



A response

Consumer law review: call for evidence

- 1 The British Brands Group welcomes the opportunity to respond to BERR's consultation on its Consumer Law Review.
- 2 The British Brands Group is a trade organisation whose members comprise brand manufacturers operating in the UK. Our members range in size and supply a variety of branded goods including food, drink, household, toiletry, pharmaceutical, DIY, clothing and sports goods.
- 3 Our input to this consultation is taken from discussions with individual members and input from the Council and the legal working group on the UK's consumer protection regime, specifically in relation to misleading packaging.
- 4 We are encouraged to see the consultation recognise **branding** as an effective force for consumer protection (paras 4.6 – 4.9). Branding helps markets work well in many ways (including the delivery of choice, an ever-improving consumer offer and enhanced competition) and consumer protection is a particularly important contribution. This is delivered by consistency in quality of specific products and services reinforced with the backing of a consumer guarantee, as well as by companies' high dependence on their reputation referred to in the consultation.
- 5 We are also pleased that the consultation recognises the **interrelationship** between open, competitive markets, consumer confidence, consumer choice and innovation. What is good for consumers is good for companies and we also therefore fully support the Government's role of setting a framework for markets that allows free and fair competition to thrive (para 2.1). As the Unfair Commercial Practices (UCP) Directive highlights, an effective consumer protection regime is one that also indirectly protects legitimate businesses from competitors who do not play by the rules (see UCP Directive, Recital 8).
- 6 As we are an organisation that focuses on branding, our comments on the consultation are confined to those areas where the consumer protection regime affects the **effectiveness of branding** in the UK market. We submit that branding is a positive and powerful force that should be promoted for its role not just in consumer protection already outlined (para 4) but also in commercialising innovation, opening and building new markets, aligning companies with the needs of society, delivering economic growth, sustaining companies' market value and promoting informed consumer choice.

7 In **summary**, our members have not expressed major concerns with the existing consumer protection regime, although of course the impact of the Consumer Protection from Unfair Trading Regulations (CPRs) has yet to be assessed. The legislative framework is, with one exception, adequate and the UK enjoys a world-standard self-regulatory marketing regime covering advertising, sales promotion and direct marketing. Brand owners are however conscious of the limited resources and fragmentation of the UK's consumer enforcement regime which, in at least one area discussed below (paras 12 - 13 below), falls short of its "world class" ambitions.

8 **Question 7 – What could be done to reform the law on supply of goods and services to consumers?**

We consider the UK's **legislative framework** to be deficient in addressing brand misappropriation, particularly in the area of packaging designs that parasitically copy those of familiar brands. This is a consumer protection issue in so far as such packaging relies on consumer deception and confusion for its commercial effect. Current examples of such packaging are provided in Annex 1 and the impact on consumers is outlined in Annex 2.

9 The producers of these parasitic copies design around existing intellectual property laws and a passing off action is a Herculean task to bring, negating the consumer protection aspects of these laws. The shortcomings of the existing legislative regime have been recognised by the Treasury-sponsored Gowers Review of Intellectual Property (see paras 5.82 – 5.85). The CPRs may address packaging that misleads over the commercial origin of the product but may well not address packaging that confuses consumers (ie. those who buy the wrong product) (see letter from David Saunders, BERR, to the British Brands Group, 30 May 2008). We see this is a strong example where legislation is complex and ineffective, resulting in unnecessarily high costs to business and low levels of consumer protection.

10 The optimum solution lies in focused legislation that makes it a civil offence for one competitor to trade off the reputation of another (see Copyright and Trade Marks Bill, 2000, Part II). Such a measure would increase consumer protection and provide companies with effective protection against such acts of unfair competition, thereby bringing the UK into line with its obligations under the Paris Convention (see Article 10^{bis}) and TRIPs.

11 Detailed briefings on this subject have been given to the Gowers Review on Intellectual Property and to all DTI / BERR's consultations on the UCP Directive and CPRs. We would be happy to provide a further detailed briefing in relation to this consultation if required.

12 **Question 18 – How can TSS use their resources most effectively to secure the best outcomes for consumers and business?**

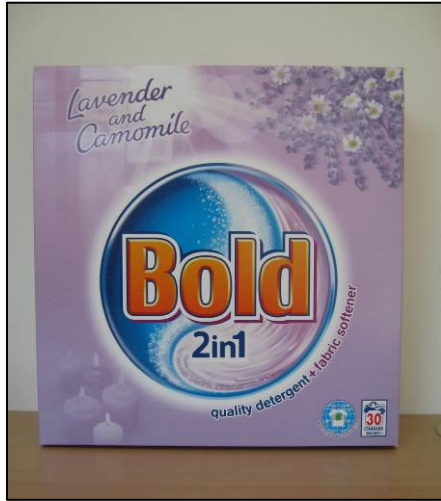
Our discussions with BERR over recent months in relation to the **enforcement** of the provisions of the CPRs have highlighted likely shortcomings in the UK's consumer protection regime. The CPRs impose a duty on the OFT and Trading Standards (amongst others) to enforce its provisions but in the specific case of misleading packaging all the indications are that the limited resources and priorities of these organisations mean that they simply will not enforce them. The OFT's remit, which includes the enforcement of competition laws, dictates a focus on matters with a general significant impact on markets

and whole sectors of the economy, and it has a declared intention only to bring formal enforcement action where there is “serious consumer harm”. TSS on the other hand already have a host of other priorities, no new resources to discharge what is in practical terms a new duty, and are not ideally placed to know whether or not packaging is sufficiently similar to mislead consumers. In short, the effectiveness of the existing consumer enforcement regime is totally reliant on the (limited) resources and priorities of the consumer enforcement bodies, with the effect that such areas as misleading packaging go un-enforced.

- 13 The UCP Directive lists misleading packaging as a banned practice (see Annex 1, clause 13) and requires member states to ensure adequate and effective enforcement (see Article 11). We therefore face a situation where the UK’s enforcement regime is simply not up to the task. The answer, we believe, is to grant companies rights of civil enforcement in those instances where the UK is unable to deliver against its commitments and where the interests of consumers and companies are fully aligned. Such an approach would yield a higher level of consumer protection at no cost to the public purse and is consistent with the approach adopted in other member states, most notably Ireland which like the UK has a common law tradition.
- 14 We understand such an approach is also consistent with the OFT’s thinking which has published a discussion paper “*Private action in competition law: effective redress for consumers and business*”. It has expressed the view that cases in which breaches of the law affect the interests of competitors should be pursued through private means and should not be prioritised by the public enforcement body, and that such an approach to prioritisation is as well adapted for its consumer enforcement role as for its competition role.
- 15 On a different but nevertheless brand-related subject, TSS play an immensely valuable role in the detection of and enforcement against **counterfeit products**. This “crime of the 21st century” is a growing problem affecting an ever widening range of products, including everyday grocery goods. Of crucial importance in the successful fight against counterfeits is a (high) consistency of enforcement effort across local authorities and close co-operation and co-ordination between all enforcement agencies and between enforcement agencies and brand owners. We refer you to the submission from the Anti-Counterfeiting Group for more detail.
- 16 One notable aspect of the consultation document – and past discussions with DTI / BERR – is the frequent reference to “**consumer detriment**”. We can however find no precise definition of this term and no guidelines on how it is measured. This generates uncertainty, particularly when it is used by policy makers and enforcement organisations to determine policies and priorities, leaving significant scope for it to be applied subjectively. It would be helpful to have clearer guidelines on the term.
- 17 We will be happy to expand on any aspect of this submission, if required.

Annex 1

Examples of potentially misleading packaging (June 2008)



How parasitic copies mislead consumers

Parasitic copying of packaging relies on provoking a consumer reaction that differs from the reaction to normal distinctive packaging. If it were not successful in provoking this, the practice would have died out very quickly.

Consumer deception takes a number of forms and each is explained in more detail below:

- outright confusion – the consumer buys the copy in mistake for the brand;
- deception over origin – the consumer recognises the copy is different but believes, due to the similar packaging, that it is made by the same manufacturer; and
- deception over equivalence/quality – again, the consumer recognises the copy is different but believes, due to the similar packaging, that the quality is the same or closer than they would assume if the packaging were more different.

Outright confusion

A range of research evidence clearly shows that consumers purchase parasitic copies by mistake:

Date	Research	Base	% buying by mistake
April 1994	NOP, for Mars	1,008	21%.
March 1995	BMRB for Consumers' Assn	-	13% had purchased a copy by mistake in the previous six months.
		-	3% had a mistaken purchase in their basket on the day of the research.
February 1997	NOP, for Marketing	996	17%
April 1998	RSL, for Consumers' Assn	2,000	6% bought the copy instead of the brand in the previous six months.
			one in three made the mistake once in the last six months. Only slightly less say they had made such mistakes three or more times.

These separate research studies consistently and clearly show that consumers buy the wrong product because of similar packaging. Between 17% and 21% state that they have purchased by mistake at some time. This equates to around 4 - 5 million UK consumers buying products they did not intend to buy, purely as a result of misleading packaging.

In considering these high percentages, it is important to bear in mind that consumers are faced with a vast array of choice in large retail environments. When buying items on a regular basis, they do not spend much time considering their purchases and their attention to any given product line will be brief, typically 4 seconds or less.

Deception over origin

Similar packaging suggests to consumers that the products in the packaging are made by the same manufacturer. A range of different research studies consistently bears this out:

Date	Research	Base	% buying by mistake
December 1993	Street interviews undertaken for a brand	747	34% believed a copy was made by the brand manufacturer.
February 1994	Interviews undertaken for a brand	305	41% believed that Nescafé made Sainsbury's coffee, with 73% attributing this to similar packaging.
February 1997	NOP, for Marketing Magazine	996	41% believe brand manufacturers make an own label product if the pack design is similar to the brand.

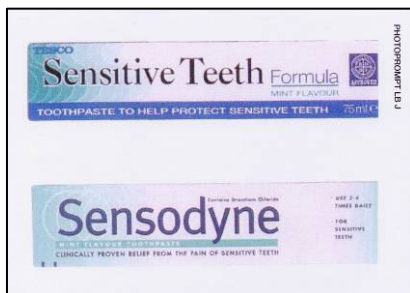
The Consumers' Association researched this question in April 1998 when they asked 2,000 consumers whether the following four copies were made by the brand manufacturer:



Definitely made by the same company	6%
Probably made by the same company	38%



Definitely made by the same company	6%
Probably made by the same company	36%



Definitely made by the same company	5%
Probably made by the same company	45%



Definitely made by the same company	7%
Probably made by the same company	45%

RSGB undertook extensive research for the British Brands Group amongst 3,994 individuals also in 1998. The sample was systematically divided into two groups, one group being shown only the packaging of a pair of products, the other group being shown only a written description. The same questions were then put to each group. In this way, the **specific impact of packaging** could be assessed.

For the similar pair, 13% of those shown the word description believed both were made by the same company. This figure **rises** to 32% for those who were shown the packaging.

For the distinctive pair, 21% of those shown the word description believed they were both made by the same company. This figure **declines** to 17% for those shown the packaging.

This research indicates there is an underlying belief amongst consumers that retailers' own label goods are made by a brand manufacturer. Packaging design is capable of increasing this inherent confusion through similarity or decreasing it by being distinctive. This is explored further below and at the end of this Annex.

Business Insights in 2005 in its report "Fighting Private Label" drew on extensive consumer research by Europanel amongst nearly 20,000 respondents internationally. It stated that "private label success is facilitated when consumers cannot tell a private label from a manufacturer brand due to similarity in packaging" and showed that, across all categories analysed, similar packaging resulted in a significant 55% increase in own label share compared to own labels in dissimilar packaging.

Europanel analysed this data further to explore any correlation between consumers' belief that brand manufactures make own label products and similar packaging. This was undertaken for 95 categories with 50 respondents per category (i.e. 4,750 respondents in total). The aggregated responses were as follows:

Belief that own label looks similar

(5 = strongly agree, 1 = strongly disagree)

5
4
3
2
1**Belief that own label is made by brand****manufacturer** (5 = strongly agree, 1 = strongly disagree)4.0
3.5
3.2
3.2
3.2

Europanel concluded that there is a common belief that own label is made by brand manufacturers but packaging similarity significantly heightens this perception

In conclusion, research evidence clearly shows that similar packaging suggests to many consumers that the product is definitely or probably made by the same company. At the lowest level in the research studies above (32%, RSGB), the practice equates to some 7½ million shoppers being misled.

Deception over quality/nature

The similar packaging suggests to consumers that the quality or nature of the copy is comparable to the quality or nature of the brand or at least is more comparable that they might otherwise assume. This suggests to consumers that price is the key basis for their purchasing decision, rather than a combination of price and quality (that is, value).

A French academic, Kapferer, Professor at HEC Graduate School of Management, explored this subject in May 1995, using a sample size of 127 women. He found a direct correlation between perceptions of manufacture and perceptions of quality:

Brand / Copy	Definitely or probably made by same company	As good as the original (perception only, not trial)
Martini / Fortini	61%	50%
Amora / Mama	67%	44%
Panzani / Padori	80%	77%
Ricoré / Incoré	31%	29%
Ricoré / Calicoré	42%	53%

The Consumers' Association research (1998) provides further insight into the connection between similar packaging and consumers' assumptions about products.

The research tested four similarly packaged pairs of products against a benchmark pair, with respondents being asked whether one of the pairs of products was much better, a little better, or the same as the other in terms of (1) quality and (2) value.

By averaging the results for the four similar pairs, the ratings were as follows:

Supermarket product same or better for	Quality	Value
Copies (av.)	43%	57%
Benchmark	30%	46%

The findings for value for money are particularly interesting, with the rating for the parasitic copies being 24% higher than for the benchmark pair. As shoppers buy for value for money, sales of a product can be reasonably expected to increase by 24% as a result of adopting very similar packaging.

Perceived manufacturers of own label

The research above indicates there is an inherent level of confusion in the market about the manufacture of own label products, irrespective of the packaging. The RSGB research puts this at between 13 - 21% (that is, those who believed, without seeing the packaging, that the products came from the same manufacture). This is explained by consumers understanding that supermarkets are retailers not manufacturers and that others make the products for them.

The Business Insights analysis of 2005 described above is also consistent with these findings. The significant point to note, however, is that distinctive packaging reduces this level of inherent confusion while very similar packaging reinforces and increases it.