



# The Gowers Review

A response

- 1 As the British Brands Group, we welcome the All Party IP Group's inquiry into the effectiveness of the Gowers Review in ensuring IP rights can be properly protected and enforced for the benefit of rights holders and consumers, and appreciate the opportunity to submit our views.
- 2 The Group provides the collective voice for brand manufacturers operating in the UK. Members range in size and supply a variety of branded products including food, drink, household, toiletry, pharmaceutical, DIY, clothing and sports goods.
- 3 As the Group focuses exclusively on the environment for branded products in the UK and their ability to make a strong, positive contribution to consumers, society, companies and the economy, we focus our response only on those aspects of the Gowers Review that directly affect brands. We do not duplicate the input of the Anti-Counterfeiting Group and refer the All Party Group to its submission on counterfeiting which we support fully.
- 4 In summary, our responses, in the context of branding, to the specific questions posed by the All Party Group are as follows:
  - (1) we consider the review and report remain strongly relevant two years on;
  - (2) Gowers' recommendation relating to the protection of brands and designs against misappropriation was one we were willing to support at the time. However now that more is known, we have significant doubts over its efficacy and we call for a further review in this specific area. The Gowers recommendation is not sufficient;
  - (3) we believe the Gowers review and the report covered the important issues relating to branding and the areas that require change;
  - (4) the delay in protecting brands and designs effectively from misappropriation means that consumers continue to be confused and misled and legitimate business harmed;
  - (5) digital developments have not had an undue effect on priorities or focus;
  - (6) Gowers' recommendation in relation to brand misappropriation has not improved choice and protection for consumers as hoped.

Specifically, measures intended to tackle unfair commercial practices such as misleading ("copycat") packaging are not working effectively.

In the following paragraphs we look at the specific recommendations that affect branding and comment on the progress that has been made since the publication of the report.

5 RECOMMENDATION 4

Policy makers should adopt the principle that the term and scope of protection for IP rights should not be altered retrospectively.

A recent Government consultation has highlighted the importance of this recommendation. The Department of Health (DH), in its *Consultation on the future of tobacco control*, raised the prospect of tobacco products being in plain packaging with all brand imagery removed, whether or not registered as trade marks. The only exception would be the product name, or word mark, which would be represented in a standard style, size and colour.

- 6 While we appreciate that IP policy must be responsive to the public interest, in this instance we do not feel that the DH recognised the enormous investment behind such trade marks, their significant value and their importance to consumers, and we wonder whether the DH consulted with the UK IPO ahead of publishing its paper. This indicates that there may be some way to go before Government departments recognise the true value of IP rights and consult appropriately between themselves on policies that may affect them before publishing consultations. In this instance, the plain packaging proposal would have the effect of altering IP rights retrospectively on the basis of evidence that the DH acknowledged was “speculative”.

7 RECOMMENDATION 25B

Introduce fast track registration for trade marks.

The UK IPO has fully implemented this recommendation in a timely way, with appropriate consultation, providing trade mark owners with an enhanced service should it be required.

8 RECOMMENDATION 34

Increase cooperation between the UK Patent Office, the Office of Fair Trading and the Competition Commission to ensure that competition and IP policy together foster competitive and innovative markets for the benefit of consumers.

We have not yet seen strong evidence of co-operation between the UK IPO, OFT and Competition Commission (CC) on matters that affect competitive, innovative markets. We have raised the issue of misleading packaging (see below) with all three organisations and with BERR as it is a problem that affects competition, consumer and IP. The OFT has indicated that it considers the practice does not help markets work well. The CC indicated in a Hearing that it considered it an IP matter but later, in its final report on the UK groceries market, as a matter of consumer protection. BERR in the meantime has questioned the consumer detriment that arises. This indicates that Government departments and agencies continue to operate in silos and are not working well together to address a problem highlighted by the Gowers Review that has consumer, competition and unfair trading (IP) implications.

9 RECOMMENDATION 37

Monitor success of current measures to combat unfair competition in cases relating to IP, and if changes are found to be ineffective, Government should consult on appropriate changes.

The Gowers review assessed the problem of misleading (“copycat”) packaging, the difficulties facing small designers and the need for a general “unfair competition” law, concluding that it did not believe that passing off went far enough to protect brands and designs from misappropriation. Its recommendation was to wait and see whether the Unfair Commercial Practices Directive, which is primarily consumer protection legislation, adequately addresses acts of unfair competition. The original timescale from the Patent Office called for a review of this recommendation at the end of 2008. This Directive was implemented in the UK as the Consumer Protection against Unfair Trading Regulations (CPRs) in May 2008 and the review has now been put back to 2010.

- 10 While we had doubts over the ability of consumer protection legislation to address adequately acts of unfair competition involving misleading packaging, we engaged BERR closely throughout its consultation on the CPRs, suggesting ways in which its provisions might be enforced effectively in this context. Its decision however not to give companies with a legitimate interest rights of civil action under the CPRs (which it was empowered to do and which was done in Ireland) confirmed our view that the CPRs will never address effectively business-to-business acts of unfair competition.
- 11 Enforcement of the CPRs is restricted, in the case of misleading packaging, to the OFT and Trading Standards. However both are unlikely to enforce due to their limited resources, other priorities, limited knowledge of the impact of specific brand imagery on consumer behaviour and difficulties in proving a breach of the CPRs. While BERR has promised a review of the effectiveness of the CPRs in 2010, it seems unlikely the protection envisaged by Gowers will be met. It seems that BERR will require a (unspecified) “consumer detriment” test to be met (which is not a requirement of the Directive) before private rights of civil enforcement will be considered and it is clear that the limited resources of enforcement agencies may not be sufficient basis for change (see Annex 1).
- 12 The difficulty in relying on the CPRs to address acts of unfair competition does not rest solely with enforcement. It is likely to be interpreted strictly in the UK to the extent that all the effects of misleading packaging are not addressed (see Annex 1) and the evidentiary test is high.
- 13 We suggest to the All Party Group that it recommends to Government that it review not only the impact of the CPRs in addressing misleading packaging in 2010, but also the effectiveness of the UK’s IP regime generally in addressing adequately acts of unfair competition, including the use of misleading packaging. This is in the interests of consumers, business and the effective and efficient working of markets as it will prevent consumers being misled, encourage investment and innovation and stimulate competition on the basis of differentiated products at different quality and price points, enhancing consumer choice.

- 14 There is an undeniable case for such a review. The UK is under an obligation to comply with the Paris Convention which requires signatories to assure nationals effective protection against unfair competition<sup>1</sup>. The UK is at odds with other member states in not providing that protection and the Gowers Review has highlighted that the UK regime does not go far enough. We wish to make it clear however that the Group does not support the introduction of a general unfair competition provision in the UK but a more focused instrument that addresses only those problems where existing IP legislation is ineffective.
- 15 We also suggest such a review is long overdue. We have been raising concerns over misleading packaging with Government since 1994, raising it formally in consultations on the Trade Marks Bill, Competition Bill and the CPRs. It has been the subject of an Adjournment Debate, a Private Members' Bill, an Upper Waiting Hall Exhibition, a number of Parliamentary Questions and has been considered by the All Party IP Group. Detailed evidence has also been presented on its impact on business and on consumers. The Government gave an undertaking in 1994 to review the situation if the problem persisted. No such review has occurred, with the exception of the brief treatment given to the matter in the Gowers Review.
- 16 While protection in the UK remains weak, products in very similar packaging to familiar brands continue to be marketed, potentially confusing and misleading consumers and damaging legitimate businesses. A small sample of such products on sale in 2008 appears in Annex 2.
- 17 **RECOMMENDATION 46**  
Establish a new Strategic Advisory Board for IP policy (SABIP), covering the full range of IP rights, reporting to the minister responsible, by 2007. The Board should be drawn from a wide range of external experts as well as key senior policy officials from relevant government departments, and should be based in London. £150,000 should be allocated to fund the secretariat by the Patent Office.

We support the role of a strategic advisory body in advising Government on IP rights and are pleased to note that SABIP has now been established in 2008. We remain concerned however that the current composition of SABIP does not reflect the "wide range of external experts" called for in the Gowers report. We particularly note the absence of expertise on trade marks and branding on the Board which is both disappointing and of concern, bearing in mind the significant economic value of these areas and their importance to consumer protection, innovation and wealth creation.

3<sup>rd</sup> October 2008

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<sup>1</sup> Article 10<sup>bis</sup>, Paris Convention – Unfair Competition

## ANNEX 1

A copy of a letter from BERR indicating the narrow way in which the Consumer Protection from Unfair Trading Regulations are likely to be interpreted and the matters that are likely to be considered when the effectiveness of the CPRs are reviewed in 2010. It highlights the need to demonstrate significant consumer detriment (which is not a requirement in the Unfair Commercial Practices Directive) and that the limited resources of enforcement agencies are unlikely to be a cause for change.

John Noble  
British Brands Group  
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30 May 2008

Dear John

Thank you for your e-mail of 13 May about the review of whether businesses with a legitimate interest should be able to take civil (injunctive) enforcement action under the Consumer Protection from Unfair Trading Regulations to stop misleading copycat packaging.

As you rightly note, following the decision to bring forward this review from three to two years after the Regulations come into force, the timescales in Baroness Vadera's answer (HL 3338, 6 May) will similarly have to be brought forward by one year.


It is clearly too early to specify in detail how this review will be carried out. However, we will need to obtain evidence about the extent to which copycat packaging design genuinely (deliberately or otherwise) misleads or confuses consumers. As you are aware Recital 14 of the Unfair Commercial Practices Directive states that it is not the intention of the Directive to reduce consumer choice by prohibiting the promotion of products which looks similar to other products unless this similarity confuses consumers as to the commercial origin of the product and is therefore misleading. It follows that packaging designs which are not misleading would not breach the CPRs even if the similarity in design occasionally caused hurried shoppers to purchase the wrong product by mistake.

We would also want to examine the consumer detriment caused by misleading copycat packaging. This is because market interventions must not only be evidence based, but they must also be proportionate. If there is little evidence that misleading copycat packaging is causing significant consumer detriment there may not be a case for giving businesses a right to enforce the CPRs, which are primarily concerned with protecting the interests of consumers, and not businesses.

Finally we would want to examine the extent to which existing enforcement arrangements are being used effectively to tackle misleading copycat packaging which is causing consumer detriment. Here we would need to bear in mind that the public enforcers' need to prioritise cases because of their limited resources applies in relation to unfair commercial practices generally and not only in relation to misleading copycat packaging. All unfair commercial practices indirectly harm businesses.

I or Peter Deft would be glad to come and speak to your members about the CPRs.

Yours sincerely

A handwritten signature in black ink that reads "David Saunders". The signature is written in a cursive style with a large initial 'D' and a long, sweeping tail on the 's'.

David Saunders

ANNEX 2

2008 EXAMPLES OF PRODUCTS IN SIMILAR PACKAGING (to be viewed in colour)

