

Study note: This module should take around 6 hours to study.

Module 9: Unfair competition

Objectives

After completing the study of this module you should be able to:

1. Give examples of unfair competition
2. List and explain the major categories of unfair competition
3. Explain some of the variations in different countries' approach to unfair competition

Introduction

This module is concerned with the concept of unfair competition. The module will explain what sorts of acts could be considered as unfair competition and explain the remedies that can be used, together with the obligations countries must fulfill, to ensure fairness in competition. The idea of unfair competition has been around for some time and was mentioned as part of intellectual property protection as early as 1900 in the Brussels revision of the Paris Convention.

What is Unfair Competition?

Article 10bis (2) of the Paris Convention defines an act of unfair competition as “any act of competition contrary to honest practices in industrial or commercial matters”.

Article 10bis (3) continues specifying which acts, in particular, shall be prohibited:

1. “all acts of such a nature as to create confusion, by any means, with the establishment, the goods, or the industrial or commercial activities, of a competitor;
2. false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor;
3. indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.”

SELF-ASSESSMENT QUESTION (SAQ)

Later on in the module you will get some more detailed examples of the types of things that constitute unfair competition but for now try this SAQ

SAQ 1: Which of the following would you consider to be an act of unfair competition?

1. **An advertisement that a competitor's dairy Yogurt was not made with cows milk**
2. **An untrue statement that a competitor was about to become bankrupt**
3. **Choosing a logo that was just marginally different from that of a competitor**
4. **Stealing the secret design of a competitor's product**
5. **Stealing the whole of an initial consignment of a competitor's new product**

Type your answer here:

[Click here for answer](#)

SAQ 1 Answer

All of the examples given in the question are dishonest but answers 1-4 are types of unfair competition and would be dealt with using any laws designed to combat unfair competition. The final example (5) is straightforward theft and could be dealt with in the normal way for such a crime.

Therefore unfair competition is at its simplest dishonest practice. Of course the concept of dishonest practice is a little difficult to precisely define and has to be defined in a country's national law. These national laws set the commercial and legal environment, ensure fairness in competition, and, as a result, complement the protection of intellectual property rights.

The need for protection

Experience has shown that there is little hope of fairness in competition being achieved solely by the free play of market forces. In theory, consumers, in their role as referees of economic play could deter dishonest entrepreneurs by disregarding their goods or services and favoring those of honest competitors. Reality, however, is different. As an economic situation becomes more complex, consumers become less able to act as referees. Often they are not even in a position to detect by themselves acts of unfair competition, let alone react accordingly. Indeed it is the consumer who—along with the honest competitor—has to be protected against unfair competition.

Fair play in the marketplace cannot be ensured only by the protection of industrial property rights. A wide range of unfair acts, such as misleading advertising and the violation of trade secrets are usually not dealt with by the specific laws on industrial property. Unfair competition law is therefore necessary either to supplement the laws on industrial property or to grant a type of protection that no such law can provide.

Audio segment 1: *How do the laws of unfair competition relate to those designed to combat the abuse of a dominant market position?*

The rules on the prevention of unfair competition and those on the prevention of restrictive business practices (anti-trust law) are interrelated: both aim at ensuring the efficient operation of a market economy. They do so, however, in different ways. Anti-trust law is concerned with the preservation of the freedom of competition by combating restraints on trade and abuses of economic power. Unfair competition law, on the other hand, is concerned with ensuring fairness in competition by forcing all participants to play according to the same rules. Yet both laws are equally important, although in different respects, and supplement each other.

SELF-ASSESSMENT QUESTION (SAQ)

SAQ 2: Which of the following are valid reasons for the need for laws concerning unfair competition?

- 1. To provide a “level playing field” for all existing and potential competitors.**
- 2. To avoid the abuse of monopoly power**
- 3. To help to ensure a working free market**
- 4. To avoid patent infringements**
- 5. To enforce trademark protection**

Type your answer here:

[Click here for answer](#)

SAQ 2 Answer

1. Yes, using the analogy between economic competition and sporting competition. To get the best and the honest result in a sporting and economic competition requires that all the competitors play to the same rules.
2. No, this would be covered by anti trust or anti monopoly laws.
3. Yes
4. No, this could be enforced under the existing Patent legislation.
5. Again no, as this could be covered by existing trademark law.

Now let's look at some of the acts of unfairness in more detail.

Acts of Unfair Competition

It is true that describing unfair competition as acts contrary to "honest trade practices," "good faith" and so on does not make for clear-cut, universally accepted standards of behavior, since the meaning of the terms used is rather fluid. The standard of "fairness" or "honesty" in competition is no more than a reflection of the sociological, economic, moral and ethical concepts of a society, and may therefore differ from country to country (and sometimes even within a country). That standard is also liable to change with time. Furthermore, there are always new acts of unfair competition, since there is ostensibly no limit to inventiveness in the field of competition. Any attempt to encompass all existing and future acts of competition in one sweeping definition—which at the same time defines all prohibited behavior and is flexible enough to adapt to new market practices—has so far failed.

This does not mean, however, that acts of unfair competition cannot be encompassed by any general definition. The most notable of these acts are the causing of confusion, discrediting and the use of misleading indications. The common aspect of these most important, but by no means exhaustive, examples of unfair market behavior is the attempt (by an entrepreneur) to succeed in competition without relying on his own achievements in terms of quality and price of his products and services, but rather by taking undue advantage of the work of another or by influencing consumer demand with false or misleading statements. Practices that involve such methods are therefore doubtful at the outset as to their fairness in competition.

The most important factor for determining "unfairness" in the marketplace, however, is derived from the purpose of unfair competition law. In this respect, unfair competition law was initially designed to protect the honest businessman. In the meantime, consumer protection has been recognized as equally important. Moreover, some countries put special emphasis on the protection of the public at large, and especially its interest in the freedom of competition. Modern unfair competition law therefore serves a threefold purpose, namely: the protection of competitors, the protection of consumers and the safeguarding of competition in the interest of the public at large.

On the other hand, there is broad agreement that at least some acts and practices are always irreconcilable with the notion of fairness in competition. These are discussed in detail below.

Categories of Acts of Unfair Competition

The following are amongst the most common generally recognized acts of unfair competition:

- Causing confusion
- Misleading
- Discrediting Competitors
- Disclosure of secret information
- Taking advantage of another's achievements (free riding)
- Comparative advertising

Let's look at each of these in turn.

Causing confusion

The Paris Convention (Art. 10bis (3)) obliges member States to prohibit all acts that are “of such a nature as to create confusion by any means whatever with the establishment, the goods or the industrial or commercial activities of a competitor”. The scope of this article is very broad, as it covers any act in the course of trade involving a mark, sign, label, slogan, packaging, shape or color of goods, or any other distinctive indication used by a businessman. Thus not only indications used to distinguish goods, services or businesses but also the appearance of goods and the presentation of services are considered relevant for the prohibition of confusion. However there are two main areas in which confusion frequently occurs.

These are indications of commercial origin on the one hand, and the appearance of goods on the other. However, this does not preclude or limit the protection of other attributes or achievements against confusion.

An example of the first type of confusion could be a situation in which an organization which is completely separate from the large American toy store known under the trademark "Toys 'R' Us" would begin to sell games in a store called Games 'R' Us

Audio segment 2: *Briefly how does industrial design protection work?*

Such legislation usually prohibits the use of identical or similar product appearances for identical or similar goods. However, as with trademark legislation, protection under special laws on industrial designs is also limited in several ways, which vary significantly from country to country. In a manner similar to the specific protection under trademark laws, such limitations may concern the general applicability of the designs law to certain product appearances and also the exact scope of the protection granted by the specific legislation. For example, if the design protection of a surface decoration is limited to the use of the decoration on products for which the design is registered, protection against copying of the design for the decoration of other products may be obtained under unfair competition law, if the copied design is misleading or causes confusion as to the commercial source.

SELF-ASSESSMENT QUESTION (SAQ)

SAQ 3: Which of the following are potentially confusing practices that could lead to unfair competition?

- 1. A product having the picture of the head of state on the packaging**
- 2. A drinks company using bottles the same as Coca-Cola**
- 3. The use of a trademark that is similar to an existing one that has not been registered for trademark protection**
- 4. A restaurant in which the decoration and furnishing are almost identical to those of a well-known competitor.**

Type your answer here:

[Click here for answer](#)

SAQ 3 Answer

Answer 1: this case has nothing to do with unfair competition. The head of state might be able to sue for infringement of his personality rights.

Answer 2-4: are all potentially confusing and could be the subject of unfair competition actions.

Answer 2: this case could also be regarded as trademark infringement.

Answer 3: the fact that a trademark is not registered is not really relevant, as the important point is the confusion that would be caused.

Misleading

Misleading can roughly be defined as creating a false impression of a competitor's own products or services. It may well be the single most prevalent form of unfair competition, and it is by no means harmless. On the contrary, misleading can have quite serious consequences: the consumer, relying on incorrect information, may suffer financial (or more harmful) prejudice. The honest competitor loses clients. The transparency of the market diminishes, with adverse consequences for the economy as a whole and economic welfare.

There is a consensus according to which the concept of misleading is restricted neither to inherently false statements nor to statements that have actually led to a false impression on the part of the consumer. Instead it is considered sufficient that the indications in question are likely to have a misleading effect. Even statements that are literally correct can be deceptive.

If, for example, chemical ingredients are generally forbidden in bread, the courts of most countries would consider an advertising claim that a certain bread "was without chemical ingredients" to be deceptive, because, though literally true, it gives the misleading impression that the advertised fact is something out of the ordinary.

It is likewise not necessary for the product in question to be inferior, in an objective sense, so long as the indication or allegation has some enticing effect on the consumer. For example, if the public prefers domestic goods to foreign goods, a false declaration to the effect that imported goods are domestic is misleading even if the imported goods are of superior quality.

SELF-ASSESSMENT QUESTION (SAQ)

SAQ 4: Would you consider the following to be misleading? An ad claims that a slice of bread from one type of loaf has fewer calories than a slice from a different type of loaf, while this is solely due to the fact that it is thinner.

Type your answer here:

[Click here for answer](#)

SAQ 4 Answer

Yes. The omission of the information that the slice was thinner can create as strong an incorrect impression, as an express statement stating that the bread as a whole had fewer calories than other breads.

SELF-ASSESSMENT QUESTION (SAQ)

SAQ 5: Could a company that produced a new beer called Bavaria be guilty of misleading the customers?

Type your answer here:

[Click here for answer](#)

SAQ 5 Answer

If the beer was not made in the German region of Bavaria it could be misleading in that its' origin might be assumed to be Bavaria. Also it might be assumed to be a German style beer made to German quality standards.

In certain countries, this might be regarded as an infringement of a Geographical Indication.

Audio segment 3: *Does the concept of misleading vary from country to country?*

Generally the concept of misleading does vary from country to country and this can best be seen in the various national treatments of exaggerations. Although in all countries obvious exaggerations (even if literally inaccurate) are not considered deceptive because they can easily be recognized as "sales talk," the question of what is mere "hot air" or "puffing" and what is to be taken seriously is answered differently in different countries. In some countries (such as Germany), it is assumed that the public basically believes all advertising statements, and especially those that claim uniqueness ("the best, the first," etc.); consequently an especially strict standard is applied. Other countries (such as Italy and the United States of America) take the exact opposite position and tolerate generally formulated indications, in particular those in the form of claims of uniqueness. Thus in the United States of America the courts have generally only intervened if the product advertised as the best is in reality inferior.

Discrediting Competitors

Discrediting (or disparagement) is usually defined as any false allegation concerning a competitor that is likely to harm his commercial goodwill. Like misleading, discrediting tries to entice customers with incorrect information. Unlike misleading, however, this is not done by false or deceptive statements about one's own product, but rather by casting untruthful aspersions on a competitor, his products or his services. Discrediting, therefore, always involves a direct attack on a particular businessman or a particular category of businessmen, but its consequences go beyond that aim: since the information on the competitor or his products is incorrect, the consumer is liable to suffer also.

Audio segment 4: *Is the concept of discrediting different in different countries?*

In some countries a literally truthful remark about a competitor may be considered unfair competition if the "attack" is blown up out of proportion, or if the words used are needlessly injurious. On the other hand, some countries expressly restrict the notion of discrediting to inaccurate or at least misleading statements.

An explanation of this difference in attitudes can be found in the diverging assessment of "commercial honor." Where unfair competition law has its roots in the protection of the commercial reputation of the individual businessman—as it does in the continental European countries—a "special tort of business disparagement" has emerged, to which, in principle, much stricter rules apply than to defamatory statements outside the bounds of competition, where constitutional considerations such as freedom of speech have to be taken into account. In other countries, especially those that have not developed a comprehensive system of protection against unfair competition, the attitude is exactly the opposite: it is assumed that, in the interest of competition, attacks on individual competitors are unavoidable, that they must be widely tolerated and that a line should only be drawn where the attack is based on false facts. In those countries, the plaintiff usually also bears the burden of proof as to the falseness of the statement—which can sometimes make an action impossible.

SELF-ASSESSMENT QUESTION (SAQ)

SAQ 6: Which of the following would be an example of unfair competition because of discrediting?

1. **Saying that a competitor's yogurt was made from stale milk**
2. **Saying that one company's product was better for the consumers' health**
3. **Using a logo similar to the one of a competitor's on a much inferior product**

Type your answer here:

[Click here for answer](#)

SAQ 6 Answer

All of them are examples of unfair competition but only No. 1 is an example of discrediting, always assuming that the statement is not true. No. 2 would be misleading if not true and No. 3 is a type of confusion.

Disclosure of secret information

A considerable amount of commercial competitiveness of an enterprise can be due to information developed and accumulated by that enterprise or individuals in it. For example, the customer and potential customer lists could give that company an edge over its' competitors who do not have such good quality lists. Another example could be that an enterprise has developed a secret industrial process, which enables it to sell a better quality or cheaper product. I hope you agree with me that if either of these pieces of information were given to a competitor without the permission of the owner of the information this would result in unfair competition. Indeed, the disclosure of secret information is defined as unfair competition by the TRIPS Agreement of 1994, which obliges World Trade Organization members to provide protection for "undisclosed information".

The TRIPS Agreement specifically describes the protection of undisclosed information as necessary to protect against unfair competition (Article 39 (2)).

(a)

Audio segment 5: *Why can't patent protection be used to protect such secret information?*

Competitive strength usually depends on innovative techniques and accompanying know-how in the industrial and/or commercial field. However, such techniques and know-how are not always protectable by patent law. Firstly, patents are available only for inventions in the field of technology and not for innovative achievements concerning the conduct of business, etc. Moreover, some technical discoveries or information, while providing a valuable commercial advantage for a particular trader, may lack the novelty or inventive step required to make them patentable. Furthermore, while a patent application is pending, as long as the information has not been disclosed to the public, the owner of the information to be patented ought to be protected against any wrongful disclosure of the information by others, regardless of whether or not the application eventually leads to the grant of a patent.

SELF-ASSESSMENT QUESTION (SAQ)

SAQ 7: Which of the following could be considered as information suitable for protection under the TRIPS Agreement?

1. The recipe for a soft drink
2. The information in an expired patent
3. The information in a yet to be awarded patent
4. A company accountancy practice
5. A list of customers

Type your answer here:

[Click here for answer](#)

SAQ 7 Answer

Only No. 2 could not be considered as a trade secret as the information in the patent has been published and is in the public domain and can be used freely after the expiry of the patent.

Taking undue advantage of another's achievements

The notion of “free riding” has a number of common features with the notions of causing confusion and misleading. It could be defined as the broadest form of competition by imitation. Under the principles of a free market, however, the exploitation or "appropriation" of another person's achievements is unfair only under specific circumstances. On the other hand, acts that cause confusion or mislead normally imply free riding on another person's achievements, but are generally recognised, as forms of free riding that are always unfair.

There are various types of free riding including the dilution of the distinctive value and quality of a competitor's mark. This could happen if a similar mark is used for dissimilar goods or services.

Comparative advertising

Comparative advertising may take two forms: a positive reference to another's product (claiming that one's own product is as good as the other) or a negative reference (claiming that one's own product is better than the other). In the first instance, where the competitor's product is usually well known, the crucial question relates to the possibility of misappropriation of another's goodwill. In the second case, where the competitor's product is criticized, it is the question of disparagement that arises. However, both forms of comparison involve an (unauthorized) reference to a competitor, who is either mentioned by name or implicitly identifiable as such by the public.

It must be remembered, however, that there are differences in the evaluation of the notion of "misleading" and especially in that of "discrediting." As mentioned above, some countries consider statements claiming superiority or uniqueness (like "the best," etc.) misleading unless they can be proved correct, while others consider them harmless exaggerations. Different assessments of the notions of "discrediting" and "misappropriation" are of even greater importance. In countries with a rather permissive attitude towards true but nevertheless disparaging statements, comparative advertising is generally tolerated. As long as what is said is true, the courts will not interfere, even if the reference to the competitor or his product is clearly disparaging or exploits his goodwill. In countries that traditionally put special emphasis on the protection of the "honest" businessman and his reputation, comparative advertising is either forbidden or at least severely restricted. Sometimes the mere fact that a competitor is named against his will is considered discrediting and therefore unfair competition. According to the rule that "the honest businessman has a right not to be spoken of, even if the truth is spoken," the legislation of some countries has even expressly forbidden all comparisons that needlessly identify a competitor. The same argument has led the courts of other countries to find comparative advertising more or less automatically against honest trade practice (and therefore against the general provision on unfair competition law).

Although many countries take a strict view that comparative advertising is an unfair practice, there has been a trend in recent years in which this negative attitude towards comparative advertising has changed. It has been increasingly recognized that true comparisons of relevant facts can not only reduce the consumer's information search costs, but also have positive effects on the economy by improving market transparency. The courts of those countries that traditionally view comparative advertising as disparaging have gradually relaxed the strict prohibition on all statements identifying a competitor. For example, price comparisons, if based on true, relevant and ample material, may be allowed. On the whole, there seems to be a clear trend towards the admission of truthful comparative advertising.

Other acts of unfair competition

As you should appreciate now the field of unfair competition is large and the treatment by different countries quite varied. So, in order to complete the list of unfair acts as much as possible, it is worthwhile giving a few more examples, briefly. These are:

- Nuisance advertising. For example, advertising which unduly exploits fear to make a sale.
- The use of sales promotion techniques such as, lotteries, gifts and bonuses. These are usually regulated to avoid undue inducement to buy.
- Impeding of market activities such as, the destruction of a competitor's returnable soft drink bottles.

Summary of unfair competition

The idea of unfair competition has been around for some time and was mentioned as one of the ways of protecting intellectual property as early as 1900 in the Brussels revision of the Paris Convention. It can best be seen as practices that distort the free operation of intellectual property and the reward system that it provides.

An act of unfair competition is any act of competition contrary to honest practices in industrial or commercial matters.

For example, the following in particular shall be prohibited:

- all acts of such a nature as to create confusion, by any means, with the establishment, the goods, or the industrial or commercial activities, of a competitor;
- false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor;
- indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods."

There are many different types of acts of unfair competition including:

- Causing confusion
- Misleading
- Discrediting Competitors
- Violation of trade secrets
- Taking advantage of another's achievements (free riding)
- Comparative advertising

Legislative Texts:

- TRIPS Agreement
- Paris Convention for the Protection of Industrial Property