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Reconstructing Criminal Liability in Trademark Law: Lessons from Indonesia and Spain

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Abstract

This study examines the construction of criminal liability in trademark law through a comparative analysis between Indonesia and Spain. The main problem addressed is the limited effectiveness of Indonesia's criminal trademark enforcement under Law Number 20 of 2016 on Trademarks and Geographical Indications, particularly due to its complaint-based offense model, unclear formulation of mens rea, limited scope of actus reus, and the absence of explicit corporate criminal liability and asset forfeiture mechanisms. The purpose of this research is to identify the similarities and fundamental differences in criminal liability frameworks in both jurisdictions and to formulate an ideal reconstruction model for Indonesia based on Spain's best practices. This study employs normative legal research, drawing on conceptual and comparative approaches, by analyzing primary legal materials, legal doctrines, and relevant academic literature. The findings show that Spain provides a more coherent and effective criminal enforcement system through the integration of trademark crimes into the Código Penal, the application of public offenses, the requirement of commercial intent, the recognition of aggravated offenses, and explicit corporate criminal liability supported by additional penalties such as confiscation and business closure. In contrast, Indonesia's current framework remains fragmented and less responsive to organized and digital-based trademark counterfeiting. This study concludes that Indonesia must reconstruct its criminal trademark provisions by shifting towards a differentiated public-offense model, strengthening the formulation of intent and commercial purpose, expanding digital enforcement coverage, incorporating protection for well-known unregistered marks, and establishing corporate criminal liability with comprehensive sanctions to ensure effective and proportional trademark protection aligned with international standards.

Keywords
Legal Reconstruction, Criminal Liability, Trademark Law.

Introduction

A trademark is a form of intellectual property that plays a significant role in global economic activities.[1] The existence of a brand serves not only as a differentiator for a product but also as an instrument for building reputation, consumer trust, and the commercial value of a business. A brand becomes a strategic element that determines a company's competitiveness in an increasingly open market.[2] Therefore, trademark protection cannot be viewed solely as the private interest of the trademark

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1 Samuel Gyedu et al., "The Relationship Between Intellectual Property Rights, Innovation, and Economic Development in the G20 and Selected Developing Countries," *Journal of the Knowledge Economy* 15, no. 4 (February 2024): 18223–56, https://doi.org/10.1007/s13132-024-01859-3.

2 Yougen Cao, Shengce Ren, and Mei Du, "Strategic Trademark Management: A Systematic Literature Review and Prospects for Future Research," *Journal of Brand Management* 29, no. 5 (September 2022): 435–53, https://doi.org/10.1057/s41262-022-00283-9.

owner, but also as a public necessity in maintaining market order.[3] This makes trademark protection an important part of the agenda in both international and national legal systems.

Trademark protection within the international legal system has undergone significant development alongside the recognition of trademarks as strategic assets in the global economy. Various international legal instruments, such as the Paris Convention of 1883, the TRIPS Agreement of 1994, and the Madrid Protocol, have established minimum standards for trademark protection that are binding on member states. Article 61 of the TRIPS Agreement requires WTO member countries to provide criminal procedures and penalties for willful trademark counterfeiting carried out on a commercial scale.[4] Although minimum standards of protection have been established internationally, the implementation of criminal liability in trademark law at the national level shows significant variation. These differing approaches directly impact the effectiveness of law enforcement and the deterrent effect against increasingly organized trademark crimes.

Criminal liability as an instrument for enforcing trademark law has strong justification, considering that trademark counterfeiting not only causes economic losses to the right holder but also endangers consumers and damages the investment climate. Criminal law dogmatics require the fulfillment of two elements for criminal liability, namely mens rea (intent or malicious purpose) and actus reus (the unlawful act).[5] Commercial-

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[3] Trademarks play a crucial role in protecting the intellectual property rights of businesses and individuals, read on Ridwan Arifin et al., "Participatory Rural Appraisal as a Legal Education for Prevention of Trademark Infringement (Case of Bandungan, Central Java, Indonesia)," *The Indonesian Journal of International Clinical Legal Education* 5, no. 3 (2023), https://doi.org/10.15294/ijicle.v5i3.75136.

[4] Sali Ahmed Abdullah, Khadijah Mohamed, and Ahmad Shamsul Abd Aziz, "An Appraisal of Yemen's Adherence to the TRIPS Agreement Standards on Civil and Criminal Enforcement Mechanisms of Copyright and Trademark Infringement," *UUM Journal of Legal Studies* 16, no. 2 (July 2025): 102–20, https://doi.org/10.32890/UUMJLS2025.16.2.7.

[5] Tova Bennet, "An Integrated Model for Criminal Responsibility in Action: How Swedish Criminal Law Operates without an Insanity Defence," *Criminal Law Forum* 35, no. 3 (September 2024): 255–87, https://doi.org/10.1007/s10609-024-09484-0.

scale brand counterfeiting often involves organized networks that systematically imitate well-known brands to make large profits.[6] This satisfies the element of intent as required by Article 61 of the TRIPS Agreement. The application of the ultimum remedium principle in criminal law must be balanced against the need to provide effective protection of the trademark owner's exclusive rights, especially when civil remedies prove insufficient to deter. The challenge in implementing criminal liability lies in the construction of mens rea in trademark infringements, as offenders often conceal intent behind complex corporate structures or lengthy distribution chains.[7]

Indonesia has regulated provisions on trademark criminal liability in Law Number 20 of 2016 on Trademarks and Geographical Indications. Article 100 Paragraph (1) of the Indonesian Trademark Law stipulates a penalty of imprisonment for a maximum term of 5 years and a fine of up to Rp2,000,000,000.00 for any person who uses a registered trademark belonging to another party without permission on similar goods or services. The formulation of Article 100 constitutes a klachtdelict (complaint offense), meaning that criminal law enforcement can be initiated only upon a complaint filed by the aggrieved trademark owner.[8] This provision limits the scope of law enforcement because many trademark owners opt for a quicker civil resolution that does not require the heavy burden of criminal proof.[9] Ambiguity in determining the

[6] Kari Kammel et al., "Trademark Counterfeiting Enforcement beyond Borders: The Complexities of Enforcing Trademark Rights Extraterritorially in a Global Marketplace with Territorial-Based Enforcement," *Fordham Intellectual Property, Media & Entertainment Law Journal* 33 (2022).

[7] Md Shahidul Islam et al., "Luxury Brand Counterfeiting: The Role of Enforcement Activism and Brand Passion," *Journal of Marketing Theory and Practice* 34, no. 1 (January 2026): 288–308, https://doi.org/10.1080/10696679.2024.2446167.

[8] Devica Rully Masrur, Irawati Irawati, and Antonius Alexander Tigor, "Complaints Regarding Trademark Crimes Against Trademark Holders and Consumer Protection," *Jurnal Pembangunan Hukum Indonesia* 7, no. 3 (December 2025): 492–513, https://doi.org/10.14710/jphi.v7i3.492-513.

[9] Masabumi Suzuki et al., "Civil Follow Criminal or Criminal Follow Civil Procedure as Models to Deal with IP Infringement: Asian Vis-à-Vis Western Approaches," in *Kreation Innovation Märkte - Creation Innovation Markets* (Berlin, Heidelberg: Springer Berlin Heidelberg, 2024), 663–739, https://doi.org/10.1007/978-3-662-68599-0_47.

element of intent in Article 100 also constitutes a systemic weakness, as the law does not explicitly define the criteria for "willfully" that distinguish between ordinary infringement and commercially motivated counterfeiting.

Spain has a comprehensive system for regulating criminal liability in trademark matters. Article 274 of the Spanish Penal Code (Código Penal) stipulates that anyone who produces, imports, or supplies goods bearing false trademarks for commercial purposes shall be liable to imprisonment for a term of 1 to 4 years and a fine equivalent to 12 to 24 months of income. This provision indicates that trademark offenses in Spain are not complaint-based (delictum aduanum), allowing law enforcement authorities to act proactively without waiting for a report from the trademark owner. Spain also integrates trademark criminal provisions within the Penal Code as part of the general criminal law system,[10] rather than in a separate trademark law as in Indonesia. As a member of the European Union, Spain is bound by Directive 2004/48/EC (the Enforcement Directive), which requires the adoption of effective, proportionate, and dissuasive measures to enforce intellectual property rights.[11] The integration between national law and supranational standards makes Spain's trademark criminal system more coherent in establishing the construction of offenses, liability, and penalties.

A comparison between Indonesia and Spain is relevant because both belong to the civil law tradition, yet they exhibit significantly different levels of development in intellectual property criminal regulations. Indonesia inherited the Dutch colonial criminal law system,

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[10] María Luisa Villamarín López, "Spanish Criminal Procedure Examined: Successes, Opportunities and Failures in the Adaptation to EU Requirements," *ERA Forum* 23, no. 1 (May 2022): 127–39, https://doi.org/10.1007/s12027-022-00698-6.

[11] Daniel Halberstam and Sina Van Den Bogaert, "A Fresh Look at Judicial Remedies in EU Equality Law and beyond: The Untapped Possibility of Structural Injunctions," *Common Market Law Review* 60, no. 5 (October 2023): 1269–1312, https://doi.org/10.54648/COLA2023093.

which still separates trademark regulations in a specific statute from the Criminal Code (KUHP). In contrast, Spain has systematically integrated all criminal provisions on intellectual property into the Código Penal. The growth of global trade in counterfeit goods further strengthens the urgency of this research. Reports from the OECD and EUIPO indicate that the value of trade in counterfeit goods exceeds USD 464 billion, representing approximately 2.5% of total world trade,[12] indicating that trademark counterfeiting has become a cross-border economic phenomenon. Indonesia also faces international pressure due to its inclusion on the United States Trade Representative (USTR) Priority Watch List,[13] which reflects a perception of weak effectiveness in the enforcement of intellectual property rights. This situation demonstrates that the reconstruction of criminal liability for trademarks concerns not only domestic interests but also impacts Indonesia's reputation in international trade. Therefore, a comparative study between Indonesia and Spain is essential to provide a scientific basis for reforming trademark criminal norms to be more effective, proportionate, and aligned with international standards.

Previous studies have examined the enforcement of trademark criminal law from various perspectives. Research by I Putu Diarsa Putra et al. (2025), published in the Asian Journal of Social and Humanities, emphasizes the practical aspects of trademark law enforcement by police authorities. The study found that the main obstacles stem from institutional factors, difficulties in gathering evidence, and a lack of technical understanding regarding trademarks during the investigation

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[12] Piotr Stryszowski, "Intellectual Property Infringement: A Persistent Threat to the World Economy," in *A Modern Guide to Patents* (Cheltenham: Edward Elgar Publishing, 2025), 299–320, https://doi.org/10.4337/9781035308606.00025.

[13] Anom Wibowo, Muhammad Zilal Hamzah, and Freddy Harris, "Watch List Status on the Special 301 Report in the Generalized System of Preference from the United States of America," *OIDA International Journal of Sustainable Development* 16, no. 10 (2023): 27–40.

process.[14] Devica Rully Masrur et al. (2025) in Jurnal Pembangunan Hukum Indonesia examined complaint-based offenses in trademark crimes. They found that the complaint mechanism often weakens consumer protection because criminal enforcement depends on the trademark holder's initiative.[15] Meanwhile, a study by Fairuzi Is'ad and Budi Agus Riswandi (2022) in JIPRO: Journal of Intellectual Property compared the protection of well-known trademarks, but focused more on civil and administrative aspects of protection than on the construction of criminal liability.[16] Based on these three previous studies, there is a gap, as no research has specifically examined the comparison regarding the elements of the offense, forms of fault, and criminal sanction mechanisms between Indonesia and Spain. Therefore, this study aims to fill this gap through a more systematic comparative approach based on norm reconstruction.

The novelty of this research lies in its specific focus on analyzing the construction of criminal liability in the trademark laws of Indonesia and Spain, rather than merely discussing law enforcement or the protection of well-known trademarks. This study offers a new approach by placing the elements of actus reus, mens rea, fault forms, and sanction mechanisms at the center of comparative analysis, thereby revealing fundamental differences in the design of trademark offenses in both countries. Furthermore, this research goes beyond merely mapping similarities and differences; it proceeds to formulate an ideal reconstruction of trademark criminal norms for Indonesia based on best practices from Spain. The scientific contribution of this study is also

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14 I Putu Diarsa Putra, Erikson Sihotang, and Kadek Dedy Suryana, "Enforcement Of Law Against Criminal Acts Related To Trademarks By The Special Criminal Investigation Directorate Of The Bali Provincial Police," *Asian Journal of Social and Humanities* 3, no. 11 (August 2025): 1977–85, https://doi.org/10.59888/ajosh.v3i11.603.

15 Masrur, Irawati, and Tigor, "Complaints Regarding Trademark Crimes Against Trademark Holders and Consumer Protection."

16 Fairuzi Is'ad and Budi Agus Riswandi, "Legal Protection for Well-Known Trademarks Between Indonesia and Spain (Case Study between Lois and NewLois)," *JIPRO : Journal of Intellectual Property* 5, no. 2 (December 2022), https://doi.org/10.20885/jipro.vol5.iss2.art5.

evident in its effort to connect trademark criminal law reform with international standards, such as the TRIPS Agreement, and the dynamics of trademark crime in modern trade. Consequently, this research proposes a conceptual solution in the form of a model for norm reform that is more effective, proportionate, and applicable to address the challenges of trademark counterfeiting in Indonesia.

The objective of this research is to comprehensively analyze the construction of criminal liability under trademark law in Indonesia and Spain, particularly regarding the elements of the offense, forms of fault, and sanction mechanisms for trademark infringements. The study also aims to identify fundamental similarities and differences between the two legal systems in regulating trademark crimes, thereby determining the factors that cause variations in the effectiveness of law enforcement in each country. Additionally, this research seeks to formulate an ideal reconstruction of criminal liability norms for Indonesia, using the Spanish legal system as a comparative reference. This reconstruction is directed toward strengthening enforcement effectiveness, clarifying the element of intent, and expanding the scope of liability, including for corporate actors. Ultimately, this research is expected to provide normative recommendations that align with international intellectual property standards and the needs of trademark protection in the era of global trade.

Method

This research employs a normative legal research method focusing on the study of positive legal norms, legal principles, and doctrines related to criminal liability in trademark law. The approach used includes a conceptual analysis of the elements of offense, forms of fault, and principles of punishment in trademark crimes, as well as a comparative analysis of the similarities and differences in trademark criminal regulations between Indonesia and Spain. Primary legal materials include

Law 20 of 2016 on Trademarks and Geographical Indications, the TRIPS Agreement of 1994, the Paris Convention of 1883, Spanish Law 17/2001 on Trademarks (Ley 17/2001 de Marcas), and the Spanish Penal Code (Código Penal). Secondary legal materials include scientific journals, books, and treatises by experts in criminal and intellectual property law. In contrast, tertiary legal materials include legal dictionaries and encyclopedias to support the interpretation of concepts. The legal materials are processed through systematic inventory and classification, followed by qualitative analysis using legal interpretation, comparative analysis, and deductive reasoning to formulate an ideal reconstruction of the norms governing criminal liability for trademark infringement in Indonesia.

Result and Discussion

A. Construction of Criminal Liability in Trademark Law in Indonesia and Spain

The regulation of criminal liability for trademark infringement in Indonesia is stipulated in Law No. 20 of 2016 on Trademarks and Geographical Indications (UU MIG). Criminal provisions regarding trademarks are set out in Articles 100 to 102, which establish three categories of trademark offenses: using an identical mark to the entire registered mark of another party, using a mark that is essentially the same, and using an identical sign for geographical indications. These provisions do not stand alone but interact with the general provisions of the Criminal Code (Kitab Undang-Undang Hukum Pidana or KUHP), particularly on the principles of criminal liability. In criminal law dogmatics, criminal liability requires the existence of fault (schuld) as the basis for punishment, which theoretically encompasses intent (dolus) or negligence (culpa).[17] The UU MIG emphasizes intent, as evidenced by the phrase "uses without rights" ("dengan tanpa hak menggunakan") in the formulation of the

[17] Vita Mahardhika, Pudji Astuti, and Aminuddin Mustaffa, "Could Artificial Intelligence Be the Subject of Criminal Law?," *Yustisia Jurnal Hukum* 12, no. 1 (April 2023): 1–12, https://doi.org/10.20961/yustisia.v12i1.56065.

offense. However, the law does not explicitly distinguish between forms of intent, such as *dolus directus* or *dolus eventualis*.

The subjective element (mens rea) in trademark offenses under the UU MIG requires intent (opzet/dolus) as the form of fault. Essentially, intent consists of the offender's will and knowledge of the consequences of their actions, meaning the offender knows the mark belongs to another party, yet still uses it. When the law merely states "without rights," proving the element of knowledge becomes difficult because there are no clear normative indicators. This affects the evidentiary process, as prosecutors must establish malicious intent through circumstantial evidence. In practice, this weakness often leads to trademark cases being resolved through civil litigation, as the burden of proof is considered easier to meet.

The objective element (actus reus) in trademark offenses comprises the act of "using a mark without rights in the course of trade of goods and/or services," which should encompass the production, distribution, sale, and offering of counterfeit goods. However, the phrase "in the course of trade" in Article 100 of the UU MIG which states, "Any person who unlawfully uses a mark that is identical in its entirety to a registered mark belonging to another party for similar goods and/or services produced and/or traded shall be liable to imprisonment for a term of up to 5 (five) years and/or a fine of up to Rp2,000,000,000.00 (two billion rupiah)" is not explicitly defined, resulting in varying interpretations in law enforcement practice. This indicates that Indonesia's trademark criminal norms are not yet fully responsive.

A prerequisite for criminal protection under the UU MIG is that the mark be a registered trademark; therefore, well-known marks not yet registered in Indonesia do not receive direct criminal protection. This provision contradicts the standards outlined in Article 6b of the Paris Convention for the Protection of Industrial Property, which states that member countries are obligated, ex officio if their domestic law permits, or at the request of an interested party, to refuse or cancel registration and prohibit the use of marks that constitute a reproduction, imitation, or translation of a well-known mark. This provision demonstrates that the protection of well-known marks should not be conditional upon registration,[18] because the reputation of well-known marks transcends the jurisdictional boundaries where registration is affected. As a member of the Paris Convention since 1950, Indonesia is obligated to implement these international commitments into national law, including within the criminal sphere. However, to date, the UU MIG has not accommodated criminal protection for well-known marks that are not yet registered.

Article 103 of the UU MIG stipulates that trademark offenses are complaint-based crimes (klachtdelict), meaning that criminal prosecution can only be initiated upon a report filed by the aggrieved party, namely the registered trademark owner.[19] This complaint-based nature has systemic implications, meaning the state cannot proactively initiate prosecution even if violations occur on a massive scale and harm public interests. Law enforcement relies heavily on the trademark owner's initiative and financial capacity to file a report. This construction indicates that the UU MIG is not aligned with the nature of trademark counterfeiting, which has evolved into organized crime with broad socio-economic impacts extending beyond the private interests of the trademark owner.

The sanction system under the UU MIG provides for imprisonment and fines in a cumulative-alternative manner, with gradations based on the severity of the offense. Article 100 paragraph (1) stipulates a penalty of up to 5 years imprisonment and/or a fine of up to Rp2 billion for using an identical mark; Article 100 paragraph (2) imposes up to 3 years imprisonment and/or a fine of up to Rp1 billion for using an essentially similar mark; and Article 102 provides for up to 1 year imprisonment and/or a fine of up to Rp200 million for geographical indication violations. These differences show that the UU MIG does not yet recognize the concept of sentence enhancement based on qualifying factors such as industrial scale, involvement in criminal organizations, or the use of digital means. The principle of proportionality in criminal law requires that the severity of punishment must correspond to the gravity of the harm

[18] Wathsala Ravihari Samaranayake, "Well-Known Marks: Jettisoning the 'Domestic Registration Requirement' Vis-à-Vis Dissimilar Goods and Services," *GRUR International* 74, no. 6 (July 2025): 507–24, https://doi.org/10.1093/grurint/ikaf054.

[19] Putra, Sihotang, and Suryana, "Enforcement Of Law Against Criminal Acts Related To Trademarks By The Special Criminal Investigation Directorate Of The Bali Provincial Police."

caused.[20] However, under the UU MIG, offenders involved in large-scale counterfeiting causing significant losses may receive the same sentence as those committing small-scale infringements. The absence of provisions regarding corporate criminal liability in the UU MIG constitutes a critical legal gap, considering that most large-scale trademark violations are committed by or through corporate legal entities.

In contrast to Indonesia, Spain regulates criminal liability for trademarks using a normative dualism model. Trademark regulations are set out in Ley 17/2001 de Marcas (Spanish Trademark Law), while criminal sanctions are established in the Código Penal (Penal Code) under Ley Orgánica 10/1995.[21] Article 274 of the Spanish Penal Code classifies brand counterfeiting as part of the delitos relativos a la propiedad industrial, meaning that trademark counterfeiting falls within the general criminal law architecture, rather than being merely administrative-criminal provisions scattered across sectoral regulations. As a member of the European Union, Spain is also bound by Directive 2004/48/EC on the enforcement of intellectual property rights (the Enforcement Directive) and Regulation (EU) 2017/1001 on the European Union Trade Mark.[22] It means that its standards for criminal trademark protection must align with the supranational framework of the European Union.

The subjective element (mens rea) under Article 274 of the Spanish Penal Code requires the existence of dolo (intent) and ánimo de lucro (commercial purpose) as subjective elements that must be proven cumulatively.[23] The strength of the Spanish system lies in the clear definition of ánimo de lucro, which explicitly distinguishes between infringements committed for commercial purposes (subject to criminal liability) and non-commercial infringements (resolved through civil or

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20 M. Rizaldi Ashar, "Legal Analysis of The Provisions of The Crime of Corruption in The Criminal Code in Terms of The Principle of Proportionality," *Pakistan Journal of Life and Social Sciences (PJLSS)* 22, no. 2 (2024): 14175–88, https://doi.org/10.57239/PJLSS-2024-22.2.001019.

21 Carmen Rocío Fernández Díaz, "Trade Secrets in Spain: Protection and Connection with Intellectual Property Rights," *Queen Mary Journal of Intellectual Property* 6, no. 4 (December 2016): 454–77, https://doi.org/10.4337/qmjip.2016.04.03.

22 Glen Gibbons, "The Exercise of Principled Discretion in Trade Mark Permanent Injunctions: Orthodoxy, Specificity and Refusal," *IIC - International Review of Intellectual Property and Competition Law* 56, no. 6 (July 2025): 1117–40, https://doi.org/10.1007/s40319-025-01622-4.

23 Adolfo Bautista Cremadez, "Evolution of Fraud in Spanish Law: From Roman 'Dolus' to Modern Codification," *Journal on European History of Law* 16, no. 2 (2025): 21–25.

administrative means), thereby better upholding the ultimum remedium principle of criminal law. This clarity regarding the subjective element also facilitates the burden of proof, as prosecutors can assess the offender's intent through indicators of commercial transactions such as distribution, importation, exportation, or sale.

The objective element (actus reus) in Spanish criminal law is formulated as an unlawful act with a broader scope. Article 274 of the Penal Code not only criminalizes the use of counterfeit marks in sales but also covers reproduction, imitation, modification, and storage for distribution. This provision is crucial, as the counterfeiting chain extends not only to the final sales stage but also to production and logistics. Furthermore, Spain recognizes aggravating factors such as especial gravedad (special severity) as qualifying elements that increase the penalty,[24] as stipulated in Article 276 for specific situations. These qualifying elements include: (a) when the offense is committed on an industrial scale or within an organized business structure; (b) when the offender utilizes electronic communication networks or information technology to distribute counterfeit products; (c) when the offender acts as a manager or administrator within a corporate entity committing the offense; and (d) when the offender has previously been convicted of similar crimes. The Spanish legal system also provides broader protection by recognizing criminal safeguards for marca notoria (well-known marks), albeit under specific conditions,[25] in line with international protection standards. These provisions demonstrate that the Spanish trademark criminal system is more responsive to the dynamics of contemporary trademark crimes, which are increasingly organized, cross-border, and technology-driven.

The most fundamental difference between Indonesia and Spain lies in their respective offenses. Spain constructs trademark counterfeiting as a public offense (delito público), meaning that the state can initiate prosecution through the Public Prosecutor's Office (Ministerio Fiscal)

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[24] Antonio Obregón García, "Key Elements of the Criminal Law Conflict System, with Special Reference to Spanish Criminal Law," *Ius Novum* 17, no. 3 (2023): 1–18.

[25] Is'ad and Riswandi, "Legal Protection for Well-Known Trademarks Between Indonesia and Spain (Case Study between Lois and NewLois)."

without waiting for a complaint from the trademark owner.[26] This policy reflects the paradigm that trademark counterfeiting is a threat to public interests, particularly consumer protection and market integrity. This approach is more aligned with Article 61 of the TRIPS Agreement 1994, which states, "Members shall provide for criminal procedures and penalties... in cases of willful trademark counterfeiting... on a commercial scale." The term "criminal procedures" requires active enforcement mechanisms, thereby providing significantly greater flexibility in law enforcement without depending on the initiative of the trademark owner. Consequently, the Spanish model demonstrates greater effectiveness, as the state has the authority to act proactively in combating trademark crimes.

Spain also excels in the aspect of corporate criminal liability. Article 31 bis of the Penal Code explicitly regulates the criminal responsibility of legal entities (*responsabilidad penal de las personas jurídicas*),[27] meaning that corporations can be held criminally liable if the offense was committed for the corporation's benefit and there was a failure in internal supervision. In corporate criminal law theory, this principle relates to the concepts of vicarious liability and corporate culture, whereby a corporation is held responsible for the actions of its organs or its internal policies.[28] Through this mechanism, criminal sanctions are not limited to fines but also include the dissolution of the legal entity, suspension of business activities, or operational bans. The application of corporate sanctions has a strong deterrent effect, as they target the main perpetrators of trademark counterfeiting. This differs from Indonesia, which has not yet established specific legal instruments to hold corporations accountable as primary actors.

In addition to principal penalties, the Spanish legal system also recognizes comprehensive accessory penalties (penas accesorias) as

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26 Grupo Ilusión de Ortodoncistas, "'AdWords,'" *IIC - International Review of Intellectual Property and Competition Law* 54, no. 3 (March 2023): 462–70, https://doi.org/10.1007/s40319-023-01308-9.

27 Miguel Abel Souto, "Money Laundering, Cybercrime and Criminal Responsibility of Legal Persons," in *Cybercrimes and Financial Crimes in the Global Era* (Singapore: Springer Nature Singapore, 2022), 145–64, https://doi.org/10.1007/978-981-19-3189-5_16.

28 Lalu Saipudin et al., "The Concept of Corporate Criminal Liability in the Indonesian Criminal Law System," *Jurnal IUS Kajian Hukum Dan Keadilan* 13, no. 2 (August 2025): 475–99, https://doi.org/10.29303/ius.v13i2.1817.

regulated in Articles 55-56 of the Penal Code. Article 127 specifies the types of accessory penalties, which include: (a) confiscation and destruction of the proceeds of crime (comiso); (b) closure of establishments used to commit the offense; (c) prohibition from engaging in similar business activities for a specified period; (d) disqualification from receiving government subsidies or aid; and (e) publication of the conviction in the media at the offender's expense. In penal theory, accessory penalties serve as preventive and restorative measures to prevent recidivism.[29] The asset confiscation mechanism (comiso) under Article 127 of the Penal Code is mandatory (comiso obligatorio) for all instruments, products, and proceeds derived from the offense, ensuring that offenders cannot benefit from their crimes even after serving their prison sentences. Consequently, the Spanish system demonstrates a more comprehensive penal design that is relevant to profit-driven trademark crimes.

Based on this comparison, Indonesia and Spain share the similarity that both require intent as the primary element of criminal liability. Both countries also recognize trademarks as valid objects of legal protection, although the scope of protection differs between them. However, fundamental distinctions exist in the regulatory model, the nature of the offense, the coverage of digital activities, and the sanction mechanisms. Indonesia still employs a sectoral approach through the UU MIG. It treats these offenses as complaint-based, whereas Spain integrates them into the general penal code and classifies them as public offenses. These differences directly impact enforcement effectiveness, as Spain is better equipped to combat trademark crimes as public and organized phenomena.

Indonesia's weaknesses lie in the inability to reach the main perpetrators, particularly corporate networks and industrial distribution chains. The absence of corporate criminal liability mechanisms and asset confiscation provisions renders Indonesian trademark criminal law ineffective in eliminating the economic gains of crime. Furthermore, the complaint-based nature hinders the state's ability to enforce the law proactively in cases affecting the general public. Trademark counterfeiting

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29 Kwadwo Oteng Akyina, "An Assessment of Some Theories of Punishment and Their Influence on Corporal Punishment's Use as a Behaviour Modification Strategy," *European Journal of Education Studies* 11, no. 8 (July 2024): 216–25, https://doi.org/10.46827/ejes.v11i8.5461.

should be classified as a public offense that can be prosecuted without waiting for a private complaint. Therefore, the reconstruction of Indonesian trademark criminal law should adopt best practices from Spain by clarifying the element of commercial purpose, expanding the scope of offenses to cover digital trade, and explicitly regulating corporate criminal liability.

B. Reconstruction of the Ideal Criminal Liability Norm for Trademarks in Indonesia

The reconstruction of trademark criminal norms in Indonesia is grounded in the theory of punishment, which synergistically combines three penal functions: retribution, a form of proportional retaliation; general deterrence; and special deterrence.[30] The current Indonesian trademark criminal system tends to be purely retributive in orientation, with relatively low sanctions and enforcement that rely on private initiative through the complaint-based mechanism. This retributive focus, unbalanced by adequate preventive functions, results in a weak deterrent effect.[31] Therefore, a reconstruction towards an integrative model is necessary, whereby every normative element is consciously designed to maximize preventive functions without disregarding the demands of proportional justice.

The Spanish practice under Article 274 of the Penal Code (Ley Orgánica 10/1995) demonstrates the successful application of punishment theory in the context of trademark crimes. The combination of public offenses, qualifying elements (especial gravedad), and a comprehensive sanction system creates a normative framework with stronger deterrent power. Article 276 of the Spanish Penal Code stipulates that penalties shall be increased to imprisonment ranging from 2 to 6 years if the offense is committed on an industrial scale or through a criminal organization.

[30] Robayet Ferdous Syed, "Intertwine Preventive (Ex-Ante) and Deterrent (Ex-Post) Mechanisms for Compliance with and Enforcement of Labor Laws: A Comprehensive Approach for Bangladesh," *Humanities and Social Sciences Communications* 11, no. 1 (August 2024): 1013, https://doi.org/10.1057/s41599-024-03443-1.

[31] Ezequiel Malarino, "The Standard of Proof and Crime Prevention: A Theoretical and Empirical Analysis," *The International Journal of Evidence & Proof* 28, no. 4 (October 2024): 259–79, https://doi.org/10.1177/13657127241228309.

Spain's success indicates that differentiating penalties based on the severity of the offense (graduated sanctions) is a key instrument in realizing punishment theory. The Spanish system also implements special preventive measures, such as prohibiting offenders from engaging in similar business activities (beroepsverbod) and closing business premises, thereby directly preventing offenders from repeating the same crimes.

The reconstruction of trademark criminal norms must remain grounded in the principle of subsidiarity and the *ultimum remedium* doctrine. The principle of subsidiarity holds that criminal law should be invoked only when other legal instruments have proven ineffective in protecting threatened legal interests.[32] The principle of *ultimum remedium* requires that criminal law be applied as a last resort,[33] meaning that not all trademark infringements should be immediately criminalized. In the context of trademark violations, applying this principle does not unduly narrow the scope of criminal law; rather, it requires a clear normative distinction between minor non-commercial infringements that can be adequately resolved through civil means and serious commercial-scale infringements that necessitate a criminal response. The Spanish model has successfully operationalized this differentiation by requiring commercial purpose (ánimo de lucro) as an additional subjective element to be proven, as well as the concept of especial gravedad as a qualifying factor. A reconstruction that ignores the ultimum remedium principle would result in overcriminalization, which is counterproductive to legal certainty and the business climate. In contrast, an overly restrictive approach would create impunity for organized trademark criminals.

The reconstruction of trademark criminal norms must also employ a functional approach within the theory of intellectual property protection. Peter Drahos views intellectual property as a bundle of rights, meaning that trademark protection concerns not only the owner's private

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32 Mirentxu Corcoy Bidasolo, "Is It Possible to Limit the Penal Intervention in the Twenty-First Century?," in *Crisis of the Criminal Law in the Democratic Constitutional State*, ed. Eduardo Demetrio Crespo, Alfonso García Figueroa, and Gema Marcilla Córdoba (Cham: Springer, 2023), 3–16, https://doi.org/10.1007/978-3-031-13413-5_1.

33 Lies Sulistiani and Efa Fakhriah, "The Effect of Extra Judicial Settlement in Criminal Cases Based on the Principle of Ultimum Remedium," *PADJADJARAN Jurnal Ilmu Hukum (Journal of Law)* 10, no. 3 (2023): 300–320, https://doi.org/10.22304/pjih.v10n3.a1.

rights but also consumer interests and public welfare.[34] Consumer interests arise because trademarks serve as informational tools guaranteeing product quality and origin. Public interests emerge because counterfeiting undermines fair competition and weakens market integrity. Under this approach, trademark crimes can no longer be regarded as merely private conflicts, necessitating a shift from a complaint-based model to a public offense model, thereby granting the state greater legitimacy to act proactively in law enforcement.[35]

The first fundamental reconstruction required is to reclassify trademark offenses from complaint-based crimes (klachtdelict) to public offenses (gewoon delict). Article 103 of the UU MIG, which states that "the offenses referred to in Articles 100, 101, and 102 are complaint-based," should be amended to include an exception: "except for offenses meeting the qualifying elements as stipulated in Article ... (qualified offenses)." This differentiation model aligns with the principle of subsidiarity, as criminalization as a public offense applies only to infringements whose impacts exceed private interests and clearly threaten public welfare.

The formulation of trademark offenses in the UU MIG needs to be reconstructed by explicitly adding two components to the *mens rea*: specifically defined intent and commercial purpose. This is necessary because the phrase "uses without rights" in Article 100 is often interpreted merely as an indicator of intent, without distinguishing among its different forms. The inclusion of detailed intent components aims to differentiate between *dolus directus* (where the offender knows and desires the act) and *dolus eventualis* (where the offender foresees the possibility and accepts the consequence),[36] thereby ensuring legal certainty in the evidential process. Meanwhile, the inclusion of the commercial purpose component is a

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[34] João Romeiro Hermeto, "The Eschatology and the Theodicy of Intellectual Property," in *The Privatisation of Knowledge* (Cham: Springer Nature Switzerland, 2025), 29–90, https://doi.org/10.1007/978-3-031-90866-8_2.

[35] Muhammad Iqbal Baiquni, Waspiah Waspiah, and Septhian Eka Adiyatma, "Competition Law in Indonesia," in *Routledge Handbook of Indonesian Law*, ed. Simon Butt and Tim Lindsey (London and New York: Routledge, 2026), https://www.routledge.com/Routledge-Handbook-of-Indonesian-Law/Butt-Lindsey/p/book/9781032709802.

[36] Tshepo Bogosi Mosaka, "A Probative Argument of Intention," *The Journal of Criminal Law* 87, no. 5–6 (December 2023): 329–43, https://doi.org/10.1177/00220183231187610.

prerequisite for punishment, ensuring that criminalization applies only to acts that have a tangible impact on the market.

The reconstruction of the actus reus in the UU MIG requires expanding the types of acts that are punishable by law. Article 100 of the UU MIG merely uses the phrase "uses an identical mark" without specifying the forms of usage that constitute criminal offenses. The reconstruction proposes including acts of production, reproduction, and imitation, as well as the provision of counterfeiting tools and materials, as punishable offenses.[37] This is done because counterfeiters are often not at the sales stage, but at the production and logistics stage.[38] Furthermore, the norms must also cover acts that facilitate trademark crimes, such as providing storage facilities or delivery services for counterfeit goods. The addition of qualifying elements is also necessary to impose heavier penalties when offenses are committed on an industrial or organized scale, through or on behalf of a corporation, involve goods that potentially endanger consumer safety, or utilize electronic communication networks. This reconstruction will make law enforcement more effective by targeting not only small-scale vendors but also larger criminal networks.

The reconstruction of the UU MIG must also explicitly include criminal protection for well-known marks, even if they are not yet registered in Indonesia, as an implementation of international obligations derived from Article 6bis of the Paris Convention and Articles 16 paragraphs (2) and (3) of the TRIPS Agreement. This reconstruction should be accompanied by objective, measurable normative criteria for assessing a mark's reputation, including the level of recognition among relevant consumers, the duration and geographical scope of use, the track record of protection in other jurisdictions, and the economic value inherent in the mark's reputation.[39] The reconstructed protection

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37 Irfan Butt et al., "Four Decades of Counterfeit Research: A Bibliometric Analysis," *Cogent Business & Management* 10, no. 3 (December 2023): 1–20, https://doi.org/10.1080/23311975.2023.2284814.

38 Sotiris P. Gayialis et al., "A Review and Classification Framework of Traceability Approaches for Identifying Product Supply Chain Counterfeiting," *Sustainability* 14, no. 11 (May 2022): 1–20, https://doi.org/10.3390/su14116666.

39 Samaranayake, "Well-Known Marks: Jettisoning the 'Domestic Registration Requirement' Vis-à-Vis Dissimilar Goods and Services"; Ayu Mustika Pamungkas and Hikam Hulwanullah, "Celebrity Persona: Can Intellectual Property Law in Indonesia Provide Adequate Protection?," *Jambura Law Review* 7, no. 1 (2025), https://doi.org/10.33756/jlr.v7i1.27579.

mechanism can adopt a tiered model by classifying infringements against unregistered well-known marks as qualified offenses carrying higher penalties, considering that the reputation of the violated mark reflects greater economic value and broader adverse impacts. This reconstruction aligns with the principle of proportionality, which requires a balance between the degree of fault and the severity of punishment. Directive 2004/48/EC (the Enforcement Directive) also emphasizes that sanctions must be "effective, proportionate and dissuasive" to ensure a strong deterrent effect.[40]

The reconstruction of Indonesian trademark criminal norms must also explicitly incorporate corporate criminal liability as a distinct legal subject. Article 31 bis of the Spanish Penal Code establishes that legal entities may be held criminally liable if the offense is committed on their behalf and for their benefit by directors, administrators, or employees acting within the scope of their authority, and if the corporation failed to implement adequate compliance programs. This Spanish model demonstrates that corporate criminal liability is not strict (absolute); rather, it can be avoided if the corporation proves that effective compliance measures were already in place before the crime was committed. Indonesia can adopt this by incorporating a reference mechanism (renvoi) to Supreme Court Regulation Number 13 of 2016 on Procedures for Handling Criminal Cases by Corporations, which already provides a procedural framework, but this needs to be strengthened with substantive provisions within the UU MIG itself. The corporate sanction system to be regulated should include fines calculated based on turnover or profits derived from the trademark crime,[41] suspension of business activities, revocation of business permits for a specified period,[42] and dissolution of the corporation in the most severe cases. Integrating a corporate

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[40] Paola Iamiceli and Fabrizio Cafaggi, "The Principles of Effectiveness, Proportionality and Dissuasiveness in the Enforcement of EU Consumer Law: The Impact of a Triad on the Choice of Civil Remedies and Administrative Sanctions," *European Review of Private Law* 25, no. 3 (June 2017): 575–618, https://doi.org/10.54648/ERPL2017038.

[41] Ronald G. Burns, Michael J. Lynch, and Katelyn Smith, "Sanctioning Corporate Crime: Fines Received by the 50 Top Revenue Generating Companies in the US," *Crime, Law and Social Change* 82, no. 5 (December 2024): 1131–55, https://doi.org/10.1007/s10611-024-10170-w.

[42] Erna Dewi, Bhanu Prakash Nunna, and Maya Shafira, "Corporate Crimes and Penal Reform in Indonesia: Evaluating the Efficacy of the Criminal Code," *Jambe Law Journal* 8, no. 1 (July 2025): 287–313, https://doi.org/10.22437/home.v8i1.525.

compliance program as a factor to eliminate or mitigate liability simultaneously encourages corporations to build internal systems to prevent trademark infringements proactively.

Based on the principle of proportionality set out in Article 3, paragraph (2) of the Enforcement Directive 2004/48/EC, the sanction system in Indonesian Trademark Law needs to be comprehensively reconstructed into three complementary layers of punishment. The first layer involves proportionally increasing the threats of imprisonment and fines and differentiating them by category: basic offenses carrying a penalty of 1 to 5 years imprisonment and/or a fine of up to Rp5 billion, and qualified offenses carrying 3 to 10 years imprisonment and/or a fine of up to Rp20 billion or three times the value of the loss incurred (multiple damages). The Enforcement Directive 2004/48/EC indicates that damage-based fines are more proportional and effective than fixed nominal fines. The second layer is the systematic integration of accessory penalties (bijkomende straffen), which must be applied by judges in crimes of a certain scale, including the confiscation and destruction of counterfeit goods and production equipment, the closure of business premises, prohibition from engaging in similar business activities, and the publication of the verdict in the media at the offender's expense. The third layer is asset forfeiture, integrated with Law Number 8 of 2010 on the Prevention and Eradication of Money Laundering, given that proceeds from large-scale trademark crime are often laundered as a subsequent offense.

The reconstruction of trademark criminal norms must also respond to the development of the digital ecosystem, which has expanded the scope for counterfeiting. Trademark infringements now frequently occur through online marketplaces, social media, digital advertising, and the misuse of domain names.[43] Therefore, criminal norms must cover the unauthorized use of marks on online platforms and the distribution of counterfeit goods via e-commerce. Furthermore, this reconstruction needs to include provisions on digital platform liability, requiring marketplace operators and e-commerce platforms to implement effective notice-and-

[43] Anna Pokrovskaya, "Protection of Trademark Rights on E-Commerce Platforms: An Updated Outlook," *Journal of Comprehensive Business Administration Research* 1, no. 2 (March 2024): 65–73, https://doi.org/10.47852/bonviewJCBAR42022153.

takedown procedures for infringing content and counterfeit products,[44] provide seller verification mechanisms and cooperate proactively with law enforcement authorities in investigating online trademark crimes. Guided by the European Union's Digital Services Act (DSA), the reconstruction of Indonesia's UU MIG can adopt the principle of tiered platform liability, stipulating that platforms with actual knowledge of trademark infringements but failing to act may be held criminally liable as accomplices (deelnemer) in the offense.[45]

The reconstruction of trademark criminal norms must be accompanied by institutional reconstruction to ensure effective implementation. Enforcing trademark criminal law requires specialized technical capacity in registration matters, proof of similarity, and digital forensics for online transactions. Indonesia needs to establish a specialized unit for handling intellectual property crimes that is integrated within the police and prosecutor's office, while also strengthening inter-agency coordination involving the Directorate General of Intellectual Property (DJKI), Customs and Excise, the Food and Drug Authority (BPOM), and the Business Competition Supervisory Commission (KPPU). Without strong institutional support, normative changes will remain merely formal reforms with no practical impact. Indonesia requires comprehensive reform based on three main pillars: shifting the paradigm from private to public interests, differentiating norms by level of harm, and integrating corporations and digital spaces as new areas of criminal activity. By adopting best practices from Spain, Indonesia can establish a system of criminal liability for trademarks that is more effective, proportionate, and aligned with international intellectual property law standards.

Conclusion

The construction of criminal liability for trademarks in Indonesia and Spain reveals that the Indonesian system still adheres to a complaint-based

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44 Susianto et al., "Legal Responsibility of Marketplace Platforms for Counterfeit Products Based on Civil Law and ITE Law," *Research Horizon* 5, no. 6 (December 2025): 2875–88, https://doi.org/10.54518/rh.5.6.2025.948.

45 Despina Anagnostopoulou, "The Role of the Court of Justice of the European Union on the Interpretation of Platform Operators and Business Users' Contracts," in *Quo Vadis Commercial Contract?*, ed. Mads Andenas and Maren Heidemann (Cham: Springer, 2023), 33–82, https://doi.org/10.1007/978-3-031-14105-8_2.

offense model with a purely retributive orientation and lacks provisions regarding corporate criminal liability, asset forfeiture, and protection for unregistered well-known marks. The ideal normative reconstruction for Indonesia must be based on an integrative theory of punishment that combines proportional retribution, general deterrence, and special deterrence, while being grounded in the principle of subsidiarity that distinguishes minor non-commercial infringements from serious commercial-scale violations. This study recommends reclassifying the nature of the offense from complaint-based to public offenses for commercial-scale infringements, adding the elements of commercial purpose and gradations of intent to the mens rea formulation, and expanding the scope of actus reus to cover digital activities and the facilitation of trademark crimes. Furthermore, it is necessary to regulate corporate criminal liability through turnover-based sanctions, to recognize compliance programs as mitigating factors, and to strengthen institutional capacity by establishing specialized intellectual property units within the police and prosecutor's offices. By contextualizing best practices from Spain, Indonesia's trademark criminal system is expected to become more effective, proportionate, and responsive to increasingly organized and transnational trademark crimes.

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