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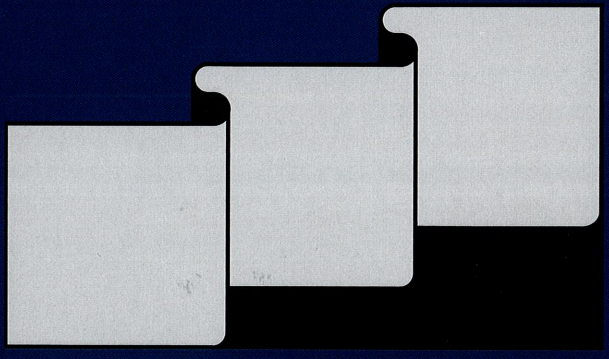
UNFAIR TRADING PRACTICES



Wolters Kluwer

Unfair Trading Practices

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Introduction

Unfair trading practices are not regulated in a coherent and uniform manner. Rather, regulation is dispersed among several laws. The main areas in which unfair trade is regulated are:

(1) Antitrust laws;
(2) Intellectual property laws;
(3) Consumer protection laws; and
(4) Fair trade laws.

In addition, Argentina, as a member of the World Trade Organization (WTO), has adopted the international treaties regulating international unfair practices, especially the Antidumping Agreement.

There is no legal tradition of claims between companies for unfair practices outside intellectual property practice. Most claims related to infringement to antitrust laws and fair trade regulations are brought by administrative agencies (the Antitrust Commission and the Fair Trade Commission).

Most claims against companies for unfair practices are brought under consumer protection regulations. The introduction of class actions related to consumer protection actions has resulted in many consumer association monitoring and challenging market practices. Litigation is most active against financial institutions and insurance companies.

Unfair Acts and Practices

Impeding Free Competition

In General

In Argentina, impeding free competition is punished by Antitrust Law Number 25,156 (the "Antitrust Law"), passed in 1999, which has been

recently amended by Law Number 26,993, passed on 17 September 2014 (the "Antitrust Amendment"). The Antitrust Law prohibits certain acts relating to the production and exchange of goods if they restrict, falsify, or distort competition or if they constitute an abuse of dominant position, provided that they cause, or may cause, harm to the general economic interest. A behavior or conduct is not unlawful unless it has the potential to cause harm to the general interest, but it will be unlawful even if such potential damages do not become actual.

The provisions of the Antitrust Law apply to all individuals and entities that carry out business activities within Argentina, and those that carry out business activities abroad to the extent that their acts, activities, or agreements may affect the Argentine market (known as the "effect theory").

Largely based on the European Union's model, the enforcement of the Antitrust Law is mainly conducted by an administrative agency. In Argentina, the competent agency is the Antitrust Commission (*Comisión Nacional de Defensa de la Competencia*), which conducts antitrust investigations and issues a non-binding opinion to the Secretary of Trade, who has the authority to make the final decisions. This situation may change since the Antitrust Amendment reserves this competence to the Enforcement Authority, which has not yet been appointed by the Government.

The Antitrust Commission, in the past almost exclusively focused on economic concentrations approvals, has regained interest in the investigation of anticompetitive conduct and has launched several high-profile investigations, with a special focus on price discrimination and other conduct that may have a direct impact on the pricing structure of consumer goods.

Types of Infringements to Free Competition

The Antitrust Law prohibits both unilateral anticompetitive behavior and collusion between competitors. Section 1 provides the general prohibition to incur in any act or conduct that would harm the general economic interest.

As in European law, in Argentina, there are no *per se* infringements since the conducts sanctioned are those that may prejudice general economic interest. Section 2 provides a non-exhaustive list of the types of infringements.

Unilateral Anticompetitive Behavior

The unilateral conduct prohibited by the Antitrust Law is abuse of dominant position. The Antitrust Law sets out the criteria to be taken into account when defining a dominant position.[1]

As mentioned, a dominant position is not anticompetitive *per se*, since in the Antitrust Law, the abuse of dominant position is forbidden if it may prejudice general economic interest.[2] However, the Antitrust Commission considers that a dominant participant must employ a greater degree of care when acting in the market. The most common conduct singled out by the Antitrust Commission as abuse of dominant position includes:

(1) Predatory pricing — The Antitrust Law defines predatory pricing as "selling goods or providing services at prices below cost, without a reason based on commercial usual practices in order to exclude competition in the market . . .".[3] The Antitrust Commission has sanctioned it only in a few cases. The Antitrust Commission has considered in some cases that sales carried out for a limited amount of time and for a promotional reason cannot be considered a predatory practice.[4]

(2) Price discrimination — The Antitrust Law describes price discrimination as "to impose discriminatory conditions for the acquisition or selling of assets or services without reasons based on usual commercial practices of the corresponding market".[5] The landmark case concerning price discrimination in Argentina was *Commission* vs. *YPF*,[6] in which the Antitrust Commission found price discrimination based on the presence of the following elements: (a) a dominant position by YPF and a foreclosure of the market; (b) the tracking of YPF's prices by other participants in the market; and (c) the prohibition on re-importing YPF's own exports that were sold at significantly lower prices since YPF could not exercise dominant power in those markets. The Antitrust Commission imposed a fine of US $109,000,000.

(3) Resale price maintenance — The Antitrust Law defines resale price maintenance as that "[t]o set, impose or carry out, directly

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1 Antitrust Law, Sections 4 and 5.
2 Antitrust Law, Section 1.
3 Antitrust Law, Section 2.
4 *Cámara Argentina de Papelerías y Librerías* vs. *Supermercados Makro*, Docket Number 064-000962/97.
5 Antitrust Law, Section 2(k).
6 *Commission* vs. *YPF and Others*, Docket Number 064-002687/97.

or indirectly, in agreement with competitors or individually, in any manner, prices and conditions for the acquisition or sale of assets, rendering of services or manufacturing".[7] The Antitrust Commission generally enforces the prohibition against minimum resale price. It has considered that, in certain cases, recommended resale prices allow efficiency gains and prevent distributors to abusively increase prices.[8]

(4) Tying arrangements — The Antitrust Law characterizes tying agreements as the act of "conditioning the sale of an asset to the acquisition of another one or the hiring of a service or conditioning the usage of a service to the hiring of another one or the acquisition of an asset",[9] There are several cases on this matter. In *Ferrari* vs. *Supercanal*[10] and *Ferrari* vs. *Plan Ovalo*,[11] the Antitrust Commission rejected the claims, observing that there were other options to the tied products.

(5) Refusal to deal — The Antitrust Law defines refusal to deal as that "to deny with no justification the provision of a specific request for the acquisition or sale of an asset or hiring of a service which had been carried out in the current conditions of the corresponding market".[12] The Antitrust Commission has stated that refusals to deal may be unlawful where the supplier could offer no specific commercial reason for its refusal other than the connection of the refused party to a competing group of the supplier.[13]

(6) Essential facilities — While this anticompetitive behavior is not expressly described by the Antitrust Law, the Antitrust Commission may prohibit refusals to grant access to essential facilities, on the basis of the general prohibition of abuse of dominance. In its first case concerning a potential essential facilities claim,[14] the Antitrust Commission held that the granting of a public authorization (in this case, to operate a slaughterhouse in a small town) entails the responsibility to satisfy demands of all sorts, even from competitors in the downstream market, and that any denial to supply must be based on objective grounds.

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7 Antitrust Law, Section 2(g).
8 *FECRA* vs. *YPF*, Docket Number 607.043/93.
9 Antitrust Law, Section 2(i).
10 *Ferrari* vs. *Supercanal*, Docket Number 333.165/31.
11 *Ferrari* vs. *Plan Ovalo*, Docket Number 064-000802/2000.
12 Antitrust Law, Section 2.l.
13 *Decoteve* vs. *Pramer*, Docket Number 064-006301/99.
14 *A. Savant* vs. *Matadero Vera*, Docket Number 30.782/81.

Similar cases have involved a wide range of industries, such as ski resorts, the certification for welding of metal coffins, and credit card network systems. Remedies have included granting access to the plaintiff as well as, in some cases, imposing moderate fines on the infringer.

In a recent case,[15] the Antitrust Commission considered that the owner of a transport company that also owned the sole bus terminal in a town had to allow other transport companies to have equal access. The Antitrust Commission stated that, while companies had the freedom to determine their own agreements, dominant companies could not block access by their competitors in the downstream market without a valid commercial justification.

Dealing with Competitors

The Antitrust Commission has carried out extensive investigations regarding interactions with competitors that have led to three major collusion cases, known as the *Cement*,[16] *Liquid Oxygen*,[17] and *Tierra del Fuego*[18] cases. The most frequent cases of collusion conducts with competitors are the following:

(1) Horizontal price fixing — The Antitrust Law describes horizontal price fixing as "fixing, agreeing, or manipulating in a direct or indirect manner the price for the sale or acquisition of assets or services that are offered or demanded on the market as well as exchanging information in this regard".
(2) Allocation of customers or territories — Allocation of customers or territories is prohibited by Section 2.c of the Antitrust Law.
(3) Exchange of information — Exchange of information is understood as entailing sensitive market information between competitors and is prohibited as leading to collusion behavior.

Most cases involving horizontal collusion concern complex and long running understandings between competitors combining the three mentioned prohibitions. The Antitrust Commission has shown an increased interest in the relationships between competitors, leading to three major cases.

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15 *Empresa Almirante Guillermo Brown and Others* vs. *Terminal Salta*, Docket Number S01:0030739/2002.
16 *Cement*, Docket Number 064-012896/99 (2005).
17 *Liquid Oxygen*, Docket Number 064-011323/2001 (2005).
18 *Tierra del fuego*, Docket Number S01:0000803/2008 (2012).

In the *Cement* case, six major cement producers were accused of staging a nationwide market allocation framework for at least 20 years. The Antitrust Commission found that the exchange of market information was performed via the Association of Portland Cement Manufacturers (APCM). The Antitrust Commission was not able to fully prove the existence of price coordination; however, since it verified the existence of a market allocation scheme as well as the coordination of production output between the parties, it did not examine the issue in full. In the *Cement* case, the Commission issued one of its most important sanctions, in which the total amount of the fines surpassed US $100-million. The fine has been confirmed by the Supreme Court.

In the *Liquid Oxygen* case, after performing several raids on the liquid oxygen companies and obtaining documentary evidence, the Antitrust Commission unveiled an alleged cartel that had been rigging bids for liquid oxygen. The four members of the alleged cartel were thought to have actively set among themselves the amounts and conditions of their offers in each bid so as to determine who would be the supplier for each public hospital. This was considered as a division of market among competitors that lasted for five years. The Antitrust Commission imposed a fine of US $30-million. The fine has been confirmed by the Supreme Court.

In the *Tierra del Fuego* case, the Antitrust Commission condemned eight (out of twelve that are active in Argentina) car terminals to pay the highest fine ever applied (approximately US $125,000,000). The case is under appeal before the Supreme Court, after the Federal Court of Comodoro Rivadavia reversed the Antitrust Commission's decision in full.

Infringement of Intellectual Property Rights

Patents

Actions for Infringement of Patents

Direct infringement of patents is regulated by Section 8 of the Patent Act and Article 28 of the TRIPS Agreement which, according to the case law of the Supreme Court, is self-executing in Argentina. According to Section 8 of the Patent Act, a patent confers on its owner the following exclusive rights:

(1) When the subject matter of the patent is a product, to prevent third parties from manufacturing, using, offering for sale, selling, or importing the patented product without its consent; and

(2) When the subject matter of a patent is a process, to prevent third parties from carrying out any act of using such process and any act of using, offering for sale, selling, or importing for subsequent sale the product obtained directly through such process, without its consent.

Section 11 of the Patent Act provides that the right granted by a patent will be determined by its first claim, which defines the invention and establishes the scope of protection. Only one independent claim is allowed. The description and the drawings or plans and, when applicable, the deposit of biological material, will be used to interpret the claim. Once they have been granted, patents enjoy a presumption of validity. Therefore, patents are considered to be valid and enforceable in principle. The Patent Act does not expressly provide for provisional protection for a patent application before its grant.

The so-called "doctrine of equivalents" has been accepted by Argentine courts. Even though there are only few and old cases in which the doctrine was applied and which were decided under a previous Patent Act, the doctrine should be equally applicable under the current Patent Act since the principles under which the doctrine was created have not been modified.

Indirect or contributory infringement is not expressly provided for in the Patent Act. However, some legal commentators indicate that indirect infringement should be considered as patent infringement. The Argentine Constitution, as well as general provisions of the Civil and Commercial Code (good faith in transactions, abuse of rights, and accomplices' joint and several liability), can be grounds for a finding of contributory infringement by the courts. There is no case law addressing this issue.

Section 81 of the Patent Law provides that the patentee is entitled to file a civil suit to have the infringer cease using the patent. Section 81 of the Patent Law also provides that the patentee is entitled to file a civil suit to obtain a compensation for the damages suffered as a consequence of the infringement. Typically, such compensation includes the damage that the patent holder is able to prove he has effectively suffered and lost profits. Financial relief is assessed based on the evidence submitted by the patentee. Lost profits, profits obtained by the infringer, price erosion, and the value of a reasonable royalty are ordinarily taken into account.

A patent holder also may request a preliminary injunction on the basis of Article 50 of the TRIPS Agreement, the Code of Civil Procedure,

and Section 83 of the Patent Act. Preliminary injunctions can be applied for before bringing the main infringement action to the court. Section 83 of the Patent Law further entitles the patentee to request the drawing up of an inventory or the attachment of the infringing goods and the machinery especially intended for the manufacturing of the product.

Finally, the Patent Act also provides for criminal sanctions for patent infringement. According to Section 76 of the Patent Act, those who knowingly manufacture or have someone manufacture one or more products infringing the rights of the patent owner, or import, sell, offer to sell, market, exhibit, or introduce into the country one or more products infringing the rights of the patent owner, will be punished with imprisonment for six months to three years and a fine.

Argentine law does not provide for criminal liability against legal entities for infringement, although they may be held liable for damages. Criminal participation and concealment are punishable pursuant to the general principles of the Criminal Code. Patentees ordinarily prefer to commence civil actions as, in criminal cases, it is the court that takes control of the case. There are very few cases of criminal sanctions imposed upon infringers of patent rights.

Actions for Wrongful Appropriation of Trade Secrets

Trade secrets in Argentina are governed by the Confidentiality Act, which essentially implements Article 39.2 of the TRIPS Agreement. Hence, anyone in control of undisclosed information has the right to prevent third parties from disclosing, acquiring, or using it contrary to fair commercial uses, so long as such information:

(1) Is secret;
(2) Has commercial value because it is secret; and
(3) Has been subject to reasonable steps to keep it secret.

Upon verification of illegitimate access to such confidential information, the holder is entitled to request for interim measures in order to stop the illicit act and commence civil proceedings demanding an injunction and/or compensation for damages. In some cases, disclosure of confidential information also can amount to a criminal offense.

In addition, according to the Confidentiality Act, those having access to confidential information as a consequence of their work or business have an explicit obligation not to use it or disclose it without

consent or due cause, provided that they are previously warned of the confidential nature of the information.

The recently enacted Civil and Commercial Code protects the confidential information shared by the parties during contractual negotiations. The party who reveals the confidential information or uses it for an unauthorized manner for its own benefit must pay the damages caused.[19]

Actions for Publication of False or Misleading Representations

Section 78 of the Patent Act provides that a fine will be imposed upon anyone who, without being the owner of a patent or no longer enjoying the rights granted thereby, makes assertions on the products or advertisements susceptible of inducing the public to error with regard to the existence of those rights.

Trade Marks

In General

The basic statute governing Argentine trade marks is Law Number 22,362 (the "Trade Mark Law"), enacted in 1980. In addition to the Trade Mark Law, there are other statutory provisions applicable to trade marks, including Decree Number 558 of 1981, which regulates the implementation of the Trade Mark Law and several other decrees and resolutions which refer to the use of specific terms and/or symbols. Several international treaties relevant to trade mark practice have been ratified by Argentina, namely the following:

(1) The Montevideo Treaty of 1889, which provides for certain minimum levels of trade mark protection;
(2) The Paris Conventions, ratified by Law Number 17,011 and Law Number 22,195; and
(3) The TRIPS Agreement, ratified by Law Number 24,425.

Actions for Infringement of Trade Marks

The Trade Mark Law provides both civil and criminal remedies applicable in cases of infringement of trade mark rights. Criminal infringements of trade mark rights are punishable with fines and imprisonment of

19 Civil and Commercial Code, Section 992.

up to two years. However, in practice, criminal prosecutions based on infringement of trade mark rights are rare, and imprisonment has never been imposed.

An infringement of a trade mark owner's exclusive rights results in possible civil remedies against the infringer, which exist in favor of both registered and unregistered trade marks, although the remedies are broader in the case of registered trade marks. The Trade Mark Law identifies the behaviors listed below as trade mark infringements:

(1) Falsifying a trade mark;
(2) Imitating a trade mark;
(3) Using a trade mark without authorizations;
(4) Selling or offering to sell a falsified trade mark or a trade mark that has been illegally imitated; and
(5) Selling, offering to sell, or otherwise marketing goods or services identified with a falsified or illegally imitated trade mark.

Trade mark owners may request courts to order the infringer to stop the use of the infringing trade marks and recover damages from the infringer. The latter is not regulated by the Trade Mark Law but results from general principles of tort law derived from the Civil and Commercial Code. In addition, trade mark owners are entitled to provisional remedies, including:

(1) Attachment of the infringing goods;
(2) Inventory and description of the infringing goods;
(3) Seizure of samples of the infringing goods;
(4) *Incidente de explotación*, a preliminary measure that provides for the interruption of the use of the infringing trade mark unless the alleged infringer provides a bond determined by the court to guarantee damages;
(5) Court orders requesting information related to infringing goods, including original and purchase documents, sales figures, and data of persons who purchased the infringing goods;
(6) Destruction of infringing trade marks and/or of any elements bearing said trade marks; and
(7) Publication of the court decision.

Actions for Wrongful Appropriation of Trade Names, Trade Dress, and Trade Secrets

Trade Names. Trade names are governed by Law Number 22,362, in its Second Chapter under "designations". Multilateral industrial

property agreements, such as the Paris Convention and the TRIPs agreement, were ratified by Argentina and regulate certain aspects of this matter as well.

A name or sign that identifies an activity with or without profit-making purposes qualifies as a trade name, according to Article 27 of Law Number 22,362. Thus, its essential function is identifying activities. It, therefore, follows the importance of the territorial dimension. Exclusive rights in a trade name are acquired only within the territory in which the trade name is publicly used and in connection with the activity it distinguishes.

The violation and/or wrongful appropriation of a trade name are generally subject to the same remedies applicable to trade mark violations. Criminal penalties are applicable in the case of illegal use of a trade name belonging to another person or of its imitation or falsification. Civil remedies consist of court orders requiring the termination of the illegal use of the trade name and the recovery of the damages caused by the illegal use.

Actions are barred by a statute of limitations of one year as of the date the trade name was extensively and publicly used and/or as of the date on which the third party learned about such use.

Trade Dress. In Argentina, trade dress can be registered as a trade mark. Its main function is to protect the rights of consumers against products or services presented in a similar manner. It consists in the non-functional physical detail and design of a product or its packaging, which indicates or identifies the product's source and distinguishes it from other products.

Trade dress may include color schemes, sizes, designs, shapes, and placements of words, graphics, and various elements and decorations on a product or its packaging. All the remedies applicable to trade marks apply to trade dress.

Trade Secrets. Argentine Law Number 24,766, published on 30 December 1996, protects trade secrets and know-how. Following the TRIPs provisions, protectable information must be secret, have a commercial value, and have been the object of reasonable means of protection by the person who legitimately controls it.

A person who, as a result of his work, employment, office, position, or performance of profession or business relations has access to protected information and has been duly warned of the confidentiality

thereof must refrain from using and revealing it without just cause or without the consent of the holder of the information or his authorized user.

Protection granted by Law Number 24,766 does not confer exclusive rights in favor of the person who possesses or has developed the information. However, when third parties have acquired the information by means contrary to honest practices, the affected person will have the right to:

(1) Apply for precautionary measures seeking to have the illicit conduct discontinued;
(2) Institute civil proceedings seeking to prohibit the use of the undisclosed information; and
(3) Recover damages.

Unfair competition principles provide for protection in cases of wrongful appropriation of trade names, provided several conditions are met, namely:

(1) The damaged party must be engaged in industrial or commercial activities, whereby secret activities are not protected;
(2) It is necessary that clients be diverted to the party supposedly guilty of unfair competition; and
(3) Both the victim and the party guilty of unfair competition must actually operate competing businesses in the same markets.

Actions for Publication of Defamatory, False, or Misleading Representations

To receive protection from infringement, trade marks must be, in principle, registered. When competitors attempt to deceptively use similar trade marks, a cause of action for infringement may exist.

Although there is no specific body regulating unfair competition principles, Section 159 of the Criminal Code, Section 10 *bis* of the Paris Convention, and the general rules of the Argentine Civil and Commercial Code, such as Sections 279 and 1721 of the Civil Code, serve as basis for protection. They establish sanctions for persons who "by means of fraudulent machinations, false accusation or any means of unfair advertising, intend to divert, to themselves, clients from a commercial or industrial establishment".

Copyrights

In General

The basic statute governing Argentine copyright is Law Number 11,723 (the "Copyright Law"), enacted in 1933. Several international

treaties relevant to copyright protection and practice have been ratified by Argentina, such as:

(1) The Treaty of Montevideo of 1889 on Literary and Artistic Property;
(2) The Universal Copyright Convention, ratified by Law Decree Number 12,088 of 1957;
(3) The Berne Convention on the Protection of Literary and Artistic Works, ratified by Law Number 17,251 of 1967;
(4) The TRIPS Agreement, ratified by Law Number 24,425;
(5) The World Intellectual Property Organization (WIPO) Copyright Treaty, ratified by Law Number 25,140 of 1999; and
(6) The WIPO Performances and Phonograms Treaty, ratified by Law Number 25,140 of 1999.

Actions for Infringement of Copyrights

In General. If a right exists under the Copyright Law, the violation of such right is an infringement that may result in various types of remedies. The remedies may be of a civil, punitive, or administrative nature.

Civil Remedies. Although civil remedies constitute the backbone of copyright protection, there are few specific provisions on such remedies as they are determined on the basis of general provisions included in or derived from the Civil and Commercial Code. Thus, if conduct infringes any of the elements of copyright and causes damage, due to the negligence or intent of the person to whom such conduct is attributed, an obligation will arise in favor of the holder of the infringed right to compensate damages caused by the infringement.

This is derived from the general Civil and Commercial Code rules on torts. In addition, if a certain conducts infringes any of the elements of copyright, it will be possible to obtain an injunction from civil courts, ordering the termination of such conduct.

Articles 80 and 81 of the Copyright Law establish a special summary civil procedure for cases involving infringements of copyright. The parties may request that evidence be produced in a public hearing at which the parties, the court, and experts may voice their opinions and arguments. Depending on the complexity and nature of the case, a special jury of experts may be appointed by the court (the composition of which varies according to the type of work involved) to issue an

opinion as to whether there has been a violation of statutory rights. Nevertheless, the final judgment is issued by the court hearing the case.

During the course of the civil proceeding, the party whose copyright has allegedly been infringed may obtain various precautionary measures, as ordered by the court. Some of the measures are provided by the Copyright Law, and some are derived from the general rules on civil procedure.

Article 79 of the Copyright Law provides that courts may, once the interested party has supplied a satisfactory bond, order as a precautionary measure the suspension of a theatrical, cinematographic, or other analogous exhibitions; the attachment of the works that have been indicated as in violation of copyright; the attachment of the proceeds derived from infringing exhibitions or works, and any other precautionary measure deemed necessary for the protection of the right involved.

The general rules on civil procedure provide various types of precautionary measures that also may be used in copyright cases, such as attachments, deposit in court of property subject to litigation, designation of court-appointed officers to receive the proceeds from exhibitions or other activities or to obtain information regarding such activities, and injunctions. Courts are allowed to issue other types of precautionary measures, to be structured by the courts, if they are necessary to prevent an imminent or irreparable damage to a legal right.

Punitive and Criminal Remedies. The Copyright Law includes the punitive provision applicable to copyright infringements. Article 71 applies to any "fraud" against intellectual property rights derived from the Copyright Law. The penalties included in Article 172 of the Criminal Code for all cases of fraud, i.e., imprisonment for a period ranging from one month to six years, are determined by the court based on characteristics of the infringement.

Article 71 must be construed in the light of the remaining provisions of the Copyright Law and other relevant copyright statutes, to determine the scope of the right that has been allegedly infringed and that therefore has become the subject matter of a fraud. In principle, any type of willful infringement of copyright is subject to the penalties provided by Article 71 of the Copyright Law.

Article 72 of the Copyright Law provides certain special types of "fraud" against intellectual property rights. These cases also are governed by and penalized in accordance with Article 71 of Law

Number 11,723, and they may result, in addition, in the sequestration of any infringing publications. The infringements listed by Article 72 are the following:

(1) Publishing, selling, or reproducing by any means or instruments an unpublished or a published work without the necessary authorization;
(2) Falsifying intellectual works;
(3) Suppressing or changing the name of the author or title of a work or willfully altering the text of a work, upon its publication, sale, or reproduction; and
(4) Publishing or reproducing a higher number of copies than those authorized.

In addition, Articles 72 *bis* and 73 of the Copyright Law provide special penalties for specific types of intellectual property infringements. Article 72 *bis* applies to violations related to phonograms, including:

(1) Reproducing for profit a phonogram, without the written authorization of the producer or of the producer's licensee;
(2) Facilitating for profit the illegal reproduction of phonograms by means of renting phonographic disks or other tangible elements;
(3) Reproducing unauthorized copies of a phonogram, upon request of third parties in exchange for a price;
(4) Storing or exhibiting illegal copies of phonograms, if the person thus acting is unable to show — by means of an invoice derived from a legitimate producer — the origin of such goods; and
(5) Importing illegal copies with the purpose of distributing them to the public.

In any of these cases, it is possible to obtain a court order for the seizure of the illegal copies and of the elements used for the illegal reproduction of phonograms either *ex officio* or upon request of an interested party. Once the seizure has taken place, the criminal action must be filed within fifteen business days or the seizure order may lapse.

Article 73 of Law Number 11,723 provides penalties consisting of one month to one year of imprisonment or a fine the amount of which varies periodically against whoever performs or organizes the public performance of theatrical, literary, or musical works, without the authorization of their authors or assigns.

The criminal proceeding with regard to copyright violations is governed by the procedural rules enacted by each province or by the federal rules in the case of violations subject to federal jurisdiction.

The criminal proceeding may be commenced *ex officio* by a court that has knowledge of an apparent criminal violation of copyright, as well as by means of an accusation made to the competent authorities or by means of criminal complaint or charges brought by the allegedly injured parties.

In case both a civil and a criminal procedure take place with regard to the same violations, the results of both procedures are independent.

This is understandable since the violations and the consequences of such violations examined in both types of procedure are different. However, the evidence obtained in one procedure may be used in the other proceeding. Article 74 expressly establishes penalties and/or imprisonment applicable if the right to obtain preliminary injunctions, in civil or criminal actions, is abused and valid public performance is unfairly prevented by a party falsely claiming the character of author, assignee, or agent.

Administrative remedies exist with regard to works that, upon expiration of the copyright protection terms, enter into the public domain. As a consequence, works may be freely used but cannot be mutilated in any manner. In accordance with article 83 of the Copyright Law, any person is entitled to request the formation of a special jury to determine whether such work has been mutilated in any manner, i.e., if there have been additions, transpositions, translation deviations, conceptual errors, or mistaken use of language. The jury decides whether the denounced crime exists and may order that the work be corrected, the exhibition of the work closed, or the circulation of the erroneous editions stopped and impose fines, the amount of which vary periodically.

Actions for Wrongful Appropriation of Trade Names, Trade Dress, and Trade Secrets

Actions for wrongful appropriation of trade names and trade dress are protected by the Trade Mark Law and trade secrets by the Confidentiality Law.

Actions for Publication of Defamatory, False, or Misleading Representations

Actions questioning the publication of defamatory, false, or misleading representations must be investigated and evaluated taking the constitutional rights of free speech and access to information into account.

Argentina has a long tradition of free speech, which was first proclaimed in the Argentine Constitution and confirmed by various treaties that Argentina has ratified, and has played an important role in the development of the nation.

In principle, no censorship is allowed, but authors of works including defamatory, false, or misleading representations are potentially liable for the damages caused by their publications on the basis of the general rules and principles of the Civil and Commercial Code. It is the complex role of the courts to decide on the delicate balance between free speech and publications protected by copyright that include defamatory, false, or misleading representations.

Unregistered Design Rights and Trade Marks

The basic condition for full protection of design and trade mark rights is their registration. Use is not a requisite for protection, although lack of use may bring about negative consequences, such as the lapsing of the trade mark rights after a period of five years. Despite this basic principle, several rights result from the mere use of a trade mark, regardless of its registration, in connection with infringements, namely:

(1) The user of a trade mark may file civil actions to recover damages caused by an infringing use of such trade mark;
(2) The user of a trade mark may request a court injunction ordering the termination of the use of the trade mark in violation of the rights obtained by the prior user;
(3) The user of an unregistered trade mark is not allowed to obtain the special preliminary measures granted by the Trade Mark Law;
(4) In favor of registered trade mark owners (although it may obtain the general preliminary measures provided by the general rules on civil procedure which assure the effectiveness of all types of rights); and
(5) The user of an unregistered trade mark is not protected by the criminal law provisions included in the Trade Mark Law in favor of registered trade mark owners.[20]

Protection of design rights is implemented by Decree Number 6673/63 as well as by international treaties, including the Paris Convention and

20 However, the users of unregistered trade marks may be protected by the criminal law provisions of unfair competition, although these are much broader than those enacted in favor of registered trade mark owners.

the TRIPS Convention. The civil and criminal remedies available for cases of infringement of design rights apply only if the design rights are duly registered with the Trade Mark Office; otherwise, the applicable remedies are those that result from the rules on unfair competition established in the general principles of the Commercial and Civil Code and the Criminal Code.

Misleading Statements

In General

Misleading statements in Argentina are mainly governed by the Consumer Protection Law (Law Number 24,240) and Fair Trade Law (Law Number 22,802). The recently enacted Civil and Commercial Code also has incorporated a regulation for consumer contracts, in line with Consumer Protection Law.

The main aim of these regulations is to protect consumers and users from unfair practices of offerors and/or sellers, regarding lack of information or misleading information about product or services, among other circumstances. The Consumer Protection Law stipulates an administrative proceeding for cases of infringement of its provisions. Sanctions, which may be imposed independently or jointly according to the circumstances, can consist of:

(1) Warnings;
(2) Fines;
(3) Confiscations of goods and products involved in the infringement; and
(4) Closures of establishments for up to thirty days.[21]

According to the Consumer Protection Law, consumers and users also may file a judicial claim when their interests are affected or threatened.[22] In such connection, it provides that, without prejudice to any other compensation, a civil fine may be imposed in favor of the consumer, in accordance with the severity of the infringement and other circumstances.[23] Likewise, the Fair Trade Law establishes an administrative proceeding for cases of infringements. Sanctions can consist of:

(1) Fines;
(2) Suspension for up to five years in vendor records that enable government contracts;

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21 Consumer Protection Law, Section 47.
22 Consumer Protection Law, Section 52.
23 Consumer Protection Law, Section 52 *bis*.

(3) Loss of concessions, privileges, and special credit or tax regimes; and
(4) Closure of establishments for up to thirty days.

These sanctions can be imposed independently or jointly according to the circumstances.[24] Both the Consumer Protection Law and the Fair Trade Law provide that the administrative acts that impose sanctions may only be challenged by direct appeal before the Court of Appeals in Consumer Relations or the Courts of Appeals based in the provinces.

Misleading Advertising

The New Civil and Commercial Code establishes the prohibition of any advertising which:

(1) Contains false indications that mislead or could mislead the consumer when they are connected to essential elements of the product or service;
(2) Makes misleading comparisons of goods or services; or
(3) Is abusive or discriminatory or induces consumers to behave in a harmful or dangerous way for their health or safety.[25]

Misleading Statements as to Price

Both the Civil and Commercial Code and Consumer Protection Law provide a general legal framework for the required information to be provided to consumers. In this regard, suppliers are obliged to provide consumers in a certain, clear, and detailed way all the information about the essential characteristics of the goods and services they provide, and the conditions of their commercialization. This information should always be free for consumers.[26]

In addition, according to the Civil and Commercial Code and the Consumer Protection Law, the specifications made in advertising or in advertisements, brochures, circulars, or other broadcast media will be considered included in the consumer contract and oblige the offeror.[27] Therefore, statements as to price included in advertisements will obligate the offeror.

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24 Fair Trade Law, Section 18.
25 Civil and Commercial Code, Section 1101.
26 Civil and Commercial Code, Section 4; Consumer Protection Law, Section 1100.
27 Civil and Commercial Code, Section 8; Consumer Protection Law, Section 1103.

Specifically, the Fair Trade Law establishes the prohibition of making presentations or advertising that by inaccuracies or misleading concealment may lead to deception or confusion about the price, among other aspects, of the goods or services provided.[28]

Furthermore, Resolution Number 7/2002 of the former Secretary of Competition, Deregulation, and Consumer Protection governs obligations concerning the display of information on consumer prices. Resolution Number 7/2002 contains general provisions regarding price displays and provides specific provisions for price displays in supermarkets, greengrocers, bakeries, takeaways, garages, parking lots, highways, service stations, hotels, and restaurants. There also are local regulations in this respect, such as Law Number 4,827 of the City of Buenos Aires ("Law Number 4,827").

Price Calculation

Price calculation on display of prices is regulated by Resolution Number 7/2002, which provides the following obligations for offerors of goods and services for consumers:

(1) Display of prices of movable goods and services for final consumers must be made in legal tender currency;[29]
(2) Display of the prices must be made per unit in a clear, visible, horizontal, and legibly way, and when displaying lists of prices, they should be accessible for consumers;[30] and
(3) When displaying financed prices, the spot price in cash must be indicated, as well as the total financed price, and the number and amount of fees and the effective annual interest rate applied must be included.[31]

Price Reduction and Comparison

According to Resolution Number 7/2002, if goods or services are offered at a reduced price, the offeror must clearly state the full price together with the discounted price, whereby when it consists of a percentage reduction of the price of a set of movable goods or services, a generic display will be enough.[32]

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28 Fair Trade Law, Section 9.
29 Resolution Number 7/2002, Section 2.
30 Resolution Number 7/2002, Section 5.
31 Resolution Number 7/2002, Section 4.
32 Resolution Number 7/2002, Section 2, Paragraphs 5 and 6.

Law Number 4,827 states the obligation of supermarkets and hypermarkets on displaying the percentage variation with respect to the beginning of the year and current month in the price of each item, product, or group of the same merchandise that is exposed to public view.[33]

Sales

According to the Consumer Protection Law, sale documents extended to consumers must be drafted in the national language, in a full, clear, and easily readable way and must contain the following information:

(1) The description and specification of the goods;
(2) The name and address of the seller;
(3) The name and address of the manufacturer, distributor, or importer, as appropriate;
(4) The details of the guarantee;
(5) The terms and conditions of delivery;
(6) The price and payment terms; and
(7) The additional costs, specifying final price to be paid by the consumer.[34]

Miscellaneous Price Requirements

Other price requirements, such as the following, can be found in the mentioned regulations:

(1) Display of prices of movable goods must be done on each object, item, or group of same merchandise that is exposed to public view and, when display is not possible, lists of prices must be used instead;[35]
(2) Prices of services must be conspicuously displayed by lists for consumers, prior to purchase or hiring of them;[36] and
(3) When minor differences of up to five cents arise from the total amount to be paid by the consumer, such differences must be in favor of the consumer when they are impossible to reimburse.[37]

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33 Law Number 4,827, Section 9, Subsection h.
34 Consumer Protection Law, Section 10.
35 Resolution Number 7/2002, Section 6.
36 Resolution Number 7/2002, Section 7.
37 Fair Trade Law, Section 9 *bis*.

Misleading Statements as to Quality

The Fair Trade Law provides that all products commercialized in Argentina, either packed or unpacked, must include their quality on their packaging or labels, unless product quality arises from the simple observation thereof.[38]

It also prohibits the inclusion of any word, phrase, description, trade mark, or any other sign that may lead to deception, error, or confusion about the quality of the products, their properties, characteristics, uses, marketing conditions, or production techniques in presentations, brochures, packaging, labels, or wrappers.[39]

The Fair Trade Law also provides that producers, manufacturers, packers, those who commit to manufacture or pack, fractionators, and importers are responsible for the veracity of the information contained in the products' labels. Wholesalers and retailers also may be responsible for such infringement and they are not allowed to commercialize infringed products.[40]

Misleading Statements as to Geographical Source

The Fair Trade Law provides that all products commercialized in Argentina, packed or unpacked, must include on their packaging or labels the name of the country where they have been produced or manufactured.[41]

The Fair Trade Law also states that products manufactured in Argentina, when commercialized in Argentina, must include the indication "Argentine Industry" or "Argentine Production".[42] The Law also provides that foreign products that undergo in Argentina any fractionation, assembly, finishing, or analog process that does not imply a modification in its nature must include such process information in their labels and will be considered foreign industry. Moreover, it establishes that labels from foreign products must be drafted in the national language, except for foreign commonly used terms, registered trade marks, or other signs with trade mark ability.[43]

The Fair Trade Law prohibits the inclusion of any word, phrase, description, trade mark, or any other sign that may lead to deception,

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38 Fair Trade Law, Section 1, Subsection C.
39 Fair Trade Law, Section 5.
40 Fair Trade Law, Section 6.
41 Fair Trade Law, Section 1, Subsection B.
42 Fair Trade Law, Section 2.
43 Fair Trade Law, Section 3.

error, or confusion about the origin of the products in presentations, brochures, packaging, labels, or wrappers.[44] Producers, manufacturers, packers, those who commit to manufacture or pack, fractionators, and importers are responsible for the veracity of the information contained in the products' labels.

Wholesalers and retailers also may be responsible for such infringement, and they are not allowed to commercialize infringed products.[45] Specifically in connection with designations of origin, the Fair Trade Law provides that national or foreign designations of origin may not be used to identify a product if it is not from the respective zone.[46]

Misleading Statements as to Quantity

The Fair Trade Law provides that all packed products commercialized in Argentina must include the net content on their packaging or labels.[47]

The Fair Trade Law forbids the inclusion of any word, phrase, description, trade mark, or any other sign that may lead to deception, error, or confusion about the quantity of products in presentations, brochures, packaging, labels, or wrappers.[48] The Law also stipulates that producers, manufacturers, packers, those who commit to manufacture or pack, fractionators, and importers are responsible for the veracity of such information.[49] Wholesalers and retailers also may be responsible for such infringement and they are not allowed to commercialize infringed products.

Misleading Statements as to Offeror

To avoid deception or error about the offeror, the Consumer Protection Law provides that, when the offer of goods and services is provided through telephone system purchases, mailing catalogs, or published by any means of communication, such offers must contain the name, address, and tax identification number of the offeror.[50]

The Consumer Protection Law also establishes that, once the purchase is made, sale documents extended to consumers must include

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44 Fair Trade Law, Section 5.
45 Fair Trade Law, Section 6.
46 Fair Trade Law, Section 7.
47 Fair Trade Law, Section 1, Subsection D.
48 Fair Trade Law, Section 5.
49 Fair Trade Law, Section 6.
50 Consumer Protection Law, Section 8.

the name and address of the seller and the name and address of manufacturer, distributor, or importer, when appropriate.[51]

Kickbacks

The Association of Certified Fraud Examiners (ACFE) defines "kickbacks" as:

> "[U]ndisclosed payments made by a third-party to a company's employees. They are classified as corruption schemes because they involve collusion between employees and vendors. In a common type of kickback scheme, a vendor submits a fraudulent or inflated invoice to the victim organization and an employee of that organization helps make sure that a payment is made on the false invoice. For his assistance, the employee-fraudster receives a payment from the vendor. This payment is the kickback. Kickback schemes almost always result in the victim company being overbilled. The false invoices either overstate the cost of actual goods and services, overstate the quantity of goods sold or delivered, or reflect completely fictitious sales. Usually, the amount of the kickback is included in the contract price so that the victim company bears the cost of the illegal payment."[52]

In practice, kickback schemes may appear when trading both with the private and public sector. Kickbacks, as a form of private commercial fraud, may be construed as a crime of "fraudulent management" under the Criminal Code. Pursuant to the Criminal Code, Section 173, Subsection 7, any person with the duty to manage the affairs of another person will have committed fraud when, in violation of his duties, he obtained a benefit for himself or a third party, by damaging the interests of or entering into abusive obligations on behalf of the person from whom he was entrusted with management. "Fraudulent management" may be sanctioned with a minimum of one month and up to six years' imprisonment.

Company codes of conduct may expressly prohibit and sanction giving or receiving kickbacks as corrupt payments. Argentine subsidiaries and branches of foreign companies have increasingly been

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51 Consumer Protection Law, Section 10.

52 See https://www.acfe.com/uploadedFiles/Shared_Content/Products/Self-Study_CPE/intro-to-fraud-exam-2011-extract.pdf.

required by their head offices to adopt codes of conduct and/or include anticorruption and antibribery clauses in the agreements with their local counterparties.

Industrial Espionage

Disclosure by Employee

Confidentiality

In Argentina, pursuant to Section 85 of the Labor Law (Law Number 20,744), employees have a loyalty obligation in accordance with the type of duties that they have been assigned. Employees may not disclose confidential information they have access to as a result of their activity as such.

As a consequence of the principle of good faith, the obligation stated by Section 85 should be kept in every stage of the labor relationship, not only at the beginning of the relationship but also during the labor relationship and after its termination. In addition to the loyalty obligation established by the Labor Law, the Confidentiality Act is applicable to employees, taking into account that they have access to confidential information as a consequence of their work and have an explicit obligation not to use it or disclose it without consent or due cause.

The Labor Law does not regulate the infringement to the confidentiality obligation of the employee. However, the actions employers are entitled to pursue if an employee does not comply with the obligation of loyalty arise from the Confidentiality Act. In case of violation of the prohibition to disclose protected information, the employer may:

(1) Request precautionary measures from the court in order to stop unlawful conduct;
(2) Initiate civil actions in order to forbid the use of the non-disclosable information and to seek compensation; and
(3) Dismiss the employee for cause.

In some cases, an employee who unlawfully discloses confidential information would be liable for criminal offences set forth by the Criminal Code.

Inventions and Discoveries Made by Employees

Section 10 of the Patent Law, in line with the Labor Law, regulates ownership in case of an employee's invention, which can be owned by the employer, the employee, or a third party as a result of an assignment from the employer or from the employee. The employer is entitled to the employee's invention if:

(1) The invention is made by an employee during the period of employment, or during the term of the agreement with the employer, when all or part of the purpose of the labor relationship is the performance of inventive activities. This specific feature must be expressly set forth in the labor contract.

(2) The invention is made in the above-mentioned circumstances, but the employee adds a personal contribution to the invention and its importance to the employer surpasses the explicit or implicit content of the labor relationship or contract. In this case, even though the employer owns the invention, the employee is entitled to a "complementary remuneration" for his inventive work.

(3) All or part of the purpose of the labor relationship or contract is different from performing inventive activities, and the invention performed by the employee is related to his professional activity within the company, where the invention was obtained predominantly by using the skills acquired in the company or the company's means. In this case, the employer is entitled to own the invention or to reserve for himself the right to use it, and the employee is entitled to a "fair monetary compensation" that must be fixed upon considering the industrial and commercial significance of the invention.

Furthermore, if the employer grants a license to third parties, the employee is entitled to up to fifty per cent of the royalties effectively collected. Otherwise, if the employer refuses to claim the ownership of the invention within ninety days from the date on which the invention is made, the employee is entitled to own the invention. In any other situation, the inventor is the sole owner of the invention if:

(1) The employer refuses to claim the invention;

(2) The invention is not related to the employee's work or, according to the Labor Law is a personal invention (even if he relied on instruments or tools belonging to the employer); or

(3) The inventor carries out the invention independently from the employer (outside the employer's premises and without using the employer's means, and on the employee's own time).

A third party would be entitled to the invention if the employer or the employee assigns the invention to a third party.

Model Piracy

Industrial models or design registrations are granted to protect the appearance or shape of an industrial product and provide an ornamental character to it. Applications may be filed in the name of an individual or a company.

A single registration may cover up to fifty examples of a single model or design, provided that all of them are homogeneous. In the absence of prior publication or use in Argentina or abroad, a valid registration may be obtained for a term of five years, renewable for two further terms of five years each. Renewals must be applied for not later than six months prior to the expiration of the respective period.

If a design application has been filed abroad, an application for a design registration in Argentina must be filed within six months from the filing date of the foreign application. The owner of a model or design registration has the exclusive right to prevent third parties from industrially or commercially making use of the registered design or imitations thereof. Court actions may be instituted in the Federal Courts.

Courts have shown some reluctance in granting preliminary injunctions since industrial models are granted without substantive examination. Thus, the assistance of an expert and/or the appointment of an official expert is advisable at the time of requesting a preliminary injunction.

Rebates

Antitrust Law

There is no explicit regulation of rebates in the Antitrust Law. However, rebates may, under certain circumstances, fall under the prohibition of the Antitrust Law as noted above.

In particular, the Antitrust Commission has considered rebates as an abuse of dominant position, in particular as exclusionary price discrimination. There is a single significant case law on this matter.

In *AAAYVT* vs. *Aerolíneas Argentinas*,[53] the Argentina Association of Travel Agencies (AAAYVT) presented a claim against certain airlines for conceding a rebate on the fees concerning Aerolíneas Argentinas and Austral (both belonging to the same group), for setting a system of fee calculation that would vary according to the share of each travel agency in the sale of flight tickets of the airlines.

The companies held a sixty per cent market share. Their conduct was considered as potentially harmful to competition since, through the system established, they might prevent travel agencies from selling the flights of other airlines. The parties themselves recognized the potential harm to competition and abandoned the commissions system.

Cash Payment Discounts

Cash payment discounts are forbidden in Argentina according to Section 37 of the Credit Card Law (Law Number 25,065), which provides that suppliers are not allowed to make price differences between cash and credit card transactions.

Dumping

Argentina, as a member of the WTO, has adopted the Antidumping Agreement that authorizes its members to take certain measures to protect domestic industry from the unfair competition created by the dumping of exports.

Dumping occurs when a product is introduced into the Argentine market at a price ("the export price") lower than its "comparable price". For these purposes, a "comparable price" is the price at which the product is sold in the course of normal business transactions in the exporting country's domestic market. The comparison between the "export price" and the "comparable price" must be made at the same stage in the distribution process, normally at the post-factory level.

The domestic procedure to be followed to impose antidumping measures under the Antidumping Agreement is regulated by Decree Number 1393/2008. Procedures involving products produced in

53 *AAAYVT* vs. *Aerolíneas Argentinas*, Docket Number 064-002388/97.

countries that do not have a market economy are further regulated by Decree Number 1219/2006. Argentina's antidumping investigation procedure follows a double-agency system:

(1) The *Dirección de Competencia Desleal* (DCD) is the agency with jurisdiction to determine whether there is dumping; and

(2) The *Comisión Nacional de Comercio Exterior* (CNCE or "Commission") is the agency with jurisdiction to determine whether there is injury (or threat of injury) to the domestic industry and whether there is a causal relationship between dumping and the injury to the domestic industry.

In order to impose antidumping duties, it is necessary to prove the existence of dumping, injury (or threat of injury) to the domestic industry, and the causal relationship between both. Antidumping duties may only be applied when dumping causes, or threatens to cause, material injury to a domestic industry, or material delay to the establishment of such an industry.

When such requisites are met, the Ministry of Economy and Public Finance decides whether to impose antidumping duties. The decision of not imposing antidumping duties, even when the legal requisites are met, may be grounded on international policy considerations.