

**MODEL PROVISIONS ON
PROTECTION
AGAINST UNFAIR COMPETITION**



WORLD INTELLECTUAL PROPERTY ORGANIZATION
(WIPO)

**MODEL PROVISIONS ON
PROTECTION
AGAINST UNFAIR COMPETITION**

Articles and Notes

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PREFACE

The Model Provisions on Protection Against Unfair Competition have been prepared by the International Bureau of the World Intellectual Property Organization (WIPO) according to its program for the biennium 1994-95. They take into account the previously published study entitled *Protection Against Unfair Competition – Analysis of the Present World Situation* (WIPO publication No. 725(E)).

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Notes on Article 1

1.01 *General.* Under Article 10*bis* of the Paris Convention for the Protection of Industrial Property (hereinafter referred to as the “Paris Convention”), member States are obliged to provide for protection against unfair competition. The same obligation exists under Article 2 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter referred to as “the TRIPS Agreement”), according to which Members of the World Trade Organization bound by Article 2 of that Agreement are obliged to comply with Article 10*bis* of the Paris Convention. The Model Provisions implement that obligation by defining, in Articles 2 to 6, the principal acts or practices against which protection is to be granted and by providing a basis for protection against any other acts of unfair competition in Article 1(1). It should be noted that the definitions contained in Articles 2 to 6 do not exclude each other and that, in practice, several of them may simultaneously apply to a specific situation.

1.02 In addition to establishing the basic protection against unfair competition, Article 1(1) serves at the same time as a general definition of acts of unfair competition. In that respect it follows Article 10*bis*(2) of the Paris Convention. The decisive criterion is that the act is “contrary to honest practices.” This notion will have to be interpreted by the judicial authorities in the country concerned. However, in cases of competition between enterprises of different countries, the notion should not be limited to honest practices in the country where an act of unfair competition is taking place: account should also be taken of conceptions of honest practices that are established in international trade.

[Notes continue on page 8]

*Article 1**General Principles*

(1) [*General Provision*] (a) In addition to the acts and practices referred to in Articles 2 to 6, any act or practice, in the course of industrial or commercial activities, that is contrary to honest practices shall constitute an act of unfair competition.

[Notes on Article 1, continued]

1.03 Systems of self-regulation may exist concerning market behavior and advertising, for example codes of conduct applying to newspaper and broadcast advertising, sales promotion, the advertising of employment and business opportunities, mail order sales, sales of cosmetics, tobacco, alcoholic drinks and so on. Whereas the rules established by self-regulatory bodies can be invoked to combat unfair competition, the opinions given by those bodies generally cannot be enforced in national courts. The rules resulting from self-regulation and the opinions based on them should, however, be taken into account by judicial authorities when they consider unfair competition matters.

1.04 *Paragraph (1)(a)*. The expression “practice” is used in addition to “act” in order to clarify that not only an “act” in the strict sense, but also behavior that consists in an omission to act, can constitute an “act of unfair competition,” for example, failure to correct or supplement information concerning a product test published in a consumer magazine, thereby giving a wrong impression of the quality of the product offered on the market, or failure to give sufficient information concerning the correct operation of a product or concerning possible side-effects of a product.

1.05 The term “industrial or commercial activities” should be understood in the broad sense that covers not only the activities of enterprises providing products or services, in particular the buying and selling of such products or services, but also the activities of professionals such as lawyers, medical doctors in private practice and other such persons. So, for the purposes of these Model Provisions, it does not matter whether the activities of a person or enterprise are for profit or not. The same term is used throughout the Model Provisions.

[Notes continue on page 10]

[Notes on Article 1(1)(a), continued]

1.06 Whereas Article 10*bis*(2) of the Paris Convention speaks of “any act of competition,” paragraph (1)(a) does not contain the condition that the act must be an act of competition. This means that the Model Provisions apply also in situations where there is no direct competition between the party who commits the act and the party whose interests are affected by the act. Where an act is not directed against a competitor of the person who has committed the act, it may nevertheless influence competition in the market by increasing the competitiveness of that person in relation to his competitors. For example, where a well-known trademark is used by someone other than its owner for entirely different products, the user of the trademark is not normally in competition with the owner, but the use of the trademark is nevertheless relevant in competition, since the user obtains an unfair advantage over his competitors who do not use the well-known trademark, which is likely to favor the sale of the user's products. Moreover, omission of the requirement that the act be an act of competition makes it clear that consumers also are protected (see also Note 1.10 below).

1.07 In addition to Article 1(1)(a), Articles 2 to 6 define specific acts of unfair competition that are considered acts of unfair competition *per se* without any need for evidence that they are contrary to honest practices.

[Notes continue on page 12]

[Notes on Article 1(1), continued]

1.08 *Paragraph (1)(b)* establishes a right to protection against acts of unfair competition. The enforcement of the protection against such acts is as important as the substantive law of unfair competition itself. Without provisions for adequate measures to prohibit acts of unfair competition, to prevent damage or further damage and to obtain compensation for damages, the protection would remain theoretical. The term “damage” should be understood in the broad sense that covers the case where the defendant has obtained, or is likely to obtain, an unjust enrichment at the expense of the plaintiff. The protection is to be granted not only against acts that have occurred but also against acts that are imminent. The provisions on enforcement will be added to the Model Provisions at a later stage, after a study on the enforcement of intellectual property rights has been carried out by the International Bureau. Due account will be taken in that connection of the provisions of Part III of the TRIPS Agreement, entitled “*Enforcement of Intellectual Property Rights.*”

1.09 The provisions to be added to the Model Provisions will in particular concern civil and administrative procedures and also remedies to be made available to natural persons or legal entities for protection against unfair competition. Such provisions may include injunctions ordering a natural person or legal entity to desist from infringement or other specified acts and practices, payment of damages to compensate for injury, provisional measures to prevent unlawful acts or to preserve relevant evidence and so on. According to Article 10^{ter}(2) of the Paris Convention and footnote 11 to Article 42 of the TRIPS Agreement, such remedies should also be made available to federations and associations whose legal status permits them to assert intellectual property rights.

1.10 The remedies referred to in paragraph (1)(b) should moreover be available also to consumers and consumer associations.

[Notes continue on page 14]

[Article 1(1), continued]

(b) Any natural person or legal entity damaged or likely to be damaged by an act of unfair competition shall be entitled to the remedies referred to in

[Notes on Article 1, continued]

1.11 *Paragraph (2)* makes it clear that the availability of patent, industrial design, trademark or copyright protection does not preclude the application of the provisions against unfair competition. For example, an inventor has the option of keeping his invention secret and relying on Article 6 to protect it against any violation of the secrecy. The protection against unfair competition then constitutes a kind of supplementary protection, additional to the protection of specific intellectual property subject matter. The Model Provisions do not contain a specific provision on protection against so-called “slavish imitation” because, at least for the time being, it has not been possible to establish generally accepted conditions for such protection that would justify introducing it in addition to protection by patent law. This does not mean, however, that acts of slavish imitation in a particular case cannot be considered acts of unfair competition under Article 1(1) if the peculiarities of the case indicate unfair conduct on the part of the imitator.

1.12 The term “trademark” is defined in the footnote to paragraph (2).

[End of Notes]

[Article 1, continued]

(2) [*Relationship Between Articles 1 to 6 and Provisions Protecting Inventions, Industrial Designs, Trademarks, Literary and Artistic Works and Other Intellectual Property Subject Matter*] Articles 1 to 6 shall apply independently of, and in addition to, any legislative provisions protecting inventions, industrial designs, trademarks,* literary and artistic works and other intellectual property subject matter.

[End of Article]

* For the purposes of these Model Provisions, the term “trademark” covers marks relating to goods, marks relating to services and marks relating to both goods and services.

Notes on Article 2

2.01 *Paragraph (1)*. Article 2 is based on Article 10*bis*(3)1 of the Paris Convention. Instead of the word “create” in Article 10*bis*(3)1, the word “cause” is used. This is merely an editorial change to modernize the terminology. The wording of paragraph (1) is not confined to covering “a competitor” as in Article 10*bis*(3)1 (see also Note 1.06 above). Where the Model Provisions use the term “enterprise,” it includes natural as well as legal persons.

2.02 Intent to confuse is not relevant for the purpose of determining whether or not an act constitutes an act of unfair competition. Moreover, it is not necessary for confusion to have actually occurred, as the likelihood of confusion affords sufficient grounds for an action claiming unfair competition. The likelihood of confusion has a detrimental effect comparable to actual confusion. Typically, the better known the trademark, trade name or other business identifier, the greater the likelihood of confusion (see Notes 2.06, 2.08 and 2.09 below).

2.03 *Paragraph (2)*. As stated in Article 10*bis*(3)1 of the Paris Convention, confusion may be caused “by any means.” Paragraph (2) contains examples of such means.

2.04 Where a trademark, trade name or any other business identifier is associated by consumers with a certain commercial source or origin, any act that causes or is likely to cause confusion with respect to the source or origin will usually constitute an act of unfair competition. The concept of confusion should not, however, be restricted to confusion with respect to commercial source or origin, but should also include anything that could indicate a business connection, for example between two users of the same trademark or of similar trademarks (confusion with respect to affiliation). Moreover, in some cases consumers, while not assuming that the products or services originate from the same source, may nevertheless expect from their similarity that the use of the trademark for the products and services in question has been agreed to by another enterprise (confusion with respect to sponsorship).

[Notes continue on page 18]

Article 2

Causing Confusion with Respect to Another's Enterprise or Its Activities

(1) [*General Principle*] Any act or practice, in the course of industrial or commercial activities, that causes, or is likely to cause, confusion with respect to another's enterprise or its activities, in particular, the products or services offered by such enterprise, shall constitute an act of unfair competition.

(2) [*Examples of Confusion*] Confusion may, in particular, be caused with respect to

[Notes on Article 2(2), continued]

2.05 *Paragraph (2)(i)*. A trademark serves to distinguish the products or services offered by an enterprise from the products or services of other enterprises. Causing confusion with a registered trademark by using an identical or similar trademark is usually prohibited under specific provisions of trademark law. Since, from the point of view of the consumers affected by the confusion, it is not relevant whether the trademark is registered or not, protection under unfair competition law should be available in the same way for registered and unregistered trademarks.

2.06 Confusion is particularly liable to be with a well-known trademark, where a sign identical or similar to that trademark is used for products or services that are not similar to those in connection with which the trademark is well known. As a general rule, since the unauthorized use of a trademark for different products or services is not likely to cause confusion, such an act is not regarded as constituting trademark infringement, because trademark law traditionally limits protection to acts relating to the same or similar products or services. However, where a sign identical or similar to a well-known trademark is used for different products or services, that use of that sign may yet lead to confusion. This is true in particular of the use of a well-known trademark in which the advertising of a dissimilar product or service seeks to take advantage of the association, in the minds of consumers, with the products or services for which the trademark is well known. These considerations apply irrespective of whether the well-known trademark is registered or not.

2.07 *Paragraph (2)(ii)*. A trade name serves to identify an enterprise and its business activities and distinguish them from other enterprises and their business activities.

2.08 *Paragraph (2)(iii)*. The term “business identifier other than a trademark or trade name” covers a variety of designations such as business symbols, emblems, logos and slogans used by an enterprise to convey, in the course of industrial or commercial activities, a certain identity with respect to the enterprise and the products produced or the services rendered by that enterprise.

[Notes continue on page 20]

[Article 2(2), continued]

- (i) a trademark, whether registered or not;**

- (ii) a trade name;**

- (iii) a business identifier other than a trademark or trade name;**

[Notes on Article 2(2), continued]

2.09 *Paragraph (2)(iv)*. The “appearance of a product” includes the packaging, shape, color or other non-functional characteristic features of the product in question. Confusion with an industrial design, whether registered or not, could fall under this provision.

2.10 *Paragraph (2)(v)*. “Presentation of products or services” includes advertising in particular. Confusion may, for example arise from information given concerning products or services or the relationship between the enterprise offering the products or services and other enterprises providing similar products or services. Confusion may also be caused by the trade dress or shop style of an enterprise, which may give the impression that the products or services are offered or provided with the authorization of the enterprise that has developed the trade dress or shop style.

2.11 *Paragraph (2)(vi)* deals with so-called “publicity rights” relating to well-known performers, media and sports personalities and other celebrities, and with “merchandising rights” relating to fictional characters in literary or artistic works. Those rights concern marketing techniques whereby enterprises are licensed, for a certain period of time, to make use of the popularity or fame attached to the names or likenesses, including for example the voices, of certain celebrities or characters, as that use is expected to stimulate consumer demand for the licensee’s product or service. Unauthorized use of the name or likeness in question could cause confusion or a risk of confusion with the popularity or fame of the celebrity or character.

[End of Notes]

[Article 2(2), continued]

- (iv) the appearance of a product;**
- (v) the presentation of products or services;**
- (vi) a celebrity or a well-known fictional character.**

[End of Article]

Notes on Article 3

3.01 *Paragraph (1)*. Damaging another's goodwill or reputation constitutes an act of unfair competition regardless of whether the act or practice concerned causes confusion with or takes advantage of another's goodwill or reputation. It does damage that goodwill or reputation if it goes beyond what is required for the defense of one's own legitimate interests (see also Note 5.02 below). However, paragraph (1) does not apply to the damaging of a competitor's goodwill or reputation where the damage is legitimately done, for example in comparative advertising that is truthful and not misleading (see also Notes 3.06 and 5.04 below). Goodwill or reputation may be damaged by misappropriation where the effect of the misappropriation is that business is or will be taken away from the proprietor of the goodwill or reputation as a result of the damage done to it. Such acts of misappropriation will in particular be directed against a competitor, but could also have a severe impact on the goodwill or reputation of a non-competitor whose trademark or trade name has been misused.

[Notes continue on page 24]

Article 3***Damaging Another's Goodwill or Reputation***

(1) [*General Principle*] Any act or practice, in the course of industrial or commercial activities, that damages, or is likely to damage, the goodwill or reputation of another's enterprise shall constitute an act of unfair competition, regardless of whether such act or practice causes confusion.

[Notes on Article 3, continued]

3.02 *Paragraph (2)* establishes dilution of the distinctive character or advertising value of trademarks, trade names and other business identifiers, the appearance of products, the presentation of products or services and celebrities and well-known fictional characters, mentioned in subparagraph (a), as a particular case of damage to the goodwill or reputation of an enterprise. “Dilution” is defined in subparagraph (b) (see Note 3.10 below). The main rationale behind the notion of dilution is that trademarks, trade names and other business identifiers, for example, should be protected against the obvious desire of other market participants to take advantage of their essential uniqueness.

3.03 Dilution of a trademark, trade name or other business identifier may occur even where there is no direct competition between the owner of the business identifier and the person who in an unauthorized manner uses it for entirely different products or services. There need not even be any confusion in the minds of consumers with respect to the enterprise that produces the products or renders the services. If confusion is caused or likely to be caused, action against the misuse may also be based on Article 2.

3.04 Acts that dilute the effect of a business identifier are considered unfair because dilution can seriously erode and even destroy the distinctive character or advertising value of the business identifier, with a consequent adverse effect on the enterprise that owns it. Distinctive character or advertising value may also diminish if consumers no longer associate the products or services offered under a trademark with their original producer. The unfairness is clear in particular if the trademark becomes a generic term as a result of unauthorized use by others.

3.05 In determining whether a subsequent user has diluted another’s business identifier, account should be taken of the similarity between the signs involved, the circumstances of the use by the infringer and the extent of that use.

[Notes continue on page 26]

[Article 3, continued]

(2) [*Examples of Damaging Goodwill or Reputation*] (a) Damaging another's goodwill or reputation may, in particular, result from the dilution of the goodwill or reputation attached to

[Notes on Article 3(2), continued]

3.06 *Paragraph (2)(a)(i) to (iii)* deals with acts of damage to another's goodwill or reputation through dilution of registered or unregistered trademarks, trade names or other business identifiers. It should be noted in this connection that reference to another's trademark, trade name or other business identifier in comparative advertising should be permitted only to the extent that the reference does not unduly damage the goodwill or reputation attached to that business identifier (see also Note 5.04 below). As regards the definitions of the signs referred to in items (i) to (iii), reference is made to the Notes on Article 2(2)(i) to (iii).

3.07 Dilution of trademarks is in particular liable to affect well-known trademarks where a sign identical or similar to a well-known trademark is used for products or services that are not similar to those for which the trademark is well known. It is frequently tempting, for people other than the owner of the well-known trademark, to use the trademark to promote sales of their own products or services. This may result in dilution of the distinctive character of the well-known trademark, whether the trademark is registered or not (see also Note 2.06 above).

3.08 *Paragraph (2)(a)(iv) and (v)*. Dilution of distinctive character or advertising value may also happen to the appearance of a product or to the presentation of products or services on which goodwill or reputation is based. Where the distinctiveness of a product derives not only from technical features necessary for the product to function properly but also from aesthetic or decorative features, any imitation of the product is liable to dilute its distinctive character. The same may apply to a service that is presented by a particular enterprise in such a way, for example by advertising, that the presentation is linked exclusively to that enterprise. Any imitation of the method of presenting the service is liable to dilute the ability of consumers to associate the service with the original enterprise. Such acts or practices that cause dilution may be considered acts of unfair competition, regardless of any confusion that they may cause in the mind of the consumer.

[Notes continue on page 28]

[Article 3(2)(a), continued]

- (i) a trademark, whether registered or not;**
- (ii) a trade name;**
- (iii) a business identifier other than a trademark or a trade name;**
- (iv) the appearance of a product;**
- (v) the presentation of products or services;**

[Notes on Article 3(2)(a), continued]

3.09 *Paragraph (2)(a)(vi)*. As regards “celebrities” and “well-known fictional characters,” reference is made to Note 2.11 above. In any instance of misappropriation by others of the publicity rights in a celebrity or fictional character, there is a risk of damage to the goodwill or reputation of the enterprise that has licensed those publicity rights, apart from which the goodwill or reputation of the actual celebrity or actual owner of the fictional character may also be damaged. The question of whether the licensor (that is, the celebrity or the owner of the fictional character) and/or the licensee can claim damages will be determined by the license contract.

3.10 *Paragraph (2)(b)* defines the term “dilution.” The reference to “lessening” implies that distinctive character or advertising value does not have to be completely destroyed. The distinctive character and the advertising value of a business identifier, for example, may include any kinds of characteristic or association that will appeal to potential buyers of the products or services offered under that business identifier. The definition also applies in any cases covered by Article 3(2) other than those specifically mentioned in paragraph (2)(a).

[End of Notes]

[Article 3(2)(a), continued]

(vi) a celebrity or a well-known fictional character.

(b) [*Definition of "Dilution"*] For the purposes of these Model Provisions, "dilution of goodwill or reputation" means the lessening of the distinctive character or advertising value of a trademark, trade name or other business identifier, the appearance of a product or the presentation of products or services or of a celebrity or well-known fictional character.

[End of Article]

Notes on Article 4

4.01 *General.* Article 4 is based on Article 10bis(3)3 of the Paris Convention. Misleading and, in particular, misleading advertising may well be the most prevalent form of unfair competition and may be generally defined as creating a false impression of one's own products or services or of one's own enterprise. However, misleading statements may also appear in connection with another's enterprise, although protection against such statements can usually be found in Article 5 on discrediting allegations. Such acts may also be committed by a third party who misleads in order to favor one party, for example a magazine that gives a misleading impression of a product in a way that would benefit competitors of the manufacturer of that product. Misleading acts are primarily targeted at consumers and not directly against competitors; they may cause consumers to take decisions prejudicial to themselves when they acquire products or receive services.

4.02 *Paragraph (1).* Misleading acts may take the form of any statement, including misleading indications or allegations about an enterprise or its products or services, or about the industrial or commercial activities of an enterprise. The concept of misleading in paragraph (1) is not restricted to inherently false statements, or to statements that have actually given the customer a false impression. It is sufficient (as under Article 10bis(3)3 of the Paris Convention) for the statement in question to be liable to have a misleading effect. Even a statement that is literally correct can be deceptive if, for example, it gives the misleading impression that the advertised fact is something out of the ordinary. The omission of information may also be potentially misleading. On the other hand, obvious exaggerations (even if literally inaccurate) should not be considered deceptive where they are easily recognizable as "sales talk."

[Notes continue on page 32]

Article 4***Misleading the Public***

(1) [*General Principle*] Any act or practice, in the course of industrial or commercial activities, that misleads, or is likely to mislead, the public with respect to an enterprise or its activities, in particular, the products or services offered by such enterprise, shall constitute an act of unfair competition.

[Notes on Article 4(1), continued]

4.03 Misleading statements may include facts concerning persons acting on behalf of an enterprise or to its assets, credit rating, sponsorship, affiliation or business connections. Wrongful use of a business identifier may also be misleading. Other examples are unfounded claims of intellectual property protection, such as references to non-existing patents, or to a diploma, medal or prize that has not been received, and incorrect information concerning the enterprise's work for charity or environmental protection.

4.04 The manner in which misleading statements are made is irrelevant. All methods of communication—written, oral or even symbolic, for example gestures—have to be taken into account. Communication may be in the form of trademarks, labels, brochures, radio commercials, television publicity spots, posters and so on.

4.05 To be considered an act of unfair competition, the misleading act need not be made in bad faith, since even unintentional deception in the course of industrial or commercial activities has to be prohibited in the interest of both consumers and competitors.

4.06 The indication or allegation must be capable of creating some sort of definite impression that can be shown to be true or untrue. Therefore unobjective or suggestive advertising, which does no more than create vague positive feelings about a product, should generally be considered outside the definition of misleading.

4.07 *Paragraph (2)* contains examples of misleading practices. Misleading is mainly done in the advertising or promotion of products or services. However, it may also occur between contracting parties or in dealings with subcontractors or suppliers, for example concerning information about business plans for promotional campaigns or exhibitions, on guarantees, resources or the ability to deliver.

[Notes continue on page 34]

[Article 4, continued]

(2) [*Examples of Misleading*] Misleading may arise out of advertising or promotion and may, in particular, occur with respect to

[Notes on Article 4(2), continued]

4.08 *Paragraph (2)(i)*. Misleading statements concerning the manufacturing process of a product may relate to the safety of the product, the configuration or assembly of its components or other technical details.

4.09 *Paragraph (2)(ii)*. A typical case of deception of consumers involves statements about the suitability of a product or service for a particular purpose. The expectations of consumers are often not fulfilled because of misleading information, especially insufficient or missing information about the product or service or about the use or results to be expected from it, such as information on a lock being “pickproof” when it can be opened without damage by keys other than the original or a duplicate key, or information on a software package being compatible with a particular computer when that is not the case. Misleading information in connection with services such as education may consist in misrepresentation of the opportunities available to graduates.

[Notes continue on page 36]

[Article 4(2), continued]

- (i) the manufacturing process of a product;**

- (ii) the suitability of a product or service for a particular purpose;**

[Notes on Article 4(2), continued]

4.10 *Paragraph (2)(iii)*. Misleading advertising concerning quality may relate to the durability of a product or the quality of its manufacturing process, and also to the particular quality of the components used in it or, for example regarding their flexibility or resistance to shock, water or heat. Misleading statements may also be made concerning the ingredients used in a product such as a food, or the way in which the product is produced; for example, the manufacturer may misleadingly indicate that the product is particularly healthy in relation to a certain disease, or that it is the result of an environmentally-friendly process or is recyclable for the greater benefit of the environment. Other misleading statements may concern the exact quantity or weight of the advertised product or the relative quantities of the ingredients of which it is made. Information on the know-how and management skills involved in providing a specific service may also be misleading. Statements in respect of “other characteristics” may, for example, suggest that the product is original or new while in fact it is deteriorated, altered, used or secondhand, or they may relate to the style of the product or the model. Other misleading acts may involve information about specifications, the date of manufacture or the results of tests or checks carried out on the product or service, or about danger, or absence of danger, to human and animal health.

[Notes continue on page 38]

[Article 4(2), continued]

(iii) the quality or quantity or other characteristics of products or services;

[Notes on Article 4(2), continued]

4.11 *Paragraph (2)(iv)*. Reference to the geographical origin of a product or service may include any name, designation, sign or other indication that refers to a given country or to a place located in it and conveys the impression that the product bearing the indication or the service originates in that country or place. The use of false or misleading indications of source would fall under this heading. Geographical indications and appellations of origin are special kinds of indication of source. A geographical indication—according to Article 22.1 of the TRIPS Agreement—is an indication that identifies a good as originating in the territory of a Member (of the WTO), or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin. An appellation of origin—according to Article 2(1) of the Lisbon Agreement (1958) for the Protection of Appellations of Origin and their International Registration—is the geographical name of a country, region, or locality, which serves to designate a product originating therein, the quality and characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors. Geographical indications and appellations of origin may be protected by special laws. Protection against unfair competition is available as well as protection under those special laws, and is equally applicable to those indications of source that do not qualify as geographical indications or appellations of origin.

4.12 *Paragraph (2)(v)*. A condition of a sale whereby, for example, the purchaser must bring in new customers (known as “pyramid” or “snowball” sales) may have the effect of misleading as to the real implications of the purchase. An advertisement that fails to specify that only a limited quantity of the advertised product may be purchased per person may also be misleading. The same applies to incomplete or incorrect statements in a contract, for example concerning payment, the customer’s right to cancel or denounce the contract or its duration.

[Notes continue on page 40]

[Article 4(2), continued]

(iv) the geographical origin of products or services;

(v) the conditions on which products or services are offered or provided;

[Notes on Article 4(2), continued]

4.13 *Paragraph (2)(vi)*. Price is one of the most decisive factors when products or services are purchased, and misleading often occurs in information on the price or the manner in which the price is calculated. For example, advertising as a special offer a price that has been the normal price for some time is misleading.

[End of Notes]

[Article 4(2), continued]

(vi) the price of products or services or the manner in which it is calculated.

[End of Article]

Notes on Article 5

5.01 *Paragraph (1)* is based on Article 10bis(3)2 of the Paris Convention and concerns false allegations in the course of industrial or commercial activities that discredit or are likely to discredit. Like misleading, discrediting aims to influence customers' decisions by conveying certain kinds of information. Unlike misleading, however, this is not done by making false or deceptive statements about one's own products or services, but rather by conveying false information on another enterprise or its products, services or industrial or commercial activities.

5.02 Not only false allegations but also unjustifiable allegations may have a discrediting effect. They are not strictly untrue of a competitor, but may under certain circumstances be considered unfair competition if the "attack" is exaggerated, or if the words used are disparaging, for example in cases of comparative advertising (see also Note 3.01 above). The same applies to true but incomplete statements, which may have a similar effect.

5.03 A false or unjustifiable allegation need not actually have discredited, nor is bad faith required. Effective protection against discrediting is independent of any proof of actual or intended damage or of the way in which the discrediting allegations are made.

5.04 False allegations about the activities of a competitor, or his products or services, typically convey untrue facts. Such allegations may appear in comparative advertising, and especially in the promotion of one's own products; it is claimed that the competitor's products are not "safe," that they do not possess the properties required of such products, either because they do not conform to certain technical specifications or because they are not compatible with other products, or that their price is higher than it really is. False allegations may also relate to facts concerning another enterprise, such as its assets, credit rating and so on (see Note 4.03 above).

[Notes continue on page 44]

Article 5***Discrediting Another's Enterprise or Its Activities***

(1) [*General Principle*] Any false or unjustifiable allegation, in the course of industrial or commercial activities, that discredits, or is likely to discredit, another's enterprise or its activities, in particular, the products or services offered by such enterprise, shall constitute an act of unfair competition.

[Notes on Article 5(1), continued]

5.05 Frequently the person or company attacked is a competitor, or at least some sort of competitive relationship exists between the parties involved. However, not only competitors but also, for example, consumer associations or the media may be acting in a manner contrary to the principles of fair competition. If they make false or unjustifiable allegations about an enterprise's products, services or business activities, actions claiming discrediting should be available. However, if protection against unfair competition is to be extended to allegations made by either the media or consumer associations, the extent to which the country exempts such organizations from liability for allegations made by them must be taken into account; the wording of paragraph (1) does not confine its scope to "a competitor," as in Article 10*bis*(3)2 of the Paris Convention (see also Note 1.06 above).

5.06 *Paragraph (2)* contains examples of discrediting which are the same as the examples in items (i) to (iii), (v) and (vi) of Article 4(2). As with misleading, discrediting mainly arises in connection with advertising or sales promotion, but may also occur in the course of industrial or commercial activities, for example in relations with subcontractors or suppliers.

5.07 Discrediting allegations will typically relate to the same kinds of feature as are mentioned in connection with misleading in the Notes on Article 4 (2)(i) to (iii), (v) and (vi), such as safety and health, the originality or style of a product or what may be expected from it. Other discrediting allegations may suggest that the price of a product is exorbitant or that its sale is subject to certain conditions (as with "pyramid" or "snowball" sales). Unlike misleading allegations, however, which are typically made about one's own products or services or other matters (see Notes 4.01 and 5.01 above), discrediting allegations are made about the products or services of a competitor or his industrial or commercial activities.

[End of Notes]

[Article 5, continued]

(2) [Examples of Discrediting] Discrediting may arise out of advertising or promotion and may, in particular, occur with respect to

- (i) the manufacturing process of a product;**
- (ii) the suitability of a product or service for a particular purpose;**
- (iii) the quality or quantity or other characteristics of products or services;**
- (iv) the conditions on which products or services are offered or provided;**
- (v) the price of products or services or the manner in which it is calculated.**

[End of Article]

Notes on Article 6

6.01 *General.* Article 6 is based on Article 39 of the TRIPS Agreement. The use of the expression “secret information” in Article 6 instead of the “undisclosed information” of Article 39 of the TRIPS Agreement does not imply any change in substance, but serves to indicate that the rightful holder of the information must take certain measures or must behave in a certain way to keep the information unknown to third parties as required under the TRIPS Agreement. If desired, the term “secret information” may be replaced by “undisclosed information” throughout the Article without any change of meaning or scope.

6.02 *Paragraph (1).* The prohibition of disclosure, acquisition or use of secret information without the consent of the rightful holder applies to all persons (“others”). Persons likely to have knowledge of secret information are typically those having special relations with the rightful holder, such as present or former employees, partners, members of the board of directors and other such persons. Independent contractors, experts, lawyers, customers or any suppliers of goods or services to the enterprise may also have such knowledge.

6.03 The “rightful holder” of secret information means the natural or legal person who is lawfully in control of the information (see Article 39.2 of the TRIPS Agreement).

6.04 As soon as valuable secret information is disclosed to the public without the consent of the rightful holder, the latter risks losing the economic value of that information, including both its licensing value and its competition value. Disclosure to the public may occur through publication, for example in the media or at exhibitions. It may also consist in communication of the information to another person who, while keeping it secret, would take advantage of it himself without the rightful holder’s consent. The communication need not be made in exchange for financial or other advantages received.

Article 6

Unfair Competition in Respect of Secret Information

(1) [*General Principle*] Any act or practice, in the course of industrial or commercial activities, that results in the disclosure, acquisition or use by others of secret information without the consent of the person lawfully in control of that information (hereinafter referred to as “the rightful holder”) and in a manner contrary to honest commercial practices shall constitute an act of unfair competition.

[Notes on Article 6(1), continued]

6.05 Competitive strength usually depends on innovative techniques and accompanying know-how in the industrial and commercial fields. If, therefore, the rightful holder of the secret information has taken appropriate measures to preserve the secrecy of the information, its unauthorized “acquisition” by others should be regarded as an act of unfair competition. However, the acquisition by employees of confidential information concerning the commercial or industrial activities of their employer may be necessary for the performance of their duties. Such acquisition is not covered by paragraph (1) in so far as it is authorized by the employer. The acquisition of secret information by a third party is covered by paragraph (2)(v).

6.06 Secret information is typically “used” by exploitation, for example in the production of the enterprise of the person who has acquired it. It can also be used to support the enterprise’s manufacturing or trading activities in other ways.

6.07 It follows from the nature of the secret information that lawful disclosure, acquisition or use by others can only take place with the consent of the rightful holder. It is the rightful holder who decides that the information should be considered secret by taking reasonable steps to keep it so (see paragraph (3)(iii) and Note 6.20 below). The requirement that such information may only be disclosed, acquired or used with the consent of the rightful holder may emerge directly from a contract or oral agreement, for example between the rightful holder and his employee, or between the rightful holder and a supplier involved in a specific project. It may also emerge indirectly from the circumstances, namely from the steps taken by the rightful holder to keep the information secret so that others may be aware of its confidential nature.

[Notes continue on page 50]

[Notes on Article 6(1), continued]

6.08 Former employees generally have the right to use and exploit, for the purpose of earning their living, any skills, experience and knowledge that they may have acquired in the course of previous employment. Admittedly, the borderline between the legitimate use of skills, knowledge and experience acquired during employment and the unfair disclosure or use of the former employer's secret information is often difficult to draw, although employment contracts may provide for special arrangements. However, in cases where the conduct of the employee involves breach of contract, breach of confidentiality obligations, theft, embezzlement, industrial espionage or conspiracy with a competitor, his disclosure or use of information is clearly unlawful.

6.09 The disclosure or use of secret information by a person who has acquired it in a legitimate business transaction with the rightful holder cannot be regarded as an act of unfair competition if the disclosure or use is made without violation of the contract (for example, if the contract is silent on the matter). Normally, however, if the disclosure or use has been made in good faith, the rightful holder has clearly taken insufficient measures to keep the information secret (see paragraph (3)(iii)), and cannot therefore claim an act of unfair competition.

6.10 *Paragraph (2)* gives examples of cases in which the disclosure, acquisition or use of secret information is liable to occur. Those examples correspond to footnote 10 to Article 39.2 of the TRIPS Agreement.

[Notes continue on page 52]

[Article 6, continued]

(2) [*Examples of Unfair Competition in Respect of Secret Information*] Disclosure, acquisition or use of secret information by others without the consent of the rightful holder may, in particular, result from

[Notes on Article 6(2), continued]

6.11 *Paragraph (2)(i)*. Industrial or commercial espionage is typically a deliberate attempt to appropriate another's secret information. Espionage may be carried out by forming a relationship with the rightful holder with the fraudulent intention of inducing the latter to communicate the secret information, for example by obtaining employment or by having an associate hired as an employee of the rightful holder. It may also be carried out by means of listening devices, by gaining access to a plant with a view to discovering the secret information and taking photographs and by other means. And it may occur through unlawfully remote access to computer files and databases. The fact that espionage is usually a criminal offense does not mean that the same acts cannot be also considered unfair competition and subject to civil remedies.

6.12 *Paragraph (2)(ii)*. Contractual obligations in connection with secret information may either be specified in an oral or written contract, typically between an employer and an employee, or, in the absence of an express contract, may be inferred from an employment relationship. Such obligations may similarly exist between business partners or between an employer and a contractor.

6.13 *Paragraph (2)(iii)* deals with the situation where there is no contract for the protection of secret information, and where the secrecy depends on a confidential relationship between individuals. Such a relationship may exist between partners; it may also arise out of the relations between an employer and his employee. If a former employee can be regarded as a competitor of his former employer after he has set up his own company in the same sector as the former employer, a breach of confidence on the part of the former employee should be considered an act of unfair competition.

[Notes continue on page 54]

[Article 6(2), continued]

- (i) industrial or commercial espionage;**

- (ii) breach of contract;**

- (iii) breach of confidence;**

[Notes on Article 6(2), continued]

6.14 *Paragraph (2)(iv)*. Disclosure, acquisition or use of secret information may clearly be of interest to people other than those who have access to it. In particular, a competitor may be inclined to induce an employee or former employee of the rightful holder to disclose the information, for example by breaching his contractual obligations towards the rightful holder. Such inducement is often combined with an act of improperly enticing the employee away, which may also be considered an act of unfair competition.

6.15 *Paragraph (2)(v)* deals with the case of acquisition by a third party who has not been directly involved in the acts specified in subparagraphs (i) to (iv). The third party may, as in the case of inducement provided for in subparagraph (iv), have a particular interest in the information if, for example, he is a competitor of the rightful holder. Only if the competitor did not know that the acquisition involved an act referred to in subparagraphs (i) to (iv) should his act not be regarded as an act of unfair competition.

6.16 *Paragraph (3)*. The definition of “secret information” in paragraph (3) is identical to the definition of “undisclosed information” in Article 39.2 of the TRIPS Agreement (except, of course, the introductory phrase). Secret information may consist of manufacturing or commercial secrets; it may include production methods, chemical formulae, drawings, prototypes, sales methods, distribution methods, contract forms, business schedules, details of price agreements, consumer profiles, advertising strategies, lists of suppliers or clients, computer software and databases.

6.17 The secret information may constitute a patentable invention, but its patentability—especially its novelty and inventive step (non-obviousness) in a patent law sense—is not a prerequisite of protection.

[Notes continue on page 56]

[Article 6(2), continued]

(iv) inducement to commit any of the acts referred to in items (i) to (iii);

(v) acquisition of secret information by a third party who knew, or was grossly negligent in failing to know, that an act referred to in items (i) to (iv) was involved in the acquisition.

(3) [*Definition of Secret Information*] For the purposes of this Article, information shall be considered “secret information” if

[Notes on Article 6(3), continued]

6.18 *Paragraph (3)(i)*. Absolute secrecy is not required. The information should be considered secret as long as it is not generally known or readily accessible to persons within the circles that normally deal with that kind of information.

6.19 *Paragraph (3)(ii)*. To be protectable, the secret information must have a certain commercial value because of its secrecy.

6.20 *Paragraph (3)(iii)*. In determining whether reasonable steps have been taken to keep the information secret, account should be taken of the amount of effort and money spent by the rightful holder on developing the secret information, the value of that information to him and to his competitors, the extent of the measures taken by the rightful holder to keep the information secret and the ease or difficulty with which it could be lawfully acquired by others. Moreover, the secret information has to be identifiable, for example in documents or through storage in a database. Although contractual obligations are not necessary, the rightful holder must have shown his intention to have the information treated as secret.

6.21 *Paragraph (4)* corresponds to Article 39.3 of the TRIPS Agreement. The provision in the TRIPS Agreement is basically addressed to governments for the protection against unfair commercial use of undisclosed information submitted for the marketing approval of pharmaceutical or agricultural products. Paragraph (4), however, is addressed to enterprises that commit certain acts after having improperly obtained such information from the authority that had received it from an applicant for marketing approval.

[Notes continue on page 58]

[Article 6(3), continued]

(i) it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;

(ii) it has commercial value because it is secret; and

(iii) it has been subject to reasonable steps under the circumstances by the rightful holder to keep it secret.

(4) [*Use or Disclosure of Secret Information Submitted for Procedure of Approval of Marketing*] Any act or practice, in the course of industrial or commercial activities, shall be considered an act of unfair competition if it consists or results in

[Notes on Article 6(4), continued]

6.22 *Paragraph (4)(i)* only relates to undisclosed test or other data that have been submitted to an authority, such as a government or a governmental agency, which is competent for the approval of the marketing of pharmaceutical or agricultural chemical products. In this connection, only chemical products that utilize “new chemical entities,” which means new chemical compounds, are to be taken into account, as provided in the TRIPS Agreement. However, since, as a matter of principle, information need not be “new” to be protectable, but need only have commercial value because of its secret nature (see Note 6.19 above), the question whether data concerning pharmaceutical or agricultural chemical products should be protected—regardless of whether or not they utilize new chemical entities—should be considered by the legislator.

6.23 The manner in which the information is obtained is immaterial to the act or practice being considered an act of unfair competition. It may be obtained from the authority either directly or indirectly. The unfairness of the act arises from the fact that the enterprise has not developed the test or other data itself and has thus avoided the expense of producing them.

6.24 To be considered protectable against unauthorized use or disclosure, the test or other data must be the result of considerable effort in relation to test or other data already available in the pharmaceutical and agricultural chemical field concerned. “Effort” includes investment in such things as staff time and equipment which entails financial expenditure.

6.25 “Unfair commercial use” means for example use of the data in question to produce the same or similar products. Such use would not normally be made by the authority in question but by third parties; it could also take the form of sale of the data to others.

[Notes continue on page 60]

[Article 6(4), continued]

(i) an unfair commercial use of secret test or other data, the origination of which involves considerable effort and which have been submitted to a competent authority for the purposes of obtaining approval of the marketing of pharmaceutical or agricultural chemical products which utilize new chemical entities, or

[Notes on Article 6(4), continued]

6.26 *Paragraph (4)(ii)*. “Disclosure” of the test or other data referred to in paragraph (4)(i) may have the same detrimental effects on the enterprise applying for marketing approval as any unauthorized use of the information. The act of disclosure of such information is therefore considered an act of unfair competition. The unauthorized disclosure may consist in publishing the information or in passing it on to others, for example for research purposes. Such disclosure should be considered an act of unfair competition regardless of whether the person who has disclosed the information receives any financial remuneration for the disclosure.

6.27 Like Article 39.3 of the TRIPS Agreement, paragraph (4)(ii) provides for two exceptions where disclosure of test or other data as mentioned in subparagraph (i) is not considered an act of unfair competition. The exceptions would typically apply to disclosure by a public authority. The first exception applies where the disclosure is necessary to protect the public, notably for the purposes of health protection. The second applies where steps have already been taken to ensure that the data are protected against unfair commercial use. For example, where the data submitted for the purposes of obtaining marketing approval are the subject of a patent application and that application is published in the course of the patent procedure, no harm is done by the same data being disclosed by the authority competent for marketing approval if they enjoy, as the subject matter of the application, provisional protection pending the grant of a patent.

[End of Notes]

[Article 6(4), continued]

(ii) the disclosure of such data, except where necessary to protect the public, or unless steps are taken to ensure that the data are protected against unfair commercial use.

[End of Article]

**MODEL PROVISIONS ON
PROTECTION AGAINST UNFAIR COMPETITION**

Article 1

General Principles

(1) [*General Provision*] (a) In addition to the acts and practices referred to in Articles 2 to 6, any act or practice, in the course of industrial or commercial activities, that is contrary to honest practices shall constitute an act of unfair competition.

(b) Any natural person or legal entity damaged or likely to be damaged by an act of unfair competition shall be entitled to the remedies referred to in

(2) [*Relationship Between Articles 1 to 6 and Provisions Protecting Inventions, Industrial Designs, Trademarks, Literary and Artistic Works and Other Intellectual Property Subject Matter*] Articles 1 to 6 shall apply independently of, and in addition to, any legislative provisions protecting inventions, industrial designs, trademarks,* literary and artistic works and other intellectual property subject matter.

* For the purposes of these Model Provisions, the term “trademark” covers marks relating to goods, marks relating to services and marks relating to both goods and services.

Article 2

Causing Confusion with Respect to Another's Enterprise or Its Activities

(1) [General Principle] Any act or practice, in the course of industrial or commercial activities, that causes, or is likely to cause, confusion with respect to another's enterprise or its activities, in particular, the products or services offered by such enterprise, shall constitute an act of unfair competition.

(2) [Examples of Confusion] Confusion may, in particular, be caused with respect to

- (i) a trademark, whether registered or not;**
- (ii) a trade name;**
- (iii) a business identifier other than a trademark or trade name;**
- (iv) the appearance of a product;**
- (v) the presentation of products or services;**
- (vi) a celebrity or a well-known fictional character.**

Article 3

Damaging Another's Goodwill or Reputation

(1) [General Principle] Any act or practice, in the course of industrial or commercial activities, that damages, or is likely to damage, the goodwill or reputation of another's enterprise shall constitute an act of unfair competition, regardless of whether such act or practice causes confusion.

(2) [Examples of Damaging Goodwill or Reputation] (a) Damaging another's goodwill or reputation may, in particular, result from the dilution of the goodwill or reputation attached to

- (i)** a trademark, whether registered or not;
- (ii)** a trade name;
- (iii)** a business identifier other than a trademark or a trade name;
- (iv)** the appearance of a product;
- (v)** the presentation of products or services;
- (vi)** a celebrity or a well-known fictional character.

(b) [Definition of "Dilution"] For the purposes of these Model Provisions, "dilution of goodwill or reputation" means the lessening of the distinctive character or advertising value of a trademark, trade name or other business identifier, the appearance of a product or the presentation of products or services or of a celebrity or well-known fictional character.

Article 4

Misleading the Public

(1) [General Principle] Any act or practice, in the course of industrial or commercial activities, that misleads, or is likely to mislead, the public with respect to an enterprise or its activities, in particular, the products or services offered by such enterprise, shall constitute an act of unfair competition.

(2) [Examples of Misleading] Misleading may arise out of advertising or promotion and may, in particular, occur with respect to

- (i) the manufacturing process of a product;**
- (ii) the suitability of a product or service for a particular purpose;**
- (iii) the quality or quantity or other characteristics of products or services;**
- (iv) the geographical origin of products or services;**
- (v) the conditions on which products or services are offered or provided;**
- (vi) the price of products or services or the manner in which it is calculated.**

Article 5

Discrediting Another's Enterprise or Its Activities

(1) [General Principle] Any false or unjustifiable allegation, in the course of industrial or commercial activities, that discredits, or is likely to discredit, another's enterprise or its activities, in particular, the products or services offered by such enterprise, shall constitute an act of unfair competition.

(2) [Examples of Discrediting] Discrediting may arise out of advertising or promotion and may, in particular, occur with respect to

- (i) the manufacturing process of a product;**
- (ii) the suitability of a product or service for a particular purpose;**
- (iii) the quality or quantity or other characteristics of products or services;**
- (iv) the conditions on which products or services are offered or provided;**
- (v) the price of products or services or the manner in which it is calculated.**

Article 6

Unfair Competition in Respect of Secret Information

(1) [*General Principle*] Any act or practice, in the course of industrial or commercial activities, that results in the disclosure, acquisition or use by others of secret information without the consent of the person lawfully in control of that information (hereinafter referred to as “the rightful holder”) and in a manner contrary to honest commercial practices shall constitute an act of unfair competition.

(2) [*Examples of Unfair Competition in Respect of Secret Information*] Disclosure, acquisition or use of secret information by others without the consent of the rightful holder may, in particular, result from

- (i) industrial or commercial espionage;
- (ii) breach of contract;
- (iii) breach of confidence;
- (iv) inducement to commit any of the acts referred to in items (i) to (iii);
- (v) acquisition of secret information by a third party who knew, or was grossly negligent in failing to know, that an act referred to in items (i) to (iv) was involved in the acquisition.

(3) [*Definition of Secret Information*] For the purposes of this Article, information shall be considered “secret information” if

- (i) it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;

(ii) it has commercial value because it is secret; and

(iii) it has been subject to reasonable steps under the circumstances by the rightful holder to keep it secret.

(4) [*Use or Disclosure of Secret Information Submitted for Procedure of Approval of Marketing*] Any act or practice, in the course of industrial or commercial activities, shall be considered an act of unfair competition if it consists or results in

(i) an unfair commercial use of secret test or other data, the origination of which involves considerable effort and which have been submitted to a competent authority for the purposes of obtaining approval of the marketing of pharmaceutical or agricultural chemical products which utilize new chemical entities, or

(ii) the disclosure of such data, except where necessary to protect the public, or unless steps are taken to ensure that the data are protected against unfair commercial use.
