

# THE SYSTEM OF UNFAIR COMPETITION PREVENTION IN JAPAN

*Christopher Heath*



Max Planck Institute  
for Foreign and International  
Patent, Copyright and Competition Law

 **KLUWER LAW  
INTERNATIONAL**  
London · The Hague · Boston

# Contents

<b>Acknowledgements</b>	xiii
<b>Preface</b>	xv
<b>About the Author</b>	xvi
<b>List of Abbreviations</b>	xvii
<b>1 Historical overview</b>	1
I. The early Meiji Period	1
II. Accession to the Paris Convention	2
III. After World War I	4
IV. The Unfair Competition Act of 1934	5
V. Changes under the Allied Occupation	6
VI. Complementary legislation	7
VII. Protection of commercial achievements	9
VIII. Latest developments	11
IX. Enforcement figures	12
X. Main sources of reference	13
<b>2 Protection against “all acts” of unfair competition</b>	15
I. General overview	15
1. Unfair competition and the Paris Convention	16
2. Legal development in Japan	20
3. Unfair competition and the courts	21
4. Systematic considerations	23
II. Protection under the Unfair Competition Act	24
1. Purpose	24
2. Prohibited acts	26
3. Exceptions	29
4. Remedies and standing to sue	30
5. Remedies for consumers?	35
6. Standing to sue and the public interest	36
7. Criminal sanctions	41

III.	Protection under the Anti-Monopoly Act and its by-laws	41
1.	General outline	41
2.	“Unfair business practices”	43
3.	Unfair trade practices and civil law in general	44
4.	Free gifts and trade misrepresentations	46
5.	Other legal instruments	47
6.	Enforcement	48
IV.	Unfair competition and intellectual property rights	49
1.	General outline	49
2.	Unfair competition and technical rights	52
3.	Unfair competition and aesthetic rights	53
4.	Unfair competition and trade mark rights	56
V.	Protection under the Commercial Code	59
1.	Legal framework	59
2.	Requirements of application	59
3.	Relationship to the Unfair Competition Act	60
4.	Use and protection of foreign trade names	61
VI.	Protection under general tort law	62
1.	General principles	62
2.	Scope of application	62
3.	Case material	63
4.	Remedies	66
VII.	Unfair competition prevention in the context of Japanese legal culture	68
1.	Institutional peculiarities	68
2.	Political peculiarities	69
3.	Legal consciousness	70
4.	The style of decisions	72
5.	Style of academic writings	74
<b>3</b>	<b>Misappropriation of commercial achievements</b>	<b>81</b>
A.	Misappropriation by confusion	81
I.	Introduction and international developments	81
II.	Statutory provisions of Japanese law	84
III.	The object of protection: indications for goods and business enterprises	84
1.	Confusion with goods	84
2.	Confusion with the business establishment	87
3.	Interdependence of elements	88
IV.	The requirement of recognition (“widely-known”)	89
1.	General concept	89
2.	Geographical range of recognition	90
3.	The relevant circles in trade	91
4.	Marketing efforts to establish goodwill	92
5.	Determining what is recognition	92

V.	The requirement of confusion	95
1.	Similarity in trade mark and unfair competition law	95
2.	The classic concept of confusion	98
3.	Confusion as to sponsorship/confusion in the broad sense	98
4.	Confusion by association with a Keiretsu-group	101
5.	Franchising systems	102
VI.	Defences	102
1.	Lack of standing to sue	103
2.	Lack of confusion	103
3.	Better rights	103
4.	Unclean hands	104
5.	Time-bar through inaction	104
B.	Misappropriation by other means	105
I.	General remarks	105
II.	Protection of trade secrets	106
1.	Definition	106
2.	Protection under tort law	107
3.	Protection under the Unfair Competition Act	108
4.	Restrictive covenants	112
5.	Protection under criminal law	120
III.	Protection against slavish imitation	120
1.	General outline and international developments	120
2.	Legislative background	124
3.	Protection under intellectual property laws	126
4.	Interpretation	128
5.	Slavish imitation and the freedom to copy	136
IV.	The protection of well-known indications	140
1.	International and foreign developments	140
2.	Protection of famous trade marks in Japan	144
3.	Analysis	146
V.	Misappropriation by an agent	152
1.	History and international developments	152
2.	Legal provision in Japan	153
VI.	Application of foreign famous marks by domestic applicants	155
1.	Domestic applications and domestic economic interests	155
2.	Legal remedies under the UCA	157
3.	Other remedies	160
VII.	Publicity rights	161
1.	General remarks	161
2.	Scope and limits of the right of publicity	163
<b>4</b>	<b>Acts designed to interfere unreasonably with a competitor's business</b>	<b>171</b>
I.	Introduction	171
II.	International and foreign developments	173

III.	Acts of interfering with a competitor's business under Japanese law	176
1.	Unfair Competition Act	176
2.	Actions based on civil law in general	177
3.	Anti-trust law	178
IV.	Undue exercise of intellectual property rights	178
1.	Acts of denigration	179
2.	Other cases of improper exercise of an intellectual property right	180
V.	Comparative advertising	183
1.	General remarks	183
2.	Japanese law on comparative advertising	185
VI.	Unfair trade practices against a competitor's business	191
1.	Acts specified under the Anti-Monopoly Act	191
2.	Unjust interference and private actions	192
VII.	Acts and remedies outside competitive relationships	194
1.	General remarks	194
2.	General legal framework	195
3.	Details of Sec. 2(1)(x) and (xi) UCA	196
<b>5.</b>	<b>Misleading indications</b>	199
I.	International and foreign developments	199
1.	International conventions and agreements	199
2.	The dawn of consumerism	202
3.	Consumer protection and free trade	204
II.	Misleading indications on goods and services under the UCA	205
III.	Advertising, free gifts, and representations	206
1.	The Free Gifts and Trade Misrepresentations Act	206
2.	Other administrative regulations designed to control deceptive forms of commercial activity	209
3.	Self-disciplinary rules	211
IV.	Geographical indications	212
1.	International agreements	212
2.	Protection in Japan	216
<b>6</b>	<b>Enforcement and legal remedies</b>	221
I.	Civil law enforcement in general	222
1.	Litigation and legal consciousness	222
2.	Legal foundation and problems of Japanese civil procedure	222
3.	Foreign reception, traditional perception and enforcement	227
II.	Particular rules on enforcing intellectual property and unfair competition matters	230
1.	National and international jurisdiction	230
2.	Selection of the basis of claim	230
3.	Production of documents	231
4.	Presumption of damages	232

5.	Particular problems of in-camera proceedings	234
III.	Remedies	235
1.	Temporary and final measures	235
2.	Injunctive relief	236
3.	Monetary compensation	238
4.	Seizure of infringing goods	246
5.	Destruction of goods	247
6.	Apology	247
IV.	Administrative measures	248
1.	Under the Anti-Monopoly Act	248
2.	Under customs procedures	249
V.	Criminal enforcement	250
1.	Criminal prosecution in cases of passing-off	251
2.	Misleading indications	251
3.	Criminal protection of trade secrets	252
<b>7</b>	<b>Towards a comprehensive system of unfair competition prevention?</b>	<b>255</b>
I.	Analysis in the context of Japanese law	255
1.	The discussion for introducing a general clause	255
2.	Setting up a comprehensive system for the control of unfair competition without a general clause	260
3.	Paris Convention and domestic legislation	263
4.	Considerations on a system of unfair competition prevention	268
II.	Unfair competition models and unfair competition system	273
1.	General remarks	273
2.	Germany as a model for Japan?	274
III.	The author's model Unfair Competition Act	276
<b>Summary</b>		<b>285</b>
<b>Appendix of Legal Statutes</b>		<b>291</b>
1.	Japanese Constitution (excerpts)	291
2.	Civil Code (excerpts)	291
3.	Code of Civil Procedure (excerpts)	292
4.	Commercial Code (excerpts)	293
5.	Criminal Code (excerpts)	294
6.	Unfair Competition Prevention Act	294
7.	Trade Mark Act (excerpts)	300
8.	Act Concerning the Prohibition of Private Monopolies and the Maintenance of Fair Trade (Anti-Monopoly Act) (excerpts)	302
9.	Free Gifts and Trade Misrepresentations Act	303
10.	FTC Guideline on Unfair Trade Practices	307
11a.	FTC Guideline on Misleading Indications as to the Origin of Goods	309

11b. FTC Application Guidelines for Misleading Indications with Respect to the Origin of Goods	309
12. FTC Guideline on Bait Advertising	310
13. FTC Legal Opinion on Comparative Advertising as of 21 April 1987 (slightly abbreviated)	311
14. FTC Legal Opinion on Sales Below Cost	314
<b>Chronological List of Cases Cited</b>	<b>315</b>
<b>Index</b>	<b>331</b>