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## Editorial

# Protection against unfair competition around the globe

Martin Senftleben<sup>ID</sup>, Michael Handler<sup>ID</sup> and Irene Calboli\*

One of the main characteristics of a market economy is the presence of competition between various actors in the market. Yet the question of where the line should be drawn between ‘fair’ competition and unacceptable competitive behaviour remains complex, and has generated abundant debate and literature around the globe.<sup>1</sup>

At the international level, Members of the World Trade Organization, by virtue of Article 2(1) of the Agreement on Trade-Related Aspects of Intellectual Property Rights (‘TRIPS Agreement’), are obliged to give effect to Article 10bis of the Paris Convention for the Protection of Industrial Property (‘Paris Convention’). Article 10bis provides:

(1) The countries of the Union are bound to assure to nationals of such countries effective protection against unfair competition.

(2) Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition.

(3) The following in particular shall be prohibited:

1. all acts 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;
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.<sup>2</sup>

Thus, while Art 10bis of the Paris Convention requires Members of the Paris Union (and, via the TRIPS Agreement, WTO Members) to ensure that effective protection is available against acts of competition that are ‘contrary to honest practices in industrial or commercial matters’, setting out three examples of the type of acts that must be prohibited, Art 10bis defines ‘unfair competition’ in an open-ended and non-exhaustive manner and does not dictate how Members are to give effect to their obligations.

This special issue brings together a set of articles from leading international intellectual property scholars who explore and critically assess how various Members of the Paris Union and the WTO give effect to their international obligation to prevent ‘unfair competition’ in their domestic or regional laws.

As will be seen in this special issue, the mechanisms chosen by Paris Union and WTO Members to ensure protection against unfair competition reflect different legal traditions and historical sources of ‘unfair competition’ law. National and regional implementation strategies range from reliance on torts such as passing off, to general consumer protection measures, to more specific statutes or regulations that address certain aspects of fair and unfair trading. Specific unfair competition

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1 For key studies from this century, see RW de Vrey *Towards a European Unfair Competition Law: A Clash between Legal Families* (Leiden: Brill 2006); RM Hilty and F Henning-Bodewig (eds), *Law Against Unfair Competition—Towards a New Paradigm in Europe?* (Berlin/Heidelberg: Springer 2007); F Henning-Bodewig (ed), *International Handbook on Unfair Competition* (Munich: CH Beck 2013).

2 This provision is supplemented by other obligations in the TRIPS Agreement. For example, Article 39(1) of the TRIPS Agreement provides that in the course of ensuring effective protection against unfair competition under Article 10bis of the Paris Convention, WTO Members shall protect undisclosed information (such as trade secrets) and certain types of data submitted to governments or governmental agencies. And under Article 22(2) of the TRIPS Agreement, Members are obliged to prevent, in respect of other Members’ geographical indications, any use that constitutes an act of unfair competition within the meaning of Article 10bis of the Paris Convention.

rules may form part of a country or region's intellectual property legislation (specifically, their trade mark statutes), its commercial code, its consumer laws or competition acts and/or its regulations seeking to promote free and fair competition. In some countries, comprehensive statutes have been adopted to provide protection against unfair competition, broadly defined, for competitors and consumers alike, although this does not appear to be part of a broader trend towards the enactment of such comprehensive statutes.

Whatever mechanisms are chosen, and despite differences in form throughout the world, the following contributions to this special issue reveal a common thread that ties together the various laws and practices at the national and regional level. This common thread is the desire to protect:

- Competitors from commercial harm flowing from unfair acts.
- Consumers from deceptive trade practices.
- The public more generally by preserving fair and undistorted competition.

The articles in this special issue also demonstrate that the contours of protection against 'unfair competition' are in constant flux. The open-endedness of Article 10bis of the Paris Convention requires national and regional protection systems to be alive to and keep pace with constantly changing market circumstances, as societies deal with shifting notions of what constitutes 'unfair' commercial practice. Technological developments that have led to new marketing and advertising strategies, challenges arising from a desire to ensure environmental sustainability and the growing recognition of the importance of safeguarding certain types of data have led to new legal regulations around the world addressing practices such as behavioural advertising, influencer marketing, product recommender systems, greenwashing and the misappropriation of data. The articles explore some of the challenges that certain countries have faced in addressing these new varieties of 'unfair competition'.

The articles in this special issue are inspired by previous contributions to the *Status Report on Protection Against Unfair Competition in WIPO Member States*, published by the World Intellectual Property Organization (WIPO) in 2022 ('Status Report').<sup>3</sup> This special issue commences with an overview of the international legal

framework, focusing on the historical development of Article 10bis of the Paris Convention and its recent interpretation by the Panel of the WTO's Dispute Settlement Body in *Australia—Tobacco Plain Packaging*.<sup>4</sup> This lays the groundwork for the subsequent discussion of how protection against unfair competition is afforded in different countries and regions from around the world. In turn, these are the United Kingdom; the United States and Canada; Australia, New Zealand and the South Pacific;<sup>5</sup> India; the ASEAN group of countries;<sup>6</sup> Japan and the Republic of Korea; China; the European Union; countries of the Arab League;<sup>7</sup> members of the African Intellectual Property Organization (OAPI);<sup>8</sup> members of the African Regional Intellectual Property Organization (ARIPO)<sup>9</sup> and South Africa; the MERCOSUR countries;<sup>10</sup> and the ANDEAN Community.<sup>11</sup> In extending their analyses from the 2022 Status Report, the authors of these articles collectively provide a fresh overview of the global landscape for protection against unfair competition, including recent trends and regulatory challenges, current as at the end of 2023.

We would like to thank Marcus Höpferger, the Director of the Law and Legislative Advice Division, Brands and Designs Sector, at WIPO, for his support for the original project that led to the Status Report in 2022, all of the contributors to this special issue for their engaging with this project and their excellent works of scholarship, and especially Katie Pestcoe for her outstanding editorial assistance.

We hope that this special issue provides a valuable resource for scholars of unfair competition law from around the world now and in the future.

3 MRF Senfleben (ed), *Status Report on Protection Against Unfair Competition in WIPO Member States* (WIPO/STRAD/INF/8, Geneva: World Intellectual Property Organization 2022). Available at <https://www.wipo.int/sct/en/wipo-strad/> (accessed 10 January 2024)

4 Panel Report, *Australia—Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Docs WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R (9 June 2020). There was no appeal to the Appellate Body on the unfair competition issue.

5 The South Pacific countries considered are Fiji, Kiribati, Papua New Guinea, Samoa, the Solomon Islands, Tonga and Vanuatu.

6 Members of ASEAN are Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand and Viet Nam.

7 These are Algeria, Bahrain, Comoros, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Palestine, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, United Arab Emirates and Yemen.

8 These are Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Congo, Equatorial Guinea, Gabon, Guinea (Conakry), Guinea-Bissau, Ivory Coast, Mali, Mauritania, Niger, Senegal and Togo.

9 These are Botswana, Eswatini, Gambia, Ghana, Kenya, Lesotho, Liberia, Malawi, Mozambique, Namibia, Rwanda, São Tomé and Príncipe, Sierra Leone, Somalia, Sudan, Tanzania, Uganda, Zambia and Zimbabwe.

10 These are Argentina, Brazil, Paraguay and Uruguay.

11 The members are Bolivia, Colombia, Ecuador and Peru.