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THE PUBLICATION OF APOLOGY ("SHAZAI-KŌKOKU") AS A REMEDY FOR UNFAIR COMPETITION IN JAPAN

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In October 1962, the Chief Justice Hiramine of Osaka Hight Court passed judgment, dismissing a defendant's appeal, on some unfair competition case. After the judgment the case has become well known among business experts as the "Pyrometer case". The followings are the outline of the fact and the court's opinion about it.

(*Outline of the Fact*)

Plaintiff (appellee) is the manufacturer and seller of physical and chemical apparata, tradename of the company is 'Kabushiki-Kaisha Shimazu Seisakusho' (Shimadzu Mfg. Co., Ltd.) and holds the title on the trademark '⊕' which is applied to the designated commodities belonging to Group 18 of Commodity classification including physical and chemical machines and apparata and measuring instruments. Their products occupy leading position in this field in terms of both quality and quantity and the said tradename and trademark are well-known in Japan. Plaintiff has been manufacturing and selling pyrometer by the name of high temperature thermometer, while around July 1959, a defendant (appellant) company, Taiyō Rikaki Kabushiki-Kaisha (Taiyō Physics and Chemistry Instruments Corp.), which specializes in physical and chemical apparata and measuring instruments, sold one pyrometer manufactured by it to Kinki University, in Fuse City, Osaka Prefecture, at ¥13,000, applying the tradename and trademark of plainntiff to the said pyrometer and the table of its test results. While the product of defendant does not satisfy Japanese Industrial Standard (JIS) and although it is cheaper, it is inferior

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to the product of plaintiff in the construction, function, appearance, durability, etc. and consequently in about 10 days after delivery, the purchaser claimed to plaintiff to inspect and repair the unit. Thereupon the defendant's wrongful act was brought to the attention of plaintiff.

Thus plaintiff claimed that defendant's sales falls under Fusei-Kyōsō-Bōshi-Hō (Law for prevention of unfair competition) Art. 1, Para. 1, Item 1 (Law No. 14, 1934), i.e., "a conduct which causes confusion with other's merchandise" and demanded defendant publication of apology (in Japanese 'Shazai-Kōkoku') as the "necessary means to recover commercial credit" injured by defendent. The court ordered defendant to publish such apology once each on Osaka Local Edition of Asahi News, Mainichi News and Yomiuri News and on Nikkan Kōgyo News, as per the following text.

> "When our company sold a pyrometer to Kinki University around July 1959, we applied, without your consent, your tradename and trademark to the said merchadise and your tradename to the table of test results of the said product and we hereby regret for such conduct and express our sincere apology."

Defendant, being dissatisfied by such judgement, insisted that (1) plaintiff's "commercial credit" had not been injured yet (2) it is sufficient to post defendant's apology within the university but to publish it on the newspaper is not a "necessary measure." The appeal was dismissed.[1]

(*Reason for Judgement—Justices Takashi Hiramine, Kenjirō Ohe and Yōzō Kitagō presiding*)

〔I〕 In order that a commercial credit is judged to be injured, it is not necessary that the credit which exists and is being maintained is impaired and lost to unidentified masses. When unfair competition is committed only once with one piece of commodity, and as the result, it causes distrust in trade on the part of only one specific trader, the degree and scope of

1) K.K. Shimazu Seisakusho v. Taiyō Rikaki K.K., 13 Kakyū saibansho minji saibanreishū [hereinafter cited Kakyū minshū] 2188 (Osaka High Ct., Oct. 31, 1962), *dismissing First Appeal* (*kōso*) *from* HANREI TAIMUZU (No. 117) 56, KOSEKI (ed.), FUSEIKYŌGYŌHŌ HANREISHŪ (Collection of cases on unfair competition law) 393 (1967) (Osaka Dist. Ct., Feb. 16, 1961)

damage should be limited, but yet it can be said that the credit has been injured to that extent.

〔II〕 Even though the party to whom the merchandise in question was sold was only one university, the scope of injury of commercial credit should not be judged to be limited to only such juridical person named Kinki University, but on the contrary, since there are many professors, students and other related persons in the university and because of the special position the university holds in the society, it is logical to consider that the impression that the product of appellee is coarse in quality may be disseminated not only within the university but also to outside of the university and it is also appropriate to conjecture that the students who were then at the said university who might have obtained such impression had already left the university and are working in and around Osaka, and therefore the evaluation and opinion of university as to the performance etc. of physical and chemical apparata are far more powerful than a private individual, "the aforesaid method of apology" is a required and appropriate measure as the means to recover the business credit of the appellee.

I

This is the case where the so-called right of claim for the means of recovery of credit was exercised against an unfair competitive act. It is particularly interesting to note that the court, upon the claim of the person who was injured of its commercial credit, ordered publication of apology, directly based on the Law for Prevention of Unfair Competition Art. 1—2, Para. 3.[2] According to the reasons of judgement, the court, following the common theory and judicial precedence, invoked the prevailing interpretation regarding libel to the "commercial credit" and recognized the probability of dissemination of damage due to purchaser's

2) According to the Japanese Unfair Competition Prevention Law art. 1—2, para. 3, the plaintiff whose business credit was injured, instead of compensation for damages or in addition thereto, may request the court to issue an order to the intentional or negligent infringer to take measures necessary for restoration of his business credit.

special position in society and judged the public notice of apology necessary. It should be said a righteous judgement.[3]

II

According to the Japanese Civil Code, the relief of unlawful act should be made in principle by monetary reparation (Civil Code art. 722, para. 1). However, depending upon the position of the injured, there may be cases when they are not satisfied with such reparation and therefore, as an exceptional case, it is permitted to resort to such measures as restoration of honor provided in Art. 723 of Civil Code.[4] In correspondence to the provision for general restoration of honor in the said Article, the Law for Prevention of Unfair Competition provides the measures, based on the same philosophy, in order to relieve the injured credit. There are special provisions regarding infringement of industrial property right: Patent Law Art. 106, Utility Model Law Art. 30, Design Law Art. 41, Trademark Law Art. 39——The provision of Article 106 (Measure to recover credit) of the Patent Law shall apply *mutatis mutandis* to infringement of trademark right or exclusive use right, etc.[5] Accoding to the majority opinion, the concept of honor meant by Civil Code includes commercial credit,[6] and therefore for the relief of injured credit which does not fall under the injury of industrial property right, Art. 723 of Civil Code shall be applied.[7] In the framework of the aforesaid system for recovery of honor and credit, it is the common practise in Japan to employ the method of publication of apology on the newspaper. There are such

3) See, comment on the case by Mitsuda, JURISUTO (No. 333) 96 (1965)
4) I. KATŌ, FUHŌKŌI (Torts) 215, in 22 HŌRITSUGAKU ZENSHŪ (Complete works of jurisprudence) (1957)
5) See, Matsuo, *The New Japanese Trademark Law*, 53 TRADEMARK REP. 117, 132 (1963); H. Shinohara, *Shingai Jijitsu no Rufu to Meiyo Shin'yō no Kison* (Dissemination of infringing matter and defamation of character and credit), JURISUTO (Special Issue), TOKKYO HANREI HYAKUSEN (Selected one hundred cases on patents) 202 (1966)
6) S. SOMIYA, MEIYOKEN-RON (Treatise on the right of honor) 260 (1939)
7) K. TOYOSAKI, KŌGYŌ-SHOYŪKEN-HŌ (Industrial property law) 144, in 54 HŌRITSUGAKU ZENSHŪ (1960); M. ONO, CHŪKAI FUSEIKYŌSŌ-BŌSHI-HŌ (Commentaries on the Unfair Competition Prevention Law) 179 (1961)

method of apology as to announce apology, at the public court or publish the verdict that the injured party won the suit. However there has been no precedence of such method in Japan.[8] In the future, it may be possible that apology is broadcasted through radio or television. The system of publication of apology certainly poses certain question in regard to its ethical nature[9] but at least at present, it is the system supported by majority. Once the question was raised whether or not it would violate the provision of freedom of conscience guaranteed by Constitution.[10]

III

The cases of publication of apology in the litigation of unfair competition can be divided into two categories according to the facts involved, which constitute essential factors,[11] namely, the case where the issue pertains directly to the conduct of person who injured the credit of

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8) T. Ikuyo, Art. 723 of Civil Code, in 19 CHŪSHAKU MIMPŌ (Annotated civil code) 369 (1965)

9) T. Ikuyo, *Meiyo-kison ni tsuki shazai-kōkoku o meizuru hanketsu* (Judgment ordering publication of apology with respect to defamation) 403, in SONGAI BAISHŌ NO KENKYŪ JŌ (The study of law of damages) (WAGATSUMA KANREKI KINEN RONBUNSHŪ) (1957)

10) K. Ōguri v. S. Kageyama, 10 SAIKŌSAIBANSHO MINJI HANREISHŪ (MINSHŪ) 785 (Sup. Ct., July 4, 1956); See, T. MIYAZAWA, KEMPŌ II (The constitution) 331, in 4 HŌRITSUGAKU ZENSHŪ (1959)

11) Unfair Competition Prevention Law art. 1 (1) reads in part as follows:

Art. 1. In case there is one person who commits an act falling under one of the following items, the other person whose business interest is likely to be injured therewith may demand cessation of such an act;

(1) Act of using an indication identical with or similar to such full name, trade name, trademark, container, packing of merchandise of the other person or any such other indication of merchandise of the other person as widely known in the territory where this law is in force or of selling, distributing or exporting merchandise on which the above indication is used, and thereby causing confusion with merchandise on which the above indication is used, and thereby causing confusion with merchandise of the other person;

(2) Act of using an indication identical with or similar to such full name, trade name, mark of the other person or any such other indication of the business and good will of the other person as widely known in the territory where this law is in force and thereby causing confusion with the business establishment or activities of the other person;

.....

(6) Act of making or circulating a false allegation of fact injurious to the credit in business of his own competitor. [EHS translation]

See also, 2 PINNER WORLD UNFAIR COMPETITION LAW 983 (1965)

others,[12] and the case where indirect injury of credit is accompanied by such act as to cause confusion of merchandises or trade.[13] In the latter case, however, it should be noted that even when there is misunderstanding and confusion of merchandise and trade; it alone can not necessarily support the assertion that the business credit of the sufferer has been injured.[14] In this regard, the judicial precedences have been consistent since long ago, ever since the judicial precedence established the principle that "when the trademark similar to the registered trademark is applied to the same kind of commodity and the said commodity is sold publicly, there may be cases where the owner of the trademark incurs damages due to such act, but as long as the quality of the merchandise thus sold is not inferior to that of the merchandise of trademark holder, it can not be claimed that the sufferer's honor was damaged by such conduct."[15] That is, when a party is manufacturing and selling the product having supreme quality and is gaining social reputation, and if a third party using similar trademark, "manufactures and sells the merchandise which is coarse in quality and induces public to confuse and misconceive the two merchandises, such act itself constitute damage of honor and credit of the said party,"[16] but "if the merchandise of the infringer is superior to the

12) For example, Osaka Nōgu Seizō K.K. v. Tadokoro Nōki K.K. et al., 3 Kakyū minshū 719 (Osaka Dist. Ct., May 29, 1952); K.K. Marumiya Shokuryōhin Kenkyūsho v. Marumiya Shokuhin Kōgyō K.K., HANREI TAIMUZU (No. 125) 77 (Tokyo Dist. Ct., Nov. 29, 1961); Rizumufurendo Hanbai K.K. v. Bunji Okumura, HANREI TAIMUZU (No. 134) 82 (Tokyo Dist. Ct., July 25, 1962)

13) For example, K.K. Tonbo Enpitsu Seisakusho v. R. Kikuchi, 3 Kakyū minshū 603 (Tokyo Dist. Ct., April 30, 1952); Marusan Jamu Seizō K.K. v. K.K. Koide Marusan Jamu Seizōsho et al., 3 Kakyū minshū 1324 (Tokyo Dist. Ct., Sept. 30, 1952); Bun'emon Kojima v. K.K. Matsumaeya, 5 Kakyū minshū 396 (Osaka Dist. Ct., March 23, 1954); Yūgen-gaisha Kikuya v. Yūgen-gaisha Kikuya Sōhonten et al., 6 Kakyū minshū 291 (Fukushima Dist. Ct., Feb. 21, 1955); Katsutarō Takagi v. Yoshirō Yamazaki et al., 9 Kakyū minshū 1897 (Fukuoka Dist. Ct., Sept. 24, 1958); Shigetarō Hirose v. Miyoji Shibata, 11 Kakyū minshū 447 (Kobe Dist. Ct., Himeji Branch, Feb. 29, 1960); K.K. Akafudado v. K.K. Dai-Akafudado, HANREI TAIMUZU (No. 178) 200 (Gifu Dist. Ct., May 10, 1965)

14) *See*, K.K. San-Ai v. K.K. San-Ai, 15 Kakyū minshū 1207 (Tokyo High Ct., May 27, 1964)

15) The so-called Raion Migakiko (Lion polishing powder) case, 10 DAISHIN'IN KEIJI HANKETSUROKU (Keiroku) 547 (Gr. Ct. Cass., March 25, 1904)

16) James Richard Charles Hennessy (*phonetic*) v. Shintarō Sugiyama, 4037 HŌRITSU SHIMBUN 7 (Tokyo Dist. Ct., June 29, 1936); *same*, Spear & Jackson, Ltd. (*phonetic*) v. Yasuji Yamamoto, 3164 HŌRITSU SHIMBUN 11 (Osaka Dist. Ct., No. 1329 (wa), 1928)

merchandise of the trademark holder"[17] there is no reason why the credit of the trade mark holder is damaged by such act. There is an objection to such interpretation,[18] but the majority theory in regard to Intangible Property Law supports such interpretation.[19] But in the case of Item 2, Para. 1, Art. 1 of the Law for Prevention of Unfair Competition, there are some problems for such interpretation.[20] The coarseness of quality meant heres hould be interpreted not only pertaining to the scientific comparison ofthe products but also the servicing system which a party operates after its sales or the favor of the public to a particular means of indication of the commodity.[21]

IV

According to the actual examples appearing in the recent precedences, the appropriate contents of publication of apology ("Shazai-kōkoku" or "Chinsha-kōkoku" in Japanese) should be the apologetic words but such wording as "hereafter, we pledge that we will never commit such wrongful act as aforesaid"[22] goes far for such publication of apology and thus not allowed. It is because the sufferer should be satisfied as long as the possibility of infringement is eliminated but it is not right to demand the infringer to take oath for the avoidance of infringing act by the pubication of apology, without asking the court for prohibition of such infringement, and such demand goes beyond the proper scope of publication of apology.[23] By the same token, the "publication of abolish-

17) Tokubē Hiramatsu v. J. Ueda, 20 DAISHIN'IN MINJI HANKETSUROKU (Minroku) 599 (Gr. Ct. Cass., July 10, 1914)
18) *See*, Kishii, *Shazai-Kōkoku-Ron* (Essay on the publication of apology), 5 (4) TOKKYO TO SHŌHYŌ (Patents and Trademarks) 1 (1936)
19) *See*, ARIMA, FUSEI-KYŌGYŌ-RON (Treatise on Unfair Competition) 376 (1922); H. MIYAKE, NIPPON SHŌHYŌHŌ (Japanese Trademark Law) 261 (1931); N. IIZUKA, MUTAI-ZAISAN-HŌ-RON (Treatise on Intangible Property laws) 176 (1940)
20) Cf. Matsumaeya case, *supra note* 13
21) ONO, *supra note* 7, at 180
22) Shigetarô Hirose v. Miyoji Shibata, *supra note* 13, at 453
23) Toyosaki, comment on the case, in 11 SHŌJI-HANREI-KENKYŪ 216, 219 (1968)

ment of the use of tradename and trademark"[24] is only serving to prevent the occurence of injury in the future but it can not be regarded to be consistent with the concept of publication of apology. However there are cases when wording of pledge is not regarded problematic.[25] — Except for special cases, there's room for saying that it may be a customary expression in the apology. Insertion of wording for publicity should be avoided in the text of apology publication. For example, such text as "I have noticed that your product with the registered tradename "TOMBOW" is the reputable product of premium quality in the pencil market and it is selling very well..."[26] (Case of Tombow Harmonica Pencil) has strong smell of promotion of the said product and it is not appropriate as the contents of publication of apology.[27] Similar example is observed in the verdict which ordered elimination of the wording of "it is recognized nation-wide as the specialty delicacy of Hakata since long ago."[28] (Case of Hakata Senbei) There is also a case where the sufferer demanded the insertion of photographs of true product and forged product in the publication of apology but the court judged that only the apology in words is sufficient for the purpose.[29] As stated above, the publication of apology should be allowed only to the extent that it is required for restoration of commercial credit.[30]

V

Court demands that there should be a dire necessity of such publication of apology to allow it the person to resort to such measure for restoration of one's credit. It is because the publication of apology inevitably

24) Mikuni Jūkōgyō K.K. v. Mikuni Tekkō K.K., 8 Kakyū minshū 1628 (Osaka Dist. Ct., Aug. 31, 1957)
25) Osaka Nōgu Seizō K.K. v. Tadokoro Nōki K.K. et al., *supra note* 13, at 728; Marusan Jamu Seizō K.K. v. Koide Marusan Jamu Seizōsho et al., *supra note* 13, at 1324
26) K.K. Tonbo Enpitsu Seisakusho v. Ryōji Kikuchi, *supra note* 13, at 603
27) K. Yamamoto, comment on the case, in 3 SHŌJI-HANREI-KENKYŪ 124, 126 (1962)
28) Katsutarō Takagi v. Yoshirō Yamazaki et al., *supra note* 13, at 1918
29) *op. cit.*
30) *See*, K. MATSUO & N. MON'YA, SHŌHYŌ (Trademarks) 313, in 7 KEIEI-HŌGAKU-ZENSHŪ (Complete works of the law of business management) (1966)

damages the credit of infringer and it can not help accompanying the effect of sanction.[31] There are many cases where the right of claim for restoration of credit is insisted during the course of litigation of civil suit, but there is comparatively few cases where the exercise of such right was admitted. It is pointed out that the reason for such rarity of approval is because the sufferers in most cases only contend abstract matters such as that they are subjected to spiritual suffering by the infringement or they are troubled by the appearance of substandard goods, in the market.[32]

In the procedural laws, the claim for publication of apology is regarded the claim based on the property right and the amount of claim is assessed by the normal fee for insertion of publication of apology on the newspaper.[33] The judgement ordering publication of apology may be executed by substitute according to Art. 733 of the Code of Civil Procedure.[34]

Conclusion

It may be said that the remedy by "Shazai-Kōkoku" (the publication of apology) is one of the important characteristics of Japanese legal system in the law of unfair competition. The idea of "Shazai-Kōkoku", as the name itself indicates, keeps in the background the Japanese way of thinking, which attaches great importance to the act of apology of moral aspects. From a legal point of view, many businessmen have acknowl-

31) The recent examples where the court judged that there is no justifiable necessity for publication of apology although it recognized the damage of credit are Kazuo Hirai v. Yasuji Sakuma, HANREI TAIMUZU (No. 133) 79 (Tokyo Dist. Ct., June 30, 1962); K.K. San'yō Shōkai v. S. Yokoi, HANSEI TAIMUZU (No. 140) 163 (Tokyo Dist. Ct., Nov. 1, 1962); Fugaku Kōgyō K.K. v. K.K. Kyōwa Undōgu Seisakusho, HANREI JIHŌ (No. 459) 69 (Osaka Dist. Ct., June 8, 1965)

32) S. Saotome, Kenri-Shingai (Infringent) 254, in K. INOUE (ed.), TOKKYO KANRI (Patent management) (1966)

33) Yoshio Shigematsu v. K.K. Kaizōsha, 12 SAIKŌ SAIBANSHO MINJI HANREISHŪ (Minshū) 1921 (Sup. Ct., Aug. 8, 1958). As for the current advertisement rates, it costs usually no less than ¥300,000 on a nation-wide edition, and about ¥70,000 on a local edition. (inquired of the Asahi Shimbun)

34) *See*, 10 SAIKŌ SAIBANSHO MINJI HANREISHŪ (Minshū) 785 (Sup. Ct., July 4, 1956); DAISHIN'IN MINJI HANREISHŪ (Minshū) 2044 (Gr. Ct. Cass., Dec. 16, 1937)

edged some merits of the system in the field of unfair competition on the one hand. But on the other, some people have doubts about the constitutionality of the publication of apology as a legal mean and point out that it does not belong to a modern idea, by reason that, in substance, it is nothing but a self-advertisement on the part of the plaintiff, and a barbarous retaliatory measure on the part of the defendant. In 1956, the Supreme Court gave a decision that, generally, the provisions of the publication of apology were not contrary to Article 19 of the constitution which provides freedom of conscience. In the field of the law of unfair competition, the court often took very strict attitude toward the plaintiff who asks for remedy by the publication of apology. In our country, it is not deniable that the raison d'être of them as a legal system is widely recognized among lawyers, and, in conclusion, it would be a future problem for us to establish a clear and definite rule about the minimum requirements for the remedy of publication of apology in the law of unfair competition.