

Four paradigms of unfair competition

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Four topics

- What is ‘unfair competition’
- How does this relate to familiar competition (‘antitrust’) law?
- What’s a paradigm, and are there really four of them?
- Where next, and does it matter?

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Unfair competition

- Note the components: ‘fairness’ and ‘competition’
- ‘Competition’: does this mean actual economic competition, or market participation, or any kind of rivalry?
- ‘Fair’: what does it mean, how do we judge? Is it too vague to apply at all?

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But beware ...

‘It is often fallacious in considering the meaning of a phrase consisting of two words to find a meaning which each has separately and then infer that the two together cover the combination so arrived at. The two together may, as here, have acquired a special meaning of their own.’

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What was that about?

- Lee v Showmen’s Guild of Great Britain [1952] 2 QB 329, CA
- One showman (fairground amusements) guilty of ‘stealing’ favourable site claimed by another
- Was this ‘unfair competition’? No.

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Lessons from Lee

- ‘Unfair competition’ may have a composite meaning to which both terms contribute, but in which neither has precisely its everyday meaning
- But, there are constraints on what it ought to mean in any particular circumstances

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NB: 'Unfair Trading'

- By convention, 'unfair trading' is principally used in the business-to-consumer sense
- 'Unfairness' vis-a-vis consumers may or may not correspond to 'unfairness' vis-a-vis competitors

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How many laws?

- How many kinds of law does it take to regulate an economy?
 - US/EEC style competition (antitrust) law?
 - French/German style unfair competition law?
 - UK/Scandinavian style consumer law?

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Just coincidences?

- There are marked geographical and historical differences in terms of whether a given country has (or had) all three sets of laws (competition, unfair competition, consumer protection) and their relative scope, importance and prestige

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Historical coincidences?

- France: early (mid C19) judge-made unfair competition law; late to adopt (and not much committed to) consumer and competition laws
- Germany: early (1909) U/C Act; strong post WWII competition law, little interest in consumer law per se

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Historical coincidences?

- UK: minimalist U/C law (passing-off), strong competition law post WWII, strong consumer laws post 1968
- USA: Sherman Act late C19, FTC Act 1914; would strongly deny having any U/C law in Franco-German sense

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A false dichotomy?

- WE protect competition, YOU protect competitors and THEY protect cartels
 - Can you protect competition, without protecting (individual) competitors?
 - Is this the right way to go about it?

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A false dichotomy?

- Two possible all-or-nothing views:
 - Protect competition per se, and everything else will look after itself
 - Ensure competitors compete fairly, consumers will benefit, competition will be protected, and everything else will look after itself

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Possible oppositions

Antitrust	Unfair competition
Protects competition	Protects competitors
Competition supposed to be inherently beneficial to society	'Fairness' supposed to be essential to market or social order
Government-centred, economist-dominated	Court-centred, lawyer-dominated
Driving value is welfare or efficiency	Driving value is justice or fairness

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Possible oppositions (2)

Antitrust	Unfair competition
Public law-Administrative	Private law-Litigious
Economic focus-Looks at outcomes	Legal focus-Looks at conduct and motive
Disregards ethics in individual cases	Disregards welfare in individual cases
Strong discretion	Weak/no discretion

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My distinction

- Antitrust laws are driven by economic considerations of welfare/utility/efficiency (or so we hope)
- Unfair competition laws are driven by legal considerations of fairness, justice, or morality (though these may be 'captured' by special interests)

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Paradigms

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What's a paradigm?

- “1. A pattern or model, an exemplar; (also) a typical instance of something, an example.”
- “4. A conceptual or methodological model underlying the theories and practices of a science or discipline at a particular time; (hence) a generally accepted world view.”

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Paradigms

- So a paradigm is simultaneously a model or pattern, and a particular subjective interpretation of that model or pattern
- “Why should your set of values be the paradigm for the rest of us?”

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Categories

- A paradigm is not a category
 - Paradigms are defined centrally; categories peripherally
 - Categories are divisions, they are mutually exclusive by definition
 - Paradigms can co-exist, and can be equally valid qua interpretations

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My four paradigms

- Misrepresentation
- Misappropriation
- Motive, including malice
- Membership

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The paradigms amplified

- Misrepresentation: telling lies
- Misappropriation: stealing things
- Motive, malice: spite (but more ...)
- Membership: just not the done thing

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And legally exemplified

- Misrepresentation: Passing-off
- Misappropriation: 'Theft'
- Motive, malice: 'Malicious falsehood'
- Membership: legally binding 'custom'

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The paradigms overlap

Misrepresentation

Misappropriation

Malice

Membership

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Common law U/C

- Misrepresentation + Misappropriation
= Passing off
- Misrepresentation + Malice
= Malicious Falsehood
- Misrepresentation on its own
= undefined and/or not in realm of U/C
- Misappropriation on its own = nothing

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German law U/C

- Kundenfang = Misappropriation by misrepresentation or by intimidation
- Anschwarzung = Damaging (mis)representation targeted at specific competitor
- Behinderung = Any (unjustified) obstructive action; 'malice' in extended sense of targeted and/or improper
- Ausbeutung = Misappropriation in general

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EU Law

- Current position
 - Strong competition law (101, 102)
 - Strengthening consumer law (UCPD)
 - Weak or no unfair competition law

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Is this sustainable?

- Present situation: EC regulates B-to-C activity, states regulate B-to-B
- Is this workable: frankly no
 - UCPD pre-empts B-to-B regulation, but does not provide a set of rules
 - Case C-304/08 'Plus' indicates problems

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Is this sustainable?

- Possible outcomes
 - Legislative harmonisation of U/C law, unlikely for political reasons
 - De facto evolution of U/C law based on UCPD and EU acquis
 - 'Lauterkeitsrecht': a blend of Arts 101, 102, unfair competition law, and consumer law

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Thank you

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