

# World Trademark Review Daily

## Defendant liable for setting up information booths on access path to plaintiff's premises Israel - Gilat, Baret & Co., Reinhold Cohn Group

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In *The Israeli Trade Fairs and Convention Centre Ltd v Bashan Bar Ilan Management Services Ltd* (CC 27080-06-11 (TA Distr), May 22 2012), the Tel Aviv District Court has held that a company that had placed information booths and distributed advertising booklets on an access path leading to a career fair organised by the plaintiff had committed the tort of unfair interference to access to a business and had unjustly enriched itself at the plaintiff's expense; however, the claim of passing off was rejected, as the court found that the plaintiff did not have independent goodwill in the fair.

The plaintiff, The Israeli Trade Fairs and Convention Centre, under a contract with the Ministry of Defence, organises a tri-annual career and academic fair for soldiers finishing their military service. It sued a company wholly owned by the student association of one of Israel's universities for setting up information booths to distribute advertising booklets along the 70-metre access path leading from the nearby train station to the premises where the career fair was held. Among other things, the plaintiff alleged that the defendant had created a false impression among advertisers and visitors that the defendant was connected to the fair. Therefore, the defendant free-rode on the plaintiff's reputation and efforts. Moreover, the defendant had included in its booklet (entitled "Information Booklet for Soldiers Finishing Service") content that did not conform to the express guidelines of the Ministry of Defence for the fair.

According to the plaintiff, the defendant's conduct constituted, among other things, passing off, misrepresentation and unfair interference to access under the Commercial Torts Law (5759-1999), as well as unjust enrichment under the Unjust Enrichment Law (5739-1979). The plaintiff sought an injunction, accounting and damages.

In its defence, the defendant argued, among other things, that:

- it had acted within the bounds of legitimate free competition;
- its actions were committed outside the plaintiff's premises; and
- it had distinguished itself by displaying its own logo on its brochures and by the distinct uniform of its representatives.

The court emphasised that the principle of freedom of occupation was recognised under Israeli law even before it was anchored as a fundamental right in the Basic Law. The court further noted that Israeli law has no general tort of unfair competition, which left the court to balance conflicting values and interests.

The court held that the defendant, by placing its booths just outside the plaintiff's premises and distributing a brochure that did not sufficiently distinguish it from the plaintiff, had engaged in unconscionable conduct. The court then proceeded to examine whether such conduct was actionable under any tort.

First, the court noted that the tort of passing off one's goods or services for those of another trader, under Section 1 of the Commercial Torts Law, has been interpreted to require not only a likelihood of confusion, but also goodwill acquired by the plaintiff. With regard to goodwill, the court explained that the public should associate the relevant goods or services with the plaintiff, so that such goodwill - whether of the plaintiff or of its goods or services - attracts customers in the marketplace. In this case, while the court was prepared to find a likelihood of confusion, it concluded that the plaintiff had not acquired goodwill in the fair, as the fair had been commissioned by the Ministry of Defence and the Israel Defence Forces and was ultimately associated with these entities rather than the plaintiff. Further, the plaintiff had failed to provide consumer surveys showing such association in the public's mind.

With regard to the claim of unfair interference to access, the plaintiff invoked Section 3 of the Commercial Torts Law, which provides as follows:

*"A business shall not unfairly prevent or burden the access of customers, employees or agents to the business, goods or services of another business."*

Noting that, as a matter of fact, the defendant's information booths and representatives were placed along the short path leading to the plaintiff's premises, so that the defendant's booklets were distributed to the visitors even before they entered the fair, and noting the defendant's refusal of the court's proposal to relocate its information booths away from the access path, the court found that the defendant's conduct had interfered ("burdened" in the sense of the statute) with customers' access to the plaintiff's event. Lastly, the court held that such interference was unfair in that the defendant free-rode on the plaintiff's investment in

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organising the event.

With regard to false representation, the court held that the defendant's representation to advertisers (ie, that the booklet would be distributed at a large event for soldiers finishing their service), constituted misrepresentation in contravention of Section 2 of the Commercial Torts Law, as the defendant was not connected to the event conducted by the plaintiff under the supervision and according to the guidelines of the Ministry of Defence; moreover, the content included in the booklets violated such guidelines.

The court also held that the defendant had enriched itself at the plaintiff's expense under the Unjust Enrichment Law, which provides for restitution if a person obtains a benefit from another without a right under law to do so. The court held that the defendant's conduct, which purposely centred around the plaintiff's event, constituted enrichment at the plaintiff's expense and was not in accordance with a right under law, because freedom of occupation did not give the defendant a right to locate its representatives at the entry of the plaintiff's business.

The court granted a permanent injunction and ordered an accounting. Legal costs of IS40,000 were awarded against the defendant.

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