



# Priority regulatory outcomes

Response to LBRO consultation

## SUMMARY

The British Brands Group supports the focus on a fair, responsible and competitive trading environment as one of the priorities for local regulatory services. Such an environment is beneficial for branding with its associated benefits for consumers, local communities, competitiveness and economic growth.

- 1 The British Brands Group welcomes the opportunity to respond to the LBRO's consultation on "Priority Regulatory Outcomes. A New Approach to Refreshing the National Enforcement Priorities for Local Authority Regulatory Services".
- 2 The British Brands Group is a trade organisation that provides the voice for brand manufacturers in the UK. Its role is to help create in the UK the optimum climate for brands to deliver their benefits to consumers. Such benefits include broader choice, ever-better products, strong value and consumer trust. The ability to innovate, invest and compete vigorously but fairly are important factors in such a climate. However the associated enabling legislative and regulatory tools require enforcement to be effective. Thus the consultation is directly relevant to branding in the UK and to our members.
- 3 We support the priority regulatory outcomes approach proposed in the consultation, in particular the inclusion of priority 5 ("Support enterprise and economic growth by ensuring a fair, responsible and competitive trading environment"). This has important positive implications for local businesses, local communities, the climate for investment, the building of strong product reputations and innovation.
- 4 An outcome-focused approach is an appropriate way to promote coherence between local discretion and the needs of local people on the one hand and national needs on the other. A common focus on outcomes across the country should be well-placed to encourage consistency of approach in local areas, encourage local areas to work effectively together when relevant, and for local efforts to support and help achieve national goals.

5 We welcome the recognition in the consultation document of the significance and scale of IP crime in the UK. We support the response given to the consultation by the Alliance Against IP Theft of which the Group is a member. This outlines the economic impact of such crime and calls for links to be strengthened with relevant Government programmes, greater co-ordination of enforcement and intelligence-sharing amongst enforcement bodies and the reduction of consumer demand for counterfeit goods using existing learnings from industry.

6 MISLEADING CONSUMER PACKAGING

Whether a fair, responsible, competitive trading environment will be achieved in practice will depend on the effectiveness of local, on-the-ground enforcement. One real example of where the current regime falls short is in addressing packaging of consumer products that mimics that of familiar branded products, misleads consumers and breaches the Consumer Protection from Unfair Trading Regulations (CPRs). Such packaging currently goes unchallenged but should receive attention under a regime intent on “ensuring a fair, responsible and competitive trading environment”. Such attention is badly needed and long overdue.

7 A briefing on this subject has already been submitted to LBRO and is provided again below. This describes the practice and outlines the implications for consumers and business. A third of all shoppers admit to having made a mistaken purchase as a result of similar packaging and many more, over 10 million, are understood to have purchased a product believing it to be made by a particular manufacturer when it was not.

8 The practice is telling as it exemplifies an unlawful practice where companies do not have effective tools themselves to seek private civil redress under intellectual property (IP) law, including the law of passing off. The Unfair Commercial Practices Directive (parent to the CPRs) created a harmonized duty throughout the EU to trade fairly and brand owners sought private civil rights of action as a means of achieving effective enforcement at no cost to the public purse. BIS declined, making it clear that the OFT and TSS have a duty to enforce the relevant provisions of the CPRs. However neither have shown a willingness to do so.

9 Strikingly similar presentations to branded products continue to be seen on the UK market. These are not achieved by accident but by deliberately navigating through and around the contentious areas within IP law that would otherwise offer civil redress. Such copying has been a common feature in the marketplace for some years, to the extent that it may be considered “custom and practice” by the perpetrators who may be unaware of the impact of the CPRs on their activities. Certainly there appears to have been:

- little enforcement communication raising awareness of packaging obligations arising from the CPRs, over and above the OFT’s guidelines;
- little, if any, visible enforcement;
- little, if any challenge to obvious copies in the marketplace; and
- in consequence, little, if any, decline in the malpractice.

- 10 The effect is an absence of enforcement against a misleading, unlawful practice that:
- runs counter to the principles of fair trading. A competitor free rides on the hard-won reputation of another without incurring the associated costs of building its own reputation, while consumers are misled over the origin of the product, a banned practice always deemed unfair under the CPRs;
  - is not a responsible practice, as it contravenes the principles of the UK Code of Non-Broadcast Advertising, Sales Promotion and Direct Marketing (CAP Code – [Articles 3.41 and 3.43](#)). Packaging however falls outside the scope of this Code. Furthermore, the companies that mimic the packaging of familiar brands tend to be sizeable with the necessary resources to be compliant;
  - does not engender a competitive trading environment where products fight head-to-head for consumers' preference on equal terms. In this case the mimic does not bring anything new to the market, commands a higher price than would otherwise be possible, poaches sales and avoids the costs of building its own reputation. Meanwhile the original loses revenue and sees its costs increase as it seeks to resist the attack, inform consumers that it does not make its products for anyone else and re-assert its distinctiveness in the marketplace. Such effects distort competition.
- 11 Misleading packaging of consumer products affects local communities and local people:
- markets, whether national or local, work best where consumers can make well-informed purchasing decisions and can be confident in the choices they make. Such markets are undermined by misleading packaging;
  - it should not be assumed that consumers are getting brand-quality products for less. The products may well be lower quality. There is also evidence that products in similar packaging command higher prices than those distinctively packaged as they enjoy a reputation they do not warrant;
  - companies with strong reputations of their own are able to use those reputations to enter new markets (including export markets) and diversify into new product areas, providing greater employment prospects and increased wealth for local communities. This can only happen if they are not unfairly disadvantaged;

It should be noted that branded companies are geographically dispersed (e.g. **Ty Nant** water, Bethania, Wales; **Barr's** drinks, Cumbernauld, Scotland; **Vimto** drinks, Newton-le-Willows, Merseyside; and **Bottlegreen** drinks, South Woodchester Gloucestershire).

## 12 ENFORCEMENT

Enforcing against misleading packaging should not be burdensome. While there may be several dozen products on the market that may breach the CPRs, the majority are commissioned by and sold through only a few retail chains. Such chains are expected to have compliance departments. The prevalence of such products on the UK market is no doubt due in part to the fact they go unchallenged, yet a relatively informal compliance approach may be sufficient to discourage the practice.

- 13 Local enforcement efforts may need to call on the expertise and knowledge of the relevant branded company being copied, as packaging of consumer products, and consumers' reactions to it, can be subtle and complex. Furthermore, there is likely to be an absence of consumer complaints as, where consumers are deliberately misled over the origin of goods (a banned practice under the CPRs), they would have no basis or reason to complain, remaining blissful in their ignorance.
- 14 It should be emphasised that branded companies support proportional remedies to copied packaging that misleads consumers. The aim should be to remove offending packaging from the marketplace as quickly as possible. However the products in the packaging should be free to return to the market in revised, distinctive packaging. This would preserve consumer choice and competition.
- 15 This example of misleading packaging is put forward to demonstrate the shortcomings of the existing regulatory regime and where a greater priority for a fair, responsible and competitive trading environment would yield important, valuable results across the market.

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6<sup>th</sup> May 2011

# Briefing

The implications of similar packaging

**Packaging consumer products to mimic familiar branded products misleads consumers and distorts competition. They are unlawful under the Consumer Protection Regulations (CPRs) but enforcement is lacking.**

## WHAT IS THE PROBLEM?

Misleadingly similar “parasitic” packaging (sometimes known as copycats or look-alikes) adopts distinctive features of the packaging of familiar branded goods. It is used by competitors to boost sales by duping shoppers into believing that a product has the same qualities, reputation and/or origin as the brand when it does not.



An example of a familiar brand and its copycat (2006)

A selection of examples found on the market in 2010 is available [here](#).

## WHAT IS THE EFFECT?

Similar packaging distorts consumer buying behaviour in three ways:

- the consumer can tell the copy from the brand but believes, due to the similar packaging, that both are made by the same manufacturer and come from the same factory;
- the consumer can distinguish the copy from the brand but believes that the quality is the same or closer to the brand than they would assume were the packaging more different;
- shoppers not paying full attention may buy the copy in error, mistaking it for the brand (the products in such packaging are normally low value, low engagement purchases). A third of all shoppers have made such a mistake (around 8 million people).

These consumer effects lie at the heart of the harm caused by similar packaging. Recent and historical research into these consumer effects can be found [here](#) and [here](#).

## HARM TO CONSUMERS

Shoppers are duped into buying a product that is not what they believe it to be. They are not only deceived but also prevented from making informed, accurate purchasing decisions.

Because the copy provokes a higher reputation than it warrants, it may command a higher price than would otherwise be possible. Evidence of such price effects is hard to obtain but was found in the legal case [L'Oréal v Bellure](#) (paragraph 6). (Note 2 below gives more on the case.)

## HARM TO THE BRANDED PRODUCT

- Lost sales** When consumers purchase the copy in mistake for the brand, there is clear and direct loss of equivalent sales to the brand.
- When consumers attribute unwarranted qualities to the copy (in terms of origin or reputation), the sales effect is harder to quantify, varying case by case. An analysis of research findings (above) suggests a sales uplift of around 25% - 55% for the copy, representing a corresponding loss to the branded product and other competing products in the category (a copy may impact other products' sales when consumers believe they are buying leading brand quality at a lower price).
- Increased costs** The brand must defend itself from the copy in the short term. This may involve management time, legal preparation and marketing initiatives to minimise consumer confusion. Kellogg's for example spent £1.1 million advertising it did not make cereals for anyone else when confronted with parasitic copies.
- In the longer term, brands must maintain their distinctiveness (they cannot afford to become generic or to lose their differentiation in the marketplace). This involves significant re-packaging costs (with the new packaging in turn being vulnerable to copying). Nestlé spent £30 million re-designing its Gold Blend packaging to re-assert its distinctiveness.
- Reputational damage** In those cases where consumers believe the copy to be made by the brand manufacturer, and are disappointed with its quality, reputational damage will result. The dilution of the brand's distinctiveness in the marketplace may also result in such damage.

The combination of lost sales, increased costs and reputational damage reduces the overall competitiveness of the brand as it is less able to invest in innovation and marketing support.

## UNFAIR ADVANTAGE

Competition between a brand and its copy is not neutral in effect such that one product simply substitutes another. The reputation of the brand, built up over years of consumer experience and investment in innovation and product performance, is hijacked. The copy bears none of the cost of building that reputation while reaping significant reward in terms of incremental sales. At the same time the brand is disproportionately damaged. The term "parasitic" is apt.

## REMEDIES

The UK has no effective civil law remedy to parasitic copying, whether through IP rights (copies tend to avoid infringing trade marks, design rights and copyright) or passing off (the evidentiary burden is extremely high). The CPRs have helpful provisions and the European Commission's [guidelines](#) recognise the three forms of consumer deception mentioned above (page 36/7). Companies however have no civil rights of redress, with the duty to enforce resting with such organisations as the OFT and TSS.

## NOTES

1. **Consumer Protection From Unfair Trading Regulations** Three clauses have the scope to address misleading packaging:
  - the general prohibition (Regulation 3);
  - misleading actions (Regulation 5);
  - one of the banned practices (Schedule 1: Clause 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).
2. The L'Oreal v Bellure legal case concerned registered trade marks. The European Court of Justice was concerned about the misappropriation of trade mark rights of prominent brands and the “riding on the coat tails” of those who invest in brands. The same commercial and ethical considerations should apply to those who ride on the coat tails of the look of products which have not been registered as trade marks.
3. The British Brands Group seeks a solution whereby products in misleadingly similar packaging are promptly re-packaged in distinctive packaging. Such a solution would preserve consumer choice and competition.
4. The British Brands Group has no concern with retailers’ own label products that compete fairly in distinctive packaging. The majority of own label products are already distinctively packaged and represent over 40% of the UK grocery product market. This demonstrates that products do not need to copy brands to succeed.
5. The Group is a membership organisation that provides the voice for brands. It is dedicated to championing brands in the UK, ensuring that their positive contribution to consumers, the economy and society is better understood by policy makers and others. Members include leading brand manufacturers of all sizes. For more information please visit our website at [www.britishbrandsgroup.org.uk](http://www.britishbrandsgroup.org.uk).