

A Study on the Difference of Criminal Protection of Trademark between China and the United States

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ABSTRACT. Trademark right, as an important part of the intellectual property right, is strongly protected all around the world. The advent of the “Internet +” era poses a severe challenge to the protection of trademark right. By comparing the criminal legislation of trademark in China with the USA, this article illustrates the difference in terms of crime constitution, sentencing rules and scope of criminal protection. In addition, some suggestions to perfect criminal protection of trademark in China are also put forth in this article.

KEYWORDS: Criminal protection; Trademark; Legislative perfection

1. Introduction

With the development of global economic integration, intellectual property is playing an increasingly prominent role in economic society. It is particularly important and urgent to strengthen the protection of intellectual property in order to provide a strong judicial guarantee for implementing the national intellectual property strategy and the national innovation-driven development strategy. In recent years, the number of intellectual property crimes has increased, especially the criminal cases of trademark infringement, which are more harmful to the society. Hans Georg Koch, an American scholar, believes that the crime of trademark counterfeiting not only infringes intellectual property, but also involves personal safety. [1] Therefore, it is urgent to strengthen the fight against trademark infringement. This article illustrates the difference in terms of crime constitution, sentencing rules and scope of criminal protection. In addition, this article provides some suggestion to perfect criminal protection of trademark in China.

2. A Contrast between the Concept of Criminal Protection and the Model of Legislation

The scientific and effective model of criminal law legislation can not only reflect the differences in the value orientation and legislative philosophy of national legislation, but also expose the defects and deficiencies in the legislation of a country. From legal perspective, the criminal protection of trademark rights is essentially to protect private rights and social public order. Throughout the world, the main difference in the criminal legislation of trademark is that private rights or public order, which should be given priority, and this different choice will affect the design and social effect of a national legal system.

There has been a long history for the United States to protect the trademark in criminal law. In a way, his protection system is relatively completed. The United States belongs to the common law system, and case law has the priority in hearing cases. In all of the United States, the written decisions of Judges in prior cases are followed as a precedent. Thus, it's not hard to conclude that due to the flexible method of adjudicating cases, there are various ways to solve the infringement of trademark rights. These precedents of courts at all levels play an important role in the protection of trademark rights. Therefore, it is of great significance to compare the legislative models of trademark protection in criminal law between China and the United States. As for the legislative model, China is a centralized legislative model, while the United States is a scattered legislative model.[2]

On the issue of maintaining social public order and individual private rights, the criminal legislation of the United States pays more attention to protect the individual private rights, because the infringement of trademark rights will not only hurt consumers and prevent economy from moving forward, but also damage the interests, the intangible property, of the trademark owners. This will bring huge loss to the owner of the trademark, which is the reason why the owner private right should be given priority. Accordingly, the United States establishes the criminal protection system of trademark right on the basis of power standard conception, resulting in the fact that

the United States adopt the scattered legislation model. That is to say, the code of criminal law with independent offenses and statutory penalties shall be stipulated in the administrative and economic law, which specially protects trademark rights.[3] On the contrary, China pays more attention to the protection of social order, and believes that the infringement of trademark right not only damages the personal interests of the trademark owner, but also the social public interests. Therefore, China defines the crime against trademark right as the crime of undermining the socialist market economy. Given this, what our country adopts is centralized legislation model, a separate criminal law, which means that all crimes of trademark infringement are stipulated in the criminal code.

3. Comparison of the Scope of Criminal Protection

In terms of the scope of criminal protection, the extent in the United States includes not only registered goods trademarks but also service trademarks. The infringement of others' service trademarks can also constitute the crime of counterfeiting trademarks. While the trademark law in our country includes the object of service trademark protection, but there are no corresponding provisions in the criminal law. In the provisions of TRIPS agreement, it is also explained that commodity trademark and service trademark have the same status. However, China only takes commodity trademark as the object of protection, which is far lower than the international standard. As early as 1946, in contrast, the United States indicated in its trademark law that the service trademark and the commodity trademark have the same important status. Since then, most countries in the world have come to a close consensus on this issue. Many countries, such as Japan, France and Britain, have revised their trademark laws and increased the infringement of registered service marks as the criminals of counterfeiting registered trademarks.[4]

At present, from the perspective of China's legislation on trademark rights, the protection of well-known trademarks and ordinary trademarks are almost the same, and the desalination of trademarks has not been included in the criminal law, while the United States has taken serious desalination of well-known trademarks as a crime.[5] It is undoubtedly a common sense that famous trademarks and ordinary trademarks are not in the same class. According to the provisions of China's trademark law, the use of the same or similar trademarks on the same or similar commodities without the permission of the trademark registrant is an act that infringes the trademark right. It can be known that the act of counterfeiting a registered trademark can be divided into four categories: (i) to use the same registered trademark on the same commodities; (ii) similar registered trademarks are used on the same products; (iii) The use of the same registered trademark on similar goods; (iv) similar registered trademarks are used on similar commodities. However, China's criminal law has only stipulated the first case as the crime of counterfeiting a registered trademark in article 213, that is, using the same trademark on the same kind of goods. The United States, a developed country in the world, has already treated three other situations as crimes.

Article 213 to 215 of the criminal law respectively stipulate the crime of counterfeiting trademark registration, the crime of trademark selling of counterfeit registered commodities, the crime of illegal manufacturing, and the crime of selling registered trademark marks illegally manufactured. The United States does not have as many crimes against trademark rights as China, only the crime of counterfeit trademark and trademark counterfeiting. However, if we observe the contents of these two crimes, we can find that they include all other three crimes in China's criminal law. It is fair enough to say that China and the United States have same principle on the object of trademark infringement.

4. Comparison of Criminal Constitution Criteria

China and the United States differ greatly in terms of what constitutes a crime. In the legislation of the United States, the circumstances of the crime and the amount of the crime are not necessary elements of the trademark crime, only the facts of subjective intent and objective infringement are required. However, the three types of trademark infringement crimes stipulated in articles 213, 214 and 215 of our criminal law all have the requirements of amount and circumstances, and need to reach a relatively large amount or serious circumstances. Furthermore, the standard for these amounts is higher than that of most national standards, with many prescribed standards and a more complex basis for calculation. In judicial practice, it is difficult for the judge to calculate the specific amount and hear the case effectively and accurately, which undoubtedly increases the difficulty for punishing the crime of trademark infringement. The United States takes the loss of the trademark owner as the standard of prosecution, while China takes the illegal gains of the actor as the standard of prosecution. The main reason for the above differences is the result of the two countries' choice of value. Based on the protection of the private rights of registered trademark owners, the United States set the standard of whether to be guilty. That

means the loss of trademark owners should be given priority instead of the impact on the interests of the society. Therefore, the crime threshold in the United States is relatively low. It is only to calculate the loss suffered by the obliges, rather than to calculate those complicated illegal gains and business gains. In contrast, China's primary concern is the public interest, because we believe that crime is not only illegal but also harmful to society. Compared with the United States, China has a high threshold for committing a crime, but China's protection of trademark rights also includes civil and administrative protection. When the amount is not large and the circumstances are not serious, the kind of cases can be subsumed into civil or administrative trials, which, to some extent, has filled in the insufficiencies of our country.

5. Comparison of Penalty Application

In terms of criminal punishment, what China and the United States have in common is that the use of criminal punishment is both personal punishment and property punishment. With different emphasis on the penalty, the suppression effect of trademark infringement crime is different. In addition, the proportion of property penalty applied to trademark crimes in the two countries is much higher than that of personal penalty, which is to reduce the occurrence of such crimes. However, there are still some differences in the criminal penalty for trademark infringement between the two countries.

Firstly, the United States pays more attention to the social cost of punishing crimes. Therefore, compared with China, the United States prefers the use of property punishment in criminal punishment. The mass use of incarceration would require more prisons to house and more personnel to manage criminals. On the contrary, the penalty structure of China's criminal law is that personal penalty is widely used, while property penalty is secondary. Considering the status quo of Chinese judicature, the difficulty of the implementation of fine punishment, the legislators take personal punishment as the main means, in order to make the criminal responsibility of the actor to be exactly implemented. Serious violations of trademark rights shall be punished with imprisonment, which can make the infringer unable to engage in illegal behavior in a short time. Nevertheless, the civil law cannot achieve this effect. That's the reason why the United States has been expanding the scope of protection and lowering the threshold for criminal penalties.[6]

Secondly, compared with China, the criminal legislation in the United States is more severe in terms of both property punishment and personal punishment. When it comes to personal punishment, the penalty for counterfeiting trademarks in the United States can be up to 20 years in prison, while the maximum sentence for all infringing trademark crimes is 7 years, including the crime of counterfeiting a registered trademark, the crime of selling goods with fake registered trademarks, the crime of illegal manufacturing and selling a registered trademark logo that is an illegal manufacture. In terms of property penalty, the maximum penalty for trademark infringement in the United States can reach 5 million US dollars for individuals and 15 million US dollars for units. There is no definite stipulation on the amount of fine in our criminal law, However, it is stipulated in the interpretation of several issues on the application of law in handling criminal cases of infringement of intellectual property rights jointly issued by the supreme people's court and the supreme people's procuratorate. The amount of the fine shall be generally not less than one time but not more than five times the illegal income, or shall be determined according to not less than one time but not more than 50 percent of the illegal business amount.[7] Actually, in judicial practice in China, the penalty is much lower than in the United States.

Finally, the relative articles of criminal law in the United States have formulated different punishment standards for trademark infringers of individuals and units according to different criminal subjects, but Criminal Law of the People's Republic of China does not distinguish the punishment standards for trademark crimes of individuals and units. There is no denying that it is a legislation deficiency in our criminal law. Compared with individuals, the unit is the main body of the market, and its influence on the market economy is far greater than that of individuals. In this sense, trademark infringement by the unit subject is more harmful to the society than the individual, and the punishment to the unit should be severer than individual, in order to adapt to the principle of verdict conforming to crime.

6. The Enlightenment of American Criminal Legislation on Trademark Infringement to China

6.1 Expanding the Scope of Trademark Protection

China's criminal legislation protection of trademark rights should learn from the United States and other advanced countries in the scope and degree of protection. First of all, China should incorporate the service trademark into the protection of criminal law, since service trademarks have the same important status as

commodity trademarks.[8] With the development of China's market economy, the service trademark, as the representative of service image, has also increased. Relevant provisions of the criminal law should be amended by China's legislature to include the service trademark into the object of criminal protection, which is not only the requirement to fulfill TRIPS agreement, but also the problem that China have to solve now.

As mentioned above, there are four categories of counterfeiting registered trademarks in China's trademark law: the use of the same trademark on the same commodity, the use of similar trademarks on the same commodity, the use of similar trademarks on similar commodities, and the use of similar trademarks on similar commodities. However, China's criminal law only stipulates the first case in the criminal law, which means the other three kinds of infringement of trademark rights, no matter how serious, will not be punished by the criminal law, which will undoubtedly exacerbate the situation of infringing trademarks. In terms of social hazards, the latter three sorts of infringement are not fundamentally different from the first one, but their actions are more covert and difficult to identify. At the same time, the damage to consumers is no less severe than the first. Considering all of this factors, it is more reasonable to regulate these acts in our Criminal law.

The protection of well-known trademarks China should be strengthened. Although both civil and administrative laws in China have some relative articles to protect well-known trademarks, there are no special provisions for well-known trademarks in criminal law, which weakens the protection of well-known trademarks. It is widely acknowledged how difficult it is to create a famous trademark. It often takes decades or even hundreds of years to develop today's so-called big brands. The infringement of the well-known trademark will lead to more serious consequences than the infringement of the general trademarks, which will seriously reduce the enthusiasm of trademark owners in production and operation. In reality, the operator will gradually weaken and even withdraw from the market after the well-known trademark is infringed. From the perspective of consumers, the infringement of well-known trademarks will affect consumers' trust in the trademarks. The consequences of these violations are far more serious than consumers can imagine. Based on these considerations, China's criminal law should give special protection to well-known trademarks

6.2 Improving the Penalty System

As for criminal protection of trademarks, there are some deficiencies in the penalty setting of criminal law, which is inconsistent with the balance principle of crime and punishment required by TRIPS. Based on the concept of punishing trademark infringement fairly and preventing trademark crimes, we should refer to the criminal legislation of the United States and improve the criminal liability allocation of trademark infringement in China.

The current criminal code of our country sets the same penalty for the crime of counterfeiting a registered trademark, the crime of selling commodities with fake registered trademarks, the crime of illegal manufacturing and the crime of selling registered trademarks with illegal manufacturing, but the degree of social harmfulness of these three crimes is not the same.

Comparing the social harmfulness of these three crimes, it can be seen that the social harmfulness of the crime of counterfeiting registered trademarks is greater than the crime of selling goods with fake registered trademarks, and correspondingly, the social harmfulness of the crime of illegally manufacturing registered trademarks is also greater than the crime of selling illegally manufactured registered trademarks,[9] which violates the principle of proportionality between crime and punishment. Moreover, the penalty should have a certain degree of hierarchy. Hence, it is suggested that China should set different penalties for these three kinds of crimes.

In addition, the criminal penalty of trademark infringement in China's criminal law takes the free punishment at its center, with fine punishment as supplementary punishment. However, China's criminal code does not provide a clear calculation of the amount of fine method and limit. In practice, the application of fine punishment is entirely at the discretion of the judge, which makes it difficult to enforce the fine punishment. There are two problems of application of fine: i. that criminal articles should provide the specific amount of fine to punish those who infringes the trademark severely; ii. that in the process of sentencing trademark crimes, whether the fine penalty can be applied to the crime of trademark rights alone.[10]

For some light trademark crimes, its subjective and social harm is also relatively small. It does not require a free sentence; only fine penalty is enough to punish the crime. Just as the relevant American criminal legislation, China should reduce the use of freedom penalty and strengthen severity of the fine.

Besides, the punishment for the crimes of trademark infringement by a unit is relatively light while harmful consequence caused by unit crimes is much larger than individual crimes. When courts affirm the crimes of

counterfeiting a registered trademark or the crimes of selling commodities with fake registered trademarks a trademark crime committed by units, the circumstances and amount of punishment are much higher than that of individual crimes, which undoubtedly alleviates the punishment to the unit, also indirectly indulges the unit crime. The punishment of trademark right crime in the United States is more worthy of our reference. To be detailed, the criminal law should set the same amount standard for the unit crime and individual crime, and a corresponding qualification penalty of infringing trademark may be established for the unit. For example, it can effectively reduce the possibility of reoffending to restrict the actor from engaging in relevant business activities and assume certain duties within a certain period of time.

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