

Legal Basis on Unfair Competition Protection

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Abstract

Competition means the rivalry between two or more businesses to gain as much of the total market sales or customers acceptance as possible. Although all countries agree that competition should not only free but also fair, however, competition becomes unfair when its effects on trade, consumers, and society as a whole are more detrimental than beneficial. Protection against unfair competition is an ever-evolving notion that has to adapt to the evolution of trade, and the development of new principles and obligations for participants in the business market. As a member of ASEAN, Myanmar shall be implemented the law for competition by 2015, therefore, Myanmar promulgate its draft in 2014. By enacting the law for competition, the Government can control inappropriate or unfair competition of business. Law for protection against unfair competition is an important one for trade and international competitions. At first, the purpose of unfair competition law aims to protect the honest competitors, but now law against unfair competition aim to ensure fair competition in the interests of all concerned. Thus, the object of this research is to identify the current unfair economic situation and then to analyze the up-coming competition law whether it is in line with the ASEAN Regional Guidelines and WIPO Model Provisions on Protection against Unfair Competition and finally to promote fair competition economic environment.

Key words: competition, unfair competition, honest competitors.

Introduction

Nowadays, the world economy has been developed and linked between the trading countries. When the countries whether developed or developing have adopted market economy system which encouraged the free competition between the competitors. However, there is a little fairness in competition. Sometimes, economic competition has been compared to competition in sport, because the best should win. So the law of protection for everyone who is concerned to business direct or indirect should be enacted.

Competition means the rivalry between two or more businesses to gain as much of the total market sales or customers acceptance as possible. Although all countries agree that competition should not only be free but also fair, however, competition becomes unfair when its effects on trade, consumers, and society as a whole are more detrimental than beneficial. Where there is competition, acts of unfair competition are liable to occur.

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Concept of Unfair Competition

The idea of unfair competition has been mentioned as one of the ways of protecting intellectual property as early as 1900 in the Brussels revision of the Paris Convention for the Protection of Industrial Property 1883. Unfair competition, a branch of Intellectual Property Law, is a term applied to all dishonest or fraudulent rivalry in trade and commerce. According to Article 10bis (2) of the Paris Convention for the Protection of Industrial Property, unfair competition means any act of competition contrary to honest practices in industrial or commercial matters.

Section 50 of the Model Law for Developing Countries on Marks, Trade Names, and Acts of Unfair Competition, defined unfair competition as any act of competition contrary to honest practices in industrial or commercial matters shall be unlawful.

In *Mathews Conveyor Co. v. Palmer-Bee Co.*,² case unfair competition was defined that the simulation by one person of the name, materials, color scheme, symbols, patterns, or devices employed by another for the purpose of deceiving the public, or substitution of goods, or wares of one person for those of another, thus falsely inducing purchase of goods and obtaining benefits belonging to competitor.

Therefore, the simplest form of unfair competition is the dishonest practices of the competitors between themselves. Unfair Competition is the reflection of the sociological, economic, moral and ethical concepts of a society, so it changes from the country to country and from time to time. Probably no exact definition of the term can be given. What is unfair depends too much upon the special circumstances and conditions of each case. There is a thin line to distinguish between what acts is fair and unfair. All enterprises shall be entitled to compete freely within the framework of the law. Competition is the battle between businesses to win consumer acceptance and loyalty. Competition can have both beneficial and detrimental. So, unfair competition is an act of dishonest or fraudulent or deceptive act in industrial and commercial fields.

The common law of unfair competition developed piecemeal. Early English common law was at first wholly preoccupied with maintaining the physical security of persons and property and did not protect trade or other relations as such or provide remedies for purely pecuniary harm. Parties to a trade relation could only claim

² *Mathews Conveyor Co. v. Plamer-Bee Co.*, C.C.A.Mich., 135 F.2d 73, 84.

protection from direct physical injuries and threats of same to their persons or direct trespass to their property.³

Nowadays, most countries are adopting and practicing market economy systems; this allows free competitions between industrial and commercial enterprises. These adopting of market economy systems are taking place not only in developed countries but also in developing countries. Free competition between enterprises is considered the best means of satisfying supply and demand in the market and of serving the interests of consumers, competitors and the whole community. However, there is a little hope of fairness in competition between the competitors. So, there should be a legal system which protects the honest competitors.

Development of Unfair Competition

Protection against unfair competition has been recognized as forming part of industrial property protection for more than a century. In 1900, at the Brussels Diplomatic Conference for the Revision of the Paris Convention for the Protection of Industrial Property (the Paris Convention), that this recognition was first manifested by the insertion of Article 10bis in the Convention.⁴

The concept of unfair competition law emerged first in France around 1850. Although at that time there was no specific prohibition of dishonest business practices, the French Courts were able to develop a comprehensive and effective system of unfair competition law on the basis of the general provision contained in Article 1382 and 1383 of the French Civil Code.⁵ The provisions of Article 1382 and 1383 are; any act whatever by a person which causes injury to another obliges him by the fault of whom it happened to compensate it; and, each one is responsible for the injury which he has caused not only by his act, but also by his negligence or by his imprudence.⁶

However, in Germany, the evolution of unfair competition law was different from France. The Germany Courts refused to extend the tort provisions of the Civil

³ McManis, Charles R., *Intellectual Property and Unfair Competition in a Nutshell*, West, a Thomson Business, 5th Edition, 2004, p.3.

⁴ *WIPO Intellectual Property Handbook: Policy, Law and Use*, World Intellectual Property Organization Publication No.489 (E), 2nd Edition, Geneva, 2004, p.130-131.

⁵ *Protection against Unfair Competition*, International Bureau of the World Intellectual Property Organization, Geneva, 2004, p.15.

⁶ Haines, Charles Grove, *Efforts to Define Unfair Competition*, Yale Law Journal, Vol.XXIX, No.1, November, 1919, p.25.

Code to unfair business practices, it was necessary to enact specific legislation on the subject.

Germany was the first country to adopt legislation implementing the Paris Convention. The first Act on unfair competition (“Gesetz gegen den unlauteren Wettbewerb” or UWG) was adopted in 1896 and soon replaced by a more effective UWG in 1909. The 1909 UWG has been replaced by a modern law in 2004, which amended in 2008, in order to implement the Directive 2005/29/EC on unfair commercial practices of the European Union.⁷

International Convention for Protection

The law of unfair competition has a long history, both on the national and international level. The protection of honest traders against malpractices by their competitors has been on the international agenda for a long time. The increase in international competition, brought about *inter alia* by the process of industrialization, the removal of logistical barriers by the introduction of modern ways of communication and transporting goods and the general increase in prosperity, led to various practices in trade that were considered to be unfair and uncompetitive. This development of a more internationally-oriented flow of technology and the increase in international trade generated, during the second half of the 19th Century, a demand for protection against unfair competitive practices.⁸

The main source of international obligation in the field of unfair competition is the Paris Convention for the Protection of Industrial Property (the Paris Convention), 1883, as revised on 1900 at Brussels, at Washington on 1911, on 1925 at The Hague, at London on 1934, at Lisbon on 1958, on 1967 at Stockholm and as amended on 1979. At first, the Paris Convention contained no provisions expressly dealing with the unfair competition, although the Preamble referred to the desire of the contracting States to guarantee fair trade.

The Paris Convention for the Protection of Industrial Property is one of the first, and arguably most important, of the various multilateral treaties protecting intellectual property. It addresses patents, marks, unfair competition whether or not implicating marks, and the related industrial property of industrial designs, utility

⁷ Stuyck, Jules Prof. Dr., *Briefing paper on addressing unfair practices in business-to-business relations in the internal market*, Policy Department A: Economic and Scientific Policy, May, 2011, p.8.

⁸ Very, Rogier W.de, *Towards a European Unfair Competition Law A Clash between Legal Families*, Martinus Nijhoff Publishers, Liden/Boston, 2006, p.11.

models, geographical indications, trade names, possibly trade secrets within the context of unfair competition, but not copyright. The Convention secures for nationals, those domiciled, and those having a real and effective industrial or commercial establishment within a country party to the Convention, the important procedural advantages of national treatment and priority rights in respect of patents and trademarks. The Convention for the most part neither defines the rights it purports to protect nor guarantees any minimum level of protection for these rights. The scope and quality of the protection member nations are obligated to provide under the Convention are, in most instances, left to domestic legislation and tribunals to develop and define.⁹

Article 1 (2) of the Paris Convention mentions the repression of unfair competition along with patents, utility models, industrial designs, trademarks, trade names, indications of source and appellations of origin among the objects of industrial property protection, and Article *10bis* contains an express provision on the repression of unfair competition. In the more than 174 States party to the Paris Convention the legal basis for the protection against unfair competition may thus be found not only in national legislation but also at the international level. A country of the Paris Union could comply with Article 10bis by having no law of unfair competition of any kind.

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) is one of the most important agreements of the World Trade Organization (WTO), which itself has its origin in the General Agreement on Tariffs and Trade (GATT) 1947, which now being incorporated into the GATT 1994. The TRIPS Agreement forms the so-called third pillar of the WTO. The three basic principles of the TRIPS Agreement are national treatment, most-favored-nation treatment, and transparency.

The TRIPS Agreement introduced a set of enforceable intellectual property rules for the international community. In doing so, it explicitly refers to the main international agreements on intellectual property law, including the Paris Convention. Nonetheless, the unfair competition provisions of the Paris Convention (Article 10bis) is incorporated into the TRIPS Agreement only in so far as it provides a framework or

⁹ <http://www.lex-ip.com/Paris.pdf>.

the protection of undisclosed information (i.e. trade secrets) and geographical indication.¹⁰

According to Article 22 (2) (b) of the TRIPS Agreement, Members shall provide the legal means for interested parties to prevent any use which constitutes an act of unfair competition within the meaning of Article 10bis of the Paris Convention.

Moreover, as stated in Article 39 of the TRIPS Agreement, Members shall protect undisclosed information, in the course of ensuring effective protection against unfair competition as provided in Article 10bis of the Paris Convention.

According to Article 10bis of the Paris Convention, Member States are obliged to provide for protection against unfair competition. The same obligation exists under Article 2 of the TRIPs Agreement, according to which Members of the WTO bound by Article 2 of that agreement are obliged to comply with Article 10bis of the Paris Convention, as far as the protection of trade secrets and geographical indications are concerned. However, many authors in the second half of the 20th Century believed that Article 10bis of the Paris Convention had become outdated and they proposed its modernization. The International Bureau of the World Intellectual Property Organization (WIPO) drafted as a first step in a series of activities concerning protection against unfair competition a set of Model Provisions on unfair competition law. The Model Provisions implement the obligations that exist under the Paris Convention and the TRIPs Agreement by defining, in Article 2 to 6, the principal acts or practices against which protection is to be granted and by providing a basis for protection against any other acts of unfair competition in Article 1(1). These Model Provisions were drafted following a study in the field of unfair competition law, as presented by the International Bureau of the WIPO.¹¹

The WIPO Model Provisions contained very details facts which based on Article 10bis of the Paris Convention. In 1964, the United International Bureaux for the Protection of Intellectual Property (BIRPI) prepared the draft of a model law for developing countries on inventions (patents and protection of technical know-how). The draft was discussed by a Committee of Experts and revised and published by BIRPI in 1965 under the title Model Law for Developing Countries on Inventions.

¹⁰ Very, Rogier W.de, *Towards a European Unfair Competition Law A Clash between Legal Families*, opcit, p. 17.

¹¹ Ibid, p.18-19.

Later, the BIRPI prepared another model law not only for patents, but also with respect to trademarks and some of the other subjects of industrial property.

In 1966, BIRPI prepared the draft of a second model law concerning to marks and related subjects, namely trade names, indication of source, appellations of origin and unfair competition. In November 1966, BIRPI invited a Committee of experts to examine the draft. Throughout the discussions of the Second Model Law Committee, it was emphasized that the text was a model and not the draft of a uniform law. Any country which want to have a new law on marks, trade names and unfair competition was entirely free to follow or not the provisions of the Model Law.

The subjects dealt with in the Model Law for Developing Countries on Marks, Trade Names, and Acts of Unfair Competition are all concerned with competition between enterprises, and the rules established in this connection serve to ensure that such competition shall be fair.¹² The Model Law consists of five parts and 55 Sections. The WIPO Model Provisions are simply a tool for assisting countries to implement international obligations extensions of intellectual property and that they threaten to destroy the balance between protection and competition.

Although the WIPO Model Provisions refer to Article 10bis of the Paris Convention, they are not only to be seen as an interpretation of the regulation in the Paris Convention, but expand the protection conferred there considerably. Therefore, the primary points of interest are those in which the WIPO Model Provisions differ from Article 10bis of the Paris Convention, or go beyond these.

All countries that have established market economy system have devised some kind of safeguard against unfair competition.¹³ WIPO Model Provisions on unfair competition are not binding on any countries; they are useful tool for countries wishing to adopt or improve legislation on unfair competition. The Paris Convention has established a minimum level of protection against unfair competition in each Member State. There have been no codification rules for unfair competition in international law; however, the international conventions have resulted in the drafting of rules on unfair competition on the national level.

¹² Model Law for Developing Countries on Marks, Trade Names, and Acts of Unfair Competition, BIRPI Publication No. 805 (E).

¹³ Very, Rogier W.de, *Towards a European Unfair Competition Law A Clash between Legal Families*, opcit, p.23.

Although the Paris Convention, TRIPS Agreement and WIPO Model Provisions provided the minimum level for protection on unfair competition, no real unification has been attained in international law regarding unfair competition; the international Conventions have nonetheless resulted in the drafting of rules on unfair competition on the national level.

Regional Legal Framework relating to Unfair Competition

Under the Paris Convention, Member States are obliged to provide for effective protection against unfair competition. In some of EU Member States were familiar with the doctrine of unfair competition. Unfair competition is a very complexity subject-matter and there are many acts which are deemed to be unfair. The EU Member States, which are all parties to the Paris Convention, are obliged to provide for protection against unfair competition.

Under the Paris Convention, the EU Member States, which are all parties to this Convention, are obliged to provide for effective protection against unfair competition. The Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market (The Unfair Commercial Practices Directive) is one of the most significant pieces of legislation to emanate from Brussels in recent times. It seeks to introduce a European conception of fairness by introducing a general clause to cover all economic harm caused to consumers by unfair practices. Moreover, it seeks to adopt a maximal harmonisation approach that would for the most part prevent Member States from introducing stricter national laws.

The European Commission, in its proposal to the Unfair Commercial Practices Directive, has indicated several reasons that justify the harmonisation of unfair competition law within Europe.

Prior to the Unfair Commercial Practices Directive, the most significant piece of horizontal European legislation in this field was the Misleading Advertising Directive, which was later extended to cover comparative advertising. This was of course narrower in only covering advertising and only controlling advertisements which were misleading.

On 11 May 2005 the European Community adopted Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market (The Unfair Commercial Practices Directive). This introduces a general prohibition on unfair business-to-consumer commercial practices that is fleshed out by reference

to the concepts of misleading and aggressive commercial practices and an annex listing practices considered unfair in all circumstances. According to Article 1 of the Unfair Commercial Practices Directive, the purpose of this Directive is to contribute to the proper functioning of the internal market and achieve a high level of consumer protection by approximating the laws, regulations and administrative provisions of the Member States on unfair competition practices harming consumers' economic interests.

If Member State has no provisions for unfair competition, the Unfair Commercial Practices Directive clearly stated in its preamble (6): The Directive neither covers nor affects the national laws on unfair commercial practices which harm only competitors' economic interests or which related to a transaction between traders; taking full account of the principles of subsidiarity, Member States will continue to be able to regulate such practices, in conformity with Community law, if they choose to do so.

The Association of South East Asian Nations (ASEAN) was established on 8 August 1967 under the ASEAN Declaration (Bangkok Declaration) in order to promote social and economic development under the cooperation of the South East Asian countries.

In order to promote the development of cross-border activities, to contribute to the attainment of a high level of consumer protection and in the absence of uniform rules at Community, the European Commission proposed the Unfair Commercial Practices Directive. And also with a view to creating a fair competition environment in ASEAN and to the establishment of the ASEAN Economic Community by 2015, the ASEAN Regional Guidelines on Competition Policy (Regional Guidelines) was adopted in 2010.

In recent times, many rapidly industrializing nations of Asia have enacted competition laws. In the member countries of Association of South East Asia Nations (ASEAN), ASEAN Leaders agreed in 2007 to the establishment of the ASEAN Economic Community by 2015 which will not only transform ASEAN into a region with free movement of goods, services, investment and skilled labour, and a freer flow of capital, but also to a highly competitive region that is fully integrated with the global economy. The member States of ASEAN have concluded various meetings which are steps for an improvement of regional integration process.

The ASEAN Regional Guidelines on Competition Policy (Regional Guidelines) were completed by the ASEAN Experts Group on Competition (AEGC). The Regional Guidelines are based on country experiences and international best practices. They set out different policy and institutional options that serve as a reference guide for ASEAN Member States (AMSs) in their efforts to create a fair competition environment. They are not intended to be a full or binding statement on competition policy. The Regional Guidelines will help to increase AMSs' awareness of the importance of competition policy, with a view to stimulating the development of best practices and enhancing cooperation between AMSs.

Practices of Some Countries relating to Unfair Competition

In the implementation of the treaty obligations, three main approaches for unfair competition protection in national level can be distinguished which are;

1. Protection based on specific legislation;
2. Protection based on general tort law and/or on the law passing off and trade secrets and
3. Combination of above two approaches.¹⁴

The legislation against unfair competition in Germany dates from the end of the 19th century. The liberalistic movement in France after the French Revolution that resulted in the ending of the guild system brought about the concept of freedom of trade: '*Laissez faire, laissez aller, le monde va de lui-même*'.¹⁵

The UWG 1896 only consisted, in contrast to the present UWG 1909, of a number of specific cases of unfair competition. A general clause was not implemented so as to prevent competition on the market from being over-regulated. However, a small general clause was provided for in Section 1, similar to the Section 3 of the UWG 1909. This concerned protection against misleading statements. In addition to this, the denigration of competitors, defamation relating to business, the imitation of identification marks and the disclosure of professional secrets were regulated. This regulation did not provide for a comprehensive arrangement of unfair competition law nor did it intend to do so.¹⁶

¹⁴ WIPO Intellectual Property Handbook: Policy, Law and Use, opcit, p.134.

¹⁵ Very, Rogier W.de, *Towards a European Unfair Competition Law A Clash between Legal Families*, opcit, 148.

¹⁶ Ibid p.150.

The first piece of legislation in the area of unfair competition was the Act of May 12, 1894 on the protection of Trade Names. Subsection 15 of this Act protected the get-up of a product or its packaging from being imitated and protection against false indications of origin was provided by subsection 16. This regulation did not suffice, however. Two years later the first version of the Act against Unfair Competition (Gesetz gegen den unlauteren Wettbewerb [UWG]) entered into force by the Act of May 27, 1896.¹⁷

The Courts extended the application of unfair competition to behavior that does not give rise to confusion as to source (parasitical competition). Case law has further extended the scope of Article 1382 and following to cases where the parties are not competitors (parasitical behavior). The “parasitical competition or behavior” decisions focus more on diversion of investment and creative effort, than on consumer confusion. These cases condemn behavior that uses the investment and creativity of a third party, to take a free ride to the market, and enhance without investment the attractiveness of a product or service. Trademark or design infringement, and unfair competition, can be claimed alternatively or cumulatively.¹⁸

SA BRASSERIE FISCHER/SAS SOCIETE INTERVREW FRANCE

(Paris Court of Appeals 14/05/04 BID 2004 N° 791 III-447)

Interbrew launched, in France, an alcoholic beverage branched BOOMERANGE, in a “long neck” shaped frosted bottle. Brasserie Fischer, which had already placed on the market a beverage with a similar bottle, brought an action for infringement of its three dimensional trademark, and for unfair competition. On appeal, the court considered the three dimensional trademark to be non distinctive, and cancelled it. But it found that imitation by the defendant of the principal characteristics of the plaintiff’s bottle, was not supported by any objective necessity, and amounted to unfair competition.

An unfair competition action, if not associated with an infringement claim, is a civil action brought before the Tribunal de Commerce. If associated with an infringement claim, it is brought before the Tribunal de Grande Instance, also a civil court. The burden of evidence is heavy, as unfair competition cases turn largely on market facts and consumer perception. If there is an infringement claim associated,

¹⁷ Very, Rogier W.de, *Towards a European Unfair Competition Law A Clash between Legal Families*, opcit, p.149.

¹⁸ www.inta.org/Advocacy/Documents/INTAUnfairCompetitionEurope2007.pdf, p.27.

evidence collecting through an ex parte seizure procedure is available. Otherwise, common law civil procedures may be used to collect specimens of alleged infringements.¹⁹

As unfair competition cases rest on complex factual circumstances and evidence, provisional injunctions are rarely granted. The quantum of damages will depend largely on the quality of the evidence of damage produced by the plaintiff. If serious evidence is provided, then the court may base an order on such evidence or order an expert evaluation. In the absence of serious evidence beyond the specific facts produced as evidence, the court will usually grant relatively nominal damages.²⁰

Unfair or parasitical competitions, and parasitical behavior claims, are often made cumulatively with IP infringement claims. They may prosper if there are distinct facts, or even where the IP right is found invalid. It must be remembered that an unfair competition action concerns market behaviour, and not infringement of a property right. Such claims are brought not only in the field of names, packaging or art work, but also in the field of advertising, consumer deception, comparative claims, tarnishment and trade libel claims.²¹

The most commonly stated objective of competition policy is the promotion and the protection of the competitive process. Competition policy introduces a “level-playing field” for all market players that will help markets to be competitive. The introduction of a competition law will provide the market with a set of “rules of the game” that protects the competition process itself, rather than competitors in the market. In this way, the pursuit of fair or effective competition can contribute to improvements in economic efficiency, economic growth and development and consumer welfare.²²

As Myanmar is one of the ASEAN Member States, Myanmar shall be implemented the law for Competition by 2015. Therefore, Myanmar promulgates the draft law in 2014. By enacting the law for competition, the Government can control inappropriate or unfair competition of business. Law for protection against unfair competition restricted the unfair acts which would a detrimental effect not only on competitors, but most importantly, the consumer.

¹⁹ www.inta.org/Advocacy/Documents/INTAUnfairCompetitionEurope2007.pdf, p.31-32.

²⁰ Ibid.

²¹ Ibid.

²² ASEAN Regional Guidelines on Competition Policy (ASEAN, 2010)

Materials and Methods

- studying on relating International Convention and Regional Law/ Guidelines
- studying on cases and published books

Findings

Unfair competition is a very complexity subject-matter and there are many acts which are deemed to be unfair. The most countries on the World, whether developing or developed, have been adopted the market-oriented economic system which encourage the free competition between competitors in industrial and commercial enterprises. However, there is a little hope of fairness in competition. Sometimes economic competition compares to sports because the best should win. So, the competitors may be made every effort to gain consumer acceptance in market. Competition is the battle between businesses to win consumer acceptance and loyalty. Competition can have both beneficial and detrimental. Competition becomes unfair when there is more detrimental than beneficial to the consumer and the whole community. So, there should be a legal system which protects the honest competitors.

Conclusion

The international regulation of unfair competition law basically fell into line with the regulation of intellectual property law. Unfair competition law at the time was primarily concerned with the protection of the honest competitor against trading practices. Most of these unfair trading practices were equivalent to the actions prohibited by industrial property law. Protection against unfair competition was consequently recognizes as forming part of industrial property protection. The first international regulation of unfair competition law was therefore included in the Paris Convention for the Protection of Industrial Property. The significance of the protection against unfair competition is expressed first of all in changing the business environment more ethical. The main purpose of protection against unfair competition is, however, to ensure that business between competitors would take place according to the good moral and the honest trade practices. Furthermore, the main purpose of unfair competition should be to protect competitors and consumers of the society as a whole.

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