



# Unfair Competition

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## Background

UNFAIR COMPETITION means any [FRAUDULENT](#), deceptive, or dishonest trade practice that is prohibited by [STATUTE](#), regulation, or the [COMMON LAW](#). It consists of a body of related doctrines that gives rise to several different causes of actions, including (1) actions for [INFRINGEMENT](#) of [PATENTS](#), [TRADEMARKS](#), or copyrights; (2) actions for wrongful [APPROPRIATION](#) of trade names, [TRADE DRESS](#), and trade secrets; and (3) actions for publication of defamatory, false, or misleading representations.

The law of unfair competition serves five purposes. First, it seeks to protect the economic, intellectual, and creative investments made by businesses in distinguishing themselves and their products. Second, the law seeks to preserve the good will that businesses have established with customers over time. Third, the law seeks to deter businesses from appropriating the good will of their competitors. Fourth, the law seeks to promote clarity and stability by encouraging customers to rely on a merchant's [TRADE NAME](#) and reputation when evaluating the quality and prices of rival products. Fifth, the law of unfair competition seeks to increase competition by providing businesses with incentives to offer better goods and services than others in the same field.

Although the law of unfair competition helps protect consumers from injuries caused by deceptive trade practices, the remedies provided to [REDRESS](#) such injuries are generally only available to business entities and proprietors. Consumers who are injured by deceptive trade practices normally must avail themselves of the remedies provided by [CONSUMER PROTECTION](#) laws. Businesses and proprietors, however, may typically avail themselves of two remedies offered by the law of unfair competition, injunctive relief (a court order restraining a competitor from engaging in a particular unlawful action) and money damages (compensation for any losses caused by the unlawful practice). These remedies may be available in both state and federal court, depending on the circumstances surrounding the unlawful act.

## The Law of Unfair Competition

### *Free Market Theory Underlying the Law*

The freedom to pursue a livelihood, operate a business, and otherwise compete in the marketplace is essential to any free enterprise system. Competition creates incentives for businesses to earn customer loyalty by offering quality goods at reasonable prices. At the same time, competition can also inflict harm. The freedom to compete gives businesses the right to lure customers away from their competitors. When one business entices enough customers away from a competitor, the competitor may be forced to shut down its business or

move to a different location.

The law of unfair competition will not penalize a business merely for being successful in the marketplace and will not subsidize a business for failing in the marketplace. Liability will not be imposed for aggressive, shrewd, or otherwise successful marketing tactics that are not deceptive, fraudulent, or dishonest. The law will assume, however, that for every dollar earned by one business, a dollar will be lost by a competitor. Accordingly, the law prohibits businesses from unfairly profiting at a rival's expense. What constitutes an "unfair" trade practice varies according to the cause of action asserted in each case.

### ***Interference with Business Relations***

No business can effectively compete without establishing good relationships with its employees and customers. In some instances the parties execute a formal contract to memorialize the terms of their relationship. In other instances business relations are based on a less formal oral agreement. Most often, however, business relations are conducted informally with no contract or agreement at all. Grocery shoppers, for example, typically have no contractual relationship with the supermarkets that they patronize. The law of unfair competition regulates all three types of relationships, formal, informal, and those falling somewhere in between.

Many businesses depend on formal written contracts to conduct business. Employer and employee, wholesaler and retailer, and manufacturer and distributor all frequently reduce their relationships to writing. These contractual relations create an expectation of mutual performance, meaning that each party will perform its obligations according to the terms of the agreement. Protecting these relationships from outside interference facilitates performance and stabilizes commercial undertakings. Interference with contractual relations upsets commercial expectations and drives up the cost of doing business by involving competitors in squabbles that can find their way into court.

Virtually every contract, whether written or oral, qualifies for protection from unreasonable interference under the law of unfair competition. Noncompetition agreements are a recurrent source of [LITIGATION](#) in this area of the law. These types of agreements are generally struck up in professional employment settings where an employer requires a skilled employee to sign an agreement promising not to go to work for a competitor in the same geographic market. Such agreements may also expressly prohibit the employee from taking client files, customer lists, and other [TANGIBLE](#) and intangible assets from the employer.

Noncompetition agreements are generally enforceable, unless they operate to deprive the employee of the right to meaningfully pursue a livelihood. Employees who choose to violate the terms of a noncompetition agreement may be sued for breach of contract, but the business that enticed the employee away from the employer may be held liable for tortious interference with an existing business relationship. The elements of this tort are: (1) the existence of a business relationship or contract; (2) the wrongdoer's knowledge of the relationship or contract; (3) the wrongdoer's intentional action taken to prevent contract formation, procure contractual breach, or terminate the business relationship; (4) lack of justification; and (5) resulting damages.

Informal trade relations that have not been reduced to contractual terms are also protected from outside interference by the law of unfair competition. Businesses are forbidden from intentionally inflicting injury upon a competitor's informal business relations through improper means or for an improper purpose. Improper means include the use of violence, undue influence, or [COERCION](#) to threaten competitors or intimidate customers. For example, it is unlawful for a business to blockade an entryway to a competitor's shop or impede the delivery of supplies with a show of force. The mere refusal to deal with a competitor, however, is not considered an improper means of competition, even if the refusal is motivated by spite.

Malicious or monopolistic practices aimed at injuring a rival may constitute an improper purpose of competition. Monopolistic behavior includes any agreement between two or more people that has as its purpose the exclusion or reduction of competition in a given market. The Sherman Anti-Trust Act of 1890 makes such behavior illegal by proscribing the formation of contracts, combinations, and conspiracies in restraint of trade. 15 U.S.C.A. sections 1 et seq. CORPORATE mergers and acquisitions that suppress competition are prohibited by the CLAYTON ACT of 1914, as amended by the Robinson-Patman Act of 1936. 15 U.S.C.A. sections 12 et seq. The Clayton Act also regulates the use of predatory pricing and unlawful tying agreements. Predatory pricing is the use of below-market prices to inflict pecuniary injury on competitors. A tying agreement is an agreement in which a vendor conditions the sale of one product upon the buyers promise to purchase an additional or "tied" product. For example, the U. S. Department of Justice sued Microsoft Corporation for allegedly tying its Internet Explorer web-browsing product to the sale of its Windows operating system. *U. S. v. Microsoft Corp.*, 253 F.3d 34 (D.C.Cir. 2001). The case was settled before the issue was finally resolved by a court.

### ***Infringement upon Trademarks, Trade Names, and Service Marks***

Before a business can establish commercial relations with customers and other businesses, it must create an identity for itself, as well as for its goods and services. Economic competition is based on the premise that consumers can intelligently distinguish between products offered in the marketplace. Competition is made difficult when rival products become easily mistaken for each other, since one business may profit from the sale of a product to consumers who believe they are buying a rival's product. Part of a business's identity is the good will it has established with customers, while part of a product's identity is the reputation it has earned for quality and value. As a result, businesses spend tremendous amounts of resources identifying their goods, distinguishing their products, and cultivating good will.

The four principal devices businesses use to distinguish themselves are trademarks, service marks, trade names, and trade dress. Trademarks consist of words, logos, symbols, slogans, and other devices that are affixed to goods for the purpose of signifying their origin and authenticity to the public. The circular black, blue, and white emblem attached to the rear end of motor vehicles manufactured by Bavarian Motor Works (BMW) is a familiar trademark that has come to signify meticulous craftsmanship to many consumers. Whereas trademarks are physically attached to the goods they represent, service marks are generally displayed through advertising. "Orkin" is the service mark for a well-known pest-control company.

Trade names are used to identify [CORPORATIONS](#), partnerships, sole proprietorships, and other business entities. A trade name may be the actual name of a business that is registered with the government, or it may be an assumed name under which a business operates and holds itself out to the public. For example, a husband and wife might register their business as "Sam and Betty's Bar and Grill," while doing business as "The Corner Tavern." Both names are considered trade names under the law of unfair competition.

Trade dress refers to a product's physical appearance, including its size, shape, texture, and design. Trade dress can also include the manner in which a product is packaged, wrapped, presented, or promoted. In certain circumstances particular color combinations may serve as trade dress. For example, the trade dress of Chevron Chemical Company includes the red and yellow color scheme found on many of its agricultural products. *Chevron Chemical Co., v. Voluntary Purchasing Groups, Inc.*, 659 F.2d 695 (5th Cir. 1981).

When a business uses a trademark, service mark, trade name, or trade dress that is deceptively similar to competitor's, a cause of action for infringement of those intellectual property interests may exist. The law of unfair competition forbids companies from confusing customers by using identifying trade devices that make their businesses, products, or services difficult to distinguish from others in the market. Actual confusion need not be demonstrated to establish a claim for infringement, so long as there is a likelihood that consumers will be confused by similar identifying trade devices. Greater latitude is given to companies that share similar

identifying trade devices in unrelated fields of business or in different geographic markets. A court would be more likely to allow two businesses to use the identifying trade device "Hot Handguns," when one business sells firearms downtown and the other business runs a country western dance hall in the suburbs.

Claims for infringement of an identifying trade device are cognizable under both state and federal law. At the federal level, infringement claims may be brought under the Lanham Trademark Act, 15 U.S.C.A. sections 1051 et seq. At the state level, claims for infringement may be brought under analogous intellectual property statutes and miscellaneous common-law doctrines. Claims for infringement can be strengthened through registration of the identifying trade device. For example, most states require that businesses register their trade names with the government and provide protection against infringement to the business that registers its trade name first.

### ***Infringement upon Copyrights and Patents and Theft of Trade Secrets***

The intangible assets of a business include not only its trade name and other identifying trade devices but also its inventions, creative works, and artistic efforts. Broadly defined as trade secrets, this body of commercial information may consist of any formula, pattern, process, program, tool, technique, mechanism, or compound that provides a business with the opportunity to gain an advantage over a competitor. Although a trade secret is not patented or copyrighted, the law of unfair competition awards individuals a property right in any valuable trade information they discover and attempt to keep secret through reasonable steps

The owner of a trade secret is entitled to its exclusive use and enjoyment. A trade secret is valuable not only because it enables a company to gain advantage over a competitor, but also because it may be sold or licensed like any other property right. On the other hand, commercial information that is revealed to the public, or at least to a competitor, retains limited commercial value. Consequently, courts vigilantly protect trade secrets from disclosure, appropriation, and theft. Businesses may be held liable for any economic injuries that result from their theft of a competitor's trade secret, as may other opportunistic members of the general public. Employees may be held liable for disclosing their employer's trade secrets, even if the disclosure occurs after the employment relationship has ended.

Valuable business information that is disclosed to the public may still be protected from infringement by [COPYRIGHT](#) and [PATENT](#) law. Copyright law gives individuals and businesses the exclusive rights to any original works they author, including movies, books, musical scores, sound recordings, dramatic creations, and pantomimes. Patents give individuals and businesses the exclusive rights to make, use, and sell specific types of inventions, such as mechanical devices, manufacturing processes, chemical formulas, and electrical equipment. Federal law grants these exclusive rights in exchange for full public disclosure of an original work or invention. The inventor or author receives complete legal protection for his or her intellectual efforts, while the public obtains valuable information that can be used to make life easier, healthier, or more pleasant.

Like the law of trade secrets, patent and copyright law offers protection to individuals and businesses who have invested considerable resources in creating something useful or valuable and who wish to exploit that investment commercially. Unlike trade secrets, which may be protected indefinitely, patents and copyrights are granted protection only for a finite period of time. Applications for copyrights are governed by the Copyright Act, 17 U.S.C.A. section 409, while patent applications are governed by the Patent Act, 35 U.S.C.A. section 111.

### ***False Advertising, Trade Defamation, and Misappropriation of a Name or Likeness***

A business that successfully protects its creative works from theft or infringement may still be harmed by [FALSE ADVERTISING](#). Advertising need not be entirely false in order to be actionable under the law of unfair competition, so long as it is sufficiently inaccurate to mislead or deceive consumers in a manner that it

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inflicts injury on a competitor. In general businesses are prohibited from placing ads that either unfairly disparage the goods or services of a competitor or unfairly inflate the value of its own goods and services. False advertising deprives consumers of the opportunity to make intelligent comparisons between rival products. False advertising also drives up costs for consumers who spend additional resources in examining and sampling products.

Both state and federal laws regulate deceptive advertising. The Lanham Trademark Act, 15 U.S.C.A. section 1051, regulates false advertising at the federal level, while many states have adopted the Uniform Deceptive Trade Practices Act (UDTPA), which prohibits three specific types of representations: (1) false representations that goods or services have certain characteristics, ingredients, uses, benefits, or quantities; (2) false representations that goods or services are new or original; and (3) false representations that goods or services are of a particular grade, standard, or quality. Advertisements that are only partially accurate may give rise to liability if they are likely to confuse prospective consumers. Ambiguous representations may require clarification to prevent the imposition of liability. For example, a business which accuses a competitor of being "untrustworthy" may be required to clarify that description with additional information if consumer confusion is likely to result.

Trade [DEFAMATION](#) is a close relative of false advertising. The law of false advertising regulates inaccurate representations that tend to mislead or deceive the public. The law of trade defamation regulates communications that tend to lower the reputation of a business in the eyes of the community. A species of [TORT LAW](#), trade defamation is divided into two categories, [LIBEL AND SLANDER](#).

Trade libel generally refers to written communications that tend to bring a business into disrepute, while trade slander refers to defamatory oral communications. Before a business may be held liable under either category of trade defamation, the First Amendment requires proof that a defamatory statement was published with "actual malice," which the Supreme Court defines as any representation that is made with knowledge of its falsity or in reckless disregard of its truth. *New York Times v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964). The actual [MALICE](#) standard places some burden on businesses to verify, prior to publication, the veracity of any attacks they level against competitors.

It is also considered tortious for a business to appropriate the name or likeness of a famous individual for commercial advantage. All individuals are vested with an exclusive property right in their identity. No person, business, or other entity may appropriate an individual's name or likeness without permission. Despite the existence of this common law tort, businesses occasionally affiliate their products with popular celebrities without first obtaining consent. Although movie stars and television actors can lend prestige to the goods and services they promote, a business which falsely suggests that a celebrity has sponsored or endorsed one of its products will be held liable for money damages in amount equal to the economic gain derived from the wrongful appropriation.

## State Law of Unfair Competition

The body of law governing unfair competition is comprised of a combination of federal and state legislation and state common law. Below is a sampling of state court decisions decided at least in part based on their own state's [STATUTORY](#) law, common law, or both.

**CALIFORNIA:** A manufacturer's price policy, which set minimum resale prices for its products and informed retailers that the manufacturer would refuse to sell products to any retailer who did not comply, was permissible under the state's unfair competition law. *West's Ann.Cal.Bus. & Prof.Code §§ 16720 et seq. Chavez v. Whirlpool Corp.*, — Cal.Rptr.2d —, 2001 WL 1324737 (Cal.App. 2 2001).

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**HAWAII:** Where the seller of a solar water heating unit incorrectly represented to a purchaser that it had been in business for 16 years and that it had licensed engineers on its staff, and then failed to scientifically tailor an efficient water heating system for the purchasers' home, installed the system knowing it was defective in design, and failed to provide a reasonable and effective service and repair program to correct the faulty system after its installation, the seller's conduct and representations constituted acts or practices violating the state's statute governing unfair competition and deceptive trade practices. HRS § 480-2. *Rosa v. Johnston*, 3 Haw.App. 420, 651 P.2d 1228 (Hawaii' App. 1982).

**ILLINOIS:** A competitor of a flashlight bulb distributor was free to copy the bulb's information chart and reorder card that was used by the distributor in connection with the sale to retail merchants of bulbs that were not copyrighted, and the only restriction imposed by the state law of unfair competition was that the competitor sufficiently identify the source of the chart and card to customers by providing proper labeling. S.H.A. ch. 121 =, § 312. *15.Duo-Tint Bulb & Battery Co., Inc. v. Moline Supply Co.*, 46 Ill.App.3d 145, 360 N.E.2d 798, 4 Ill.Dec. 685, (Ill.App. 3 Dist. 1977)

**INDIANA:** The appropriate remedy for the misappropriation of a university's name or likeness by a professor for his website and e-mail addresses was under the state's unfair competition law, trademark statutes, and the common law of tortious interference with business relations. West's A.I.C. 24-2-1-1 et seq. *Felsher v. University of Evansville*, 755 N.E.2d 589, (Ind. 2001).

**NEW JERSEY:** The "rule of reason" analysis, rather than a "per se" approach, is required for restraint of trade claims alleging [CONSPIRACY](#) to damage or eliminate a competitor by unfair means, and thus a distributor's failure to establish probable or actual injury to competition caused by a processor's conduct precluded the imposition of liability upon the processor. *Ideal Dairy Farms, Inc. v. Farmland Dairy Farms, Inc.*, 282 N.J.Super. 140, 659 A.2d 904, (N.J.Super.A.D. 1995).

**NEW YORK:** The plaintiff's allegations failed to state a claim for unfair competition arising out of miscellaneous business relations, where the complaint did not state the requisite elements of a confidential business relationship between the parties or indicate that the parties had entered a valid agreement to refrain from the alleged acts of unfair competition. *Ponte and Sons, Inc. v. American Fibers Intern.*, 222 A.D.2d 271, 635 N.Y.S.2d 193 (N.Y.A.D. 1 Dept. 1995).

**OHIO:** Actions under the state's deceptive trade practice and unfair competition law have been restricted by court interpretation of federal copyright law to lawsuits seeking to redress violations of a company's trade dress and labeling so as to prevent purchasers from being misled as to the source of goods. 17 U.S.C.A. § 301. *George P. Ballas Buick-GMC, Inc. v. Taylor Buick, Inc.*, 5 Ohio Misc.2d 16, 449 N.E.2d 805, 1983 Copr.L.Dec. P 25,550, 5 O.B.R. 236 (Ohio Com.Pl., 1981).

**WASHINGTON:** A state court's issuance of an injunction against a national bank's use of a name was inconsistent with the authority of the COMPTROLLER of Currency to approve names for national banks, and thus the court's reliance on the state's law of unfair competition was preempted by the Comptroller's congressionally-approved discretion to approve bank names. *National Bank Act*, 12 U.S.C.A. § 30. *Pioneer First Federal Sav. and Loan Ass'n v. Pioneer Nat. Bank*, 98 Wash.2d 853, 659 P.2d 481 (Wash. 1983).

## Additional Resources

*American Jurisprudence*. West Group, 1998.

<http://profs.lp.findlaw.com/copyright/index.html>. FindLaw for Legal Professionals: Copyright Law.

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<http://www4.law.cornell.edu/uscode/17/index.text.html>. Title 17 United States Code: Copyrights.

<http://www.findlaw.com/01topics/23intellectprop/03trade.mark>. FindLaw for Legal Professionals: Trademark Law.

*Intellectual Property in a Nutshell: Patents, Trademarks, and Copyright*. West Group.

*McCarthy on Trademarks and Unfair Competition*. West Group, 2001.

*West's Encyclopedia of American Law*. West Group, 1998

## Organizations

### *Intellectual Property Owners Association*

1255 23rd St NW # 200  
Washington, DC 20037 USA  
Phone: (202) 466-2396  
Fax: (202) 466-2366  
URL: [www.ipo.org](http://www.ipo.org).  
Primary Contact: Ronald E. Myrick, President

### *Recording Industry Association of America*

1330 Connecticut Avenue NW, Suite 300  
Washington, DC 20036 USA  
Phone: (202) 775-0101  
Fax: (202) 638-0862  
URL: <http://www.riaa.com>  
Primary Contact: Hilary B. Rosen, Chief Executive Officer

### *U. S. Patent and Trademark Office*

Crystal Plaza 3, Room 2C02  
  
Washington, DC 20231 USA  
Phone: (800) 786-9199  
Fax: (703) 305-7786  
URL: <http://www.uspto.gov>  
Primary Contact: Nicholas Godici, Director

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