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Unfair Competition

Introduction

Unfair competition is the misappropriation of another person's business accomplishments, which inhibits fair competition and infringes the business interests of others. Examples in an intellectual property context are counterfeiting and disclosure or revealing of trade secrets. Further examples are causing confusion by misappropriating and using famous or well-known indications and imitating the shape of another person's goods.

Japan's Unfair Competition Prevention Act (UCPA) was amended in 2006 (effective January 1, 2007) and seeks to ensure a fair business environment "that fully implements international agreements and contributes to the sound development of the national economy". This extends to various types of activities prohibited under the IP treaties such as the World Intellectual Property Organization (WIPO), Paris Convention and the WTO/TRIPS Treaty. It extends to the OECD Treaty of Prevention of Bribery of Foreign Government Officials.

Japanese law follows essentially very similar principles to the Australian Trade Practices Act, including section 52, relating to misleading and deceptive conduct.

What does the law say?

Under Japanese law, unfair competition includes:

- Using an indication of goods or business (such as a name connected with a person's business, trade name, trade mark, container or package of goods) which is identical with, or similar to, another person's indication of

goods or business that are well-known to consumers or other purchasers, thereby causing confusion with another person's goods or business. In the case of a well-known mark, "likelihood of confusion" is a legal requirement for protection.

- Selling, distributing, displaying for the purpose to sell or distribute, exporting, importing or providing through a telecommunication line the goods on which such indication is used, thereby causing confusion with another person's goods or business.
- Assigning, leasing, displaying for the purpose of assignment or leasing, exporting or importing goods which imitate the shape (excluding the shape that is indispensable for ensuring the function of said goods) of another person's goods.
- Using an indication of goods or business which is identical or similar to another party's well known goods or other indication as one's own or assigning, delivering, displaying for the purpose of assignment, or delivery, exporting, importing or providing through a telecommunication line the goods on which such indication is used.
- Acquiring a trade secret by wrongful means (such as theft, fraud or duress) or using or disclosing a trade secret so acquired.
- Making or circulating a false allegation injurious to the business reputation of another person in a competitive relationship.
- Acquiring or holding a right to use a domain name that is identical or similar to another person's specific indication of goods or services (which can include a name, trade name, trade mark, mark or any other



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indication of a person's goods or services), or using any such domain name, for the purpose of acquiring an illicit gain or causing injury to another person.

- Using or making an indication on goods or services or in advertisements of goods or services, which is likely to mislead the public as to the place of origin, quality or contents of goods or services, or assigning, delivering, displaying for the purpose of assignment or delivery, exporting, importing or providing through a telecommunication line the goods with such misleading indication, or providing services with such misleading indication.

Full information on offences and remedies may be obtained from an English translation of the law, available online at:

<http://www.cas.go.jp/jp/seisaku/hourei/data/ucpa.pdf>

What can you do about unfair competition practices?

There are a number of avenues an Australian business can pursue. For example, a person whose business interests are infringed or are likely to be infringed by unfair competition is entitled to request an injunction and also to request the destruction of the infringing objects or otherwise to stop the infringing behaviour.

A person who intentionally or negligently infringes the business interests of another person by unfair competition will be liable to pay damages.

The court may order an infringer to take necessary measures to restore the business reputation of the person affected, possibly including an order requiring public apology in newspapers.

Through 2005 and 2006 revisions of UCPA, criminal penalties have been stiffened:

- The penalties for certain acts of infringement of trade secrets have been increased to imprisonment of up to ten years, a fine of up to 10 million yen (AU\$10,000) or both.
- Other unfair competition acts, such as: (i)

misappropriating famous indications for a purpose of acquiring an illicit gain or damaging reputation or fame of such indications, (ii) causing confusion by using well-known indications for a wrongful purpose; (iii) imitating the shape of another's goods for the purpose of acquiring an illicit gain, can be punished with imprisonment for up to five years, a fine of up to 5 million yen (AU\$5,000) or both.

- A company is liable to a fine of not more than 300 million yen (AU\$3 million) when a representative or employee of the company has violated UCPA with regard to the business of the said company.

Australian businesses are advised to seek the advice of a professional for help with unfair competition infringement matters in Japan.

Border Enforcement

The Japan Customs Act specifies goods that constitute unfair competition acts are those that:

- cause confusion by using well-known indications
- misappropriate famous indications
- imitate the shape of another person's goods.

These are liable for seizure if imported into or exported from Japan. These goods include goods that infringe intellectual property rights such as patents, utility models, trade marks, designs or copyrights.

Customs is entitled to confiscate the imported or export-prohibited goods.

Those people that are entitled to request an injunction against the above-mentioned unfair competition can file an Import or Export Suspension Application with Customs to prevent importation or exportation of the infringing goods.

Prior to 2006, the *Customs Tariff Act* provided for import regulations but the *Customs Act* has been



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revised to include both import and export regulations. Therefore, the Customs Act has become the basis of border enforcement.

For information about enforcement by Customs
http://www.customs.go.jp/mizugiwa/chiteki/ipr_p.pdf

For a translation of the UCPA
<http://www.cas.go.jp/jp/seisaku/hourei/data/ucpa.pdf>

See also the Trade Secrets fact sheet in this series.

Disclaimer:

This information is intended to help the reader gain a basic understanding of some IP concepts. It is not designed to provide legal, business or other relevant professional advice. IP Australia recommends that you seek independent legal, business or other relevant specialist advice as necessary. This fact sheet has been developed in conjunction with Hodgkinson McInnes Patents.

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