

# 中國有關商業秘密的案例和探討

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目前在中國的知識產權訴訟中，商業秘密訴訟佔到了相當比例，原因是商業秘密法是知識產權法中舉足輕重的法律。從性質上說，知識產權保護有四個基本支柱：

1. 著作權法，保護特定種類的思想、感情的表達結果，如文學藝術、科學技術作品；
2. 專利法，保護發明創造的技術構思；
3. 商標法和反不正當競爭法中的反假冒、防止混淆的規定，用以保護商譽的特定體現，如商標、商品外觀裝潢、經營標識，禁止攀附他人商譽、保護消費者利益。
4. 商業秘密法，保護秘密狀態的知識成果。

受知識產權法保護的智力成果，在這四種法律中，起碼可以找到一種合適的保護方式。商業秘密法起着其他知識產權法不可替代的作用，其保護對象不限於特定種類，而是涉及智力成果的相當部分，缺少了商業秘密保護，知識產權法的基礎體系就部分欠缺。

中國法律界的共識，是商業秘密是一種知識產權，但是如果進一步探討商業秘密權的性質，大多數人只想到商業秘密是一種財產權。其實商業秘密保護，並不像有些人認為的那樣簡單，而是一種複雜的法律現象——其現階段是一種知識產權，但歷史上卻是從合同法、侵權法、財產權的保護發展起來的。至今對於商業秘密進行知識產權法保護，仍然自覺、不自覺地受着財產權理論、合同權理論和侵權法思維、理論的影響，這三種理論是世界上保護商業秘密歷史悠久的基本理論，在中國的案例中同樣有所表現。

## 廈門市粉末冶金廠案

### —保護商業秘密的合同法理論

#### 原告

本案原告為廈門市粉末冶金廠。1984年受讓了一家外國公司的青銅元件鑄造技術，包括有關圖紙、技術資料；合同有效期8年，其中約定合同期間及期滿後5年內，本案原告無權將合同範圍內的任何資料轉讓給合同以外的第三人。該項目是原國家機械部確定的引進項目之一。

#### 被告

本案被告為廈門市開元區橫竹金屬製品廠，以及二個人被告陳昆西、陳孟宗，二人曾是本案原告的職工。

#### 原告與被告的合同關係

二個人被告在職時，曾作為原告技術、管理人員前往國外接受技術培訓，受訓內容有書面記載，並得到本案原告和有關外國公司的確認，其中陳昆西學習了產品模具的設計和有關工藝技術。

有關技術引進以後，本案原告組織出國學習的技術人員對技術進行了消化吸收，使該引進技術獲得廈門市科技成果三等獎。

陳昆西曾與原告簽訂了專業技術人員聘任合同，其中規定聘任期間“不得利用職權或工作方便以權謀私，侵犯企業技術權益和經濟利益”。

#### 糾紛起因

1988年8月，陳昆西、陳孟宗同廈門市開元區橫竹生產服務社共同投資開辦了橫竹金屬製品廠，註冊資金人民幣10萬元，陳昆西、陳孟宗分別出資41,379元、23,901元。

1990年6月，橫竹廠從廢品回收公司選購了原告售出的廢舊模具，加工修復使用，生產與原告相同的青銅元件投放市場，致使原告產品銷售量下降，原告向廈門市中級人民法院與侵犯商業秘密為由，提起訴訟。

#### 原告的商业秘密及其鑒定

原告主張其商業秘密為模具設計、使用以及產品生產的系列技術。法院向中國粉末冶金協會、北京粉末冶金二廠、北京粉末冶金研究所和西北有色金屬研究院的有關專家作了調查，上述單位、專家均認為原告掌握的技術在全國範圍內屬獨一無二的先進技術。

法院還委託專家鑒定組對橫竹廠使用的技術與原告的技術進行鑒定，相同點有：模具方面基本相同；產品加工方面，生產原理相同，具體作業參數有差別。

#### 一審判決

法院於1993年12月23日判決：陳昆西、陳孟宗將原告的商業秘密用於自己投資的廈門市開元區橫竹金屬製品廠，已構成侵權，橫竹金屬製品廠作為實施單位應承擔連帶責任。為此，該院於1993年12月23日判決：(1)橫竹廠停止使用原告技術；(2)陳昆西、陳孟宗各賠償原

告經濟損失 1.32 萬元，橫竹廠對上述賠償員連帶責任。

### 二審判決

原告不服一審判決，上訴稱被告侵權 4 年多，僅判賠償 2 萬多元，與實際損失相差甚遠。被告上訴稱原告對技術未採取保密措施，如曾將舊模具售給廢品公司，將模具圖紙提供給其他單位加工模具等，已使該技術公開，不存在商業秘密侵權。

福建省高級人民法院認為：本案原告取得的國外技術，經消化吸收後，已在全國同行業中佔有優勢的競爭地位。原告為不使該項技術讓公眾知悉，僅限少數有關人員掌握，並採取了適當的保密措施。陳昆西與陳孟宗作為原告掌握和瞭解該商業秘密的工作人員，未經許可將該秘密使用於與他人共同投資興辦企業，生產、銷售相同產品，給原告造成經濟損失，已經構成侵犯原告的商業秘密。

至於原告將模具圖紙委託其他廠家製作模具和向廢品公司出售廢舊模具的行為，由於非知情人難以知悉模具如何使用，因此不可能從廢品公司選購舊模具加以修復、使用，故上訴及答辯的理由不能成立。

二審法院認為一審判決定性正確，但是賠償數額偏低，且未確定橫竹廠應負的賠償責任，故於 1994 年 9 月判決：陳昆西、陳孟宗、廈門市開元區橫竹金屬製品廠賠償原告 17.84 萬元，其中二個人被告各承擔 40%，橫竹金屬製品廠 20%。

上述賠償責任為連帶責任。

### 評述

上述廈門市粉末冶金廠案是中國《反不正當競爭法》實施以後，第一例見諸於報導的按照商業秘密侵權處理的案件，有依據合同法理論保護的特徵。

1. 本案原告接受國外技術使用許可，當然享有商業秘密權。但是其保密措施並非無懈可擊，被告稱原告未對技術未採取保密措施，如原告曾將舊模具售給廢品公司，將模具圖紙提供給其他單位加工模具等，在理論上已使該技術公開，不能再主張商業秘密權。

2. 在產品的加工方面，對於生產原理、技術等，通過一段時間的勞動，會轉化為勞動者自身的知識、經驗和技能，只要沒有帶走商業秘密文件、圖紙，其在合法流動後，可以使用屬於勞動者自己的知識、經驗和技能。

在上述情況下，如果嚴格適用財產權理論，我們可以發現原告商業秘密的很多部分已經公開或淡化，不能構成其特有的財產受到保護：勞動者從公開市場上購買了原告出售的廢舊模具，利用其自身的知識、經驗和技能，採用不同的具體作業參數，生產競爭產品，不構成侵權。

但是本案兩級法院的判決，重點強調了被告與原告的特殊關係，即出於僱傭關係、勞動關係，本案二個人被

告被派往國外學習，掌握了同業競爭者並未掌握的特殊知識，於是產生了特殊保密義務。這種特殊保密義務要求，二個人被告在離開原告企業以後，仍然對工作中獲知的特殊知識保守秘密，不能先於社會公眾對有關知識加以利用。

本案原告將廢舊模具投入公開市場，任何人雖然可以購買，但是沒有特殊知識，仍然可能做不出合格產品。所以二個人被告的特殊義務仍未消滅，其雖然可以購買原告的廢舊模具，但在有關知識全部進入公用領域之前，仍然不能用以生產競爭產品。

合同法理論在發達國家的商業秘密訴訟中經常被引用，是一種歷史悠久的理論，但在中國比較薄弱，導致對於這樣的信息，往往不能肯定是否可以保護。即：1. 儘管權利人與本單位職工有保密約定，但有關信息的秘密性比較差；2. 有關信息構成商業秘密，但權利人與本單位職工沒有明確約定，職工僅有默示的保密義務。

在以上兩種情況下，若判決權利人勝訴，有關判決有被上級法院撤銷審判或改判的可能。

其實，信守合同約定是市場經濟法律中的起碼要求，合同涉及的領域是經濟、技術發展需要決定的，當事人之間對需要保密的信息，即使不是商業秘密，訂立保密合同也是合理、有效的，因而也必須執行。即使沒有書面合同、只有默示義務，對默示合同義務也應該遵守。

從這一基本原則出發，保護商業秘密的合同法理論才會在中國發展起來。

僅僅依據合同法理論，可能使商業秘密保護的範圍過於寬泛，例如將經濟、技術合作關係和勞動、僱傭關係中對方可能接觸的所有信息，都指稱為商業秘密。為了克服合同法理論的缺陷，如果“權利人”依據合同關係，追究“義務人”的責任，義務人認為不公平，可以用有關合同不是當事人的真實意思表示，或者有關商業秘密的合同關係當中沒有可受保護的對象作為其抗辯理由。

## 三豐科技實業有限公司案

### 一保護商業秘密的財產權理論

#### 原告

本案原告為四川省廣漢市三豐科技實業有限公司，擁有“生活垃圾無害化資源化處理工藝與利用技術”。該技術獲得國家環境保護總局《1998 年國家環境保護最佳實用技術推廣計劃項目證書》，並獲國家科學技術部等 5 部、局頒發的《國家重點新產品證書》。

#### 被告

本案有若干被告，主要有“合同被告”四川省環保建設開發總公司，其與原告簽訂下述合同；

本案還有“第三人被告”—四川省內江機械廠。

#### 合作約定

1998年1月14日，本案被告四川省環保開發總公司作為甲方，三豐科技公司作為乙方，簽訂《合作協議書》。雙方約定：

1. 甲方工作：對乙方工藝技術及其裝備進行推廣實施，建造垃圾處理廠；甲方承擔垃圾廠工程的土建設計、施工管理、業務聯繫等；

2. 乙方工作：負責對甲方承建的垃圾廠工程提供生產工藝技術方案、設備製造、安裝調試等；

3. 利益分配：凡由甲方簽訂承包合同承建的垃圾廠工程，乙方向甲方交納自製設備價格的5~10%作為管理費用；

4. 保密約定：乙方提供的任何工程總體方案、工藝技術和配套設備其所有權歸乙方，甲方對技術和相關硬件負有對第三方保密的義務，並在承包協議中作出“保證對該技術不外泄和嚴禁仿造設備”的承諾。

合同期限為三年。

#### 糾紛起因

1998年4月2日，本案被告省環保開發總公司與第三人被告內江機械廠簽訂合同。雙方約定：省環保開發總公司將其所承擔的內江垃圾處理廠工程中的全部設施委託內江機械廠設計、製造、安裝。

1999年3月9日，三豐科技公司向四川省高級人民法院起訴省環保開發總公司等，理由是被告以合作名義，取得相關技術資料，轉給內江機械廠等單位，仿造生產全套設備，修建完全照搬原告技術的垃圾處理廠，侵犯其商業秘密所有權。

原告請求判令被告立即停止侵害，歸還從原告處獲得的技術資料等；判令被告賠償原告的直接和間接損失1000萬元，承擔本案全部訴訟費用。

#### 原告主張的商業秘密和鑒定結論

三豐科技公司確定其商業秘密後，1999年9月15日原告、被告協商，一致同意委託四川省建設委員會組織有關專家，對原告所列11項技術信息是否屬於商業秘密、被告是否使用了商業秘密，進行技術鑒定。

同年12月7日，四川省建設委員會組織的專家組根據三豐科技公司所提交的技術資料及現場考察，做出《技術認定意見》，認定原告要求鑒定的11項技術信息，均不構成專有技術即商業秘密。

原告向中國專利局申請“垃圾複合肥料及其生產方法”發明專利，經公開後，由於未在指定期限內陳述意見，於2000年2月9日被視為撤回申請。該項技術方案現已進入公知領域。

#### 判決

在上述鑒定、事實認定的基礎上，法院於2000年中下達判決認為，“生活垃圾無害化資源化處理工藝與利用技術”的研究項目，是原告完成。1997年7月5日，該項技術成果通過了原國家科委委託四川省科委組織的鑒定，故三豐科技公司享有該項技術的成果權。

不過，根據鑒定專家組的《技術認定意見》，三豐科技公司的技術不構成受法律保護的技術。法院認定可以保護的技術秘密，是指處於秘密狀態、有實用價值並採取保密措施的技術方案或技術訣竅，原告所主張的11項技術要點，有的已規定在行業標準中，有的在使用中公開，並見諸於公開出版物，故作為技術秘密保護的理由不能成立。三豐科技公司向省環保開發總公司提供的“機械設備清單及報價”，主要是設備的規格、價格，不能反映本案所涉的技術秘密，故被告利用“設備清單及報價”侵犯原告技術秘密的理由也不能成立。

法院還指出，該《技術認定意見》結論與國家科技部等行政機關頒發的證書內容及證書的取得，並無衝突與矛盾，《技術認定意見》並不構成對行政機關授予證書的否定。

法院最後判決，駁回原告的訴訟請求。

本案原告不服判決，提出的上訴，被最高法院駁回。

#### 評述

上述三豐科技實業有限公司案在中國商業秘密保護中有一定代表性，目前一些案件按照這一模式處理，更多地依據了財產權理論。

1. 本案原告三豐科技實業有限公司與被告與被告四川省環保建設開發總公司簽有合作合同，約定被告負責項目推廣，原告負責設計、施工。原告認為自己的“生活垃圾無害化資源化處理工藝與利用技術”屬於商業秘密，被告在合同中也未提出異議。

爾後被告終止合同，與第三人被告內江機械廠簽訂合同，由第三人被告負責設計、施工。原告認為被告將相關技術資料轉給第三人被告，導致第三人被告的設計與其設計雷同，侵犯了其商業秘密權。

2. 法院在審理中首先確定原告的商業秘密是否具有新穎性，即是否具有從現有技術中不能得出的要素、內容。根據有關專家鑒定，法院認定被告的技術有的已成為行業標準，有的在使用中公開，並見諸公開出版物，故不屬於商業秘密。

原告沒有商業秘密，也就沒有無形財產權，導致合作合同失去對象，使合同被告無須承擔違約責任；同時對第三人被告的商業侵權之訴，失去了基礎，因為第三人被告設計與原告的類似，可以認為是同為公有技術。

適用財產權理論，在本案中導致違約、侵權均不存在。

### 3. 財產權理論的最大優點和缺點

保護商業秘密的財產權理論，產生了商業秘密保護的最大優點，同時也導致了商業秘密保護的最大缺陷。

所謂最大優點有三個。第一，是在商業秘密的刑事保護中，一旦商業秘密具備了高度新穎性，根據商業秘密的財產權學說，就容易追究商業秘密犯罪行為人的刑事責任。第二，是在商業秘密的民事保護中，財產權理論對意外獲得商業秘密者的義務、責任，以及善意第三人對商業秘密的義務、責任，提供了合適的法理基礎。對這些責任使用其他理論，均不能獲得像財產權理論那樣圓滿的解釋。第三，對一些“假”商業秘密即根本不符合商業秘密保護條件的對象，依據財產權理論，可以宣佈有關保密合同、契約無效，有關行為不構成侵權。目前中國行政機關認定的某些成果、頒發的證書，存在瑕疵，將公知技術或公知技術的簡單變形，認定為成果。採用財產權理論，對這些成果進行是否構成知識產權的鑒別，在經濟技術合作合同關係中，可以防止合同欺詐，保護合同對方的利益。在勞動關係中，保護合理流動的勞動者的合法權益。

所謂最大缺陷，是指在商業秘密的民事保護中，財產權理論要求商業秘密具備新穎性，也就是說在決定商業秘密能否得到保護，先要鑒別是否具備類似專利法意義上的創造性高度，相當一部分應該受到保護的商業秘密，會排斥在保護範圍以外。在實踐中違反保密合同的，即使保密信息的秘密性不高，但是如果違反的是真誠訂立的協議，還是有違約行為存在。同時，在商業秘密侵權訴訟中，侵權人侵犯的，也不一定是達到專利水平的商業秘密。如果過分要求新穎性、創造性，對違約、侵權行為就是一種鼓勵。

依據財產權理論，可能使商業秘密保護的範圍過於狹窄，例如在經濟、技術合作關係和勞動、僱傭關係中，義務人會認為，凡是權利人的保密信息沒有高度創造性的，就不能作為商業秘密保護。如果義務人依據財產權理論否認商業秘密的存在，權利人認為不公平，其抗辯理由可以是：即使有關信息的秘密性比較差，但是當事人之間達成的合同、合同關係出於當事人的自願，不存在欺詐，所以根據合同法必須追究義務人的責任。在權利人的有關信息秘密性比較差，但行為人故意以盜竊等不正當手段獲取該信息的情況下，權利人應強調行為人的主觀惡意和行為本身的惡劣性質，從而證明自己的有關信息具有相對秘密性，符合法律保護條件。

### 富士寶家用電器有限公司案 —保護商業秘密的侵權法理論

原告

本案原告為廣東省南海市富士寶家用電器有限公司，其多年來投入資金、人力和物力，通過採用一系列的營銷、獎售等方法，在全國各地形成了一個較大規模的銷售網絡，包括沈陽天虹電器經銷部、北京天河物資供應站、山東淄博聯華百貨站等 83 個一級經銷單位；北京懷柔縣百貨大樓、北京房山縣商業大樓等 500 個二級銷售網點。

富士寶公司對上述經營信息採取相應的保密措施，包括對知悉公司銷售網絡的銷售人員經常進行保密教育，明確保密義務，並制訂員工手冊，註明“對公司的業務秘密、技術資料以及工作會議記錄等均視為商業秘密，不得向外洩漏，違者受到嚴肅處理”。

富士寶公司注重產品開發，有若干專利，其中包括 1997 年 5 月授權的本案直立式電熱開水瓶外觀設計專利權。

#### 被告

本案被告為廣東省南海市家樂仕電器有限公司，其法人代表潘應明於 1991 年任富士寶公司的銷售員，1995 年任銷售部經理，1997 年 6 月辭職離開富士寶公司。潘應明辭職前，已向工商行政管理部門申請註冊了家樂仕公司。家樂仕公司於 1997 年 11 月開始向富士寶公司的銷售網絡中銷售自己的產品，其中部分單位為富士寶公司至今尚未公之於眾的秘密客戶。僅從家樂仕公司不完整的帳目上統計，該公司從 1997 年 10 月至 1998 年 3 月銷售電熱開水瓶 69,882 個，每個產品的稅後純利潤為 1,536 元。

#### 訴訟請求與抗辯

原告富士寶公司向廣東省佛山市中級人民法院起訴，稱被告公司向原告公司的銷售網絡中銷售仿冒原告公司外觀設計專利的電熱開水瓶，侵犯了原告公司的專利權和商業秘密。請求判令被告停止侵權，銷毀侵權產品、半成品及模具，賠償損失，賠禮道歉、消除影響。

被告除對外觀設計專利侵權指控進行抗辯，認為其產品與原告的外觀設計不相同、不相似以外，還認為原告銷售網絡在其每個產品的保修卡上均可以找到，是公開的，故原告沒有理由對其銷售網絡主張商業秘密權。

#### 認定與判決

1. 對外觀設計侵權之訴，法院經徵求雙方當事人的意見後，委託中華全國專利代理人協會專家委員會對原被告的產品進行了技術鑒定。依據鑒定結果，法院認定被告產品外觀設計與原告的外觀設計相近似，易使普通消費者在視覺上產生混淆，構成對富士寶公司專利的侵權。

2. 對經營秘密侵權之訴，法院認為，雖然為消費者提供維修便利，富士寶公司將自己的部分客戶名單在保

修卡上公開，但其他客戶名單尚未解密。被告家樂仕公司的法人代表潘應明明知這些商業秘密是原告公司經過長時間投入才得來，公司對員工有保密約定，卻違反約定，辭職後將其掌握的富士寶公司商業秘密提供給家樂仕公司。家樂仕公司利用這些信息從事銷售活動，以至在短時間內獲取高額利潤，構成惡意第三人侵權，應當承擔賠償責任。

法院於 1998 年 9 月 2 日判決：

1. 被告家樂仕公司自本判決生效之日起立即停止生產、銷售侵犯外觀設計專利權的產品，並銷毀侵權產品的模具。

2. 被告家樂仕公司一次性賠償原告公司經濟損失人民幣 102,140,928 元、律師費 2 萬元、調查費 2,105,520 元，共計 106,246,448 元。

3. 被告家樂仕公司在判決生效後十日內，在《南方日報》上書面向原告富士寶公司公開賠禮道歉，消除影響。

4. 被告家樂仕公司在判決生效後二年內，不得利用原告公司的經營信息、銷售網絡，銷售與富士寶公司專利相同的產品。

本案被告隨後的上訴，被廣東省高級法院駁回。

#### 評述

上述富士寶家用電器有限公司案，表明中國商業秘密保護與國際潮流同步發展，帶有侵權法保護的特點。

保護商業秘密的侵權法理論，不再強調當事人的合同義務以至商業秘密的財產性質，其特點是認為一切民事行為必須具有善意，違反這一義務即產生法律責任。侵權法保護的特點之一，是在保護對象方面更加趨於靈活，不但保護系統的商業秘密，而且可以保護零星的、有用時間較短的保密信息。本案原告起訴被告盜用其客戶名單，被告抗辯認為原告的客戶名單已經公開。法院認定原告客戶名單的部分公開，並不導致尚未公開的部分解密。雖然被告使用原告的公開客戶名單是合法行為，但使用未公開客戶名單，屬於惡意，應當承擔賠償責任。

從 TRIPS 協議保護商業秘密的規定中也可以看出侵權法的痕迹。TRIPS 協議第 39 條規定的保護商業秘密（即未披露的信息）的條件是：“其在某種意義上屬於秘密，即其整體或者要素的確切體現或組合，未被通常涉及該信息有關範圍的人普遍所知或者容易獲得”。這個定義說明，即使有關信息一部分為公眾所知，其他部分未公開的內容、全部內容的組織和排列等，仍然可以構成商業秘密。上述富士寶家用電器有限公司案就鮮明地說明了這一點，且該案中屬於經營秘密的客戶名單，即使是在發達國家，保護起來也有一定難度。上述判例說明中國法院在保護經營信息方面，有相當力度。

上述判例的另一個特點，是在禁止侵權的禁令方面，適用了“扣除領先時間(lead time)原則”。商業秘密的性質決定了權利人只有相對的禁止權，即只有在商業秘密未被有關競爭者公知的時間內，才可禁止被告使用，而不像專利權那樣，在專利有效期內，可以絕對禁止他人使用。上述判決禁止被告在兩年之內向原告的銷售網絡中銷售競爭產品，這就消除了被告相對於業內其他競爭者，在獲得原告的銷售網絡這一商業秘密方面的領先時間。兩年以後，原告的銷售網絡可能被業內人士公知，被告就可以向業內其他競爭者一樣，使用相同的銷售網絡。扣除領先時間原則體現了商業秘密侵權禁令的鮮明特色，上述案例是筆者見到的中國最早見諸報端的適用扣除領先原則的司法判決。

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# Case Analyses and Exploration Concerning Trade Secret in China

Zhang Yurui

To date, a considerable number of IP lawsuits in China involves trade secrets for the reason that the trade secret law is essential in the IP laws. There are basically four components in the IP protection regime:

1. The copyright law, designed to protect the results of expression of thoughts and feelings of particular nature, viz. literary, artistic and scientific works;
2. The patent law, designed to protect technical conception of invention-creations;
3. The provisions of the trademark law and unfair competition law for repressing counterfeit and for preventing confusion for protecting specific embodiments of commercial reputation, viz. trademarks, trade dresses, business representation, with a view to prohibiting use of others' commercial reputation and protecting consumers' interests; and
4. The trade secret law, designed to protect intellectual results kept confidential.

In these four categories of laws, at least one appropriate means of protection is available for any intellectual result protected under the IP laws. The trade secret law plays a role irreplaceable by any other IP laws, with the objects of protection not limited to some particular categories, but relating to a range of intellectual results. Absence of the trade secret law would make the regime of IP laws inadequate.

It is a consensus in the legal community in China that trade secret is one of the IP rights. However, if the nature of trade secret right is to be further explored, most scholars think that a trade secret is a property right. In fact, protection of trade secret is a rather complicated legal phenomenon, not as simple as some might have thought: it is now an IP right, but has evolved from the protection of property rights under the contract law and tort laws. Even today, the IP protection of trade secret is somewhat affected by the concepts and doctrines governing the property rights, contract right and those of the tort laws, which are the long-standing basic theory on trade secret protection in the world as is also demonstrated in the cases of the nature in China.

## Case of Xiamen City Metallurgical Powder Factory: Contract Law Doctrine on Trade Secret Protection

### The Plaintiff

The plaintiff in the case is the Xiamen City Metallurgical Powder Factory, a licensee, in 1984, of a know-how for casting bronze components from a foreign company, with the relevant drawings and technical data included. The term of the licensing contract is 8 years. It is agreed in the contract that the plaintiff has no right to transfer any data covered by the contract to a third party during the term of contract and within 5 years after the expiration thereof. This is one of the projects for introducing foreign technologies planned by the former Ministry of Mechanical Industry.

### The Defendants

The defendants in the case are the Xiamen City Kaiyuan Hengzhu Metal Products Factory and two individuals Chen Kunxi and Chen Mengzong, former employees of the plaintiff.

### The Contractual Relationship between Plaintiff and Defendants

The two individual defendants once went abroad to receive technical training as technicians and administrative members of the plaintiff. The training program was written down and confirmed by the plaintiff and the relevant foreign company. Chen Kunxi was trained in designing product moulds and the relevant technology in respect of the workmanship.

After the involved know-how was introduced, the plaintiff organised the trained technicians to internalise and improve it, so that it was given the third-place award for technological achievement by the Xiamen Municipality.

Chen Kunxi signed an employment contract with the plaintiff, in which it is provided that during his service, Chen "should not take advantage of his duty or service to seek personal gains and to encroach upon the corporate technology and its economic interests."

### Cause of Dispute

In August 1988, Chen Kunxi and Chen Mengzong and the Xiamen City Kaiyuan Hengzhu Production Service made joint investments to have set up the Xiamen City

Kaiyuan Hengzhu Metal Products Factory (Hengzhu), its registered capital being RMB 100,000 yuan, of which Chen Kunxi and Chen Mengzong invested RMB 41,379 and 23,901 yuan respectively.

In June 1990, Hengzhu bought from a salvage station used moulds sold by the plaintiff and repaired them to make the same bronze components as those made by the plaintiff and marketed them. This caused the plaintiff's sale to decline and the latter sued in the Xiamen Municipal Intermediate People's Court for infringement of its trade secret.

#### **Plaintiff's Trade Secret and Relevant Evaluation Thereof**

The plaintiff claimed that its trade secret was a series of know-how for the design and use of moulds and for the manufacture of the products. The court consulted some associations, factories and research institutes in the field, and all these organisations and experts held that the plaintiff's know-how was an advanced technology unique in China.

The court also entrusted experts with the evaluation of the know-how used by Hengzhu and the plaintiff, finding out that (1) the moulds used and (2) product processing and principle were the same, but specific operational parameters were not.

#### **First-instance Judgement**

On 23 December 1993, the court decided that Chen and Chen used the plaintiff's trade secret in Hengzhu, the factory they invested in, and the use constituted an infringement, and Hengzhu should bear joint liability as an execution entity. It, therefore, ruled that (1) Hengzhu cease the use of the plaintiff's know-how; (2) Chen and Chen pay RMB 13,200 yuan in compensation of the plaintiff's economic damages, and Hengzhu also be held liable for the damages.

#### **Second-instance Judgement**

Dissatisfied with the first-instance judgement, the plaintiff appealed that its trade secret had been infringed for 4 years, and the compensation of RMB 20,000 yuan was far from enough to cover the actual damages. In defense, the defendant argued that the plaintiff failed to take measures to keep its know-how confidential and that selling the old moulds to salvage station and giving the drawings to other entity to process moulds had rendered it disclosed. There was no trade secret involved.

The Fujian Provincial Higher People's Court held that the plaintiff mastered the foreign advanced know-how and achieved its competitive edge in the industry in China. Besides, it allowed a very few employees to get to know the know-how and took appropriate measures to keep it confidential, so as not to make it known to the public. As employees of the plaintiff who had internalised the know-how, Chen and Chen used the secret, without the

permission therefrom, for the enterprise they set up with others to make and sell the identical products, and, in doing so, inflicted economic damages to the plaintiff. Such an act had infringed the plaintiff's trade secret.

As for the plaintiff's act of giving the drawings to other manufacturer processing mould and selling old moulds to the salvage station, any layman would find it difficult to know how to use the moulds, and, hence, would find it impossible to repair and use them again. For this reason, the grounds for the appeal and defense were not tenable.

The court of second instance held the first-instance judge was correct in determining the nature of the case, but the amount of damages was too low, and no decision was made on the liability of Hengzhu for the damages. It therefore ruled in September 1994 that Chen and Chen and Hengzhu compensate RMB 178,400 yuan, of which the two individual defendants pay 40% respectively, and Hengzhu the remaining 20%.

The above liability for damages is a joint one.

#### **Analysis**

This is the first case handled as an infringement of trade secret after the entry into force of the Unfair Competition Law and reported in China, with some features typical of the protection under the contract law doctrine.

1. Having received the license for the foreign know-how, the plaintiff, of course, enjoys its right in the trade secret, but the measures it takes to keep it confidential is not unassailable. The defendant argued that the plaintiff did not take any measures to keep it confidential, say, selling its used moulds to the salvage company and giving the drawings to another entity for mould processing. In theory, it has disclosed the know-how, and is not entitled to claim for the trade secret.

2. As regards the processing of the products, it is possible for the production principle and know-how to become working knowledge, experience and skill of those doing the work after a period of time. As long as they do not take away any trade secret documents and drawings, employees may use their acquired knowledge, experience and skill, and make a competing product by using different operational parameters. This does not constitute an infringement.

In these situations, in strictly applying the property right theory, we may find that a considerable part of the plaintiff's trade secret has been disclosed or diluted, and does not constitute its special property to be protected. Besides, the act to buy the plaintiff's used moulds from a market place and use his own working knowledge, experience and skill and adopt different operational parameters to make a competing product does not constitute an infringement.

However, the two courts have stressed in their

respective judgements the special relationship between the defendants and plaintiff, i. e. one of employment. The two individuals' being sent abroad to be trained in the special know-how other competitors do not get their hands on has generated a special obligation to confidentiality, which requires them to keep confidential the skill they have acquired from their service even after leaving the employer and not to use their relevant skill before the public do.

The plaintiff sells their used moulds, and any one that may buy them cannot make sound products using them for lack of the specialised know-how. It is for this reason that the two individual defendants remain under the special obligation. Although they may buy the used moulds, they should not make competing products before the entire know-how at issue enters into the public domain.

The contract law doctrine, widely applied in trade secret lawsuits in the developed countries, has a long history, but is relatively less influential in China, which results in the uncertainty whether information of the nature is protectable or not. That is, (1) although a rightholder has a contract with its employees for confidentiality, the relevant information is in a relatively poor state of confidentiality; and (2) while some relevant information constitutes a trade secret, there is no expressed agreement therebetween, but the employees are under the implied obligation to confidentiality.

In the above two circumstances, if a judgment is made that the rightholder is the winner, it is possible for the judgement to be revoked or changed by a court of higher level.

As a matter of fact, honouring contractual agreements is one of the fundamental requirements of the laws governing the market economy, and the fields relative to contracts are decided upon by the needs of the economic and technological developments. It is appropriate and effective to conclude contracts on confidentiality between interested parties in respect of confidential information, even if it is not a trade secret, and the contracts should be complied with. In the absence of a written contract, the implied contractual obligation also requires compliance.

On the basis of this basic principles, it is possible for the contract law doctrine in respect of trade secret protection to be evolved in China.

The contract law doctrine may broaden the extent of protection for trade secret in a sense that all the information exposed by either of the two parties in economic or technical cooperation, or in employment may be referred to as trade secrets. To overcome the defects of the contract law doctrine, if "a rightholder" holds "someone under obligation" liable on the basis of contractual relationship, the latter who thinks it unfair may make his counterclaim on the ground that the relevant contract is not a true expression of his will or that there lacks an object

protectable in the relationship governed by the relevant trade secret contract.

### Case of Sanfeng Technological and Industrial Co., Ltd. : Property Right Doctrine on Trade Secret

#### The Plaintiff

The plaintiff in this case is the Sichuan Guanghan City Sanfeng Technological and Industrial Co., Ltd. (Sanfeng), owner of the "know-how for innocuous treatment and use of household garbage as recycled resources." The know-how was rewarded by the State General Administration for Environment Protection the 1998 Certificate of the Best National Environment Protection Project Planned for Wide Application, and the Certificate of the State Key New Product issued by the Ministry of Science and Technology in conjunction with other 4 ministries and bureaus.

#### The Defendants

The Defendants in this case are the "contractual defendant" the Sichuan Environment Protection Construction and Development Corporation (SEPCDC), which entered into the following contract with the plaintiff, and "the third-party defendant" the Sichuan Neijiang Machinery Plant (SNMP).

#### The Cooperation Agreement

On 14 January 1998, the defendant SEPCDC (Party A) and Sanfeng (Party B) signed the Cooperation Agreement with regard to the following matters:

1. Party A's work: to widely apply and exploit Party B's know-how and equipment to construct garbage treatment plants; to undertake construction design for the project of garbage treatment plants, construction management and business contact;

2. Party B's work: to be responsible for the provision of technical programme, manufacture, installation and adjustment of equipment;

3. Distribution of benefits: Party B pays Party A 5-10% of the monies paid for the equipment made by itself as management fee for all the garbage treatment plant projects contracted by Party A; and

4. Agreement on confidentiality: all general project plans, know-how and equipment sets provided by Party B are owned thereby. Party A is obliged to keep the know-how and relevant hardware confidential against a third party, and required "not to disclose the know-how and strictly prohibit equipment imitation under the contractual agreement".

The term of contract is three years.

#### Cause of Dispute

On 2 April 1998, the defendant SEPCDC signed a contract with SNMP, in which both parties agreed that SEPCDC entrusted SNMP with the design, manufacture



and installation of the project of Neijiang Garbage Treatment Plant and all the equipment it undertakes to construct.

On 9 March 1999, Sangfeng sued SEPCDC in the Sichuan Provincial Higher People's Court on the ground that the defendant obtained the relevant technical information in the name of cooperation, and then transferred them to SNMP to imitate and make the whole set of equipment to build a garbage treatment plant exactly on the basis of the plaintiff's know-how. In doing so it infringed the plaintiff's property right in the trade secret.

The plaintiff requested the court to order the defendant to immediately cease the infringement, return all the technical information it obtained from the plaintiff; order the defendant to pay it RMB 10 million yuan in compensation of the damages directly and indirectly inflicted. Besides, the defendant should bear all the litigation fees.

#### **Claimed Trade Secret and the Conclusion of Evaluation**

After Sanfeng established its trade secret, both the plaintiff and defendant, on 15 September 1999, agreed on the entrustment of the Sichuan Provincial Construction Commission with the organisation of experts to conduct a technical evaluation to find out whether the 11 items of technical information listed by the plaintiff were trade secret and whether the defendant had used the trade secret.

On 7 December the same year, the experts invited by the Sichuan Provincial Construction Commission came up with their Technical Evaluation Conclusion on the basis of the technical information provided by Sanfeng and their site inspection, concluding that all the 11 items of technical information which the plaintiff requested to evaluate did not constitute a know-how, i. e. trade secret.

The plaintiff applied to the Chinese Patent Office for a patent for invention of "garbage-compound fertilizer and the process for the manufacture thereof", and the application was disclosed. It was then deemed to have been withdrawn on 9 February 2000 for its failure to make a statement in response to the office action within the fixed time limit. For this reason, the technical solution had already entered into the public domain.

#### **Judgement**

On the basis of the above evaluation and facts, the court rendered its ruling in the middle of 2000, holding that the research project of the "know-how for innocuous treatment and use of household garbage as recycled resources" was accomplished by the plaintiff. On 5 July 1997, the technical achievement passed the evaluation by the Sichuan Provincial Science and Technology Commission entrusted by the former State Science and Technology Commission; hence Sanfeng was the owner of the right in the know-how.

However, according to the experts' Technical Evaluation Conclusion, the technology of Sanfang did not

constitute a know-how under legal protection. The court decided that a technical secret eligible for protection was a technical solution or know-how that was kept confidential, had its practical value and one for which measures had been taken to keep it confidential. As for the 11 technical elements claimed by the plaintiff, some were the norm of standard prescribed in the art, while others were disclosed through use and in publications; hence the ground to protect it as a trade secret was not tenable. Besides, the Catalogue and Prices of Offer of the Mechanical Equipment Sanfeng furnished to SEPCDC were mainly specifications and prices of the equipment and did not reflect the technical secret involved in the case. Accordingly, the allegation that the defendant used the Catalogue and Prices of Offer of the Mechanical Equipment to infringe the plaintiff's technical secret was not tenable.

In addition, the court also pointed out that the conclusion of the experts' Technical Evaluation Conclusion did not conflict, nor contradict, with the certificates issued by the administrative authorities, such as the Ministry of Science and Technology and the acquisition thereof, and it did not constitute a denial of these administrative certificates.

The court finally ruled to have rejected the plaintiff's claim.

Dissatisfied, the plaintiff made an appeal, which was rejected by the Supreme People's Court.

#### **Analysis**

This case is, to a certain degree, very typical in the trade secret protection in China. Now, some cases are handled in this manner, which is the distinctive characteristic of the thinking of property right protection.

1. The plaintiff Sanfeng, with the defendant SEPCDC, signed a cooperation contract, in which it was agreed that the defendant was responsible for widely applying the project, and the plaintiff for the design and construction. The plaintiff held that its "know-how for innocuous treatment and use of household garbage as recycled resources" was a trade secret, an idea to which the defendant made no objection in the contract.

Later, the defendant terminated the contract, and signed a contract with the third-party defendant SNMP for the latter to undertake the design and construction. The plaintiff alleged that the defendant gave the relevant technical information to the third-party defendant SNMP, and the consequence was that the third-party defendant's design was the same as that of its own, thus infringing its trade secret right.

2. In hearing the case, the court first determined whether the plaintiff's trade secret was novel, viz. whether there were elements or contents that could not be derived from the prior art. According to the relevant experts' evaluation, it was determined that some elements of the

defendant's know-how were the norm of standard prescribed in the art, while others were disclosed by use and in publications; it was not a trade secret.

The non-existence of the plaintiff's trade secret and intangible property right resulted in the loss of subject matter of the cooperation contract, making the defendant not liable for the breach of contract; meanwhile, it rendered the plaintiff's accusing the third-party defendant of trade secret infringement groundless. Since the third-party defendant's design was similar to the plaintiff's, it may be held that this was determined on the basis of the publicly-owned technology.

In applying the property right doctrine, there is no such thing as breach of contract, nor infringement in this case.

### 3. Biggest Advantages and Disadvantages of the Property Right Doctrine

The property right doctrine which protects trade secret gives rise to the biggest advantages in protecting trade secret, and meanwhile the biggest disadvantage therein.

There are three biggest advantages. First, in criminal protection of trade secrets, once a trade secret is highly novel, it is easy to impose criminal liability on an actor for his criminal act of trade secret infringement according to the property right doctrine on trade secret and result in criminal penalty. Second, in civil protection of trade secrets, the doctrine lays the appropriate jurisprudential foundation for the obligation and responsibility of those unexpectedly having obtained their trade secrets and those of third parties in good faith in respect of trade secrets. Applying other doctrines to these responsibilities would not generate an explanation as satisfactory as the one made on the basis of the property right doctrine. Third, in respect of some "false" trade secrets, namely, those failing to meet the requirements for trade secret protection, the relevant contract on confidentiality or agreement may be declared invalid and relevant acts do not constitute infringements according to the property right doctrine. At present, some achievements determined and certificates issued by the administrative authorities in China are not without defects, and, as a result, publicly known technologies, or the simple variation thereof, are determined as achievements. Applying the property right doctrine in evaluating whether these achievements constitute intellectual property would prevent contractual deception, and protect the interests of the other party to contract in the relationship under contract for economic or technical cooperation. Besides, it protects the legitimate rights and interest of employees who reasonably change their job in the protection of relationship generated by the employment.

By the biggest disadvantage is meant that in the civil protection of trade secrets, the property right doctrine requires that a trade secret be novel. That is to say, to

decide whether a trade secret is eligible for protection, it should first be evaluated as to its inventiveness as is also required under the patent law, and a considerable number of trade secrets eligible for protection may be excluded from protection. Where there is breach of contract on confidentiality in practice, even if the confidential information is not very much kept confidential, breaching act exists if an agreement concluded in good faith is broken. Meanwhile in lawsuits of trade secret infringement, what an infringer infringes is not necessarily a trade secret having reached the level of a patent in inventiveness. Being too demanding on novelty, inventiveness will invite breach of contract and infringement.

Following the property right doctrine is likely to narrow the scope of trade secret protection. For example, a person under obligation in the relationship of technical or economic cooperation and employment may think that any rightholder's confidential information which is not highly inventive is not eligible for trade secret protection. If he denies the existence of a trade secret according to the property right doctrine, the rightholder finds it unfair and makes his counterclaim on the ground that even if the involved information is relatively poor in confidentiality, the contract is concluded and the contractual relationship established between the interested parties with full volition, without any fraud; hence responsibility should be imposed on one who is under obligation according to the contract law. Where a rightholder's information involved is relatively poor in confidentiality, but the actor obtains the information by theft or any other unfair means, the rightholder should draw attention to the actor's subjective bad faith and the malicious nature of the act per se, so as to prove that his relevant information is comparatively confidential and meets the requirement for legal protection.

### Case of Fushibao Electronic Appliances Co., Ltd. : Trade Secret Protection under Tort laws

The plaintiff in this case is the Guangdong Nanhai City Fushibao Electronic Appliances Co., Ltd., (Fushibao) which has, over the years, invested money, manpower and other resources in establishing, through a series of methods of marketing and prize sale, a relatively wide market network nationwide, with 83 first-class dealers, such as, among others, the Shenyang Tianhong Electric Appliances Dealer, Beijing Tianhe Materials Supplier, Shandong Zibo Lianghua General Mechandise Supplier and 500 second-class dealers, such as the Beijing Huairou Department Store and the Beijing Fangshan Department Store.

Fushibao adopted corresponding measures to keep the above business information confidential by educating the salespersons who were familiar with the corporate market

network, teaching them the specific obligations to confidentiality and preparing employees' handbooks in which it was clearly stated that "the corporate operation is to be kept confidential. The technical information and records of the work meetings are deemed to be its trade secrets that should not be divulged. Anyone acts in contravention of this rule should be treated with seriously punishment".

Fushibao attaches importance to product development and has been granted several patents, of which there is a patent granted in May 1997 for the design of vertical electronic thermal bottles.

### The Defendant

The defendant in this case is the Guangdong Nanhai City Jialeshi Electric Appliances Co., Ltd. (Jialeshi), whose legal representative is Pan Yingming, a salesperson in 1991 and manager of the sales department in 1995 of Fushibao. In June 1997, Pan resigned from Fushibao. Before his resignation, he filed an application with the administrative department for industry and commerce for registration of the Jialeshi Corporation, and in November 1997, Jialeshi began to market its products in the Fushibao market network, in which some are Fushibao's confidential clients who were unknown to the public. Just as the incomplete statistics made on the basis of Jialeshi shows, it sold 69,882 electric thermal bottles from October 1997 to March 1998, and the after tax profit for each bottle was RMB 1,536 yuan.

### Claims and Counterclaims

The plaintiff Fushibao sued in the Intermediate People's Court of Foshan City, Guangdong Province for the defendant's infringement of its patent right and trade secret by selling in the plaintiff's market network the electric thermal bottles passing off its corporate patent for design, requesting for ordering the defendant to cease the infringement, to destroy the infringing products, semi-finished products and moulds, to pay for the damages, to make an apology and to eliminate ill effects.

In addition to making counterclaim against the alleged infringement of the patent for design and holding that its products were not the same, or even not similar to, the plaintiff's design, the defendant argued that the plaintiff's market network was disclosed as it was indicated in the guarantee card attached to each product, and the plaintiff had no reasonable grounds to claim the trade secret right for its market network.

### Establishment and Judgement

1. Accusation of infringement of the design. Upon consulting with the two parties involved, the court entrusted the Experts of the All-China Patent Agents Association with the technical evaluation of the products manufactured by the plaintiff and defendant. On the basis of the evaluation result, the court established that the

design of the defendant's products, similar to the plaintiff's design, was easy to cause visual confusion on the part of ordinary consumers; hence, constituted a patent infringement.

2. Accusation of infringement of the business secret. The court reasoned that, though Fushibao had disclosed some of its clients in the guarantee card for the convenience of the consumers, other clients were not made known. The legal representative Pan of the defendant clearly knew that these trade secrets were acquired by the plaintiff through years of efforts and investments, and all the employees were obliged to keep them confidential. However, he resigned and set up his own factory and acted in contravention of the agreement to confidentiality by giving the trade secret of Fushibao to Jialeshi. The latter used the information to have marketed its products and sought a lot of profit within a short period of time. It thus constituted a third-party infringement in bad faith, so Jialeshi should be liable for the damages.

The court made its judgement on 2 September 1998 as to the following:

1. The defendant Jialeshi immediately stop manufacturing and selling the products infringing the design from the date on which the judgement takes effect, and destroy the moulds for making the infringing products;

2. The defendant Jialeshi pay a lump sum of RMB 106,246,448 yuan, of which 102,140,928 yuan be paid for the corporate damages, RMB 20,000 yuan for the lawyer's fee, RMB 2,105,520 yuan for the investigation fee;

3. The defendant Jialeshi make a public apology to the plaintiff Fushibao in the Nanfang Daily within 10 days after the judgement takes effect to eliminate the ill effects; and

4. The defendant Jialeshi not use the plaintiff's business information and market network to sell products that are of the same class as designated by the Fushibao's patent.

The defendant made an appeal, which was rejected by the Guangdong Province Higher People's Court.

### Analysis

This case, showing the characteristic of protection under the tort laws, reflects the development of the trade secret protection in China along with the international trend.

The tort laws doctrine on the protection of trade secret, no longer stressing the contractual obligation of the interested parties and the nature of trade secret as property, has the characteristic that all civil acts must be performed in good faith, and breaking this obligation would give rise to legal liability. One of the characteristics of the tort laws protection is that the objects of protection are more flexible. It protects not only a body of trade secret, but also isolated or short-term confidential information. The

plaintiff accuses the defendant of infringing and abusively using its clients name list, but the latter counterclaims that the list is disclosed. The court establishes that it is partially disclosed, with a part kept undisclosed. While the defendant's use of the disclosed part of plaintiff's list is lawful, the undisclosed part thereof is used in bad faith, and it should be held liable for damages.

Provisions are set forth in the TRIPS Agreement, and the traces of tort laws are visible therein as far as the object of protection is concerned. The requirement for the protection of undisclosed trade secret in Article 39 of the TRIPS Agreement is that "(such information) is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question." This definition indicates that even if relevant information is partially known to the public, the remaining part of the undisclosed information, the configuration and assembly of all the contents may still constitute a trade secret as clearly demonstrated by the present case. Besides, being a business secret, the clients name list at issue in this case is somewhat difficult to be protected even in the developed countries. And the judgement of this case shows that the courts in China are rather vigorous in protecting business information.

Another characteristic of this precedent lies in the injunction prohibiting infringement applying the "lead-time reduction doctrine." The nature of trade secret determines that the rightholder just has a limited right of prohibition. That is to say, only within the time when a trade secret is not known to a relevant competitor is it possible to prohibit the defendant from using it. This is not the case with the patent right, within the term of validity of which the patentee can prohibit others from using the right unconditionally. The above judgement prohibits the defendant from selling competing products in the plaintiff's market network, which deprives the defendant of the lead time for obtaining the trade secret of the plaintiff's market network relative to other competitors in the industry. After two years' time, it is possible for the plaintiff's market network to become known to the people in the relevant circle, and the defendant may use the same network as other competitors do. The lead-time reduction doctrine embodies the strong feature of the injunction against infringement of trade secret, and this case is the first of the kind reported in which the judicial judgement is rendered on the basis of the lead-time reduction doctrine.

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