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## **Cyber Consumer Protection and Unfair Competition\***

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1. Consumer law and competition law, both against cyber criminality. Metatags, spamming, framing, cyberquatting, domain names ... those are terms that did not exist fifteen years ago. Today, they belong to the current law language of those who deal with cyber business.

This helps us to understand why the comparative law congress taking place in Utrecht focuses on, among other matters, cyber consumer protection and unfair competition practices.

The difficulty for national law systems is of course amplified by the fact that new technologies have been developing, and more precisely the internet, which has, in just a few years, become a place which is prone to unfair practices.

Cyber space increases the weakness of those who do not have sufficient knowledge concerning computers, whether they are consumers or business professionals. Unfair practices on the net are increasingly frequent and specific case law has started to develop. A certain number of national jurisdictions have already had to deal with the subject,<sup>1</sup> designed as 'cyber disloyalty'. The national reports show how the national systems are trying to deal with the problem.

What is at stake is the development of this economic new space, whose success relies on different actors' confidence therein.

Comparing the systems makes us realise that, despite the variety of questions that have appeared, similarities between the various legal systems do in fact exist. Before coming to the general reflections elaborated upon in the national reports, we have to look at these similarities. In this respect, unfair competition law and consumer law are associated with each

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\* Session IIIA3. National Reports received from: Belgium, E. Terry; Canada, V. Gautrais; Germany, S. Leible; Italy, G. M. Riccio; Macao, A. Teixeira Garcia; Poland, W. Katner.

<sup>1</sup> See the Italian and Canadian reports.

other in facing the question of cyber criminality. They both have the same goal: searching to create a framework in which it could be possible to reprehend practices that disturb the market.

And every unfair practice, whether it is against consumers or business professionals, disturbs the market. Therefore, the perspective is wider than B2B relations which competition law deals with, or B2C relations which consumer protection law deals with. Both must intervene, competition law a priori, consumer protection a posteriori.

2. Similarities between national systems regarding the methods used. The common question is the following: do we have to consider unfair competition in cyberspace as a particular and specific matter or do we have to use general principles and methods? Of course, some questions require specific answers and common law cannot answer all of them. But common law has always been associated with a specific law. When unfair competition is reprehended through very general dispositions (such as liability in tort), there is no difficulty in applying it when unfair practices take place on the internet. For consumer law, considering the fact that it has often been elaborated over the years, one step after another, and often under the influence of European law or the CNUDCI, some of its tools have been adapted so as to protect the specific cyber consumer.

The national reports show that national laws use both common law that courts adapt to the internet and special new law. The solutions adopted to regulate this new business field are a combination of adapted pre-existing norms (1) and the adoption of new norms (2).

### 1. Cyber Consumer Protection Through Adapting Pre-Existing Norms

3. Classic law adaptation. The determination of unfair commercial practices is not a new question. Every traditional unfair practice can be used in cyber space. Texts have to be adapted to the virtual world, competition law (1.1) as well as consumer protection (1.2).

#### 1.1. The Adaptation of Competition Law

4. Cyber issues can be assimilated with physical issues. Professionals have the same obligations whether they do business on the internet or in the traditional way. So competition law is to be applied in both its material or procedural aspects.

5. Material competition law and cyber consumer protection. Indirect cyber consumer protection by the market is assumed by competition law and more precisely by unfair competition dispositions and other rules aiming to attain a free competition market. It appears that practices are often reprehended through two ways: there is a general interdiction and

there are specific norms which have been created to condemn some competition restricting or potentially restricting practices which are forbidden for one market actor: for example, a minimum compulsory price, abusive clauses, etc. All the rights exposed by the different reports are protected by, on the one hand, legal dispositions or case law which insists, in a very general way, on the fact that those commercial activities must be exercised in a free competition market; and, on the other, there are also more precise dispositions. For instance, Professor Wojciech Katner describes the Polish system: article 3 of the Law of 16 April 1993 on unfair competition describes an act of unfair competition as any act contrary to the law or general usage which threatens or violates professional or client interests. Then, this law provides a long list of examples of unfair competition practices. The law of Macao does exactly the same. It states that an act of unfair competition is an act contrary to every honest practice. There then follows a list of those unfair practices. This method has also been adopted by the directive of 11 May 2005 on both classical and cyber business, and in its article 5 it provides a general disposition and in article 6 and thereafter a precise description of those practices which will be forbidden in European Community.

The French jurisdiction has often applied those principles to practices taking place on the internet. The best example is what in French law is called parasitic behaviour, that is to say when a business uses, for its own profit, the commercial success or reputation or intellectual investment of someone else. Of course, the internet has developed the possibilities for such a behaviour. Behind those new practices, we find the abusive use of hyperlinks or metatags that have been precisely described in the reports by Professors Augusti Teixeira Garcia and Maria Riccio. Those practices violate competitors' rights and also abuse the consumer. French judges do not hesitate to condemn such behaviour on the ground of unfair competition.<sup>2</sup> It is the same with Italian case law<sup>3</sup> which considers that there is a case unfair competition when the provider of the website registers a domain name which is identical to an existing trademark or when the site contains hyperlinks directing the consumer towards other web sites offering similar products. A domain name is not considered under French law as an object of intellectual property. Therefore, it is the role of the courts to protect such names by referring commercial names or trademarks when such signs are used for the purpose of distinction<sup>4</sup> and to protect them in the field of unfair competition.

6. Procedural unfair competition law and cyber consumer protection. We also have to focus on the judicial tools used against unfair competition practices. Several states try to provide

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<sup>2</sup> See Paris, 13 March 2002, CCE July-August 2002, n° 99, obs L. Grynbaum. In this case, it was decided that registering a competitor's mark in the company source code can be sanctioned on the ground of unfair competition, and this was sufficient to award damages to the victim under article 1382 of the Civil code.

<sup>3</sup> See the Italian report, §5.

<sup>4</sup> C. Caron, *Domain name at the gate of intellectual property*, CCE December 2005 comm. 181.

a quick answer by means of injunction proceedings when those practices occur: such a procedure exists, for instance, in German law, or in the law of Macao. Another similar procedure is possible in Canada. The advantage of such a procedure is that it puts a quick end to unfair practices which may be taking place, such as, for instance, stopping unauthorised email advertisements from being sent.

Similarities between the legal systems also exist regarding the sanctions adopted for unfair practices. All of them use civil damages as a remedy. Usually, the more reprehensible forms of behaviours are also criminally sanctioned. Some systems, like the German one, give damages a punitive function. The aim is then to prevent practices that affect a large number of consumers, but only affect individual consumers in a very limited way. The German Law of 8 July 2004 makes it possible to condemn a company which has intentionally violated competition rules and has thereby made a profit: in such a case the company in question can be ordered to repay its profits to the federal state.

All these tools, as useful as they may be, must be associated with others which have been adapted to international situations, a situation which is, of course, rather frequent. Such questions can be solved by the application of tort rules. It is usually case law that has to answer those complex questions through the interpretation of private international law. Regarding international jurisdictions, the Brussels convention has been transformed into an European norm which applies in every country of the European Union and it gives the plaintiff the possibility, when instigating proceedings, to choose between the defendant's place of residence or the place where the damage actually occurred. Also, it is usually the place where the damage occurred that is used to determine the applicable national law. But how is it possible to localize damage on the internet? As was stated by Professor Stefan Leible, there is often a dissociation between the place where the damage originated and the place where it actually occurs. The European Court of Justice has decided that the courts only have jurisdiction over damage that has taken place in the state where it is seized. All the reports agree on the fact that those questions are very difficult to resolve.<sup>5</sup> An exhaustive description thereof would go beyond what the subject of this contribution.

If we can see some similarities in the solutions adopted by the different states concerning unfair competition, it is the same phenomenon when we look at general consumer protection, which is of course used for protection on the internet.

## 1.2. Adaptation of Consumer Law

7. The Internet's assimilation to distance selling contracts. The Internet increases the risks of abuse for consumers, even if the considered unfair practices are not new. Regarding consumer

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<sup>5</sup> See the Belgian and Italian reports.

protection, forbidden practices and obligations by professionals are strictly determined in the legal texts.<sup>6</sup> They have been constantly renewed or added to others in the last thirty years. The latest regulations are usually there to transpose European directives. The German, Belgian, and Polish reports stress the importance of this European influence. In those countries, legislation on consumer protection results from these directives. Directive n°2005/29/CE of 11 May 2005 on unfair commercial practices gives a common legal framework to classical business and to business 'on line'. It was intended to replace various national rules protecting consumers. The aim is to contribute to the development of a common market with a high level of consumer protection. This directive has to be transposed into the national systems before 12 June 2007. It is all the more important that the harmonization is the highest possible. Nevertheless, the option chosen has meant some inconvenience for some states. This is the case for Belgium,<sup>7</sup> for instance, or France,<sup>8</sup> whose very protective legislation might have to submit to change.

Incriminating practices can be found in the entire selling process, but also in everything that is supposed to incite the consumer to buy: misleading advertising, pre-contractual information, the right to retract, imperious rules on the form of the contract, organization of victim's actions before the courts ...

So, in every national legal system we find these elements of protection: protection before the contract is signed, protection during conclusion and protection after conclusion. Those three aspects are present in all the national legal systems that have already transposed the directives, but also in Canadian law and in the legal system of Macao.

8. Advertising regulation. These dispositions are of great importance for commercial practices on the internet. Professionals who sell via the internet need to make themselves known to potential consumers. Condemning misleading advertising is a common aspect in all the reports. The rules applied to traditional misleading advertising can be applied to advertisements on the web. Professor Augusto Teixeira Garcia explains that in Macao there are no specific rules for advertising on the internet. But the traditional rules contained in the Commerce code do apply when necessary, for instance to combat spamming or to compel the seller to clearly identify his message as an advertisement. Reprehending aggressive electronic advertisements is another method. Actually, a consumer can be a victim of real commercial harassment via emails and receiving unsolicited promotional messages. That is usually called spamming. In such a case the legislation protecting personal information<sup>9</sup> can be applied

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<sup>6</sup> J. Calais-Auloy & F. Steinmetz, *Consumer Law* (6<sup>th</sup> ed. 2003).

<sup>7</sup> See the Belgian report n° 34 and others.

<sup>8</sup> Chron. RTD Com 2005.631 obs M.L.

<sup>9</sup> The protection of the internet user against spamming was first regulated by the directive of 20 May 1997 on consumer protection in distance selling contracts, in accordance with the system of opting out, thereby accepting

to sanction companies using spamming techniques. The criminal courts, for instance, have recently condemned such practices,<sup>10</sup> stating that it is illegal to accumulate people's personal electronic addresses collected from the public domain of the internet.

9. The search for clear consent. Cyber consumer protection is also the work of texts that try to regulate the circumstances in which contracts can be concluded. First, unfair practices were prevented on the ground of general protective consumer dispositions for traditional business (directive on abusive clauses, consumer credits, ...). Then came the regulation of distance selling contracts with the directive of 20 May 1997 on consumer protection in distance selling contracts and the directive of 23 September 2002 on distance selling contracts concerning financial services. All European states have transposed those two texts. For instance, the Belgian legislation of 14 July 1991 on commercial practices, information and consumer protection concerns every practice whether it takes place on the internet or elsewhere and has integrated the two directives. European law has for instance imposed cooling-off periods allowing consumers to retract and some specific information obligations in the case of distance selling contracts.

10. How to bring an action before the courts. If it is essential to elaborate protective consumer systems, it is also important to give consumers the possibility to bring an action. This aspect might be the one where national systems demonstrate the greatest differences. For instance, Polish consumer protection is assumed by a state body: the competition and consumers protecting office. In some countries like Belgium or Germany, consumer associations are authorised to bring actions. But these tools are not systematically used. Professor Evelyne Terryn states that these actions are rarely used in Belgium due to the lack of financial means on the part of these associations. In contrast, Professor Stefan Leible explains that they are frequently used in Germany. National answers are often both preventive and repressive, often associated with criminal sanctions.

11. International jurisdiction. Electronic commerce and more precisely cyber consumer protection have brought new difficulties regarding international jurisdictions and conflicts of laws.<sup>11</sup> Determining the jurisdiction and the law is made by using common rules. In

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spamming as long as the user had not refused it, before adopting the system of opting in in the directive of 12 July 2002, forbidding spamming without any previous consent. *See* A. Lepage, *Fundamental rights and liberties facing the internet* (2002).

<sup>10</sup> Crim. 14 March 2006, appeal n°05-83423.

<sup>11</sup> *See* the analysis of French law. J. Passa, *The international electronic contract: conflicts of laws and jurisdictions*, CCE May 2005, Study 17, O. Cachard, *International Regulation of the Electronic Market* (2002), and the various contributions in *The First international days of electronic commerce*, Colloque of Nice, 23-25 October 2000 (2001).

the European system, the Rome convention of 1980 on the applicable law in contractual matters and the Brussels convention, that is now the 44/2001 European rule on international jurisdictions, do apply. These texts contain provisions on conflicts of laws which have been drafted to protect consumers, frequently allowing consumers to choose the jurisdiction of their residence. It is the role of the courts to apply those texts to specific questions resulting from electronic commerce. The national reports show that the main difficulties concern the localization of the incriminated acts, and the question of knowing whether those acts concern a particular market.

The difficulties in determining those situations are not limited to national frontiers and the absence of unification could inspire some pessimism regarding the usefulness of classic tools in cyber consumer protection. The development of unfair commercial practices on the internet implies specific reactions from states. Then, we must focus on specific electronic commerce rules that national legal systems have brought about.

## 2. Consumer Protection through New Specific Rules

12. The elaboration of new law. The national reports show that states have already begun to adapt their legal systems to those new practices, taking into account the development of electronic commerce. But this construction cannot as yet be achieved. Therefore, we have to present the actual systems (2.1) before asking what could be the other potential solutions (2.2).

### 2.1. De Lege Lata

13. Specific protection of the cyber consumer. Facing the growing importance of cyber business, some countries have adopted specific rules. European directives, especially the one of 8 June 2000 on electronic commerce, have played an important role in the elaboration of national rules. The directive has, of course, been transposed in all the states. This is true of the German, Belgian, Italian and Polish systems. The model laws of 1996 by the United Nations on electronic commerce, and the one of 2001 on electronic signatures, have also been used as models by non-European states to adopt their specific legislation. The example here is Macao or the Canadian provinces. But the two reports underline that their legislation is less advanced than that of European states, and that specific norms are less numerous and less complete.

We can already discern that those texts, dealing only with the internet environment, do not only concern consumers, but also the professionals, as is noted by Professor Evelyne Terryn. It is the same in French law. The Law of 21 June 2004 on confidence in the

numeric economy<sup>12</sup> that had transposed the directive of 8 June 2000 deals only with cyber consumers;<sup>13</sup> the Law of 13 March 2000 has adapted the system of proof to electronic signatures<sup>14</sup> and concerns all economic participants; and more recently, the Law of 2 August 2005 organising electronic reversed auction sales<sup>15</sup> deals only with professional participants.

14. Cyber consumer law. What is the precise content of those texts especially elaborated to regulate electronic business? Three goals can be distinguished in the various national systems: organizing electronic business contracts, ensuring that online transactions are safe and reinforcing electronic business professionals' liability. Electronic business-specific rules are intended to regulate contracts concluded through the internet. Professor Vincent Gautrais's report underlines that contracts offered online are in some aspects dangerous: a screen is less easily readable and leaves less time for reflection than a written form, the documents are often more complex and the contractual clauses can be dispersed somewhere on the web site. Moreover, the way in which one has to conclude a contract is dangerous: there is a risk of find oneself bound by a simple click that will be immediately registered and irreversible. This can link the consumer without a real will to be so linked. All market actors are targeted by this electronic business regulation. The Directive of 8 June 2000 on electronic trading states that companies who offer online services will have to offer certain information at the same time, thereby making it possible to identify the operator who is offering the online services. They will also have to describe the different steps in the conclusion of an online contract. Professor Vincent Gautrais deplors the fact that Canadian law is dragging its heels on this point compared to European law.

Specific rules have also been created to guarantee the safety of online transactions. The pertinent point is to adapt classic rules on proof and electronic signatures and to guarantee the safety of online payment.

In 2005 Macao adopted a law on the electronic signature inspired by the standard law of CNUDCI. European systems also have specific rules on electronic signatures. The Polish one even offers different categories of electronic signatures. Those rules are in addition to European rules intended to guarantee the safety of on-line payments.

Moreover, the emergence of new risks as a result of the numeric environment has led states to reinforce the responsibility of electronic business operators, compared to the one that exists

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<sup>12</sup> P. Stoffel-Munck, *Electronic commerce contracts reform* (2004) I.1341.

<sup>13</sup> Actually, this law does not only concern consumers and some of its dispositions can apply to business relations. It is the case for dispositions on offer and acceptance (articles 1369-1 and 1369-2 of the Civil code), but also for the contractual automatic responsibility of the services provider via the internet.

<sup>14</sup> P. Catala, *et al.*, *Introduction of the electronic proof in the Civil code* (1999) I, 182.

<sup>15</sup> N. Genty, J. Huet & A. Dumont-Tricot, *Electronic reversed auction sales in the law* (law of 2 August 2005), CCE May 2006, n° 13.

in the classic business context. The directive of 8 June 2000 has imposed such obligations. The aim is to protect only consumers by laying down the automatic responsibility of the provider for the correct execution of his obligations.

15. Specific unfair competition law for electronic business. We have to address specific rules created by ICANN (Internet Corporation for Assigned Names and Numbers) to deal with the creation of addresses and web sites. Their function is not to directly protect the consumer. But they do so indirectly by laying down unified rules on domain names and arbitration procedures for litigation on this subject. Some states have already decided to adapt their industrial property law to cover domain names: for instance the reform (of 5 February 2005) of the Italian industrial property code or the Law of 23 June 2003 on the registration of illegal domain names to combat industrial property violations via the internet.

## 2.2. De lege ferenda

16. Three methods. No remedy on its own can resolve all the unfair practice difficulties resulting from the internet. Different ways can be considered to reinforce the practices of online loyalty. The national reporters usually consider three possibilities to reinforce the current legal framework: reinforcing national tools is useful, but is not always efficient in such a worldwide internationalised context. Then, answers can be sought by elaborating informal tools for the self-regulation of the market, or by the harmonisation or unification of national legal frameworks.

Electronic business operators' protection or cyber consumer protection certainly imposes the reinforcement of national laws. This is what Professor Vincent Gautrais hopes for Canada. Even if a common law can bring about some solutions, more and more countries should go further by adopting specific rules for this specific situation, as has already begun, because electronic business is becoming increasingly important in national economies, and because new unfair practices have arisen. Actually, some of the reports lead us to think that a common law cannot deal with such new practices on its own, and this is especially true when we look at, for instance, advertising or parasitic behaviour (hyperlinks, metatags, the attribution of domain names, conflicts of laws, international jurisdictions). Furthermore, national laws are not complete concerning, for instance, legal relations between individuals or, as is underlined by the Italian report, online auction sales.

According to the national reports, self-regulation must be promoted. Professor Vincent Gautrais underlines the importance of the Canadian code on the practice and uses of consumer protection in electronic commerce. Professor Giovanni Maria Riccio notices that a part of

the Italian doctrine is in favour of self-regulation. The European Union also stimulates the implementation of self-regulation. The codes on uses and practices are explicitly highlighted and promoted by the directive of 11 May 2005. They allow for soft rules which are simple to amend and are non-restrictive, but can be used by judges if and when necessary, as has occurred in Germany. Of course, the main inconvenience of self-regulation is that it offers limited guarantees to market participants, and mostly to consumers.

As online commerce has no natural frontiers, the implementation of legal tools implies a real political will on the part of states. Several methods can be used. Logically, and considering the efficiency and dynamism of the European institutions, the most important unification concerning this matter is the European one: the distance selling contracts directive and the online business directive have largely contributed to states introducing adequate tools. We can nevertheless deplore the fact, as Professor Stefan Leible has done, that this movement has very little to do with B2B relations. Harmonisation or unification has taken into account substantive rules or private international regulations. Professor Augusto Teixeira Garcia notices that the need for private international rules is vitally important here. This question is also of primary importance for the European authorities. Beyond the provisions of the sectorial directives that deal with transfrontier situations, the European Union has elaborated two projects. They are the Rome I proposition<sup>16</sup> on the law which is applicable in the case of contractual obligations and Rome II<sup>17</sup> on the law which is applicable in the case of non-contractual obligations. Both have taken into account the difficulties resulting from an electronic global context and try to establish conflicts of laws rules which are applicable in classic business and in electronic commerce.

All the reporters agree that it is impossible to attain a perfect worldwide unification of the rules, whether they be substantive rules or private international law rules. Nevertheless, two possibilities can be looked at. The first one consists of the elaboration of international legal tools that would not be imperative. This is the path followed by the CNUDCI, whose objective is to offer model guidelines to the states wishing to adopt specific rules for electronic business. The second consists of referring to general law principles, *lex mercatoria* principles (that could be called *lex electronica*) inspired, for instance, by *Unidroit*. There, the operators remain very free and there are few constraints on loyal behaviour. Of course, this choice, which, for instance, is preferred by Professor Wojciech Katner, implies a great belief in economic operators.

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<sup>16</sup> Proposition of the European Parliament and Council of 15 December 2005, COM (2005) 650 final.

<sup>17</sup> Proposition of the European Parliament and Council of 22 July 2003, COM (2003) 427 final.

### 3. Conclusion

Faced with the legitimate fears of business participants, legal answers have been numerous and quick to emerge. But we can question the efficiency and the relevance of regulatory tools put forward to protect loyalty in electronic business practices. This inherently ignores frontiers and, consequently, compulsory regulation. Nevertheless, we cannot be too pessimistic. Surely time will help companies and consumers to understand the dangers or the great advantages of the internet. It is only then that a better knowledge thereof will help to avoid unfair practices.

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