## *Criminal Trademark Enforcement and the Problem of Inevitable Creep*

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Trademark owners have long been able to enforce their rights through a federal cause of action against unauthorized uses of their marks. Private enforcement, however, is now only part of the story. The federal government also acts on behalf of mark owners, both seizing infringing and counterfeit goods at the border and prosecuting counterfeiters under federal criminal law. The idea of criminal penalties for certain trademark violations is not new - indeed, Congress enacted criminal penalties as early as 1876, just a few years after it passed the very first federal trademark statute. But mark owners had to be content with civil remedies for most of the history of American trademark law - Congress would not again enact criminal trademark penalties for more than 100 years after the Supreme Court struck down the 1876 Act in the Trademark Cases. Thus, for all practical purposes, criminal enforcement is a modern development, and one that has received little scholarly attention. This essay focuses initially on the federal Trademark Counterfeiting Act (TCA). That statute was intended to increase the penalties associated with the most egregious instances of trademark infringement - those involving the use of an identical mark for the identical goods or services for which the counterfeited mark is registered and which are likely to deceive consumers about the actual source of the goods. But several recent trends in the application of the TCA suggest doctrinal creep is afoot. Courts have accepted as relevant in the counterfeiting context some of the most controversial theories of civil infringement, and they have interpreted specific provisions of the TCA in ways that undermine their limiting role. These trends are consistent with a number of parallel developments in and around intellectual property law in which provisions created on the promise of narrow application to the most serious violations have in fact been applied far more broadly than originally claimed. Collectively these developments suggest a strong tendency for this form of regulation (particularly the use of extreme, but supposedly narrowly-tailored, remedies) to fail along the scope dimension. To put it simply, if the benefits of such provisions exceed their costs only to the extent there are limited to the truly egregious cases, then their benefits are unlikely to exceed their costs over time because narrow application will not hold.

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