Ethiopian Law of Unfair Competition: A Critical Evaluation

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Abstract

What is unfair competition, and how does the Ethiopian legal system protect against it? This article aims at exploring Ethiopian unfair competition law with a view to analysing the concept of unfair competition, situations of unfair competition, remedies available to victims of unfair competition, and other issues arising thereof.

Why Unfair Competition Law?

It is a fundamental tenet of economic liberalism which, albeit an exceedingly broad doctrine, very roughly refers to "the view that the best economic order is a free market"[1], that competition is desirable and necessary. Underlying this is the belief that robust competition between commercial rivals keeps prices low, quality high, and provides overall economic efficiency. Competition law rests upon the premise that healthy competition is good both for traders[2] and for consumers. In other words,

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[1] Maryanne Cline HOROWITZ(ed.), **New Dictionary of the History Ideas**, Vol.3,Thomson Gale, New Haven, 2005, p. 1267

[2] In order to avoid verbosity, the term "traders" throughout the text of this article is deliberately used to include business organizations.

if traders compete on a level playing field, they will flourish, and consumers are more likely to pay lower prices, and get better quality and more choices.

The order contained in a free market was first recognized by Adam Smith. Smith, in his groundbreaking work *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776), discovered the unintended concurrence between individual pursuit of self-interest and public interest as the most remarkable feature of a competitive market economy.[3] In one of the most famous passages of all economics, he contended that notwithstanding the fact that every trader "intends only his own security, only his own gain, he is led by an invisible hand to promote an end which was no part of his intention. By pursuing his own interest he frequently promotes that of society more effectually than when he really intends to promote it."[4] Therefore, for him, an ideal market economy is one in which all goods and services are voluntarily exchanged for money at market prices. However, no economy, in the real world, actually conforms totally to the idealized world of the smoothly functioning invisible hand. Rather, every market economy experiences failures.[5] In particular, markets fail to provide an efficient allocation of resources in the presence of imperfect competition. To combat these conditions, most governments regulate business behavior by enacting competition laws whereby

[3] Paul A SAMUELSON and William D. NORDHAUS, **Economics**, 18th ed., Tata McGraw-Hill, New Delhi,2005, p.29

[4] Quoted in Ibid,p30

[5] Supra at n.3, p.35

they *inter alia* control the price of basic goods or utilities, prohibit anti-competitive actions such as price fixing and agreeing to divide up markets, and proscribe acts of unfair competition.

Robert Nelson has recognized that the virtues of the market mechanism are fully realized only when "there is a clear limit to self-interest." Elaborating on this proviso, he writes:

> The pursuit of self-interest should not exceed to various forms of opportunism, such as cheating, lying, and other types of deception, misrepresentation, and corruption within the marketplace...Francis Fukuyama comments that " the ability to cooperate socially is dependent on prior habits, traditions, and norms, which themselves serve to structure the market." As a result, the very ability of a society to maintain "a successful market economy is codetermined by the prior factor of social capital." Experience has shown that " a healthy capitalist economy is one in which there will be sufficient social capital in the underlying society to permit businesses,

> corporations, networks, and the like to be self-organizing." This social capital is found in such things as attitudes of trust, commitments to honest behavior, respect for property rights, and-perhaps most important in many societies- the bonds of social cohesion that allow for effective collective action (including the maintenance of the market institution itself).[6]

Against this background, we shall attempt to consider the chief objectives which the law of unfair competition aspires to realize. One major purpose of unfair competition law is to assure that competition is fairly and properly carried on. The rules against unfair competition aim at securing fair competition for traders through the preservation of goodwill. The second chief aim of the rules against unfair competition is to safeguard consumers' interest through the preservation of goodwill. The first purpose seems direct and self-evident whilst the

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[6] Robert H. NELSON, **Economics As Religion- From Samuelson to Chicago and Beyond**, The Pennsylvania State University Press, PA, 2001, pp.268-269

second would appear to be indirect and remote. The key to understanding this is to grasp the presumption behind the second objective. That goodwill and consumers' expectations, however divergent, are directly related. Thus, a certain consumer, who is a habitual customer of a given trader, has a legitimate interest in the preservation of the trader's goodwill, precisely because, in the eyes of the consumer, it is this trader and only this trader who can market products or services of the best quality or of the most quantity or of his taste or whatever at a relatively lower price. Put differently, the consumers' interest consists in their right not to be deceived, misled, confused, or wronged as to the business, products/services, or commercial activities of the trader whom they look up to and continue to patronize.[7]

[7]For instance, the advantages of protecting trademarks are that they lower consumer search costs and foster quality control rather than create social waste and consumer deception. For more on the topic, see William M. Landes and Richard A. Posner, Trademark Law: An Economic Perspective, 30 Journal of Law & Economics 265, 269 (1987). See also Stanley M. Besen and Leo J. Raskind., An Introduction to the Law and Economics of Intellectual Property, The Journal of Economic Perspectives, Volume *5,* Issue 1Winter, 1991, 3-27. Commenting on the evolution the jurisprudence of trademark protection, Besen and Raskind write"[T]he legal theory of protection was...to prevent a second entrant from unfairly appropriating the value of a successful trademark, service mark, or trade dress. Thus, the protection of trademarks has evolved as a form of indirect

The danger of unfair competition from the viewpoint of traders consists in the erosion or loss of their goodwill. The harm that a competitor does to his rival through unfair competition, in effect, is to cut down or take away his clientele. However, each and every act of taking away a trader's clients does not amount to an act of unfair competition. This is so, because such clients may be taken away by virtue of honest and proper competition. A case in point is a competitor taking away a good portion of his rival's clientele by offering a product or service of better quality.

Yet, there are other trade practices that aim at taking away a competitor's clients and thereby cutting down the goodwill, which are presumed to be unfair and improper, and, as such, are prohibited by law. In this sense, commerce is like a game in which competitors must play by the rules, which are the rules against unfair competition.[8]

The law of unfair competition is primarily comprised of torts that cause an economic injury to a business, through a deceptive or wrongful business practice. In the words of Everett Goldberg, "Unfair competition is a particular type

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protection of the consumer by insuring that purchasing decisions are based on marks that properly identify the product and its source."

[8] Everett F. GOLDBERG, "The Protection of Trademarks in Ethiopia", **Journal of Ethiopian Law**, Vol.VIII,No.I, 1972, pp.130-147,at p.134

of extra-contractual liability. ...Unfair competition is a type of liability based upon fault."[9] Therefore, unfair competition, as a species of extra-contractual liability, can be broken down into two categories: on the one hand, commercial unfair competition and on the other, civil unfair competition. The definition of commercial unfair competition in Art.133 of the Commercial Code has been supplemented recently by Trade Practice Proclamation No. 329/2003. Besides supplementing the Commercial Code's definitional provision of commercial unfair competition, the Trade Practice Proclamation broadens its scope of protection. It prohibits four categories of unfair trade practices:

- anti-competitive practices,
- unfair competition,
- abuse of dominance, and
- miscellaneous

Generally, unfair trade practices which may affect trade within Ethiopia are prohibited by the Commercial Code, the Civil Code, Trade Practice Proclamation, Trademarks Registration and Protection Proclamation, and the Criminal Code. However, since the scope of this article is limited to the second category of unfair trade practices known as "unfair competition", no attempt shall be made to treat the remaining three categories.

[9] Ibid,p.139

What is the Nexus between Business, Goodwill, and Unfair Competition Law?

Article 124 of the Commercial Code defines business as "an *incorporeal movable* consisting of *all movable property* brought together and organised for the purpose of carrying out any of the commercial activities specified in Art.5 of this Code." (Italics mine.)Thus, the ultimate essence or quality of any business, as can be gathered from the above definitional provision, is its incorporeality irrespective of the existence of corporeal elements. The importance of the incorporeal elements figures is prominently under Article 127, which stipulates:

> (1) A business consists *mainly* of a *goodwill.*
> A business may consist of *other incorporeal elements* such as:
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> (a) the trade-name;
> (b) the special designation under which the trade is carried on;
> (c) the right to lease the premises in which the trade is carried on;
> (d) patents or copyrights;
> (e) such special rights as attach to the business itself and not to the trader. (Emphasis added)

According to Art. 128, the corporeal elements that make up a business include equipments and goods. Therefore, what transpires from Chapter 2, of Title 4, of Book I of the Commercial Code is the fact that immovables, i.e. the business premises and the land on which the premises has been erected, had been excluded from the ambit of the definition of the elements of a business. Of course, a naïve and

shallow-minded person will find it odd to see that only one aspect of the immovables, namely the right to the lease of the premises[10], was incorporated in the enumeration of the elements a business. The oddity, none the less, will wither away no sooner than he realizes the lease right's inextricable link with the goodwill of the business.

In a nutshell, the term "business" embraces tangible and intangible assets, including tools, equipments, raw materials, goods in stock, good will, trade name, trade mark, patent, copy right, and the right to lease of the premises. But, immovable properties cannot form part of the business (fonds de commerce). Hence, the land or buildings which form of the business premises and the fixtures on such premises are no part of the business, even though they are owned by the trader himself. To a greater degree, the business is regarded as an entity distinct from its constituent elements, as long as the whole is more valuable than the sum of the constituent parts. In this sense, the business is a *res*, thing, or object over which a person can exercise property rights, including ownership, usufruct, and lease.[11]

In view of the foregoing, what is goodwill, and why is it of enormous value? Why is it that a business is mainly consisted of goodwill? Since the definition of goodwill in Art.130 of the Commercial Code is

[10] Comm.Code, Art.129

[11] See Art.125(3), Arts.150-209, Comm.Code

defective, it is of little help to us. This is so, precisely because it fails to tell us the essence or nature of goodwill. Instead of doing the proper job of a definition, it gives you an extra piece of information concerning its origin and the obvious thing that goodwill has a value. Art. 130, reads:

> The goodwill *results from* the creation and operation of a business and *is of a value* which may vary according to the probable or possible relations between a trader and third parties who may require from him goods or services. (Emphasis added.)

With respect to the origin of goodwill, Art.130 tells you that it "results from the creation and operation of a business." In my humble opinion, this part of the definition adds nothing up to the stock of knowledge of any academic lawyer, so long as the fact that goodwill originates from the creation and operation of a business has already been made crystal-clear from preceding provisions on elements of business. Goodwill, being the main constituent element of a business, results from the creation of business. The second part of the definition, which says goodwill is of a value, too, adds little to your craving for understanding the essence of goodwill.

In order to appreciate the very essence of goodwill, I propose to consider two legal lexical definitions of

the term as found in the Black's Law Dictionary and the Oxford Dictionary of Law respectively.

> A business's reputation, patronage, and other intangible assets that are considered when appraising the business, esp. for purchase; the ability to earn income in excess of the income that would be expected from the business viewed as a mere collection of assets. • Because an established business's trademark or service mark is a symbol of goodwill, trademark infringement is a form of theft of goodwill. By the same token, when a trademark is assigned, the goodwill that it carries is also assigned.... "[Goodwill] is only another name for reputation, credit, honesty, fair name,

> reliability." ... "Good will is to be distinguished from that element of value referred to variously as going-concern value, going value, or going business. Although some courts have stated that the difference is merely technical and that it is unimportant to attempt to separate these intangibles, it is generally held that going-concern value is that which inheres in a plant of an established business."[12]

> The advantage arising from the reputation and trade connections of a business, in particular the likelihood that existing

[12]Bryan A. GARNER(ed.) , **Black's Law Dictionary**, 8th ed., West Group, St. Paul, 2004.

> customers will continue to patronize it.[13]

In order to gain a head start to appreciate the nexus between goodwill and unfair competition, the reader is advised to peruse the following instances of unfair competition: trademark infringement, dilution of goodwill and trademarks, use of similar trade or firm names, simulation of product packaging or configuration, false advertising, passing off goods for those of another, and theft of trade secrets. Most, if not all, of the examples of unfair competition listed above include a common element: Utilizing someone else's commercial reputation for commercial benefit or 'sailing in their wind' This commercial reputation or 'wind' is more often than not referred to, in legal parlance, as the 'good will' of a business. This 'good will' or reputation is generally focused in the public's attention in the form of a trademark, trade name, product appearance or configuration, and trade secrets. Accordingly, unfair competition law is nothing but one of the devices designed to protect or preserve the goodwill of a business. As per Art.131, two alternative courses of action have been put at the disposal of a trader in the hope of enabling him to effectively safeguard his goodwill. The first course of action available to such a trader is to bring an unfair competition claim under Art.133 of the Commercial Code. The second is to institute a proceeding based on the legal or contractual

[13] Elisabeth A. Martin (ed.), **Oxford Dictionary of Law**, 5th ed., Oxford University Press, London, 2003.

prohibitions specified in Art. 30,40,47,55,144,158,159,204 and 205 of the Commercial Code.

For the moment it suffices to say that there is a common thread passing through all instantiations of unfair competition: utilizing or assailing someone else's commercial reputation for commercial benefit. This commercial reputation, more often than not, is referred to, in legal parlance, as the "goodwill" of a business.

Commercial Unfair Competition

Art.133 sets forth acts of competition that are regarded as unfair:

(1) Any act of competition *contrary to honest commercial practice* shall constitute a fault.
(2) The following shall be deemed to be acts of unfair competition:
(a) any acts *likely to mislead customers* regarding the undertaking, products or commercial activities of a competitor;
(b) any false statements made in the course of business with a view to *discrediting* the undertaking, products or commercial activities of a competitor.[Emphasis added.]

Art.133 has been modelled upon the Convention of Paris for the Protection of Industrial Property of 1833, as amended. Thus, one should not be taken aback if the definition of unfair competition in Art.133 follows closely Art.10^{bis} of the Paris Convention. For the purpose

of comparison, the full content of Art.10[b] is reproduced below:

> (1) The countries of the Union are bound to assure to persons entitled to the benefits of the Union effective protection against unfair competition.
> (2) Any act of competition **contrary to honest practices** in industrial or commercial matters constitutes an act of unfair competition.
> (3) The following in particular shall be prohibited:
> 1.all acts of such a nature as to create **confusion** by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor;
> 2.false allegations in the course of trade of such a nature as to **discredit** the establishment, the goods, or the industrial or commercial activities, of a competitor;
> 3.indications or allegations the use of which in the course of trade is liable to **mislead the public** as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.[14]

A quick look at the above cited provisions discloses that the definition of unfair competition in Art.133 is substantially the same as the 1st and 2nd lines of sub-Arts (2) and (3) of Art.10[b] of the Paris Convention.

Implicit in the notion of commercial unfair competition are two ideas: unfairness and competition. Before we

[14] Peter WINSHIP (ed. & trans.), **Background Documents to the Ethiopian Commercial Code of 1960**, Artistic Printers, Addis Ababa, 1974, pp.178-179.

move onto a discussion of the unfairness aspect, a few words are in order about the competition aspect. Competition presupposes the existence of competitors. Competitors are traders who are trying to reach the same customers. In other words, competitors are traders who offer products or services in the same market. Thus, inherent in the idea of competition are three elements: they must be selling similar products, in the same area, and at the same time. Consider the following counterexamples:

(1) A trader who produces coffee beans is not in competition with a trader who grows roses. In economic parlance, the goods or services have to be at least substitutes.

(2) A trader who exports bottled potable water is not in competition with a trader who markets bottled potable water only in Ethiopia.

(3) A trader who ceases to offer products or services for sale or does not yet offer products or services for sale is no longer in competition with a trader who does.

Turning to a tentative treatment of the unfairness aspect, Art.133 gives us two standards whereby we can designate certain acts of commercial competition as unfair. The first, which I may call the general standard, is provided

for in sub-art.(1). The second, which might be called the specific standard, is provided for in sub-art.(2). The specific standard can further be broken down into two alternative requirements: likelihood of confusion and false discrediting statements. In connection with the scope of these standards, the first, by contrast, is broader than the second in that it is difficult, if not impossible, to figure out, at a given point in time and space(i.e., now and here) of all possible situations of unfair competition that it covers. Put differently, the scope of activities prohibited by the general standard of unfair competition in sub-art.(1) is wider than the specific acts mentioned in sub-art.(2).As a result, this provision can be construed as a catch-all for all forms of unfair competition falling outside the purview of sub-art.(2). Unfair competition, as defined in sub-art.(1), expresses the idea that a particular act of competition is to be condemned as unfair because it is inconsistent with the community's currently accepted standards of honest practice. Thus, unfair competition depends upon commercial custom in determining what acts are honest and what are not. By virtue of its flexibility, the general standard requires judges to exercise their discretionary powers. In exercising their judicial discretion, the judges must take into account the peculiarities of each case as well as the historical and cultural context in which the case arises.[15] Therefore, the following discussion shall focus upon the specific standard.

The Specific Standard

[15] GOLDBERG, supra at n. 5, p.135

A. Misleading Commercial Practices

A confusion analysis has to be made to reach a decision pursuant to sub-art (2) (a) of Art. 133. An act gives rise to liability if it is "likely to mislead customers", though it does not create actual confusion. It is sufficient that an act passes the test of likelihood of confusion. One standard example of an act of unfair competition that is likely to mislead or confuse customers is trademark infringement. To prove a claim of unfair competition based upon trademark infringement, it is not necessary to prove actual confusion of specific customers. Proof of the likelihood of confusion in the market circumstances satisfies the requirement, so that similarity between two marks can make a case for unfair competition. Strictly speaking, sub-art.(2)(a) does not grant legal rights in trademarks beyond registration. However, sub-art (2)(a) affords a remedy for unfair competition involving special designations, including trademarks. Unlike trademark infringement claims under the Trademarks Registration and Protection Proclamation, unfair competition claims do not require any registered marks. As a result, sub-art (2) (a) of Art.133 involve all unfair competition claims based upon trademark infringement and extend further to cover other situations of unfair competition.

A likelihood of confusion exists when there is confusion as to the enterprise/undertaking/business, products and services, or commercial activities. More particularly, confusion may occur with respect to any of the following:

(a) trade-names

(b) distinguishing marks
(c) the appearance of a product,
(d) the presentation, including advertising, of products or services

B. False Discrediting Statements

Sub-art.(2) (b) of Art.133 broadens the touchstone of liability for unfair competition by making actionable any false statement that is likely to discredit or compromise the reputation of a business or its activities, when made in a competitive context. A claim of unfair competition under sub-art.(2)(b) requires a showing that a party made misrepresentations in the course of business. The elements an alleged injured party must show to sustain a claim of unfair competition based on false discrediting statements are:

1. a party uses any false statement,
2. in the course of business,
3. to misrepresent the nature, characteristics, qualities or geographic origin of a competitor's undertaking, goods or services.
4. with the purpose of discrediting the establishment, products or services of a competitor.

Typically, situations that fall under sub-art.(2)(b) include, if not limited to, false advertising. Here, it has to be emphasized that any false allegations made, in the course of business, against the person, rather than against his undertaking, products or services, do not fall under sub-art.(2)(b). Such cases may constitute defamation, subject to the fulfillment of the requirements in Arts.2044-2049 of the Civil Code.

Effect of Unfair Competition

In any event where an act of unfair competition has been committed by one trader against another, the Commercial Code affords the victim remedies. Article 134(1) provides for certain remedies: damages and other orders that are deemed fit to put an end to the unlawful act.[16] The orders may in turn take the form either of an order for corrective publicity under Art.2120 of the Civil Code or an injunctive order Art.2122 of the Civil Code. Sub-art (2) of Art.133 stipulates:

(2)The court may in particular:

(a) order the publication, at the costs of the unfair competitor, of notices designed to remove the effect of the misleading acts or statements of the unfair competitor to cease this unlawful acts in accordance with Art. 2120 of the Civil Code.

(b) order the unfair competitor to cease this unlawful acts in accordance with Art. 2122 of the Civil Code.

The courts, while entertaining a claim for damages arising from unfair commercial competition, must stick to the rules and principles of the Civil Code governing extra-contractual liability. In the words of Everett F Goldberg: "Since unfair competition is a species of extra-contractual liability, all the Civil Code provisions on extra-contractual liability dealing with matters not expressly covered in Articles 132-134 are applicable; for example, period of limitation, burden of proof, extent of

[16] See Art.155, the Civil Procedure Code.

damages, responsibility of persons or bodies corporate for the acts of others, etc." [17]

Trade Practice Proclamation

The Trade Practice Proclamation, which entered into force on 17th of April 2003, contains 31 articles under 4 Parts. Part one, being general, deals with short title, definitions, objective, and scope of application, whilst Part two contains rules regulating, as can be gathered from its caption, anticompetitive practices. Part three establishes the Trade Practice Investigation Commission and defines its powers. Part four provides for such miscellaneous matters as indications of prices, labels, power to regulate prices of basic goods, issuing and keeping of receipts, administrative measures and penalties, rule-making powers, repeal, and effective date.

A closer perusal of the above legislation reveals that it prohibits two types of commercial behaviour: anti-competitive and no-competitive behaviours. The former comprises of three categories of acts, viz. anti-competitive agreements, unfair competition, and abuse of dominance while the latter consists of non-compliance with the legal requirements pertaining to indications of prices, labels, price lists of goods and services subject to regulation; conditions of distribution, sales and movement of same; orders for replenishment of stock of same; and the issuance and keeping of receipts.

[17] GOLDBERG, Supra at n.5, p.140

The proclamation applies to all commercial activities except such "activities that are, according to investment proclamation, exclusively reserved for the Government." Besides, "[e]nterprises having significant impact on development and designed by the Government to fasten growth and facilitating development" are also excluded and so are "[b]asic goods or services that are subject to price regulation."[18]

The declared aim of the Trade Practice Proclamation, in keeping with the free market economic policy of the country, is maximizing economic efficiency and social welfare by promoting competition and regulating anti-competitive practices.[19] In particular, the proclamation has two objectives: to secure fair competitive process through the prevention and elimination of anti-competitive and unfair trade practices, on the one hand, and to safeguard the interests of consumers through the prevention and elimination of any restraints on the efficient supply and distribution of goods and services, on the other.[20]

In what follows, I shall focus on unfair competition as found in Article 10 of the Trade Practice Proclamation No.329 and leave out the remaining forms of unfair trade practices untreated, as they fall beyond the scope of this

[18]The Trade Practice Proclamation No.329/2003, Art.4
[19]Ibid, Preamble
[20] Ibid, Art.3

paper. Here, again, it has to be borne in mind, as a caveat, that the scope of activities prohibited by sub-Art.(1) is broader than the specific acts enumerated in sub-Art.(2), though the list in the latter is more elaborate and lengthier than its counterpart in the Commercial Code.

Unfair Competition

1) Any act or practice, in the course of commercial activities, *that aims at eliminating competitors* through different methods shall be deemed to be an act of unfair competition.
2) The following activities, in particular, shall be deemed to be acts of unfair competition.
   (a) Any act that *causes* , or *is likely to cause*, *confusion* with respect to another enterprise or its activities, in particular, the products or services offered by such enterprise;
   (b) Any act that *damages* , or *is likely to damage the goodwill or reputation* of another enterprise falsely;
   (c) Any act 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;
   (d) Any act of *disclosure, acquisition or use of information* without the consent of the rightful holder of that information in a manner contrary to honest commercial practice ;
   (e) Any *false or unjustifiable allegation that discredits, or is likely to discredit* with

respect to another enterprise or its activities, in particular the products or services offered by such enterprise;

(f) Any act that directly or indirectly *restricts, impedes or weakens the competitive production and distribution* of any commercial good or the rendering of any service;

(g) Any act that *restricts or debars the timely or economic means of producing or distributing* any goods or rendering of any service;

(h) The importation of any goods from any foreign country into Ethiopia *at a price less than the actual market price or wholesale price of such goods in the principal markets of the country of their production with the intent to destroy or injure the production of such goods in Ethiopia or to restrict or monopolize* any part of trade in such goods;

(i) Trading in any manner in *goods imported into Ethiopia for humanitarian purpose without authorization* by the Ministry. (Emphasis added.)

In connection with the definition of unfair competition in Art.10 of Proclamation No.329/2003, I should say the following by way of commentary. First, it is important to bear in mind that the logical organization of Art.10 is parallel to that of Art.133 of the Commercial Code. Despite the absence of the element of honest commercial

practice in sub-art.(1) of Art.10, unlike sub-art.(1) of Art.133, both deploy general standards: likelihood of elimination of competitors in the former and contrariness to honest commercial practice in the latter. In spite of the structural similarity between these two provisions, however, the missing element renders the literal application of Art.10(1) broad and impractical. For example, under a strict interpretation of the provision, a trader who resorts to producing better products, which is an honest method, and thereby eliminates competition would be held to be liable for unfair competition. Also sub-arts.(2) of the two articles consist in specific standards. The difference between these sub-articles lies in the former's inclusion of such activities as provided for in (d), (f), (g), (h), and (i). Even (d) can be interpreted to fall within sub-art.(1) of Art.133, as the test deployed is the one encapsulated in the phrase " in a manner contrary to honest commercial practice." In my opinion, the whole of the provisions under sub-art(2) can be reformulated in such a manner as to avoid redundancy, which I suspect has been an outcome of bad legislative draftsmanship. In this regard, my proposal is to merge some of the provisions together.

(a) and (c): Misleading/confusing activities;
(b) and (e): False discrediting statements;
(d): Secret information;
(f) and (g):Restricting, impeding, debarring, or weakening the competitive(efficient) production and distribution of goods and services;
(h): Dumping, and
(i): Trading in humanitarian aid.

With respect to sub-art.(2)(d), it is interesting to note two serious pitfalls. That the information has to be secret is self-evident inasmuch as what is prohibited is the acquisition, disclosure, or use of such information contrary to honest commercial practice. But, what kind of information is considered secret is not clear. Besides, the legislation fails to pin down the nature of the sort of information that it purports to protect. The legislation should have made it explicit that to qualify for protection, a piece of information should not only be secret, but also a trade secret.[21]

[21] It is instructive to consider, at this point in time, the manner in which other legal systems deal with the same problem. For example, Art.8(2) of the Protection Against Unfair Competition Act of 1998 of Barbados defines the term "secret information" as follows:

" For the purpose of this Act, information shall be considered "secret information" if

(a) it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons that normally would have knowledge of or access to the kind of information in question;

(b) it has commercial value because it is a secret; and

(c) the rightful holder has taken responsible steps under the circumstances to keep it secret."

Cf. Sub-art.(1) of same to see how the law of Barbados attempts to establish the nature of the secret information.

The Uniform Trade Secrets Act, §1(4) (1979),

defines trade secret as "information including a formula, pattern, compilation, program, device, method technique, or process, that: (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."

See also Art.39 (1) and (2) of Agreement on Trade Related Aspects of Intellectual Property Rights(TRIPS), which reads:

(1) In the course of ensuring effective protection against unfair competition as provided in Art.10^{bis} of the Paris Convention (1967), Members shall protect undisclosed information....

(2) Natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices so long as such information:

(a) is secret in the sense that 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

Finally, I wish to point out one substantive loophole in the Proclamation. In this regard, no where in the text of the Proclamation, unlike the Commercial Code, is it provided that a violation of any provisions thereof constitutes a fault. Of course, there is no question that any infringement of a specific and explicit provision of a law constitutes a civil offence by virtue of Article 2035 of the Civil Code. Consequently, it is doubtful whether a judicial remedy is available for a plaintiff claiming under Art.10 of the Proclamation in the first instance, rather than under Art.2035 of the Civil Code, as long as the only type of remedy mentioned by the Proclamation is administrative measures or/and penalty.

Trade Practice Investigation Commission

In 2003,with the enactment of the Trade Practice Proclamation No.329, the House of Peoples' Representatives created the Trade Practice Investigation Commission and charged it with the duty to prevent and eliminate "...anti-competitive and unfair trade practices [and]...any restraints on the efficient supply and distribution of goods and services."[22] To this end, the

normally deal with the kind of information in question;

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

(c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

[22] Art. 3, Trade Practice Proclamation

five-member commission, representing the public sector, the private sector, and consumers' association and being appointed by the Prime Minister upon nomination by the Minister of Trade and Industry, is empowered to conduct appropriate investigations and hearings and to take action against violators and apply administrative measures and penalties. Sub-art.(2) of Article 15 provides:

1. The Commission shall have the following powers:
   a. to investigate complaints submitted to it by any aggrieved party in violation of the provisions of this Proclamation;
   b. to compel any person to submit information and documents necessary for the carrying out of the commission's duties;
   c. to compel witnesses to appear and testify at hearings;
   d. to take oaths or affirmations of persons appearing before it, and examine any such persons;
   e. to enter by showing the commission's Id card and search the premises of any undertaking during working hours, in order to obtain information or

documents necessary for its investigation;

f. to appoint or employ, upon the approval of minister, experts to undertake professional studies as may be necessary;

g. to take administrative measures or/and give penalty decisions on any complaints submitted to it.

The said legislation also requires that in order to execute any decision for administrative measures and penalties, it must be endorsed by the Minister of Trade and Industry who has the discretion to approve, amend, or retain the same.

The Proclamation provides for four distinct kinds of administrative measures. Article 25 stipulates that:

> The Commission may impose the following administrative measures, where any person violate the provisions of this Proclamation, Regulations, Public Notice or Directives issued for the implementation of same.
>
> 2. Suspend, correct or eliminate the practice in question;

3. Suspend or cancel business license;
4. Take any appropriate measure that enable the victim's competitive position to be reinstated;
5. Seizure and selling of goods that are subject to price regulations, provided that the proceeds less any selling expense shall be paid to the owner, who in no case shall demand interest or any other payments.

Moreover, the Proclamation imposes fines upon defendants who have been proven to have violated any provision thereof by way of penalty. Article 26 reads:

> Without prejudice administrative measures that may be taken pursuant to Article 25 of this Proclamation, the Commission may impose the following penalties where any person violates the provisions of this Proclamation or Regulations, Public Notice or Directives

	issued for the implementation of the same.
	1. Fine up to 10% of the value of the total assets of the violator or 15% of yearly total gross sales of the violator, alternatively.
	2. Fine from 5,000.00(five thousands) up to Birr 50,000.00(fifty thousands) where the direct or indirect cooperation of any individual in any prohibited practice is proven.

In addition, the Proclamation, in its Article 27, sets forth factors that the Trade Practice Investigation Commission should take into account while assessing the amount of fines. As a result, the Commission is expected to take stock of such factors as the extent of the damaged caused, the market share of the violator, the size of the market affected, and the financial status of the violator.

At this point in time, I should draw particular attention to an important procedural lacuna in the Trade Practice Proclamation. In connection with the procedural issue, neither the Civil Procedure Code nor the Proclamation has a rule on pendency which precludes an administrative tribunal from adjudicating a matter brought before it at any time subsequent to the institution of a civil matter in

a competent court of law. The Proclamation incorporates a rule on appeal, instead of one on pendency. According to Article 17(1), any party may appeal to the Federal High Court against any administrative measures or/and penalty decisions within 30 days from the date that he was aware of the approval of the execution. Besides, sub-Art.(2) of the same prohibits the Ministry of Trade and Industry from executing any decision before the expiry of the 30 days period. In this connection, I wish to raise the following issues. First, what is the legal ramification of sub-Art.(1) of Article 17? Does it divest Federal First Instance Courts of their jurisdiction to hear and decide unfair competition claims under Article 10 in the first instance? As long as all that the said provision talks about is the appellate power of the Federal High Court and as long as there is no explicit provision prohibiting Federal First Instance Courts from assuming jurisdiction over lawsuits for unfair competition in the first instance, the author contends that Federal First Instance Courts must have competence to adjudicate such matters. If so, at this point, the procedural problem pointed out earlier figures in prominently, viz. if it is the case that both forums, the judiciary and the administrative tribunal, have competence to hear and decide claims for unfair competition in the first instance, will it be fair and expeditious to allow the parties continue litigating in two different forums on the same matter? Does the Trade Practice Investigation Commission have the power to award damages? Can't damages be read into sub-art.(3) of Art.25 that provides for the Commission's power to "[t]ake any appropriate measure that enable the victim's competitive position to be reinstated" ? What if both

forums reach inconsistent decisions, say, the civil court decides on the merits that the defendant is not liable whilst the Commission holds him liable? Does it not give plaintiffs ample opportunity to harass and vex defendants by instituting judicial and administrative proceedings at the same time?

The Trade Practice Investigation Commission has, of course, made its position unambiguously clear on this point. In INTERNATIONAL COMMISSION AGENCY PVT. LTD. CO. AND ALEM INTERNATIONAL COMMISSION AGENCY PVT LTD CO. v. GARAD ENTERPRISE AND SHEMSU HASSEN[23], one of the defendants invoked pendency as a defence, stating that the Commission did not have competence to hear and decide the case, as it had been being entertained, under Civ/F/No.1983, by the Second Division of the Federal First Instance Court at Arada, which adjourned for Hamle 13, 1997 EC to pass judgement. Having framed the said objection as one of its issues, the Commission overruled the objection as long as pendency does not obliterate its jurisdiction and as long as the cause of action does not give rise to a criminal or civil liability for damages.

Criminal Unfair Competition

In addition to the civil and administrative remedies discussed above, the Ethiopian legal system affords victims of unfair competition a criminal remedy. Although Article 719 of the Criminal Code defines criminal unfair competition, Articles 720 and 721 also

[23] Trade Practice Investigation Commission, 1997, File No. 3/1997, Addis Ababa

criminalize such specific cases of unfair competition as infringements of intellectual property rights. In connection with Article 720, it has to be noted that it "is essentially a form of unfair competition, in that it emphasizes the misconduct of the wrongdoer in misleading the purchasing public. But its scope is both broader and narrower than Article 133 of the Commercial Code."[24] These differences in the scope of the said articles have a major advantage from the vantage point of the victim as long as a violation of Article 720 brings about extra-contractual liability in accordance with Article 2035 of the Civil Code.[25] Commenting on the similarities and differences between Article 674 of the Penal Code (which Article 720 of the Criminal Code mimics) and Article 133 of the Commercial code, Goldberg has this to say:

> Insofar as the act of imitation, the likelihood of misleading customers and the involvement of products are concerned, there is little difference between Article 674 and Article 133. Article 674 speaks of infringement and passing off as well as imitation, but for purposes of this discussion these words essentially mean the same thing. Article 674 says, "in such a manner as to deceive the public," instead of "likely to mislead customers," but the two phrases should be interpreted the

[24] GOLDBERG, supra at n.5, p. 141
[25] Ibid

> same way. One might argue that the phrase in the Penal Code requires actual confusion, but such a strict construction is unsound in light of the difficulty of proving actual confusion and the relation of Article 674 to unfair competition generally. A strict reading is not justified by the fact that penal sanctions are more severe than civil sanctions, since the requirement of intent adequately protects the offender's interests in this regard.
>
> ...
>
> The major differences between Article 674 and Article 133 are that Article 674 *may* apply even if the offender and victim are not competitors and that it will *not* apply unless the offender actually intended to imitate the victim's mark in such a manner as to deceive the public.[26] (Italics in the original)

Article 719 stipulates:

> Whoever intentionally commits against another an abuse of economic competition by means of direct or any other process contrary to the rules of good faith in business, in particular:
>
> (a) by discrediting another, his goods or dealings, his activities or business or by making untrue or false statements as to his own goods, dealings,

[26] Ibid,pp141-142

activities or business in order to derive a benefit therefrom against his competitors; or

(b) by taking measures such as to create confusion with the goods, dealings or products or with the activities or business of another; or

(c) by using inaccurate or false styles, distinctive signs, marks or professional titles in order to induce a belief as to his particular status or capacity; or

(d) by granting or offering undue benefits to the servants, agents or assistants of another in order to induce them to fail in their duties or obligations in their work or to induce them to discover or reveal any secret of manufacture, organization or working; or

(e) by revealing or taking advantage of such secrets obtained or revealed in any other manner contrary to good faith,

is punishable, upon complaint, with a fine of not less than one thousand Birr, or simple imprisonment for not less than three months.

With respect to the above definitional article, the following words sre in order. First, I propose to re-organize the 5 sub-articles in Article 719 into three categories for the purpose of this paper. (1) using false or discrediting statements; (2) misleading acts; (3) trade secrets.

Conclusion

Unfair competition law consists of enforceable legal rules applicable to commercial tactics and transactions involving traders. It is concerned with the goodwill or reputation of businesses. The rules against unfair competition usually prohibit commercial tactics and transactions that are anticompetitive in nature and would conflict with consumers' interest. So, the law of unfair competition is primarily comprised of torts that cause an economic injury to a business, through a deceptive or wrongful business practice.

Although the Trade Practice Proclamation tends to give its readers the impression that it contains the most comprehensive and detailed rules against unfair competition, however, this is far from the truth. It is not an overstatement to say that most of the provisions under sub-art (2) of Art. 10 of the Proclamation are only a few instantiations of the general rule under sub-art (1) of Art.133 of the Commercial Code.

One discrepancy existing between Article 133 of the Commercial Code and Article 10 of the Trade Practice Proclamation concerns the standards deployed under the first provision of both articles. A certain competitive tactic or strategy is said to be unfair in pursuance of sub-art.(1) of Article 133 if it is found to be contrary to honest commercial practice. Nevertheless, an act of competition turns out to be unfair in accordance with sub-art.(1) of Article 10 of the Trade Practice Proclamation, provided that it aims at eliminating competitors whatever the mental state of the competitor. The problem posed by the above textual discrepancy looms larger in the face of the

Repeals Clause of the Proclamation, which reads: "Any law or practices inconsistent with this proclamation shall be inapplicable with regard to matters provided for in this proclamation." By virtue of this inconsistency, the provision of sub-Art.(1) of Article 133 would seem to have been superseded by that of sub-Art.(1) of Art.10.

Another defect found in the Trade Practice Proclamation is that it failed to provide for, with clarity and precision, the kind of relationship that may exist between itself and other laws of the country in general and the Commercial and Civil Codes in particular. First, it is not clear enough whether a trader may bring an action for extra-contractual liability under Art.2057 of the Civil Code against any person who commits an act of competition which amounts to a fault. Put differently, the Proclamation lacks in a provision parallel to Art.132 of the Commercial Code which makes an express cross-reference toArt.2057 of the Civil Code. Nor does Art.10 of the Proclamation make use of the term 'fault', as opposed to Arts.132 and 133 of the Commercial Code. Second, its legislative intent has not been made sufficiently explicit, provided that the intention was to make it, for the largest part, a supplement to rather than a replacement of the Commercial Code provisions. Therefore, in keeping with the plain rule of statutory construction, a correct reading of Art.30 of the Proclamation is that it renders inapplicable "any law or practices inconsistent with this proclamation...with regard to matters provided for [therein]." That is to say, the thrust of the repeal is not so sweeping as to efface all the Commercial Code provisions dealing with unfair competition. As a result,

from among Arts.132-134 of the Commercial Code, it is only sub-art(1) of Art.133 which has been shown to be inconsistent with sub-art(1) of Art.10 of the Proclamation and, as such, is abrogated.

A further problem posed by the Trade Practice Proclamation is procedural. The Proclamation does not prohibit the Investigation Commission from adjudicating a matter brought before it at any time subsequent to the institution of a civil suit in a competent court of law. Consequently, it is unlikely that like cases will be treated alike across-the-board, which is an important consideration of justice and fairness, regardless of the question of the kind of forum in which they were heard and decided. Besides, it gives plaintiffs ample opportunity to harass and vex defendants by instituting judicial and administrative proceedings at the same time.