Supreme Court again rejects ‘consumer error’ theory

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- **According to the ‘consumer error’ theory, consumers must be misled as to the authenticity of the goods in order for an industrial property crime to be committed**
- **The Supreme Court has again refuted this theory, adding new legal arguments**
- **“The risk of confusion does not have to become a reality by generating an error among consumers”, the court said**

On 27 June 2024 the Second Chamber of the Spanish Supreme Court dismissed the cassation appeal filed by one of the convicted parties against a judgment issued by the Madrid Appeal Court. The appeal court had rejected the appeal filed against the condemnatory judgment handed down at first instance by the Trial Court No 18 of Madrid.

The cassation appeal that gave rise to the Supreme Court ruling raised a legal question of interpretation of the law, alleging that the lower court had improperly applied Article 274 of the Criminal Code relating to crimes against industrial property for infringement of a registered trademark.

The defence argued that the facts declared as proven did not constitute a crime against industrial property, since the seized products did not generate any risk of confusion among potential consumers.

The ‘consumer error’ theory

The so-called ‘consumer error’ theory, which has been progressively abandoned by the case-law of the provincial courts (see, eg, here, here and here), was a jurisprudential trend whereby, for a crime to have been committed, the illicit products had to sufficient mislead potential purchaser as to their authenticity. Acquittals were thus issued in those cases where the low quality of the infringing products, the low price at which they were marketed or the place where they were sold could not lead to such deception.

This case-law trend originated in certain Supreme Court judgments applying the former Criminal Code 1973, in which it was assessed whether there had been a "fraud" of the type provided in the code. In this respect, it was relevant to consider whether consumers were deceived when buying a product bearing a counterfeit brand.

However, the new Criminal Code 1995 represented a paradigm shift for this type of crime: it aimed to protect the trademark right for what it was (ie, a property right), and not to protect consumers. The only legally protected right in the current Article 274 of the Criminal Code is the right to sole and exclusive use or exploitation of an industrial property right; it is irrelevant whether the use of another's trademark may mislead consumers, as long as there is an unauthorised use of the trademark by a third party.

However, despite this reform, some provincial courts had continued to embrace this theory. Subsequent amendments to the Criminal Code and the Criminal Procedure Act (both of 2015) led to an increase in prison sentences for these crimes and to a reform of cassation appeals in criminal proceedings, allowing the Supreme Court to be approached for reasons of interpretation of law – something that, up to now, was not possible and, as a consequence, dissimilar case-law criteria co-existed for the same type of crime.

Decision

As far as the 'consumer error' theory was concerned, the Supreme Court rejected the appellant's thesis, which subordinated the criminal protection of trademarks to an understanding of the "confusability" between the original product and the copy. Such proposition would exclude from the scope of Article 274 of the Criminal Code all those cases where the low quality of the infringing products, their distribution outside official channels or their low price would not lead consumers to think that they were acquiring original products.

The Supreme Court argued as follows:

> *"Indeed, an appreciable degree of similarity is indispensable, not only for criminal protection, but also for any other form of legal protection. However, the risk of confusion does not have to become a reality by generating an error among consumers. The legislature wanted to extend the protection of trademarks even to those cases where, due to the circumstances in which copies of the original product are offered, the consumer has ample reason to believe that they are not acquiring the genuine product. This is deduced, because of the reform operated by Act 1/2015, from the content of Article 274.3 of the Criminal Code, according to which 'the itinerant or occasional sale of the products referred to in the previous paragraphs shall be punished with a prison sentence of six months to two years'."*

Comment

It is evident that consumers who buy trademark-protected items on a street stall, at a price significantly lower than that which the market associates with the original product, would have reason to suspect – or even be certain – that they are not acquiring the genuine products. However, the credulity of consumers cannot form a neutralising element of criminal protection; the wording of the criminal offence as defined by the Criminal Code does not require this additional element. The crime provided for in Article 274 of the code does not impose that it should be committed in a certain venue – for example, that the sale of fake products be carried out in exclusive urban areas.

Since 1995, and up to now, few Supreme Court resolutions have addressed this matter. The previous two – **dated 16 September 2021** and 21 September 2023 – clearly and vigorously dismantled this theory. The judgment in the present case follows the same line of jurisprudence and refutes this unfortunate interpretation of the Criminal Code with even more vehemence by adding new legal arguments.

The judgment should have a great impact on anti-counterfeiting and criminal litigation in the field of industrial property crimes, where the unfortunate 'consumer error' theory has represented one of its main challenges for years.

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