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## **History of Amendments to the Unfair Competition Prevention Act of Japan—From a developing country to a developed country\***

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The Japanese Unfair Competition Prevention Act was enacted in 1934 in order to implement the provisions of the Paris Convention relating to unfair competition. The Unfair Competition Prevention Act was the first law relating to unfair competition in Japan. It was enacted very hurriedly in 1934, by the government which, at the time, was eager to be accepted as an important member of the international community. At the time, in Japan, it was considered a requirement for a developed country to have a law regulating unfair competition. In this respect, Japan considered itself to be a “barbarian” making an offering to the developed countries by enacting the Unfair Competition Prevention Act. In other words, the enactment of this law was, to the Japanese, a way of showing that it was prepared to do what was necessary in order to be recognized as a developed country. As a result, this law was not well drafted, and it is considered to have many gaps, thus making it unsuitable as the fundamental law of Japan. This is one of the main reasons why this law remained almost dormant, that is, there has been very little litigation for over fifty years.

The Patent Monopoly Ordinance (Sembai-tokkyo-jorei) was promulgated in 1885, as Dajokan Proclamation No. 7. This was the first patent law actually enforced in Japan, and the date of its promulgation, April 18th, was made Hatsume-no-hi (Inven-

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tion Day). The Patent Law of 1899 was enacted together with the Design Law and the Trademark Law in order to ratify the Paris Convention for the Protection of Industrial Property in the same year. In 1905, the Utility Model Law was enacted following the pattern of the German "Gebrauchsmustergesetz". These four laws comprise what is known in Japan as the "Major Laws on Industrial Property".

However, the Unfair Competition Prevention Law is noticeably missing from this Japanese concept of industrial property law. In other words, the Japanese concept of what is industrial property was until recently very narrow, as compared with the concept of industrial property envisaged by the Paris Convention.<sup>1)</sup> One example which illustrates this point concerns the 100th anniversary in 1985, of the beginning of the industrial property law system in Japan. The Ministry of Posts and Telecommunications issued a commemorative stamp celebrating this occasion. The stamp featured Korekiyo Takahashi, who was the first head of the Patent Office, and at the top of the stamp were the four words, "PATENT, UTILITY, TRADEMARK, DESIGN". So, as you can see, even as late as 1985 the concept of industrial property was limited to these four traditional areas of the law. Of course, the Unfair Competition Prevention Act contains the provisions relating to other types of industrial property, such as geographical indications, and indirectly, service marks, but just as these were omitted from the commemorative stamp, so too has their existence as part of the industrial property law system been traditionally ignored.

Before the major amendment to the Prevention of Unfair Competition Law in 1990, there had only been one significant amendment carried out in 1950. The 1950 amendment was brought about when Japan was still under occupation by the Allied Forces. This amendment saw the introduction of a new provision prohibiting misleading representations concerning goods.

In 1990, the Prevention of Unfair Competition Law was amended to include protection of trade secrets. This amendment came about as a result of pressure on Japan by the GATT member countries to harmonize its system with the systems of foreign countries.<sup>2)</sup> The law provides that "technical and business information useful in commercial activities, such as manufacturing and marketing methods, which is kept secret and is not publicly known" will be protected against anyone who commits, or

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1) According to the Paris Convention, of March 20, 1883, for the Protection of Industrial Property, protection of industrial property has as its object patents, utility models, industrial designs, trademarks, service marks, trade names, and indications of source or appellations of origin, and repressions of unfair competition. See Article 1 of the Paris Convention and also Article 2(viii) of the Convention Establishing the World Intellectual Property Organization signed at Stockholm on July 14, 1967, defining "intellectual property".

2) See Edward G. Durney, "New Trade Secrets Law", IP ASIA, June 28, 1990, pp. 12-15.

prepares to commit, any of the unfair practices listed in the law. The law is designed to protect customer lists, experimental data, design drawings, sales manuals, and other know-how and technical information.<sup>3)</sup>

The second major amendment to the Prevention of Unfair Competition Law was proclaimed in May of this year and will come into effect next year.<sup>4)</sup> The main features of this latest amendment are as follows.<sup>5)</sup>

Firstly, the categories of unfair competition have been expanded to include protection from slavish imitations<sup>6)</sup> and free-riding.<sup>7)</sup> In addition, this protection will now extend to services as well as to goods.<sup>8)</sup>

Secondly, in a claim for damages, the rules relating to proof of damage have been relaxed.<sup>9)</sup>

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- 3) See Hideo Nakoshi, "New Japanese Trade Secrets Act", *Trademark World*, November 1992, pp. 29-34.
  - 4) *Kampō* (Official Gazette), May 19, 1993/Revised Unfair Competition Prevention Act [Japanese].
  - 5) See Institute of Intellectual Property (IIP), *Concerning the Revision of Unfair Competition Prevention Law in Japan* (June 1993).
  - 6) According to the new law, Article 2 defines the term of "unfair competition". Article 2(1)(iii) provides as follows:

"An act of assigning, leasing, displaying for the purpose of assignment or lease, exporting or importing goods which imitated the configuration\* of another person's goods"\*\*\*

\* excluding a configuration which is commonly used for goods of the same kind (or, in the case where it is not the same kind of goods, goods which have an identical or similar function and utility of those of such other person) as that of such other person

\*\* excluding goods for which three years have elapsed from the date of first sales thereof
  - 7) According to the new law, Article 2(1)(ii) provides as follows:

"An act of using as one's own indications of goods or others which are identical or similar to another person's well-known indications of goods or others, or an act of assigning, delivering, displaying for the purpose of assignment or delivery, exporting or importing goods which uses such indications of goods or others".
  - 8) According to the new law, Article 2(1)(x) provides as follows:

"An act of making a representation on goods or in relation to a service, or in an advertisement thereof or in a document or correspondence used in a transaction, which is likely to mislead with respect to the place of origin, quality, contents, manufacturing method, use or quantity of such goods or the quality, contents, use or quantity of such service, or an act of assigning, delivering, displaying for the purpose of assignment or delivery, exporting or importing goods with such an indication or offering a service with such an indication".
  - 9) According to the new law, Article 5(1) provides as follows:

"In the case where a person, whose business interests have been infringed as a result of unfair competition, has made a claim for compensation in respect of damage suffered by himself, against a person who intentionally or negligently infringed such business interests, and where the infringer receives the profits shall be presumed to be the amount of damages caused to the person whose business interests were infringed."

Thirdly, criminal sanctions have been strengthened.<sup>10)</sup>

Finally, the objectives of the Prevention of Unfair Competition Law have been clearly set out in a new section 1 which states that:

“This law aims to ensure fair competition amongst traders and its enforcement within the international framework by establishing measures to prevent unfair competition and to provide compensation for acts of unfair competition, thereby contributing to the sound development of the whole economy.”<sup>11)</sup>

I would like to conclude my talk with a few comments regarding this latest amendment and the future of the Prevention of Unfair Competition Law. This latest amendment is considered to be a total revision of the law, but I think there are still many important problems left to be considered. For example, the introduction of a general clause, the establishment of a general right of consumers to sue and the widening of the regulation of misleading advertising are all important issues which were not addressed by the amendment.<sup>12)</sup>

10) The former provision on criminal sanctions, an amount of a fine was limited to 500,000 yen. Under the new law, a fine shall be within the limits of 3,000,000 yen. And also a newly-established sanction for corporations has been created. Article 14 provides as follows:

“In the case where a representative of a juridical person or an agent, servant or other employee of a juridical person or a natural person has committed any of the violations described in the preceding article in connection with the business of such a juridical or natural person, such a juridical person shall be fined an amount not exceeding 100,000,000 yen and such a natural person shall be liable to the same fine described in the preceding article in addition to the violator being penalized.

11) The Institute of Intellectual Property (IIP) is translating the Article 1 as follows:

“The purpose of this Law is to contribute to the sound development of the national economy by providing measures for the prevention of, and compensation for damages from unfair competition in order to ensure fair competition among business entities and the full implementation of international agreements related thereto.”

12) See Junichi Eguchi, “Fuseikyōsōbōshihō-Kaisei to Shōhishahō” (Revision of Unfair Competition Prevention Law and Consumer Protection), *Shōhishahō Nyūsu* (Consumer Law News) No. 14, pp. 2-27 (January 1993) [Japanese]; Junichi Eguchi, “Nippon Fuseikyōsōbōshihō no Sōgōka, Gendaika, Kokusaika” (Toward Harmonization, Modernization and Internationalization of the Protection of Unfair Competition Act of Japan), *Nihon Kōgyōshoyūkenhō-Gakkai-Nempō* (Annual of Industrial Property Law, Japan Association of Industrial Property Law) No. 14, pp. 130-142 (June 1991) [Japanese]

In the field of unfair competition law, the contributor has published the following manuscripts written in English:

Junichi Eguchi, “The Publication of Apology (“Shazai-Kōkoku”) As a Remedy for Unfair Competition”, *Osaka University Law Review* No. 18, pp. 19-28 (1971)

Junichi Eguchi, “Various Aspects of the Development in the Law of Unfair Competition in Japan”, *Osaka University Law Review* No. 19, pp. 1-19 (1972)

Junichi Eguchi, “The Protection of Geographical Indications in Japan”, *Osaka University Law Review* No. 39, pp. 1-10 (1992)

Finally, I would like to say that I believe that within the framework of an international market system, the Prevention of Unfair Competition Law should be considered as the fundamental law to regulate intellectual property. In this regard, I think the Swedish Marketing Act (*Marknadsföringslagen*) of 1975 is an excellent example of such a fundamental law in that it has established a marketing code of conduct which both protects traders from unfair competition through the protection of intellectual property as well as directly protecting the rights of consumers.<sup>13)</sup>

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13) About the modern aspects of Japanese situation of the Prevention of Unfair Competition Act, please see recent publications as follows:

Guntram Rahn, "Das Japanische am japanischen UWG", 1992 *GRUR Int.* 362-365 (1992)

Christopher Heath, "Zur Reform des japanischen Gesetzes gegen den unlauteren Wettbewerb (UWG)", 1993 *GRUR Int.* 740-742 (1993)

B.J. Meadows III, "Trademark Dilution: Its Development, Japan's Experience, and the New USTA Federal Proposal", 1991 *Intellectual Property Law Review* 325-355 (1991).

