The Press and Unfair Competition under Swiss Law

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In several recent cases, the Swiss Federal Court has sentenced journalists and authors to criminal and civil sanctions for having violated the rules contained in the 1986 Federal Unfair Competition Act. The Swiss Federal Court found these writers liable for unfair competition because they had criticized products or enterprises in a way that was considered contrary to the requirements of good faith and fair dealing. The fact that these writers were not in competitive relationship with the plaintiff nor acted with intent to interfere with competition was held irrelevant.

Substantial criticism has been raised against this application of the law. Many fear that this approach will endanger the freedom of the press and the consumers’ right to information. One of the latest cases involves a biologist, Mr. Hertel, who was held to be responsible for unfair competition by the Swiss Federal Court and ordered to refrain from publishing his studies warning against the dangers of microwave ovens in non-scientific journals 1. The biologist, however, appealed this decision to the instances in charge of applying the European Convention on Human Rights seated in Strasbourg 2. The European Court of Human Rights found that a violation of

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1 See ATF 120 II 76; Jdt 1994 I 365.

2 See Cite full name of parties and date of decision, [http://www.echr.coe.int/hudoc/ViewRoot.asp?Item=0&Action=Html&X=509082514&Notice=0&Noticemode=&RelatedMode=0].
the freedom of expression as set forth in Section 10 of the Convention on Human Rights has occurred. Following the decision of the European Court of Human Rights, Mr. Hertel has asked the Swiss Federal Court for a new judgment. He asked the Court in particular to lift the bans that had been ordered against him. The Swiss Federal Court decided again that restrictions could be imposed upon Hertel. To my knowledge, Mr. Hertel appealed this new decision to Strasbourg, but no judgment has been rendered so far.

After presenting an overview of the Swiss law against unfair competition in part I, I will address the relationship of this law to the freedom of press in part II, in the light of the Hertel case.

I. Swiss unfair competition law: an overview

Section 94 of the Swiss Federal Constitution authorizes the Federal Parliament to regulate commerce and industry in order to protect the nation’s economy. According to Section 97 of the Federal Constitution, the Federal Parliament can also adopt measures for the protection of consumers. Based on these provisions, the Swiss legislator enacted a new act against unfair competition (hereinafter: the UCA) in 1986, replacing the Federal Act of 1943.

1. The aim of the 1986 UCA and its consequences

a. The aim

Section 1 of the Swiss UCA of 1986 states that the act aims at achieving fair and undistorted competition in the interest of all participants. The expression “all participants” signifies that the act intends to protect competitors, clients (at all stages in the economic exchange process) and the general public. In preparing this act, the Government insisted repeatedly on this triple objective of the new law against unfair competition.

3 ATF 125 III 185.
4 31 bis II before the 1.1.00.
5 31 sexies before the 1.1.00.
6 See in particular F. Riklin, Schweizerisches Presserecht, (Berne, 1996), 266.
b. The consequences

This triple dimension implies the following three consequences:

1. The object of the Swiss UCA is to promote functional competition. Functional competition is defined as competition that helps achieve distribution of profit according to market performance, regulation of supply through demand, optimal combination of means of production, adaptation of production according to non economic data and achievement of technical progress. Functional competition also implies market transparency and lower prices.

2. As set forth in Section 1, the UCA provides as a special aim that of guaranteeing of fairness and undistorted competition processes. Fairness and absence of distortion aim together at the proper functioning of competition, thus precluding all acts that would fall under the notion of unfair behavior as defined in the law.

3. The subjects of protection of the UCA are competitors, suppliers and buyers at all levels, and the general public.

Because of this triple objective, one can say that the UCA is an act of significant political and economic content. Not only does it aim at protecting from unfair and immoral business conduct; it also seeks to avoid infringements upon the functioning of free competition. The law against unfair competition must protect not only the competitors, but also the clients and consumers, which are the public at large. In short, the UCA’s goal is to protect the functioning of competition itself. Unfair competition is defined accordingly.

2. The definition of unfair competition

Section 2 of the UCA provides a general clause of unfair competition. Unfair and illegal under Section 2 mean any behavior or business practices that are misleading or in any way against the principle of good faith, and that influence the relationship between competitors or between suppliers and buyers. Section 3 identifies certain conducts as unfair. According to Section

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9 See Zeller, ibid, at p. 21; see also R. Sack, Probleme des neuen schweizerischen UWG im Vergleich mit dem deutschen UWG, Das UWG auf neuer Grundlage, (Bern/Stuttgart, 1985), 113 ff.
3 para. a of the UCA, unfair conduct includes, for example, the disparaging of others, their goods, works, achievements, their prices or their business situation, by means of incorrect, misleading or unnecessarily damaging statements.

It is important to stress that the sanctions (see below I/3) provided by the act apply not only when economic interests have actually been hurt, but also when these interests are menaced. The behavior of the defendant does not need to have an actual impact on competition; it is enough for the behavior to be capable of triggering that impact. Unfair within the meaning of Section 2 is thus any behavior contrary to good faith, capable of having an impact on competition. This definition entails three elements: an act, a violation of the principle of good faith and the mere possibility that the behavior might have an impact on competition.

In relation to Section 1 of the UCA, Section 2 clarifies the proposition that the act does not just regulate the abuse of economic competition, but also aims at defining and imposing fairness. It is not just an act on unfair competition; as its title emphasizes, it is an act against unfair competition. Section 2 further indicates that everyone is to be protected in their fair expectations of a functioning market. The principle of good faith is violated when someone jeopardizes these expectations. Put the other way round, a person who does not respect the rules of competition in his or her conduct or who threatens important functions of competition or who menaces the results expected from competition, violates the principle of good faith within the meaning of Section 2.

Of course, the forbidden behavior must be an act of commercial competition, that is an act which is relevant for the market, or market or competition oriented. Acts of a political, religious, artistic or scientific nature do not fall under the 1986 UCA. The behavior is thus pertinent under the law against unfair competition when it is objectively able to increase or diminish the success of profit enterprises in their struggle to win market shares.

11 See Zeller, supra note 8, at p. 21 ff.
However, and this is the important point, the relation to the market of the person who acts does not matter. Instead of applying only to competitors, as the law of 1943 did, at least in principle, the 1986 law applies also to non competitors. It applies even to those who do not act with the intent of favoring a competitor to the detriment of another one. It thus defines a wide circle of possible defendants.

Things are different under German law, for example, and under other European laws. In Germany, the law against unfair competition can apply to non competitors only if there is an intention on the part of the tortfeasor to have an impact on competition (Wettbewerb beförderungsabsicht). The mere consciousness of favouring the competition of a third party is not sufficient for a Wettbewerbabsicht.

The circle of defendants as defined in the UCA is thus very large; it includes the press, radio and television, but also consumer organizations that publish test results on marketable goods. This circle also includes financial analysts, scientific reviewers, and art critics. Consequently, the media and the press can be liable for unfair competition not only when it engages in competition with its direct competitors or when it publishes ads for competitors, but also when it interferes or acts in a way which is capable of interfering with the general competitive process in Switzerland.

3. The sanctions
The UCA provides for both civil and criminal sanctions. The criminal penalties include imprisonment and fines of up to 100,000 Swiss francs (see Sections 23 ff. of the UCA). As far as civil sanctions are concerned, Section 9 provides that the defendant can be enjoined from acting before the injury has occurred; the defendant can also be ordered to cease his or her current conduct. Furthermore, the plaintiff can ask the judge to declare the

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14 See ATF 98 II 57.
15 See § 1 UWG; on this subject, see W. Herfermehl and A. Baumbach, Wettbewerb berecht (Munich, 1989), 187, who explain: "Eine Wettbewerbabsicht erfordert die Absicht, eigenen oder fremden Wettbewerb zum Nachteil eines anderen Mitbewerbers zu fördern". (A competition intention requires the intention, to promote competition in a way that disadvantages the competitor); Thuer, supra note 7, note 284; see also Y. Cherpillod, "Anwendung des UWG an Journalisten", Pläderer 1992, 37.
16 For more details, see A. Meili, Wirtschaftsjournalismus im Rechtsvergleich, (Baden-Baden, 1996), 97 ff. with further references.
17 See in particular Sack, supra note 9, 121 ff.
18 See Riklin, supra note 6 288 ff. with further references.
illegality of the defendant’s act when the disturbing effect of this past act continues. The Plaintiff can also seek damages and compensation for pain and suffering.

Whether the defendant has acted with the intent of interfering with competition or not is never relevant for the application of Section 2 of the UCA. However, the intent of the defendant is relevant for criminal sanctions. The defendant can only be criminally punished for intentional action. For all other sanctions, it is enough to show that the defendant had objectively acted in contrary to the principle of good faith

Whether the defendant is in a relationship of competition with the plaintiff or not is also irrelevant. The text of the UCA clearly does not mention that circumstance. Further, the legislative history shows that when the legislature enacted the UCA, it did not want this circumstance to influence the liability of potential defendants.

II. Unfair competition law and the press

On the basis of this law, journalists and authors have been sanctioned both civilly and criminally.

1. The case law

The First Federal Court case to apply the 1986 UCA to a journalist is the Bernina case. It was decided in 1991.

In 1988, an article had appeared in a Swiss German local newspaper that criticized Bernina sewing machines. On the front page, there was a headline stating: "Bernina sews technically backwards". The article contained an interview with a specialist for sewing machines who also was the representative of Elna and Pfaff, competitors of Bernina.

Among other statements, the article contained the conclusion "the new Bernina machines are already outdated when they appear on the market".

The court held that because this statement was not true it was an unfair statement within the meaning of the 1986 UCA. The decision was criticized by the press, who considered it to be an act of censorship worthy of the

19 Ibid, at p. 267.
Middle Ages. It was also greeted with great suspicion by most legal scholars, who feared for the freedom of the economic press.\footnote{21}

The next case to be decided by the Federal Court was between a journalist and a large Swiss department store chain named Denner.\footnote{22} The Federal Court was confronted with the following facts. Denner had decided to reduce the number of items supplied in some of its smaller stores. Instead of 2400 items, those small stores were only left with 1300. A journalist declared in a Sunday magazine that the Denner policy was dictatorial. Denner attacked the journalist for unfair competition. The court declared that this statement, while a bit strong, was not disparaging within the meaning of Section 3 of the UCA because the average reader was not about to assimilate the head of Denner to Hitler; thus the honor of Denner was safe.

However the Court confirmed its views as expressed in Bernina, and insisted upon the fact that intention to compete on the part of defendant was irrelevant for the application of the UCA. To hold otherwise required, in its view, an amendment of the text of the law.

There have been more subsequent cases involving the same issue. Among them, the most recent one decided in January 1998 involved an enterprise selling a brand-named drug (Contra-Schmerz), that sued the Swiss TV for having broadcasted negative information against this drug, leaving the impression that this particular brand-name was the only one implicated, when in fact the negative information concerned also comparable drugs of other brands, made of the same substance.\footnote{23} Another case involved the author of a pamphlet against the dangers of the Creutzfeldt-Jakob-disease (mad cow disease).\footnote{24} To distribute his pamphlets, the author had placed himself in front of a butcher’s shop, thus leaving the impression that this particular butcher was selling dangerous meat. The author was sued by the butcher and the Swiss Association of Butchers.

In both cases, the Federal Court insisted that even if the press has the duty to inform the public and warn consumers against health hazards, it is not relieved from a duty of journalistic care and prudence in that the press must avoid discriminating against certain competitors. In the Contra-Schmerz

\footnote{21} On this case, see P. Nobel, "Zu den Schranken des UWG für die Presse", RSJ 1992, 249 ff.; Zeller, supra note 8, at p. 23 ff.

\footnote{22} Non published case of December 13 1994, printed in mediaslex 1995, 45 ff.

\footnote{23} See ATF 124 III 72; mediaslex 1998, 100.

\footnote{24} See ATF 123 IV 52.
case, the court held that the press could not criticize one drug and fail to clearly mention that other drugs present similar dangers.

2. Critiques

A minority of commentators has approved of the Federal Court’s decisions just mentioned. Those who approve of these decisions have argued that journalists can respect the requirements of the law against unfair competition by obeying the very rules and standards that journalists have set for themselves in their code of conduct. That code implies respect for truth and assumes freedom for criticism and commentary; it also implies that journalists will not deform statements or facts, and that they will present unconfirmed information as such. Instead of affirming, journalists can question; instead of using the indicative form, they can use the subjunctive form. They must also attempt to present facts separately from evaluating them. Journalists who respect these rules might still have an impact on competition; but it will not be in violation of the principle of good faith within the meaning of Section 2 of the UCA.

Basically, the freedom of journalists who respect their own standards and control their language will not be curtailed. The realization of their freedom will instead promote transparency of the market and help protect consumers. The freedom of the press, as guaranteed by Section 17 of the Federal Constitution, only protects objective information or information that presents a plurality of opinions. The press must certainly inform the public, help the public to form its opinion, provoke an exchange of ideas, contribute to the solutions of problems of public interest, as well as denounce abuses in the practices of governance. Nevertheless, this mission does not exempt the press from respecting the laws against unfair competition.

However, a large majority of authors has criticised the application of the UCA to the press. As far as criminal sanctions are concerned, it has been said that the norms that ban unfair competition in the UCA are too vague in their content. To attach criminal sanctions to the violation of crimes defined in such lose terms as those of Section 2 and 3 of the UCA (see above) thus violates the principle of legality. More generally, the application of criminal, as well as civil sanctions to journalists who do not mean to interfere

25 See Zeller, supra note 8.
26 See in particular Riklin, supra note 6, at p. 277.
with the process of competition or do not act as competitors, has also been criticized.

Some authors have argued that the unrestricted application of this act to journalists endangers the freedom of the economic press and thus consumer protection. Because of fear of being prosecuted and sentenced for its activity in the economic arena, the press is likely to concentrate on other areas; the result will harm efficient consumer information. Other authors also insist that if journalists have to verify each statement, the economic press is likely to lose much of its value. By definition, business news, in particular when relating to the evaluation of enterprises, is essentially subjective; in order to be useful it also has to fresh. Confronted with the one sided information that producers deliver through advertisement, the consumers are better off if they can read an analysis that deliberately takes the other side. Ultimately it is in the consumer's best interest to be able to base a judgment on contradictory opinions and to give those different opinions whichever the value he or she wants.

Regarding the CONTRA-SCHMERZ case, it has been for instance rightly pointed out that the duties imposed on the media by the Swiss Federal Court are too severe and practically not enforceable without jeopardizing the functioning and the raison d'être of economic press. Thus, one should not expect journalists to make long inquiries in order to be able to list all the dangerous products comparable to the one they criticise. In the interest of efficient information, one author expressed the view that long and difficult investigations cannot be imposed.

In sum, most legal commentators reject the application of the UCA to journalists who have acted without the intent of influencing competition. Based on this requirement, they advocate redrafting of the 1986 UCA. Twice such change has been discussed in the Federal Parliament. In 1994, the Swiss government found that critical journalism is still possible under the present act; but more recently it decided to revise the criminal sanctions provided for by the act. In my view, the civil law should also be revised. The UCA

27 See in particular J.B. Zufferey, Droit de la personnalité: quelques éléments d'une analyse économique, in Contributions en l'honneur de Pierre, (Fribourg, 1993), 222 ff.
28 Ibid, at p. 223; see also M. Altempole, "Verhindert das neue UWG die Medienkritik am Wirtschaftsgeschehen", NZZ of January 18 1992, 33; F. Chappuis, La lutte contre les actes de concurrence déloyale en droit pénal suisse (Bern, 1996), 187 ff.
29 See the critical comments by Sæxer, in medialex 1998, 104; see also UWG "hemmt Warentests in den Medien", Plädoyer 1998, 67 ff.
30 This proposition has been made in the Swiss Federal Parliament and hearings have taken
should only apply to journalists who acted with an intention to interfere with the competition process, namely on behalf of one or more competitors to the detriment of others. To hold otherwise would not only endanger consumer protection but also put an excessive burden on the freedom of expression, as guaranteed by the Swiss Federal Constitution and the European Convention on Human Rights. We will come back to this point later.

3. The Hertel case
While the Swiss Federal Court cannot review the constitutionality of federal statutes, in the light of the Federal Constitution’s provisions, it must apply international treaties, even if they contradict federal law. If international law contains rules of constitutional rank, these rules must be applied and the potential unconstitutionality of a federal law can be challenged. This is what has happened with the Hertel case involving a biologist who was charged under the 1986 UCA for having published his views on the dangers of microwave ovens.

a. The facts
As summarized in the decision of the European Court of Human Rights, the facts of the case are the following.

Dr. Hertel does biological research in his own laboratory. One of his projects concerns food prepared in microwave ovens. In spring 1991, he published, together with a professor at the Swiss Federal Institute of Technology at Lausanne, a research report on the effects on human beings of food prepared by conventional means and in microwave ovens. The report contained very alarming results concerning the dangers of microwaves ovens. In 1992, a number of journals and magazines referred to the defendant’s report either fully or in part. The "Journal Franz Weber" had on the cover page the text: "Microwaves: Danger scientifically proven" and displayed a reaper carrying a microwave oven. The article itself had the title "Microwaves ovens: a danger for health. The evidence is uncontestable" and stated, inter alia:

"The research results of B. and [the defendant] are so worrying that one should prohibit the use of microwaves as soon as possible and

place before the judicial committee of the Council of States. No such proposition has yet formally been accepted.

31 See Section 191 of the Swiss Federal Constitution.
stop the production and trade of such apparatuses. At the same time all microwave ovens currently in use should be destroyed. Public health is at stake! ... The ... indubitably proven, devastating characteristics of microwaves adversely affect ... also directly via the radiated food the human being."

In a previous article in the "Journal Franz Weber", the defendant had written:

"Today, microwaves, together with cigarettes, are probably one of the worst reasons for cancer which the human mind has ever thought up ... Have you got a microwave oven within your walls? Then bring it as soon as possible back to where you bought it so it can be disposed of! For microwave ovens are more malicious than the gas stoves of Dachau. If you prepare your meals in such an oven, your slow death will begin ..."

The professor later distanced himself in a newspaper article from the defendant's publications. In this person's submissions, the research of 1989 only permitted the conclusion that further research should be undertaken on the matter. He found that the defendant's conclusions had such a weak basis that a normal scientist would never had dared formulate them.

Subsequently the Association of Electrical Appliances for Household and Trade in Switzerland told the defendant that his statements concerning the influence on the health of human beings of microwave ovens amounted to a completely unjustified denunciation of the apparatus lacking serious scientific conclusions. The defendant was requested to issue a declaration according to which in future he would no longer make any unfair statements about microwave ovens. The defendant did not react thereto. On August 1992, the Association filed an action before the Commercial Court of the Canton of Bern. The Association submitted an opinion of Professor T. of the Swiss Federal Technical High School at Zurich who stated that the defendant's research was useless and the conclusions untenable. On March 19, 1993, the Commercial Court upheld the action and prohibited the defendant, under threat of criminal sanctions, from stating that food which had been prepared in microwave ovens was hazardous to health. The defendant was also prohibited from using in publications or in public conferences about microwave ovens the picture of a reaper or any other symbol of death. The court stated in part:

"clearly, it may not be said that it is scientifically proven that food which
has been prepared in a microwave oven is hazardous to health and
causes cancer. Presently, there are insufficient indications in science
for such an influence. Neither the defendant's own research — which
does not comply with the generally valid scientific requirements — nor
other investigations of serious scientists substantiate his statements.
The contrary is rather the case, as the observations of the World
Health Organisation and the Federal Health Office demonstrate ...
The [defendant]'s statement according to which food which had been
prepared in microwave ovens is hazardous to health and leads to
changes in the blood of consumers, indicating a situation which could
amount to the beginning of cancerous growth, is manifestly untrue
and false and therefore incorrect within the meaning of S. 3 (a) of
the Federal Unfair Competition Act. The action must in this respect,
therefore, be upheld. The defendant is of course free to base his theses
on new scientific research".

*The Federal Court of Switzerland* dismissed defendant's appeal. In its
decision, the court found that scientific research and publications did not
as such fall within the framework of competition as long as they remained
academic. Scientific statements interfered with competition, however, if, as
in the present case, they were employed negatively to influence the sale of a
particular product. It further stated:

"Positive or negative publicity with scientific data must therefore, in
the public interest and in order to ensure effective competition, only be
admitted if the data correspond to established scientific conclusions,
or at least if the diverging views are clearly referred to. If there is
no full guarantee that the scientific data are correct, their uncritical
publication is at least misleading and therefore deceptive within the
meaning of Article 3 para. a of the Federal Unfair Competition Act ...
According to the Commercial Court's conclusions the [defendant]'s
views are not at all scientifically secure; on the contrary, they are, on
the whole, rejected. To state in the context of competition that they are
correct is inadmissible within the meaning of Article 3 para. a of the
Federal Unfair Competition Act ..."
The Court concluded that a person relying on the freedom of scientific research was free to explain his conclusions within academic circles. However, in the context of competition he could not assume that his views were correct if they were disputed.

The European Commission on Human Rights in Strasbourg was of the opinion that the decision of the Swiss Federal Court violates Section 10 of the European Convention on human rights. This provision states, insofar as is relevant:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority...
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as prescribed by law and necessary to a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health and morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

The defendant contended that the law on which the prohibition is based is unclear. It gives the impression that it concerns persons interested in competition. A wide interpretation of this law in fact prevents a large number of religious, philosophical or political opinions. The defendant further pointed out that Section 10 para. 2 of the Convention on Human Rights does not mention the "economic well-being of the country" contrary to other provisions of that Convention. The defendant further submitted that the Government is avoiding the real issue, namely whether it can be justified in prohibiting the publication of a thesis solely because it is not scientifically proven. The defendant finally claimed that it was disproportionate to throttle a weak critic when the producers of microwave ovens constantly advertise their products. Freedom of opinion is a necessity in a democratic society as it can make authorities and the scientific community discover problems of public health.

In its brief, the Swiss Government argued that the interference with the defendant’s rights was justified under Section 10 para. 2 of the Convention. The measure was "prescribed by law" as required by this provision in that it was based on Section 9 of the UCA. Moreover, the measure aimed at "the protection of the rights of others" and "the prevention of disorder" within the meaning of Section 10 para. 2 of the Convention. The government also stressed the fact that defendant was only affected in his commercial relations, but remained free to undertake scientific studies and to publish his results, in particular in scientific and academic circles. It insisted on the fact that commercial publicity is inadmissible where it is incorrectly presented as being scientifically proven. Insofar as the defendant also employed symbols of death in his publications, this was both bad taste, and unnecessarily harmful and misleading.

The Commission ruled first that the prohibition of the defendant’s rights to publish is an interference by a public authority with the exercise of the defendant’s rights under Section 10 para. 1 of the Convention. It further ruled that the provisions of the UCA were sufficiently precise for the defendant to regulate his conduct. Thus, the Commission held that the interference by public authority was "prescribed by law" within the meaning of Section 10 para. 2 of the Convention. Moreover, it said that the interference, serving to protect the public from inadmissible publicity, aimed at the "protection of the reputation (and) rights of others": in that, it pursued a legitimate aim in accordance with Section 10 para. 2 of the Convention. However it found that the measure was not proportionate, as it was not necessary within the meaning of the Section 10 para. 2 of the Convention.

According to the Convention organs' case-law, "the interference at issue must correspond to a "pressing social need" and be proportionate to the legitimate aim pursued". Freedom of expression constitutes one of the essential foundations of a democratic society; subject to para. 2, it is applicable not only to "information" or "ideas" that are favorably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. In determining whether interference is "necessary in a democratic society", the Convention organs must also take into account that a margin of appreciation is left to the contracting States. Such a margin appears essential in commercial matters, in particular in an area as complex and fluctuating as that of unfair competition.

The Commission proceeded in saying the following.

"In the present case, the Commission considers at the outset that the
[defendant] was expressing his views on issues of public health in connection with the use of a modern technical appliance. Clearly, the [defendant] was not acting as a competitor. There is also no indication in the case-file that he was undertaking negative commercial publicity by attacking a specific brand, or a particular producer, of the appliance. The domestic courts mainly criticised the [defendant] for publishing scientifically untenable results. However, the Commission notes that the [defendant] is an engineer by training. While the [defendant]'s research apparently deviated from the mainstream of scientific opinion, at least at the outset his research was supported by Professor B., though the latter later distanced himself from the [defendant] as his research had a weak basis. It is true that the publications at issue employed an exaggerated language, for instance, that "all microwave ovens... should be destroyed", and were accompanied by the symbol of a reaper. In the Commission's opinion, however, the publications thereby made it clear to the reader that the [defendant] was aiming at expressing his own opinion on a matter on which he felt strongly, rather than engaging on a balanced and pondered scientific discussion.

While it is true that Section 10 (Art. 10) of the Convention leaves a margin of appreciation to Contracting States in such circumstances, the Commission considers that freedom of expression is of special importance for free debate on matters of public importance for the community, such as public health (see mutatis mutandis Eur. Court HR, Barthold v. Germany judgment of 25 March 1985, Series A no. 90, p. 26, para. 58).

As a result, the measure complained of was not proportionate to the legitimate aim pursued and, accordingly, was not "necessary in a democratic society... for the protection of the reputation (and) rights of others" within the meaning of Section 10 para. 2 (Art. 10-2) of the Convention."

b. The decision of the European Court on Human Rights
On August 25, 1998, the European Court on Human Rights essentially confirmed the views expressed by the Commission. It ruled that the defendant had been subject to interference by public authorities in the exercise of the rights guaranteed by Section 10 of the Convention. In accordance with the paragraph 2 of this norm, the Court then examined whether that interference was prescribed by law, in pursuance of a

34 See party names, date of decision, [http://www.dhcour.coe.fr/hudoc/ViewRoot.asp?Item=0&Action=Htm&X=505120449&Notice=0&Noticemode=&RelatedMode=0].
legitimate aim within the meaning of this paragraph and necessary in a democratic society.

aa. "Prescribed by law"
The Court ruled that the interference in issue was prescribed by law within the meaning of Section 10 para. 2 (n. 32 ff. of the decision). It considered that the prohibition imposed on the defendant was validly based on Sections 2, 3 and 9 of the UCA even though the defendant was not a competitor of the injured party. The Court further mentioned that whether or not the defendant had a subjective intention to affect the market was irrelevant. Insofar as the norms of the UCA are formulated with sufficient precision so to enable citizens to regulate their conduct, they can be regarded as a "law" within the meaning of Section 10 para. 2. The UCA is not confined in scope solely to economic agents; people, such as Mr. Hertel, who are not market players, are also affected.

bb. "Legitimate aim"
The Court further stressed that the decision of the Swiss Federal Court pursued a legitimate aim within the meaning of Section 10 al. 2 of the Convention (n. 39 ff.). The judges observed that the UCA was intended to guarantee, in the interests of all concerned parties, fair and, undistorted competition, and that a person who sustains or is threatened to sustain damage to his or her goodwill, credit, professional reputation, business or economic interests in general through an act of unfair competition may apply to a court for an order prohibiting such act. They further held that the restriction imposed on Mr. Hertel on behalf of the Swiss Association of Manufacturers and Suppliers of Household Electrical Appliances was aimed at protecting the rights of others.

c. "Necessary in a democratic society"
In judging whether the restriction imposed was necessary in a democratic society (n. 43 ff.), the Court considered that the Swiss authorities had some margin of appreciation to decide whether there was a pressing social need to impose the injunction in question on the defendant. It reminded, moreover, that such margin of appreciation is particularly essential in commercial matters, especially in an area as complex and fluctuating as that of unfair competition. The Court made it clear however that it is necessary to reduce the extent of the margin of appreciation when what is at stake are not purely
commercial statements, but participation in a debate affecting the general interest, for example, over public health. In the instant case, the Court held that such a debate on the effects of microwaves on human health existed.

The Court consequently examined whether the restriction imposed on Hertel was proportionate to the aim pursued and the judges balanced his freedom of expression against the need to protect the rights of the Association of Manufacturers and Suppliers of Household Electrical Appliances. The Court observed that the defendant had nothing to do with the editing of the issue of the periodical in which the relevant publication appeared nor in the choice of its illustration, of which he became aware only after the date of publication. The Court also noted that it was not alleged that the publication in issue had a measurable impact on the sale of microwave ovens or caused actual damage to the members of the Association.

In those circumstances, the Court observed a disparity between the challenged restriction and the conduct it was intended to rectify. That disparity created an impression of imbalance, materialised by the scope of the injunction in question. Despite the fact that the injunction related only to specific statements, those statements were nonetheless related to the very substance of the defendant’s view. The effect of the injunction was thus partly to censor the defendant’s work and substantially to reduce his ability to put forward views which have their place in an existing public debate. The Court made it clear that the fact that Hertel’s view appeared to be without merit was irrelevant; in a sphere where it is unlikely that any certainty can exist, it would be particularly unreasonable to restrict freedom of expression only to generally accepted ideas. Even shocking and disturbing ideas are protected by the freedom of expression.

The Court did not take into account the possibility open for Mr. Hertel to pursue his research and to present its results within the scientific community. In its opinion, it was not obvious from the Swiss courts’ decision that defendant was accorded such a possibility. Furthermore, if Hertel failed to comply with the injunction, he was under the risk of a penalty, which could include imprisonment. In light of the foregoing, the measure in issue was held not to be necessary in a democratic society, thus contradicting Section 10.

Three judges of the Court expressed dissenting opinions. These judges considered essentially that the majority in the Court did not respect the margin of appreciation indispensable for national authorities in determining what restrictions on the freedom of expression might be necessary in economic
matters, and especially in the field of unfair competition. One of them noticed that in unfair competition cases, States should be afforded a wider margin of appreciation than in other spheres of freedom of expression. Otherwise, the system for preventing unfair competition, one that is beneficial to the business world, would be jeopardized. This judge concluded that, in view of this margin of appreciation, the majority was wrong in considering that the measure imposed to the defendant was disproportionate.

c. The new decision of the Federal Court of Switzerland
Following the decision of the European Court of Human Rights, Mr. Hertel asked the Swiss Federal Court to revise its first judgment. He asked the Court in particular to lift the bans ordered. It is useful at this point to remember that the Court in Bern had forbidden Hertel: 1) to state that food prepared in microwave ovens is dangerous for human health and may cause cancer; 2) to use the image of death or any symbol representing death in publications and in public speeches concerning microwave ovens.

Much to the surprise of most observers, the Swiss Federal court decided again in April 1999 that restrictions could be imposed to Hertel. However, it specified that the first prohibition only concerned declarations made outside scientific circles to the general public when presented as scientifically established and without any reference to the scientific controversy. To my knowledge this judgment has been challenged again in front of the European Court, but no judgment has been rendered yet.

4. An appraisal

a. The Hertel case I
The opinion of the European Court of Human Rights of August 1998 is interesting in various aspects. While I do not want to make a detailed analysis of this decision, I should like to make a few remarks about it.

The first is to say that I agree with the outcome. It is interesting to note that, with the exception of the second Hertel case, in the cases decided between April 1997 — the moment at which the decision of the European Commission was taken — and now, the Swiss Federal Court has slightly distanced itself from the language used in the first Hertel case. It has done so in the 'butcher case' where the Federal Court addressed the legality of

35 ATF 125 III 185.
information on the dangers of the Kreutzfeld-Jacob disease contained in flyers. The Court held that freedom of expression requires judicial restraint in finding statements to be unlawful denigration or disparaging. In that case, the Court even considered that reference to scientific opinions was not necessary.

The second point I would like to make is that the motives of the decision of the European Court are disappointing. The Court merely held that the Swiss decision was disproportionate. It did not challenge the Swiss law as such, nor its application to the media when acting without intent of interfering with competition. It held that the UCA is sufficiently precise to qualify the restriction to free speech as prescribed by law within the meaning of Section 10. This is a bit disconcerting, since all the critiques had targeted the application of the statute to non competitors.

Indeed, though it considered that the Swiss decision is disproportionate, admittedly because the sanction was too severe, the European Court also held that the Swiss Act against unfair competition is sufficiently precise to qualify the restriction of free speech as "prescribed by law" within the meaning of Article 10. However, at no time did the Court discuss really the disproportionate nature of the sanction which consisted in the preclusion of further publications in non-scientific journals by the author. This is unsatisfactory, if not contradictory. In insisting on the fact that the Act is sufficiently precise, the Court has rejected one of the grounds for criticism that Swiss legal commentators have made about the vagueness of this act, from the point of view of the principle of legality, as it must relate to criminal sanctions ("nullum crimen, nulla poena, sine lege"). One may wonder whether the principle of legality is as sacred as criminal lawyers tend to say, but it seems inconsistent to regard the provisions as sufficiently precise for the defendant to act accordingly, but to hold at the same time that the defendant should not have been subject to the legally prescribed sanction for what he had done. If the rules justify interference with freedom of speech by the authority, they should also call for a sanction at least of a certain kind. In this case, the nature of the justified sanction was not discussed, neither in principle nor in kind.

It also seems puzzling to hold that interference based on this norm was legitimate, as it had been aimed at protecting the public from inadmissible publicity and then not to consider that a sanction should be applicable. I fully agree with the Court when it stresses the special importance of freedom of expression in relation to free debate on matters of public importance.
for the community, such as public health, and when it insists on the fact that undisputed scientific conclusions are to be considered as opinion and not fact. However the very importance of freedom of expression is what makes the application to journalists of the law against unfair competition unacceptable, not merely the sanctions adopted in application of this law.

In reality, the Court rightly stressed the fact the defendant was not acting as a competitor and that there was no indication that he was undertaking negative commercial publicity by attacking a specific or a particular producer of the criticised appliance. By insisting on that element, the Court made it implicitly clear that what is bothersome is the application of a law against unfair competition to someone who was not a competitor, not the disproportionate sanction resulting from the application of this law. Thus it would have been more convincing had the Court refrained from saying that the application of the law against unfair competition to journalists pursues a legitimate aim in accordance with Section 10 para. 2. Again, the problem with the Swiss law against unfair competition is not lack of proportionality; it is the legitimacy of applying fairness market standards of speech to people who are not part of the competitive process, or at least have no intention of interfering with this process.

b. The Hertel case II

With respect to the second decision of the Swiss Federal Court in the Hertel case, I would also like to make two remarks.36

The first is that the distinction between declarations made in the commercial sphere and ones made within academic circles, on which the Federal Court based its decision, is not convincing. First, because it is wrong to think that the academic discourse would by nature have no influence on business, as well as it is incorrect to think hold the restrictions on the freedom of expression in the public arena would affect only the commercial sphere of the person concerned. Second, because one does not see why, unilateral, critical and thought-provoking discourse on public health should take place in camera between scientists. People that attack the dangers of a product must be allowed to do it not only in scientific publications but also in the media serving the general public. In addition, it should be stressed that nothing prevents those who hold the majority view, as well as the producers and sellers of the criticized products, to take part in the debate and answer

the critiques through the views of a dissenting scientist, especially if the allegations are indeed wrong.

The second remark is that the distinction between the different spheres is not really new. In a slightly different form, it was proposed by the Swiss Federal Court in its first decision\textsuperscript{17}, and if the European instances did not reject it, they clearly ignored it: the European Commission noted it without discussing it (n. 29), while the Court ruled it out in an obiter dictum (n. 51). In view of the importance of the other reasons adopted by the Court, it is surprising that the Swiss Federal Court took up this distinction again.

According to the new Hertel judgment, the Swiss Federal Court seems to hold that there is no exception to the application field of the UCA and that scientific discourse remains outside the scope of its application only if, and insofar as it does not influence the functioning of competition. This is dubious. In fact, if scientific freedom should be respected, it is not because there is no impact on the competition, but because a more basic and essential freedom in a democratic society must be recognized. The only limit to this freedom should be the intention of the scientist to intervene in an unfair way in the functioning of the competition process.

After the decision of the European Court of Human Rights, the Swiss Federal Court would have been well-advised to recognize that the application of the UCA to discourse of an ideal nature or to any other discourse by a non competitor is justified only in case the author expresses himself or herself with intent to disturb in an unfair way the functioning of the competition. That is exactly the standard applied by German law as well as in other European laws\textsuperscript{38}. One has to wait for a new Strasbourg judgment to see in which direction the debate on the application of the UCA to journalists will evolve.

\textbf{Conclusion}

In sum, I think that journalists that criticise commercial products should not be exposed to liability in the same way as competitors when using unfair methods to discredit their rivals. Should however journalists who use disparaging language against products not be held responsible at all, no

\textsuperscript{17} See ATF 120 II 76 c. 3; JdT 1994 I 365.

matter how they write? As far as the competitive interests are concerned, there should be no limit, except for the case in which the journalist writes with the sole intent of harming a business or favoring another. Personality interests should however be protected by the general law protecting the personality (Sections 28 ff. CC). Whenever the honor of an enterprise or of a single person is violated, this law should step in. This would require distinguishing the rights of the personality from rights deriving from the law against unfair competition, but also distinguishing the language against commercial products, from the language aimed at hurting the personality of those who make those products. Immunity should be granted to those who criticise even unfairly commercial products, as long as they do not act with the intention of favoring a competitor’s product. No immunity however should be given to those who thereby disparage the honor or dignity of persons — individuals or corporations —. Of course, producers and competitors might regard this level of protection as too limited. But I think that this is the right counterweight to the freedom they have in advertising, sometimes shamelessly, and by definition unilaterally, the quality of their products. A pluralistic society is better served with the publication of controversial arguments than with court injunctions restraining freedom of speech.