QUESTION 2 (LIDC)

A. SOME PRELIMINARY REMARKS

1. - Discussions of issues relating to "unfair competition law" imply the risk to talk round the subject. The reason is that most of the European countries recognize a specific field of law, usually called "unfair competition law" ("concurrence déloyale", competência desleal", etc.) while others do not. In any event, there are big differences when it comes to regulations, to substantive law and to sanctions (cf. the study "Protection against Unfair Competition", WIPO 1994).

Question 2 deals with the sanctions, which means with the issue as to how to enforce claims set forth due to unfair competition. Of course, this issue requires that claims for unfair competition can be set forth, at all. Thus, we cannot avoid discussing some preliminary questions. They are not only necessary for a better understanding of the special question 2 but also because the law on competition is about to change, at least on the European level.

2. - Because of the great difference in the understanding I would like to make some brief preliminary remarks on the development and the current status of the "unfair competition law" in Europe.

> While it is generally impossible to bring an action because of "unfair competition" in Great Britain and Ireland, most of the continental European countries grant legal protection based on the law of torts. In some countries (France/Italy/Netherlands) the tort of unfair competition was developed in case law without any changes of the general tort clause. In some other countries (Germany, Austria) specific statutes on unfair competition were passed, following closely the tort law approach. In all countries the original idea was exclusively to protect trade and business from unfair competition practices of direct competitors. This is also the basis of the only international regulation at this point, Art. 10^{bis} Paris Convention which includes a general clause ("honest trade practices") and three examples (disparagement, likelihood of confusion, misleading statements).

A break in the relatively uniform conception of the European continental countries was caused by consumer protection coming into play. Some countries extended their laws on competition (directly or indirectly) so that they now include an integrated protection of competitors and consumers. Some other countries still grant competitor protection ("B2B") on the basis of the general clause of the law on torts and passed special laws on the

protection of consumers (“B2C”). Besides, the law on competition became in some countries a general “law on commercial practices” (Belgium) or “market laws” (Sweden).

The differences existing between the European countries do also exist on an international level. In the U.S.A. and Canada e.g. the approach adopted for a protection from unfair competition is different from the European approach (see WIPO study).

3. - Therefore it is not astonishing that a full harmonization has not yet been reached on the European level. Instead, particular areas were adjusted:

- Directive 84/450/EEC: Misleading Advertising
- Directive 97/55/EC: Comparative Advertising
- Directive 894/455/EEC: TV activities
- Directive 31/2000/EC: Electronic Commerce

The current work of the EU Commission is not consistent. While the General Direction for the Internal Market wants to continue the “piece meal” approach, e.g. in the field of sales promotion, the GD SANCO (in charge of consumer protection) prefers a framework directive on “fair trading”, however, limited to consumer protection (“B2C”). Both projects seem currently to block each other.

4. - Another problem is the treatment of cross-border competition (multi-state competition). Up to now the principle of territoriality applied. But this principle is frequently not satisfactory. A new try of the Commission (materialized in the E-Commerce Directive) is the so-called principle of the country of origin. According to this principle the applicable law is in the end the law of the country in which the offerer (advertiser) is established. But there might be other alternatives, e.g. “cross border injunctions”.

5. - On the international level we have to date only Art. 10^{bis} Paris Convention. In the TRIPS Convention only rules on geographic indications of origin and the protection of know-how are laid down.

6. - As regards question 2, we are particularly interested in the procedural law. In which proceedings including which particularities etc. can claims for unfair competition be asserted (if at all)? There are differences in this respect, too. While some countries provided for special proceedings (e.g. Belgium), it is the normal procedural law, which principally applies in most countries. However, there are special procedural rules for competition actions, either prescribed by law or developed by practice.

7. - The subsequent questionnaire is to give some ideas for answering the questions. The “explanations” not written in bold letters are to be understood as checklist. The answers to the preliminary questions (complex I) should be kept short; we are focused on II (sanctions) and III (enforcement). Instructive case law is of major importance, e.g. to explain by giving examples based on case law.

B. QUESTIONNAIRE

I. - Preliminary questions relating to unfair competition law

1. - Is there at all a specific field of law called “unfair competition law”?

The answer to this question should be given irrespective of whether there exist particular statutory regulations or not. A look into specific groups of cases dealt with in the literature and/or in case law and relating to the topic “unfair competition” “concurrence deloyale” “ongoorloofde mededing” etc. would be an indication.

Brazil is signatory party of the Paris Convention and, therefore, applies the content of its article 10 *bis,* which addresses unfair competition practices. Brazil is also a member of and incorporated the TRIPS Agreement and therefore the general rules related to the restriction of competition that may negatively affect commerce.

The unfair competition rules in Brazil have been very much influenced by the general law of torts, as initially developed by arts. 1382 and 1382 of the French Civil Code. According to Articles 207 and 209 of the Industrial Property Law (Law 9,279 of May 14, 1996), the aggrieved party may file civil actions, in order to be indemnified from the damages arisen from unfair competition practices. Such civil action shall combine regulations of torts, according to Brazilian Civil Code, with specific dispositions of the Industrial Property Law. This action will take place irrespective of the existence of a criminal action.

Furthermore, some practices of unfair competition have been identified that may deeply damage the “fair practice in the course of trade”, the free competition in the realm of economy context of the nation, the consumers rights and, most importantly, the notoriety of companies. A set of practices has been classified as “criminal unfair competition” and therefore ruled by the proceedings set out by the Criminal Law and the Criminal Procedure Law.

Accordingly, article 195 of the Brazilian Industrial Property Law (Law 9,279/96) specifies the practices classified as crime of unfair competition, as well as the corresponding penalties.

Notwithstanding the aforementioned, there is no such autonomous and independent field of law so called “unfair competition law” since its main elements reveal the impossibility of a clear individualization in Brazilian law: (a) unfair competition is still ruled by the Theory of Illicit Acts as specified by art. 186 to 188 of the Brazilian Civil Code; (b) it lacks specific principles and international convention and (c) it lacks didactic autonomy, which means that unfair competition is studied within the legal and doctrine framework of the Theory of Torts and Industrial Property Rights.

As a final point, there is no tendency in Brazil to enact a specific unfair competition law.

2. - Which practices do normally fall under “unfair competition law”?

Unfair competition is understood broadly as any commercial act contrary to honest practices in industrial, commercial and trade matters. Under this perspective, a wide range of commercial practices may fall into the scope of unfair competition, including acts that create confusion by any means with commercial establishment or the goods of a competitor or violation of confidentiality clauses. Unfair competition rules also provide the grounds to prevent the imitation or reproduction of a non-registered trademark used by a competitor.

At dealing with the crime of unfair competition, art. 195 of the industrial property law framed some practices as a truly unfair competition, as follows:

I - publishes false statement that detracts a competitor to one’s own advantage;

II - discloses false information on a competitor, to one’s own advantage;

III - uses fraudulent means to solicit, for one’s own or someone else’s benefits, a third-party clientele;

IV - uses or imitates a third-party advertising slogan or sign, in a manner to cause confusion between the products or establishments;

V - unduly uses a third-party commercial name, establishment name or insignia, or sells, exhibits, offers for sale or maintains in stock a product with such references;

VI substitutes, with his own name or company name, on a third-party product, the name or company name of such other party, without his consent;

VII - claims, as a means of advertising, to have received a prize or praise that he has not in fact been awarded;

VIII - sells, exhibits or offers for sale, in a third-party container or package, an adulterated or falsified product, or uses it to do business with a product of the same type, even if not adulterated or falsified, if the fact does not constitute a more severe crime;

IX - gives or promises money or other assets to a competitor's employee, whereby that employee, in failing in his duty in his employment, provides him with an advantage;

X - receives money or other assets, or accepts a promise of payment or reward, for—in failing in his duty in his employment—providing his employer's competitor with an advantage;

XI - engages in unauthorized disclosure, exploitation or use of confidential knowledge, information or data usable in industry, commerce or service-rendering activities, unless in public domain or which is evident to a person skilled in the art, to which he has had access by means of a contractual or employment relationship, even after termination of the corresponding contract;

XII - engages in unauthorized disclosure, exploitation or use of knowledge or information as mentioned in the preceding item, when obtained by illicit means or to which he has had access by fraud;

XIII - sells, exhibits or offers for sale a product which is wrongly stated to be the subject matter of a patent grant or application, or of a registered industrial design, or whoever wrongly states in a business

advertising or document that such product is the subject matter of a grant, application or registration; or

XIV - engages in the unauthorized disclosure, exploitation or use of the results of tests or other undisclosed data, the preparation of which involves considerable effort and which has been presented to government entities as a condition for having the trading of a certain product approved.

Unfair competition may be further found in the following practices:

(a) misleading and comparative advertising;
(b) slavish imitation;
(c) protection of know-how.

Sales at a price below the cost price and sales promotion activities are regarded as violation of the antitrust law (Law 8,484/94), when they affect competition and alter the market structure of a relevant market.

Some other rules related to consumers rights, laws on health protection copyright law, broadcasting etc. may constitute an act of unfair competition permitting competitive advantages to the competitors.

3. - Relation to other branches of law

As aforementioned, unfair competition law is part of the law on torts and intellectual property rights, as specified by arts. 186 to 188 of the local Civil Code and arts. 195 and 209 of Law 9,279/96. As it interferes with the free competition and the maintenance of the economic order, unfair competition is closely related to consumers rights and intellectual property rights.

According to art. 4 of the Consumers Rights Code (Law 8,078 of September 11, 1990), the prevention and repression of unfair competition is regarded as a principle of the National Policy for Consumer Protection. However, protection under unfair competition law is only granted to a competitor and with regard to his very own interest. Legal protection for consumer requires specific proceedings with a different subject matter, that is the violation of the consumer rights.

As a final aspect, there is no relation between unfair competition and the antitrust laws, although they both aim to protect the free and fair competition of the local

market. The antitrust is considered as a subject matter of public interest, while the protection against unfair competition is seen as a protection of private interests since it protects individual interest.

4. - What is the basis on which protection from unfair competition is granted?

As aforementioned, protection against unfair competition is provided by arts. 186 to 188 of the Brazilian Civil Code and art. 209 of Law 9,279/96, which establish the main requirement for the infringed party to seek losses and damages in court.

The basis for the protection of unfair competition is the general clause of the law on torts (Illicit Acts) which obliges any trader to compensate another party who by his fault causes damages to another by means of infringement of the loyal competition.

Furthermore, protection extends to the criminal prosecution of the infringer solely in those enlisted cases in art. 195 of the industrial property law.

5. - Self-control

What is understood by self-control? How important is self-control in relation to an enforcement in court? Which sanctions are available (especially do sanctions lead to a definite cease of the impugned act?)

For purposes of the present question we will consider “self control” as the safeguards that can be taken by the businessman against unfair competition practices.

Since protection of unfair competition reaches only private interests, the self -control will be necessarily related to protection of the companies’ rights. The civil actions and even the criminal actions, regarding unfair competition practices, must be requested by the injured party, the criminal ones by a proceeding named “private criminal action”.

The criminal action reaches the imposition of a criminal penalty or a punitive fine against the “unfair competitor”. The civil action aims to reinstate the violated “status quo” by restraining unfair competition practices and to seek an indemnification for the damages emerging from such acts.

It is important to note that the courts will only render a decision after the measures taken by the injured party against unfair competition.

6. - General Clause

Is there a general clause particularly for unfair competition? (please quote). Or is it that the general clause of the law on torts is used? If there is no general clause: Why not?

The general clause of the law on torts is used and therefore is provided by arts. 186 to 188 do the Brazilian Civil Code. Furthermore, arts. 207 and 209 of the industrial property law reinforce the right of the infringed party to seek losses and damages derived from unfair competition practices, especially those acts that damage the reputation of other's business, create confusion among companies and among products.

7. - Purpose of protection

(Whether a regulation on "fair trading" is only to protect consumers ("B2C") or concurrently competitors ("B2B") is currently a particularly contentious issue in the European Union. What do national laws say?

The Brazilian regulation to "fair trading", as provided by arts. 186 to 188 (Theory of Illicit Acts) and arts. 195, 207 and 209 of the industrial property law protect solely competitors as they require the existence of competition between the individuals, public or private companies or associations.

Nevertheless, unfair competition may affect consumers rights and therefore consumers may proceed in court under the rules of the Consumer Rights Protection Law (Law 8,078/90). Article 6 of the aforementioned law sets out the basic rights of consumers, as follows:

(a) the safeguarding of life, health and safety against risks caused by the supply of products and services considered hazardous or harmful;
(b) education and disclosure as to the proper consumption of products and services, thereby ensuring freedom of choice and equality in contracting;
(c) adequate and clear information on different products and services, with correct specifications as to quantity, characteristics, composition, quality and price, as well as any risks they entail;
(d) protection against misleading and deceptive advertising and coercive or unfair business practices, as well as against practices and conditions that are deceptive or imposed regarding supply or products and services;

(e) amendment to contractual clauses establishing disproportionate obligations, or revision based on subsequent facts that render them excessively nervous;
(f) effective prevention and redress of individual, collective, and diffuse property and moral damages among others.

The consumer interest may be exercised in court individually or collectively. The collective interest takes place when it involves the diffuse interests/rights (collective indivisible interest and rights) or the homogeneous individual interests or rights (common interest).

- Are competitors, consumers (possibly the general public) equally protected (imposed by law or acknowledged in case law and in the literature)?

See above.

- Are competitors and consumers protected by different regulations? (e.g. France: competitor protection according to Art. 1,382 Cc, consumer protection according to the provisions of the Code de la consummation.)

Yes. While the “fair trading” applicable to competitors is disposed by arts. 186 to 188 (Illicit Acts Theory) and arts. 195, 207 and 209 of Law 9,279/96, a consumer protection is dealt with by Law 8,078/90.

- Which connections are there between competitor protection and consumer protection?

The connection between competitor protection and consumer protection exists already in the Federal Constitution of 1988 as both “free competition” (fair competition should be also included) and “consumer protection” are principles of the Brazilian economic order. Furthermore, the National Consumer Relation Policy enlists the elimination of unfair competition practices as a principle to guarantee the rights of consumers.

- Which other reasons do there exist for a protection? (middle class protection, etc.)

The basic reason for their existence lies on the need to value the human work and free enterprise. Free enterprise is understood as part of the human rights, since the need to venture (including commercial venture) is embedded in its personality.

- What is the relation to antitrust law (reason of protection: “Functioning of the law on competition”)?

Although they are different concepts, their relation comes from the fact that “fair trading” is usually included in the “free competition” principle, as it seeks to guarantee the free exercise of any economic activity.

Furthermore, unfair competition court proceedings envision the protection of businessmen and companies, their individual interests. The antitrust laws protect basically the economic order and therefore they are of public order.

8. - Scope of application

- Is the scope of protection limited to acts of competition?

Yes. Since the scope of the unfair competition provisions consists in the protection of subjective rights of each competitor (individualist conception of competition), the competition relationship is required for the application of the specific law.

An exception to this rule is the protection of confidentiality, provided for by items XI and XII of art. 195 of Law 9,279/96. Accordingly, any party bound by an agreement commits a crime of unfair competition if it breaches a confidentiality obligation.

- How is a limitation obtained otherwise (e.g. “seller” in the Belgian commercial practice law)?

In the absence of a competition relationship, protection may be sought by means of arts. 186 to 188 of the Brazilian Civil Code based on the Illicit Act Theory or on the grounds of section 16 § 3 of TRIPS (association with well-known trademarks).

- Under which conditions are media, consumers’ associations etc. subject to the regulations on unfair competition?

If any entity may in practical terms compete directly or interfere with competition in a relevant market, it may be subject to the laws and rules of unfair competition repression.

II. - SANCTIONS IMPOSED FOR UNFAIR COMPETITION

1. - Sanctions

If legal protection from unfair competition is granted, at all: Is this legal protection primarily granted under civil law, criminal law or administrative law (public authority(? Is there a distinction made between competitor protection ("B2B") and consumer protection ("B2C")? are there public authorities, an Ombudsman System or similar institutions?

The Industrial Property Law provides protection against unfair competition within the criminal sphere, establishing the penalty of imprisonment from three months to a year or a fine. The criminal sanction is independent from the civil sanctions, which encompass a restraining order and an award of damages.

As a rule, protections against unfair competition acts involve parties competing in the same field of activity. On the other hand, consumer protection involves the supplier of products or services, and on the other part, the end user of said products or services. Many times, however, an act of unfair competition directly affects the consumer, as for example, when the consumer is led to error or to confusion as a result of companies that use similar trade names.

In cases the practice of unfair competition also characterizes a violation of consumer rights, the offender may be subject to the administrative penalties set out in the consumer protection law, such as fines, imposition of counter-advertising, cancellation of the establishment's license, and so on. The same law lists several consumer protection bodies such as Consumer Protection Prosecutors, subordinated to the Ministry of Justice and consumer protection institutions such as the Consumer Protection Office - Procon.

2. - Right of action

Who can take legal action because of unfair competition? Industrial associations? Consumers' associations? Individual consumers? Public authorities etc.? Ombudsman?

The injured party usually initiates the legal action, which are usually private companies. Furthermore, there is a specific action specified in the Consumer Rights Code allowing association and public authorities to protect consumers in court when diffuse interests or rights of collective interest are involved. The legitimate parties to

initiate a collective defense are: (i) Office of the Attorney General; (ii) Associations legally incorporated; (iii) direct or indirect public administration entities and bodies and (iv) the representatives of the Federal, state and municipal government.

3. - Which claims can be asserted under civil law?

Court suit filed within the civil sphere must seek the elimination of the unfair competition practice (claims for cease and desist of the illegal practice) often coupled with a motion for injunctive relief and the request for losses and damages.

- **cease and desist (also in view of a prevention) -** yes

- **removal, correction, corrective advertising -** yes

- **damages -** yes

- **publication of judgement -** only in specific cases

- **unjustified enrichment -** yes

- **information (on customers and/or suppliers) -** only in specific cases

- **siphoning-off of profits -** yes

4. - In particular, claims for a cease and desist

- **Who can answer as the proper defendant? The disturber? How is the disturber defined?**

Yes, the disturber can file his own defense. The disturber can be defined as the agent who practiced one of the acts classified as “unfair competition”.

- **Is the risk of repetition required for a claim for cease and desist (e.g. the risk of commission in case of a preventive claim for cease and desist)?**

Assuming as “risk of repetition” the risk that the unfair competition may occur once more, we understand that a cease and desist order will only be granted by the judge if the plaintiff evidences that the defendant is still committing that practice. Otherwise, the cease and desist request has no grounds and the issue can be resolved by the payment of an indemnification.

- **Which requirements have to be met in practice for a risk of repetition (risk of commission)? Is e.g. the risk of commission assumed? With whom lies the burden of proof?**

The burden of proof relies over the plaintiff, but it is not necessary, in a preventive claim, the demonstration of a risk of repetition. The sole evidence of the unfair practice is enough. However, the risk shall be evidenced on the main suit.

- **Is the risk of repetition dispelled by the infringer's declaration and undertaking of cease and desist (subject to penalty)?**

Yes, the risk of repetition can be dispelled by the infringer's declaration and undertaking of cease and desist. Such declaration, unless express written provision, does not discharge the infringer from liability for the damages, which may have been caused.

- **Are there any particular difficulties when formulating the prohibited conduct?**

Yes, sometimes it is very difficult to prove the violations, especially in cases of trade secrets.

- **Are claims secured by a coercive penalty payment ("dwangsom")?**

Article 287 of the Civil Procedural Code establishes that "if the plaintiff claims that the defendant is ordered to cease and desist from performing any act (...) it may also plead that a fine be imputed for noncompliance with the court decision or with the ruling granting interim relief." Said law also establishes in its article 461 that independently of the plaintiff's claim, the court can order the defendant to pay a daily fine in case of failure to comply with the injunctive order or with the decision. Therefore, claims of cease and desist from unfair competition acts may be secured by a coercive penalty payment.

- **Should the claim for a cease and desist be simplified, e.g. should a risk of repetition be dropped?**

The claim for a cease and desist should be simplified, e.g., requesting the disturber to refrain his specific unfair act. The practice recommends, however, that the request be as comprehensive as possible, in order to avoid other related unfair competition practices.

5. - In particular, claim for damages

- **How is the fault principle handled in practice?**

According to said principle, the person who acts with willful misconduct or culpability (recklessness, negligence or unskillfulness) and as a result of such conduct causes damage to a third party, is obliged to indemnify the losses entailed, whether they be property or moral damages. In practice, application of this principle waives evidence of willful misconduct, that is, the intention of the individual who commits an act of unfair competition; and damages will be payable provided it is evidenced that said individual acted in a reckless, negligent or unskillful manner.

- **How is damage proved? Presumed or estimated? Do punitive damage, license analogy or the recoveries of profits (e.g. in case of a slavish imitation) exist?**

The Industrial Property Law, in its Article 210 sets out that payment of damages should be ordered by the courts based on the criteria that is most favorable to the aggrieved party, and shall include: (i) the benefits that the aggrieved would have obtained if the violation had not occurred; or (ii) the benefits that were obtained by the offender; or (iii) the remuneration that the offender would have paid to the holder of the violated right for a license to legally exploit the asset.

In the cases of items (i) and (iii) above, the indemnity is estimated by the court, since these criteria involve mere suppositions, rather than facts that have actually occurred such as the benefits that would have been obtained by the aggrieved party and the license that could have been agreed between the parties. In the event in item (ii), the indemnity will be estimated based on the benefits actually obtained by the offender, which may be ascertained by analyzing its accounting records. The theory of punitive damages does not apply in Brazilian law.

- **What is the significance of a claim for damages in relation to a claims for a cease and desist?**

The claim for damages seeks redress of damage resulting from performance of illegal acts, since refraining from these acts, in it, is insufficient to redress losses resulting therefrom. Therefore, a claim for damages may be filed when the violation has ceased or while it continues, and in the latter event, such claim will be coupled with a claim for cease and desist from the illegal practice.

- **Can damages be asserted in interim injunction proceedings?**

An injunctive order to pay damages is only applicable if the general requirements for interim relief, set forth in article 273 of the Civil Procedure Code are present, namely: uncontested proof and verisimilitude of the allegations coupled with grounded concern of irreparable damage or damage of difficult reparation or coupled with abuse of the right of defense, or moreover the defendant's clear intention of stalling proceedings. Interim relief may not be granted when there is any risk that it may be irreversible.

- **Should claims for damages be made more efficient? How?**

Brazilian law sets out all the instruments that are required to ensure effectiveness of the damages for the practice of unfair competition acts, as for example, the prerogative of calculating the amount of damages based on criteria that is more favorable to the aggrieved party. However, due to the large volume of proceedings under way, the number of judges to hear these cases is insufficient, thus causing entertainment and judgment of these proceedings to be excessively drawn out.

III. - THE ENFORCEMENT OF FIGHTS IN COURT

1. - Are there special proceedings for actions against unfair competition? Does a special court have jurisdiction?

Within the civil sphere, action against unfair competition acts follow normal proceedings, as set out in article 282 et seq. of the Procedural Code.

There are no special proceedings for actions against unfair competition.

Within the criminal sphere, action against acts of unfair competition is regulated by articles 195 et seq. of the Industrial Property Law, in addition to provisions of the Code of Criminal Procedure. According to articles 524 to 530 of this law, if the crime of unfair competition leaves any evidence, the complaint will not be examined if it is not supported by an expert's opinion. Besides such preliminary proceeding, set out for crimes that leave evidence, a criminal proceeding will follow normal proceedings.

On the other hand, although article 241 of the Industrial Property Law has authorized the Judiciary to create special courts to settle intellectual property-related disputes, as a rule, proceedings involving unfair competition acts are entertained and judged in common courts. As an exception, a single court specialized in intellectual property was created in the Judicial District of Rio de Janeiro.

2. - Assertion of rights in actions before the courts of law?

- legal process, competence of courts, general requirements for an action

In the civil sphere, court action against unfair competition is filed under normal proceedings at a common state court. The requirements for the action are those set out in the Civil Procedural Code, that is, judicable controversy, standing to sue and cause of action.

Within the criminal sphere, an action is filed by a complaint (private criminal action). If the crime leaves any evidence, the complaint will only be cognized if it is supported by an expert's opinion establishing the alleged crime (a specific requirement of the action). This preliminary search and seizure is carried out by two experts appointed by the judge, who should verify whether there are grounds for such seizure, and submit the respective report within the legal term. After the judge has ratified the opinion, and should it be in favor of the claimant, the criminal action will be initiated.

- Are there any particularities as regards actions on the law on competition?

Which one?

- period of limitation (interruption of the period of limitation)

- grant of selling-off/cooling-off periods, etc.

The statute of limitations to file a civil action with a claim of cease and desist from unfair competition will expire in ten (10) years, pursuant to the general rule set out in article 205 of the new Civil Code (enacted in 2002). In the case of a suit for damages, article 205, paragraph 3, item V, of said Code establish a 3-year term. Practitioners, however, sustain that damages arisen from the violation of the Industrial Property rights (regulated by Law 9,279/96, which encompasses unfair competition rules) remain submitted to the 5-year statute of limitations foreseen in section 225 of said Law 9,279/96. Since the enactment of the new Civil Code is recent, there is no case law determining which rule should prevail.

As a rule, the right to file criminal actions against crimes of unfair competition is expires six months from the date on which the aggrieved party becomes cognizant of the perpetrator of the crime, pursuant to article 38 of the Criminal Code. In crimes of unfair competition that have left evidence the complaint should be filed within thirty

(30) days after ratification of the expert report (article 529 of the Code of Criminal Procedure).

Actions filed against unfair competition do not have any particularities regarding interruption of the terms for the statute of limitations or for the loss of procedural right.

3. - SUMMARY PROCEEDINGS

- Is there a possibility for summary proceedings in matters relating to competition?

Yes, in cases of unfair competition it is possible to resort to more concise and effective procedures, through motions for injunctive relief seeking to cease the wrongful acts, since many times the traditional ordinary action coupled with a motion for refraining undue use and indemnification of damages may take a long time to produce practical effects.

The request for advance protection in the ordinary action, and the precautionary action may be mentioned among these procedures, which may be adopted so long as the basic prerequisites of "*fumus bonus iuris*" and "*periculum in mora*" are met.

In the ordinary action coupled with a motion for advance protection, the judge may anticipate the effects of the favorable decision, even before the judgment is rendered. Therefore, the judge may immediately determine upon receiving the complaint prompt refraining from using the third party's trademark.

On the other hand, precautionary actions seek to ensure the effectiveness of a main proceeding. However, many times it is necessary to anticipate evidence, under penalty of their production be no longer possible. In these cases, it is essential to adopt a precautionary measure to ensure its appropriate granting. In the unfair competition field, for instance, such precautionary measure is usually filed for seizure of forged goods that will be used as evidence in the main action.

- Are the proceedings final or preliminary?

The "Summary Proceedings" may occur at any time during the development of the case. It may take place before the proceedings--like it happens with a precautionary measure--or at its start-up--like it happens with a preliminary injunction, or even at any time of the case development, which is the case of advance protection. It is worth mentioning, however, that the revalidation of any "Summary Proceeding" is subject to the existence of a main action. Accordingly, the validity of a precautionary measure relies on the filing of the main action within 30 days at the most.

- **Which courts are competent?**

State Courts have jurisdiction to hear cases of unfair competition, and the competent judicial district is the defendant's domicile jurisdiction.

- **If urgency is required, is it presumed, really examined or for the most part assumed?**

To be granted *in limine*, the "Summary Proceedings" must satisfy the basic prerequisites of presence of color of right ("*fumus boni iuris*") and ineffectiveness resulting from possible delay ("*periculum in mora*"). Therefore, its granting requires a summary examination of the request, whereupon the judge considers its plausibility and urgency.

- **How free is a judge in the appreciation of evidence, etc.?**

Judges are free to examine and form their belief in the pieces of evidence. Their conviction of the urgency of a request may require further evidence.

- **Are the parties normally heard?**

All proceedings must satisfy the adversary system principle, i.e., the parties must have the right to be heard and participate in the process of forming the conviction of the judge.

In these procedures with a motion for injunctive relief, the party must file the respective request and, depending on the case, judges may even grant the request before the opposing party is heard, should they understand that the immediate granting of the effects of the injunctive relief is imperative, but normally the decision should only be rendered after the opposing party is duly heard.

- **Are "protective brief" possible or common (which significance do they have?)**

One of the fundamental principles of Brazilian law is that the parties will be given the opportunity to confront each other (adversary proceedings). This principle establishes that a party may provide its arguments to allegations made by the opposing party, performing all the necessary procedural acts to exercise its full

defense. If we presume that “protective brief” refers to the concession of injunctive relief *“inaudita altera parte”*, two requirements must be present: *fumus boni iuri* (under the color of right) and *periculum in mora* (ineffectiveness due to possible delay), as explained above.

- **How long do the proceedings normally take?**

The injunctive relief is immediately examined by the judge, who may grant it as soon as the legal prerequisites are found duly satisfied. However, these injunctive relief may (i) be connected to a main ordinary proceeding, like in cases of precautionary actions; or (ii) occur in an ordinary proceeding, like in cases of advance protection, and (iii) take from 2 to 5 years to be judged.

- **What is the ratio of summary proceedings in relation to normal court proceedings?**

It is impossible to specify the ratio of summary proceedings in relation to normal proceedings since summary proceedings are necessarily conditional on the existence of main actions to be considered valid (as stated in the answer to question 3, “Are there proceedings final or preliminary”).

- **Which other particularities are there?**

Please see above.

4. - Warning notice

- **Is a prior “warning” of the infringer prescribed by law?**

With respect to unfair competition, there is no prescription of warning letter. However, using civil proceedings, it is possible to send a cease and desist letter to the infringer, requesting him to stop the unfair practice.

The sending of such warning is very usual, as put the infringer on default, since he could not allege on a possible suit that had no knowledge of the infringement.

- **Are infringers warned off in practice?**

Please see above.

- **What are the consequences if the infringer was not warned off (e.g. resulting costs)?**

In this case, the plaintiff shall prove the fraud and bad faith used by the infringer on his unfair competition act.

- Which consequences have the warned person's promise to cease the impugned acts? Is the risk of a repetition eliminated? Under which conditions?

Such promise will only have a practice consequence if the warned person really refrains to practice the act. Therefore, the risk of repetition is not eliminated.

5. - Class action

Are class actions possible? Which are the requirements?

Not on pure unfair competition cases, which defend private interests but on consumer protection rights field.

6. - Costs

- Who pays the court fees?

The plaintiff. If the action is considered with grounds, the defeated party must reimburse the costs.

- Who pays the legal fees?

The same as precedent question

- Can the costs be claimed as damages? Is it customary in practice?

No, but the defeated party is obliged to reimburse the costs expended by the winner party.

7. - Frequency of actions relating to competition law?

How frequent are actions on competition? (Any estimate will be helpful.) Are there any statistics? Special magazines (sections) dealing with it?

Unfair competition cases are not very common. A recent research published in Brazil found only 50 (fifty) Appeal Court decisions, being 37 with grounds and 13 denied.

IV. - CROSS-BORDER CASES (“MULTISTATE COMPETITION”; “CROSS-BORDER INJUNCTIONS”)

- How is cross-border competition judged? Do courts normally apply the national law?

There is no such proceeding in Brazil in view of the sovereignty principle that rules court proceedings.

- Is it possible to order a cease and desist abroad (“cross border injunctions”)?

Yes, insofar as the legislation of the country permits.

- What is the opinion on the principle of the country of origin? (provided in the E-Commerce-Directive on Online Advertising)

- **Has the Directive 98/27/EC produced any effect on claims for a cease and desist?**

Not applicable**.**

V. - EVALUATION, HARMONIZATION

- How efficient is the national system in view of a combat of unfair competition? Which advantages or disadvantages does it have?

The law applicable to unfair competition is in accordance with TRIPS and the Paris Convention, being considered as one of the most advanced. The problem occurs on its application, especially because of the slowness of the judiciary system.

- Is there, in particular, sufficient protection from future infringements? Yes.

- Is the protection from cross-border unfair competition sufficient? How could it be improved? Not applicable.

- **Is there a need for an adjustment of the national provisions?** No.

- **In material law?** Yes. Unfair competition should also be applied to the selling or renting of intellectual works protected by copyrights in addition to copyright violation.

- **In procedural law, especially the introduction of special proceedings for unfair competition?** No.

- **Should legal protection from unfair competition be improved on the international?** No.