The Role of the Novelty Requirement in Protecting Start-Ups from Unfair Competition

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Abstract: Start-ups constitute a fundamental driver of national economic prosperity, particularly insofar as they are nascent enterprises predicated upon innovation, experimentation, and entrepreneurial risk-taking. For this reason, the Algerian legislature has conferred upon them a special protective regime safeguarding their innovations, subject to the indispensable requirement that such innovations satisfy the criterion of novelty and exhibit distinctiveness vis-à-vis pre-existing products, while simultaneously shielding them from acts of unfair competition perpetrated by other economic operators.

This study seeks to elucidate the legal mechanisms adopted by the Algerian legislature for the protection of start-up innovations and for ensuring their continuity and viability within the marketplace, while further assessing the adequacy of such protection in fostering entrepreneurial initiative and creative activity. The research concludes that the current legal framework affords substantial protection through intellectual property legislation and competition law; nevertheless, it remains in need of reinforcement through more flexible and adaptive instruments consonant with the intrinsic nature of start-ups and the accelerated pace of their development.

Keywords: novelty requirement – unfair competition – start-ups – patent – protection of innovation.

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Introduction:

In recent years, start-up enterprises have attracted heightened institutional attention within the framework of the Algerian State's economic recovery strategy, in light of their decisive role and far-reaching economic impact. The term "start-up" has consequently emerged as one of the most widely circulated concepts in contemporary economic discourse. Such enterprises are newly established entities founded by one or more entrepreneurs with the purpose of developing an entirely novel product or service, designed either to satisfy latent market needs, to remedy structural inefficiencies, or to generate new markets altogether.

These enterprises are characterized by rapid scalability, technological experimentation, and entrepreneurial risk. In recognition of these attributes, the Algerian legislature has enacted a dedicated corpus of legal instruments, most notably Executive Decree No. 20-254 establishing the National Commission for the granting of the "Start-up" and "Innovative Project" labels and defining its competencies, composition, and procedures[1], as well as Law No. 22-09 amending and supplementing Order No. 75-59 on Commercial Law[2], which introduced the simplified joint-stock company as the principal legal vehicle for start-ups.

Given that the core activity of such enterprises consists in the materialization of innovative concepts, they naturally attract human capital endowed with technical expertise and creative aptitude. Their entitlement to the "start-up" label is limited to a renewable four-year period. Among the most salient rights associated with these enterprises is the patent right, alongside protection for industrial designs and models.

In order for innovation to benefit from effective legal protection and immunity from encroachment—particularly from unfair competition—it must satisfy a set of substantive conditions, foremost among which is the requirement of novelty, enshrined in Order No. 03-07 governing patents.

This paper forms part of the broader scholarly endeavor to analyze the legal mechanisms designed to protect innovative enterprises from anticompetitive practices. It revolves around the following central question:

To what extent does the novelty requirement contribute to the protection of start-ups against acts of unfair competition?

The study proceeds from two principal hypotheses:

1. The rigorous application of the novelty requirement provides robust legal protection against the unlawful appropriation of innovations, whereas ambiguity or deficiency in its formulation undermines its effectiveness and facilitates anticompetitive conduct.

[1] Executive Decree No. 20-254, dated 15 September 2020, establishing a National Commission for the granting of the "Start-up", "Innovative Project", and "Business Incubator" labels, and defining its powers, composition, and functioning, *Official Gazette of the People's Democratic Republic of Algeria*, No. 55, issued on 21 September 2020.

[2] Law No. 22-09 amending Order No. 75-59 relating to the Commercial Code, promulgated on 5 May 2022, *Official Gazette*, No. 32, issued on 14 May 2022.

2. Despite its centrality, the novelty requirement is insufficient in isolation and must be supplemented by additional criteria such as inventive step and industrial applicability.

The methodology combines analytical and comparative approaches through the examination of domestic legislation, international conventions, and comparative law, supplemented by descriptive and critical methods aimed at identifying normative and jurisprudential shortcomings and proposing corrective measures.

Section 1 : Conceptual and Legal Framework of the Novelty Requirement in Start-Up Inventions.

The novelty requirement constitutes a cornerstone of patentability and applies equally to industrial designs and models.[3] It is enshrined in Algerian law[4] as well as in international conventions.[5] This section examines its conceptual foundations, legal nature, and its impact upon the qualitative value of inventions.

First Subtitle: Concept of the Novelty Requirement

We will address in this section the definition of the requirement of novelty and its various forms, both in terms of time and place, in detail as follows:

I- Definition of Novelty

Pursuant to Article 3 of Order No. 03-07, patents may be granted only for new inventions, whether relating to products or processes. Article 4 provides that an invention is deemed new if it does not form part of the "state of the art," defined as everything made available to the public by written or oral description, use, or any other means, anywhere in the world, prior to the filing date or priority date.

The Algerian legislature thus adopts a dual criterion—state of the art and secrecy—without articulating an exhaustive doctrinal definition, thereby preserving interpretative flexibility consistent with technological evolution, in alignment with French legislative technique.

Pursuant to the provisions of Article Four, supra, the state of the art is determined through the interpretation of the terms the public and access to the public. The public denotes any person whatsoever who is not bound by an obligation to preserve the secrecy of the invention, whether such obligation is legal or contractual. In addition, it is required that the person having access to the invention possess the competence necessary to understand and apprehend it, such competence being determined in accordance with the standard of the person

[3] Farha Zraoui Salah, *Comprehensive Treatise on Commercial Law – Intellectual Rights – Industrial and Commercial Property Rights – Literary and Artistic Property Rights*, Ibn Khaldoun Publishing and Distribution, Oran, 2006, p. 60.

[4] Order No. 03-07, dated 19 July 2003, relating to Patents, and Order No. 03-08, dated 19 July 2003, relating to the Protection of Layout Designs of Integrated Circuits, *Official Gazette*, No. 44, issued on 23 July 2003.

[5] Paris Convention for the Protection of Industrial Property (1883), as amended, acceded to by Algeria pursuant to Order No. 66-48 dated 25 February 1966, *Official Gazette*, No. 16, issued on 25 February 1966, and ratified by Order No. 75-02 dated 9 January 1975, *Official Gazette*, No. 10, issued on 4 February 1975.

skilled in the art.[6] Accordingly, if persons possessing expertise are unable to disclose its secret, the invention shall not be deemed disclosed and shall consequently be regarded as a new invention.[7]

Access to the public denotes that the invention has become known to a group of persons, whatever their number may be, or at least that they had the opportunity to become acquainted with it. It is not necessary that the public have actually examined the invention; what is essential is that it be possible for them to know the substance of the invention, and that the information obtained be sufficient for the person skilled in the art to manufacture the same installations[8], provided that they are not bound by an obligation to preserve the secrecy of the invention. Thus, where the inventor conducts experiments within the establishment and solely in the presence of workers, such persons are bound by the duty not to disclose the secret of the invention.

Likewise, it is immaterial who discloses the secret of the invention, whether the inventor himself or a third party; for as soon as the public becomes capable of knowing it, whether as a result of its written or oral description, or by reason of its use prior to the filing of the patent application, the invention loses the characteristic of novelty.

Disclosure is assessed with reference to accessibility by an unbound and competent public. Where disclosure is limited to persons bound by confidentiality, novelty subsists. Publication at officially recognized international exhibitions is excluded from novelty-destroying disclosures for a period of twelve months, pursuant to Article 24.

Moreover, good-faith prior users who had commenced exploitation or made serious preparations prior to filing retain a vested right of continued use under Article 14.

Novelty thus signifies the absence of prior use, disclosure, or patenting; failing which, the invention enters the public domain and becomes incapable of appropriation.[9]

Notwithstanding the agreement of most legislations on the definition of the novelty requirement, they have diverged as to its nature. Some have adopted the principle of absolute novelty, such as the Algerian legislation[10] and the French legislation[11], by which is meant that the invention must not have been previously achieved at any time prior to the date of filing the patent application, and must not have been known, whether within the State in which the patent is sought or in any part of the world, nor previously published, whether by means of a written or oral description or by any other means.[12]

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[6] Kheira Messaadaq, "The Novelty Requirement in Algerian Patent Law," Summary of Master's Thesis, Business Law Specialization, published in *Enterprise and Commerce Journal*, Ibn Khaldoun Publishing and Distribution, Issue No. 5, 2009, p. 96.
[7] Farha Zraoui Salah, *op. cit.*, p. 64.
[8] Farha Zraoui Salah, *ibid.*, p. 63.
[9] Ali Jassem Abdullah Moussan, "The Novelty Requirement in Patent Law – A Comparative Study," *Tishreen University Journal for Research and Scientific Studies – Economic and Legal Sciences Series*, Vol. 36, No. 6, 2014, p. 369.
[10] The position of the Algerian legislature clearly appears from Article 4 of Order No. 03-07, *supra*, whereby it adopted the requirement of absolute novelty.
[11] Beier, Friedrich-Karl, "The European Patent System," *Vanderbilt Journal of Transnational Law*, Vol. 14, No. 1, 1981, pp. 1–15.
[12] Ali Jassem Abdullah Moussan, *op. cit.*, p. 371.

II- **Forms of the Novelty Requirement**

Certain legislations have adopted the principle of relative novelty, such as the Egyptian legislation and the Iraqi legislation[13]. Relative novelty takes two forms: novelty in terms of time, which refers to the determination of a specific time period during which the invention is deemed to have entered the state of the art if a prior disclosure exists therein, such period varying from one legislation to another; and novelty in terms of place, whereby certain systems determine a geographical scope within which the invention loses its novelty if a prior disclosure exists therein, which is referred to as relative novelty in terms of territory[14]. Thus, in Egypt, the prior grant of a patent or the prior filing of an application abroad does not deprive the invention submitted of its novelty.

The Algerian legislator has provided for two forms in which novelty may attach to an invention, either in the form of a new product or the invention of a new process, under Article Three of Order No. 03-07 relating to patents. These were mentioned by way of illustration and not limitation, for the purpose of leaving room for the protection of other forms of inventions that may be revealed by scientific and technological progress. Jurists have defined the new product as a device or a material object having a mechanical structure or a specific chemical composition distinguishing it from others[15], and it is required that the product be embodied exclusively in a chemical or mechanical composition. In order to enjoy protection, it must result from an inventive activity, be new, and be capable of industrial application, without contravening public order, public morals, health, or the environment.

The new process has been defined as a set of chemical or mechanical elements used to obtain a tangible object called the product, or an intangible object called the result[16]. In order for the process to be granted a patent, the element of novelty must be present in view of its components and the means employed. If such process does not include a structural modification leading to a distinct and different industrial result, it shall not be regarded as new. Moreover, the same invention may include both a product and a process; and if the inventor is unable to protect his invention by means of a product patent due to lack of novelty, he may claim protection for the new process adopted to obtain that product, provided that the required conditions are fulfilled[17].

Second Subtitle: The Relationship between the Novelty Requirement and the Patent

The patent constitutes the principal driving force for the advancement and development of the national economy; therefore, it is necessary to encourage the continuous development of inventions in order to keep pace with technological and scientific progress, and to reach contemporary inventions, whether by the domestic inventor or the foreign inventor (investor). The invention constitutes the pillar upon which technology is based, and herein appears the

[13] Salah Zine El-Din, *Industrial and Commercial Property – Patents, Industrial Designs, Industrial Models, Trademarks, Commercial Indications*, 12th ed., Dar Al-Thaqafa for Publishing and Distribution, Amman, p. 37.
[14] Kheira Messaadaq, *op. cit.*, p. 96.
[15] Kheira Messaadaq, *ibid.*, p. 98.
[16] Farha Zraoui Salah, *op. cit.*, p. 72.
[17] Kheira Messaadaq, *The Novelty Requirement in Algerian Patent Law*, Master's Thesis, Comparative Business Law Specialization, Faculty of Law and Political Science, University of Oran, 2008–2009, p. 61.

impact of the novelty element on the quality of the invention, which cannot be achieved except through the establishment of regulatory bodies entrusted with monitoring it.

I- The Effect of the Novelty Element on the Quality of the Invention

The novelty requirement has a profound effect on patents and their quality at the environmental, consumer, and investment levels.

At the environmental level, the novelty requirement plays a major role in improving the quality of the invention. The modification of a product in order to render it less polluting constitutes a form of novelty, since introducing modifications to a product and rendering it safer for the environment and human health, and more reliant on clean technologies, falls within the scope of innovation and creativity. In order that the invention carried out by man may not constitute a danger to the environment, it is necessary to reconcile the provision of adequate protection for the invention, on the one hand, with the protection of the continuity of life on Earth, on the other[18]. Accordingly, the TRIPS Council consistently seeks to adopt the concept of green innovation and to encourage its dissemination to developing countries, which has led to the emergence of modern inventions granted green patents containing new environmentally friendly elements[19].

At the consumer level, the novelty requirement contributes to improving the quality of the invention for the purpose of satisfying consumers and achieving a competitive market, through the development of the invention and its constituent elements in order to achieve high product quality, thereby attaining a satisfactory result for the consumer and enhancing fair competition among inventors for the purpose of obtaining patents for high-quality inventions.

At the investment level, the novelty element contributes to economic development, encourages the attraction of investments, and creates a genuine competitive market in Algeria. It is observed that the Algerian legislator has shown interest in this field for the purpose of attracting investment in technologies related to intellectual property rights, considering them as investment projects in their own right, particularly by providing sufficient legal guarantees capable of protecting foreign investments, promoting technological transfer to local investment and protecting it, and enhancing the concept of the knowledge economy through Articles 2 and 9 of the Investment Law[20]. Empirical studies demonstrate that weak legal protection deters investors from taking the risk of establishing innovative projects.

II- Monitoring Systems for the Novelty Requirement to Achieve Invention Quality

In order for the novelty requirement to contribute to the quality of the invention, it must be subjected to administrative and judicial supervision. Administrative supervision is classified into three principal systems: the automatic grant system, under which patents are granted without any prior examination; the controlled grant system, under which patents are granted only after substantive and formal examination of the invention and the protection application;

[18] Rima Abdel-Samad and Djalila Massaour, "The Role of Novelty as a Substantive Condition in Patent Quality," *Journal of Legal Studies and Research*, Vol. 6, No. 2, 2021, p. 197.
[19] Law No. 22-18 relating to Investment, promulgated on 24 July 2022, *Official Gazette*, No. 50, issued on 28 July 2022.
[20] Mostafa Kamal Taha, *Commercial Law – Commercial Acts, Commercial Companies, Commercial and Industrial Property*, University Printing and Publishing House, 1986, p. 690.

and an intermediate system between the two, known as the mixed system, adopted by the Algerian legislator, which combines the advantages of both the automatic grant system and the controlled grant system while avoiding their disadvantages. Under this system, patents are granted only for inventions deserving of legal protection, unlike the automatic grant system, and without the complexities of prior examination which requires a longer period[21].

The Algerian legislator did not confer upon the competent administrative authority the power to withdraw the filing application where the novelty requirement or any of the conditions prescribed by Articles 3 to 8 of the Algerian Patent Law is not satisfied, and provided that patents shall be issued for applications fulfilling the conditions without prior examination and under the responsibility of the applicants and without any guarantee, whether as to the reality of the invention, its novelty, its merit, or the completeness and accuracy of the description[22].

Determining the nature of the filing system allows clarification of the powers conferred upon the competent authority, namely the National Algerian Institute of Industrial Property, to assess the novelty of the invention. The Algerian Patent Law did not clearly specify the powers granted to the Institute, which necessitates a deeper interpretation of the legal texts, particularly in the absence of any provision conferring upon the Institute the power to withdraw the filing application for lack of novelty, unlike the French legislator who expressly and precisely provided for such power.

As regards judicial supervision of the novelty requirement, the Algerian legislator regulated it under Article 53 of the Patent Law and granted standing to any person having a legally required interest to bring an action seeking the invalidation of the patent for lack of novelty, either by an original action or by an incidental plea, expressly providing therefor in view of its great importance compared to administrative supervision.

Section 2: The Novelty Requirement as a Mechanism for Protecting Start-ups from Unfair Competition

The novelty requirement creates a competitive environment in the market between innovative start-ups and other economic operators, fosters the creation of new markets based on inventions and innovations, and promotes the development of products and production methods. Accordingly, strict examination of the novelty requirement constitutes a necessary and important measure for obtaining a patent and enhancing the quality of submitted inventions, and increases fair competition among inventors for the purpose of obtaining patents for high-quality inventions. The revival of prior techniques as a new invention without introducing substantial modifications to all their elements, particularly their essential components, constitutes unfair competition protected by judicial action.

First Subtitle: The Concept of Unfair Competition for Innovative Start-ups

The principle established in commerce is freedom of competition among economic operators, based on honesty and integrity, with respect for laws, customs, and commercial practices. The spirit of competition leads to the continuous creation of innovations and inventions, which is reflected in the

[21] Article 31 of Order No. 03-07 relating to Patents, *supra*.
[22] Kahina Zawawi, *Unfair Competition in Industrial Property under Algerian Legislation*, Doctoral Dissertation, Business Law Specialization, Faculty of Law and Political Science, Mohamed Khider University of Biskra, 2014–2015, p. 9.

development and prosperity of the national economy. However, the problem arises when fair competition departs from these frameworks and becomes unlawful.

I-Definition of Unfair Competition

The concept of unfair competition first appeared in France in 1850, and the first legislation on competition protection and prevention of monopolistic practices was enacted in 1893. In the United States, it emerged following demands by small agricultural producers against large companies, leading to the enactment of pioneering competition laws, most notably the Sherman Act of 1890, aimed at protecting freedom of contract amid market congestion[23]. With scientific and industrial developments and the emergence of innovations and inventions, and the flourishing of competition, it became necessary to enact laws regulating freedom of competition and defining practices contrary thereto.

The Algerian legislator defined unfair competition in Article 26 of the law governing commercial practices, providing that unfair commercial practices are those contrary to honest commercial customs whereby an economic operator infringes the interests of one or several other economic operators[24]. The Paris Convention defined unfair competition as any act contrary to honest practices in industrial or commercial matters[25].

II- Conditions of Unfair Competition

It follows from the foregoing that the existence of competition as a preliminary matter between an innovative start-up and an economic operator is required, together with the registration of the right sought to be protected from industrial property rights, and that such competition be unlawful by fulfilling the following conditions:

1. **The condition of competition.**

It is required that a competitive relationship exist between the economic operators, and this constitutes a self-evident and logical condition, since no breach of law, custom, ethical values, or commercial integrity can arise in the absence of two creative parties situated in a competitive position. A competitive relationship is deemed to exist where the creativity or innovation offered by them is wholly similar, or at least similar in part; absolute identity is not required, it being sufficient that they be proximate in such a manner that each exerts an influence upon the other, so that there exists a minimum degree of similarity between them[26].

This requirement is regarded by some scholars as having merely a complementary function, serving only to elucidate the elements of fault and damage, and as an auxiliary criterion relied upon by the judiciary in that respect. Others, however, consider it to be a condition of paramount importance, in view of the close connection between the requirement of competition and the element of damage, insofar as it performs a revealing function[27]. Accordingly, no action for unfair competition may be brought where economic operators engage in different commercial

[23] Article 26 of Law No. 04-02, dated 23 June 2004, determining the rules applicable to commercial practices, *Official Gazette*, No. 41, issued on 27 June 2007.
[24] Article 10bis(1) of the Paris Convention for the Protection of Industrial Property, concluded on 20 March 1883, as revised in Brussels (14 December 1900), Washington (2 June 1911), The Hague (6 November 1925), London (2 June 1934), Lisbon (31 October 1958), Stockholm (14 July 1967), and Geneva (28 September 1979).
[25] Salha Al-Omari, "The Action for Unfair Competition for the Protection of Industrial Property Rights under Algerian Legislation," *Notebooks of Politics and Law*, Issue No. 03, June 2010, p. 210.
[26] Salha Al-Omari, "The Action for Unfair Competition for the Protection of Industrial Property Rights under Algerian Legislation," *Notebooks of Politics and Law*, Issue No. 03, June 2010, p. 210.
[27] Salha Al-Omari, *ibid.*, p. 210.

activities and offer different products; in such a case, recourse lies against the infringer by way of the general tort action[28].

2. **The condition of prior registration of the right to be protected.**

The Algerian legislator has made the prior registration of the right sought to be protected from among the rights of industrial property a mandatory condition, requiring that such right be duly deposited and recorded in accordance with the procedures prescribed by law. In this regard, Article 57 of Law No. 03-07 relating to patents provides that: "Acts occurring prior to the registration of the patent application shall not be deemed to prejudice the rights arising from the patent and shall not give rise to conviction, even civil conviction, save for acts occurring after notification of the suspected infringer by means of an official copy of the patent specification annexed to the patent application."

This principle has been affirmed by Algerian jurisprudence in Decision No. 380811 dated 28 March 2007, rendered in the case brought by the appellants against the judgment issued by the Boumerdès Court of Appeal which had found the existence of patent infringement. The Supreme Court ruled to admit the appeal both in form and on the merits and to set aside the impugned decision, on the ground that the appellants had been using since 1999, in their professional activity relating to the repair of laboratory equipment, the thermal and chemical method invented by (M.K.) and (M.H.), whereas the latter did not deposit their patent application until the year 2001. As is well established, acts prior to the registration of the patent do not affect the rights arising therefrom and do not warrant conviction[29].

Likewise, Article 25 of Order No. 66-86 relating to industrial designs and models[30] provides that: "Acts prior to filing confer no right to bring either criminal or civil proceedings arising from this Order; nor may acts occurring after filing but prior to publication confer any right to bring proceedings, even civil proceedings, unless the injured party proves the defendant's bad faith."

In this context, a decision was rendered by the Algiers Court of Appeal, Commercial and Maritime Division, dated 20 April 1998 (unpublished), in a dispute between the company "Bimo", engaged in the production and marketing of chocolate under the trademark "Ambassador" with black packaging bordered in red, such model having been duly deposited and registered with the Algerian Institute for Industrial Standardization and Industrial Property on 29 November 1995, and the company "Lorigal", which used similar packaging bearing the same design and model but under the trademark "Prezido", deposited subsequent to the filing by Bimo.

The latter instituted proceedings before the El Harrach Court on the basis of infringement, in view of the confusion created in the mind of the consumer. The court rendered judgment in its favor by reason of priority of filing, ordered the annulment of the subsequent registration,

[28] Miloud Moubarki, "Conditions for Bringing an Action for Unfair Competition in the Protection of Industrial Property Rights," *Annals of Béchar University for Law and Political Science*, Issue No. 15-B, 2015, p. 58.
[29] Supreme Court Decision No. 380811, Commercial and Maritime Chamber, dated 28 March 2007, *Supreme Court Review*, Issue No. 1, 2009, p. 357.
[30] Order No. 66-86, dated 28 April 1966, relating to Industrial Designs and Models, *Official Gazette*, No. 35, issued on 3 May 1966.

enjoined the defendant to cease marketing the product employing the disputed model, ordered its withdrawal from the market, and awarded damages — a judgment which was upheld on appeal before the Algiers Court of Appeal.

3. **That the competition be contrary to lawful commercial practices.**

Unfair competition affecting inventions possessing novelty concerns industrial innovations and industrial property rights relating to new inventions, whether relating to new products or new manufacturing processes. Mere imitation, even without use or marketing, constitutes a breach of fair competition. Protection extends to external appearance, total or partial imitation, and the creation of overall similarity likely to mislead consumers.

Innovative start-ups granted patents enjoy rights of exclusivity, exploitation, and disposition, and others are bound not to infringe such rights. Where unfair competition occurs, Algerian law grants judicial protection through the action for unfair competition.

Second Subtitle: The Action for Unfair Competition as a Legal Mechanism for Protecting Start-up Innovations

The action for unfair competition is not intended to pursue purely civil objectives; rather, it constitutes in reality an instrument for the protection of the legal positions of the parties operating within the competitive market, and for the regulation of the latter in accordance with the principles of integrity and legality. With reference to Algerian law, the legislator has not enacted specific rules governing liability arising from acts of unfair competition, and has confined himself to defining the practices contrary to fair competition. This legislative approach has led Algerian jurists to rely upon the traditional foundation, by construing unfair competition on the basis of tortious civil liability, in accordance with the general rules set forth in Article 124 of the Civil Code, which provides as follows: "Any act whatsoever committed by a person through his fault, and which causes damage to another, obliges the person by whose act it occurred to make reparation[31]."

This is the same orientation adopted by the French legislator, who has considered that unfair competition does not constitute an autonomous action in its own right, as it does not enjoy a specific legal regime, but rather represents a particular application of extra-contractual civil liability and is subject to the provisions of the French Civil Code[32]. Accordingly, it is founded upon three constituent elements, namely fault, damage, and the causal link. Fault in the context of unfair competition consists in the use of means contrary to integrity and commercial usages, and such fault results in the infliction of damage upon the innovative start-up enterprise; finally, the existence of a causal relationship between the fault and the damage is indispensable.

[31] Article 124 of Order No. 75-58, dated 26 September 1975, relating to the Civil Code, as amended by Law No. 05-10 dated 20 June 2005, *Official Gazette*, No. 44, issued on 26 June 2005.
[32] Antoine Pirovano, "Unfair Competition in French Law," *International Review of Comparative Law*, Vol. 26, No. 3, 1974, pp. 577–602, available at: persee.fr, accessed on 12 October 2025 at 15:05.

I- Conditions Governing the Action for Unfair Competition

The conditions governing, in general terms, the institution of an action for unfair competition correspond to those required for the establishment of liability arising from a wrongful act, subject, however, to due regard for the particular nature of the action for unfair competition, especially in the field of industrial property. These conditions may be set forth as follows:

1. Fault in the Action for Unfair Competition:

The existence of fault constitutes an indispensable requirement for the institution of an action for unfair competition, for no person may be held liable where no fault has been committed. It is presumed that the person who commits such fault has made use of an invention in order to attract the public and to compete with the holder of the right by unlawful means. The constituent element of fault may further be ascertained through the act of exploiting an invention protected by a patent, and account is taken both of the fault arising from actual unfair competitive conduct and of the fault resulting from acts in violation of statutory provisions and contrary to commercial customs and usages.

The Algerian legislator has not provided a definition of the fault upon which liability for a wrongful act is founded, leaving this task to legal doctrine, which has defined it as "a breach of a legal duty accompanied by awareness on the part of the offender, arising from every act contrary to commercial custom through the misuse of freedom of trade[33]." The criterion adopted in determining the meaning of fault consists in the performance of acts that are inconsistent with the rules of honesty, honor, and commercial integrity. Among the conditions required for the existence of fault is the existence of a competitive relationship, as previously indicated, together with the commission by the competitor of an unlawful act, which constitutes fault giving rise to liability.

Such acts are determined by the law governing competition and by the law regulating commercial practices. Of particular relevance here are the acts that constitute infringements of industrial property rights relating to innovations. Articles 11 and 56 of the Patent Law[34] provide that an infringement of the rights arising from a patent shall be constituted by the act of a third party who, without the consent of the patent holder, manufactures the patented product, uses it, sells it, offers it for sale, or imports it for such purposes, or who uses the patented manufacturing process and exploits, sells, offers for sale, or imports the product directly obtained by that process, in the absence of authorization from the patent holder, without assignment thereof, without the grant of a license within the framework of licensing agreements, and without transfer by way of inheritance, provided that the act of infringement occurs subsequent to the

[33] Taima Saafak Al-Shammari, "Rules of Unfair Competition in Kuwaiti Law," *Kuwait Law Journal*, Issue No. 1, 1995, p. 55.

[34] Article 56 of Order No. 03-07 relating to Patents, *supra*, provides that: "Any act listed in Article 11 above carried out without the consent of the patent holder shall constitute an infringement of the rights deriving from the patent." Article 11 of the same Order provides that the patent grants its owner the following exclusive rights:
– Where the subject of the invention is a product, third parties are prohibited from manufacturing, using, selling, offering for sale, or importing the product for such purposes without the owner's consent.
– Where the subject of the invention is a manufacturing process, third parties are prohibited from using the process and from using, selling, offering for sale, or importing the product directly obtained by that process without the owner's consent.

registration of the patent application or after notification of the alleged infringer by means of an official copy of the patent description annexed to the patent application, as expressly provided in Article 57 of the same law.

The Algerian legislator has confined the rights arising from the patent that may be the object of infringement to those having industrial and commercial purposes, and has excluded acts performed for scientific research purposes, acts relating to the patented product after its lawful placing on the market, and the use of patented means on board ships, spacecraft, or foreign air or land transport vehicles entering territorial waters, airspace, or national territory temporarily or under compulsion[35].

2. Damage in the Action for Unfair Competition:

The mere existence of fault is insufficient to sustain an action for unfair competition; it is additionally required that such fault result in damage to the claimant start-up enterprise (whether the inventor or the holder of the patent). However, it is incumbent upon the claimant to establish the damage suffered as a consequence of the unlawful act committed by the competitor. Damage is understood as any harm affecting a person in the exercise of his rights or in the enjoyment of his legitimate interests. It is not required that the damage be substantial; the condition of damage is satisfied even if it is minimal or merely potential, rather than certain. Furthermore, an actual loss need not have occurred; it is sufficient that an opportunity was foregone. Such damage may be material—for instance, loss of revenue incurred as a result of imitation of the invention and the consequent reluctance of consumers to engage with the original product due to an inability to distinguish between the original and the imitation—or it may be non-material, manifesting as harm to the reputation and commercial renown of the invention. In either case, such damage warrants compensation.

3. Causation in the Action for Unfair Competition:

Causation constitutes the most significant element for the establishment of liability; it requires the existence of a direct and proximate link between the act of unfair competition and the damage sustained by the injured party. The unlawful act must constitute the primary and direct cause of the damage incurred. The alleged infringer may rebut causation by demonstrating that the damage arose from an extraneous cause beyond their control—such as force majeure, a sudden accident, the act of a third party, or the act of the injured party themselves—thereby negating liability and obviating the duty to compensate. The burden of proof rests upon the party asserting the existence of such unlawful competitive conduct. Consequently, an action for unfair competition may not be initiated by the injured party unless a causal nexus between the fault committed and the resulting damage to the inventor or patent holder is established.

From the foregoing, it follows that unfair competition with respect to inventions and innovations characterized by novelty is predicated upon fundamental conditions: the existence of an act of unfair competition directed at the invention by the competitor, whether committed negligently or intentionally; the existence of damage suffered by the innovative start-up enterprise, which obliges the responsible party to compensate the injured party upon proof

[35] Article 12 of Law No. 03-07 relating to Patents, *supra*.

thereof; and the existence of a causal link between the fault and the damage, which is a core element of liability, particularly in commercial transactions. The essential requirement is the realization of damage, whether material, relating to the subject matter of the patent, or immaterial, affecting the reputation and honor of the inventor.

II- Legal Effects of the Action for Unfair Competition

The action for unfair competition brought by innovative start-up enterprises is governed by the general rules, as previously stated. Accordingly, such action produces legal effects, among which are the right to compensation as reparation for the damage suffered by the inventor whose work has been infringed, and the right to obtain cessation of the continued practice of unfair competition.

1. Compensation for the Damage Sustained by the Start-Up Enterprise as a Result of Exposure to Unfair Competition in Accordance with the General Rules:

Pursuant to the fundamental principles of law, any person who commits an act constituting a fault, whether intentionally or unintentionally, is thereby obliged to compensate the person who has suffered damage, provided that such fault bears a direct causal relationship to the damage sustained by the injured party. Such compensation constitutes one of the principal means of protection afforded to the injured innovative start-up enterprise.

Although the law has not provided, within its provisions, a definition of compensation, jurists have endeavored to articulate a general concept thereof, the most significant of which is that compensation consists in the reparation of the damage arising from the wrongful act, either by the payment of a monetary sum corresponding to the damage, or by restitution of the object to its rightful owner, or by reimbursement of the expenses incurred as a result of instituting the civil action in order to obtain compensation. It further denotes that which the person liable in civil liability is bound to provide to the person who has sustained damage; it constitutes the sanction of liability, such that whenever an unlawful act occurs, it gives rise to a right to compensation for the damage resulting therefrom, namely the substitution of such damage by a monetary equivalent[36].

Unfair commercial competition constitutes a harmful act giving rise to the liability of its perpetrator to compensate the damage resulting therefrom. It is deemed a transgression of the legally permissible bounds of competition through the commission of acts contrary to the law or to commercial customs, or through the use of means inconsistent with the principles of honour and commercial probity, thereby conferring upon the injured party the right to claim compensation before the competent judicial authority[37]. Where the court finds that acts constituting unfair competition have been committed, it establishes the entitlement of the injured party to compensation, which is determined in accordance with the general rules governing tortious liability. Such compensation is ordinarily monetary, representing the financial consideration corresponding to the damage sustained by another as a result of acts of

[36] Marwa Jeriri and Miloud Salami, "Compensation as an Effect of the Action for Unfair Competition in Industrial Property Matters," *Journal of Research in Law and Development*, Vol. 2, No. 1, June 2022, p. 41.

[37] Article 536 bis of Law No. 08-09 dated 25 February 2008 relating to the Code of Civil and Administrative Procedure, as amended by Law No. 22-13 dated 12 July 2022, *Official Gazette*, No. 48, issued on 17 July 2022, providing that the specialized commercial court has jurisdiction over intellectual property disputes.

unfair competition, which have caused the claimant either loss of profit or the incurrence of loss.

Monetary compensation constitutes the most prevalent form of compensation, and has been provided for by the Algerian legislator in several provisions of the Law on Industrial Property Rights, either expressly or implicitly, most notably in Article 58 of Order No. 07/03 relating to patents, which provides that: "If the claimant proves the commission of one of the acts mentioned in the preceding paragraph, the competent judicial authority shall award civil damages and may order the cessation of such acts and the adoption of any measure provided for under the legislation in force." However, the legislator has neither specified the amount of such compensation nor the manner of its assessment, leaving such determination to the discretionary power of the judge before whom the dispute is brought. Judges frequently resort to the appointment of specialized experts in this field in order to assess the damage to be repaired by means of fair compensation. Compensation may be monetary or in kind, such as the publication of the judgment in newspapers at the expense of the convicted party; nevertheless, monetary compensation remains the most common form, as it constitutes the principal means of repairing damage.

2. Compensation for the Damage Sustained by the Start-Up Enterprise as a Result of Exposure to Unfair Competition in Accordance with Competition Law:

The natural sanction of unfair competition consists in putting an end to the acts constituting such unfair competition, although logic dictates that the court should order the removal of the unlawful act in affirmation of the doctrinal maxim that harm must be eliminated. The cessation of the unlawful act does not entail the definitive elimination of the trade, for such consequence arises only in cases of prohibited competition; rather, it signifies that the court shall adopt the necessary measures to prevent the continuation of the unlawful situation[38]. This is the course provided for in the second paragraph of Article 58 aforementioned[39], which states that: "If the claimant proves the commission of one of the acts mentioned in the preceding paragraph, the competent judicial authority … may order the cessation of such acts and the adoption of any measure provided for under the legislation in force."

Conclusion:

In view of the legal nature of start-up enterprises, which is founded upon the concepts of creativity, innovation, experimentation, and risk-taking, such enterprises are more exposed than others to unfair competition on the part of other economic operators. Among the most significant substantive conditions for the protection of innovation and for shielding it from any infringement is the requirement of novelty, which denotes that the invention must not have been previously used, published, or granted a patent, whether in the form of a new product or in the form of an invention of a new process. The Algerian legislator has adopted two criteria for determining the novelty and quality of the invention, namely the state of the art and secrecy,

[38] Fadila Brahimi, "The Action for Unfair Competition," National Conference on Intellectual Property between the Requirements of Globalization and the Challenges of Development, Faculty of Law and Political Science, Abderrahmane Mira University, Béjaïa, April 2013, p. 6.
[39] Order No. 03-07 relating to Patents, *supra*.

which constitute an effective mechanism for protecting innovative start-up enterprises against unfair competition.

Once the condition of prior registration of the right sought to be protected is fulfilled in favour of such start-up enterprise, it acquires all the rights arising from its ownership of such right, including the right of exclusivity, exploitation, and disposal thereof, in addition to the right to immunity from any infringement of its innovative activities. Accordingly, if it is subjected to any practice contrary to the rules of fair competition, it enjoys legal protection and has the right to have recourse to the judiciary in order to prevent such infringement and to obtain reparation for the damage resulting therefrom by means of the action for unfair competition, which constitutes a judicial mechanism for the protection of the innovations of start-up enterprises whenever its conditions of admissibility are satisfied.

Through the present research paper, we have arrived at the following findings: that the requirement of novelty plays an effective role in protecting innovative start-up enterprises from unfair competition on the part of other economic operators, and that the Algerian legislator has not conferred upon the Algerian National Institute of Industrial Property the authority to withdraw an application for filing in cases where the requirement of novelty is not fulfilled.

Among the recommendations which we have deemed appropriate to propose are the following:

– The establishment of specific legal frameworks for the protection of start-up enterprises from any infringement affecting their innovations by other economic operators, in order to ensure their continuity and to secure the benefit derived from their innovations.

– The conferral of broader powers upon the Algerian National Institute of Industrial Property in the exercise of ex ante and ex post control for the purpose of determining the element of novelty in inventions, together with the granting thereof of the power of withdrawal, in a manner analogous to the French legislator.