SPP Guiding Case No. 101: Yao Changlong and Four Others (Counterfeiting Registered Trademarks)

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Supreme People's Procuratorate Guiding Case No. 101 (Procuratorial Example No. 101)

Released among the Twenty-Sixth Batch of Guiding Cases of the Supreme People's Procuratorate

Keywords

Counterfeiting registered trademarks — manufacture within China and sale abroad — joint crime.

Holding

The exclusive right to use a trademark lawfully registered in China and within its term of validity shall be protected in accordance with Chinese law. Where goods bearing a counterfeit of a registered trademark are manufactured or sold without the permission of the trademark owner, the conduct shall be prosecuted in accordance with law if the circumstances are serious and a crime is constituted, regardless of whether the counterfeit goods are sold abroad. In determining whether a joint crime is constituted in a case of trademark infringement, the procuratorial organ shall focus on the communication of intent between the producer and the seller of the counterfeit goods, the degree of awareness of the unlawfulness of the counterfeiting, and awareness of the difference between the sale price and the price of the genuine goods, among other factors, in making a comprehensive judgment.

Basic Facts

Defendant Yao Changlong, male, born in 1983, was the legal representative of Rizhao Donggang District Wanneng International Trade Co., Ltd. ("Wanneng International").

Defendant Gu Jin, male, born in 1989, was a purchaser of Wanneng International.

Defendant Wei Zihao, male, born in 1990, was a sales team leader of Wanneng International.

Defendant Zhang Chao, male, born in 1990, was a sales team leader of Wanneng International.

Defendant Zhuang Qianxing, female, born in 1989, was a sales team leader of Wanneng International.

From 2015 to April 2019, defendant Yao Changlong arranged for defendant Gu Jin to purchase printers, label paper, optical fiber modules, and other materials, to counterfeit "CISCO," "HP," and "HUAWEI" optical fiber modules and other goods, and arranged for defendants Wei Zihao, Zhang Chao, and Zhuang Qianxing to sell them abroad. Yao Changlong and Gu Jin jointly produced and sold more than 100,000 counterfeit optical fiber modules bearing the aforesaid registered trademarks, with total sales of over RMB 31.62 million; 11,975 counterfeit optical fiber modules, switches, and other items were seized on site, worth over RMB 3.83 million; and the amounts of illegal gains of Yao Changlong and Gu Jin were RMB 4 million and over RMB 240,000 respectively. The sales amounts of Wei Zihao, Zhang Chao, and Zhuang Qianxing were over RMB 7.45 million, RMB 4.29 million, and RMB 3.52 million respectively; their amounts of illegal gains were RMB 200,000, RMB 185,000, and RMB 140,000 respectively.

Judgment

Review for arrest. In April 2019, the Rizhao Municipal Public Security Bureau of Shandong Province (the "Rizhao Municipal Public Security Bureau") opened an investigation after receiving a report from HP Company. On May 24 of the same year, the Rizhao Municipal People's Procuratorate of Shandong Province (the "Rizhao Municipal Procuratorate") approved the arrest of defendants Yao Changlong and Gu Jin on

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suspicion of the crime of counterfeiting registered trademarks. It did not approve the arrest of defendants Wei Zihao, Zhang Chao, and Zhuang Qianxing because their criminal intent and criminal amounts could not yet be confirmed, and at the same time required the public security organ to obtain the testimony of overseas buyers and relevant documentary evidence in order to ascertain whether Wei Zihao, Zhang Chao, and Zhuang Qianxing had joint criminal intent and their respective criminal amounts.

Review for prosecution. On July 19, 2019, after supplementing evidence, the Rizhao Municipal Public Security Bureau transferred the case to the Rizhao Municipal Procuratorate for prosecution, charging defendants Yao Changlong and Gu Jin with the crime of counterfeiting registered trademarks and defendants Wei Zihao, Zhang Chao, and Zhuang Qianxing with the crime of selling goods bearing counterfeit registered trademarks. On July 23 of the same year, the Rizhao Municipal Procuratorate assigned the case to the Donggang District People's Procuratorate of Rizhao, Shandong Province (the "Donggang District Procuratorate") for handling.

During the review for prosecution, the Donggang District Procuratorate required the public security organ to supplement and improve the following evidence: first, to obtain electronic data such as QQ chat records and email correspondence among the five defendants, including Yao Changlong, to prove that Zhuang Qianxing, Zhang Chao, and Wei Zihao subjectively knew that the goods they sold were goods bearing trademarks counterfeited by Yao Changlong and Gu Jin, yet still sold them as arranged by Yao Changlong, constituting a joint crime without prior conspiracy. Second, to obtain electronic data such as electronic contracts, shipment notices, and orders, combined with the sales ledgers seized in the case and the defendants' statements and witness testimony, to prove the respective roles of the defendants in the joint crime. Third, to obtain documentary evidence such as the trademark registration certificates of the trademarks involved and the certificates approving transfer and renewal of the trademarks, to prove that the trademarks involved were registered in China and were within their term of validity. After reviewing the aforesaid evidence, the Donggang District Procuratorate held that the existing evidence could prove that defendants Zhuang Qianxing, Zhang Chao, and Wei Zihao, after joining Wanneng International as sales personnel, had compared the prices of the company's products with those of genuine goods, had received customer feedback that the product quality was poor, and had discovered during the counterfeiting process that Gu Jin was responsible for replacing serial numbers and exchanging goods for problematic products. The aforesaid evidence was sufficient to prove that Zhuang Qianxing, Zhang Chao, and Wei Zihao subjectively knew that the optical fiber modules they sold were counterfeit goods bearing registered trademarks that had been branded and manufactured by Yao Changlong and Gu Jin. Accordingly, the three were determined to have constituted the crime of counterfeiting registered trademarks, constituting a joint crime with Yao Changlong and Gu Jin. The procuratorial organ also reviewed in accordance with law whether Wanneng International constituted a unit crime, and determined that Wanneng International, from its establishment in 2014 until the case arose, had not conducted any other business and in fact mainly conducted criminal activities, and that the relevant criminal proceeds had not been attributed to Wanneng International. Pursuant to Article 2 of the Interpretation of the Supreme People's Court on Several Issues Concerning the Specific Application of Law in the Trial of Unit Crime Cases, where a company, enterprise, or institution established for the main purpose of committing crimes commits a crime, it shall not be treated as a unit crime, and therefore Wanneng International did not constitute a unit crime.

On September 6, 2019, the Donggang District Procuratorate changed the charges transferred by the public security organ and initiated a public prosecution in the Donggang District People's Court of Rizhao, Shandong Province (the "Donggang District Court") charging defendants Yao Changlong, Gu Jin, Zhuang Qianxing, Zhang Chao, and Wei Zihao with the crime of counterfeiting registered trademarks.

Charge and proof of the crime. On October 10, 2019, the Donggang District Court publicly tried the case in accordance with law. During the trial, some defense lawyers raised the following defense opinions: (1) that defendants Zhuang Qianxing, Zhang Chao, and Wei Zihao did not constitute a joint crime with defendant

Yao Changlong; and (2) that the goods in this case were all sold abroad, so the social harm was relatively minor. The prosecutor replied as follows: First, Zhuang Qianxing, Zhang Chao, and Wei Zihao knew that the counterfeit goods bearing registered trademarks they sold had been branded and manufactured by Yao Changlong and Gu Jin, yet continued to sell them, and therefore had the subjective intent to counterfeit registered trademarks and constituted a joint crime of counterfeiting registered trademarks. Second, although the goods in this case were all sold abroad, the infringed trademarks were all registered in China, and the criminal conduct of counterfeiting registered trademarks occurred within Chinese territory; regardless of whether the goods involved were sold abroad, the legitimate rights and interests of the owner of the registered trademark were infringed. The collegial panel adopted the prosecutorial opinions.

Disposition. On December 12, 2019, the Donggang District Court rendered a first-instance judgment, sentencing defendants Yao Changlong, Gu Jin, Zhuang Qianxing, Zhang Chao, and Wei Zihao to fixed-term imprisonment ranging from two years and two months to four years for the crime of counterfeiting registered trademarks, and applying probation to Gu Jin, Zhuang Qianxing, Zhang Chao, and Wei Zihao. At the same time, Yao Changlong was sentenced to a fine of RMB 5 million, and Gu Jin and the other four were each sentenced to fines ranging from RMB 140,000 to RMB 250,000. After the first-instance judgment, none of the aforesaid defendants appealed, and the judgment became effective.

Reasoning

(1) Where goods counterfeiting a trademark registered in China are sold abroad and the circumstances are serious so as to constitute a crime, the conduct shall be prosecuted in accordance with law. The exclusive right of a trademark owner to use a trademark lawfully registered in China and within its term of validity shall be protected in accordance with Chinese law. Without the permission of the owner of the registered trademark, goods counterfeiting a trademark registered in China — whether manufactured in China and sold abroad, or manufactured abroad and sold into China — violate China's trademark administration laws and regulations, infringe the exclusive right to use the trademark, and harm the reputation of the goods; where the circumstances are serious, a crime is constituted. In judicial practice, the punishment of cross-border crimes of infringing registered trademarks shall be strengthened so as to create a favorable business environment.

(2) In determining whether upstream and downstream defendants in a crime of counterfeiting registered trademarks constitute a joint crime, a comprehensive judgment shall be made in light of factors such as the communication of intent between the producer and the seller of the counterfeit goods, the degree of awareness of the unlawfulness of the counterfeiting, and awareness of the difference between the sale price and the price of the genuine goods. Cases of infringing registered trademarks often involve a relatively large number of persons and present the characteristics of gang-based crime with orderly division of labor. In practice, where the objective conduct of the defendants manifests a division of labor such as production and sale, the procuratorial organ shall, in light of factors such as the communication of intent between the producer and the seller of the counterfeit goods, the degree of the seller's awareness of the unlawfulness of the production of the goods and the making of trademark signs, awareness of the difference between the sale price and the price of the genuine goods, whether the seller deliberately concealed or evaded the fact that the goods were counterfeit in selling them, and the seller's professional experience, make a comprehensive judgment as to whether a joint crime is constituted. Where some defendants developed subjective knowledge during the continuation of the conduct of counterfeiting registered trademarks, formed a common intent of communication with a division of labor, and continued to maintain or carry out acts of assisting the sale, they shall be determined to have constituted a joint crime.

Relevant Legal Provisions

Articles 25, 27, 30, 64, 67, and 213 of the Criminal Law of the People's Republic of China

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Articles 1, 12, and 13 of the Interpretation of the Supreme People's Court and the Supreme People's Procuratorate on Several Issues Concerning the Specific Application of Law in Handling Criminal Cases of Infringement of Intellectual Property Rights

Article 2 of the Interpretation of the Supreme People's Court on Several Issues Concerning the Specific Application of Law in the Trial of Unit Crime Cases

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