Unfair Competition Law in Japan: Distant, Yet So Close

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Unfair Competition Law in Japan: Distant, Yet So Close. Though Japan is geographically and culturally distant from Slovakia, several similarities and divergences can be observed between the two countries' unfair competition laws. This study therefore explores the most significant parallels and differences in the structure of the unfair competition law systems in both jurisdictions. It also offers a more detailed examination of two selected and interrelated forms of unfair competition—namely, passing off and the unauthorized use (dilution) of designations with reputation. The analysis concludes by highlighting certain aspects of Japanese unfair competition law and practice that could serve as inspiration for the application and further development of Slovak unfair competition law.

Keywords: *unfair competition, Japanese law, likelihood of confusion, passing-off, dilution, marks with reputation, similarity*

Introduction

Although Japan is very distant from Slovakia and the Central European region not only geographically but also culturally, it is quite surprising that this does not fully extend to the field of law—particularly in relation to private law—where Japanese law is closely connected to the legal traditions of the broader Central European region. The reason lies in the fact that, since its modernization and Westernization at the end of the 19th century,[1] Japanese law has been heavily influenced by German law and its legal scholarship.[2] The influence of German law on Japanese law is so profound that one commentator even likened their relationship to that of a mother and her child.[3] Japan is thus one of the few countries outside the European continent to have significantly adopted German law.[4]

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[1] LUNEY JR., P. R.: Traditions and Foreign Influences: Systems of Law in China and Japan. In *Law and Contemporary Problems*, vol. 52, 1989, p. 129, 147–150. ONO, S.: Comparative Law and the Civil Code of Japan (1). In *Hitotsubashi Journal of Law and Politics*, vol. 24, 1996, p. 27. ONO, S.: Comparative Law and the Civil Code of Japan (2). In *Hitotsubashi Journal of Law and Politics*, vol. 25, 1997, p. 29. JALUZOT, B.: The Meiji Era: When Japanese Law Became Positivized. In DUPRET, B., HALPÉRIN, J.-L. (eds.): State Law and Legal Positivism: The Global Rise of a New Paradigm. Leiden: Koninklijke Brill NV, 2022, p. 215 *et seq*.

[2] NODA, Y.: Introduction to Japanese Law. Tokyo: University of Tokyo Press, 1976, p. 51–58. KITAGAWA, Z.: Development of Comparative Law in East Asia. In REIMANN, M., ZIMMERMANN, R. (eds.): The Oxford Handbook of Comparative Law. Oxford: Oxford University Pres, 2006, p. 237, 240–243.

[3] KITAGAWA, Z.: Theory Reception—One Aspect of the Development of Japanese Civil Law Science. In *Law in Japan*, vol. 4, 1970, p. 1, 12.

[4] ZWEIGERT, K., KÖTZ, H.: An Introduction to Comparative Law. 3d. ed. Oxford: Oxford University Press, 1998, p. 298–299. KITAGAWA, Z.: Development of Comparative Law in East Asia, p. 240–244, 256–259. CHEN, T.-F.: Transplant of Civil Code in Japan, Taiwan, and China: With the Focus of Legal Evolution. In *National Taiwan University Law Review*, vol. 6, 2011, p. 389.

The close connection with the German-speaking world is unsurprising when considering that Japanese scholars specializing in private law were traditionally expected to have a strong command of the German language. As a result, their research primarily focused on studying legal scholarship in Germany and other German-speaking countries.[5] At the same time, setting aside countries that are territorially, historically or economically close to Japan, such as South Korea, Taiwan, China or the United States (US), Germany remains one of the few countries where its legal scholarship actively engages in profound studies of Japanese law.[6]

For this reason, a close relationship and several parallels can also be observed in the field of unfair competition law, which in Japan[7] was significantly influenced by German models and by the international harmonisation of unfair competition law through the *Paris Convention for the Protection of Industrial Property*[8]—similarly to what occurred within the territory of Slovakia.[9] The current Slovak unfair competition law is largely based on the unfair competition law of the First Czechoslovak Republic,[10] which was heavily inspired by international law and German law of that time.[11] A similar impact of German unfair competition law can also be observed in Japanese law, although in its early stages it was rather cautious and reluctant to go beyond the requirements of international legal obligations,[12] which significantly shaped its subsequent development.

Recently, various influences from US law can also be observed in Japan, as the United States is one of Japan's most significant trading partners due to the size of its economy. The gradual introduction of US legal institutions into Japanese law is linked both to the post-World War II situation in Japan and to the current global dominance of the English language and the United States. This has also contributed to a gradual and partial decline in the importance of the German language and German legal scholarship at Japanese law schools.[13]

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[5] MATSUMOTO, E.: Lost in Translation: The Reception of German Law in Japan. In *Housei Riron*, vol. 42, no. 3-4, 2010, p. 100, 120–125.

[6] An example is the publication of the specialised academic journal *Journal of Japanese Law* (*Zeitschrift für Japanisches Recht*), which is dedicated exclusively to Japanese law. It is published by the Deutsch-Japanische Juristenvereinigung e.V. in cooperation with the Max Planck Institute for Comparative and International Private Law in Hamburg.

[7] HEALTH, C.: Japan. In HENNING-BODEWIG, F. (ed.): International Handbook on Unfair Competition. Munchen: C.H. Beck, 2013, p. 342, 343-345.

[8] Decree of the Minister of Foreign Affairs No. 64/1975 Coll., as amended by Decree No. 81/1985 Coll. HENNING-BODEWIG, F.: International Protection against Unfair Competition. In HENNING-BODEWIG, F. (ed.): International Handbook on Unfair Competition, p. 9. SENFTLEBEN, M.: Article 10*bis* of the Paris Convention as the Common Denominator for Protection against Unfair Competition in National and Regional Contexts. In *Journal of Intellectual Property Law & Practice*, vol. 19, no. 2, 2024, p. 81.

[9] HAVLÍN, M.: Historický vývoj právní úpravy nekalé soutěže. In *Právník*, roč. 135, č. 9, 1996, s. 822. VOZÁR, J. Právo proti nekalej súťaži. Bratislava: Veda, 2013, s. 13–39.

[10] Czechoslovak Act No. 111/1927 Coll. on the protection against unfair competition.

[11] German Act of 7 June 1909 against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*) (RGBl. S. 499).

[12] Japanese Act No 14/1934 of 27 March 1934 on the Prevention of Unfair Competition (*Fusē kyōsō bōshihō*).

[13] KELEMEN, R. D., SIBBITT, E. C.: The Americanization of Japanese Law. In *University of Pennsylvania Journal of International Economic Law*, vol. 23, 2002, p. 269.

Last but not least, the so-called "Brussels Effect" can also be witnessed in Japanese law. This phenomenon is reflected in the tendency of various countries worldwide to draw inspiration from European law, owing to its progressiveness, linguistic accessibility (as most major international languages, such as English, French and Spanish, are official languages of the European Union (EU) as well) and the Union's economic significance.[14] Japan is thus no exception in this regard.[15]

Given that international harmonisation in the field of unfair competition law, as well as the legal traditions of German-speaking countries—such as Austria and Germany—have historically had a significant influence on the law applied in Slovak territory, it is not surprising to observe both several parallels and fundamental differences between Slovak and Japanese unfair competition law. This Article will therefore begin by examining the key similarities and differences in the overall structure of the unfair competition laws in both countries. It will then proceed to a more in-depth analysis of two selected, closely related types of unfair competitive behaviour—namely, the creation of confusion and the unauthorised use of a famous designation as one's own—as a comprehensive examination of all types recognised in both jurisdictions is far beyond the scope of this Article. Finally, the Article will highlight several features of Japanese unfair competition law from which the theory and practice of Slovak unfair competition law could draw inspiration in its application and further development.

1. Parallels and Differences in the Structure of Unfair Competition Laws

Similarly to German unfair competition law[16] and the interwar legal regulation in Slovakia,[17] a substantial part of Japan's unfair competition law is also regulated by a separate statute, namely the *Act on the Prevention of Unfair Competition*.[18] However, in contrast to the German[19] and Slovak[20] laws, Japanese law does not contain a general clause defining what constitutes unfair competition. Historically, Japanese law has defined unfair competition solely through an exhaustive list of acts constituting unfair competition, explicitly delineated in the statute.[21] The following analysis therefore focuses on examining the similarities and differences between Japanese and Slovak laws,

[14] BRADFORD, A.: The Brussels Effect: How the European Union Rules the World. Oxford: Oxford University Press, 2020.

[15] TANAKA, H.: Impact of the GDPR on Japanese Companies. In *Business Law International*, vol. 20, 2019, p. 138. SCHWARTZ, P. M.: Global Data Privacy: The EU Way. In *New York University Law Review*, vol. 94, 2019, p. 771.

[16] German Act of 3 July 2004 against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*) (BGBl. I S. 1414), as amended (hereinafter "**UWG**").

[17] Act No. 111/1927 Coll.

[18] Japanese Act No 47/1993 of 19 May 1993 on the Prevention of Unfair Competition (*Fusē kyōsō bōshihō*), as amended (hereinafter "**UCPA**").

[19] § 3 UWG.

[20] § 44(1) Slovak Commercial Code (Act No. 513/1991 Coll., as amended (hereinafter "**ObZ**")).

[21] Article 2(1) UCPA. HEALTH, C.: Japan, p. 344–345.

first with regard to the general definition of unfair competition, and subsequently in relation to the specific unfair competitive practices.

1.1 General Clause Defining Unfair Competition

German commentators often point out that a key shortcoming of Japanese unfair competition law is the absence of any general clause defining unfair competition,[22] as found in German law,[23] and even in Slovak law.[24] However, the main historical reason for rejecting the introduction of such a general clause into Japanese unfair competition law reflects, in some respects, the rationale behind the rejection of a unified tort of unfair competition in English common law. The concern was that such a clause could significantly restrict economic competition in a free market—competition that typically relies on imitation among competitors, a practice that also substantially benefits consumers through lower prices.[25] Courts in many common law jurisdictions have repeatedly stated explicitly that it is not their role to educate competitors; rather, competitors are free to adopt any business practices they choose, provided they do not mislead consumers or engage in other unlawful conduct.[26]

Moreover, it has historically been argued in Japan that the country lagged behind economically and needed to catch up with other developed nations—an aim that would have been significantly hindered by a broad definition of unfair competition, as it would have restricted the imitation of products and services from more advanced economies.[27] For this reason, the Japanese economy was, for a long time, largely based on emulating models from developed countries, whether European or North American.

One might object, however, that a general definition of unfair competition could be developed through case law by identifying common features among the individual definitions of specific unfair competitive practices, or by gradually extending the scope of such unlawful practices to analogous cases. Nevertheless, Japanese case law reveals no clear trend towards the adoption of such a general definition.

This, nonetheless, has not prevented Japanese courts from addressing newly emerging forms of unfair competitive conduct that are not already covered by the acts of unfair competition explicitly defined in the statute. In such cases, the courts either interpret the existing statutory definitions broadly or, as a last resort, rely on general provisions on non-contractual liability for damages under civil law.

The courts thus encountered no insurmountable obstacle in concluding that the use of a famous designation belonging to another competitor in a domain name, for the purpose

[22] HEALTH, C.: Japan, p. 345.

[23] § 3 UWG.

[24] § 44(1) Commercial Code.

[25] GANGJEE, D. S.: Law(s) against Unfair Competition: The Legitimacy of the UK Approach. In *Journal of Intellectual Property Law & Practice*, vol. 19, no. 2, 2024, p. 90.

[26] MORISON, W. L.: Unfair Competition at Common Law. In *University of Western Australia Law Review*, vol. 2, no. 1, 1951, p. 34.

[27] HEALTH, C.: Japan, p. 344.

of economic gain, constituted unauthorised use of another's designation—even where the parties were in no direct competition. As a result, they were able to find consumer confusion under one of the existing acts of unfair competition, even at a time when no explicit statutory provision addressed such a specific scenario.[28]

A similar judicial approach was adopted in cases involving the unauthorised reproduction of databases. In such cases, the courts applied general civil law provisions on non-contractual liability and found that harm had been caused to the developer of the database.[29] This occurred despite the absence of any specific legal right in databases under Japanese law unlike EU law, which requires EU Member States to provide such protection through their national legal systems.[30] A key limitation of this approach in Japan, however, is that general tort law typically allows the injured party to claim only damages, whereas the specific provisions on unfair competition offer a wider range of remedies.

Japanese unfair competition law places the entitled party in a more favourable position with respect to the calculation of damages, as it is not always necessary to prove the actual extent of the loss incurred. Damages may instead be assessed based on a percentage of typical revenue.[31] The entitled party may also seek an injunction to prevent the unlawful conduct[32]—an option not always available under the general provisions on delictual liability in Japanese civil law, which, in principle, provide compensation as the primary and often sole legal remedy.[33]

Accordingly, although Japanese law contains no general clause on unfair competition, affected parties are not precluded from seeking legal protection against unfair competitive practices in cases not expressly stipulated by the law. Nevertheless, in such cases, the affected party cannot benefit from the additional legal remedies that Japanese law provides exclusively for acts explicitly stated in the Act on the Prevention of Unfair Competition.

On the other hand, once courts recognise new unfair competitive practices, these are often incorporated, over time, into the statutory definitions of individual forms of unfair competition. This has been the case, for example, with the protection afforded against the unauthorised use of competitors' product or business designations in domain names,[34] as

[28] K.K. JACCS v. Nihonkai Pakuto, Heisei 12 (Ne) 244 and Heisei 13 (Ne) 130 (Nagoya High Court 10 September 2001). K.K. Daigyotsusho v. J-Phone Higashi Nihon K.K., Heisei 13 (Ne) 2931 (Tokyo High Court 25 October 2001). YONEHARA, B. T.: Landoftherisingsun.co.jp: A Review of Japan's Protection of Domain Names Against Cybersquatting. In *IDEA*, vol. 43, 2003, p. 207.

[29] Yomirui Newspaper v. Digital Aliance, Heisei 17 (Ne) 10049 (Intellectual Property High Court 6 October 2005). LEE, N.: Protection of Data under Unfair Competition Law in Japan and Korea—A Case of Asymmetric Convergence? In *Journal of Intellectual Property Law & Practice*, vol. 19, no. 2, 2024, p. 135.

[30] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the Legal Protection of Databases (OJ L 77/20, 27.3.1996), as amended.

[31] Articles 4 to 9 UCPA (simplifying the burden of proof for the injured party in establishing the damage caused, for instance, through the presumption of damage amounts and the determination of reasonable compensation).

[32] Article 3 UCPA.

[33] Articles 709 to 724*bis* Japanese Civil Code (Act No. 89/1896 of 27 April 1896) (*Minpō*), as amended.

[34] Article 2(1)(xiii) UCPA.

well as with the extension of legal protection to unauthorised use of famous designations outside situations involving a likelihood of confusion—such as where a party obtains an unfair advantage or causes harm to another competitor.[35]

A comparison of the number and definitions of specific unfair competitive practices at the time this legal regime was first introduced into Japanese law with the current provisions reveals a significant expansion both in the number of individual acts and in their scope, which have been adapted to reflect developments in new technologies and unfair commercial practices.[36]

1.2 Specific Acts of Unfair Competition

As mentioned above, the Japanese Act on the Prevention of Unfair Competition defines unfair competition through the exhaustive enumeration of specific acts in its Article 2(1). Japanese law accordingly recognises forms of unfair competitive practices, such as causing confusion with another's goods or business;[37] the unauthorised use of a famous designation as one's own;[38] product imitation;[39] infringement of trade secrets;[40] unauthorised use of shared data subject to restricted access;[41] circumvention of technological measures limiting access to copyrighted works[42] and their unauthorised reproduction;[43] misuse of domain names;[44] misleading indications;[45] defamation;[46] and unauthorised use of a trademark by an agent.[47]

Although acts comparable to the individual forms of unfair competitive practices recognised under Japanese law can also be found in Slovak unfair competition law, there are several fundamental differences between the two legal frameworks. Firstly, while some of the recognised practices overlap, notable differences can be observed in their scope and application. For example, the act of product imitation[48] under Japanese law essentially encompasses slavish copying, which, in the European context, would fall under the protection afforded to unregistered EU designs under EU design law,[49] or, to

[35] Article 2(1)(iii) UCPA.
[36] HEALTH, C.: Japan, p. 344–345.
[37] Article 2(1)(i) UCPA.
[38] Article 2(1)(ii) UCPA.
[39] Article 2(1)(iii) UCPA.
[40] Article 2(1)(iv) to (x) UCPA.
[41] Article 2(1)(xi) to (xvi) UCPA.
[42] Article 2(1)(xviii) UCPA.
[43] Article 2(1)(xvii) UCPA.
[44] Article 2(1)(xix) UCPA.
[45] Article 2(1)(xx) UCPA.
[46] Article 2(1)(xxi) UCPA.
[47] Article 2(1)(xxii) UCPA.
[48] Article 2(1)(iii) UCPA ("the act of transferring, leasing, displaying for the purpose of transfer or lease, exporting or importing goods that imitate the form of another person's goods (excluding that which is indispensable to its functioning)").
[49] Article 11 Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (OJ L 3/1, 5.1.2002), as amended (hereinafter "**EUDR"**).

some extent, under the concept of imitation[50] as part of the specific act of creating a likelihood of confusion under Slovak unfair competition law.[51] However, unlike Slovak law[52]—and similarly to the protection of unregistered EU designs in the EU[53]—Japanese law does not require a likelihood of confusion in such cases, as the conduct in question constitutes slavish copying. Legal protection in this context is also limited to a period of three years from the date on which the new product is first placed on the market.[54] This provision under Japanese law thus more closely resembles the protection afforded to unregistered EU designs under EU law than the regulation of imitation through the creation of a likelihood of confusion under Slovak unfair competition law.

Secondly, the Japanese law includes, as specific acts of unfair competition, certain types of conduct that are similarly regulated under Slovak law but are not expressly classified as separate acts of unfair competition—or, in some cases, are not even covered by unfair competition law at all (*e.g.*, being regulated by copyright or trademark law). An example is the regulation of domain names that infringe the rights of third parties, which currently constitutes a separate act of unfair competition under Japanese law.[55] In Slovak law, however, such conduct is subsumed under the general clause on unfair competition, being regarded as behaviour contrary to the good morals of competition, as established by the case law of Slovak courts.[56]

Moreover, certain specific acts that are explicitly regulated as unfair competitive practices under Japanese law—such as the circumvention of effective technological measures protecting copyrights, or the removal or alteration of electronic rights management information,[57] which derive from international copyright law[58]—are governed under Slovak law by copyright law provisions.[59]

Thirdly, certain specific unfair competitive practices recognised under Slovak unfair competition law are not covered by the Japanese Act on the Prevention of Unfair

[50] § 47(1)(c) ObZ.

[51] § 47 ObZ.

[52] § 47(1) ObZ („pokiaľ tieto konania sú spôsobilé vyvolať nebezpečenstvo zámeny s podnikom, obchodným menom, osobitným označením alebo výrobkami alebo výkonmi iného súťažiteľa“).

[53] Article 19(4) EUDR ("The holder of an unregistered EU design shall be entitled to prevent acts referred to in paragraphs 1 and 2 only if the contested use results from copying the protected design.").

[54] Article 19(1)(v)(a) UCPA (excluding "the act of transferring, leasing, displaying for the purpose of transfer or lease, exporting or importing goods that imitate the form of goods if three years have elapsed since the date they were first sold in Japan").

[55] Article 2(1)(xix) UCPA ("the act of acquiring or holding a right to use a domain name that is identical or similar to another person's specific indication of goods or services (meaning a name, trade name, trademark, marks, or any other indication of goods or services belonging to a person's business), or using any of such domain name, for the purpose of wrongful gain or causing damage to that other person").

[56] ZLOCHA, Ľ.: Právne nároky z nekalosúťažného zneužitia doménových mien. In VOZÁR, J., ZLOCHA, Ľ. (eds.): Aktuálne trendy v oblasti práva hospodárskej súťaže. Bratislava: Ústav štátu a práva SAV, 2017, s. 116.

[57] Article 2(1)(xvii) and (xviii) UCPA.

[58] Articles 11 and 12 WIPO Copyright Treaty (WCT), 20 December 1996 (No. 189/2006 Coll.), Articles 18 and 19 WIPO Performances and Phonograms Treaty (WPPT), 20 December 1996 (No. 177/2006 Coll.) and Articles 15 and 16 Beijing Treaty on Audiovisual Performances, 24 June 2012 (No. 192/2020 Coll.).

[59] §§ 60 and 61 Copyright Act (Act No. 185/2015 Coll., as amended).

Competition, although they may be regulated under other statutes. For instance, the Slovak law recognises a specific unfair competitive practice of the endangerment of consumer health and the environment,[60] a concept that does not appear in Japanese law in this form.

This highlights another fundamental difference between Japanese unfair competition law and the legal frameworks of other jurisdictions, including Slovakia. Under the Japanese Act on the Prevention of Unfair Competition, consumers or collective organisations representing consumer interests are not entitled to seek legal protection. This is regarded as a significant shortcoming, particularly concerning the scope of the specific provision on misleading indications related to goods and services, which is explicitly regulated by the Act,[61] given that consumers are often the primary parties affected by such conduct. Although other competitors may, in principle, bring claims under this provision, it is generally difficult for them to demonstrate that they have suffered harm as a result of the misleading indication in question. However, with regard to consumers, this issue is addressed under Japanese law through separate statute.[62]

2. Selected Unfair Competitive Practices

The following analysis focuses on two interrelated forms of unfair competitive practices, whereby one competitor unlawfully uses or imitates, under certain conditions, the marks or products distinctive of another competitor. This is typically exemplified by acts of causing confusion or the unauthorised use of a famous designation belonging to another competitor as one's own.

2.1 Causing Confusion

The specific unfair competitive practice of causing confusion encompasses typical cases in which one competitor uses a designation for goods or a business that is identical or similar to a mark distinctive of another competitor, thereby creating a likelihood of confusion with the latter's goods or business.[63] This constitutes a standard form of unfair competition found in international law,[64] as well as in many national unfair competition laws.[65]

[60] § 52 ObZ.

[61] Article 2(1)(xx) UCPA.

[62] Japanese Act No. 134/1962 of 15 May 1962 against Unjustifiable Premiums and Misleading Representations (*Futō kēhinrui oyobi futō hyōji bōshihō*), as amended.

[63] Article 2(1)(i) UCPA ("the act of creating confusion with another person's goods or business, by using an indication of goods or business (meaning a name, trade name, trademark, marks, containers or packaging for goods belonging to a person's business, or any other indication of a person's goods or business; the same applies hereinafter) that is identical or similar to another person's indication of goods or business that is widely recognised among consumers as belonging to that person, or by transferring, delivering, displaying for the purpose of transfer or delivery, exporting, importing or providing through telecommunications lines goods that use such indication").

[64] Article 10*bis*(3)(i) Paris Convention for the Protection of Industrial Property.

[65] § 47 ObZ.

Its application is subject to several conditions. Firstly, it must concern "goods or other similar indications" (*shōhin-tō hyōji*), a term more precisely defined in the relevant statutory provision as "a name, trade name, trademark, marks, containers or packaging for goods belonging to a person's business, or any other indication of a person's goods or business".[66] The definition itself clearly indicates that the scope of this unfair competitive practice is broadly framed, extending beyond trademarks or trade names to include packaging used for goods, as well as any other means by which a competitor's goods or business may be identified. Accordingly, such a designation may also encompass the appearance and form of a product—a position affirmed by Japanese courts, which have readily assessed the imitation of several popular and commercially successful products, such as the Rubik's Cube[67] or the children's adjustable Tripp Trapp chair,[68] under this form of unfair competition. Accordingly, the act of causing confusion under Japanese unfair competition law is construed as broadly as the concept of creating a likelihood of confusion under Slovak law.

Another requirement is that the designation must be "widely recognised among consumers" (*juyōsha-no ma-ni hiroku ninshikisaretēru*). This corresponds to the concept of "distinctiveness" as used in Slovak trademark[69] and unfair competition law.[70] It is not necessary for the designation to be known throughout the entirety of Japan. It is sufficient if consumers in a substantial part of Japanese territory recognise it as distinctive of the competitor concerned. Japanese courts assess the fulfilment of this condition on a case-by-case basis, considering standard factors such as the duration of sales, sales volume, extent of advertising and so on. For example, the courts held the requirement to be satisfied where 18.3% of respondents in a nationwide survey recognised the stitching pattern on the back pocket of denim jeans.[71] Moreover, where a competitor has made significant investments in advertising, the courts have accepted even a few months of public promotion as sufficient for the designation to become widely recognised among consumers within the relevant territory.[72]

To establish the act of causing confusion, it is necessary for the relevant designations to be either "identical" (*dōitsu*) or "similar" (*ruiji*). However, difficulties frequently arise in this regard, as Japanese courts may deem certain differences between the compared designations sufficient to conclude that they are neither identical nor similar.[73] As a result, comparable cases may, at times, be decided differently by Japanese courts than by courts in other jurisdictions.

[66] Article 2(1)(i) UCPA.

[67] K.K. Tsukuda Original v. K.K. Lana, Heisei 12 (Ne) 6042 (Tokyo High Court 19 December 2001).

[68] Peter Opsvik AS and Stokke AS v. K.K. Noz, Reiwa 5 (Ne) 10111 (Intellectual Property High Court 25 September 2024).

[69] § 5(2) Act No. 506/2009 Coll. of 28 October 2009 on Trade Marks, as amended (hereinafter "**ZOZ**").

[70] § 47(1)(b) ObZ.

[71] Levi Strauss & Co. v. K.K. Edwin Mfg., Heisei 8 (Wa) 12929 (Tokyo District Court 28 June 2000).

[72] Heisei 13 (Ne) 2931.

[73] HEALTH, C.: Japan, p. 351–354. PORT, K. L.: Trademark Dilution in Japan. In *Northwestern Journal of Technology and Intellectual Property*, vol. 4, no. 2, 2006, p. 228, 237–238.

An example can be a case involving protection against unfair competition relating to the design of the children's adjustable Tripp Trapp chair, which utilised notches on the main body of the chair to adjust its configuration.[74] The defendant marketed a very similar product using a different method of connecting the individual adjustable components. The defendant's system did not use notches but rather drilled holes into the main body of the chair, into which the adjustable parts were inserted. This difference was deemed by the Japanese Intellectual Property High Court sufficiently significant to conclude that the two adjustable systems were different, and therefore the requirement of identity or similarity for the specific offence of causing confusion was not met.[75] In this case, however, the design was quite minimalistic, where even minor divergences could be sufficiently significant and thereby fundamentally influencing the court's assessment.

Another distinctive feature of Japanese law in assessing the similarity of word marks is the use of multiple writing systems in the Japanese language—namely *hiragana*, *katakana*, Chinese characters (known in Japanese as *kanji*), and even the Latin script. As a result, where identically or similarly sounding marks are written using different scripts, the courts may determine that they represent two distinct designations.[76] This approach is grounded in the fact that the Japanese language, due to its adoption of several scripts, contains a large number of homophones—words that are pronounced the same but differ in meaning depending on the script or characters used. A comparable example of homophones in Slovak would be pairs such as "výr" (*eagle owl*) and "vír" (*whirlpool*), or "bit" (*to beat*) and "byt" (*to be*). Unlike Slovak, however, Japanese also freely permits the creation of new homophones through the selection of Chinese characters with different meanings.

Although the wording of the law refers to "causing confusion", proof of actual confusion is not required and therefore the mere likelihood of confusion is sufficient. This is the case even though Japanese trademark law and unfair competition law employ different terminology in this context. Trademark law refers to the creation of a "likelihood of confusion" (*kondō-wo shōzuru osore*),[77] whereas unfair competition law explicitly refers to "causing confusion" (*kondō-wo shōjisaseru*).[78] Nevertheless, Japanese courts do not differentiate between the nuances of these expressions and apply the same standard of assessment in both areas of law,[79] thereby imposing identical requirements on both registered and unregistered trademarks.

Furthermore, Japanese courts distinguish between two types of likelihood of confusion. In the narrower sense, it refers to the risk that consumers may be misled into believing that the product in question was manufactured by a different competitor.[80] In

[74] Reiwa 5 (Ne) 10111.

[75] *Ibid*.

[76] HEALTH, C.: Japan, p. 352–353.

[77] Japanese Act No. 127/1959 of 13 April 1959 on Trade Mark (*Shōhyōhō*), as amended.

[78] Article 2(1)(i) UCPA.

[79] Chanel SA v. Sugimura, 1995 (O) 637 (Supreme Court of Japan 10 September 1998). PORT, K. L.: Trademark Dilution in Japan, p. 239.

[80] HEALTH, C.: Japan, p. 354–356. PORT, K. L., TAMURA, Y., LAFRANCE, M.: Japan. In BERESKIN, D. R. (ed.): Trademark Dilution and Free Riding. Cheltenham: Edward Elgar Publishing Ltd., 2023, p. 263, 268.

the broader sense, it is sufficient if consumers are mistakenly led to believe that some form of commercial or ownership relationship exists between the two competitors, *i.e.* membership in the same corporate group, or a licensing or other contractual arrangement, such as an agreement relating to advertising or promotional activities.[81]

Although the likelihood of confusion or association is assessed in a similar manner under Slovak and European trademark and unfair competition law, Japanese law goes considerably further with its understanding of the likelihood of confusion in the broader sense. This broader conception was applied to cases where the parties concerned were neither direct nor indirect competitors, for instance, where a renowned designation of a transport company was used as the stage name of a comedian.[82] Japanese courts therefore concluded that such a case constituted a likelihood of confusion. Under Slovak unfair competition law, this would more likely be regarded as parasitism on reputation.[83] Nonetheless, this issue will be examined in detail below in connection with the unauthorised use of a famous designation belonging to another competitor as one's own under Japanese law.

In cases of likelihood of confusion in the broader sense, it is commonly required that the designation be more famous, and the conduct of the second party is likened to some form of parasitism on the reputation of the other competitor, or to the detriment or other endangerment caused by the contested use.

2.2 Unauthorised Use of a Famous Designation (Dilution)

Cases involving dilutions, *i.e.* the unauthorised uses of famous designations as one's own, under Japanese unfair competition law[84] correspond to cases of parasitism on reputation under Slovak unfair competition law,[85] as well as to the protection of trade marks with a reputation under both Slovak and EU trade mark law.[86] Unlike cases concerning a likelihood of confusion, the unauthorised use of a famous designation does not require any risk of confusion. However, it must be shown that the designation qualifies as "famous" (*chomēna*)—a threshold significantly higher than that required for widely recognised signs in confusion-based cases—and that it has been "used" (*shiyō*)

[81] Japan Womanpower K.K. v. Manpower Japan K.K., Showa 57 (O) 658 (Supreme Court of Japan 7 October 1983). Marutake Shoji, K.K. v. NFL Properties Inc., Showa 56 (O) 1166 (Supreme Court of Japan 29 May 1984). HEALTH, C.: Japan, p. 356–358. PORT, K. L., TAMURA, Y., LAFRANCE, M.: Japan, p. 268–269.

[82] Tokyo Kyuko Dentetsu K.K. v. Takachi Noboru, Heisei 9 (Wa) 3024 (Tokyo District Court 13 March 1998).

[83] § 48 ObZ.

[84] Article 2(1)(ii) UCPA ("the act of using an indication of goods or business that is identical or similar to another person's famous indication of goods or business as one's own, or of transferring, delivering, displaying for the purpose of transfer or delivery, exporting, importing, or providing through telecommunications lines goods that use such indication").

[85] § 48 ObZ.

[86] Article 9(2)(c) Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union Trade Mark (codification) (OJ L 154/1, 16.6.2017) (hereinafter "**EUTMR**").

without authorisation, regardless of whether the use relates to identical, similar or dissimilar goods.

In such cases, the designation must be known throughout the entire territory of Japan, and not merely within a specific region.[87] In one judgment, the court explicitly stated that, although recognition by 18.3% of the population may be sufficient for a designation to be considered widely recognised in the context of assessing a likelihood of confusion, it is insufficient for a finding that the designation is famous for the purposes of assessing dilution.[88] Nevertheless, the designation need not be globally recognised, like "Sony", "Toyota" or "Panasonic". It is sufficient if the designation is famous among consumers across Japan, as in the cases of the pharmaceutical brand "Seirogan Toi-A"[89] or the dietary supplement "Alinamin A25".[90]

When assessing whether a particular designation is recognised across the entire territory of a geographically extensive country such as Japan, it is important to take into account cases in which certain products are typically used only in specific regions or among particular segments of the population, owing to natural limitations affecting their usability. For instance, goods intended for winter use, such as skis, ice skates or snow blowers, are understandably less likely to be known in regions where such products are, in practice, almost unusable, such as tropical and subtropical zones where it neither snows nor freezes. Nonetheless, given the high degree of mobility in modern society, individuals frequently encounter such products and their designations even if they are not used in their home region. It is then sufficient for the designation to be known in areas where the goods are typically used and where there is a likelihood that consumers from other parts of Japan may come into contact with them.[91]

Japanese law does not limit legal protection solely to the unauthorised use of identical designations but also restricts the use of similar ones. In assessing the similarity of designations, Japanese courts apply methods analogous to those used in trademark law—namely, visual, phonetic and conceptual similarity.[92] This approach effectively introduces elements of confusion-based analysis into the assessment of this legal provision, a practice that has been criticised by commentators.[93] Their critique centres on the view that unauthorised use of a famous designation should not hinge on the existence of a likelihood of confusion, but rather on any unauthorised use that results in unjust benefit to the user or detriment to the rightful owner. Nevertheless, this form of assessment

[87] PORT, K. L., TAMURA, Y., LAFRANCE, M.: Japan, p. 271.

[88] Heisei 8 (Wa) 12929.

[89] Taiko Pharmaceuticals v. Nisshin Pharmaceuticals K.K. (Osaka District Court 11 March 1999). In *Hanrei Taimuzu*, No. 1023, 2000, p. 257.

[90] Takeda Pharmaceuticals K.K. v. Toyo Farumer K.K. (Osaka District Court 16 September 1999). In *Hanrei Taimuzu*, No. 1044, 2001, p. 246.

[91] PORT, K. L.: Trademark Dilution in Japan, p. 236. PORT, K. L., TAMURA, Y., LAFRANCE, M.: Japan, p. 270.

[92] PORT, K. L.: Trademark Dilution in Japan, p. 238. PORT, K. L., TAMURA, Y., LAFRANCE, M.: Japan, p. 266.

[93] PORT, K. L.: Trademark Dilution in Japan, p. 237–238, 248. PORT, K. L., TAMURA, Y., LAFRANCE, M.: Japan, p. 266.

applies only in cases involving similar designations and is intended to mitigate the potentially adverse effects of an overly broad application of this legal provision on market competition.

Consequently, it is not surprising that, although the statutory provision governing dilution is broadly formulated, in practice its application remains very limited. This can be attributed to several factors, one of which is the abovementioned broad interpretation of the likelihood of confusion under the provision concerning the act of causing confusion. While this broad interpretation offers certain advantages, it also entails notable drawbacks. It has enabled Japanese courts to address dilution cases even in the absence of a narrow, traditional form of confusion, such as in the cases of parasitism or harm to the reputation or distinctiveness of the designation in question. This was the case even before a specific statutory provision concerning the unauthorised use of famous designations was explicitly introduced into Japanese unfair competition law. Examples include the unauthorised use of the designation "Chanel", known for perfumes, by a love hotel;[94] "Disney", associated with theme parks and animated characters, by a shop selling adult goods;[95] and "Porsche", known for motor vehicles, in connection with sunglasses.[96]

Even after the introduction of a specific statutory provision on dilution, Japanese courts have continued to apply the broad interpretation of the likelihood of confusion. Consequently, this provision is invoked in only a very limited number of cases. In many instances, courts find that a likelihood of confusion exists in a broader sense and therefore see no need to consider whether the conduct also constitutes any unauthorised use of a famous designation—an assessment that does not require any finding of confusion. For this reason, some commentators have criticised the courts' approach.[97]

On the other hand, a positive aspect of this judicial practice is that it imposes limitations on the scope of the broadly worded provision concerning dilution, which does not specify additional criteria such as parasitism on reputation, blurring of distinctiveness, or tarnishing of reputation—requirements commonly applied in both European[98] and Slovak[99] law. Therefore, although the provision on the unauthorised use of a famous designation could potentially extend to a wide range of unauthorised uses, Japanese courts interpret and apply it narrowly to prevent potential negative effects on the market and innovation that might arise from its overuse.

At the same time, this judicial approach introduces a certain degree of legal uncertainty, as courts rarely provide detailed reasoning as to why the specific legal provision is applicable in a given case. Typically, they merely state that the conduct in question clearly constitutes unfair competition, which must be restricted under the relevant provision of the Act on the Prevention of Unfair Competition.[100]

[94] "Hotel Chanel", Showa 59 (Wa) 94 (Kobe District Court 25 March 1987).
[95] "Pornoland Disney" (Tokyo District Court 18 January 1984). In *Hanrei Taimuzu*, No. 515, 1984, p. 210.
[96] "Porsche Sunglasses", Showa 57 (Mo) 432 (Fukui District Court 25 January 1985).
[97] HEALTH, C.: Japan, p. 359. PORT, K. L., TAMURA, Y., LAFRANCE, M.: Japan, p. 267–269.
[98] Article 9(2)(c) EUTMR.
[99] § 8(2)(c) ZOZ and § 48 ObZ.
[100] PORT, K. L.: Trademark Dilution in Japan, p. 248. PORT, K. L., TAMURA, Y., LAFRANCE, M.:

It should also be noted that, in dilution cases, Japanese courts require proof of actual harm, in contrast to cases concerning the likelihood of confusion, where harm is normally presumed. In such cases, the use of the designation is regarded as capable of damaging the reputation of the affected competitor.[101] It is then sometimes procedurally more straightforward for the aggrieved party to pursue a claim based on a broader interpretation of the likelihood of confusion, rather than on the unauthorised use of a famous designation. Moreover, this evidentiary requirement ensures that the relevant provision is applied only in very limited and clear circumstances.

Conclusion

From the foregoing, it is apparent that Japanese and Slovak unfair competition laws share more in common than might initially be expected. This is largely attributable to the extent to which national unfair competition laws have been harmonised through the Paris Convention, as well as to the fact that both legal systems draw inspiration from German law in this field. Although the absence of a general clause defining unfair competition in Japanese law might appear as a shortcoming, it has not prevented Japanese courts, when necessary, from extending the scope of existing specific forms of unfair competitive practices through extensive interpretation, or from resorting to civil law provisions on liability in tort as a measure of last resort.

The application of civil law rules on delictual liability to the development of unfair competition law is nothing unusual among national unfair competition laws. In some legal systems, it is even a defining characteristic, as exemplified by French unfair competition law, which has gradually evolved from case law concerning compensation for damage arising from unfair commercial practices in the marketplace.[102]

On the other hand, Japanese courts are aware of any potential misuse of unfair competition law to restrict market competition in respect of broadly defined specific unfair competitive practices. Consequently, they have adopted a cautious approach and a restrictive interpretation of broadly framed statutory provision on the unauthorised use of a famous designation as one's own.

This flexibility, combined with the rigidity and vagueness demonstrated by Japanese courts under certain specific circumstances, could serve not only as an inspiration but also as a cautionary tale for both the theory and practice of Slovak competition law in its application and further development.

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Japan, p. 276–277.

[101] PORT, K. L., TAMURA, Y., LAFRANCE, M.: Japan, p. 273.

[102] NÉRISSON, S.: France. In HENNING-BODEWIG, F. (ed.): International Handbook on Unfair Competition, p. 207, 210–212.

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