
SpeechlyBircham

CONFUSION, HEURISTICS & THE CONSUMER

ALEXANDER CARTER-SILK BA HONS. LAW/ECONOMICS (SOLICITOR)
JANE LEIGHTON PHD

1. CONSUMER BEHAVIOUR AND CONFUSION	1
Reliability and cost of evidence of confusion	1
The tragedy of the commons	2
2. INTRODUCTION TO HEURISTICS	3
Heuristics: Two-stage process	4
First stage processing	4
Second stage processing	4
Attribute association	5
Processing fluency	5
Symbols and ciphers	5
3. HISTORY: GOODWILL, TRADE MARK & CONFUSION	6
History of Trade Marks	6
History of goodwill.	7
History of Passing off	8
4. CONFUSION: GOODWILL AND EVIDENCE	12
Evidence: Judicial Perception	13
Shoppers don't read labels	13
5. HEURISTICS: APPLICATION TO CONFUSION	14
The Mountainview research	14
Reduced branding	14
Copycat branding	15
Making decisions at speed	15
Research methodology	16
6. ASSESSING CONFUSION	17
7. RECOGNITION: HEURISTIC V. RATIONAL	18
Judicial perception: Case examples	18
A "seabird" as an heuristic	19
Misrepresentation must be present	21
Detriment to the distinctive character	22
Passing off: the "Specsaver's case"	23
8. PROVING CONFUSION	28
9. POLICY ISSUES AND ECONOMICS	29
Government policy and consumers	29
10. CONCLUSION	32

1. CONSUMER BEHAVIOUR AND CONFUSION

This paper was borne out of a chance meeting and a combination of inquiring minds from quite different disciplines. We revisit the way in which confusion is caused by copycat packaging by applying a combination of disciplines; economics, law, history and behavioural psychology.

Confusion and goodwill are legal constructs devised by the Courts to provide a rational structure around which to establish rules as to what is and is not fair competition. Claimants have struggled to produce convincing evidence to show how or why consumers are confused or misled by copycat packaging. By understanding how copycat packaging misleads, or misrepresents itself, and by understanding the effect this has on decision-making, litigants should be able to construct evidence which is a great deal more compelling than conventional surveys, or witness evidence has proven to be.

How and why individuals or entire economies behave the way that they do when presented with particular choices has preoccupied scientists, economists and marketers for many years. The science explained in this paper provides an insight into how we can explain what effect a copycat has on a consumer's choice, and more particularly, how we can demonstrate this in evidence before a Court.

Reliability and cost of evidence of confusion

"It is not the severity of punishment which acts as a deterrent, but rather the certainty of that punishment".¹

For markets to work effectively and fairly, competitors must have clarity on the following issues;

- what is the wrong that will be restrained by law?
- what principles or rules must a brand owner or others apply to assess what is lawful or unlawful?
- what evidence must a party to proceedings bring forward to demonstrate either unlawfulness or to justify its conduct?

Brand owners and competing manufacturers need clarity and a test that they can apply to know that the investment that they are making is worthwhile. Third parties need to be clear and know where the boundary is to be drawn between lawful and infringing activities.

Lack of certainty is damaging to the cause of fair competition and investment. The copycat knows that he is taking a risk, but takes that risk because the financial rewards are substantial.

The Courts consistently reject witness testimony as not assisting them to explain what has happened at the point of purchase. Furthermore, whilst survey evidence has become part of the fabric of these cases, all too frequently it is dismissed, as not being probative of the issues the Judge must determine.

Litigant's lawyers have struggled to present compelling consistent evidence to demonstrate why or how copycats misrepresent themselves or confuse consumers. As this evidence is prepared at enormous expense, it is worthwhile considering what it is they are seeking to prove.

The historic formulation of confusion is an adequate basis for protecting the goodwill of manufacturers, but it must be applied in the context of a media rich environment in which the consumer has developed sophisticated mental filtering and media management techniques. Armed with the knowledge of how the consumer is actually making purchase decisions, copycats have adapted their techniques to map onto the consumer's mental processing and infiltrate the decision process at the sub-conscious, pre-rational stage.

¹. Sir Robert Peel on the formation of the police force

If we can explain how and why consumers are “confused” then perhaps we can go about producing evidence with a greater probative value that is more reliable and cost effective.

The tragedy of the commons

An individual consumer may obtain a short-term perceived benefit from the purchase of a counterfeit, knock-off or copycat. Suggestions that this “perceived benefit” to the consumer is economic justification for copycats as “fair competition” is fundamentally misconceived. There are two reasons for this;

First: brand owners, creative talent and engineers will be incentivised to invest time and capital if they perceive that they will receive adequate benefit from the output of that effort; investment is essential to economic prosperity. The development of goodwill in businesses and their products generates both revenue and capital value for the individual business and the economy as a whole.

Second: the suggestion that copycats benefit the consumer suffers from the dilemma demonstrated by the “tragedy of the commons”. That is to say each consumer acting independently and rationally in their self-interest acquires the copycat, and by doing so, ultimately depletes the investment in brands which provided the choice/benefit in the first place, even when it is clear that it is not in anyone’s long-term interest for this to happen.²

2. “The Tragedy of the Commons”, written by ecologist Garrett Hardin and first published in the journal Science in 1968

2. INTRODUCTION TO HEURISTICS

The science of behavioural economics lies at the interface between economics and psychology, but it has also played a significant part in competition law in the guise of game theory. The science explains how in order to cope with the vast quantities of information we all receive, we take **mental shortcuts**. These shortcuts are known as **heuristics**. This process allows us, and in this context shoppers, to solve problems and make judgements quickly and efficiently. These strategies shorten decision-making time and allow us to function without constantly stopping to think about the next course of action.

The first formal description of heuristics in the decision-making process suggested that consumers make decisions based on the expected outcomes of their decisions. The proponents of this “Utility Theory” assumed that consumers were rational agents, acting to maximise their individual well being, to arrive at their optimal solution (Bernoulli and elaborated upon by von Neumann and Morgenstern).

It soon became evident that this theory could not predict or explain many aspects of actual behaviour. Shoppers do not engage in a mental cost-benefit analysis to determine which choice to make. Instead of making decisions or judgements based on this model, humans regularly show biases and commit systematic errors (Tversky & Kahneman, 1974, 1983).

In the mid-1950s, Herbert Simon proposed an alternative model called “Satisficing”, where rather than evaluating all possible outcomes, people would evaluate a limited number of options until arriving at a solution that was “good enough”. While this theory improved on the Utility Theory, it still left significant room for improvement in predicting behaviour.

Simon’s major contribution in this area was to propose the concept of “Bounded Rationality”. This suggested that in decision-making, the rationality of individuals is limited by the information they have, the cognitive limitations of their minds, and the finite amount of time they have to make a decision.

The main reason that early theories of decision-making failed to explain accurately or predict behaviour is that they did not recognise humans’ limited cognitive abilities and failed to appreciate how these limitations would constrain decision-making.

A rich history of cognitive research now clearly documents our limited cognitive capabilities (e.g. Broadbent, 1957, Luck & Vecera 2002).

First, we do not take in most of the information that is around us. Each second we are exposed to an estimated 11 million pieces of information through all of the senses, yet humans are capable of processing only around 50 pieces of that information, letting most of the input go by unnoticed (Wilson, 2002).

Second, even information that makes it past this attention filter is unlikely to be stored for long due to working memory limitations; we can only retain a limited amount of information in working memory and that information is only stored for a limited amount of time (Miller, 1956).

Third, limited computational abilities mean that even information that has been taken in and stored will be subject to our limited processing capacity (e.g. Shiffrin, 1988; Barsalou, 1992). Only so much information can be processed at once before we become overloaded.

These limitations in our attention, memory and computational abilities have critical consequences for decision-making. The link between cognitive limitations and decision-making can be found in such disparate research programmes as Piaget’s theory of the cognitive development of children (e.g., Flavell, 1985), Johnson-Laird’s mental model theory (1983; Johnson-Laird et al., 1999) and Kahneman and Tversky’s heuristics-and-biases programme (e.g., Kahneman, Slovic & Tversky, 1982).

In a seminal article, Kahneman and Tversky (1979) demonstrated compelling examples of decision-making which disobeyed the laws of “rational thinking”. In order to account for these behavioural anomalies, the authors developed the “Prospect Theory”, for which they were awarded a Nobel Prize in 2002.

Kahneman and Tversky suggested that people rely on a limited number of heuristics, or mental shortcuts, which reduce the complex task of assessing probabilities and predicting values to simpler judgemental operations. Shah & Oppenheimer (2008) describe these mental shortcuts in terms of an effort-reduction framework where heuristics make decision-making easier and more efficient.

Heuristics: Two-stage process.

Kahneman and Frederic suggest that decision-making based on heuristics is a two-stage process.

First stage processing

The first process is satisfied when the consumer identifies or “notices” products. This first stage is entirely subconscious and was described in by Daniel Kahneman and Shane Frederick as “attribute substitution”. Kahneman and Frederick proposed that a target attribute (which is likely to involve a complex decision) is substituted with a (much simpler) heuristic attribute.³

“Information processing theories envisage problem solving as involving very selective search through problem spaces that are often immense. Selectivity based on rules of thumb or “heuristics”, tend to guide the search into promising regions, so that solutions will generally be found after search of only a tiny part of the total space. Satisficing criteria terminate search when satisfactory problem solutions have been found...

.....choice is not determined uniquely by the objective characteristics of the problem situation but depends also on the particular heuristic process that is used to reach the decision....⁴

Daniel Kahneman and Shane Frederick suggest that, faced with an overwhelming volume of information, individuals select the information upon which they choose to make their decision.

Individual consumers “filter out” all of the information they consider unnecessary to their decision and then make rational decisions within the bounds he or she has chosen. The scope of the boundary is specific to experience and preferences of that individual. These associations quickly identify the class of products they are searching for. This sets the boundary for the subsequent “rational decision”.

Each consumer may set their decision boundary differently; this may be set for a class of products or for an individual product. When they see a green top on a milk bottle, the heuristic may return “semi-skimmed”; red packaging on one chocolate bar and blue on another may produce a heuristic interpretation that the first is dark chocolate and the second is milk chocolate

Second stage processing

The second stage in the decision-making process requires a proportionate increase in objective evaluation of the array of products that have been selected and which fall within the boundary.

3. Kahneman and Frederick
“Representativeness Revisited”
Attribute Substitution in
Intuitive Judgement

4. Herbert A. Simon Rational
decision-making in business
organisations Nobel Memorial
Lecture 8th Dec 1978

This evaluation is shaped by the propensities, preferences and desires of the consumer at the point in time he or she makes the purchase decision.

Whilst this evaluation process may involve a greater degree of conscious consideration, it will not dispel the heuristics and is very unlikely to remedy any mistaken belief that the copycat is associated with the branded product, an association that occurs at the first stage in the decision-making process.

Each consumer may develop his or her own variation of these codes based on his or her preferences and learned perceptions. When a large enough sample of the target consumer base has acquired similar coding; we would conclude that a packaging get-up or mark has acquired distinctiveness, reputation and goodwill.

Attribute association

Established brands are associated with a number of attributes. For well-established brands, it is likely that there are lots of positive attributes. This associative network of attributes is activated whenever we come into contact with the brand. If a similar product shares enough characteristics (visual similarity, name etc.) with the established brand then it is possible that this network of associations is activated in response to the copycat. This mechanism enables the copycat to piggyback or take advantage of the goodwill of the established brand. In the associative learning literature, this phenomenon is called “stimulus generalisation”.

Processing fluency

Items that are processed quickly and easily tend to be liked more/chosen more. Well-established brands with lots of learned associations are ‘fluent’. By looking like an established brand, copycats make themselves more fluent, and therefore increase their perceived value and likelihood of being selected by the consumer.

Symbols and ciphers

The fact that packaging design influences a consumer is as self-evident as the fact that copycats exist to take advantage of the influence created by their host brand. Advertising generates associations with characteristics. Such qualities become reinforced or modified over time as the product becomes trusted. “Have A Break, Have A Kit Kat.”, or “The Ultimate Driving Machine” act as “cues” creating powerful associations with a particular source or quality of a product or service.

These cues are shortcuts, ciphers or the modern equivalent of the regimental flag to which armies rallied. They encapsulate all the emotions, loyalties, prejudices and biases used to make decisions. The cues are intertwined and symbiotic with the goodwill of the businesses creating them. Just like the soldiers who rallied to the regimental flag, brand symbols and cues provide a code of preference for the consumers who purchase them.

Some consumers may not like the taste of Kit Kat or might prefer Mercedes to BMW. The response to each of these messages may be negative, but the fact that they evoke a response, means that we must have individually learnt something about what these straplines mean in order to reach an instant conclusion. These responses are “learnt” and over time become truth in purchasers’ minds.

3. HISTORY: GOODWILL, TRADE MARK & CONFUSION

History of Trade Marks

The law of “marks made in trade” and the origins of passing off can be traced back to the 14th and 15th Century.

One of the earliest proprietary marks was the “Swan Mark” which was cut into the beak of a swan and registered with the King. By a statute in 1483, “no person except the king’s sons should have a swan mark unless he possessed a freehold of the clear yearly value of 5 marks”.

Throughout the 15th Century, the Guilds controlled much of the trade in everything from bread-making to pewter casting, wool trading, pottery, and of course, printing. It was not merely an entitlement for the guildsman to apply his “mark” to his goods; it was compulsory and punishable by significant fines or even imprisonment if he did not do so.

The Guilds enforced fair competition and even prevented the members from advertising. Poor or shoddy goods bearing the guildsman’s mark could bring heavy punishment down on the perpetrator. Fraudulently applying a guild mark was punishable by imprisonment. These obligations were mostly enforced by the Guilds themselves operating under charter and via their own Courts. These Guilds held monopolies over the production of goods and prevented goods from being sold outside of the boundaries set by the Guild.

Over time these Guild or “police” marks became valuable assets and could be inherited. The concept that the marks were, of themselves, valuable assets can be tracked through the evolution of the printer’s marks following the commercialisation of the Caxton press. Caxton published his first printed book in 1477, but did not actually use a printer’s mark until 1487.⁵

Reynold Woolfe, (the King’s printer) who worked in the mid 16th century, bequeathed his “sign” of the “Brazen Serpent” to his wife who continued the business and subsequently bequeathed the sign to her sons in 1574. The graphic embellishment of the “Brazen Serpent” was capable of being passed by will because it was quickly recognisable and carried with it all of the associations for quality, longevity, reliability and royal patronage of the proprietor.

Over time the Guild marks evolved into much more decorative and elaborate signs, hung from the trading establishment. The incorporeal right to trade under these “signs” was considered as property, which extended beyond their intrinsic value so as to be the subject of specific gifts in the wills of printers and dealt with in the same way as chattels.

Whilst it was the act of printing which created income, the signs were imbued with the qualities and “repute” of the businesses they represented. These signs were “shorthand” for all of the qualities and attributes of the printer’s “business” and the forerunner to modern branding.

Words are not sufficient in a modern economy. On the supermarket shelf the modern equivalent of the “Brazen Serpent” is the visual presentation of the packaging. As the research shows, speed of recognition is an essential component and metric for goodwill.

There are two objectives that lawmakers have addressed:

- **to ensure “fair” competition between competitors** and
- **to protect the consumer from being misled or deceived.**

5. A.W. Pollard “Some Notes on English Illustrated Books in Trans Bibliography Soc vo vi p29 and HR Plomer Short History of English Printing 2nd Edition p6

The consumer has always warranted greater protection than a business. The standards applied to these objectives may therefore be different.

These objectives can be tracked in English law from the origins of the “marks of the trade” and the genesis of passing off through the creation of the law of registered trade marks. The law of passing off and trade marks evolved from the tort of “deceit”, from which also evolved the concepts of “causing confusion” and “making misrepresentations directed at the consumer” as the tests for wrongdoing.

Society accepts that it is wrong to make a “substantial copy” of an artistic or literary work and that in design law it is wrong to profit from a design which is copied and which creates the same “overall impression” on the “informed user”. The law of England and Wales has not however, developed a law of “unfair” competition, although we do legislate for unfair trade practices between businesses and between a business and its consumer.

A modern trade mark is registrable if it is “capable of distinguishing the goods and services of one proprietor from those of another”. These signs create “shortcuts” by which the customer can quickly identify the vendor with whom he wishes to trade. Once registered it is assumed that the business which owns the mark has “goodwill”.

Goodwill evolved as an asset identified as being synonymous with a visual representation, namely the sign or “mark of the trade”. The wrong occasioned by passing off or trade mark infringement, therefore, is that the misuse of another business’ trade mark (registered or unregistered) damages the goodwill of the owner or wrongfully benefits the infringer.

The value of the goodwill of the business relies on recognition by consumers/customers of a complex mixture of messages and qualities that we refer to as a “brand”. If a third party presents his products in a way which uses the host’s mark or other visual cues to take the commercial benefit of that goodwill then the law will provide a remedy either by way of trade mark infringement or passing off.

In a modern economy the variety of ways in which a representation can be made are extensive; keywords in a website, a telephone number or, as we will discuss here, the “get-up” of a product’s packaging.

History of goodwill

If we are to propose a scientific approach to the collection of evidence to show damage to goodwill, we must understand what is meant by “goodwill”.

In 1901 Lord Macnaghten provided an enduring definition of goodwill as follows ⁶ :

“the benefit and advantage of the good name, reputation, and connection of a business. It is the attractive force which brings in custom.”

Lord Macnaghten additionally stated that goodwill is composed of a:

“variety of elements. It differs in its composition in different trades and in different businesses. One element may preponderate here and another element there.”

Passing off protects the goodwill of the business, not merely the symbols as such. A passing off action is only available to traders, as private individuals can have no goodwill in that capacity; the concept of trader is broad enough for people that make a living from their trade to claim passing off.

6. *Inland Revenue Commissioners v Muller and C Margarine (1901)* ACS 213, at 223

The need for recognition of a property right in goodwill and the evolution of the requirement for deceit into its modern expression as “misrepresentation” (regardless of the state of mind of the defendant) leads us to the modern day statement of the tort of passing off formulated by Lord Oliver in *Reckitt & Coleman v. Borden*⁷:

“First [the plaintiff] must establish a goodwill or reputation attached to the goods or services which he supplies in the mind of the purchasing public by association with identifying ‘get-up’ (whether it consists simply of a brand name or trade description or the individual features of labelling or packaging) under which his particular goods or services are offered to the public, such that the get-up is recognised by the public as distinctive specifically of the plaintiff’s goods or services.

Secondly, he must demonstrate a misrepresentation by the defendant to the public (whether or not intentional) leading or likely to lead the public to believe that goods or services offered by him are the goods or services of the plaintiff.....

Thirdly, he must demonstrate that he suffers or..... is likely to suffer damage by reason of the erroneous belief engendered by the defendant’s misrepresentation that the source of the defendant’s goods or services is the same as the source of those offered by the plaintiff”. (Emphasis added)

The notion that brands build associations between their symbols and signs and their products in the minds of consumers is consistent with the definition of goodwill expressed by Lord Macnaghten.

The classic jurisprudence for an action in passing off to succeed requires that the consumer is induced by a misrepresentation into acquiring a product from the competitor which he/she would not otherwise purchase. This misrepresentation relates to the appropriation by (in this case) a copycat of the goodwill, not merely a reproduction of visual representation or “cues” which are used by the host. The claimant must establish that they have goodwill associated in the mind of the consumer with a particular get-up (or in the USA, “trade dress”).

History of Passing off

The first recorded authority, credited as being the origin of the common law action of passing off, was probably brought by a consumer who asserted that he had been defrauded by buying cloth to which the “mark” of another supplier had been fraudulently applied.⁸

Subsequently in *Southern v How*, which was reported variously in Popham’s Reports in 1656, and later in Bridgman’s reports, the principle that one party should not be permitted to represent his goods as those of another was recognised wherein it was stated that a clothier

“...had gained great reputation for his making of his cloth, and by reason whereof he had great utterance to his great benefit and profit, and that he used to set his mark to the cloth, whereby it should be known to be his cloth, and another clothier perceiving it, used the same mark to his ill-made cloth on purpose to deceive him, it was resolved that an action did well lie.”⁹

In *Blanchard v Hill*¹⁰ it was in fact assumed by Lord Hardwicke that an action would lie between clothiers as “deceit”, irrespective as to whether *Southern v How* was an action by a purchaser or not.

The law of passing off has its origins in deceit. The claimant would need to show that the defendant used the claimant’s mark or a colourable imitation of it with the intention of deceiving the public. By the latter half of the 19th Century, however, it was clear that the Court of Chancery would intervene, even if this intention were not demonstrated in order to protect the claimant’s property.¹¹ However, the defendant’s intention remained relevant to the remedies available to the claimant, as it does today.

7. [1990] 1 All ER 873

8. The case reports are inconsistent as to whether this action was brought by a competitor or a consumer

9. Reported Popham’s cases 1618 *Southern v. How* Doderidge J

10. 1742 Kent commentaries 7th Edition p446

11. See *Edelstein v Edelstein* (1863) 1 De GJ & Sm 185 per Lord Westbury LC at 199 “at law the proper remedy is in an action in the case for deceit and proof of fraud on behalf of the defendant is one of the essence of the action, but this Court will act on the principle of protecting property alone and it is not necessary to prove fraud.

When the Judicature Acts 1873 heralded the combining of the Courts of Law and Equity, the equitable approach prevailed and fraud ceased to be a required element of passing off. The basis of the modern law of passing off is conveniently summarised by Lord Langdale MR in *Perry v. Truefitt*:¹²

“A man is not to sell his own goods under the pretence that they are the goods of another man; he cannot be permitted to practice such a deception, or to use the means which contribute to that end. He cannot therefore be allowed to use names, marks, letters, or other indicia, by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person” (emphasis added).

By 1842, therefore, the focus had entirely shifted from the defendant’s intentions to the effect that the defendant’s conduct had on consumer behaviour.

By 1925 debates continued as to whether the law should operate as a species of unfair competition or whether it was for the protection of the consumer.¹³

The action of passing off is old. Lord Halsbury L.C. in *Magnolia Metal Co. v. Tandem Smelting Syndicate Ltd* referring to the case quoted by Doderidge, pointed out:¹⁴

“Going back, therefore, as far as the reign of Elizabeth the form of action which this statement of claim adopts has undoubtedly been a form of action in which if the right of a man to have the reputation of selling that which is his manufacture as his manufacture, the right to prevent other people fraudulently stating that it is their manufacture when it is not — if that right is infringed there is a remedy. That has, as I have said, ever since the reign of Elizabeth, been established in our Courts as being a right of action upon which anybody may sue who has a ground for doing so”

The principles upon which actions for passing off were expounded at the turn of the century by Lord Parker in his well-known speech in *A. G. Spalding Bros. v. A. W. Gamage Ltd* are as follows:¹⁵

“...nobody has any right to represent his goods as the goods of somebody else. It is also sometimes stated in the proposition that nobody has the right to pass off his goods as the goods of somebody else.

I prefer the former statement, for, whatever doubts may be suggested in the earlier authorities, it has long been settled that actual passing off of the defendant’s goods for the plaintiff’s need not be proved as a condition precedent to relief in equity either by way of an injunction or of an inquiry as to profits or damages. Nor need the representation be made fraudulently. It is enough that it has in fact been made, whether fraudulently or otherwise, and that damages may probably ensue, though the complete innocence of the party making it may be a reason for limiting the account of profits to the period subsequent to the date at which he becomes aware of the true facts. The representation is in fact treated as the invasion of a right giving rise at any rate to nominal damages, the inquiry being granted at the plaintiff’s risk if he might probably have suffered more than nominal damages”

Lord Parker also identified the basis of the cause of action and the property right which was damaged. He said, at p. 450:

“The basis of a passing off action being a false representation by the defendant, it must be proved in each case as a fact that the false representation was made. It may, of course, have been made in express words, but cases of express misrepresentation of this sort are rare.”

The more common case is where the representation is implied in the use or imitation of a mark, trade name, or get-up with which the goods of another are associated in the minds of the consumer, or of a particular class of the public.

“In such cases the point to be decided is whether, having regard to all the circumstances of the case, the use by the defendant in connection with the goods of the mark, name, or get-up in question impliedly represents such goods to be the goods of the plaintiff or the goods of the plaintiff of a particular class or

12. (1842) 6 Beav 77

13. *The Historical Foundation of the Law relating to Trade-Marks* Frank Schecter AM JD 1925

14. (1900) 17 RPC 477

15. (1915) 84 L.J. Ch 449

quality, or, as it is sometimes put, whether the defendant's use of such mark, name, or get-up is calculated to deceive.

It would, however, be impossible to enumerate or classify all the possible ways in which a man may make the false representation relied on. There appears to be considerable diversity of opinion as to the nature of the right, the invasion of which is the subject of what are known as passing off actions.

The more general opinion appears to be that the right is a right of property. This view naturally demands an answer to the question — property in what? Some authorities say, property in the mark, name, or get-up improperly used by the defendant. Others say property in the business or goodwill likely to be injured by the misrepresentation.”

Lord Herschell in *Reddaway v. Banham* expressly dissented from the former view, expounded by Lord Parker, saying:¹⁶

“...if the right invaded is a right of property at all, there are, I think, strong reasons for preferring the latter view. In the first place, cases of misrepresentation by the use of a mark, name, or get-up do not exhaust all possible cases of misrepresentation. If A says falsely, ‘These goods which I am selling are B’s goods,’ there is no mark, name, or get-up infringed unless it be B’s name, and if he falsely says, ‘These are B’s goods of a particular quality,’ where the goods are in fact B’s goods, there is no name that is infringed at all.”

a) Implied misrepresentation

In 1915 Lord Parker in *Spalding v Gamage* reviewed the law of passing off, as it then stood, and restated the principles of what underpins this flexible tort;

“...the basis of a passing-off action [is] a false representation by the defendant, it must be proved in each case as a fact that the false representation was made. It may, of course, have been made in express words, but cases of express misrepresentation of this sort are rare. **The more common case is where the representation is implied in the use of imitation of a mark, trade name, or get-up with which the goods of another are associated in the minds of the consumer.** In such cases the point to be decided is whether, having regard to all the circumstances of the case, the use by the defendant in connection with the goods of the mark name or get-up in question impliedly represents such goods to be the goods of the plaintiff, or the goods of the plaintiff of a particular class or quality, or, as it is sometimes put, whether the defendant's use of the mark, name or get-up is calculated to deceive. It would, however, be impossible to enumerate or classify all the possible ways in which a man may make the false representation relied on....”
(Emphasis added)

In 1980 Lord Diplock set out **five characteristics**, which must be present in order to create a valid cause of action for passing off:¹⁷

- (1) misrepresentation
- (2) made by a trader in the course of trade,
- (3) to prospective customers of his ultimate consumers of goods or services supplied by him,
- (4) which is calculated to injure the business or goodwill of another trader
(in the sense that it is a reasonably foreseeable consequence) and
- (5) which causes actual damage to a business or goodwill of the trader by whom the action is brought or
(in a *quia timet* action) will probably do so.

¹⁶. (1896) AC 199

¹⁷. *Warnick (Erven) Besloten Veenotschapp v. Townsend & Son (Hull)* (the *advocaat* case)

b) The minds of the consumer

These authorities establish that misrepresentation operates on the “minds of the consumer”.

The copycat infiltrates the bounding decision by free riding on the recognition of the visual cues established by a proprietor as “associated” with the host brand. The misrepresentation is made when the consumer accepts the copycat without rational consideration. As we have seen a misrepresentation can be express or implied.

Pausing for a moment, we can see that the judiciary are, and have been, alive to the fact that there is a mechanism at work here, namely the way in which the misrepresentation operates on the “minds of the consumer”. This represents serious evidential challenges; how does one explain or evidence how a representation has operated on the “minds of the consumer”?

The presentation of evidence throughout the history of passing off has relied upon surveying large numbers of consumers and calling witnesses to explain how their purchasing decision was altered by the presence of the copycat. At its highest, the claimant would like a witness to say that he got it wrong and purchased the wrong product, that is to say they were misled or confused.

This clarity of evidence is usually difficult to obtain because the proficient copycat will deploy a combination of heuristic cues to induce the desired association when the decision to purchase is taken at speed, but which can easily be differentiated when considered objectively. Taken at speed, the consumer is frequently unaware as to how they have been affected. The case law demonstrates that consumers have great difficulty explaining (after the event) how this occurred.

4. CONFUSION: GOODWILL AND EVIDENCE

Whether a copycat misrepresents itself as something else or takes advantage of its host's goodwill is a question of fact and therefore evidence. The challenge for a claimant's counsel is how to give evidence of a mental process to a Court, which is inherently sceptical of anything it cannot see or hear.

Lawyers are often asked to look at packaging and advise whether the presentation is "too close" to an original product. This expression underpins the concern that the visual comparison is such that there is likely wrongful appropriation of the goodwill of the host brand.

The test applied by the Courts to determine whether there has been a wrongful appropriation of goodwill is whether the copycat has been presented in such a way as to have caused confusion.

The concepts of causing confusion and misrepresentation evolved from principles of deceit which induced the consumer into being misled, confused or tricked. The Courts must decide whether the symbol or feature replicated by the alleged copycat can properly be claimed by the original brand to be associated with its goodwill in the minds of a significant body of consumers. If the original brand cannot prove this claim then the replication of the particular feature will be fair competition.

Lawyers tend to make the assessment as to whether the copycat is "too close" by matching this to their own experiences, preferences and biases and then rationalising the conclusion. When the Courts consider this question they are frequently presented with many witnesses, all with their own particular perception as to how the copycat packaging affected their individual decisions. These are frequently confused and inconsistent, and often result in Judges relying on their own perceptions.

Attempting rationalisation through the eyes of the hypothetical "informed consumer" of a mental process, undertaken in a media rich environment, at speed, and dominated by sub-conscious associations, is always going to be unsatisfactory. Levelling the playing field requires the Judge to be empowered by having evidence presented that enables the cause and effect to be looked at through the spectacles of the consumer taken in the actual context of the purchase at the appropriate speed and with all of the influences and distractions that involves.

The environment and the consumer's mental processes are used to great advantage by a copycat, safe in the knowledge that evidence of the misrepresentation is likely to be a two-dimensional and sterile process. As the Courts themselves have recorded, witnesses who are asked (however carefully) to rationalise the effect on their mind of a copycat, after the event, will see differences between the host brand and the copycat. Objective scrutiny will reveal disparities the consumer simply does not see when in the "real" shopping environment.

Evidence: Judicial perception

When consumers make purchase decisions at speed, the way in which they can be misled, influenced or tricked cannot always be replicated in the Courtroom. Case law shows that Judges frequently modify or disregard unsatisfactory evidence and substitute their own perceptions.

Case law shows that the Courts have regularly intuitively identified the components of behavioural heuristics without having the tools or scientific rigour to test or rationalise the behaviour being considered. If this can be formulated into a structured process, then perhaps judgements will be more predictable.

Shoppers don't read labels

By accepting that “a consumer does not read labels” the House of Lords acknowledged that a shopper who was asked to make a careful comparison in the Courtroom would easily see that the two products came from a separate source, but that the purchaser did not make such a comparison in the real life context.¹⁸

It seems therefore that the poor consumer who was forever immortalised as the “moron in a hurry” is to be forgiven¹⁹. The Court must take the consumer as he or she is found, which means for legal purposes it must be provided with evidence which goes beyond random witnesses and surveys and actually explains empirically how the particular on-pack presentation of the host brand and the copycat are interacting and influencing the purchase decision. If we accept that consumers behave in an apparently irrational way and this is “normal”, we can explain the mechanisms at play and adapt the evidence presented to the Court.

This is particularly relevant if the marketing and advertising community (especially the copycats) is also adapting presentation of packaging to take advantage of the consumer's reliance on heuristic “shortcuts”.

18. *Warnink v Townend* (1980) per Diplock

19. *Morning Star v. Express Newspaper* (1979) Per Foster

5. HEURISTICS: APPLICATION TO CONFUSION

If we are to test for “confusion” in the modern consumer environment we need to have a model which fits the environment in which the decision takes place, and to construct the evidence which replicates that environment and responds to the mental process being relied upon by marketing professions (positively) and copycats (negatively).

Copycat packaging secures essential “attention” from the consumer by misappropriating the “heuristic” cues from the host brand. Consumers learn through use that Champagne comes from a specific region or that Swiss chocolate has known qualities or even that vodka has a particular ingredient. Each of these “associations” is created in the mind of the consumer and the appropriation of key words or characteristics facilitates a decision that requires little rational effort.

Lawyers need to explain how it is that a consumer who saw a can of Sainsbury’s Cola may not be able to explain that they know it is not Coca-Cola (the target choice) and yet would still pick up the copycat. How does this fit with concepts of confusion?

Established brands are associated with a number of attributes. For well-known brands it is likely that there are multiple positive attributes. The associative network of attributes is activated when we come into contact with the brand. If a copycat product shares enough characteristics (visual similarity, name etc.) with the established brand then it is possible that this network of associations is activated in response to the copycat. This results in the copycat piggybacking on the established brand’s associations. In the associative learning literature, this phenomenon is called stimulus generation.

The Mountainview research

The relevant research undertaken by Mountainview²⁰ as part of this project focussed on

- 1. the impact of reduced branding;**
- 2. the impact of copycat branding;**

We expect to see a correlation between a reduced speed of recognition associated with the existence of similar packaging that obscures or muddles the signals being received by the consumer.

Reduced branding

The research showed that reducing the branding on packaging can influence consumer behaviour, by reducing attention to and recognition of certain brands. Strong evidence from the recognition data suggests that reducing the size of a logo on packaging impairs the consumer’s ability to recognise and find a brand that they are looking for. This effect was particularly pronounced when the changes to the logo size are large.

20. www.britishbrandsgroup.org.uk

Copycat branding

In relation to the impact of copycat branding the research found:

“Strong evidence from the recognition data suggested that copycat branding can influence consumer choice; the results demonstrated the impact of perceptually similar (copycat) brands on an established brand. In cases where an established brand was displayed alongside a copycat supermarket brand, participants were slower and more inaccurate in identifying the established brand. This was compared to cases where the established brand was displayed alongside a non-supermarket brand. The robust results suggest that the presence of the copycat brand may distract or confuse consumers, impairing their ability to find the brand that they are looking for, and, in some cases, causing them to choose the wrong brand.

Making decisions at speed

The Mountainview research demonstrates the effect on the consumer’s ability to recognise a target brand when a copycat was present. The tests included providing the subjects with high-resolution images in a number of categories. Each category included the key brand, a copycat and a supermarket brand that was not a copycat together with other “filler brands”. The project tested whether, and if so how quickly and accurately, the subjects could identify the target brands. The tests showed that:

“Participants were slower to identify the key brands when a copycat brand was present than in either of the other two conditions.”²¹

The research also reported that:

“There is no difference in brand recognition when a non-copy supermarket brand is present. This suggests that the effect is driven by the perceptual similarity of the copycat to the established brand.”

The conclusion, which correlates with hypotheses derived from behavioural science, is that the perceptual connection and recognition of the established brand is weakened by the existence of the copycat.

Using these techniques and measuring the time taken to recognise the target brand and the number of errors in doing so could well provide empirical evidence to a Court of the effect of copycats on decision-making. Taken at its lowest point these techniques can provide corroboration for what is otherwise an intuitive reasoning process.

The time taken to find a target brand in a store presentation of competing brands compared to the time taken to do so when a copycat is present is, we suggest, a useful metric to measure recognition and blurring.

The report concludes that:

“Further robust evidence suggests that copycat branding has a strong detrimental effect on the consumer’s ability to find and choose the brands that they are looking for. Copycat brands slow down brand recognition and can cause consumers to make errors, mistakenly selecting the copycat brand in place of the brand that they are looking for. It is possible that these effects are indicative of confusion between perceptually similar brands.”

21. The two conditions were non copycat supermarket and no supermarket brand present.

Research methodology

This research was undertaken under controlled conditions and used response latency techniques. Consumers are asked to make a physical response as quickly as possible. The test therefore constitutes a measure of automatic behaviour that is not likely to be subject to conscious control.

This methodology allowed the researchers to obtain statistically relevant data and the time it took for the subjects to identify a brand. This is a measure of “automatic behaviour”.

The lab environment strips away rationalisation and measures empirically how long it takes for the consumer to identify and recognise a specific brand.

The research chose a number of brands and their “copycat” equivalents, and measured the time taken to recognise the original brand and also the accuracy of identification. With both “error rate” and “response rate” the researchers concluded that:

“...the results from this study provide strong evidence that copycat branding, that is brands that are perceptually similar to other established brands, influences recognition. They can cause consumers to make errors, mistakenly selecting the copycat brand in place of the established brand. Furthermore they slow down recognition of key brands.”

The report further suggests:

“It is possible that this slowing of recognition is indicative of confusion between the perceptually similar brands. What these results do indicate is that the presence of a copycat brand has a detrimental effect on the brand that it has copied.”

The Courts do recognise that when a witness is offered the opportunity to compare products objectively the differences become obvious. There is certainly an intuitive acceptance by the Courts that if the copycat is an adequate emulation of the established brand then the “learnt” association between the features established by the original brand may cause the consumer to accept the copycat as an acceptable alternative, assume some association or simply become confused. All too often judges substitute their own perception for unsatisfactory witness evidence.

For the claimant there is an inherent uncertainty because the evidence to prove or disprove a claim does not lie in the hands of the parties, but in interpreting what was in the mind of specific consumers who can be persuaded to give evidence as to what they were thinking at the point of the purchase decision. As the narratives in the cases show, consumers frequently exhibit minimal knowledge about how they were influenced into making a purchase decision or indeed how or why they chose a copycat.

6. ASSESSING CONFUSION

The question for the Court (as explored in the Mountainview research) is whether the emulation of another brand's get-up is sufficient to constitute a misrepresentation which has led, or is likely to lead, to appropriation of the goodwill of the host brand or lead the consumer to believe that the defendant's goods are the claimant's goods or at least associated with them.

Whilst parties frequently seek to rely upon survey evidence, however much effort has gone into these, the Courts regularly dismiss them as having little evidential value. Frequently, this is by reason of the survey subject's response being "coloured" or "tainted" by the questions posed to them and their reaction being considered to be un-representative of a purchase made in a real-life context.

A full analysis of survey evidence is beyond the scope of this paper. It is clear however, that even when the Courts have approved the form of the question, little valuable evidence as to how consumers perceive the copycat is ever obtained. We suggest that this distrust is a proxy for the Court's intuition that what is being reported does not correlate with the actual decision-making environment. Indeed, only when a witness actually attests that he/she picked up the wrong product does this evidence appear to carry any significant weight.

The true impact of a copycat on the shopper's purchase decision cannot be reliably assessed by asking the consumer to consider the effect of the two product presentations in an environment which is devoid of the pressures, influences or distractions present in the real-life 'shopping' situation.

As one might expect, the established case law suggests that the greater the degree of resemblance between the copycat and its branded counterpart, the more likely it is to cause confusion. However, no rules or meaningful guidance has been provided as to what will be considered to be too similar. Indeed, one Judge said "what degree of resemblance is necessary...is from the nature of things incapable of definition a priori".²²

22. *Seixo v Provenzano* (1865)
LR 1 Ch 192

7. RECOGNITION: HEURISTIC V. RATIONAL

If goodwill is “the thing which brings in business”, then the Mountainview research shows that visual recognition and goodwill are inextricably intertwined. The information, prejudices, likes and dislikes, preconceptions and emotional responses that consumers have stored in their memories about brands are crucial in guiding purchase decisions. What the Mountainview work shows is that in a crowded, media-rich world the sub-conscious dominates the conscious; these are “heuristic responses”.

In order to evaluate this recognition, Mountainview employed objective tests designed to assess the subject’s ability to recognise particular products and brand attributes from an array of visual material and competing products. These tests reveal the subconscious associations a consumer has with a brand, by measuring the ‘raw’ responses elicited by a brand.

Asking a consumer why he or she made a brand choice may be like asking a tightrope walker how he stays on the wire or a racing driver how he can drive more quickly than another driver. When one appreciates the influence that media and packaging have on the consumer, it becomes apparent that the decision to purchase and the recognition of specific symbols and images are “learnt”, buried in the sub-conscious and subsequently unconsciously retrieved at the point of decision-making. If that is the case then one must also accept that, if a third party misuses those symbols in packaging presentation or “get-up” to deliver the same or equivalent signals to the consumer, then one can assume that the consumer will respond to those heuristic signals or “triggers” in an entirely predictable way.

From a marketing perspective it is clearly valuable to be able to measure the effectiveness of specific cues, components or characteristics. From a copycat’s perspective, it is equally valuable to know which component or characteristic he can appropriate to free-ride on the investment made by the brand owner.

What differs between modern (particularly retail) purchases and those made when the law of trade marks and passing off were developed is the volume and complexity of media input which a consumer receives, the self-service nature of the sales environment and the extent to which decision-making has moved from rational and reasoned to sub-conscious and responsive.

The empirical evidence provided by Mountainview demonstrates that the ability to distinguish origin does not dilute the halo effect thrown around the copycat by emulation of the essential visual signals that trigger the same emotional subconscious and heuristic response.

Judicial perception: Case examples

A review of the various judicial decisions demonstrates that each of the phenomena we describe has had some resonance in the words of the witnesses or the Judge. We take two examples to demonstrate that if evidence on heuristics were to be presented either in support or defence to a claim for passing off or trade mark infringement, it would likely resonate with what Judges already intuitively believe to be the case.

A “seabird” as an heuristic



The Penguin/Puffin case²³ is informative because the heuristic symbols were not copies. Each brought to mind the same concept and triggered the heuristic response.

The case, brought in passing off, asserted that Asda were passing off Puffin biscuits as having a connection with the ubiquitous brand leader manufactured by United Biscuits, namely the Penguin.

When comparing the United Biscuits’ “Penguin” packaging with the Asda copycat “Puffin” packaging, Robert Walker J acknowledged that the packages were “far from similar”.

We have chosen this as a study because the Judge’s own perception was that he could not have been confused and that the Puffin did not wrongfully appropriate the goodwill belonging to United Biscuit’s Penguin. If the matter had stopped there, the Court would most likely have decided that there was no passing off. This would have been based on a detached, objective or “rational” evaluation.

However, the witness evidence showed that consumers were in fact confused between the two products. The judgement shows how uncertain the witnesses were and how they had difficulty explaining objectively how they made their purchase decision and what the effect of the copycat was. The witnesses’ evidence was that, notwithstanding clear differences, consumers purchased the ‘Puffin’ chocolate biscuit “thinking it to be a ‘Penguin’ biscuit”.

The claimant was fortunate to find witnesses who were willing to give evidence that they picked up the wrong product (the high watermark of passing off). In cases where the witnesses are ambivalent, the Judge is frequently left to substitute his own personal perception (albeit assuming the mantle of looking through the spectacles of the “informed consumer”).

Looking at the two packs, one can understand the Court’s reluctance to follow the evidence. Had the comparison been re-tested in the virtual retail environment, it may have been possible to demonstrate the degree to which a potential consumer had to hunt a virtual display for the Penguin biscuit, the time taken to make the selection and the number of errors in selections that were made. The evidence so provided may not have been conclusive of itself but it would at least have demonstrated the “First stage” process and enabled the Judge to have greater confidence in relying on the witnesses (or substituting his alternative perception).

In the end, the Judge accepted that the association between the “Puffin” and “Penguin” bars created in the consumer’s mind was between a seabird and a chocolate biscuit. These heuristics are not necessarily visual comparisons. The Court needs to discern what the attribute is which creates the heuristic response. In this case the “attribute” is a seabird, it may not matter whether it is the same species of bird or depicted in the same pose or even using the same colours. The question is, does it operate “heuristically”?

As we have established, heuristics are shortcuts, developed to cope with fast decision-making when the consumer is being flooded with information and images. The Courts have expressly accepted this crowded media environment as being a relevant consideration by acknowledging that the time frame for the purchase decision is short. Expert evidence has accepted this to be the case, namely; that “a typical family

23. Insert reference

shop among 25,000 different items ranged in a supermarket takes 40 minutes. Consumers tend to scan and make rapid decisions”.

The Court has to decide for itself whether any particular aspects of a product will cause relevant confusion. It has however been pointed out that:

“what the Court is trying to do is decide how members of the public will react to the defendant’s use of marks or get-up in the real world...In many cases the circumstances in which the marks or get-up are put before the public and the way in which it reacts to them will be far removed from what happens in Court....²⁴

The Courts have therefore explicitly recognised that time, and the environment in which a purchase decision is made, is relevant to evaluating the nature of confusion (irrespective as to when doing so it is understood why the consumer was confused). Indeed, the finding that the consumer does not pay attention or makes mistakes, is entirely consistent.

Walker J, in the Penguin and Puffin case, clearly struggled with the evidence of confusion from witnesses. He dismissed the survey evidence as being of no assistance. Revisiting the evidence of confusion, with the benefit of the Mountainview research and an understanding of the science, is informative.

The learned judge records the evidence of one witness (Miss Hughes), who spoke of an “unconscious association,” but also said she had made a “wild lucky guess”. A further witness, Mr Stewart, a retired steel-mill worker, explained:

“Several reasons, I suppose but I was not aware, and am still not aware, of any other chocolate biscuits that I normally see, even if I do not buy them, that are the name of a bird. I think of an immediate sort of connotations between Penguin and Puffin because they were both birds and I did not know any other chocolate biscuits called after birds”

In cross-examination the Head of Marketing for Asda gave evidence of the importance of “cues” and indeed gave evidence that the Puffin was the dominant cue, the principal attribute being that it was a “seabird”.

The Judge drew three conclusions from the evidence:

“First, although occasional mistakes may be made for unaccountable reasons (emphasis added) it is unlikely that a significant proportion of shoppers would fail to distinguish between Penguins and Puffins if they are both next to each other.

Second, a substantial number of shoppers would suppose or “assume” or guess at an association (in the form of common manufacture.

Third, the great majority of shoppers would not know who manufactures Penguins.

And finally what they are concerned with is taste and quality.”

A significant component of the decision was the Judge’s own impression. The existence of an explanation of the “unaccountable” reason might have made the task easier.

United Biscuits had established the “seabird” (the Penguin) in the minds of consumers, through advertising and sales over time, as an heuristic trigger. The purchase decision made at speed relied upon that trigger and the consumer did not need to go any further. The consumer did not need to go past the first stage from the sub-conscious to the rational.

The Mountainview research shows that the first response to pack design is not rational but heuristic. Reputation and recognition equate to implanted perceptions, biases and even misconceptions for features of the product. The decision to purchase is influenced by “triggered heuristic responses”, and if a competitor uses the same triggers or emulates those triggers then it is entirely foreseeable that three things will happen:

24. Laddie J *Kimberly-Clark Lt v. Fort Sterling Limited* [1977] FSR 877

the consumer will, without conscious or rational consideration, accept the copycat as a legitimate choice without questioning the source or quality;

the strength of the link between the consumer and the original product will be weakened; and

there is a greater possibility that the consumer's heuristic preference can be broken and that the copycat can force a (second stage) rational comparison to "switch" based on some other criteria (often price).

Misrepresentation must be present

The application of the science of heuristics will not obviate the need to demonstrate that there has been a misrepresentation.

Heuristics explain the mechanism by which consumers are misled into making decisions they would not otherwise have made. The policy of the UK Court is, however, clear that there is no appetite on the part of the judiciary for extending the law of passing off to a more nebulous concept of unfair competition, Lord Justice Jacob:

"At the heart of passing off lies deception or its likelihood, deception of the ultimate consumer in particular. Over the years passing off has developed from the classic case of the defendant selling his goods as and for those of the plaintiff to cover other kinds of deception, e.g. that the defendant's goods are the same as those of the plaintiff when they are not, e.g. *Combe International Ltd v. Scholl (UK) Ltd* [1980] R.P.C. 1; or that the defendant's goods are the same as goods sold by a class of persons of which the plaintiff is a member when they are not, e.g. *Warnink (Erven) Besloten Vennootschap v. J. Townsend Sons Ltd* [1980] R.P.C. 29. Never has the tort shown even a slight tendency to stray beyond cases of deception. Were it to do so it would enter the field of honest competition, declared unlawful for some reason other than deceptiveness. Why there should be any such reason I cannot imagine. It would serve only to stifle competition."²⁵

Lord Justice Jacob further commented that:

"An established trader would like the law to hold off all his competitors – and as far as possible. He would want to prevent all copying of his products and for as long as possible, preferably indefinitely. He would want as wide a gap as possible between his trade marks and those of others. He would oppose any form of comparative advertising. A newcomer will want to be able to copy – and to improve. He will want to be able fairly to advertise comparatively. And the consumer will want the best deal he can get. He would oppose anything deceptive, but probably nothing else."

The policy is therefore that; it is not enough to establish similarity of "get-up", one must establish misrepresentation. The usual way of doing this is to call the witnesses who have purchased the product, or to conduct surveys of the public to evaluate whether there is deception. Ultimately, it is unlikely that a Court will be persuaded that there has been any deception or confusion without hearing directly from witnesses.

The obvious deficiency in this logic is that the Courts have repeatedly recognised that witnesses have no difficulty, after the event, distinguishing between a copycat and the host product, but often fail to explain why they did not do so at the point of purchase. It also seems to raise surveys to a level of probative value going well beyond what the judgements suggest the Courts are willing to accept.

The question as to whether there has indeed been a misrepresentation is for the Court and the impression of the Judge cannot be discounted.

25. *Hodgkinson & Corby v Ward Mobility Services Ltd* [1994] 1 WLR

“Ultimately, the question is one for the Court, not for the witnesses. It follows that if the Judge’s own opinion is that the case is marginal, one where he cannot be sure whether there is a likelihood of sufficient deception, the case will fail in the absence of enough evidence of the likelihood of deception.

But if that opinion of the Judge is supplemented by such evidence then it will succeed. And even if one’s own opinion is that deception is unlikely though possible, convincing evidence, of deception will carry the day. The Jif lemon case²⁶ is a recent example where overwhelming evidence of deception had that effect. It was certainly my experience in practice that my own view as to the likelihood of deception was not always reliable. As I grew more experienced, I said more and more “it depends on the evidence.”²⁷

If the claimant can demonstrate that a consumer “has learnt” or acquired the heuristic trigger sufficient to render recognition automatically (first stage processing), rather than simply asking a witness whether he or she does in fact recognise the product, then applying the techniques used by Mountainview to test for recognition and the effects of blurring of that recognition may advance the cause of identifying how copycats appropriate or damage the goodwill of the host.

Detriment to the distinctive character

The Court of Justice in the case of *L’Oréal v Bellure NV* (2009) C-487/07 ECR I-5185 at [39-42] elaborated upon three types of injury in the case of “taking unfair advantage of a trade mark with a reputation”:

C-487/07 *L’Oréal v Bellure NV* [2009] ECR I-5185 at [39]-[42]: “39. As regards detriment to the distinctive character of the mark, also referred to as ‘dilution’, ‘whittling away’ or ‘blurring’, such detriment is caused when that mark’s ability to identify the goods or services for which it is registered is weakened, since use of an identical or similar sign by a third party leads to dispersion of the identity and hold upon the public mind of the earlier mark. That is particularly the case when the mark, which at one time aroused immediate association with the goods or services for which it is registered, is no longer capable of doing so (see, to that effect, *Intel Corporation*, para.29). As regards detriment to the repute of the mark, also referred to as ‘tarnishment’ or ‘degradation’, such detriment is caused when the goods or services for which the identical or similar sign is used by the third party may be perceived by the public in such a way that the trade mark’s power of attraction is reduced. The likelihood of such detriment may arise in particular from the fact that the goods or services offered by the third party possess a characteristic or a quality which is liable to have a negative impact on the image of the mark.

41. As regards the concept of ‘taking unfair advantage of the distinctive character or the repute of the trade mark’, also referred to as ‘parasitism’ or ‘free-riding’, that concept relates not to the detriment caused to the mark but to the advantage taken by the third party as a result of the use of the identical or similar sign. It covers, in particular, cases where, by reason of a transfer of the image of the mark or of the characteristics which it projects to the goods identified by the identical or similar sign, there is clear exploitation on the coat-tails of the mark with a reputation.

26. *Reckitt & Coleman Products Ltd v Borden Inc* [1990] RPC 341

27. Council Regulation (EC) No 40/94 of December 1993 on Community Trade Marks

Passing off: the ‘Specsavers case’

Over time the symbols, graphics and product presentation secure ‘reputation’ and arouse immediate association. There is, therefore, judicial acknowledgement that speed of recognition is closely correlated with reputation and goodwill.

It creates in the mind of the consumer a series of heuristic memories, associations, prejudices and preferences ‘associated’, or triggered by perception of a particular signal. In the case of the Penguin and the Puffin, it was a seabird.

For the purpose of this paper we will focus on article 9(1)(c) of the European Directive. The correlation is that “reputation” and goodwill are closely aligned if not substitute terms. One can suggest that there is, or should be, very little difference between a “misrepresentation” in passing off and “taking unfair advantage” for the purposes of Article 9(1)(c). Article 9 states:

“Rights conferred by a Community trade mark

1. A Community trade mark shall confer on the proprietor exclusive rights therein. The proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade:

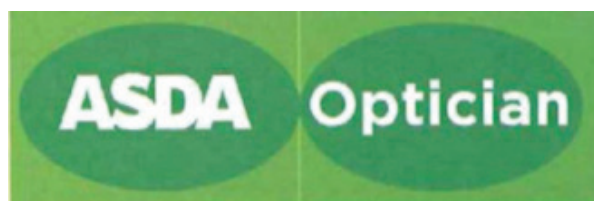
(a) any sign which is identical with the Community trade mark in relation to goods or services which are identical with those for which the Community trade mark is registered;

(b) any sign where, because of its identity with, or similarity to, the Community trade mark and the identity or similarity of the goods or services covered by the Community trade mark and the sign, there exists a likelihood of confusion on the part of the public; the likelihood of confusion includes the likelihood of association between the sign and the trade mark;

(c) any sign which is identical with, or similar to, the Community trade mark in relation to goods or services which are not similar to those for which the Community trade mark is registered, where the latter has a reputation in the Community **and where use of that sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the Community trade mark.**”

This “Specsavers” case has particular interest for our story because two different Courts decided it, in opposite directions, on the same evidence. As an appeal we can, of course, justify this difference by suggesting that the learned Judge in the Court below got it wrong. This would be an over-simplification. The two Courts were looking at the same images and arrived at opposite conclusions based on their own “perceptions” as to how the informed user would have reacted.

It is necessary to point out that a number of questions have been referred to the European Court of Justice and therefore one should not consider what follows to be an analysis of the trade mark law but rather an examination of the way in which the Court arrived at its conclusions on “confusion”.





The evidence given by witnesses for Asda showed that Asda deliberately wished to create an association between its offering and the offering made by Specsavers.

The in-house legal team advised the designers what they considered “safe” and what was “living dangerously”. The point to note from this is that the lawyers were not working from empirical evidence as to how the visual presentation did influence consumers, but were instead working from their own perception as to whether the visual impression was “too close”.

The objective of the association by Asda was clearly to benefit from the goodwill created by Specsavers, and to use this to direct attention to Asda’s value proposition. When reviewing the evidence of the buying manager as to how the campaign was put together, Mr Justice Mann recounted the following:

“The top two (designs) were overlapping ovals with the Asda rubric within them. The “Consequences” of using these were that they were **“Highly recognisable” and “Aggressive”**. **Mr Langrish-Dixon accepted that this meant highly recognisable as Specsavers, but he also said that it was highly recognisable as Asda.** The third is a different lens-shaped logo. This is said to be “not as easily recognised”. Mr Langrish-Dixon’s oral evidence as to what this meant was confused. He did not really answer the question “Not as easily recognisable as what?”. He ended up by saying that the first two were more like eyes, which is what Asda wanted, and the bottom one was more like spectacles, which would put some people off. I think that in this passage of his evidence he was trying to avoid saying that the third logo was not so easily recognised as Specsavers because, despite the earlier evidence he had given about the top two, he did not want to reinforce the link to Specsavers too much in his evidence. This particular presentation slide is seeking to start with the Specsavers logo and then to represent steps away from it, and **“recognised” means having a resonance with Specsavers**. The consequence of one not being “as easily recognised” was not a desirable consequence to Mr Langrish-Dixon. This ties in with his evidence that what they were after was a “parody” of Specsavers. He referred to a parody (for these purposes) as being:

“something that in the customers’ **mind they would then compare to Specsavers** so that they would then look to see whether Asda was, in fact, better value than Specsavers ... This was an example of a parody ... [it] was a step too far ... So, again, these were just thoughts and ideas that we were sharing internally to help us to get the correct logo ultimately”.

This account correlates tightly with our hypothesis of a two-stage process. Asda knew that they could force the consumer to consider the Asda offer without any investment in marketing or advertising merely by confusing or muddling the first stage heuristics. Asda effectively admitted that their need to use the competitor’s logo and alter it was **to get the Asda proposition noticed**. The recognition of the Specsavers’ logos was a requisite part of their goodwill, the essence being that the consumer did not need to “read the label” as indeed the House of Lords has suggested.

With the benefit of the behavioural science, we can say with some force that the defence often played out by copycats that the “informed user” can distinguish the two “get-ups” should be dismissed as representing an inadequate defence, in the same way as disclaimers do not detract from the benefit claimed by the misuse of another’s trade mark.

The confusion as to origin may indeed be temporary and subsequently corrected, but what is not corrected is the advantage that has already been taken by the copycat, without which the competitor would have had to build its own brand proposition and invest in securing the same level of recognition.

The available research shows that, where reputation and goodwill have been established, the consumer will be drawn to the recognisable heuristic features and will not “process” other information.

Being “noticed” relied on the copycat free riding on the goodwill of the host brand and appropriating goodwill to which Asda was not entitled. Making a decision to purchase from Asda knowing that Specsavers and Asda are different did not purge the advantage taken from the first stage.

The evidence shows that Asda knew that they were “living dangerously”. The marketing team thought that, if at the point of sale there was no clear misrepresentation that Asda was Specsavers or was connected, by the time the shopper entered the “rational” stage then they could purge the advantage taken in the first stage.

Asda expected that the emulation of the “get-up” would pass the first stage “heuristic” recognition and that the consumer would be sufficiently muddled to then have to enter a rational process of choice. In phase 1 the consumer filters out all other comparisons and is forced to focus on the differentiator chosen by Asda, namely price.

It is interesting to note that the evidence resonating with the two-stage heuristic hypothesis was actually given by the defendant. One can speculate that the defence might have been less willing to lead this evidence had they realised the importance of what they were suggesting, especially if it had been explained to the Court how this was an effective misrepresentation in the real-life context of fast consumer decisions.

As it happened, Mr Justice Mann, when considering the evidence and comparing the Specsavers logo with the divided circles of the Asda presentation, concluded that:

“the consumer would not be confused because the Asda logo was so clearly endorsed with “ASDA.”

The use of shape and colour are well recognised as being powerful “signals”. Indeed, the history of colour marks shows that there has to be compelling evidence to show that a colour without any words can “signal” one product and no other. In this case the colour green and the shape of the ovals might (if they had been tested) have shown that one could have written virtually anything across the green concentric circles and the consumer would still have made the “connection” to Specsavers.

The judicial language references creating a “resonance”:

“I conclude that the plan of the design teams was to have a logo that at least had resonances to Specsavers’ logo. They did indeed start from Specsavers and go to what their lawyers told them was a safe distance. It is in the bracket of “living dangerously” cases. This material provides support for a confusion case. At the same time a big step in removing one perceived element of association was taken when it was decided that the logo would be green on white and not the other way round. It does not follow that there was necessarily confusion of course, and I shall have to make a decision about that, based on the final forms of logo.

What then transpired is that the Judge suggested (in fact without any evidence) that the circumspect consumer would distinguish between the two logos without difficulty. We already know from the empirical work done by Mountainview and the established (Nobel Prize-winning) work that this is conceptually flawed. The Judge set out his reasoning as follows:

“I find that Specsavers fails in this claim under Article 9(1)(b). There is a degree of similarity in that both logos have ovals with text inside, though that degree is significantly lessened by the fact that the Specsavers ovals overlap in a very characteristic fashion and Asda’s touch. **That introduces a significant area of visual difference.** However, while the ovals are an important part of the Specsavers sign they **do not dominate so as to subordinate the wording** as a matter of overall appearance. The wording is equally significant. That being the case, a different form of wording (in the form of the Asda wording)²⁸ introduces a

28. The issue as to whether wording placed over a trade mark (layering of marks) is an infringement of either or both marks has been referred to the European Court of Justice.

very significant difference. In my view a very different overall impression is given. Taking that comparison by itself, **I do not see how the reasonably circumspect consumer would be confused by the only real element in common, namely the presence of ovals, and thereby think that the two marks connote the same trade origin.** Asda is itself a well-known name, and I do not readily understand how its name expressly spelled out, in prominent letters, could leave a reasonably circumspect consumer thinking that the mark is, or even might be, Specsavers”.

The Judge had no evidential basis for making these conclusions. Without any empirical analysis as to what element or combination of elements created the instant recognition this conclusion is pure speculation. The Judge cannot be criticised when neither party presented any evidence to show how the shape and colour configuration would be recognised.

The Court of Appeal upheld the finding under Article 9(1)(b) on the basis that it was for the first instance Judge to weigh the evidence and that **the higher Courts should not substitute their opinion if there was no flaw in the reasoning.** Whether the use of the copycat has caused the sort of confusion which we contend for, is a matter of evidence. When considering such evidence we know from the research and the learned papers that “dominant” characteristics may not correlate with “heuristic triggers”. The judgements clearly struggle to take account of the elements of a logo (or packaging “get-up”) collectively and individually and attempt to find some logical construct around which to build a structured reasoning. This hunt for a structured way of evaluating on-pack design is flawed because it fails to evaluate what elements the consumer has “learnt” to create a “shortcut”. The reality is that lab techniques are available to evaluate pack against pack and what the effect is of removing or altering individual components of the on-pack presentation.

The consideration of the Court of Appeal in respect of Article 9(1)(c) is equally telling and we suggest correlates closely with the common law principles of damage to goodwill. It would be strange if the result of a case for infringement under Article 9(1)(c) came to a different conclusion for a claim brought in passing off on the same mark.

Mr Justice Mann at first instance said:

“...That resonance is capable of amounting to **“bringing to mind” within the test. The extent to which that is true depends on the degree of resonance.** I have to make a judgement about that. On the basis of that evidence I think that although there is probably just a calling to mind, it is of the very weak variety. It will be more of a vague impression than a firm implantation.”

He went on to say:

“Mr Purvis submitted that subliminal effects did not amount to “calling to mind” for the purposes of the Intel test, and to hold that it did would be extending the law. Mr Bloch submitted that one could not draw sharp dividing lines. **The exploitation of a mark might involve an effect of which consumers were not consciously aware, but if it has such an effect, and if an infringing sign has such an effect, then the first mark is called to mind for these purposes.**

I do not propose to enter these psychological waters. I am prepared to accept, for these purposes, that a mark of repute is capable of operating at a number of psychological levels. The Asda design team understood that and thought that what was left of their logo after the lawyers had had a go at it still had an effect. That is evidence of a link.”

Mr Bloch QC as counsel for the Claimant was, as we now know, far closer to the truth than he knew. We draw from the learned Judge’s comments that the Court accepted the hypothesis which is set out in this paper, but as we have observed has not been presented with a case in relation to which these processes and the psychological effect on “muddling” or “confusing” the decision-making process have been explained.

When one considers that, notwithstanding the conclusions which he reached and his comments as to staying out of the “psychological waters”, one has to wonder whether, if the Judge had a report from

Mountainview before him (properly instructed and focused), he might not have concluded as he did, namely:

“...But this was not such as to confer an unfair advantage, even allowing for the use of the colour green...

...It is, however, very weak. It arises out of the shapes of the ovals and no more. It is heavily countered by the Asda wording. I suppose that, although it is weak, it might be thought to carry some advantage (that would, after all, be the purpose of going for an association) but in my view it is by this time a very slight one, and is too slight to be unfair notwithstanding that it might be thought to have been intended.

Nothing else makes it unfair. There is no question of detriment to Specsavers’ mark arising out of it.

I reach this conclusion despite the colouration of the logo on the recall card. It seems to me that notwithstanding the fact that colour is of only limited relevance in an Article 9(1)(b) infringement, it might have more of a part to play in relation to Article 9(1)(c). If the proprietor’s mark has a strong reputation in a given colour, to produce a similar resonating mark in a similar colour might reinforce the link, or reinforce the fairness case.

However, I do not consider that I need to go into that question in this case. Even allowing for the colour green used in the logos I still think that the link is weak, any advantage is very slight and the advantage is not unfair. This applies to both forms of the logo.”

The degree to which the witness evidence was unhelpful is demonstrated by the fact that the Court of Appeal finding was opposite to the lower Court on the same evidence. The Court has in effect substituted its own evaluation as to how a consumer would respond to the in-store promotions.

“164. In assessing whether the use of the Asda logo has taken unfair advantage of the distinctive character or repute of the Specsavers Shaded and Un-shaded logo marks it is of course necessary to carry out a global assessment.

So I must also have regard to all relevant circumstances, including the significant reputation attaching to Specsavers’ marks, the fact that the goods are identical and the fact that it was Asda’s intention to target this campaign at Specsavers and to convey the message that Asda offered good, if not better, value. Taking all these matters into account I am satisfied that the use of the Asda logo (in both its forms) as part of the campaign including the straplines was such as to create a link with Specsavers Shaded and Un-shaded logo marks in the mind of the average consumer; **that this link did confer an advantage upon Asda; and that this advantage was unfair and without due cause.**

As in the case of the straplines, the use of the Asda logo permitted Asda to benefit from the power of attraction, reputation and the prestige attaching to Specsavers and its Shaded and Un-shaded logo marks and **to exploit without paying compensation the marketing efforts which Specsavers has made.**

I would therefore find infringement of the Shaded and Un-shaded logo marks by the use of the Asda logo (in both its forms) as part of the composite advertising and promotional campaign.”

Each component of the way in which consumers perceive packaging, how they make “links” through replication of features, how these operate at a sub-conscious level and how this takes unfair advantage of and free rides on the goodwill of the host brand, have all been considered and implicitly recognised at various times and to varying degrees, by the Courts.

The Asda marketing team knew that they had taken advantage of the key heuristics to free ride on the Specsavers’ goodwill. The advice given by the legal team at ASDA was based on a “rational” evaluation as to whether they could tell which supplier provided which product. Perhaps if they had asked their commercial team, “why do you want to use the green interlocking ellipses?”, they may have advised differently.

When the matter came back before the Court of Appeal, the existence of the Asda wording was disregarded. The Court clearly felt that the “link” was made by the other elements of the overall get-up and that the existence of the Asda wording did not operate to break that link.

8. PROVING CONFUSION

The paradox disclosed by the Mountainview research and echoed in the reports of evidence in the reported case law is that a consumer may be able to say, when subsequently challenged that he/she knows that the product chosen is not the established brand, but will frequently not be able to explain why he or she made the decision to purchase the substitute copycat.

Packaging and product “get-up” is clearly a significant component of the goodwill of the business. In a cluttered market the brand owner relies on creating instant recognition by a large proportion of consumers so as to increase the likelihood of the product being noticed and therefore chosen. We do not need to consider consciously whether we prefer Starbucks to Café Nero (or whether we have no preference).

“...there is strong evidence that copycat brands, that is brands that are perceptually similar to other established brands, influence brand recognition. They cause consumers to make errors, mistakenly selecting the copycat brand in place of the established brands. Furthermore they slow down recognition of key brands....” [Mountainview 2012]

9. POLICY ISSUES AND ECONOMICS

Government policy and consumers

This paper started by explaining that the law of passing off has two objectives; the first is to protect the consumer against being deceived and the second is to ensure fair competition between businesses. The link between the two is created by the conceptualisation of goodwill.

If markets work well then those markets should self-correct for any abuses. In the case of copycat packaging it is clear that the market is not self-correcting. Therefore one need ask why?

Behavioural economics suggest that as humans we tend more often than not to operate on the basis of “rational self-interest”. This does not mean that there are not a significant number of people who act altruistically, but the norm is that the prime driver is not social, but individual interest. Regulation balances the interests of the individual against the greater good.

The arch copycat offenders are also the primary distribution channels for the brands on which they predate. The additional complexity arises from the reluctance of the regulators to protect those who are capable of protecting themselves. This paper does not suggest that brand owners have no remedy against copycats; far from it. We suggest that the legal remedy may be more effective if the approach to providing the Courts with evidence of misconduct was improved. This does not address the kernel of the problem, namely that the brand owners cannot exercise the remedy without fear of economic reprisal.

Where the victim is powerless, by reason of the imbalance of market power or market structure, to have an effective remedy, then the norm would be for misconduct to be the subject of regulation. There are two separate streams of regulation; competition law and the consumer protection legislation.

The OFT has expressed the view that it has no desire to invoke the Consumer Protection Regulations to restrain copycats because they see no detriment to the consumer.

The Consumer Protection Regulations 2009 prohibit and make it a criminal offence to undertake “Misleading Actions”.

“Misleading actions

5.—(1) A commercial practice is a misleading action if it satisfies the conditions in either paragraph (2) or paragraph (3).

(2) A commercial practice satisfies the conditions of this paragraph—

(a) if it contains false information and is therefore untruthful in relation to any of the matters in paragraph (4) or if it or its overall presentation in any way deceives or is likely to deceive the average consumer in relation to any of the matters in that paragraph, even if the information is factually correct; and

(b) it causes or is likely to cause the average consumer **to take a transactional decision he would not have taken otherwise.**

What constitutes a misleading action is defined at clause 3

(3) A commercial practice satisfies the conditions of this paragraph if—

(a) it concerns any marketing of a product (including comparative advertising) which creates confusion with any products, trade marks, trade names or other distinguishing marks of a competitor; or

(b) it concerns any failure by a trader to comply with a commitment contained in a code of conduct which the trader has undertaken to comply with, if:

(i) the trader indicates in a commercial practice that he is bound by that code of conduct, and

(ii) the commitment is firm and capable of being verified and is not aspirational”

The policy expressed through these Regulations is that misleading or confusing the consumer is detrimental to the consumer.

“.....it causes or is likely to cause the average consumer to take a transactional decision he would not have taken otherwise.”

Under Section 3(4) the Regulations render commercial practices automatically unfair if they are listed in Schedule 1. In this regard clause 13 is of particular relevance, namely

“13. Promoting a product similar to a product made by a particular manufacturer in such a manner as deliberately to mislead the consumer into believing that the product is made by the same manufacturer when it is not.”

There are two inferences that can be drawn from this; first that any deliberate passing off will be an offence under these Regulations and second, that where a copycat knows that the effect of his activities will mislead a consumer in the way described in this paper this should also cause an offence under these regulations.

The Regulations can only be enforced by action commenced by regulators. No prosecution of copycats has been pursued under these Regulations and there are, so far as we are aware, no plans to do so. This clearly does not deal with counterfeits, which are of course dealt with under the Copyright Designs & Patents Act 1988 and the Trade Marks Act 1994.

The link between competition law and consumer protection was also recognised in the OFT report in 2009:

“2.3 Traditionally, competition and consumer policy have each been attributed distinct objectives and features, and they have generally been treated as separate disciplines. According to this view, competition policy is about how firms interact with each other and looks at issues such as cartels, mergers, and monopolisation. It is seen as less concerned with individual retail consumers and their contract terms, as long as the market is competitive. Competition policy generally does not look at individual consumers to determine if there is anti-competitive harm. **If the market is competitive, then competition policy generally assumes that the market will provide consumers with efficient outcomes.** The focus of competition policy also tends to be on large players, both upstream and downstream.

2.4 Consumer policy on the other hand is seen as focusing on how firms interact with consumers, on trading practices and contract terms. It is also about how consumers interact with firms – purchase decisions, confidence, buying practices, search and switching. **Traditionally consumer policy examines firms’ dealings with retail consumers to determine whether they lead to consumer harm and it is concerned with issues such as fairness at the level of individual transactions.** It is less concerned with whether the market is competitive or not, and indeed consumer policy issues may arise in industries that seem highly competitive, such as house repairs and airlines. Consumer policy is interested in suppliers of all sizes, right down to individual traders.

2.5 We believe that this traditional separation is damaging to both sets of objectives. It ignores the interdependency of consumer welfare and competition, encourages narrow thinking about the origins of market problems and fails to grasp the practical benefits from integrated approaches to remedies.”

The consumer benefits when markets operate competitively. When they do so, innovation and investment follows. One has to wonder what the Stationers Guild would have had to say about copycats. Passing off protects the goodwill of the business and the consumer, the Consumer Protection Regulations are intended to reinforce the consumer protection aspect and the competition and intellectual property law protects goodwill and innovation. These cannot, as the reference above acknowledges, be separated:

“Good consumer outcomes rely on competitive markets to provide choice and value, while vibrant competition relies on consumers confidently shopping around. Competition and consumer policy together provide a framework for markets to deliver maximum benefits for consumer welfare and productivity growth.”²⁹

As the OFT recognises, there is a clear need for a consistent approach, to connect the dots. Ultimately, the economy as a whole and the individual consumer benefits from investment. Investors are entitled, as we have seen, to reap the benefits of their investment. Permitting one segment, such as the copycat, to flourish on the back of investment by another (the brands) is therefore a market distortion that can only reduce choice and innovation. Taken to its ultimate conclusion, any lack of effective protection for goodwill is a barrier to entry for new brands and undermines innovation.

The wider interest of the law as it was originally perceived and which has formed the backbone of jurisprudence, was established by the principles in *Southern v How*, to protect fair competition between businesses by ensuring that businesses collectively and individually do not deceive the consumer. If the goodwill of the business/suppliers is damaged then the principles of the “tragedy of the commons” are invoked and everyone loses.

One of the primary drivers for investing in the creation of a brand is that branded products often carry a premium. That premium can be represented as shifting the demand curve to the right. A brand can sell the same volume of product at a higher price or more products at any given price. It is implicit in this statement that brands do not compete and cannot be forced to compete on price, which tends to be the territory of the own label. The abuse which copycats perpetrate is that they induce the consumer to consider price by misappropriating the symbols of the brand to bring him or herself within the bounding decision.

29. Para 1.2 *Joining up competition and consumer policy* Office of Fair Trading December 2009

10. CONCLUSION

The judgements show that the Courts intuitively understand the ways in which packaging, advertising and media can influence the consumer and how the misappropriation of symbols and ciphers can free ride on, and be damaging to, goodwill.

The Judges have adapted the basic concepts of confusion and misrepresentation to accommodate the multiplicity of ways in which the goodwill of a competitor can be appropriated by using visual representations.

The existing methods of providing evidence to a Court are not only expensive, unreliable and unpredictable; they do not address what we know to be the process by which copycat packaging appropriates goodwill.

By building virtual retail stores and deploying the techniques mastered by Dr Leighton, we can accurately identify which components, individually or collectively, stimulate the heuristic response. The virtual store allows us to introduce the copycat and test for the Stage 1 responses to the stimuli.

Using the techniques alluded to in combination with expertise before the Courts; we can, by manipulating the stimuli in terms of similarity, proximity and the combination, of the ciphers and symbols, colour and shape of other products in the class, measure and explain the sub-conscious response to “learnt” or heuristic triggers.

The techniques deployed in this research could be deployed to provide a measure as to the strength that each visual cue taken separately or collectively has to influence recognition by a consumer.

When building and developing brand recognition and deciding which elements or symbols to deploy as brand ciphers, we can test for recognition of these both individually and as part of the “global appreciation”. Knowing, for example, that a “seabird” is a heuristic for Penguin biscuits could provide the basis for a family of products benefiting from association. Understanding what creates the mental association is as important to the brand owner as it is to the copycat. Knowing this also enables brand owners to decide which cases to pursue and which are not likely to have a material impact.

By building data banks of research relating known symbols, colours, features, shapes and combinations, we can provide suggestions as to which aspects of on-pack or advertising design are most likely to become valuable symbols for brand recognition.

There is no suggestion that a science-based approach to evidence should replace oral testimony or that judicial evaluation should be displaced. However, incurring the time and cost of pursuing a case relying solely on witness testimony, without the corroborating empirical verification, will continue to mean that advisers are making educated guesses as to whether a particular copycat will be or can be proved to be unlawful.

As the Courts become familiar with these techniques, greater reliance can be placed on this form of evidence. For the present, it is likely to add a layer of corroboration and rational support for what the Judges intuitively accept, but have difficulty explaining. Given that the Judges have intuitively voiced all of the elements of this approach, this is not a big step.

Both judicial comment and the evidence given in a number of high profile cases are consistent with the hypotheses set out in this paper but, in the absence of a structured presentation of the evidence, judgements will remain unpredictable and vulnerable to individual biases and perceptions of particular Judges.

The building of a computer-simulated marketplace to test any number of variations is underway.

Alexander Carter-Silk BA Hons (Law/Econ)

Jane Leighton PhD

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ALEXANDER CARTER-SILK
PARTNER AND HEAD OF IP, TECHNOLOGY & DATA

+44 (0)20 7427 6507
ALEXANDER.CARTER-SILK@SPEECHLYS.COM
WWW.SPEECHLYS.COM

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