Are Federal Criminal Sanctions for IP Infringement Unconstitutional?

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A number of scholars, including myself, have explored in recent years various aspects of criminal sanctions for intellectual property offenses. Their works have tended to revolve around the wisdom of different provisions based on utilitarian or ethical considerations, or have traced the historical development of related doctrines. None of them, however, have explored the question of whether such sanctions are constitutional at all, and the question has barely arisen during either congressional or committee hearings for the bills introducing these sanctions. Furthermore, few cases have genuinely delved into the constitutionality of federal criminal laws of any sort, much less of those related to IP. In this paper, I examine the neglected area of the constitutional basis of federal criminal laws, with a focus on intellectual property. I begin by studying the period surrounding the Constitutional Convention and the laws passed in its aftermath to gain a better understanding of what the Founders considered legitimate use of federal criminal law. As part of this project, I also review the Founders’ writings on the subject of criminal law and of intellectual property. I then consider from a number of angles whether federal criminal laws for IP infringement exceed congressional authority, including whether they violate any part of the Bill of Rights. One particular focus is the application of the principle of “expressio unius est exclusio alterius” to
the question of whether federal criminal sanctions for intellectual property withstand constitutional scrutiny given that criminal punishment is only listed in a limited number of contexts, which do not include IP, in the Constitution. At the end of this examination, I draw conclusions as to the legal implications for both existing and future criminal sanctions for intellectual property infringement.