
Susan M. Richey

This article questions whether the current use of federal registrations of trademarks and copyrights in the prosecution of intellectual property crimes violates the confrontation rights of criminal defendants.

Federal registrations are public records, and the Federal Rules of Evidence (FRE) characterize public records as an exception to the general rule against hearsay in civil litigation. In other words, certified copies of public documents may be introduced into evidence in civil proceedings to prove the truth of the matters recited in them. That exception does not apply to public records introduced against defendants in criminal prosecutions due to a concern that accepting such out-of-court statements could violate their confrontation rights. The confrontation clause of the Sixth Amendment of the U.S. Constitution, made applicable to the states by the Fourteenth Amendment, guarantees each criminal defendant the right to “be confronted with the witnesses against him.” The U.S. Supreme Court has interpreted this provision to mean that testimonial evidence against an accused may not be presented through out-of-court statements unless the witness is unavailable and the statements have previously been subject to cross-examination. In short, the accused is entitled to have accusations of criminal conduct made face-to-face in a courtroom so that the accusations may be probed in front of the fact-finder.

Despite the foregoing, certified copies of federal registrations of trademarks and copyrights are routinely accepted into evidence in criminal proceedings as prima facie evidence of ownership and validity of the intellectual property rights they represent. Federal courts generally construe evidentiary inferences to be implied assertions, which the FRE excludes from the definition of hearsay, so that accepting evidence for this
purpose in criminal proceedings presumably does not run afoul of the rule against hearsay. The inferences themselves rely upon the official imprimatur of the Trademark and Copyright Offices, respectively, but that imprimatur is granted on the basis of representations made by registration applicants to those Offices. In fact, the 1946 Lanham Act establishes a presumption that a requested federal trademark registration will issue unless the Trademark Office establishes that the application falls under one of the statutory bars or is otherwise deficient. Although the 1976 Copyright Act does not establish a similar presumption regarding issuance of the registration, the examination process by the Copyright Office is cursory at best. Information reflected in federal registrations reflects applicants’ statements made to either Office under penalty of perjury.

Even though the government is not precluded from relying upon the evidentiary inferences attending proof of a federal trademark or copyright registration by virtue of the rule against hearsay, those inferences arguably conflict with a criminal defendant’s confrontation rights. At present, U.S. Supreme Court confrontation clause jurisprudence is fractured, particularly with regard to what constitutes out-of-court “testimonial” statements, but the Court seems to agree that it includes statements made in anticipation of their use in litigation. Justice Alito’s plurality opinion in Williams v. Illinois************* adds the further gloss that the statements must be directed to “the primary purpose of accusing a targeted individual” of criminal activity and they must be formalized in some fashion.

Certainly one purpose of obtaining federal trademark registrations is to render the subject marks enforceable through criminal counterfeiting laws which require the existence of a federal registration on the USPTO’s Principal Register as a jurisdictional element of the crime. Moreover, validity of intellectual property rights is an element of the crimes of trademark counterfeiting and copyright infringement and, to the extent the government attempts to prove validity by relying on the inference created by a certificate of federal registration, that practice provides a prosecution-related purpose to apply for federal registrations. Finally, registrations reflect applicants’ sworn statements regarding the rights in issue, which

formalizes the statements. Of course, applications for federal registration are generally pursued without a specific wrongdoer in mind and may be pursued without any thought of criminal enforcement at all.

This article argues that Justice Alito’s plurality opinion should not apply in the context of establishing the existence of intangible property rights as a precursor to proving that the rights have been criminally infringed. Rarely would the creation of rights be undertaken in anticipation of enforcement of those rights against a specific wrongdoer. Nevertheless, proof that intangible property exists--an element of any intellectual property offense--should comply with the confrontation clause. Requiring the rights holders themselves to testify in court to establish validity, unless they are unavailable and their testimony has already been confronted, would serve the policies underlying the confrontation clause.