

# The Trial Mode Selection of Commercial Secret Criminal Civil Cross Case

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## Abstract

In recent years, the commercial secret criminal case has attracted the attention of scholars in the field of procedural law and intellectual property. As a kind of case form, there exist two modes of dispute in the trial practice of trade secret cases: "Punishment before civil procedure" and "Civil procedure before punishment", which has aroused various thinking and criticism in the theoretical circle on the mode selection of trade secret cases. Through the comparison of the two trial modes, this paper analyzes and summarizes the various problems arising in the trial process of the commercial secret criminal and civil cross cases in China, in the context of intellectual property cases "three trials in one", in order to provide some ideas for the exploration of the trial mode of the commercial secret criminal and civil cross cases.

## Keywords

Trade Secret Cases; Criminal and Civil Overlapping; Trial Sequence; Civil Procedure Priority; Criminal Procedure Priority.

## 1. Introduction

The main reason for the cross criminal and civil cases of trade secrets in China is that some trade secrets infringements have violated the relevant provisions of China's Anti Unfair Competition Law and criminal law, resulting in corresponding civil and criminal liabilities respectively. After the amendment of the anti unfair competition law in 2019, the types of acts infringing trade secrets, the distribution of the burden of proof and damages have been revised. From the legislative level, it strengthens the protection of the obligee of trade secrets. In 2020, the Supreme People's Procuratorate issued the decision on Revising the standards for filing and prosecuting criminal cases of infringement of trade secrets, which relaxed the standards for prosecuting criminal crimes to 300000 yuan. After the decision was issued, a large number of trade secret crimes were prosecuted, and the cross criminal and civil cases collided with each other, which caused a series of problems.

The case of commercial secret criminal and civil cross is not a single mode of non-criminal and civil or non-civil and criminal mutually exclusive in a simple sense, but a mixed case of civil and criminal blending. China's current litigation system has no specific provisions on the trial procedure of cross criminal and civil cases of trade secrets, but under the influence of the traditional thought of severe punishment and the introduction of relevant handling opinions, judges often adopt the mode of priority of criminal procedure in the trial of specific cases, which has also been applied to the trial process of trade secrets cases. In recent years, with the influx of intellectual property cases, the disadvantages of the idea of giving priority to criminal procedure have gradually appeared and expanded. There has been a fierce ideological collision in the academic community. Some scholars propose to use the "civil procedure priority" model to make up for the deficiencies in the trial process. For example, Professor Chen Xingliang believes that the trial of intellectual property cases, especially trade secret cases, should respect the parties' independent choice, Professor Zhang mingkai believes that the case of disputed

ownership of trade secrets should be brought in a civil lawsuit first to confirm the ownership of trade secrets, and then further solve the criminal problem. Some scholars believe that intellectual property cases should be thoroughly "punishment before the civil procedure" trial mentality, the first civil proceedings in line with the characteristics of the case and the law of trial.

But in fact, both the absolute priority of criminal procedure and the special priority of civil procedure are lack of necessary tension, and there are inevitable shackles in a single mode. In practice, for the infringement or criminal acts of trade secrets, most of the right holders will report to the public security organs at the same time of filing a civil lawsuit for trade secrets, seeking criminal relief, and bringing the case into criminal proceedings. Under this premise, how to deal with the relationship between the two kinds of proceedings and the order of the problem is still controversial. In addition, the resulting misplacement of jurisdiction, conflict of standards of proof and other issues, under the background of "three cases in one" of intellectual property rights, have also brought no small resistance to the trial of trade secret cases. This paper intends to put forward some views on the handling order of criminal civil cross cases of trade secrets from a theoretical point of view, in order to provide useful help for the trial practice of such cases.

## 2. Problems and Inadequacies of Priority in Criminal Procedure

### 2.1. Conflict of Case Logic

The existence of trade secret infringement is the premise for the perpetrator to constitute the crime of trade secret. For the determination of infringement, the court usually follows the thinking of "similarity + contact - legal source" to judge. The judge first determines the ownership of the right to trade secret, and then determines whether there is infringement, and finally determines whether the crime of trade secret is constituted according to the amount of illegal income.

In the mode of priority in criminal procedure, criminal cases involving commercial secrets will be blindly handed over to the criminal court for identification of ownership and identification of secret points. Although the burden of proof of the right holder is reduced, the public prosecution will provide evidence to cross-examine the case, which is conducive to the identification of facts. However, it deprives criminal defendants of their litigation rights to a considerable extent, makes them fall into the role of criminal suspects prematurely, loses the equal status of substantive confrontation with the plaintiff, and makes the commercial secret crime cases as a whole show the trend of "extensive punishment".

### 2.2. The Level of Court Proceedings is Misplaced

Business secrets crime as an ordinary criminal cases shall be the responsibility of the basic people's court trial and civil cases are differentiated according to the cause of action, involving the infringement civil cases of first instance of the technical secret by the intellectual property rights courts and part of the intermediate people's court of intellectual property under the jurisdiction of the court, without a intellectual property under the jurisdiction of the region then designated by the higher people's court of the court; The first instance cases of infringement of business secrets will still be tried by the basic courts with jurisdiction over general intellectual property civil dispute cases. Under the background of "three cases in one", especially the case of infringement of technical secrets presents the situation of misplacement of jurisdiction level because of its complexity and professionalism.

In the case of infringement of technical secrets, for example, civil cases are handled by intermediate courts, while criminal cases with higher requirements are handled by lower-level courts.

### 3. Comparative Analysis of Priority in Civil Procedure

As a kind of mixed case, the distinction between crime and non-crime is mainly reflected in the amount of crime. Therefore, in the determination of the amount of crime and the collection and preservation of criminal evidence, due to the lack of compulsory measures, civil procedure priority has natural disadvantages.

#### 3.1. The Amount Ascertained Standard is Relaxed

The amount of loss is the focus of the trial of trade secret cases, which is not only the criterion of incriminating trade secret crimes, but also the important key point of civil relief of trade secret infringement cases. In civil cases, judges mostly use discretionary method to determine the specific amount of damages, which is relatively loose, and the direct loss and indirect loss of the right holder of trade secrets are included in the scope of civil tort compensation. The criminal procedure requires the judge to make a specific judgment according to the disclosure and use of trade secrets, and the amount determination does not include the indirect loss of the right holder. Therefore, in the determination of amount, the determination of loss in civil procedure is relatively loose, while the determination of loss in criminal procedure is tight.

In the trial of civil and criminal cases, if the civil procedure is carried out first, then the loss calculated is bound to be more than the criminal procedure. Therefore, in the trial process, the case is easy to enter the criminal procedure to investigate the criminal responsibility of the infringer because of the large amount, resulting in the problem of extensive punishment in the field of trade secrets.

#### 3.2. Litigation is Less Efficient

Although there is the problem of the absence of preservation measures in the criminal procedure, the criminal suspects can be controlled by all kinds of compulsory measures in the criminal procedure to cut off the source of the crime. In the process of evidence collection, since there is no compulsory measures in the civil procedure, the infringer will destroy the evidence to reduce his liability in the process of litigation. At the same time, the amount of the above-mentioned decided that, due to the civil procedure, the commercial secret the infringer easily according to the amount of tort civil judgments on the nature of the case, the case has not yet entered the criminal procedure, criminal responsibility to escape to coverup, transfer property and abscond abroad, increase the difficulty that trial and execution.

#### 3.3. Lack of Res Judicata in Civil Judgments

The civil procedure follows the principle of "the one who claims to prove", and the right holder of trade secrets should provide effective evidence for his claim. In criminal proceedings, except private prosecution cases, public prosecution cases are provided by public security organs or procuratorates. In terms of probative force, the standard of proof in civil litigation should reach a high degree of probability, while in criminal case, it should be beyond reasonable doubt. Because of the difference of probative force and standard of proof, civil judgment has no substantial effect on criminal judgment. Even if there is a prior civil judgment, the trial of criminal cases of trade secret crimes still needs to carry out procedures such as identification and comparison of secret points, cross-examination of evidence and determination of criminal amount.

### 4. Trial Mode Selection of Mixed Commercial Secret Criminal and Civil Cases

The effect of criminal protection is the best, but the attack must be focused, otherwise even the most severe measures will lose their sharp edge over time. Trade secret cases blindly adopt the

mode of criminal procedure first, which cannot solve the drawbacks caused by such disputes. Although the civil procedure priority mode alleviates some problems caused by the preferential application of criminal procedure in mixed civil and criminal cases to a certain extent, fundamentally, this mode is not suitable for the use of commercial secrets in the case of civil and criminal overlapping. Therefore, the choice of trial mode for trade secret cases should be considered carefully according to the specific situation.

Some scholars believe that such cases should not simply copy or carry other types of judicial relief models. However, the rules should be redesigned on the basis of fully reflecting the unique characteristics of trade secret cases. The trial of trade secret cases should first examine whether the right holder's trade secret exists and judge whether the defendant's behavior constitutes the infringement of trade secret based on the evidence. At the same time, according to the amount of the evaluation of its behavior to meet the constitutive elements of trade secret crime, establish a "right review - review of constitutive elements - conviction and sentencing" intellectual property criminal trial thinking.

If the obligee submits the effective criminal judgment documents in the civil lawsuit, the claims concerning evidence and infringement determination should be accepted and taken as the prima facie evidence for the establishment of the obligee's claim based on the judgment of judgment. If the litigant submits the effective civil judgment during the trial of the commercial secret crime criminal case to prove the existence of the identification error of the effective criminal judgment, the trial supervision procedure of the criminal case should be initiated at this time. In addition, for the statements and confessions made by the parties in criminal cases, the court shall confirm the authenticity of the statements and confessions in combination with the documented evidence in civil cases.

The author thinks that the trial efficiency and the protection of the rights and interests of the parties should be emphasized in the process of the trial of the case involving the infringement of commercial secrets. Abandon the single criminal procedure first or civil procedure first trial model. In dealing with the case of civil and criminal cases, we should absorb useful experience from the traditional mode, learn from the experience of intellectual property rights trial, reform the trial mode of commercial secret criminal and civil cases, flexibly trial, and give full play to the professional advantages of the trial of commercial secret cases under the background of "three in one".

## 5. Conclusion

As a private right, the protection of trade secrets is related to social and economic development. Although the protection of trade secrets in China has been improved, there are still great shortcomings in the protection measures. the civil protection focuses on the protection of private rights, while the criminal emphasizes the presumption of innocence. The mode of priority in criminal procedure can effectively restrain the crime of commercial secrets, and the mode of priority in civil procedure provides a more harmonious and stable environment for the development of socialist market economy. in trade secret cases, the court has more discretion in the choice of trial mode. How to ease the conflict between different modes, balance the interests of all parties, promote fairness and justice, and maintain a good market competition environment need to be further explored and run in the future trial practice.

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