CIVIL PROTECTION OF TRADE NAMES

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Abstract:
The trade name enjoys civil protection under the action of unfair competition, as the usurpation of the trade name is undoubtedly unfair competition with the resulting confusion, the distortion of public and unjustified use of the name of the accused does not rule out the charge of unfair competition for the same offence because the civil offence is broader than the criminal offence.
All this is why we will try to address the concept and legal basis of unfair competition in the field of trade names and then address the conditions and implications that must be respected to such action.
Keywords*: trade name, civil protection, unfair competition action.*

INTRODUCTION:

The protection of a commercial enterprise against unfair competition claims is broader in scope than the criminal protection provided by law to a trade name as it is considered a right of a commercial trader. The owner of a trade name may file an unfair competition claim and demand compensation based on the conditions of liability if the elements of fault, damage, and causation are present, and it does not matter whether the trade name has been registered or published. If the owner of a trade name has begun using it, and it is attacked by an unfair act of competition, he may file a civil indemnity lawsuit against the offender, even if he has not registered or trademarked his trade name. (El-Qalyoubi, 2013)
Unfair competition claims are often considered among the provisions related to the commercial establishment because they aim to protect the rights of the shop owner from unfair acts committed by competitors to attract customers from other traders. As long as an unfair competition claim is a means for a trader to prevent other traders from attracting his customers using unlawful means, its provisions are often included in those related to the commercial establishment.
However, Algerian commercial law did not explicitly regulate such a claim within the provisions concerning the commercial establishment[i]. Instead, it implicitly referred to it in texts concerning the moral elements involved in its formation. Sometimes, relief for a claim might require compensation with a published judgment, while other times, it may necessitate the destruction of infringing materials.
With the issuance of Law No. 04-02 on the rules applied to commercial practices, dated June 23, 2004, Algerian law prohibits all unfair commercial practices that contravene good and fair commercial practices, whereby a business acts to benefit itself at the expense of another or several other parties.
Furthermore, Article 43 of Algerian Law No. 16-01, which relates to the revision of the Algerian constitution in 1996, stipulates that monopolies and unfair competition are banned.
It should be noted that the theory of unfair competition was established by French jurisprudence based on Articles 1382 and 1383 of the French Civil Code. (Izorche, p. 1996)
Its system was not founded on a specific economic model as it did not aim to protect a particular group of economists.
Interestingly, the Algerian legislature used the term "dishonest" instead of "unauthorized" in the fourth chapter of the third section concerned with the honesty of commercial practices. The legislature differentiated between illegitimate, fraudulent, arbitrary contractual practices and those that are not fair. (Marie-Anne Frison Roche, 2006)

Separately, some regulations have established special protection for some elements of the commercial establishment, such as intellectual property rights, including patents, fees, industrial designs, trademarks, and trade names, as well as copyright and related rights. Moreover, special protection for the commercial establishment has been provided through lawsuits known as the unfair competition or unfair rivalry claim. These lawsuits aim to protect the commercial establishment from any unfair competition practices that undermine its safety, value, and deprive it of its customers.

The Algerian legislature did not protect the commercial enterprise as an independent financial entity in itself, but rather ensured its protection through various provisions that protect some intangible elements, subjecting them to special laws, such as Order 03-06 regarding trademarks dated 19/07/2003, Order 66-86 regarding fees and industrial designs dated 28/04/1966, Order 03-07 regarding patents dated 23/07/2003, in addition to Order 03-05 related to copyright and neighboring rights.

From analyzing these legal provisions, it can be observed that they only apply to the intellectual property elements of the enterprise, whether in the industrial or literary aspects. Other obligatory and non-obligatory intangible elements have not been granted special provisions for their protection in case of infringement. Thus, they are subject to the protection provided for in the civil law based on Article 124 related to tort liability, the commercial law, civil and administrative procedures, the law of applicable rules on commercial practices, competition law, criminal law, and others.

If a claim for unfair competition aims to protect the rights of the owner of the commercial enterprise and the intangible elements included within it, the provisions related to the commercial enterprise would apply.

However, Algerian commercial law does not contain provisions on unfair competition, although the legislature has provided for it in Law 04-02 related to rules applied to commercial practices.

Unfair competition actions that are not addressed by special provisions rely on the provisions of tort liability stated in Article 124 of the civil law.

Based on these provisions, the definition and conditions of an unfair competition claim will be discussed.

Section I: Provisions of the Unfair Competition Lawsuit

Algerian legislation, as most comparative legislations, does not explicitly regulate the Unfair Competition lawsuit through specific provisions but leaves it to judicial discretion. (Taha, 2003)

However, the jurisprudence differs in ascribing this lawsuit; some consider it based on general rules of tort liability, while others assign it to special rules.

A) The Conceptual Dimension of the Lawsuit

Unlawful competition is defined by some legal scholars as "the penalty imposed by law for any reprehensible behavior in the field of competition by others. (Al-Boustani, 2011)" Others define it as "the means used by merchants to protect the elements of their store, which, as a whole, contribute to the formation of the customer base and help retain them." (Amar, 2015-2016)

Meanwhile, Colonel Roubier believes that unlawful competition is "a claim for punishing the violation of the duty to use non-contravening customs." (Al-Saffar, 2007)

Some define it as "a legal claim aimed at stopping and/or reforming unlawful competition, which is not organized by law but created through judicial interpretation." (Blaise, 1999)

While there are differences in perspective among these legal opinions on the nature of unlawful competition, they all agree on the fundamental issue of the illegitimacy of actions that violate customary practices, commercial ethics, and fairness in transactions, with the intent of confusing and misleading customers.

In summary, the courts and legal scholars consider any act committed by a merchant with ill intention for the purpose of diverting or attempting to divert customers, undermining the interests of competitors, through the use of illegal means, customs that run counter to the law, and unethical or unprofessional conduct, to constitute unfair competition.

It should be noted that the French Court of Cassation has taken a modern approach in its interpretation of the concept of unlawful competition over the past two decades by promoting commercial and economic freedom while ensuring that consumers understand and perceive the product. In principle, the adoption of a promotional idea by one competitor does not represent an act of unfair competition unless there is a likelihood of confusion among the public. (Rigal, 2010-2011)

The principle of freedom of competition should not be absolute, as it is necessary at least to limit competition by the freedom of others. Trade is an economic activity with a social function that requires protecting competition and ensuring its freedom to continue its beneficial role, without this freedom turning into harm and damage to trade. Allowed practices include projects striving to achieve quality and gain customers as a result, without resorting to methods and practices of illegitimately displacing competitors. (Salama, 2015)

Unfair competition can be broadly defined as any private lawsuit that is not legally regulated, except based on general standards, raised against any economic agent employing means that are contrary to commercial customs and ethical standards of integrity, honesty, and professionalism, aiming to compensate for the damage resulting from the illegitimate diversion of customers, in addition to stopping such illegitimate actions and preventing their recurrence in the future. It is a broad concept of compensation and remediation and is an economic control tool aimed at protecting the right to competition due to its ability to keep pace with modern developments in economic activities, achieving the idea of the general economic system. (Beriri, 2013)

B) the legal basis for the

Due to the absence of a specific text regarding the legal basis for the unfair competition lawsuit, Arab jurisprudence has followed the French jurisprudence in this regard, (Similarly, 2012) by establishing the unfair competition lawsuit based on the provisions of the civil law of each country, especially regarding the general principles of tort liability and contractual elements. The elements of the unfair competition lawsuit can be achieved by the act of wrongful harm, even if it is unintentional, and whoever causes it is liable for compensation.

1- Traditional Trends in Establishing a Lawsuit

The majority of jurisprudence and the judiciary in France believe that an unjust competition lawsuit is nothing but the application of the concept of error committed by the defendant, arguing that an unjust competition lawsuit requires the same conditions as in cases of liability for negligence, including fault, damage, and causal relationship. French jurisprudence relied, when emphasizing the protection of the commercial establishment from unjust competition, on the general rules of liability for negligence and the necessity of the existence of an error, which was established as a principle by French judiciary through the text of Article 1240 of the Civil Code. The French Court of Cassation ruled: "That an unjust or unbecoming competition lawsuit can only be filed through Article 1283 (Article 1240 currently) of the French Civil Code and thereafter, which mainly requires the presence of an error committed by the defendant." (Abderrahman Qarman, 2016)

However, this theory was not free from criticism because it is not sufficient to justify an unjust competition lawsuit for the following reasons:

1- A negligence claim requires three conditions: fault, harm, and causal relationship between them, while an unjust competition lawsuit does not require the existence of harm but the possibility of its occurrence.

2- Negligence liability aims only to compensate for damages, unlike an unjust competition lawsuit, which is not only designed to compensate for damages, but is also preventive and governed by judges to stop trade disturbances and ensure the plaintiff against potential customer transitions.[ii]

3- Negligence liability aims to protect a specific interest, while an unjust competition lawsuit also aims to protect a public interest and the interest of professional circles. It is characterized by a moral and ethical nature, which has led some to liken it to a public lawsuit, which sets it apart from general rules.

As a result of the above-mentioned paragraph, some jurisprudence found that the theory of abuse of right in using the right is the basis for filing an unjust competition lawsuit, so that an unjust competition claim only occurs in cases of abuse of right by the defendant. Jurist Josserand confirms this idea, which he considers the founder of this theory, in his book "The Spirit of Rights and their Relativity," (Nasif, 2007) where he adopts it by saying: "In addition to acts that are not based on right, such as acts of imitation, we must understand and distinguish acts that are carried out arbitrarily in using the right of freedom of competition and those acts that have deviated from the normal path and taken an unusual path, through the idea of fraud and unjust spirit, and these acts constitute unjust competition."[iii]

But this opinion is not exempt from criticism on the grounds that a trader engaging in unfair competition activities generally intends to harm competition,[iv] and this intent may be present even in cases of legitimate competition. However, this cannot be applied to the theory of abuse of rights. (Zaamoum, 2003)

2. Modern Trends in Establishing a Lawsuit

The unique nature of the unfair competition lawsuit has made legal research into its foundation a necessity that requires logical justifications related to the nature of the person being attacked by these unfair acts, the place of the attack, its resulting effects, and the effectiveness of the protection provided against it.

Some believe that the unfair competition lawsuit is an economic lawsuit, as evidenced by the collective nature of the lawsuit, which points to a tendency to protect the interests of business owners, in addition to being based on the dishonorable acts and illegal practices of traders, without regard to the rights of others. (Aziz Al-Akili, 2009)

This view has been adopted by both Professor Antoine Pirovano and jurist Jaque Azéma, who believe that the unfair competition lawsuit is the legal means aimed at promoting professional ethics in the entire economic sphere. (Younes, sans année de publication)

However, attributing an economic character to the unfair competition lawsuit does not constitute a correct legal basis for this lawsuit, but rather it is closer to its quality from one perspective. On the other hand, the unfair competition lawsuit does not have to be of a collective nature, as it threatens the commercial, economic, or service interests, whether individually or collectively, and this entails that the goal is to protect the interests of individuals and groups in all activities from being attacked.

After it was proven that the aforementioned bases are insufficient, the perspective changed from the competitor responsible for the damage to the damaged competitor in order to facilitate his obtaining compensation. Therefore, the idea of proving misconduct as the basis for accountability must be surpassed, as the principles of protecting the right to competition are based on the principles of responsibility to the extent that they agree with its nature. Moreover, proving damage is not an essential condition for the responsibility of the competitor to arise, and the civil responsibility theory is based entirely on preventing intentional harm to others, contrary to competition which inherently involves intentionally causing damage to others in legitimate competition. The competitor is not responsible unless he goes beyond the reasonable use of competition freedom, which leads to the conclusion that the lawsuit to protect the right to competition is a special type of responsibility lawsuit. (Al-Khasawnah, 2015)

Some jurists believe that this claim goes beyond the scope of liability because it aims to compensate for damages and protect the right of ownership of the commercial enterprise,[v] considering that it also has a protective function. Therefore, this claim has a preventive purpose and is closer to claims of possession or entitlement that protect ownership of material wealth[3] than liability claims.

The juristic debate regarding the determination of the nature of the right protected by the claim of unfair competition is still ongoing, as the right to fair competition is inherently composed of proprietary and personal rights.

Regardless of this dispute, the judiciary considers the claim of unfair competition as a claim of liability for negligence, governed by special circumstances, as its purpose is considered a claim for

repair and compensation, as well as a claim for deterrence to avoid future damage that may arise. (Al-Khir, 2008)
Therefore, the claim of unfair competition can be considered a special type of liability claim, which differs in some of its provisions from liability claims concerning unlawful work. However, it is subject to general rules that govern the latter claim in all matters that do not conflict with the nature of the right it aims to protect. (Mahrez, sans année de publication)
It is clear from the foregoing that despite juristic and judicial differences in attempting to determine and regulate the legal basis of the claim of unfair competition, the provisions of liability for negligence remain the means for the affected competitor to compensate for the damages suffered by their person or products, (Al-Hamsi, 2010) while referring to law 04-02 regarding the penalties related to this claim. This makes the claim of unfair competition a special type of claim, as it aims not only to compensate the affected party but also to protect against future harm and to suppress fraud. This is the desire of the Algerian legislature to ensure the prosecution of all business practices that violate the ethics accepted in the commercial sector, which makes this claim tend towards criminal law.

Section II : Elements of Unfair Competition Claim

It is submitted that the unfair means employed by a competing trader to obtain the customers of others, in a way that does not conform to the principles of honesty, integrity and fair dealing in trade, constitute unlawful conduct that imposes liability on the trader to compensate the damage caused to others and refrain from continuing such conduct through a claim of unfair competition. The basis of this claim, as the prevailing view in jurisprudence and judiciary suggests, is tort liability, thus the conditions of unfair competition claim are the same as those of liability for unlawful conduct, namely, fault, harm, and causal relationship between them. However, before all of that, competition must exist between economic agents.

A) Existence of Competition between Disputing Parties

Initiating an unfair competition claim requires the existence of competition between economic agents in similar or identical trades. This means the occurrence of two activities of the same type in the same field and at the same time with the aim of connecting with customers to increase transactions on products. It is not necessary for these trades to be completely identical, (Mabrouk, 2011) but it is sufficient for them to be similar, (Naima, 2013) or even partly similar, in terms of goods and services directed to the target audience of customers. If this mutual flexibility between the activities is absent, then competition is also absent. (Mohamed, 2015)
The determination of the existence of competition and participation in the same market is left to the judge to assess in light of the facts before him. (Al-Arini, 1998)

b) Competitive Misconduct

The mistake is considered an essential element for establishing a claim of unfair competition. To understand the meaning of mistake in an unfair competition claim, there must be competition between two establishments or individuals engaged in the same type of industry or trade, whether in similar or slightly different types, such that one of them has an impact on the other's customers. The harmful actions must be related to trade and not for personal purposes, and the mistake must be committed in the context of competition.
Therefore, in the field of unfair competition, the mistake is committing acts that violate the law and customs, or using means that do not conform to the principles of honor, honesty, and integrity in transactions, if intended to cause confusion, i.e. open up the possibility of suspicion between two commercial establishments or between products, or create disturbance in either of them.
As malice is considered an intangible element, it has become difficult to prove and determine accurately. However, this principle enabled many wrongful acts to escape punishment, under the condition that the person responsible for them did not intentionally cause harm to the claimant. Thus, the intention element began to fade away. (Mahrez A. , 1980)
It can be seen from the above determination that the mistake element in the claim of unfair responsibility has a special character. Its specificity lies in the difference in legal standards

determined for the acts it constitutes, which form the basis of the claim. The opinion in jurisprudence and the judiciary has settled on the need to resort to professional customs followed in trade to determine the meaning of mistake in an unfair competition claim, which differ from civil customs used to determine the meaning of mistake in a liability claim for unlawful work.

c) Damage and Causal Relationship

A claim of unfair competition requires not only the mistake element but also damage to the claimant. There is no responsibility without damage. Damage is what is usually estimated for compensation in tort liability. (Slimane, 2015) Competitive damage is defined as "the loss suffered by the affected party due to the deprivation of the element of communication with customers resulting from unfair competition." (August, 2002)

The damage that is sought to be proven in this lawsuit is limited to the loss of customers or clients of the plaintiff's products or goods due to the defendant's use of unlawful methods, (Guyon, 2003) regardless of whether these customers were turned to products or goods of those who used these methods or to other traders and industrialists. (Eddine, 2000) Therefore, the damage in an unfair competition lawsuit is the harm caused to the competitive ability of the institution. Given the interests that an unfair competition lawsuit aims to protect, it has been decided to grant it some exceptions beyond the general rules, especially since this lawsuit has a preventive nature aimed at preventing damage as well as compensating for damage contrary to the unlawful work liability lawsuit which aims simply to compensate the affected. (Nadjia, 2014) Therefore, court rulings do not require the actual damage to be proven due to its difficulty, but rather it is inferred from the facts that could have caused harm to the plaintiff.

It is difficult to prove the relationship between the error and the damage suffered by the owner of the commercial store, such as causing chaos in the market or losing customers or tarnishing reputation or industrial or commercial fame. (Al-Fatlawi, sana anné de publication) It is difficult to prove the causality relationship between the two. However, there are cases where competitive acts are unintentionally causing harm to the plaintiff, so the purpose of this lawsuit is to remove the illegitimate work in the future. Hence, the unfair competition lawsuit differs from the civil liability lawsuit that aims to compensate for the damage, (Mohamed Abou Al-Atham Al-Nassour, 2012) and thus there is no need to prove the causal relationship in the lawsuit for possible affected.

Conclusion

It is clear that the trade name is one of the elements that are included in the assessment of the value of the commercial store, and encroaching it causes harm to the owner. Therefore, the owner has the right to file an unfair competition lawsuit against those who encroached on the trade name to claim compensation for the harm caused. Courts also have the right to take necessary measures to stop and remove the infringement, such as removing the encroached trade name from the facade of the commercial store and publishing in the newspapers about the infringement for raising awareness.

It is clear from the foregoing that the trade name is a right of industrial and commercial property, according to the Paris Convention for the Protection of Industrial and Commercial Property and the Intellectual Property Protection Agreement.

It is the name that attracts customers to a shop rather than another, due to the confidence in it. The trade name is considered as the name of the establishment or commercial origin, and it is an element of the intellectual property of the commercial shop, and it has a financial value that can be traded. The regulatory decrees of the commercial register have required every natural person who conducts or intends to conduct commercial activity, as well as every legal person who is a trader, formally or by subject, and based in Algeria, to register in the commercial register, and the registration requires the mention of the person's identity, nationality, eligibility, trade name, and commercial address. Once the trade name is registered, its ownership arises, and its use by others is prohibited within certain limits. The trade name appears to others by being displayed on the shop front.

In case of infringement, it is protected by the claim of unfair competition only. This protection cannot achieve the desired protection because it lacks the character of deterrence and

suppression. Therefore, the Algerian legislature must develop an independent law to protect the trade name and address, and specify the criminal liability of the offenders, accompanied by imprisonment or a fine, as has been done by the comparative Arab legislations.
The rule is to protect the trade name within the limits of the type of trade, namely the similar trade. (Al-Qurashi, 2011) Nevertheless, there is a new trend in jurisprudence and French justice to protect the trade name without restricting whether the trade is similar or not. In this regard, the French Court of Cassation ruled that the launch of the name "La couple," which may distinguish a famous café in Montparnasse neighborhood in Paris, on a building under construction that markets its units and is located in the same neighborhood, is considered a mistake that requires compensation.
The court may order the modification of the trade name as a precautionary measure or the addition of a statement to distinguish it from others, and the court may also order the publication of the verdict in one or more newspapers at the expense of the convicted party. (Idris, 2011) It may also order the removal of the trade name or impose preventive fines on the usurper or imitator of the trade name. The goal of these procedures is to prevent the repetition of such action in the future. The consensus in jurisprudence is that these measures have a preventive nature, and can be enforced even in cases where there is no harm.
Unfortunately, we all witness actions and attacks by some economic agents against their competitors, causing them harm. However, the victim does not dare to protect their commercial shop or protect the intellectual property elements included in it. They need to respond to such attacks by legal means, either due to ignorance about the law allowing him to use these means to protect his shop, or out of fear and avoidance of resorting to justice, unlike other countries where such claims have been widely used. This, of course, is due to the awareness of society of its rights, and its intolerance towards any infringement of these rights, as well as the ease of litigation procedures.

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