Determining the Proper Scope of Unfair Competition

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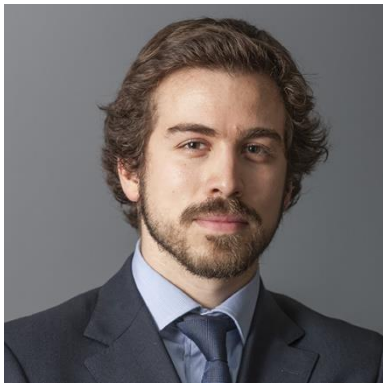

Nuno Sousa e Silva is a lawyer specializing on Intellectual Property and Digital Law and an Assistant Lecturer in Law at the Porto Law School of Universidade Católica Portuguesa. He also teaches at Porto Business School and has previously lectured at Instituto Superior de Contabilidade e Administração do Porto and at the School of Arts of Universidade Católica Portuguesa. In 2020 he earned a PhD in Law (summa cum laude), with a thesis on the inter-sections between IP and unfair competition. He graduated from the Law School of the Catho-lic University of Portugal in 2011 and in April 2013 he concluded his Master of Laws degree at the same University with a thesis on the concept of trade secrecy. Nuno also studied at MIPLC where he obtained his LLM degree in Intellectual Property and Competition Law in November 2013, writing his thesis on the ownership problems of overlaps in European Intel-lectual Property Law. He has published more than thirty articles and three books in the areas of Internet Law, Intellectual Property, European Law, Unfair competition and Contract Law. He has given lectures in Portugal, Germany, Hungary, Poland, Denmark, and the UK.

Abstract

This presentation addresses the relation between unfair competition and Intellectual Prop-erty Law. The aim is to understand whether and on what terms it is possible to invoke unfair com-petition when the intangible at hand is no longer, never has been, or cannot be pro-tected by exclusive rights. For this purpose, unfair competition is understood narrowly, fo-cusing on business-to-business interactions and protection of trade values.

The presentation starts by critically describing the justifications for unfair competition laws, rejecting the idea of investment protection, and concluding that business ethics is the real foundation of unfair competition law. Hence the rejection of misappropriation as a valid cause of action. It is submitted that the only valid grounds for unfair competition should be misrep-resentation and aggressive practices.

Taking this into account, I look at the relationship between the protection of signs (such as trade marks, GIs or trade names) and unfair competition. The need for common criteria, namely when it comes to determining the level of confusion requiring a legal intervention, is high-lighted. I propose a model to discipline the relationship between trade marks rules and principles (e.g. absolute grounds of refusal, the principles of speciality and territoriality) and unfair competition, admitting a limited protection of unregistered trade marks.

Subsequently, the relationships between IPRs and unfair competition in field of innovation is perused. I submit that the numerus clausus principle is valid and, therefore, unfair competition cannot have an equivalent effect to an exclusive right. In the same vein, in order to preserve areas of freedom and respect the limited duration of IPRs relating to innovation, a certain de-gree of confusion ought to be tolerated. Therefore, the use of non-protectable or no-longer protected inventions or creations is in principle free and should not be prevented by unfair competition rules.

To conclude, the nature of this relationship is summarized. The idea of precedence is rejected, in favour of a coherent and systematic interpretation of unfair competition. It is submitted that the main question is determining the proper scope of unfair competition instead of looking at the interaction as a conflict between rules.