

# *The Case for Reclaiming European Unfair Competition Law from Europe's Consumer Lawyers*

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## 1. THE UNFAIR COMMERCIAL PRACTICES DIRECTIVE AS WHAT KIND OF LEGISLATION?

**A**S ITS FULL title indicates, the Unfair Commercial Practices Directive<sup>1</sup> is principally concerned with consumer protection law. And as a passage in the middle of Recital 6 provides:

It neither covers nor affects the national laws on unfair commercial practices which harm only competitors' economic interests or which relate to a transaction between traders; taking full account of the principle of subsidiarity, Member States will continue to be able to regulate such practices, in conformity with Community law, if they choose to do so.

This is consistent with the explanatory memorandum to the draft Directive published in 2003, which commented:<sup>2</sup>

40. It [the scope being confined to matters affecting consumers' interests] also means that acts which constitute unfair competition in some Member States but which do not harm the economic interests of consumers, such as slavish

\* The present chapter is an exception to the majority in this volume in that it was not delivered to the Conference entitled *The Regulation of Unfair Commercial Practices under EC Directive 2005/29: New Rules and New Techniques* on 3 Mar 2006. It is based on a paper delivered to the Oxford Intellectual Property Research Centre on 7 Feb 2006, under the title 'Is it Time to Reclaim Unfair Competition Law from the Consumer Lawyers?', and is included here at the invitation of the Editors.

<sup>1</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer practices in the internal market ('the Unfair Commercial Practices Directive'); [2005] OJ L 149/22.

<sup>2</sup> Proposal for an Unfair Commercial Practices Directive, COM(2003)356 final, para 40.

imitation (i.e. copying independently of any likelihood of consumer confusion) and denigration of a competitor, are outside the scope of the Directive. Acts which are classed some Member States as unfair competition which do harm consumers economic interests, such as confusion marketing (which generates a danger of confusion among consumers with the distinctive signs and/or products of a competitor) are within scope.

So in the phraseology of the day it is concerned with business-to-consumer ('B2C') relationships rather than business-to-business ('B2B') ones. However, in almost the same breath the Directive acknowledges that it can hardly avoid affecting the latter as well. According to Recitals 6 and 8 (emphasis added):

(6) This Directive ... approximates the laws of the Member States on unfair commercial practices, including unfair advertising, which directly harm consumers' economic interests *and thereby indirectly harm the economic interests of legitimate competitors.*

(8) This Directive directly protects consumer economic interests from unfair business-to-consumer commercial practices. *Thereby, it also indirectly protects legitimate businesses from their competitors who do not play by the rules in this Directive and thus guarantees fair competition in fields co-ordinated by it.* It is understood that there are other commercial practices which, although not harming consumers, may hurt competitors and business customers. *The Commission should carefully examine the need for Community action in the field of unfair competition beyond the remit of this Directive and, if necessary, make a legislative proposal to cover these other aspects of unfair competition.*

It is this second aspect of the Directive which I propose to address. Given that the Directive acknowledges that it will have, at the very least, certain indirect effects on the law of unfair competition, then is it satisfactory for it to derive its policies and priorities entirely from the point of view of consumer protection, if that is indeed the case? Alternatively, might the Directive have gone too far in the opposite direction, so as to enact in the name of consumer protection a collection of principles and provisions which owe far more than is acknowledged to unfair competition law, and specifically to the legacy of the German *Gesetz gegen den unlauteren Wettbewerb* 1909 (the *UWG*)?<sup>3</sup> If these are taken as accusations rather than questions, then they may seem to be inconsistent with one another, but

<sup>3</sup> The *UWG* of 1909 has now been replaced by the similarly named Act of 2004, which claims to have pre-emptively incorporated most, if not all, of the requirements of the Directive. I shall refer principally to the 1909 Act because of its historical importance, and because it was still in force while the study led by Professor Micklitz ([http://ec.europa.eu/comm/consumers/cons\\_int/safe\\_shop/fair\\_bus\\_pract/green\\_pap\\_comm/studies/sur21\\_vol#\\_en.pdf](http://ec.europa.eu/comm/consumers/cons_int/safe_shop/fair_bus_pract/green_pap_comm/studies/sur21_vol#_en.pdf), considered more fully below) was taking place. (Replace '#' with '1', '2' or '3' for the relevant volume)

until the underlying questions are resolved both possibilities deserve to be taken seriously, and there is even a sense in which they might be reconciled, though it is rather a discouraging one. It is to suggest that the Directive may be at risk (either now or in the future) of being unconsciously over-influenced by a particular collectivist economic world-view which prevailed in Germany (and elsewhere) from the late nineteenth century to the advent of ordoliberalism after World War II, and which became entwined with the German UWG of 1909 and (especially) the enormous and hugely influential body of case law spawned by the latter. Conversely, it is suggested that those responsible for the Directive have not (so far) attempted to incorporate into it the results of any principled or scientific exercise balancing the legitimate rights and expectations of competitors *inter se*, or with respect to the public, as opposed to the rights of consumers *vis-à-vis* producers and suppliers.

All this does matter to consumers as well. The constitutional basis for the Directive is harmonisation within the internal market, but goods, persons, services and information neither know nor care whether legal barriers to their free movement are characterised as measures for consumer protection or come under a law of unfair competition. An immunity, incentive, disincentive or prohibition embodied in European consumer law may be vitiated or overridden by a contrary one in unharmonised national unfair competition law, at least until the discrepancy is acknowledged and European law is allowed to prevail. Fair and honest competitors who are disadvantaged by the 'unfair' and unrestrained competition of rivals, or by the action of 'unfair' laws, (perhaps even to the point of being driven out of business) will not be able to compete effectively, or at all, and the public will ultimately have no choice but to deal with those who have undeservedly supplanted them.

## 2. ENGLISH AND GERMAN ATTITUDES TO UNFAIR COMPETITION CONTRASTED

Since the late nineteenth or early twentieth century, English and German attitudes to unfair competition as a civil law tort have exhibited the polarity of irreconcilable opposites. To enumerate all the differences would easily fill the present volume and more. For present purposes, the point of difference on which I propose to dwell is the centrality of the consumer in English law, and his or her peripheral relevance in German law. English common law understands unfair competition almost entirely through the prism of the consumer: if the consumer is deceived by a competitor's misrepresentation or misconduct then there is (or may be) actionable passing-off or injurious falsehood; if not, there is likely to be a remedy only on the rare occasions on which one of the so-called 'economic torts' can be invoked. So English

law equates ‘fairness’ with ‘honesty’, and ‘honesty’ with ‘truthfulness’, and makes the consumer the determinator of what is honest, and therefore of what is fair. Any business arguing that it subject to ‘unfair’ competitive conduct in any other sense must bring its complaint within one of the limited number of nominate torts. The *locus standi* of the competitor to sue is, so to speak, parasitic on the harm suffered by the consumer.

The same was at least formerly true of the United States,<sup>4</sup> and the *locus standi* of the competitor cannot be put better than it was by Judge Learned Hand in the Second Circuit Court of Appeals in a case in which a manufacturer of floor polish (Johnson’s Wax) objected to the deceptive use of the same surname for a household textile cleaning compound. Learned Hand was prepared to describe the plaintiff as the ‘vicarious champion’ of the public against the deception practised on them, but quite strictly limited the ability of the plaintiff company to invoke this status to cases in which it suffered damage in its existing trading capacity (citations omitted):<sup>5</sup>

It is true that a merchant who has sold one kind of goods, sometimes finds himself driven to add other ‘lines’ in order to hold or develop his existing market; in such cases he has a legitimate present interest in preserving his identity in the ancillary market, which he cannot do, if others make his name equivocal there. But if the new goods have no such relation to the old, and if the first user’s interest in maintaining the significance of his name when applied to the new goods is nothing more than the desire to post the new market as a possible preserve which he may later choose to exploit, it is hard to see any basis for its protection. The public may be deceived, but he has no claim to be its vicarious champion; his remedy must be limited to his injury and by hypothesis he has none. There is always the danger that we may be merely granting a monopoly, based upon the notion that by advertising one can obtain some ‘property’ in a name. We are nearly sure to go astray in any phase of the whole subject, as soon as we lose sight of the underlying principle that the wrong involved is diverting trade from the first user by misleading customers who meant to deal with him.

German law historically took quite the opposite approach. The duty of fair trading imposed under the general clause of the UWG 1909 was primarily owed to one’s competitors (interpreted in the broadest possible sense) and to the relevant business community at large, and was enforceable by them and by various trade associations dedicated to stamping out trade practices which their membership or their executive considered undesirable. Subsequently, consumers’ organisations were added to the list of possible

<sup>4</sup> The present state of the law of unfair competition in the US is well beyond the scope of the present contribution.

<sup>5</sup> *S C Johnson & Son v Johnson*, 116 F 2d 427 (CA 2d Cir, 1940). Our hero had previously made an appearance (under the sobriquet of the ‘vicarious avenger’) in *Ely-Norris Safe Co v Mosler Safe Co*, 7 F 2d 603, (CA, 2d Cir, 1925).

plaintiffs. The principles governing *locus standi* under the UWG 1909 are summarised in the national report on Germany in the Micklitz survey:<sup>6</sup>

The basic legal rule for fair-trading is §1 UWG which provides claims for injunctions and damages against everybody who acts contrary to honest business practice. Case Law shapes the contents of the general clause. The vast majority of the principles and values applied under the general clause to individual cases today have been laid down and developed by jurisdiction throughout the last 100 years. ... The original concept of the law against unfair competition is aimed at the protection of traders against the unfair acts of their competitors. Accordingly only competitors and business associations had been entitled to claim for injunctions and damages. But as not only competitors are concerned by unfair competition, but also consumers and the general public, the UWG now provides for a right of action by consumer associations as well and this has been the case since 1966.

Case law under section 1 of the UWG 1909 is by hallowed convention divided into five categories or *Fallgruppen*, of which it will be seen that only the first unambiguously corresponds to the scope and policy of the Directive (citations omitted):<sup>7</sup>

The Act [the UWG 1909] contains specific provisions, and two general provisions of which section 1 UWG is the more important. It is a general expression of the principle that an injunction and a claim for damages are awarded in those cases in which someone in the course of business acts in conflict with *bonos mores*, good morals. The German courts have used this provision to build a comprehensive body of law governing the protection against unfair competition. Within this body of case law five categories of unfair acts can be distinguished, namely fishing for customers, obstructive practices, exploitation of reputation and achievement, breach of law, and disturbance of the market.<sup>8</sup>

Historically, and despite their many differences, English and German laws of unfair competition did have at least two things in common. First, that each expected businesses to foot the bill for suppressing conduct considered injurious to consumers. But businesses are not selfless. English law only works because (or to the extent that) their interests and resources are necessarily engaged on the same side as the consumer, and it is therefore extremely reluctant to allow businesses to invoke what purports to be concern for consumer welfare unless identity of interests is assured. No such invocation

<sup>6</sup> Micklitz Report, above n 3, volume 3, at 79. This should now be read subject to the repeal of the UWG 1909 and its replacement by the UWG 2004.

<sup>7</sup> A Kamperman Sanders, *Unfair Competition Law: The Protection of Intellectual and Industrial Creativity* (Oxford, Clarendon Press, 1997) 57. Practices under the first head ('*Kundenfang*') include both deceptive and aggressive marketing techniques.

<sup>8</sup> In German: *Kundenfang*, *Behinderung*, *Ausbeutung*, *Rechtsbruch* and *Marktstörung*.

of consumer welfare is necessary under German law, since aggrieved competitors may sue in their own capacity for breach of duties owed directly to them, but it is still assumed that the actions competitors take for their own protection or advantage will safeguard that abstract quality of ‘fairness’ in the market, and therefore benefit consumers as well.

Secondly, that each looked exclusively to a one-dimensional relationship to define ‘fairness’: in English law this was business-to-consumer (ie vertical); whereas in German law it was business-to-business (ie horizontal). English law asks: ‘is this fair to your consumers?’ (although its ideas of what is ‘fair’ to consumers are sometimes rather robust). German law asks: ‘is this fair to your competitors?’, and is altogether more solicitous. Each body of law seems to have taken it for granted that if conduct was ‘fair’ in the one dimension which it recognised, then it would also necessarily be ‘fair’ in the other. The assumption is beguiling, but on reflection it is self-evidently untrue as a general proposition, at least in the short term. To give two examples: charging below cost price (predatory pricing) can hardly be described as unfair to the consumer (who would think in terms of overcharging being unfair)—but it is certainly damaging to one’s competitors, and it may be regarded as unfair to them. On the other hand, suborning a competitor’s employees to divulge his trade secrets is as wrongful to him as it is self-evidently unethical (and there are effective common law remedies against it, though not under the name of unfair competition), but there is no immediate adverse effect on consumers. If anything, the latter stand to benefit from the cheaper, better, or more varied goods which the appropriator can now produce.

### 3. THE MICKLITZ STUDY AND THE PLACE OF UNFAIR COMPETITION

The immediate origins of the Directive lie in the monumental exercise undertaken for DG Health and Consumer Affairs by Professor Micklitz and his co-workers at the *Institut für Europäisches Wirtschafts- und Verbraucherrecht eV* (and elsewhere) under the title ‘The Feasibility of a General Legislative Framework on Fair Trading’.<sup>9</sup> However, this exercise was in many respects the culmination of a programme which had begun with the attempted harmonisation of European unfair competition law in the period from 1965 to 1975, had continued with efforts to harmonise consumer protection law so far as advertising and ‘commercial communications’ were concerned, and

<sup>9</sup> Available at [http://ec.europa.eu/comm/consumers/cons\\_int/safe\\_shop/fair\\_bus\\_pract/green\\_pap\\_comm/studies/sur21\\_vol#\\_en.pdf](http://ec.europa.eu/comm/consumers/cons_int/safe_shop/fair_bus_pract/green_pap_comm/studies/sur21_vol#_en.pdf). (hereafter the ‘Micklitz Report’).

may now be within sight of returning full circle to the original project. As recital 8 to the Directive concludes:

(8) ... The Commission should carefully examine the need for Community action in the field of unfair competition beyond the remit of this Directive and, if necessary, make a legislative proposal to cover these other aspects of unfair competition.

One of the starting points for the Micklitz study was the survey of the unfair competition laws of the then Member States carried out for the Commission by the late Professor Eugen Ulmer and the Max Planck Institute for Foreign and International Patent, Copyright and Competition Law (Munich) in the 1960s.<sup>10</sup> That survey led to abortive attempts by the Commission to harmonise unfair competition law in the early 1970s;<sup>11</sup> and when these failed, the remnants of the programme formed the basis for the first exercises in harmonising the law of commercial communications: initially through the Misleading Advertising Directive<sup>12</sup> and subsequently through the Directive on Comparative Advertising<sup>13</sup> and the 1996 Green Paper on Commercial Communications<sup>14</sup>. The Micklitz survey itself was published in November 2000, and may be regarded as marking the point of transition between the end of the restrictive ‘commercial communications’ phase, and the 2001 Green Paper on Consumer Protection,<sup>15</sup> which led by way of drafts in 2003 and 2005,<sup>16</sup> to the present Directive. After much debate the latter is ‘maximal’ in the sense of leaving no scope for national law within what is now a wholly occupied field, but less than maximal in so far as that field is purportedly confined to consumer protection law.

As Professor Micklitz’s acknowledgements of the Ulmer survey imply, there is a close connection between laws of consumer protection and those of unfair competition. This is partly historical. Consumer protection law as we know it today is a phenomenon of the late twentieth century, but laws of unfair competition go back to the second half of the nineteenth century,

<sup>10</sup> E Ulmer, *Das Recht des unlauteren Wettbewerbs in den Mitgliedstaaten der Europäischen Wirtschaftsgemeinschaft*, Bd. 1, *Vergleichende Darstellung mit Vorschlägen zur Rechtsangleichung* (Munich, CH Beck, 1965), with subsequent national volumes.

<sup>11</sup> For a critical commentary on these early developments, and their continuing relevance, see C Wadlow, ‘Unfair Competition in Community Law’ (Part I, ‘The Age of the “Classical Model”’) [2006] *European Intellectual Property Review* 433 and (Part II, ‘Harmonisation Becomes Gridlocked’) 468.

<sup>12</sup> Directive 84/450/EEC [1984 OJ L 250/17].

<sup>13</sup> Directive 97/55/EEC [1997] OJ L 290/18. See A Ohly and M Spence, *The Law of Comparative Advertising: Directive 97/55/EC in the United Kingdom and Germany* (Oxford, Hart Publishing, 1999).

<sup>14</sup> COM(96)192 final, updated by COM(98)121 final.

<sup>15</sup> COM(2001)531 final, with follow-up paper COM(2002)289 final.

<sup>16</sup> Proposal for an Unfair Commercial Practices Directive, COM(2003)356 final; Common Position [2005] OJ C 38E/1.

and to a considerable extent still embody modes of thought which were prevalent then. As the Micklitz Report notes (emphasis in original):<sup>17</sup>

Originally—at the end of the 19th century—the law of ‘Fair Trading’ (or in other terms: the law of ‘Unfair Competition’) which developed as a result of industrialisation and the liberalisation from restrictive mercantilist trading rules, was relatively ‘narrow minded’. There was one main purpose for competition law, whether it was based on the General Clauses of the civil code as in France or Italy, or on a specific statute directed against ‘Unfair Competition’ as in Germany—and its aim was: *to protect competitors—and that means traders—from each other and against unfair marketing practices*, in this way constructing the legal order of the (national) markets as a level playing field for enterprises. A by-product of this was a kind of consumer protection, e.g. as a result of the prohibition of misleading advertising, in other words a mere ‘reflex’ accepted by the lawmaker *but not intended*.

With the passage of time, the relationship of consumer protection law to unfair competition law became less one of parasitism and more one of equality, but always subject to tension, even to the point of antinomy. The story may be taken up by Professor Beier, summarising the outcome of the Ulmer survey of the unfair competition laws of the six original Member States in the 1960s (citations omitted):<sup>18</sup>

Ulmer’s comparative survey showed a clearly structured and coherent field of law despite national differences, namely the classical field of unfair competition or ‘concurrence déloyale’. By the end of the 1950’s this field had undoubtedly progressed considerably in Continental Europe from its beginnings as a concept developed by the French courts in the middle of the 19th century. It had evolved and gained considerable importance, but its development was a continuous and cautiously advancing achievement, based for more than a century on consistent concepts with regard to (a) the protected interests and (b) the overall objectives of unfair competition law.

The protected interests were those of the honest trader in having the right to restrain his competitors from causing him injury by unfair conduct. The test was whether a competitor’s conduct complied with the ‘honest usages’ of the trade, the ‘usages honnêtes’ (Article 10bis Paris Convention), the ‘correttezza professionale’ (Article 2598 Codice Civile) or the ‘bonos mores’ (‘gute Sitten’) in the course of trade (Article 1, German Unfair Competition Act 1909).

However, all this is part of the history of the law of unfair competition, not consumer protection law. So far as the former was concerned, the Micklitz

<sup>17</sup> Micklitz Report, above n 9, ii, at 57.

<sup>18</sup> FK Beier, ‘The Law of Unfair Competition in the European Community: Its Development and Present Status’ [1985] *European Intellectual Property Review* 284. The article reproduces the Second Herschel Smith Lecture delivered in London in 1985, when Professor Beier was the Director of the Max Planck Institute for Foreign and International Patent, Trade Mark and Competition Law, Munich.



reporters agreed that the appropriateness of some sort of ‘general clause’ was widely accepted in national and international law (with the exception of the United Kingdom and Ireland, and subject to the unstated qualification that at least two types of ‘general clause’ were being treated as one<sup>19</sup>), but counselled that this was not to say that businesses should be allowed to define their own moral code (emphasis added, citations omitted):<sup>20</sup>

At least in quantitative terms there seems to be a wide-spread agreement on the appropriateness of a general clause on fair trading. This is not only true for nation states, but also for international regulatory initiatives. ... The reference point ... however, is intellectual property rights and not so much fair trading as such. *Here, honest practice shall constitute the reference point. Eugen Ulmer had already emphasised the need to clarify that the final decision on honest practices should not remain in the hands of those who shape it. Otherwise business alone could decide over the degree of honesty to be guaranteed in industrial and commercial matters.*

So if we approach consumer protection law by way of unfair competition law (which in turn is almost universally accepted as a branch of intellectual property law<sup>21</sup>) then we should heed the warning:<sup>22</sup>

The far-reaching disregard of consumers’ interests in the field of Intellectual Property very often results in some kind of inappropriate ‘extension’ of the respective ‘exclusive’ right by interpreting the General Clauses on Fair Trading in a manner, which creates a ‘supplementary function’ widening the scope of protection given by the specific Rules of Intellectual Property Law. The reason for this anti-competitive approach lies mainly in tradition and the historic development of the concept of ‘unfair competition’, which is much more influenced by the interests of the supply side, being protected from one another against specific marketing activities, than by the spirit and philosophy of consumer protection.

But given the close connection in practice between laws of unfair competition and laws of consumer protection, and the historical dominance of the former, it is not surprising to see works on unfair competition cited as principal sources of reference in several of the mini-bibliographies which begin each national chapter of the Micklitz study, despite the fact that the latter is concerned in terms only with consumer protection law. The upshot of all this is that the United Kingdom’s strong tradition of consumer

<sup>19</sup> There is a crucial difference between a general clause in a code or statute specifically dedicated to unfair competition (as in Germany); and a general clause which is not specific to any single field (as in France, where the ‘general clause’ in question is the general tort provision of Art 1382 of the Civil Code).

<sup>20</sup> Micklitz Report, above n 9, i, at 13.

<sup>21</sup> Art 10*bis* of the Paris Convention for the Protection of Industrial Property (Stockholm, 1967).

<sup>22</sup> Micklitz Report, above n 9, i, at 56.

protection by independent administrative authorities has been quite well accounted for in the Survey and its recommendations;<sup>23</sup> but that the parallel tradition of minimal judicial interference with business competition at the suit of competitors has not, nor has the common law action for passing-off received anything like the consideration it might have deserved in comparison to the German UWG. This would not have mattered but for the fact that the UWG has arguably been mischaracterised as a consumer protection law at some point in the legislative process (in the absence of any German law more to the point), and may have been given too much influence as a result. This is not to say that the UWG was misunderstood in the Micklitz exercise: on the contrary, its affinity to intellectual property law and its attachment to the interests of traders, rather than consumers, is fully recognised.<sup>24</sup> What is surprising is that the implementation of the Micklitz proposals in the Directive sometimes gives the impression of taking the UWG as if it were a model consumer protection law, which it has never been. This is particularly to be seen when it comes to the 'general clause', and to enforcement mechanisms.

#### 4. THE EXAMPLE OF LOOK-ALIKES

The self-imposed conceptual limitations of the Directive are well illustrated by the issue of 'look-alike' or 'copycat' products in the fast-moving consumer goods industry.<sup>25</sup> These are not terms of art, but for present purposes they denote that the packaging or get-up of products, typically but not invariably supermarket 'private label' or 'own-brands', has been designed so as to prompt a conscious or unconscious association with the brand leader in the mind of the consumer, but with sufficiently prominent differences for it to be unlikely that any but a very careless consumer would actually mistake them for the brand leader. Own brand look-alikes are rarely litigated in this country, partly because supermarkets and their suppliers are well acquainted with the law and display excellent judgement in keeping fractionally within its limits, and partly because brand owners are acutely conscious of the commercial disadvantages of taking on a rival which is also a major customer, unless the case is an open-and-shut one.

A judge faced with a reasonably close 'look-alike' for the first time can react in a number of ways, and it is typical of the actual development of the law in this field that this instinctive reaction in cases of first impression

<sup>23</sup> Presumably attributable at least in part to the presence in the editorial team of Professor Geraint Howells, a prominent British consumer lawyer.

<sup>24</sup> Eg Micklitz Report, above n 9, iii, at 96: 'Consumer protection and Intellectual Property Rights: General Approach'.

<sup>25</sup> See the contribution of Vanessa Marsland to this book.

goes quite a long way to wards determining the actual outcome of that case and its successors, with rationalisation following. A judge, and especially an English judge, might well start from the proposition that what was complained of was entirely consistent with the normal cut-and-thrust of competition, and only be tempted to intervene if there were special factors on either the legal or moral plane to take the case out of the ordinary. Alternatively, a more sensitive judge might feel instinctively shocked, and might therefore be inclined to penalise the look-alike. But precisely what is it that the judge finds shocking? Once again, an essentially non-rational response is quite likely to come first, with rationalisation following.

Once either the judge or the commentator has begun to attempt to rationalise what was probably originally an instinctive and morally-driven response, we shall see that a number of quite different conceptual paths are open. First, the judge may have felt (or reasoned) that the look-alike was 'unfair' because it was likely to deceive or confuse. In context, this can only mean that customers would be deceived or confused: no one suggests deception of the brand owner is likely or relevant. Self-evidently deception is a bad thing and confusion not much better, but the first response of the judge may equally well have been driven either by concern for consumers for their own sakes; or by the thought that the deceptive look-alike was in some sense 'stealing' trade from its rightful owner, the brand-leader. So is it a case of the look-alike cheating the consumer, the competitor, or both? And does the answer to that question have any consequences either in fact or in legal analysis? At one extreme, the judge might deplore the fact that consumers were being deceived, but treat it as *res inter alios acta* so far as the brand-leader was concerned.<sup>26</sup> At the other extreme, the judge might reason that consumers actually suffered little or not at all from their mistakes or confusion (the look-alike perhaps being as good as or better than the brand-leader in terms of quality and value), but that the brand-owner suffered significantly, and that the latter was entitled to compel the look-alike to play by the rules of the game. So a rationale based on deception of consumers can be driven by concern for them, or by concern for competitors, or both, but even these variants do not exhaust all the possible rationales.

Secondly, the judge may have reacted on the basis that the look-alike was an unauthorised copy. Its originator therefore took a short cut, and (mis)appropriated something of value to the brand-leader. At this point, a judge from the common law tradition would probably have said to himself that if no issue of statutory infringement arose, then it was not for him to invent new quasi-proprietary rights in a field which had been pre-empted by Parliament. There is much writing on the misappropriation of 'valuable

<sup>26</sup> This was the rationale of the old decision in *Webster v Webster* (1791) 36 ER 949 (Lord Thurlow LC), decided before the action for passing-off became accepted: '[t]he fraud on the public is no ground for the plaintiff's coming into this court.'

intangibles', but little or no case law.<sup>27</sup> The same judge would probably also be reluctant to interfere without statutory authority in a manner which would reduce freedom of competition, without having the excuse of suppressing falsehood. A judge from another tradition might have a very different response. He might regard it as self-evident that the promoter of the look-alike should not enrich himself at the expense of a fellow trader, and that to do so was not only morally wrong but *prima facie* unlawful as 'slavish' (or 'servile') imitation.<sup>28</sup> This train of thought finds a place in the doctrine of unfair competition in many Continental legal systems, including those of France and Germany:<sup>29</sup>

German tort law on unfair competition provides a protection of commercial and industrial products against direct takeover, so-called 'slavish imitation'. The copying of a product, a characteristic product-line, a famous label or a well-known brand is regarded as an unfair trade practice when it is a 'free ride' by taking advantage of the competitor's investments of time, effort and money in research and marketing. Therefore, an exception to the general freedom of imitation is accepted under German law in addition to intellectual property rights. The reason for this is that the business person has been deprived of the possibility of recouping his or her costs of research, development and marketing by a simple one-to-one copy of the product or service. The competitor can offer the imitation for a much lower price than the original product or service and gains his market share by exploiting the achievement of the original producer.

At this point the argument can be pursued into at least two further subdivisions: whether the matter appropriated was the *input* or *investment* of the brand-owner into the item copied (its quality, design, advertising expenditure, etc), or the composite *product* of these factors and others, namely the goodwill the brand-leader enjoyed and the willingness of the public to buy it in preference to its competitors, and possibly to pay more for it. At this point we may note that we have reached a rather similar end-point to one of those based on misrepresentation, but that we have reached it without invoking misrepresentation because it was the copying, rather than the deception, which provided the element of 'unfairness' which the law seeks to remedy. We could pursue further refinements of analysis according

<sup>27</sup> See M Spence, 'Passing Off and the Misappropriation of Valuable Intangibles' (1996) 112 *Law Quarterly Review* 472.

<sup>28</sup> See para 40 of the Explanatory Memorandum to the draft Directive (Proposal for an Unfair Commercial Practices Directive, COM(2003)356 final). The imitation need not be particularly close to count as 'slavish', the principal question generally being whether there was some valid reason (such as functionality) for copying, or whether the latter was gratuitous.

<sup>29</sup> The summary of the position in Germany is taken from B Steckler, 'Unfair Trade Practices Under German Law: "Slavish Imitation" of Commercial and Industrial Activities' [1996] *European Intellectual Property Review* 390 at 397. For France, see, eg, A Kamperman Sanders, *Unfair Competition Law: The Protection of Intellectual and Industrial Creativity* (Oxford, Clarendon Press, 1997) 24.

to whether we were dealing with what is effectively a branch of the law of unjust enrichment, or with innominate or emergent property rights as such, but in either event this entire chain of argument owes everything to the supermarket acting ‘unfairly’ vis-à-vis a competitor-cum-supplier, and nothing at all to its acting unfairly with respect to its own customers.

The issue of look-alikes poses few theoretical difficulties in English law, but that is at least partly because the common law is wholly attached to the misrepresentation model and has no place for ‘parasitism’ or ‘slavish imitation’, unless deception as well as misappropriation is involved. Of the two passing-off cases decided by the House of Lords in recent years, one concerned a (branded) look-alike rival to the *Jif* plastic lemon, and *Jif* won: *Reckitt & Colman v Borden*.<sup>30</sup> A rare but illuminating decision on supermarket own-brand or private label look-alikes is to be found in *United Biscuits v Asda Stores* (PENGUIN vs. PUFFIN biscuits).<sup>31</sup> In the course of his judgment for the plaintiffs Robert Walker J observed (citation omitted):

These causes of action [passing-off and registered trade mark infringement] are the subject of a great deal of learning, some of which has been deployed in argument during the hearing, but their basic idea is quite simple. It is (and has been for a very long time) the policy of the law to permit and indeed encourage fair competition in trade but to discourage and indeed prevent unfair competition. ... The rules as to passing off and trade mark infringement are (in non-statutory and statutory form respectively) a very important part of the law preventing unfair competition. Their basic common principle is that a trader may not sell his goods under false pretences, either by deceptively passing them off as the goods of another trader so as to take unfair advantage of his reputation in his goods, or by using a trade sign the same as, or confusingly similar to, a registered trade mark.

After this lengthy introduction, can we say that supermarket look-alikes are ‘unfair’, in the case of those that do not actually deceive or confuse the average consumer? Not so according to the Directive, which recites (in part):

(14) ... It is not the intention of this Directive to reduce consumer choice by prohibiting the promotion of products which look similar to other products unless this similarity confuses consumers as to the commercial origin of the product and is therefore misleading.

Likewise, paragraph 40 of the Explanatory Memorandum accompanying the draft Directive in 2003 singled out ‘slavish imitation (i.e. copying independently of any likelihood of consumer confusion)’ as an act frequently

<sup>30</sup> *Reckitt & Colman v Borden* [1990] 1 WLR 491; [1990] 1 All ER 873; [1990] RPC 340 (HL).

<sup>31</sup> *United Biscuits v Asda Stores* [1997] RPC 513 (Robert Walker J).

amounting to unfair competition under national laws, but outside the Directive's intended scope.<sup>32</sup>

And from the point of view of the consumer the answer is equally obviously 'no', unless the look-alike in question oversteps the line between legitimate and non-confusing copying of certain generic visual cues, into deceptive similarity or outright counterfeiting, or unless its quality is less than he or she had been led to expect from the implicit claim of parity with the brand leader. Brand-owners, on the other hand, tend to regard look-alikes as inherently unfair even if they are not confusing or deceptive. If the law allowed, they would follow the second line of argument above and assert that, deception aside, look-alikes are unethical and ought to be unlawful, because they are parasitic imitators. The supermarket reaps where it has not sown.

Despite the clarity of the Directive on this point, it is not surprising to find its general clause in danger of being misinterpreted (if not actually misappropriated) on behalf of brand owners to combat what is really, to their way of thinking, a case of unfair competition based on the 'misappropriation of valuable intangibles', and having little or nothing to do with misrepresentation. Just such a tendency may be seen from the following excerpts:<sup>33</sup>

Even if the new law does not completely satisfy brand owners or provide guaranteed protection against lookalikes, it must be regarded as a step in the right direction.

Brand owners will no doubt be watching this [transposition] with interest and may well wish to take the opportunity to ... maximise the benefits of the Directive in the UK for their specific purposes.

So in the name of 'fairness' towards consumers, we are being invited to suppress a practice which is, in most cases, perfectly innocuous from their point of view, and to impose a morality which (rightly or wrongly) can only draw its validity from a certain world-view of the rights of businesses inter se. If this is to be justified, it can only be on the basis of a properly thought-out law of unfair competition. But if this turns out to be the result of the Directive in practice, then we will have submitted ourselves to a de facto law of unfair competition which has not been thought out at all.

## 5. SUMMARY AND CONCLUSIONS

The thesis of the present contribution is that the legitimate interests of consumers and businesses do not routinely or necessarily coincide.

<sup>32</sup> Proposal for an Unfair Commercial Practices Directive, COM(2003)356 final, para 40.

<sup>33</sup> G Grassie, 'EU Directive on Unfair Commercial Practices—a UK Perspective' (2006) 1 *Journal of Intellectual Property Law and Practice* 107 at 111.

The expedient of the business claimant as the ‘vicarious champion’ of the consumer is a useful one, but it holds good only in limited circumstances. What is ‘ethical’ for one business vis-à-vis another business may not be ethical vis-à-vis the consumer, and vice versa. Laws of unfair competition and of consumer protection may impinge on the same conduct, but they pursue different agendas and reflect different moral values and economic priorities. They may be good neighbours, but they are unlikely to be happy bedfellows.

It follows that a consumer protection law based on what are in fact intra-business ethics will not appropriately protect consumers from unfair business practices in general, no matter how reasonable that law may appear to be in terms of its protection of business interests from unfair competition. Conversely, an unfair competition law based on what are in fact consumer-driven ethics is certain to be incomplete and is likely to be inappropriate. Incomplete, because the business-to-business dimension is *ex hypothesi* ignored or understated; inappropriate, because conduct which is neutral (or even beneficial) vis-à-vis the consumer may be ‘unfair’ to the point of being wrongful between competitors, once the latter’s values and legitimate interests are taken into account. A law of either kind written by or for business incumbents is likely to be over-prescriptive, over-proscriptive, and over-protective of those who benefit from the status quo. Businesses tend to prefer collusion to competition (whatever they say to the contrary), and any law they write for themselves will reflect this. After all, the law they write is likely to be a collective, rather than a competitive, effort.

So does the Directive (and especially its general clause) take due but not excessive account of the legitimate interests of competitors (not to mention the public at large), or is it exclusively focussed on the interests of consumers as such? And to the extent that it does take account of the interests of competitors and the public, then how successful is it? These are big questions, but at the very least, we may all agree with Professor Micklitz when he recollected (citation omitted):<sup>34</sup>

As early as 1965 Eugen Ulmer wrote, in his comparative analysis of the Member States’ law on fair trading, that the range of interests which shall be protected—those of the competitors and/or those of consumers and/or the public at large—is of outstanding importance for each and every regulatory approach and may be of even greater importance than the actual wording of the general clause. Thirty-five years later there is nothing which lessens the relevance of this statement.

The case for reclaiming European unfair competition law from Europe’s consumer protection lawyers, is that keeping the two separate is the only way to do justice to both sets of parties.

<sup>34</sup> Micklitz Report, above n 9, i, at 16.

