

IP & Unfair Competition

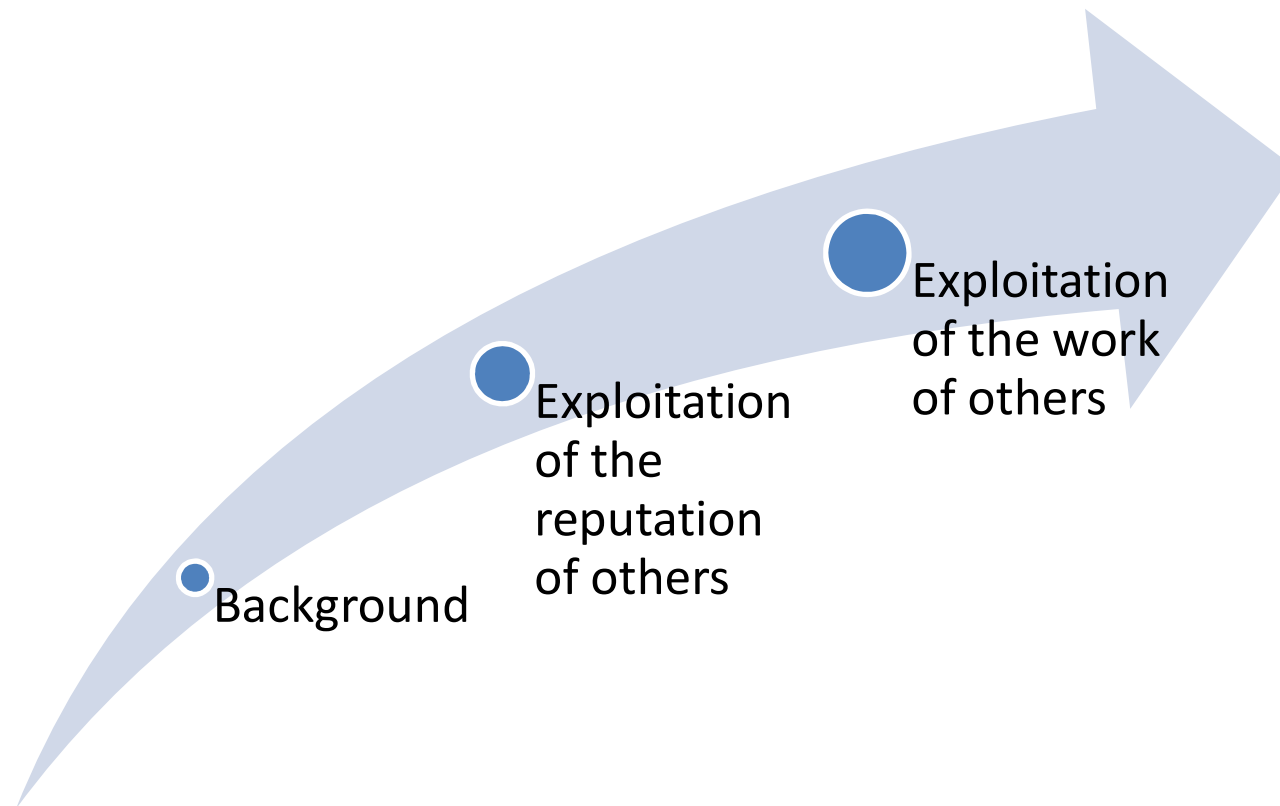
**Summer School on IP
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Outline

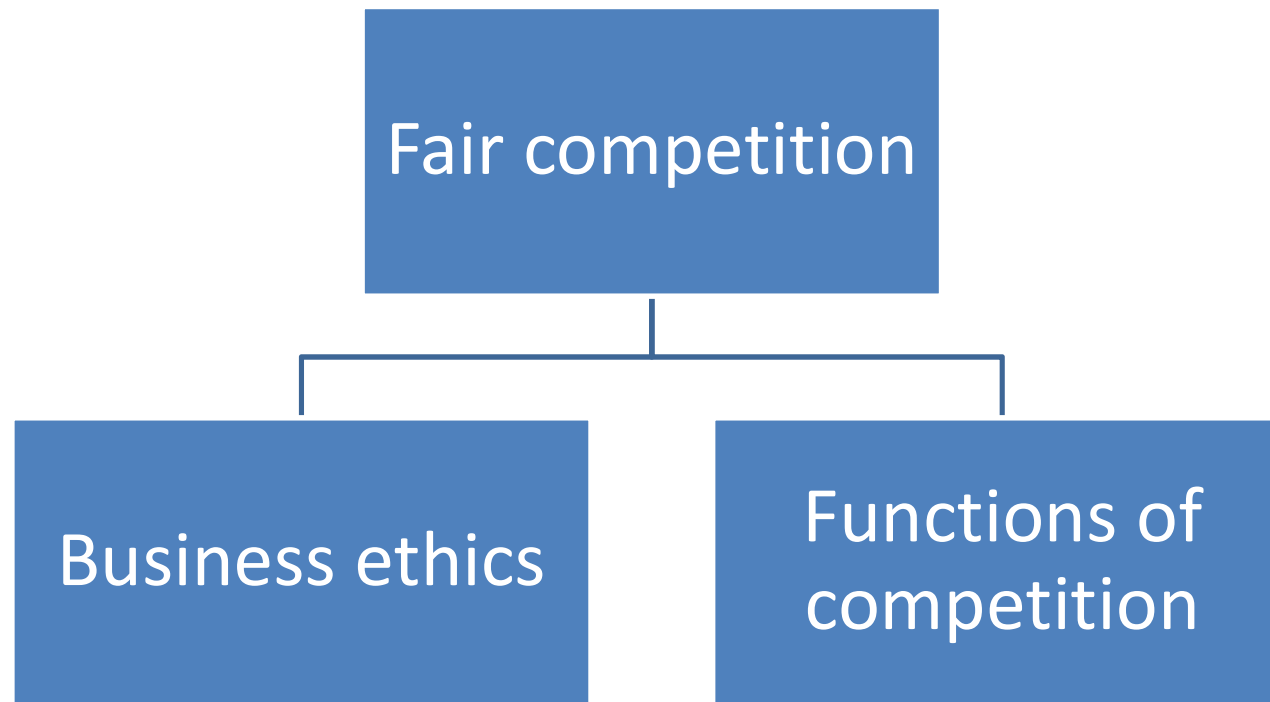


➤ Flipped classroom

➤ Team work

1. Background

sigma:legal 1.1 Purpose of unfair competition law



sigma:legal 1.2 Interfaces

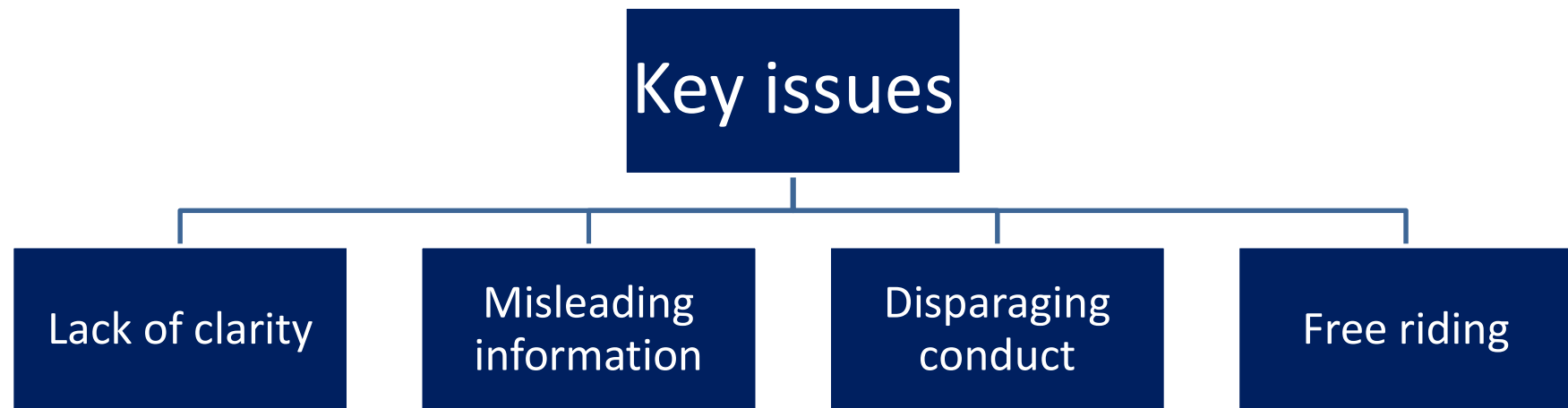
Unfair imitation only in
particular circumstances

Intellectual
Property

Unfair
Competition

Independent application of each
body

sigma:legal 1.3 Key issues



2. Exploitation of the reputation of others

sigma:legal 2.1 Risk of confusion



sigma:legal 2.1 Risk of confusion

*Limmi II case
(Swiss Supreme
Court, sic! 2005,
221)*

- No distinctive character / descriptive shape
- Same notion of risk of confusion in Trademark and Unfair Competition law
- Global presentation of the product is relevant in Unfair Competition law
- Label may lead to sufficient distinction
- Problem of “post sale confusion”

→ Risk of confusion

sigma:legal 2.2 Risk of association



sigma:legal 2.2 Risk of association

*Maltesers case
(Swiss Supreme
Court, ATF/BGE
135 III 446)*

- Clearly different overall impression
- Only limited similarity (notably red background)
- Similarity relates only to descriptive elements and is justified on objective grounds
- Products are close so that understandable that packages are similar

→ No risk of association

sigma:legal 2.3 Parody

Harry Potter



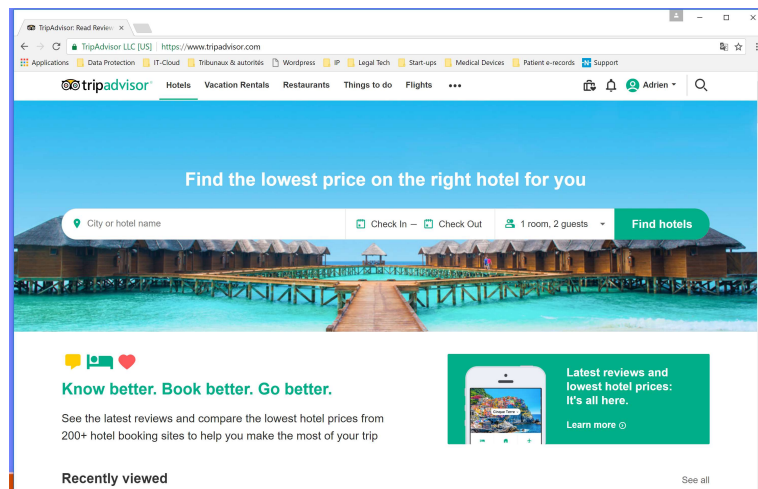
sigma:legal 2.3 Parody

*Harry Popper case
(Kantonsgericht
Schwytz, sic!
2011, p. 108)*

- Famous TM / Unfair competition
 - Risk of dilution
 - Exploitation of reputation
 - Disparagement left open

3. Exploitation of the work of others

sigma:legal 3.1 Meta search engines (scraping)



Mere scraping of third-party
information

sigma:legal 3.1 Meta search engines (scraping)

- Assessment based on database regulation
- Reuse of substantial parts of third-party database
- Depriving database owner of revenue which should have enabled him to redeem the cost of the investment
- Not limited to indicating to the user databases providing information on a particular subject
- Close to the manufacture of a parasitical competing product

→ Violation of database right (close to violation of work of others)

*Innoweb case
(CJEU, C-202/12)*

sigma:legal 3.1 Meta search engines (scraping)

- Exploitation by Z AG of a software to search for real estate advertisements on third parties websites, copy and present them on its own website according to its own criteria
- Advertisements as marketable results of work of a third party
- Costs supported by Z AG for the implementation, monitoring and adaptation of the software not insignificant
- Costs supported by the third parties unsufficiently known
- Impossible to conclude that the costs supported by Z AG were excessively small in comparison to the costs supported by third parties

*Such-Spider (Swiss
Supreme Court,
ATF/BGE 131 III
384)*

→ No exploitation of the works of others

sigma:legal Takeaways

- **Unfair Competition law does not confer exclusive rights outside the scope of IP**
- **Protection against imitation only in particular circumstances (in order to protect competition)**

Many thanks for your attention!

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