



Empowering and protecting consumers

Response to BIS consultation

SUMMARY

Branding plays an effective and powerful role in informing, empowering and protecting consumers, while encouraging companies to invest in long-term reputations. The parasitic copying of distinctive brand identities, despite representing a breach of European consumer laws, continues unchecked in the UK due to lack of enforcement. This demonstrates a weakness in the current consumer regime which is not addressed in the consultation's proposals. It needs to be for the UK to comply with the Unfair Commercial Practices Directive.

- 1 The British Brands Group welcomes the opportunity to respond to the Department of Business Innovation and Skills' (BIS) consultation on institutional changes for provision of consumer information, advice, education, advocacy and enforcement..
- 2 The British Brands Group is a trade organisation that provides the voice for brand manufacturers in the UK. Its role is to help create in the UK the optimum climate for brands to deliver their benefits to consumers. Such benefits include broader choice, ever-better products through innovation, strong value and consumer confidence. A list of members is provided at the end of this response.
- 3 The Group supports the Government's aim to empower consumers to make wise decisions when purchasing goods and services. Consumers need clear, unambiguous information about products when making choices. We also welcome the recognition that businesses investing in goods and services need to know they will not be undercut by rogue traders.
- 4 We also concur with Government that regulation is not the sole solution. Branding is a powerful mechanism for empowering and protecting consumers. Consumers understand the provenance of branded products and services, trust them and have the reassurance of a guarantee of quality. Meanwhile companies invest to create long term positive impressions and reputation through differentiation, consistency and a socially-oriented approach to business. Branding itself therefore has an important role in delivering policy goals.

5 It is encouraging to see the relevance of brands recognised in the consultation document, with the brands of the Citizens Advice service and the British Standards Institution acknowledged. Indeed, it is the Citizens Advice brand that will be instrumental in determining its success as a source of information and advice trusted by consumers. The consultation does not give supporting evidence on the Citizens Advice brand. We certainly urge its monitoring and management, and indeed development to reflect its new proposed role (if this is not already being done). It is, after all, a critical “success factor” for the proposed new regime.

6 RESPONSE TO THE CONSULTATION

The consumer regime forms an important part of the overall environment for branding in the UK, helping create and shape the conditions for investment and innovation by companies, and trust and confidence amongst consumers. However, we do not have a brand-specific perspective on the questions posed in the consultation that will not be addressed by other business representatives. Rather, we wish to highlight a case study that illustrates one important failure of the current regime and which will not be addressed by the proposals outlined in the consultation.

7 Case study: Misleading “parasitic” packaging

Misleading “parasitic” packaging concerns traders introducing consumer products in packaging designs very similar to those of familiar branded products. While similarity of packaging makes it much more likely that consumers will purchase the product by mistake thinking it to be the brand, the more insidious problem is the implicit suggestion conveyed by the similar packaging that both products come from the same production line and are of the same quality and reputation when they are not. The effect is to boost the sales of the copy.



An example of a familiar brand and a parasitic copy (2006)

A selection of examples on the market in 2010 is available on our [website](#). Examples from previous years are also available, demonstrating how the problem persists.

8 The impact of such similar packaging has been researched extensively since the early 1990s, with evidence of consumers buying the copy in error and believing the copy to be made by the original brand manufacturer when it is not. Both recent and historical research evidence is available on our [website](#), demonstrating that the practice affects millions of UK consumers.

- 9 The designers of parasitic packaging are careful not to infringe registered intellectual property rights in their copies. Meanwhile the law of passing off is ineffective in tackling the problem, due to the need to show misrepresentation and the very high evidentiary threshold required to demonstrate consumer confusion. The practice however is covered by the Unfair Commercial Practices (UCP) Directive, enacted in the UK as the Consumer Protection from Unfair Trading Regulations 2008 (CPRs) (see Regulation 3, 5 and Schedule 1, Clause 13 – the list of banned practices), hence the relevance of this case study to this consultation.
- 10 During consultation on the CPRs, we were assured by BIS that the OFT and Trading Standards had a duty to enforce the Directive’s provisions. Indeed, Article 11 of the UCP Directive requires the UK to ensure there are “adequate and effective means to combat unfair commercial practices..”. In reality however neither the OFT or Trading Standards have taken action, despite being presented with the evidence to do so. Indeed, both have advised us that they either do not have the resources or that the problem does not meet their prioritisation principles. The OFT has furthermore added a further barrier to enforcement, requiring an unspecified “consumer detriment” hurdle to be overcome which is not specified or required in the legislation. The Government, under pressure from the Opposition, promised a review of the UCP Directive in 2010 but this has never happened.

11 *Implications*

This case study illustrates:

- How consumers are prevented from making informed choices when similar packaging designs dupe them into believing there to be a link with a familiar brand when none exists;
- how practices that breach consumer law affect legitimate business and their investments (whether in product quality, innovation and / or reputation);
- the gap between assurances from BIS on the enforcement regime and the reality of day-to-day enforcement;
- that, where no authorised body takes enforcement action against a particular type of practice, there is no overall responsibility, accountability or monitoring to ensure the UK’s enforcement obligations are met;
- how a practice persists where there is no enforcement action, to the detriment of consumers and legitimate companies;
- how a simple solution – providing companies affected by the misleading practice with private rights of action under the CPRs – would have resulted in stronger consumer regime, cost-free to Government. Such rights, which we strongly advocated, were explicitly rejected by BIS during its consultation on the CPRs.

- 12 Under the regime proposed in the consultation, we see no prospect of this situation being addressed, particularly in light of the reduction in resources available to Trading Standards from £214 million (2009) to £140-170 million (2014). This indicates a continued weakness in the UK’s consumer regime, with consumers being deliberately prevented from making informed decisions and companies investing in strong, differentiated reputations being disadvantaged.

13 *Remedies*

As the perpetrators of parasitic packaging are often reputable retailers with compliance departments rather than rogue traders, there is potential for both soft and strong enforcement action of existing consumer rules to have an impact:

- The practice may be deterred were Ministers to express explicit censure of the practice, following the example of the European Parliament in its report on a more efficient and fairer retail market (5th July 2011):

Considers that 'parasitic copying', ..., is an unacceptable practice that should be addressed without delay (paragraph 31)

- An investigation by the OFT or a test enforcement action by Trading Standards would clarify the scope and efficacy of the CPRs against packaging that misleads, potentially creating a future deterrent;
- Companies affected by copying should have the right to bring civil enforcement action themselves. A narrow right only in relation to misleading packaging of consumer products would suffice. In such cases the interests of consumers and affected companies are wholly aligned, the UK would meet its obligations under the UCP Directive, there would be higher levels of consumer protection and there would be no cost to the taxpayer.

- 14 The purpose of enforcement action would be to force companies that use similar packaging to re-package their goods in distinctive packaging that does not mislead consumers. This would empower consumers and preserve consumer choice, as well as ensure stronger competition.

14 CLOSING REMARKS

Parasitic copying continues unchecked in the UK, due primarily to the ineffectiveness of the country's IP laws (notably passing off) and the lack of enforcement of consumer protection legislation. This submission deals with the latter aspect.

- 15 The proposed consumer regime outlined in the consultation offers no prospect of more effective enforcement of the CPRs in relation to misleading packaging . This is required for the UK to comply with the UCP Directive and we urge BIS to take this opportunity to resolve the matter.

J A Noble

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