Criminal Enforcement in China

By Amy Hsiao
Partner at Swanson & Bratschun
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Iowa City, IA: August 28, 2018
Kansas City, MO: August 30, 2018
Enforcement

- Enforcement Overview
- How to start criminal?
- Relevant laws?
- Pros and cons?
- Recent developments?
- 25 Slides
Overview – Dual System

The Court System

The Administrative System
<table>
<thead>
<tr>
<th>Authorities</th>
<th>Duty</th>
<th>Main Legal Basis</th>
</tr>
</thead>
</table>
| **AIC** Administration of Industry and Commerce | • TM infringement and unfair competition activities in manufacturer, distribution and advertising  
• Assisting the infringer in transportation, storage and money transfer  
• Many other compliance issue business | • Trademark law  
• Anti-unfair competition law |
| **TSB** Technology Supervision Bureau | • False labeling regarding identity, address and origin  
• Product defect and quality issue  
• Compliance issue regarding mandatory national or industrial standards | • Product quality law |
| **Customs**           | • Importation and exportation of goods infringing other’s TM registration in China  
• Recordation of TM registrations at GAC | • Regulations of customs IP protection |
| **PSB** Public Security Bureau | • Counterfeiting activities reaching the criminal threshold | • Criminal law |

Main Administrative Authorities in TM Protection

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AIC --- Pros and Cons
Now .... The Criminal Part
Sentenced Criminals for IP Violations (in China)

<table>
<thead>
<tr>
<th>Year</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008</td>
<td>5,386</td>
</tr>
<tr>
<td>2009</td>
<td>5,832</td>
</tr>
<tr>
<td>2010</td>
<td>6,000</td>
</tr>
<tr>
<td>2011</td>
<td>7,892</td>
</tr>
<tr>
<td>2012</td>
<td>15,338</td>
</tr>
<tr>
<td>2013</td>
<td>13,265</td>
</tr>
<tr>
<td>2014</td>
<td>13,734</td>
</tr>
<tr>
<td>2015</td>
<td>12,580</td>
</tr>
<tr>
<td>2016</td>
<td>10,334</td>
</tr>
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According to “Prosecution Daily” (Beijing)
法制日报

In 2016:

• Arrested over 3797 people (in connection with 2251 IP criminal cases)
• Prosecuted 7059 people (in connection with 3863 cases)

In 2017:

• Arrested over 4272 people (in connection with 2510 IP criminal cases)
• Prosecuted 6809 people (in connection with 3674 cases)
• Arrested over 3975 people, 93.1% of overall arrests (in crimes related to counterfeiting of registered trademarks, include: selling, manufacturing, transporting and storing)
• Prosecuted over 6468 people, 95% of overall prosecutions (in crimes related to counterfeiting of registered trademarks, include: selling, manufacturing, transporting and storing)
Where are the most likely places to start?
The Store on Taobao

adidas, the world’s foremost sportswear brands, has opened a flagship business-to-consumer (B2C) platform within Taobao. The adidas online store in China.

adidas is delighted to be partnering with Taobao for the official launch of our online store,” said Christophe Bezu, managing director of adidas in China. “This special initiative addresses our Chinese customers’ changing lifestyle needs and we will now be able to provide them with an ideal online shopping channel to purchase authentic and high-quality products at their own convenience.”

Online Takedown

AIC Raid Action

Customs
HOW?
- Report to PSB directly
- PSB discovers it during its own investigation
- AIC / Court Action → PSB

- Report to AIC
- Threshold met
- Convert to Criminal Action

- Either initiated by brand owner or Alibaba itself
- Big data support

- Very fast timeline
- Need letter

- Fewer Cases
What are the relevant laws?
Article 213 of the Criminal Law

Anyone who uses an identical mark on identical registered products without authorization is punishable with imprisonment/detention up to three years with a fine or imposed fine (for serious cases) and punishable with imprisonment/detention over three but under seven years with a fine (for extreme cases).
Article 213 of the Criminal Law

Where anyone uses a trademark identical with a registered trademark in respect of the same goods without the authorization, a criminal case shall be established so long as the followings are met:

(1) The illegal revenue is more than 50,000 yuan, or the illegal income is more than 30,000 yuan;

(2) Counterfeiting more than two kinds of the registered trademark: the illegal revenue is more than 30,000 yuan or the amount of illegal income is more than 20,000 yuan;

Essentially, this means...
Article 214 of the Criminal Law

第七十条 [销售假冒注册商标的商品案(刑法第二百一十四条)]销售明知是假冒注册商标的商品，涉嫌下列情形之一的，应予立案追诉:

(一)销售金额在五万元以上的;
(二)尚未销售, 货值金额在十五万元以上的;
(三)销售金额不满五万元, 但已销售金额与尚未销售的货值金额合计在十五万元以上的。

Anyone knowingly sells commodities bearing counterfeit registered trademarks, a criminal case shall be established once the followings are met:

(1) The sales amount is more than 50,000 yuan;
(2) The value of unsold commodities is more than 150,000 yuan; or
(3) the sales amount is less than 50,000 yuan, but the sum of the value of sold commodities and the value of unsold commodities is more than 150,000 yuan.
Bottom line is:

- Sales revenue > $8,000 (USD)
- Inventory value > $24,000 (USD)
- However, infringers don’t keep accurate books. Most of the time inventory found on the spot.
- Sample purchase helps.
- **Question** --- how to determine value?
Article 12
(Interpretation by Supreme People’s Court on IP Criminal Cases)

- The term “illegal business operation” refers to the manufacturing, storing, transporting and selling of counterfeit goods that infringed upon intellectual property rights. The values of the sold counterfeit goods are calculated based on the actual sale prices. Whereas the value of manufactured, stored, transported and unsold counterfeit goods are calculated based on the listed prices or the average of the actual sale prices of the goods found. In the event that the actual prices cannot be determined, the prices shall be calculated base on the sale prices of similar counterfeit goods on the market.

This is the language that causes the problem...
YiWu Razor Blade Example

The difference between 3 cents and 7 cents. Local PSB logistics value

Pros and Cons
• No discovery
• AIC --- ok to check bank accounts but difficult
• PSB --- can check bank account, find electronic transaction record; work with eCommerce platforms or customs
• EXAMPLE: warehouse
• EXAMPLE: distributor
• Difficult to meet threshold
• Infringers on high alert
• No specific timeline
• **Average time line** for PSB vs. AIC
• **Average cost** for PSB vs. AIC
• PSB (9 months)--- PSB (arrest; 3 months)(12 months; others) → prosecutor’s office (if already arrest, 6 months; if not, 12 months) → court action (2 months)
Some Encouraging Developments...
Top Case #2 - Fake SAMSUNG Case

Enforcement breakthrough for CRIMINAL prosecutions in China
2017 Top Enforcement Cases

Fine imposed through 2017 trademark enforcement cases: roughly US $70 million

One of the highest fine imposed: US $882,000

Source:
http://home.saic.gov.cn/sbj/sbjg/201804/t20180426_273944.html
## Summary

<table>
<thead>
<tr>
<th>Institution/Entity</th>
<th>Responsibilities</th>
<th>Cause of action</th>
<th>Pros and Cons</th>
</tr>
</thead>
<tbody>
<tr>
<td>Administration of Industry and Commerce <em>(AIC)</em></td>
<td>Manufacture, distribution and sale of counterfeit goods</td>
<td>Trademark Infringement</td>
<td>Quick and effective. But limited influences.</td>
</tr>
<tr>
<td>Police <em>(PSB)</em></td>
<td>Criminal</td>
<td>Severe intentional trademark infringement</td>
<td>Imprisonment. But high requirements on evidences and investigation.</td>
</tr>
<tr>
<td>Customs</td>
<td>Export and import of counterfeit goods.</td>
<td>Trademark Infringement</td>
<td>An efficient gate keeper for exportation. But limited scope.</td>
</tr>
</tbody>
</table>
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Thank you.