

ATRIP 37th Annual Congress
“Fairness, Morality and *Ordre Public* in Intellectual Property”

Speaker:

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Title:

Honest Commercial Practices in Unfair Competition and Confidential Information Law

Abstract:

Fairness plays a significant role within the notion of “honest commercial practices” in unfair competition and confidential information law. The concept, as used in international treaties and in EU Directives, is of fundamental importance for the determination of unfairness and thus prohibition of acts of competition.

Regarding unfair competition law, the Paris Convention for the Protection of Industrial Property of 20 March 1883 (Article 10^{bis} para. 2) and the EU Unfair Commercial Practices Directive 2005/29/EC (Articles 2 letter h and 5 para. 2 letter a) require that a practice be contrary to honest practices or to the requirements of professional diligence, respectively, in order to be considered as unfair. As far as confidential information law is concerned, the TRIPS Agreement (Article 39 para. 2) as well as the EU Trade Secrets Directive 2016/943 (Articles 3 para. 1 letter d and 4 para. 2 letter b) predicate lawfulness of acquisition, use or disclosure of trade secrets on conformity with honest commercial practices.

The abstract notion of “honest commercial practices” is not specifically defined but rather open to various interpretations by the countries concerned. In Germany, for example, it is currently controversial how the relevant provisions of the Trade Secrets Directive should be implemented into national law. In that respect, the modification of the wording in the recently published German Draft Trade Secrets Act causes confusion.

This presentation is based on a paper in progress. The purpose of the paper is to (a) examine how the notion is construed in different jurisdictions, (b) analyze reasons justifying identified differences and similarities in approach and (c) discuss advantages and disadvantages of the use of general clauses in unfair competition and confidential information law.