Contents

Acknowledgements xiii
Preface xv
About the Author xvi
List of Abbreviations xvii

1 Historical overview 1
I. The early Meiji Period 1
II. Accession to the Paris Convention 2
III. After World War I 4
IV. The Unfair Competition Act of 1934 5
V. Changes under the Allied Occupation 6
VI. Complementary legislation 7
VII. Protection of commercial achievements 9
VIII. Latest developments 11
IX. Enforcement figures 12
X. Main sources of reference 13

2 Protection against “all acts” of unfair competition 15
I. General overview 15
1. Unfair competition and the Paris Convention 16
2. Legal development in Japan 20
3. Unfair competition and the courts 21
4. Systematic considerations 23
II. Protection under the Unfair Competition Act 24
1. Purpose 24
2. Prohibited acts 26
3. Exceptions 29
4. Remedies and standing to sue 30
5. Remedies for consumers? 35
6. Standing to sue and the public interest 36
7. Criminal sanctions 41
III. Protection under the Anti-Monopoly Act and its by-laws
1. General outline
2. "Unfair business practices"
3. Unfair trade practices and civil law in general
4. Free gifts and trade misrepresentations
5. Other legal instruments
6. Enforcement

IV. Unfair competition and intellectual property rights
1. General outline
2. Unfair competition and technical rights
3. Unfair competition and aesthetic rights
4. Unfair competition and trade mark rights

V. Protection under the Commercial Code
1. Legal framework
2. Requirements of application
3. Relationship to the Unfair Competition Act
4. Use and protection of foreign trade names

VI. Protection under general tort law
1. General principles
2. Scope of application
3. Case material
4. Remedies

VII. Unfair competition prevention in the context of Japanese legal culture
1. Institutional peculiarities
2. Political peculiarities
3. Legal consciousness
4. The style of decisions
5. Style of academic writings

3 Misappropriation of commercial achievements
A. Misappropriation by confusion
I. Introduction and international developments
II. Statutory provisions of Japanese law
III. The object of protection: indications for goods and business enterprises
   1. Confusion with goods
   2. Confusion with the business establishment
   3. Interdependence of elements
IV. The requirement of recognition ("widely-known")
   1. General concept
   2. Geographical range of recognition
   3. The relevant circles in trade
   4. Marketing efforts to establish goodwill
   5. Determining what is recognition
CONTENTS ix

V. The requirement of confusion 95
1. Similarity in trade mark and unfair competition law 95
2. The classic concept of confusion 98
3. Confusion as to sponsorship/confusion in the broad sense 98
4. Confusion by association with a Keiretsu-group 101
5. Franchising systems 102

VI. Defences 102
1. Lack of standing to sue 103
2. Lack of confusion 103
3. Better rights 103
4. Unclean hands 104
5. Time-bar through inaction 104

B. Misappropriation by other means 105
I. General remarks 105
II. Protection of trade secrets 106
1. Definition 106
2. Protection under tort law 107
3. Protection under the Unfair Competition Act 108
4. Restrictive covenants 112
5. Protection under criminal law 120

III. Protection against slavish imitation 120
1. General outline and international developments 120
2. Legislative background 124
3. Protection under intellectual property laws 126
4. Interpretation 128
5. Slavish imitation and the freedom to copy 136

IV. The protection of well-known indications 140
1. International and foreign developments 140
2. Protection of famous trade marks in Japan 144
3. Analysis 146

V. Misappropriation by an agent 152
1. History and international developments 152
2. Legal provision in Japan 153

VI. Application of foreign famous marks by domestic applicants 155
1. Domestic applications and domestic economic interests 155
2. Legal remedies under the UCA 157
3. Other remedies 160

VII. Publicity rights 161
1. General remarks 161
2. Scope and limits of the right of publicity 163

4 Acts designed to interfere unreasonably with a competitor's business 171
I. Introduction 171
II. International and foreign developments 173
III. Acts of interfering with a competitor's business under Japanese law
   1. Unfair Competition Act
   2. Actions based on civil law in general
   3. Anti-trust law
IV. Undue exercise of intellectual property rights
   1. Acts of denigration
   2. Other cases of improper exercise of an intellectual property right
V. Comparative advertising
   1. General remarks
   2. Japanese law on comparative advertising
VI. Unfair trade practices against a competitor's business
   1. Acts specified under the Anti-Monopoly Act
   2. Unjust interference and private actions
VII. Acts and remedies outside competitive relationships
   1. General remarks
   2. General legal framework
   3. Details of Sec. 2(1)(x) and (xi) UCA

5. Misleading indications
   I. International and foreign developments
      1. International conventions and agreements
      2. The dawn of consumerism
      3. Consumer protection and free trade
   II. Misleading indications on goods and services under the UCA
   III. Advertising, free gifts, and representations
      1. The Free Gifts and Trade Misrepresentations Act
      2. Other administrative regulations designed to control deceptive forms of commercial activity
      3. Self-disciplinary rules
   IV. Geographical indications
      1. International agreements
      2. Protection in Japan

6. Enforcement and legal remedies
   I. Civil law enforcement in general
      1. Litigation and legal consciousness
      2. Legal foundation and problems of Japanese civil procedure
      3. Foreign reception, traditional perception and enforcement
   II. Particular rules on enforcing intellectual property and unfair competition matters
      1. National and international jurisdiction
      2. Selection of the basis of claim
      3. Production of documents
      4. Presumption of damages
III. Remedies 235
1. Temporary and final measures 235
2. Injunctive relief 236
3. Monetary compensation 238
4. Seizure of infringing goods 246
5. Destruction of goods 247
6. Apology 247
IV. Administrative measures 248
1. Under the Anti-Monopoly Act 248
2. Under customs procedures 249
V. Criminal enforcement 250
1. Criminal prosecution in cases of passing-off 251
2. Misleading indications 251
3. Criminal protection of trade secrets 252

7 Towards a comprehensive system of unfair competition prevention? 255
I. Analysis in the context of Japanese law 255
1. The discussion for introducing a general clause 255
2. Setting up a comprehensive system for the control of unfair competition without a general clause 260
3. Paris Convention and domestic legislation 263
4. Considerations on a system of unfair competition prevention 268
II. Unfair competition models and unfair competition system 273
1. General remarks 273
2. Germany as a model for Japan? 274
III. The author's model Unfair Competition Act 276

Summary 285

Appendix of Legal Statutes 291
1. Japanese Constitution (excerpts) 291
2. Civil Code (excerpts) 291
3. Code of Civil Procedure (excerpts) 292
4. Commercial Code (excerpts) 293
5. Criminal Code (excerpts) 294
6. Unfair Competition Prevention Act 294
7. Trade Mark Act (excerpts) 300
8. Act Concerning the Prohibition of Private Monopolies and the Maintenance of Fair Trade (Anti-Monopoly Act) (excerpts) 302
10. FTC Guideline on Unfair Trade Practices 307
11a. FTC Guideline on Misleading Indications as to the Origin of Goods 309
11b. FTC Application Guidelines for Misleading Indications with Respect to the Origin of Goods 309
12. FTC Guideline on Bait Advertising 310
13. FTC Legal Opinion on Comparative Advertising as of 21 April 1987 (slightly abbreviated) 311
14. FTC Legal Opinion on Sales Below Cost 314

Chronological List of Cases Cited 315

Index 331