for technical comparison with the patent in suit (“facts related to the element of technical solution”). Third, judge whether the substantial technical contents are in a state of being available to the public (“facts related to

the element of publicly available state”). Fourth, judge whether the publicly available state of the technical contents exists before the filing date of the patent in suit (“facts related to the element of disclosure time”).

Although the act of use is the kernel constituent element of disclosure by use, the mere existence of the act of use cannot automatically establish the disclosure by use. Only when all the above four ultimate facts are found can the related technical contents qualify as a prior art formed through disclosure by use. On the contrary, if any one of the ultimate facts is not found, the conclusion that the technical solution has been disclosed by use cannot be drawn and the party bearing the burden of proof shall face the unfavorable consequences.

Under some circumstances, the ultimate facts of disclosure by use can also be divided into two parts according to the nature thereof: one is the technical facts represented by the element of technical solution; and the other is the facts related to the acts of disclosure, comprising acts of use, prior to the filing date, and technical solution being in a state of being available to the public. Such a division is conducive to extracting and highlighting the technical facts, thereby laying the foundation for the smooth progress of proof and further comparison of technical solutions. However, in order to clarify the general framework of the application of law concerning disclosure by use, the article is going to discuss and analyze the four ultimate facts.

IV. Constructing a systematic case fact model and its proof based on ultimate facts

Ultimate facts are the basis and core of principal facts¹⁷ in the sense of procedure law, and not the entirety of case facts concerning disclosure by use. The case facts on which the application of law relies shall also include indirect facts which are related to the principal facts, associated indirect facts that link up the principal facts, auxiliary facts and the like¹⁸. According to the basic legislative principles for disclosure by use and in conjunction with trial experience, this article intends to further construct a more comprehensive and systematic case fact model with multiple levels based on each of the ultimate facts mentioned above, in a bid to theoretically resolve the complicated but typical issues concerning the application of law or factual

findings in the cases involving disclosure by use.

1. Ultimate facts related to the element of acts of use

The Guidelines for Patent Examination provide for several common acts of use, including sale, use, production and display. From the perspective of acts, the essence of disclosure by use is that the acts of use lead to the consequence of the technical solution being disclosed. Thus, the ultimate facts related to acts of use are the foundation of the model and also the basis and focus of proof. The parties concerned need to prove the existence of acts of use under patent law by evidence on the premise that the type of acts is specified, and the examiners also need to ascertain the type of acts and determine whether the acts have been proved based on the evidence submitted by the parties concerned.

(1) Constituent elements of the acts of use

The proof of acts of use depends on the proof of the following constituent elements: time, place, person(s) involved in the acts, course of acts, object(s) involved in the acts, and other factors that affect the examination of disclosure. The above constituent elements of acts constitute the group of facts to be proved centering on the acts of use. For instance,¹⁹ the petitioner intended to prove the following sale acts with a piece of physical evidence and its ancillary evidence (an invoice, photos and the like): in 2007, Sun brought a GREE air-conditioner in cash from a branch of Guosheng Electric Appliance Co., Ltd., and the branch issued an invoice on the same date and gave it to Sun for recordal. From the perspective of the constituent elements of acts, the factual allegation is presented as follows: the acts belong to sale, the time is 2007, actors involved are Sun and Guosheng Electric Appliance Co., Ltd., objects involved are the GREE air-conditioner and the invoice, and the course of acts is in line with the characteristic, i.e. payment, delivery and invoicing, of public sale of goods.

(2) Common types of acts of use

Sale is a common and easily recognized type of acts of use in invalidation cases. "Sale" in the context of disclosure by use doesn't only refer to the transfer or delivery of a product from a seller to a buyer through a specific transaction. Rather, as long as the manufactured product is publicly on sale, it can be considered as being disclosed by sale. With the constant development of the Internet economy, the sales have been transformed from traditional offline sales to sales through various channels, including numerous e-commerce platforms and sellers on different social media. The

acts of uploading product pictures, possibly with literal introduction, onto the Internet to put the manufactured product on sale to the public can be determined as disclosure by sale²⁰.

In addition to sale, many invalidation cases also involve other types of acts, such as exhibition display and assembly²¹. The approaches for identifying the state of public availability or disclosure date for different types of acts are dissimilar. For example, the explicit or implicit confidentiality obligation is usually taken into account for trial production, and whether a product is open to the public is mostly considered for manufacturing²².

Facts related to elements of acts of use will be explained with reference to the following invalidation cases.

Case I:

The Invalidation Decision No. 49053 relates to a utility model patent No. 201220229825.7 with the title of "Ship Hydrodynamic Front Guide Wheel Energy - Saving Device". The petitioner of this case manufactures guide pipes similar to the patent in suit. The petitioner asserted that it is the guide pipes manufactured by itself that disclosed the patent as the products had been used, specifically installed, on newly-built ships. To this end, the petitioner provided a document issued by Germanischer Lloyd as evidence (Exhibit 11), in which it is testified that "the four guide pipes shown in the above drawings are planned to be used for the new ships built in China by Taizhou Port Shipyard", so as to prove that the guide pipes manufactured by the petitioner have been installed on a new ship built by Taizhou Port Shipyard (which corresponds to the element of the acts of use). Exhibit 11 also contains the drawings of the guide pipes, showing the relevant technical means (which corresponds to the element of technical solution). Exhibit 9 and Exhibit 17 proved that the newly built ship has been launched and stopped at Vancouver for inspection, and the launching time and inspection time can prove that the guide pipes have been in the state of being available to the public prior to the filing date of the present patent (which corresponds to the elements of disclosure time and of the publicly available state).

The Invalidation Decision found that guide pipes are auxiliary devices on ships, which means they may or may not be installed on the ships. The expression of the testimony in Exhibit 11 can only prove that the guide pipes are planned to be used on ships under construction, but fails to directly prove that the guide pipes shown in the drawings

have been installed. The ship launching and inspection records in Exhibit 9 and Exhibit 11 can only indicate the time of the public use of the ship, but cannot indirectly prove the installation of the guide pipes. In addition, the Invalidation Decision held that the petitioner, as the supplier of the guide pipes in Exhibit 11, is capable to provide the sale contract, invoice or delivery record of the guide pipes or other documents proving that the guide pipes have been sold, delivered or installed. However, the petitioner failed to prove the above in the trial. Hence, the petitioner shall bear the unfavorable consequences.

According to the model on ultimate facts, the petitioner asserted that the installation of the guide pipes constituted disclosure by use, but Exhibit 11 cannot prove that the act of installation has actually occurred. Disclosure by use cannot be established due to the failure to prove the acts of use.

2. Ultimate facts related to the element of technical solution

(1) Technology involved in the acts of use shall present substantive technical contents

The Guidelines for Patent Examination set forth the following provisions on the technical contents in relation to disclosure by use: “[s]o long as by the above means the relevant technical content is placed in such a state that the public can know it if they wish, disclosure by use can be established, and it is of no relevance whether the public had actually known it. However, if …… no explanation of the technical contents thereof is provided so that the structure and function or composition of the product is not known to a person skilled in the art, the exhibition or demonstration does not constitute a disclosure by use.”²³ It is viewed that the above provisions suggest that in assessing novelty over disclosure by use, whether the public can obtain the technical solution through use is one of the important criteria for judging whether the acts of use constitute disclosure by use under the patent law.²⁴ This article agrees on the above viewpoint that where the ultimate facts related to acts of use have been found, the object of the acts, namely the used technology, should have substantive technical contents, or otherwise the public cannot acquire the key technical information from use, not to mention that the technical solution has been disclosed.

What are “substantive technical contents”? This concept is about the extent of disclosure of technical information, for which the requirement should not be set too high²⁵. As long as certain technical effect can be achieved by the

certain technical means, substantive technical contents can be found. Nevertheless very limited disclosure may not be sufficient to invalidate the target claim.

(2) Proof of technical solution

The technical solution learned is a collection of technical concepts formed in a human mind through sensory input, that is to say, technical solution can only be perceived with the help of a carrier. In the case of other types of disclosure, such as paper publication disclosure, video disclosure, verbal disclosure and the Internet disclosure, the technical solution is perceived by humans from a carrier by means of seeing and hearing. Moreover, the carrier often indicates the relevant date directly. In comparison with disclosure by use, the above means of disclosure generally have longer duration, and can directly and explicitly record the technical solution on the carrier, which makes it easier to determine whether a solution has been disclosed and the date of disclosure.

However, in the process of disclosure by use, the acts of use to be proved are usually transient and may have ended before evidence collection. The acts themselves usually cannot directly reflect the solution of a product claim, so an object related to the acts and other information carriers related to the object are usually required. For example, the acts of prior public sale of a product *per se* give no hint to technical solution, but the product sold can physically demonstrate its structure and composition, and its test report can reveal performance parameters. Even though the acts alone may sufficiently and directly show a method-related solution, since the prior use is not reproducible, it is usually necessary to present the solution with the help of acts-related objects and carriers. As a result, to prove the ultimate facts of technical solution, the carrier of the technical solution must be proved, and meanwhile the carrier must be linked to the acts, that is, the connection therebetween is also necessary to be proved.

In other words, for the reasons as stated above, the carrier of the technical solution can only indirectly present the technical solution disclosed by the previous acts, and the evidence collection, which is inherently conducted after the use, further increases the difficulty in proving the technical solution. Whether the technical solution embodied in the acts-related object and other information carrier later obtained by a party as evidence is identical with that at the time of acts and whether it can be taken as the basis for finding technical facts are the focuses in many cases con-

cerning disclosure by use²⁶ and also questions must be answered during the proof of disclosure by use.

As to the technical solution identicalness, disputes often relate to maintenance and replacement of vulnerable components²⁷, structural deformation and/or changes in chemical properties during long-term use, and multiple product structures under the same model, and the like.

In the following case, plastic wind turbines previously sold had been used for more than ten years by the time of evidence collection. The patentee challenged that the wind turbines had possibly been replaced and have undergone severe deformation, and thus the wind turbines and the related measurement report adduced by the petitioner cannot prove the original technical solution at the time of purchase. Both parties argued around this issue with evidence respectively. The collegial panel took account of various affecting factors and determined that the physical evidence adduced by the petitioner can reflect the technical solution at the time of sale. Only with a determination as such, a solid factual foundation can be laid for the technical solution comparison in the next step.

It is noteworthy that similar issues appear where the Internet evidence is taken as the carrier of the technical solution. For instance, in an e-commerce related case, the evidence filed by the petitioner for proving disclosure by sale is the product sales webpage that was recorded and preserved at the time of evidence adduction. There is usually a time span between the date of evidence collection and when the product hit the shelves. Since sales platforms usually give users with more interactive permissions, the product displayed on the sales webpage adduced as evidence may not be the product originally launched, but the launching time remains the same, that is, the product adduced as evidence may not be the same as that corresponding to the launching date, which also raises the issue of the identicalness of technical solutions.

This is illustrated by the following example.

Case II:

The Invalidation Decision No. 38626 relates to an invention patent No. 201410090627.0 with the title of "Anchor Device". The petitioner asserted that as known from Exhibit 3, a purchase contract between the patentee and a company in Sichuan Province, the anchor device of the present patent has been put into use since 20 September 2013, which is earlier than the filing date. Photos of Exhibit 4 show the structure of an anchor adjuster, which is the same as the an-

chor device claimed in the patent, indicating that the technical solution of the present patent has been disclosed by use prior to the filing date. Based on the Exhibit 3 and Exhibit 4, the collegial panel found the following facts: the company in Sichuan Province used the floating stage for the first time on 20 September 2013, which comprises a floating body and auxiliary equipment including the anchor device. The anchor device as shown in the photos of Exhibit 4 was delivered and installed on the floating stage by the patentee.

According to the case fact model, in this case, the actual use of the anchor device after its delivery corresponds to the element of acts of use, the carrier of the technical solution to be proved is the photos of the anchor device obtained afterwards, and the location of the acts of use is the floating stage. The use is open to the public, so the time of first use can be deemed as the disclosure time. So far, the elements of the acts of use, the publicly available state and the disclosure time have all been proved. As long as the used anchor device is identical with that shown in the photos, the element of technical solution can be satisfied, and therefore the disclosure by use can be established.

However, both parties argued on this issue. The patentee stated that it owned many patents directing to anchor products and provided products of different models as required during the long-term cooperation with the company in Sichuan. The product shown in Exhibit 4 was not the product mentioned in the contract of Exhibit 3 and was installed at a later time. The Invalidation Decision held that the petitioner failed to fulfill its burden of providing *prima facie* evidence on the connection between the acts of use and the carrier for proving the technical solution, namely the identicalness of technical solutions, and therefore shall bear the unfavorable consequences as the facts cannot be found. The first-instance judgment²⁸ upheld the Invalidation Decision, holding that "the plaintiff shall bear the burden of proving that the installed anchor device has not been replaced or modified, i.e., the product structure has not been changed". In the second instance, allocation of the burden of proof is still the key issue, and the second-instance judgement²⁹ also upheld the Invalidation Decision. ■

(To be continued)

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¹ Feng Shujie and Cui Guozhen (2012). Disclosure by sale for the determination of prior art in patent law. *Intellectual Property*, 2.

² For instance, a petitioner adduced 39 pieces of evidence to support two sets of claims based on “disclosure by use”, and each set comprises multiple facts in support of “disclosure by use”. Evidence for proving “disclosure by use” is characterized by various types, large number and great difficulties in determining their admissibility. This article mainly focuses on how to create a complete chain of evidence for “disclosure by use”, and therefore will not expound the issues related to admissibility.

³ The Administrative Judgment No. Jing73xingchu 417/2018.

⁴ Hu Xuejun (2019). Between life facts and juristic elements: The mistaken recognition and return of the object of burden of proof. *China Legal Science*, 2.

⁵ Ito Shigeo (JPN). *Basis of Ultimate Fact: The Structure of Civil Adjudication*. Law Press•China.

⁶ Tez-Chien Wang. *Legal Thinking and Civil Cases*. China University of Political Science and Law Press.

⁷ Cao Zhixun (2020). Models of proof of factual allegations in civil proceedings. *Journal of Soochow University (Law Edition)*, 4.

⁸ See supra note 5.

⁹ Zou Bihua. *Nine-Step Approach for Adjudication Based on Ultimate Fact*. Law Press•China.

¹⁰ See supra note 5.

¹¹ Tez-Chien Wang has proposed the idea of ultimate fact when introducing the concept of subsumption in his Book *Legal Thinking and Civil Cases*. The approach based on ultimate fact as applied in this article is not confined to the theories on ultimate fact advocated by scholars in Japan or China, and also incorporates law application methods commonly used in jurisprudence and trial practice in China.

¹² The fact model as mentioned in this article is a modelled concept between constituent elements and the specific facts of an individual case. The significance of proposing the fact model is to summarize the complicated facts regarding “disclosure by use” so as to argue the points of this article.

¹³ Article 22.2 & 22.3 of the China’s Patent Law reads that novelty means that the invention or utility model does not form part of the prior art; and inventiveness means that, as compared with the prior art, the invention has prominent substantive features and represents a notable progress and that the utility model has substantive features and represents progress. Article 22.5 of the China’s Patent Law reads that the “prior art” referred to in this Law means any technology known to the public before the date of filing in China or abroad. According to the Guidelines for Patent Examination, the means of disclosure includes

disclosure by publications, disclosure by use and disclosure by other means.

¹⁴ Guidelines for Patent Examination, Part II, Chapter Three, Section 2.1.2.2 “Disclosure by use”.

¹⁵ See supra note 1.

¹⁶ See supra note 6.

¹⁷ Some scholars deem that the facts required as legal prerequisites in their entirety are juristic elements, each individual fact constituting the juristic elements is an ultimate fact (legal fact), and the specific facts that are in line with the ultimate facts are the principal facts. In this article, the principal facts and the ultimate facts substantially have the same meaning. However, the principal facts are more related to a specific case, and the ultimate facts are the theoretical definition of the principal facts from the perspective of the application of law.

¹⁸ He Jiahong and Liu Pinxin. *Evidence* (7th edition). Law Press•China.

¹⁹ The Invalidation Decision No. 50181.

²⁰ There is also a view that such means of disclosure is more similar to the disclosure by publications. Due to the limited space, this article is not going to make further discussion in this regard.

²¹ The Invalidation Decision No. 14848.

²² The specific state of disclosure resulted from different acts of use will not be expounded herein. Please see below for details.

²³ See supra note 14.

²⁴ Li Xinzhi. A case study of disclosure by use in U.S. patent novelty examination. *Examination Newsletter*, Vol. 2, Issue 2.

²⁵ The Administrative Judgment No. Jing73xingchu5086/2018.

²⁶ Zu Kan. Issues to be noticed in proof of prior art disclosed by use. *China Intellectual Property*, 125.

²⁷ See supra note 3. “The Patent Reexamination Board and the Beijing Intellectual Property Court both opined that some components of the rotary cultivator are prone to damage during use, and the maintenance and replacement of some vulnerable components are relatively simple and easy, so it is difficult to determine from these photos the structure, composition, and connection relationship and operation modes of the rotary cultivator at the time of rollout. Hence, how to prove that the notarized structure of the product is the same as that at the time when the product was sold becomes the key issue in determining whether the disclosure by use is established.”

²⁸ The Administrative Judgment No. Jing73xingchu 3115/2019.

²⁹ The Administrative Judgment No. Zuigaofazhixingzhong 442/2021.