



The Interplay Of Counterfeiting And Unfair Competition: Toward A Unified Approach

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Abstract: This article examines the intricate relationship between counterfeiting and unfair competition, delineating the convergences and divergences of these legal concepts. Through a comparative analysis of European Union and Chinese legal frameworks, it offers recommendations for bolstering the legal protections afforded to businesses, considering the evolving technological landscape and the challenges presented by e-commerce.

Index Terms – Counterfeiting, unfair competition, intellectual property, e-commerce, globalization, innovation, business protection, cross-border e-commerce, jurisprudence, counterfeit products.

I. INTRODUCTION

The successes of e-commerce and globalization have heightened the challenge posed by counterfeiting and unfair competition. Although studied separately, they are linked and share a common interest. Their complexity requires an integrated analysis. While the distinction between infringement of an intellectual property right and unfair practice is classically established, economic reality reveals significant areas of overlap. The objective of this article is to explore these interactions, going beyond a simple juxtaposition of the two notions. The comparative study of European and Chinese legislation will allow us to analyse the definitions, evidentiary mechanisms and sanctions applicable to these practices. The analysis will be based on a study of concrete cases in order to illustrate the difficulties encountered by companies and to propose recommendations to strengthen their legal protection. Indeed, the fight against counterfeiting and unfair competition is crucial to preserve free competition, stimulate innovation and promote sustainable economic growth.

Purpose of the Research:

This article aims to explore in depth the interaction between counterfeiting and unfair competition, going beyond the dichotomy often observed in doctrine and case law. Indeed, our study aims to highlight the overlaps and common points between these two offences, particularly in a context marked by globalization and the rise of e-commerce. Through an analysis of current legal issues, we will seek to formulate recommendations to strengthen the protection of companies against these illicit practices, which harm fair competition, innovation and generate significant economic losses for companies.

Methodology:

To achieve our objectives, we will undertake a comparative study of the European and Chinese legal systems. This choice is motivated by the differences that exist between these two frameworks, with varied economic and cultural realities, in order to identify the strengths and weaknesses of each. Our analysis will cover several aspects: the definitions, the protection mechanisms and the sanctions applied in each jurisdiction. This will be done from multiple angles

- Evolution of the legal framework: we will analyse the legal framework and its legislative evolution in the face of the challenges of counterfeiting and unfair competition in the digital economy era and of cross-border trade.

- Analysis of Jurisprudence and Case Studies: The examination of recent judicial decisions and published case studies, from innovative economic sectors, will illustrate the complexity of the problems encountered by companies.

To analyse these complex interactions between counterfeiting and unfair competition, it is essential to precisely define these two concepts.

II. DEFINITION AND CONCEPTS

This section therefore aims to precisely define counterfeiting and unfair competition, highlighting their distinct aspects and their areas of overlap, before analysing their interactions in the following sections.

Counterfeiting:

is the unauthorized reproduction or imitation of a product, trademark, patent, design or work protected by intellectual property rights, with the aim of deceiving or taking unfair advantage of the holder of the original right.

Legal basis

- Intellectual Property Code (CPI), article L331-2, France: "Any edition of writings, musical compositions, drawings, paintings or any other production, printed or engraved in whole or in part, in defiance of the laws and regulations relating to the property of authors, is an infringement and any infringement is an offence."

Unfair competition:

Unfair competition refers to the abusive exploitation of the freedom to conduct business by a company, which adopts practices that are contrary to commercial norms and standards.

characterized by dishonest business practices that contravene the ethical and legal norms of the market. This harmful behavior aims to harm competitors or market players, and is governed by civil liability, as provided for in Article 1240 of the French Civil Code. To establish a fault of unfair competition, it is necessary to demonstrate the existence of an error, damage and a causal link. [1] Companies guilty of such practices risk having to pay damages. [2]

Literature review: Beyond the simple dichotomy – New perspectives on the interaction between counterfeiting and unfair competition.

Academic literature and case law have traditionally treated counterfeiting and unfair competition as distinct concepts. [3] The first infringes intellectual property rights, while the second constitutes an abusive commercial practice.

"The action for unfair competition requires a fault and the action for infringement concerns the infringement of a private right, [...] these two actions arise from different causes and do not tend towards the same ends, [...] the second is not the accessory, the consequence or the complement of the first" [4]

However, this distinction, although practical, obscures complex interactions, particularly in the current context of globalization and e-commerce. [5] The rise of online commerce has made the fight against counterfeiting more difficult, due to the anonymity of the actors and the opacity of the transactions. [6] Quantitative studies highlight the scale of the phenomenon, with considerable estimates of the volume of imports of counterfeit products. [7] Illegal trade has found in e-commerce a considerable field of expansion. [8] The 2000 e-commerce directive, though pioneering, is now outdated by the dizzying speed of digital innovation, [9] is being questioned in the face of rapid digital developments. [10] In the face of this reality, it is imperative that jurisprudence adapt, paving the way for a more global and agile regulation, capable of keeping up with the frenetic pace of the online market. A new, more integrated and proactive approach is now imperative.

Case law has evolved, recognizing the need for a more integrated approach. Important judicial decisions have highlighted the influence of brand reputation on the assessment of the likelihood of confusion, going beyond a simple visual analysis. [11] A holistic approach is now preferred, taking into account various factors such as phonetic similarity, target audience and competitive context. [12]

The evolution of intellectual property and competition law, influenced by case law and international agreements, has created new challenges. The balance between the protection of intellectual property rights

and the promotion of fair competition is a major issue. [13] Research has examined how the strengthening of intellectual property protection influences innovation and technology transfer, while also highlighting the potentially anti-competitive effects. [14] Orsi (2002). [15] It is essential to adopt a nuanced approach that takes into account the particular economic and social contexts in order to reconcile innovation and competition. At the same time, recent studies reveal a significant increase in e-commerce in the distribution of counterfeit products, which underscores the urgency of adapting strategies to combat this growing phenomenon. [16]

After a thorough study, the relationship between counterfeiting and unfair competition reveals a multifaceted complexity characterized by areas of overlap, complementarity, and distinction. The sale of counterfeit products is a perfect illustration of this: it represents not only an infringement of intellectual property rights but also a form of unfair practices, [17] as it relies on consumer deception. 'Overlaps' Counterfeiting is often used as a lever for unfair competition, offering reduced prices that disadvantage companies that respect the rules of fair competition. The common goal is unfair economic gain. However, the legal bases differ: counterfeiting infringes intellectual property rights, while unfair competition violates the principles of commercial fairness. The required evidence also varies. [18] 'Complementarity'

Despite these links, significant differences persist. Counterfeiting is a direct infringement of intellectual property rights, whereas unfair competition aims to maintain a fair business environment. Punitive measures vary in severity, with counterfeiting often being punished more rigorously. Therefore, adopting an integrated approach is essential to understand these dynamics and ensure effective protection for businesses while promoting fair competition. [19] 'Distinctions'

In conclusion, the interaction between counterfeiting and unfair competition is complex and requires a case-by-case analysis, because while overlaps exist (counterfeiting may constitute an act of unfair competition), fundamental distinctions must be preserved. The evolution of case law, in particular on the requirement of distinct facts, highlights the difficulty of reconciling the protection of intellectual property and the preservation of fair competition. The choice between an action for counterfeiting, unfair competition, or both, depends on the facts and evidence available. A thorough evaluation is essential to establish the legal qualification and consider the necessary measures. This complexity calls for a comprehensive approach, taking into account definitions, case law, and previous research. Legal comparisons, particularly between European and Chinese legislation (section III), as well as the case studies presented in the following sections (section IV), will serve to develop recommendations to strengthen the protection of businesses (section V).

III. COMPARATIVE STUDY OF THE RELATIONSHIPS BETWEEN COUNTERFEITING AND UNFAIR COMPETITION IN EUROPEAN AND CHINESE LEGAL SYSTEMS

This study examines the perspectives of European Union law and Chinese law on the links between counterfeiting and unfair competition. It is based on the legal foundations of the EU and the recent interpretation of Chinese laws related to unfair competition.

Exploration of the Interactions between Counterfeiting and Unfair Competition within the European Legal Framework.

1. The Hidden Face of Unfair Competition

In the context of European law, counterfeiting is viewed not only as an infringement of intellectual property rights but also as a form of unfair competition. Indeed, acts of counterfeiting undermine consumer trust and disrupt market balance, resulting in negative economic consequences for rights holders. A company using counterfeit products gains an unfair advantage by avoiding the costs of innovation and marketing while profiting from the reputation of legitimate businesses.

For example, in the luxury sector, which is particularly sensitive to counterfeiting, and the case law of the Court of Justice of the European Union concerning the exhaustion of trademark rights, the owner of a trademark loses his exclusive right to the products once they have been placed on the market in the European Economic Area by himself or with his consent. However, this limitation on the exhaustion of rights does not apply to the resale of counterfeit products. [20] Counterfeiting represents a violation of intellectual property rights, subject to direct penalties under EU law.

2. Régulation and Fight Against Counterfeiting

The fight against counterfeiting in Europe revolves around the principle of the free movement of goods while emphasizing the importance of protecting intellectual property rights. Intellectual property, including trademarks, patents, copyright, etc., is thus protected by a substantial legal arsenal.

The fight against counterfeiting as an act of unfair competition is based on several legal foundations within the European Union:

- **Treaty on the Functioning of the European Union (TFEU):** Article 114 TFEU allows for the harmonisation of the laws of the Member States to ensure an efficient internal market. [21] Similarly, Article 101 TFEU prohibits agreements that may distort competition, including arrangements aimed at favoring counterfeit products. Furthermore, [22] Article 102 TFEU aims to prevent the abuse of a dominant position, [23] which can manifest in practices related to counterfeiting.

- **Dedicated regulatory framework:** The European Union has established a robust system for the protection of intellectual property, including regulations and directives concerning trademarks (Regulation (EU) 2017/1001), [24] to patents (Regulation (EC) No 1257/2012) [25] and copyright (Directive 2001/29/EC). [26] Any violation of these protections can lead to both civil and criminal penalties.

- **Trade protection measures:** Tools such as the anti-dumping and anti-subsidy regulations (Regulation (EU) 2016/1036 [27] and Regulation (EU) 2016/1037) [28] are also employed when counterfeiting is associated with unfair trading practices, particularly selling at excessively low prices.

3. Link to Other Unfair Competition Practices

Counterfeiting frequently co-occurs with other unethical practices, such as:

- **Deceptive Advertising:** Promoting counterfeit products under a false label goes against advertising standards, as per Directive 2005/29/CE, [29] which aims to safeguard consumers from misleading commercial practices.

- **Parasitism:** Leveraging the reputation of an established brand by a legitimate business is another form of unfair competition. Here, brand image is unauthorizedly utilized, undermining the original enterprise's efforts.

- **Denigration:** Spreading false information about competitors' products can also be categorized as unfair competition acts, damaging the reputation of businesses.

4. Sanctions and Consequences

Penalties for counterfeiting vary based on the national legal framework and the specific intellectual property right involved. They may encompass substantial fines, financial reparations for damages, seizure of counterfeit products, and, in some instances, criminal prosecution.

Interaction between Counterfeiting and Unfair Competition in Chinese Law:

Chinese Law Based on the New Judicial Interpretation of China's Law Against Unfair Competition (2022). [30] This interpretation clarifies several important points, including the definition of "business ethics", the notion of confusion and the responsibility of service providers.

- **Business Ethics (Article 3):** The new interpretation broadens the notion of business ethics, taking into account the professional norms and standards specific to each sector. This allows for better adaptation to market realities and greater precision in the assessment of business behaviour.
- **Confusion (article 6,7,12,13):** The new interpretation specifies the cases where confusion will not be recognized by the courts, in particular when the elements used are prohibited from registration as a trademark (e.g.: elements of the national flag) [31] It also broadens the scope of the notion of "specific link with others", now including commercial partnerships, licensing agreements, sponsorship, [32] etc. This measure enhances the protection of rights holders, particularly against the unauthorized exploitation of the images of famous personalities.
- **Sale of Counterfeits (article 14):** The sale of counterfeit products is regarded as an unfair competition practice, unless the seller can prove their ignorance regarding the legal origin of the products and the identity of their supplier.
- **Liability of service providers (article 15):** The new interpretation introduces a principle of joint and several liability for service providers who intentionally contribute to acts of confusion (e.g. storage, transport, printing of counterfeit products). [33]

The sale of counterfeits is explicitly addressed, with the possibility of exoneration for the seller who can prove his ignorance, the legal obtaining of the products and the identification of his supplier. [34]

- **Calculation of damages (article 17.23):**

The judge can award damages based on the victim's losses or the offender's gains with the possibility of multiplying this amount up to 5 times in serious cases. The recent interpretation expands access to flat-rate damages for various types of violations, including breaches of commercial ethics, misleading advertising, commercial disparagement, and illegal online activities.

Counterfeiting in China, like in Europe, represents a significant form of unfair competition. The new interpretation strengthens the fight against this phenomenon by clarifying the criteria for assessing acts of unfair competition and by extending the liability of the actors involved in the distribution chain.

Comparative analysis:

Both European and Chinese law consider counterfeiting to be a serious form of unfair competition. However, there are differences in their approaches on several aspects:

- **Legal framework:** The European legal system exhibits greater harmonization, based on common regulations, while Chinese law is fragmented and constantly evolving, both legislatively and judicially.
- **Definition of unfair competition:** In China, the concept of unfair competition is broader, encompassing aspects such as violations of commercial ethics, which are often less clearly defined in European law.
- **Liability of service providers:** Chinese law holds service providers more responsible for the distribution of counterfeits, with joint and several liability, unlike European law which remains more measured on this point but not as strict.
- **Assessment of Damages:** Unlike the European framework, Chinese law allows judges to set fixed damages in certain cases of unfair competition, facilitating the repair process.

Protection of Inventions in Technology Transfers:

While there is a gradual convergence between Chinese and European legislation concerning the protection of inventions, notable differences persist. These divergences extend beyond technical considerations, impacting the philosophical foundations that shape each region's approach to intellectual property.

1. Philosophical and Historical Divergences

In China, the perception of intellectual property is influenced by philosophical traditions such as Confucianism, which values social harmony and the common good, in contrast to the Western perspective that emphasizes individual ownership of knowledge. This historical difference is manifested in the management of invention protection in China, where periods of nationalization and collective rewards have prevailed, contrasting with a more individualistic approach in Europe. These divergences complicate the harmonization of intellectual property protection systems (Zhang & Yu, 2021). [35]

2. Patent Protection

Although China has aligned its patent legislation with international standards following its accession to the WTO, inconsistencies remain between the law and its practical implementation. European companies face challenges regarding the enforcement of patent eligibility criteria and the associated rights.

The complexity of the Chinese system, coupled with challenges related to patent protection, remains a source of concern for European investors (Liotard, 2012). [36] The perception of challenges related to patent protection in China may deter firms from fully engaging in technology transfers (Rouge, 2017). [37]

3. Protection of Trade Secrets

China's legal framework for trade secret protection is fragmented, relying on a combination of unfair competition laws and criminal law. Unlike Europe, which has a consolidated legal framework, China uses a combination of unfair competition laws and criminal law to protect trade secrets. This heterogeneity in the legal framework increases the risk of counterfeiting and unfair competition, making European companies more vulnerable during technology transfers (Wodka-Gallien, 2015). [38]

4. Contractual Framework and Dispute Resolution

Technology transfers are often governed by international contracts, but these contracts must also comply with mandatory Chinese rules that protect domestic socio-economic interests. Although mediation and arbitration are gaining popularity in China, procedural and substantive differences with European dispute resolution mechanisms complicate the comparison of risks associated with contract enforcement. This uncertainty underlines the importance of a prudent approach, incorporating robust contractual clauses and a thorough understanding of the Chinese legal context (Winckler, 2014). [39]

Despite partial convergence, philosophical differences and gaps in the application of Chinese intellectual property laws create major obstacles for European companies. These difficulties, particularly concerning patents, trade secrets and dispute resolution, require a cautious approach including sound contracts and a thorough knowledge of the Chinese context. Legislative and jurisprudential developments in both regions remain a determining factor.

Comparative legal analysis of European and Chinese legislation on the interaction between counterfeiting and unfair competition in the digital economy

Technology transfers are often governed by international contracts, but these contracts must also comply with mandatory Chinese rules that aim to protect the country's socio-economic interests. This part will be

enriched with relevant references highlighting the different aspects addressed: the context, the objectives, the regulatory approaches, as well as the sanctions and their effectiveness.

- **Background and objectives:**

The context of the digital economy in Europe and China is marked by a common desire to protect intellectual property rights while stimulating innovation. The EU, through its directives, aims to establish a single market where the protection of consumers and businesses is paramount (Nicoli & Iosifidis, 2023). [40] In China, the government is seeking to strengthen its laws to support its domestic businesses while promoting its integration into the global economy, a crucial issue in a rapidly changing digital environment, [41] (Cheng, 2020). [42]

- **Regulatory approaches:**

There are notable differences in regulatory strategies. The EU has established a stringent legal framework, exemplified by Directive 2005/29/EC on unfair commercial practices, which aims to safeguard consumers and govern business conduct (Nicoli & Iosifidis, 2023). [43] China, for its part, has amended its Unfair Competition Law to include specific provisions regarding e-commerce, reflecting an adaptation to the realities of the digital market; (Pekarskienė et al., 2018). [44] These differences illustrate the specific responses of each region to the challenges of the digital economy.

- **Sanctions and effectiveness:**

Penalties for counterfeiting and unfair competition vary. In Europe and China. In Europe, they include significant fines and compensation for harmed consumers, reinforced by cooperation mechanisms between Member States (Nicoli & Iosifidis, 2023), [45] (Zhang & Yu, 2021). [46] In China, sanctions also exist. However, their effectiveness is debated, particularly due to disparities in the application of laws and questions about the potential protection of the interests of state-owned enterprises (Liotard, 2012) [47]; (Rouge, 2017). [48] These differences raise questions about the ability of each system to deter anticompetitive behavior and effectively protect intellectual property rights.

Conclusion:

The comparative examination of competition and anti-counterfeiting systems highlights divergent approaches between the EU and China. The EU favors a proactive and harmonized regulation, as evidenced by Regulation (EU) No 608/2013 on customs seizures. In contrast, China, facing the challenges of its digital economy and the dominance of its major platforms, adopts a more pragmatic strategy, aiming to find a balance between innovation and the prevention of abuse of dominant position. This pragmatism, shaped by the context of a developing economy, stands in stark contrast to the European and even American models. Therefore, companies are encouraged to adjust their strategies according to these varied legal frameworks.

IV. CASE STUDY: INTERACTIONS BETWEEN COUNTERFEITING AND UNFAIR COMPETITION

A. Legal Analysis of the Hermès Case (2023) “Chaîne d’Ancre” Jewelry: Possibility of Cumulation

1. Context

In this case, the Hermès company sued a Parisian company for having marketed jewellery using its emblematic “Chaîne d’Ancre” [49] motif. Hermès invoked both counterfeiting and unfair competition.

2. Critical Analysis

2.1. Penalty for Counterfeiting

The Court of Cassation confirmed that the “Anchor Chain” motif was an original work of the mind, protected by copyright. [50] It therefore upheld the Parisian company's conviction for counterfeiting, ordering it to pay Hermès 35,000 euros for infringement of copyright and 5,000 euros for infringement of design rights.

2.2. Sanction for Unfair Competition

Beyond the counterfeiting, the Court considered that the marketing by the Parisian company of an entire range of jewellery reproducing the iconic Hermès models created a risk of confusion in the minds of consumers. [51] This fact constitutes an act of unfair and parasitic competition, which is clearly distinct from counterfeiting. The Court thus upheld the decision to condemn the company to pay 40,000 euros to Hermès for this reason.

2.3. Issues and Scope of the Decision

This ruling highlights the possibility of combining actions for counterfeiting and unfair competition when distinct elements are established. [52] It highlights the importance for companies to protect not only their intellectual property rights, but also their brand image and reputation, particularly in sectors where originality and notoriety are essential. This accumulation of sanctions strengthens the protection of companies against

unfair practices, but also increases the legal and financial risks for offenders. This encourages companies to be more vigilant about the anteriority and exploitation of their creations.

3. Grey area

The Hermès decision, handed down by the Court of Cassation, illustrates the complexity of protecting intellectual property rights, particularly in the face of unfair competition. Although this decision strengthens the possibility of combining actions for counterfeiting and unfair competition, it raises questions about the precise definition of these two concepts, particularly concerning the assessment of the risk of confusion.

Jurisprudence affirms the protection of copyright for original works. However, the line between simple inspiration and an illegal copy remains blurred. The Hermès ruling, by protecting the “Anchor Chain” motif, raises the question of the definition of originality sufficient to benefit from this protection. The absence of objective criteria to quantify this originality creates a grey area, leaving room for a certain subjectivity in the judges’ assessment.

Similarly, the assessment of the risk of confusion, a central element of unfair competition, is subject to interpretation. The similarity between the products, the perception of the average consumer, and the intention of the counterfeiter are all factors that influence this assessment. The absence of precise criteria for measuring this risk contributes to legal uncertainty. A slight deviation in design may be considered as simple inspiration, while a closer imitation will be qualified as unfair competition. This nuance, which is difficult to grasp, makes the application of the law unpredictable.

The accumulation of sanctions for counterfeiting and unfair competition, although legally possible, also raises questions. Demonstrating separate facts for each infringement can be complex, increasing the risk of disproportionate decisions. The balance between the protection of intellectual property rights and commercial freedom therefore remains a challenge for case law. The search for greater objectivity in the assessment of the risk of confusion and the originality of creations appears necessary to clarify this grey area and ensure a more predictable application of the law. A more precise codification of the assessment criteria would reduce the current legal uncertainty.

B. Legal Analysis of the Mango Case (2018): Range Effect

1. Analysis of the judgment

The judgment rendered by the Commercial Chamber of the Court of Cassation on November 14, 2018, no. 16-25.692 [53], provides essential details on the conditions for incurring liability for unfair competition, particularly in the field of clothing design.

The decision confirms the possibility for the judge to address a competition infringement based on facts similar to those that have already been dismissed for counterfeiting. [54] Indeed, the Court of Cassation believes that the accumulation of actions for counterfeiting and unfair competition is possible as long as wrongful conduct is established, even in the absence of proven counterfeiting. [55] Thus, the absence of counterfeiting alone is not sufficient to dismiss the existence of unfair competition.

On the merits, the High Court supports the analysis of the Court of Appeal, which held Mango liable for unfair competition. This ruling is based on Mango reproducing a "range" of clothing similar to that of the company Speaking Image, incorporating comparable stylistic and graphic elements.

The Court of Cassation considers that copying a "range" of products, even without individual originality of the components, can lead to a risk of confusion. [56] This risk should be assessed in the mind of the average consumer. Therefore, the emphasis is placed on a global evaluation of the collection's impact on the public, beyond the isolated analysis of each product.

This position reflects a realistic understanding of commercial practices, taking into account the importance of the range effect in consumer perception. It enables the sanctioning of wrongful behavior, [57] even in the absence of proven infringement, provided it results in a risk of harmful confusion.

The consistent case law of the Court of Cassation affirms the sovereign nature of trial judges' assessments on these issues. Only a manifest violation of the law or a distortion of facts could lead to the censorship of their analysis.

Ultimately, this decision provides a balanced legal framework, reconciling the freedom of clothing design with protection against unfair practices likely to mislead consumers. It illustrates the judge's ability to adapt to changes in commerce.

2. Grey area

In the *Mango v. Speaking Image* case, the gray area lies in the legal uncertainty regarding the assessment of unfair competition in the absence of proven counterfeiting.

The challenge lies in the evaluation of the risk of confusion and the characterization of wrongful conduct. Although the Court of Cassation has confirmed the possibility of combining the action for unfair competition and the action for counterfeiting, validating a global approach taking into account the "range effect", the boundary between simple inspiration and parasitic, unfair copying remains blurred.

The assessment of the risk of confusion is subjective and depends on the sovereign assessment of the trial judges. There are no objective and precise criteria for determining when a resemblance between two clothing lines crosses the red line. The assessment of the unfair nature of a commercial practice therefore remains subject to a case-by-case examination, strongly dependent on the factual analysis and the interpretation of the evidence by the trial judges.

This ambiguity calls for continuous clarification from the legislator and the jurisprudence, in order to offer companies better legal certainty in the face of the challenges posed by the evolution of commercial practices.

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Similarly, proof of wrongful conduct can be difficult to establish. Intent to cause harm is not always necessary to characterise unfair competition, but demonstrating intentional conduct or gross negligence can be complex. Mere knowledge of the existence of the competing range is not always sufficient to prove wrongful conduct. In summary, the grey area lies in the subtlety of the interpretation of the facts by judges, faced with a subjective assessment of the risk of confusion and the difficulty of proving wrongful conduct in a context where inspiration and copying can be difficult to dissociate. The judgment provides clarifications, but does not remove the uncertainty inherent in this type of litigation.

C. Legal Analysis of the Judgment of July 8, 2014: Case of Violation of a License Agreement

The judgment rendered by the Court of Cassation on July 8, 2014 (No. 13-11.208) constitutes an important milestone in the understanding of the articulation between counterfeiting and unfair competition, particularly in the context of license agreements. This decision provides clarifications on the conditions allowing the rights holder to cumulate these two types of actions, thus strengthening the protection of intellectual property.

1. Background to the Case

In the case examined, company A had developed a licensed software, which was used by company B without authorization in the context of a public tender. Company A therefore initiated proceedings for counterfeiting and parasitism. The central question was whether the unauthorized use of the software constituted a distinct fact from the breach of the license agreement, thus allowing the accumulation of actions.

2. Legal Framework

2.1. Counterfeiting and Intellectual Property Law

According to Article L716-5 of the Intellectual Property Code, the action for counterfeiting must be brought by the rights holder when a third party infringes on their copyrights. In this context, a breach of a license is considered an act of counterfeiting, engaging the liability of the infringer for the unauthorized use of a protected work. [58]

2.2. Unfair Competition

Actions for unfair competition, governed by Articles 1240 and 1241 of the French Civil Code, require proof of harm suffered by the victim, a fault committed by the perpetrator, and a direct causal link between the two. [59] Parasitism, which consists of exploiting the work of others without compensation, is a typical example of sanctioned behavior.

3. Analysis of the Judgment

3.1. Conditions for Accumulation of Shares

Jurisprudence establishes that the violation of a license agreement **copyright infringement** and the resulting parasitic acts **unfair competition** can constitute separate offenses. The unauthorized integration of software into another product, for example, represents both a breach of contract and an act of parasitism, justifying two separate legal actions. [60] , [61]

The finding of copyright infringement creates a presumption of fault. [62] The violation of an intellectual property right is sufficient to establish the liability of the infringer, thus facilitating an action for unfair competition.

4. Implications of Jurisprudence

In conclusion, the 2014 ruling significantly strengthens the protection of rights holders. It specifies that they can pursue separate legal actions, both contractual **license violation** and tortious **unfair competition**, to obtain

redress for the harm suffered and protect their commercial and intellectual interests. The non-cumulativity of contractual and tortious liability does not preclude this dual action when the facts are distinct. [63]

5. Conclusion

The July 8, 2014, decision of the Cour de cassation is a cornerstone of intellectual property protection in the economic sphere. It establishes a clear framework for the accumulation of actions for infringement and unfair competition, thus better protecting the rights of creators and their ability to defend their interests against unfair commercial practices.

6. Grey area

The decision of the Court of Cassation raises a major difficulty in the application of intellectual property and competition law: determining the limits of the cumulation of actions for infringement and unfair competition following a violation of a license agreement. The heart of the problem lies in the interpretation of the criterion of the "distinction of facts". While case law allows cumulation when the facts constituting the two offenses are distinct, it does not provide objective and precise criteria for making this distinction. The difficulty does not only lie in the identification of the acts themselves, but also in their legal classification.

The same act may be qualified as infringement due to the violation of an exclusive intellectual property right (e.g. unauthorized reproduction of software), and simultaneously as unfair competition, for example for parasitism, if the unauthorized use takes undue advantage of the reputation or efforts of the rights holder. The boundary between these qualifications is blurred and depends heavily on the sovereign assessment of the trial judges.

Several crucial questions remain unanswered and contribute to this grey area:

- **The threshold of distinction:** What intensity or nature of difference between the facts is necessary to justify the accumulation? Is a simple difference in qualification sufficient, or is a significant material difference in the acts committed required? The absence of a precise answer leaves room for great subjectivity in the application of the law.
- **The interaction between contract and tort:** Are the violation of a contractual clause (e.g. non-competition clause) and the violation of an intellectual property right (e.g. copyright) always separate facts? European case law, which favors the action for infringement for violations of copyright, even contractual, further complicates the situation. The principle of non-accumulation of contractual and tortious liability, well established in civil law, finds its limits here.
- **The predictability of law:** The lack of objective criteria makes it difficult, if not impossible, for economic actors to predict the legal consequences of their actions. This legal uncertainty can discourage innovation and hinder economic development.

In conclusion, the grey area identified is not limited to a simple difficulty in applying the law, but reveals a gap in the very formulation of the legal rules. More precise legislative or jurisprudential clarification on the criteria for distinguishing the facts constituting counterfeiting and unfair competition is necessary to ensure better legal certainty and a more consistent application of the law. The objective would be to reconcile the effective protection of intellectual property rights and the maintenance of a fair and predictable competitive environment.

D. Legal Analysis of the Ruling of the People's Court of Shenzhen Nanshan: Counterfeiting of an Article Written by an Algorithm (Tencent Robot Dream writer)

1. Context

The ruling by the Shenzhen Nanshan People's Court of China regarding the infringement of an article written by the algorithm "Tencent Robot Dream writer" provides an interesting insight into the evolution of copyright law in the face of works generated by artificial intelligence (AI), and its interaction with unfair competition. [64] The legal analysis of this decision must take into account several aspects:

2. Critical analysis

2.1. Copyright eligibility of an AI-generated work:

The decision marks a turning point in recognizing copyright protection for a work produced by an algorithmic program. Unlike a previous decision by the Beijing Internet Tribunal (2019), which denied protection to works generated by AI [65], The Shenzhen Court considered the article to be original in its form of expression, content and structure. This aspect is crucial because it departs from the traditional conception of human authorship. The court focused on the creative process, highlighting the choices and judgment involved in the selection of data and the generation of the article by the "Dream writer". It acknowledged that this process, although different from classical human creation, had elements of intellectual creation. [66]

2.2. The distinction between “AI generated” and “AI assisted”:

The Chinese court's ruling on Tencent's AI-related case notably omits a critical distinction highlighted by the WIPO: the difference between wholly AI-generated and AI-assisted works. [67] This silence leaves a significant gap in the decision's interpretation. The extent of human involvement in Tencent's creative process ‘minimal or substantial’ remains unaddressed, a crucial factor in assessing the ruling's implications. A finding of substantial human intervention would significantly strengthen the decision, aligning it more closely with precedents involving traditional computer-aided creative processes. Without clarity on this pivotal point, the ruling's scope and future applicability remain uncertain and open to multiple interpretations.

2.3. Interaction with unfair competition:

Tencent's copyright infringement lawsuit against Shanghai Yingxun Technology is also related to unfair competition. [68] The unauthorized reproduction of the article not only constitutes copyright infringement, but also an act of unfair competition, as Shanghai Yingxun Technology has profited from Tencent's work without authorization. [69] The ruling, by protecting the work under copyright law, strengthens protection against unfair competition, as it provides an additional legal basis for legal actions.

2.4. Limits and implications of the decision:

The decision, while progressive, does not resolve all issues related to copyright and AI. It remains specific to the Chinese context and national legislation. The criteria used to determine originality and the presence of an intellectual creation remain unclear and require future clarification. [70] The decision could encourage further litigation and influence international debates on the protection of AI-generated works. The lack of a clear definition of “author” in this context remains a major challenge.

2.5. Comparison with European law:

The Delvaux report (2017) of the European Parliament proposes sui generis protection for works generated by AI. [71] The Chinese decision differs by relying on existing copyright law, adapting its notion of originality rather than creating a new legal regime. [72] This approach is more pragmatic, but raises questions about the application of traditional copyright criteria to works generated by non-human processes.

3. Conclusion:

The Shenzhen People's Court ruling represents a significant step in adapting copyright law to the age of AI. It highlights the inherent complexities of intellectual property in the context of AI-assisted or generated works, underscoring the urgent need to redefine criteria for originality and intellectual authorship in the digital age. While progressive, the decision initiates a crucial debate on the very nature of creation and the necessity of a more nuanced and forward-looking legal approach. Its impact on international law remains to be seen, but it underlines the growing importance of the protection of digital works and the need for international harmonization of laws in this area. Finally, the interaction between copyright protection and unfair competition is clearly illustrated in this case, strengthening the protection of innovative companies against unfair practices.

4. Grey area

The intersection of artificial intelligence and copyright law reveals a significant "grey area," a legal and ethical no-man's-land where existing frameworks struggle to address novel scenarios. This ambiguity manifests in several key areas:

Authorship Attribution: Traditional copyright hinges on human authorship. AI-generated works challenge this fundamental premise, leaving the question of rightful attribution unresolved.

Defining Originality: Establishing originality in AI-created content is problematic. Current standards, designed for human creativity, fail to adequately capture the unique characteristics and processes of AI-driven generation.

The AI-Assisted/AI-Generated Dichotomy: The line between AI-assisted and wholly AI-generated works remains blurred, creating uncertainty regarding the extent of legal protection afforded to each.

Applying Existing Legal Frameworks: Existing copyright laws, crafted for human creators, often lack the flexibility to fully encompass the complexities of algorithmically generated works, leading to inconsistencies in protection.

This legal uncertainty demands urgent clarification to ensure that AI creations are appropriately protected while safeguarding the rights of human creators. The preceding case studies highlight the intricate interplay between copyright infringement and unfair competition, exposing the challenges businesses face in protecting their intellectual property. Building upon these observations, the following section offers concrete recommendations to bolster this protection, considering recent technological and legislative advancements, as well as the unique characteristics of European and Chinese legal systems..

V. RECOMMENDATIONS FOR BETTER MANAGEMENT OF THE RELATIONSHIP BETWEEN COUNTERFEITING AND UNFAIR COMPETITION

Counterfeiting and unfair competition are major challenges for businesses. After an in-depth analysis of the interaction between counterfeiting and unfair competition, this article proposes recommendations to clarify legal definitions, adapt legislative frameworks to technological developments, strengthen international cooperation, improve proof and sanction mechanisms, raise awareness among businesses, and promote an integrated approach.

1. Clarification and harmonization of legal definitions

Precisely define the criteria of originality and risk of confusion: These criteria should be clearly established to allow for better identification of acts constituting infringement and unfair competition. For example, the criterion of originality could be defined according to creativity and innovation, while the likelihood of confusion could be assessed according to elements such as the similarity of marks or products. Infringement involves the direct copying of protected intellectual property (trademark, design, etc.), while unfair competition encompasses a broader range of misleading or deceptive practices that harm competitors, even without direct copying (e.g. imitation, misappropriation of trade secrets, false advertising).

Harmonizing European and Chinese approaches: With the rise of commercial exchanges between Europe and China, it is imperative to synchronize legal standards. To achieve this, it would be beneficial to prioritize dialogue between legislators and professionals from both regions in order to develop common guiding principles. This collaboration would promote a better mutual understanding and strengthen the legal framework applicable to international transactions. [73]

2. Adaptation of legal frameworks to technological developments

Technological advancements, particularly in the fields of e-commerce and artificial intelligence, require a revamp of existing legal frameworks:

Revision of E-Commerce Laws: It is essential to adjust legislation to incorporate the specificities of online commerce, such as product traceability and platform liability. These adaptations will help better regulate emerging practices and ensure adequate consumer protection. This includes establishing effective reporting mechanisms for intellectual property rights violations. The rise of e-commerce platforms has amplified the scale and scope of counterfeit products. The cross-border operation of these platforms complicates enforcement. The effectiveness of notice and takedown systems is questionable. The anonymity offered by online marketplaces makes it difficult to identify and prosecute counterfeiters. New technologies, such as AI image recognition and blockchain-based product authentication, offer potential solutions, but their implementation requires increased development and collaboration between platforms, brands and authorities. [74]

Clarifying the legal status of AI-generated works: Works created by algorithms raise complex questions regarding their copyright protection. [75] It is imperative to define whether these works can be considered original and, therefore, protected. Also consider the impact of technologies like 3D printing and AI-assisted design theft.

Clarify the issues related to blockchain and NFTs: How these technologies impact ownership and verification. [76]

3. Promoting Bilateral and Multilateral Agreements

Specific agreements could be developed to enhance cooperation in intellectual property protection, thereby facilitating the identification and enforcement against counterfeiting activities. This collaborative approach would strengthen the framework for safeguarding rights on an international scale.. [77]

4. Improvement of proof and sanction mechanisms

Current mechanisms of proof and sanction must be strengthened to deter illicit behaviour:

Developing tools to facilitate the provision of evidence: In the context of e-commerce, digital tools could be developed and implemented to help collect and present evidence of counterfeiting or unfair competition. Explore the use of digital forensics.

Strengthen sanctions: Stronger criminal sanctions could be considered for serious offences, in order to deter unfair behaviour. This could include substantial fines and imprisonment for repeat offenders. Detail the

different types of sanctions (civil, criminal, administrative) and their effectiveness. Address the challenges of cross-border enforcement.

5. Awareness and training of companies

Better awareness among businesses is essential to prevent counterfeiting and unfair competition:

Training programs: Targeted training initiatives, particularly for SMEs, could help them better understand their rights and put in place effective protection strategies. Explain how to conduct intellectual property audits to identify vulnerabilities.

Encourage proactive strategies: Companies should be encouraged to develop internal policies for protecting intellectual property, including regular audits of their assets. Emphasize the importance of due diligence in supply chains. Discuss strategies for protecting brands online and the use of technology to monitor infringement.

Addressing the issue of bad faith trademark filings: Bad faith trademark filing is a form of unfair competition observed in particular in China. This practice involves third parties registering trademarks similar to existing trademarks, with the aim of obtaining financial advantages or taking advantage of the reputation of the original trademark ⁶. Promoting an integrated and pragmatic approach

A flexible and contextual approach is needed to address cases of counterfeiting and unfair competition:

Prioritize case-by-case analysis: Legal decisions should take into account the specific circumstances of each case, rather than rigidly applying the rules.

Seeking a balance between protection and competition: It is crucial to find a balance between the protection of intellectual property rights and the need to maintain healthy competition, in order to foster innovation and economic development.

VI. CONCLUSION

This study has highlighted the complex interactions between counterfeiting and unfair competition in an increasingly globalized and digital world. It revealed that, while these two phenomena are interconnected, they remain distinct and require in-depth analysis to understand the challenges faced by businesses.

The comparative examination of European and Chinese legislations has demonstrated significant divergences in legal approaches, underscoring the urgency of harmonization to facilitate the protection of businesses on an international scale. The findings of this research emphasize the importance of developing effective strategies against counterfeiting and unfair competition, taking into account technological advancements and legislative changes.

Furthermore, the study brings to light persistent gray areas, such as the impact of the range effect and the legal classification of creations generated by artificial intelligence. These uncertainties necessitate clarification at both legislative and jurisprudential levels to ensure legal security.

The conclusions open new avenues for research, particularly regarding a deeper exploration of interactions in various economic and legislative contexts, as well as quantitative studies on the economic impact of these issues. A dynamic and adaptive approach is essential, given the rapid evolution of technology and ongoing challenges.

Finally, this research contributes to a better understanding of the obstacles businesses face regarding counterfeiting and unfair competition, while offering recommendations to strengthen their legal protection and promote a fair and sustainable competitive environment.

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