

**Model Gun Case (Unfair Competition)
(Meaning of 'Use' in Indication of Goods)
Decided by the Tokyo District Court
Case No: H10(wa)21508 (June 29, 2000)**

FACTS

Plaintiff 1, Beretta Company, is an Italian gun maker. Handguns (Beretta M92F) made by the Plaintiff are being employed by the military and police in numerous countries. Plaintiff 2, Company W, has been licensed by the Plaintiff 1 to produce and sell model guns of Beretta Company's handgun. The Defendant, Company M, is a Japanese company manufacturing and selling model guns and markets authentic looking model guns of a large number of real guns. One of the model guns sold by the Defendant is a model gun of the Beretta M92F. This model gun does not function as a real gun, but is substantially the same in scale as the real gun and is manufactured by reproducing the external aspects of that gun. The outside is stamped with the same marks as the Plaintiffs' marks at the same locations as the real gun. Further, the package uses a photograph of the real gun and the marks of the Plaintiffs.

The present case was instituted by the Plaintiffs, claiming that manufacture and sale of the model guns by the Defendant corresponded to use of the Plaintiffs' famous indication of goods of the and thus is in violation of the Unfair Competition Prevention Act, Article 2, Paragraph 1, Subparagraph 2, and seeking the cessation of use and compensation for damages.

According to evidence which the Defendant submitted in response to the Plaintiffs' claims, it was shown that a large number of toy gun manufacturers are producing model guns of various types of real guns manufactured by various real gun makers and that these model guns are all based on actually existing guns and as such are actual size and faithful reproductions of configurations and even marks stamped on the actual gun bodies.

ISSUE

Whether the Defendant's attachment of indications on the Defendant's products and packaging corresponds to "use" as an "indication of a good."

DECISION AND HOLDING

Decision: The Plaintiffs' claims are dismissed.

Holding: The Defendant's attachment of various indications to the Defendant's products and their packaging does not constitute "use" as in the "indication of a good" and attachment of such indications does not cause confusion with the Plaintiff's products.

Reasons: The purport of the Unfair Competition Prevention Act, Article 2, Paragraph 1, Subparagraph 1 lies in protecting the function of the indication of goods relating to the business of a person in displaying the origin of the goods, discriminating them from other goods, and guaranteeing their quality and in protecting their ability to attract consumers and, thereby, to protect fair competition between businesses. Accordingly, in order to fall under this subparagraph, it is not enough that an indication which is the same as a well known indication of another party be applied to the goods. It is necessary that this indication be used in a manner which fulfils the function of displaying the origin of the goods and discriminating them from other goods.

In this regard, a model only has meaning in faithfully copying the appearance of the genuine article. A model is evaluated according to how close it approaches the genuine article in appearance. This naturally results not only in the shape of the genuine article, but also in its texture, patterns, and marks being skillfully reproduced. This feature of models has been broadly recognized in society for many years. Even if indications which are applied to the model are the same as those of the genuine article, it is widely known in society that these do not indicate the source of the goods. Therefore, even if various indications are used on the Plaintiffs' actual guns as indications showing the goods are the Plaintiffs' Berettas and the same indications as the Plaintiffs' actual guns are attached to the Defendant's products, it cannot be said that these are used in a manner having the function of indicating the source of the goods.