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## Misleadingly similar, ‘parasitic’ consumer packaging

A critique of the UK legal regime and its ineffective protection of both shoppers and businesses against the unfair competitive practice of ‘parasitic packaging’.

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## Executive summary

Misleadingly similar “parasitic” packaging (*aka* copycats or look-alikes) adopts distinctive features of familiar branded products to dupe shoppers into believing that it has the same qualities, characteristics, reputation and/or origin as the brand when it does not. It affects large and small branded companies alike.

The practice has been long-running and pervasive in the UK for many decades, with brand owners first raising concerns with policymakers in 1994. Dossiers of recent examples were published in [2017](#) and [2022](#).

Consumers in their millions face such packaging on every shopping trip they make to the large supermarkets that stock such packaging.

The Brands Group considers that the existing patchwork of intellectual property rights and consumer protection law is inadequate, difficult to enforce and favours copiers.

With brand owners unable to protect themselves and with no public enforcement of consumer protection law in this area, shoppers are left unprotected.

The following explains why the UK regime is deficient:

- Demonstrating confusion to a court, essential to successful passing off actions and most trade mark infringement cases, is extremely difficult and hard to evidence.
- Trade mark law does not provide an effective remedy in most instances. Having the right registration in relation to a specific copy is essential.

It is not unlawful under UK trade mark law for a copier to create a false association in the shoppers' mind with the original, yet it is this association that misleads and boosts the appeal of the copy.

- Copyright only applies where a substantial part of the work has been copied/reproduced. A copier need not go so far to form an association in shoppers' minds sufficient to boost sales.
- Design protection is only available where brand designs are novel and possess individual character. Brand owners however wish to sustain familiarity and recognition of their products amongst shoppers, achieved by evolving existing designs, not introducing new ones.
- Consumer protection rules are simply not enforced (there has only been one – successful – intervention and that was sixteen years ago).

The UK, unlike many other countries, does not have a dedicated unfair competition law that protects companies against acts contrary to honest practices and that mislead the public, despite this being a requirement of all signatories to the Paris Convention.

The Brands Group has proposed many solutions to UK government to compensate for the absence of an effective unfair competition. All have been rejected. **It seeks a narrow solution which focuses only on deterring the use of parasitic packaging.** The legal regime matters. International retailers that adopt a copying strategy in the UK do not do so in other jurisdictions.

The Brands Group calls for products in such packaging to be repackaged so as not to compete unfairly with the original. This would preserve consumer choice and strengthen competition.

## Introduction

Misleadingly similar “parasitic” packaging (*aka* copycats or look-alikes) adopts distinctive features of familiar branded products to dupe shoppers into believing that it has the same qualities, characteristics, reputation and/or origin as the brand when it does not. Shoppers buy the copy based on these mistaken assumptions (which may be subconscious) and there is evidence they can pay more than were the product distinctively packaged.

The practice has been a long-running and pervasive practice in the UK for many decades, with brand owners first raising concerns with policymakers in 1994.

This paper explains the practice, looks at available remedies and explores why they are ineffective. It has been prepared for the UK Intellectual Property Office.



*Thatchers' claims of passing off and trade mark infringement (including the taking of unfair advantage) were dismissed by the Court – 2024*



*MoroccanOil's claim of passing off was dismissed by the Court – 2014*

## The problem and its effects

### *Free riding*

Parasitic packaging allows competitors to free ride off brand owners' significant investments to boost their own revenues and margins. They exploit a number of aspects of brand competition:

Brand owners are innovators while parasitic copies differentiate only on price. Recent research found that 57% of all innovation in UK grocery and 87% of all distinctive innovation was brought to market by brand owners. The innovations add value and command a premium. Along with brand investments in marketing and promotion, they also attract new buyers to categories and drive growth.

Brand owners focus on adding value and delivering consistent product quality, seeking to match or exceed expectations. Over time, this builds reputation and trust. Shoppers know what they are buying and understand that a brand purchase is a 'safe' purchase.

Brand owners also invest significant sums to ensure their product packaging is recognised and understood by shoppers, allowing them to make fast, accurate, informed buying decisions.

Parasitic copies make none of the investments above but reap the returns, unfairly and unlawfully.

### *Shopper manipulation*

While parasitic copies exploit brand investments, they also prey on shoppers' behaviour and beliefs:

Shoppers self-select products from shelf. Stores stock so many products that decision-making must be, and is, fast (typically around 2 seconds or less per choice);

These are regular purchases and the brand is familiar, so shoppers tend to deploy sub-conscious, intuitive System 1 thinking rather than the more analytical, careful System 2;

Labels are not studied closely. Colour and shape are more powerful stimuli than words;

The similar packaging prompts shoppers to buy a product they didn't intend to, because they mistake it for the original, mistakenly believe it comes from the same factory and/or has the same qualities and characteristics;

At a more subliminal, subconscious level, it makes an unknown product look familiar. This reduces perceived risk, enhances trust and increases propensity to buy. Taken together, such shopper manipulation can result in a significant uplift in sales;

The similar packaging also distorts shoppers' perception of price and value. By suggesting, falsely, that the product in the packaging is familiar and trusted, the copier is able to charge more than would otherwise be optimal. Evidence puts the uplift at some 10%<sup>1</sup>.

### *Impact on legitimate businesses*

Such copies are a commoditising force. In addition to effects on the shopper, there are negative effects on the original brand owner and for other producers with products in the same category:

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<sup>1</sup> William Grant & Sons Irish Brands Limited v Lidl Stiftung & Co KG And Ors. [2021] CSOH 55

- For the original, copied brand, it is no longer distinctive in the market. The brand is devalued, sales lost and costs increased. Overall, return on investment in innovation, reputation and quality is reduced;
- For other products in the same category, they may lose sales if shoppers switch to the copy assuming leading brand quality at a lower price. In some cases, such losses of sales and profitability could lead to de-listing.

The only winner from such packaging is the copier. Its sales are boosted as shoppers buy their products by mistake or trust them unduly and they are also able to charge higher prices.

#### *The scale of the problem*

Similar packaging persists on the UK market, with dossiers published in [2017](#) and [2022](#). These dossiers present examples only and are not exhaustive.

Two retailers have featured more prominently than others in these dossiers and in IP litigation – Aldi and Lidl – with the number of incidents suggesting that using such packaging is now an established business strategy in the UK (though not, we understand, in other countries). They will understand that the risk of successful litigation against them will be low and that any accompanying publicity can be leveraged by their social marketing teams to ridicule those they seek to exploit. This combination (limited prospects of success in the courts with reputational harm on social media) deters challengers.

Products in potentially misleadingly similar packaging are on display to their shoppers in every store every day. Aldi claims to have some 19 million shoppers while Lidl states 3 in 5 Brits shop in its stores. The problem is therefore significant in the UK market, in terms of both incidents and reach.

## UK remedies and why they are ineffective

The Brands Group considers that the existing patchwork of intellectual property rights and consumer protection law relevant to parasitic packaging are inadequate and difficult or impossible for brand owners to enforce. The regime favours those who copy.

Large and small branded companies alike that have innovated, invested and worked to build their brand's reputation and profile do not have the tools needed to tackle this free riding simply and cost-effectively.

The following explains the Brands Group's view that the UK regime does not provide effective protection. A fuller analysis of all the potential remedies available and their shortcomings are provided in [Annex 1](#).

- Demonstrating and evidencing confusion to a judge, essential to successful passing off actions and most trade mark infringement cases, is extremely difficult. Quantitatively validated consumer research evidence of confusion tends not to be acceptable to courts (surveys are deemed artificial), shoppers often blame themselves when buying the wrong product and demonstrating to a court what is taking place in the mind of the shopper is high impossible.

Where copies are produced by retailers, the case in most instances, retailers will not provide access to their stores for the gathering of evidence or the identification of potential witnesses. Furthermore, if witnesses are found, they are unlikely to come forward and attend court where low-priced items are concerned. Often shoppers will blame themselves for making mistakes or mistaken assumptions, not realising they have been duped.

To the contrary, strong factors may be deemed to mitigate against confusion, for example if a retailer has a reputation for copying, there is a significant price difference between the original and the copy, and/or the original is not stocked at the retailer stocking the copy.

The court relies heavily on brand name elements and whether they are similar or different, in contrast to the elements most used by shoppers in store, which tend to be colour, shape, brand imagery and signals of taste and flavour<sup>2</sup>.

- Trade mark law does not provide an effective remedy in most instances. Having the right registration (in relation to a specific copy) is essential, as is having the necessary and sufficient evidence to a court's standards. 'Having the right registration' only becomes clear once the copy is launched and any trade mark on the register will be used by the copier as a guide to packaging designs to avoid while still bringing the original to mind.

Even with the essential elements in place for an infringement claim, protection is often only available where there is outright confusion or confusion over origin. The copier may not be seeking to confuse in these ways, though will be seeking to create a false association in the shoppers' mind with the original, as this is what boosts appeal and perceived value. That is not unlawful under UK trade mark jurisprudence.

A claim of unfair advantage does not require evidence of confusion of any kind. However, protection is only available to registered marks with a reputation and, again, is dependent on the right registrations and persuasive evidence. The court has typically applied a restrictive approach to this extended form of protection, the recent *Thatchers / Aldi* case being an example.

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<sup>2</sup> The Psychology of Lookalikes, Influence At Work (UK) Ltd for Stobbs, 2013 - [link](#)

- The Gowers Review<sup>3</sup>, an independent, government-commissioned and funded review of the UK's IP framework, found shortcomings in the UK's regime. Specifically, it stated "that passing off does not go far enough to protect many brands and designs from misappropriation..." The regime has changed little since so this finding still stands.
- Copyright and design rights will provide remedies in some circumstances, though not all. Copyright is only relevant where a substantial part of the copyright work has been copied/reproduced, something that is not necessary to form an association in shoppers' minds sufficient to boost sales and/or the ability to charge more for the copy. Design protection is a complex patchwork. One category of design rights only protects that shape and configuration of an article, excluding surface decoration, so rarely applies in parasitic packaging cases. The EU law-derived design right is only available to those brand designs that are novel and possess individual character. In most instances, established brand owners strive to evolve existing designs rather than introduce new ones. Careful pack design evolution is needed to sustain familiarity, recognition and mental recall for the brand amongst shoppers so it is recognisable and stands out on shelf.
- Consumer protection rules, heralded as a potential solution in the Gowers Review, have the potential to be effective but, with one (successful) exception are simply not enforced by public enforcers, the only ones empowered to bring civil actions. While government gives assurances that enforcement will be effective, in practice every effort to prompt enforcement by public enforcers (notably Trading Standards and the Competition and Markets Authority) has failed.
- The cost of litigation is notoriously high in the UK, meaning that protection is only available to those who possess effective IP registrations and rights, the right evidence and deep pockets. A recent case brought by Thatchers Cider, a family company, against Aldi for passing off and trade mark infringement (including the taking of unfair advantage), which it lost on all counts, is expected to have cost Thatchers in the region of £300K.
- Commercial realities also play a part, in that copiers tend to be existing or potential large retail customers of branded suppliers. It tends not to be good business practice to take commercial customers and partners to court, especially where these customers act as gatekeepers to UK shoppers. Taking legal action will be particularly damaging where legal remedies are weak and there is a strong likelihood that the brand owner will lose. A retailer may take painful retribution in many ways against a branded supplier that displeases.

The shortcomings of other remedies, such as misleading comparative advertising and the UK's self-regulatory advertising code, are discussed in [Annex 1](#).

The UK, unlike many other countries, does not have a dedicated unfair competition law that protects companies against acts contrary to honest practices and misleading the public over the nature or characteristics of a product. A requirement of the Paris Convention is to prevent unfair competition yet the Court has expressly held there to be no tort of unfair competition in the UK<sup>4</sup>. The UK has the tort of passing off, which is the UK's answer, but it does not afford brand owners a comparable level of protection (see above and [Annex 1](#)).

While an unfair competition law would fill the gap in the UK's patchwork of IP rights, this solution is not sought by the Brands Group. Such a law would likely have far-reaching, broad implications and effects, some of which may be negative, while the gap in protection is narrow, involving only parasitic packaging. A more targeted, focussed solution is required.

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<sup>3</sup> Gowers Review of Intellectual Property, 2006 - [link](#)

<sup>4</sup> L'Oreal SA & Ors v Bellure NV & Ors [2007] EWCA Civ 968

## Evidence on the effects of parasitic packaging

Extensive and substantive evidence has been gathered over three decades on the effects of parasitic packaging. Presented here are some key sources:

The Gowers Review (2006) contained some top-level evidence of the confusion caused and the assumptions that similar packaging creates (see Box 5.3).

The UK IPO-commissioned report from the IP Institute, *The Impact of Lookalikes*<sup>5</sup>, published in 2013 summarised much of the existing evidence at the time and included new evidence. The conclusions arising from this report, available [here](#), were:

Consumers are more likely to make mistaken purchases if the packaging of products is similar and there is strong evidence that consumers in substantial numbers have made mistakes;

Consumers' perceptions of the similarity of the packaging of goods are correlated with an increased perception of common origin and to a material degree. There is also an increased perception of quality.

The lookalike effect increases consumers' propensity to buy a product in similar packaging.

Since the UK IPO study was undertaken, more research has been undertaken, using behavioural and neuroscience methodologies to understand better how shoppers shop and the cues to which they respond. This research has been summarised effectively in a report commissioned by the law firm Stobbs IP, titled *The Psychology of Lookalikes*<sup>6</sup>.

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<sup>5</sup> *The Impact of Lookalikes – similar packaging and fast-moving consumer goods*, Intellectual Property Office, 2013 - [link](#)

<sup>6</sup> *The Psychology of Lookalikes, Influence At Work (UK) Ltd for Stobbs*, 2013 - [link](#)



## Potential solutions

While the absence of an effective unfair competition law lies at the heart of the UK's poor protection for brand owners and shoppers against the effects of parasitic packaging, brand owners in the UK have not sought the introduction of such a law. Parasitic packaging seems to be the only instance where the UK's deficiency results in significant problems in the market.

The remedies proposed by brand owners over the years are documented in the IPO's study *The Impact of Lookalikes* (see page 146 – 148).

Following the recommendation of the Gowers Review and the clear view of the Competition Commission that parasitic packaging is a consumer protection matter, the Brands Group has focused on having the consumer protection rules enforced, whether by public enforcers or by the granting of private civil enforcement rights to affected brand owners. The latter approach would have the added advantage of reducing the onus on public enforcers and reducing pressure on taxpayers.

At a meeting in March 2024, the Brands Group was informed by the then IP Minister, Viscount Camrose, that this was an area for IP policy to address.

Absent interventions by public enforcers, **brand owners seek a narrow remedy that is available to producers of original consumer products that are subjected to competing packaging that mimics their own, to the extent that the original is unduly brought to mind and an unfair advantage taken.** Such instances are likely to involve shoppers being manipulated in their decision-making, in ways which may be conscious or subconscious.

Brand owners do not seek the removal of products inside such packaging from the market, just that the product be repackaged so as not to compete unfairly with the original. This will preserve consumer choice and strengthen competition on the market. Products in distinctive packaging will tend to be cheaper, as they are unable to convey spurious 'added value' through association with the qualities and reputation of the original, and products will be competing on a range of features such as quality, innovation and reputation, rather than just on price. Hence competition can be expected to be stronger.

Evidence suggests that effective measures to prevent copying will not give rise to unexpected consequences:

- most EU and other countries have unfair competition laws and there is no evidence to suggest these constrain innovation, competition or other market dynamics related to packaging;
- a number of countries, including the Republic of Ireland, allow companies to enforce consumer protection laws via civil remedies and this has not opened the floodgates to litigation;
- requiring companies to compete on their own merits spurs innovation. In contrast, permitting competitors to present their products in a way that falsely suggests they are the same as a leading competitor, with the only differentiator being price, removes the imperative to innovate to succeed;
- the overwhelming majority of private label products in the UK are distinctively packaged already and so will be unaffected by effective measures against parasitic packaging.

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## Annex 1 – Available remedies

### The tort of passing off

Often described as the UK's version of unfair competition legislation, this common law has not proved effective in countering similar packaging. For a successful passing off action, it is necessary to prove (1) goodwill, (2) a misrepresentation that is likely to deceive the public and (3) damage. These tests are challenging in cases involving similar packaging designs: -

- The copier often does not use the same product name as the original, though they are typically similar in length and comprise the same first and last letters (e.g. Penguin / Puffin; Thatchers / Taurus). By adopting a different product name, and having a different manufacturer, the copier is often able to claim convincingly that there has been no misrepresentation.
- Demonstrating deception to the satisfaction of a court also presents challenges, for several reasons. Copies are often commissioned by retailers who will not allow people into their stores to approach buyers of infringing products to be sources of evidence or witnesses. Courts tend not to admit survey evidence to establish misrepresentation/deception, on the basis that it tends to be (among other things) at risk of being artificial and not of real value (*Interflora v Marks and Spencer* [2012]<sup>7</sup>). Copied items tend to be inexpensive, so purchasers are unlikely to be motivated to attend court as witnesses.

While demonstrating confusion is challenging, counter evidence compounds the challenge. Social media posts that highlight the similarities but distinguish between the producers is an example. The fact that a retailer may have a reputation for copying may reduce the prospects of a finding of a likelihood of deception as it is argued that shoppers know what to expect. If the original product is not stocked and on shelf along with the copy, deception will be harder to prove. If the original and the copy vary significantly in price, again deception will be difficult to prove (e.g. *Moroccanoil vs Aldi's Miracle Oil*, 2014).

- While Passing Off provides protection against those shoppers who are deceived or misled, it does not afford full protection against all types of confusion, for example mistaken association. Paragraph 1 of Article 10<sup>bis</sup> of the Paris Convention, in contrast, requires protection against confusion more generally.
- 'Unfair advantage' is not a relevant consideration when assessing misrepresentation under Passing Off. In the *Moroccan Oil vs Miracle Oil* case (2014), the copier had made a conscious decision to package its product to be reminiscent of the original and the Judge considered that the copy 'brought to mind' the original but that was not sufficient to establish misrepresentation. 'Living dangerously' was irrelevant. In the *Thatchers vs Aldi [Taurus]* case (2024), it was found that Aldi had instructed its designer to use the Thatchers product as a 'benchmark' and to create a 'hybrid' of the two brands, a finding which was not considered unlawful.

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<sup>7</sup> [2012] EWCA Civ 1501

While there are instances where the tort of passing off has been used successfully against similar packaging (Reckitt & Coleman vs Borden, Penguin vs Puffin), there are also instances where it has not been successful (e.g, Moroccan Oil vs Miracle Oil and Thatchers vs Taurus).

The Gowers Review, when considering remedies, concluded that “passing off does not go far enough to protect many brands and designs from misappropriation for the following reasons:

- if copycats appear on the market before the defendant has built up goodwill in a certain appearance, the brand owner cannot rely on the law of passing off. This may prevent new entrants from adequately protecting the appearance of their products; and
- it is difficult to demonstrate consumer confusion in court and substantial evidence may be required to bring a successful passing off action.” (Paragraph 5.84).

### Trade mark law

In the comparative analysis of EU remedies undertaken by Hogan Lovells, trade mark law was identified by some countries as a way to deal with parasitic copies. Its effectiveness however is dependent on being able to register packaging elements or the packaging overall and having the right registration in relation to any specific copy.

When shopping in supermarkets that stock many thousands of products, shoppers use primarily colour, then shape, then brand imagery to make the necessary fast decisions in the normal shopping trip. Shoppers do not always read the labels of every product purchased (research by TNS suggests the average shopper will only read around 8 words whilst shopping). Words come fifth in the hierarchy. This shopper hierarchy for identifying products and making choices tends to be inversely related to the registrability of the elements as trade marks, with colour for example being notoriously hard to register.

Copiers have access to the Trade Mark Register and design labels to minimise the risk of infringement. There are many ways of designing labels and packaging such that the original is called to mind without infringing specific elements that may be registered as trade marks. For protection, the brand owner must have the right registrations (which only becomes clear once the copy is on the market) and those registrations must be up to date.

The UK Trade Marks Act (see [Annex 2](#)) provides protection in circumstances where (among other things) a sign similar to the trade mark is likely to confuse part of the public, which includes likelihood of association (section 10(2)(b)). But the association needs to be one where an economic connection is made by the consumer connecting the copycat with the original. This is generally considered to be a lower threshold than the threshold for establishing misrepresentation (which is a deception on the public) under the tort of Passing Off, going beyond deception, but does not cover all types of confusion as covered by Article 10<sup>bis</sup>.

Many of the challenges of demonstrating actual or likelihood of confusion to the satisfaction of a court are the same as those listed above for passing off. So, even if there are relevant trade mark registrations in place, if there is no available evidence to demonstrate actual or likely confusion, it is difficult to successfully establish an infringement has occurred.

The Trade Marks Act does give protection to marks with a reputation where a pack design takes unfair advantage of that reputation, without due cause. There is no need to demonstrate a likelihood of confusion in these instances. A copier is able to circumvent such protection though by creating a pack design that creates an overall impression of the original and calls it to mind,

but is judged not to be so similar as to take unfair advantage of the trade mark or influence shoppers' economic behaviour, even where it is known that was the copier's intention. While on the face of it a useful tool to counter copies, it is only available to well-known marks and even then claims will often fail, as was the case in Thatchers' case against Aldi.

Trade marks therefore only provide protection in limited circumstances and in general favours those brands who have the resources to build extensive portfolios of registered rights and to enforce them. Small brands are at a particular disadvantage when a misleading copy is launched against them.

It can be said that registered trade marks, rather than being a means of protection, provide a blueprint for copiers on how to design packaging that calls to the shopper's mind the original without getting so close as to infringe.

### **Design protection**

Registered designs provide some protection in certain circumstances, though design rights have significant limitations in relation to their effectiveness against copiers.

Design rights are, for many brands, a confusing patchwork of registered and unregistered rights. At the time of writing there are three design rights under UK law, down from four rights as of the end of 2023.

Registered designs can only be registered where the design is new and has individual character (i.e. must produce a different overall impression on the informed user). This tends to mean that only new products or new packaging are eligible for such protection. In the early stages of a product's life, the design has yet to form recognition in shopper's minds and their commercial success is unproven. These reasons make them unattractive to copiers. Once a product's packaging has become familiar to shoppers, attractiveness to shoppes will increase. However, as soon as the original packaging evolves (producers will wish to keep their packaging designs fresh and relevant whilst sustaining the mental recall that has been built up in shoppers' minds), the iterative designs are not as easy to protect as they are less likely to satisfy the criteria, i.e. that they are novel and possess individual character.

Similar shortcomings in protection arise in relation to unregistered designs as the design must be original and not commonplace. This may be achievable in the early stages of a product's life in relation to its packaging but, again, becomes more difficult to establish when the original design is further developed. More problematic is that UK Unregistered Design Right does not protect surface decoration (i.e. 2D packaging) and the Supplemental Unregistered Design Right (the comparable right to EU Unregistered Design Right post Brexit which does protect surface decoration such as on packaging) only lasts for 3 years.

Unlike the design of a product, which tends not to evolve, the packaging of consumer products is continuously evolving to remain current while sustaining recognition by shoppers. This reduces the scope for design protection at each iteration.

## Copyright

As is the case of other IP rights, copyright may provide some protection in specific cases while falling short in providing effective overall protection. To infringe, a 'substantial part' of the copyright work (i.e. the packaging design) must be reproduced on the copy. The copiers, with the original design in front of them as they develop their designs, are capable of creating a pack design that brings to the mind of the shopper the original product and will spark recognition and familiarity sufficient to increase propensity to purchase, but not to the extent that the court would consider a substantial part of the original copyright work has been reproduced in order to establish infringement.

## Consumer protection law

Misleadingly similar packaging falls within the scope of consumer protection laws (originally The Consumer Protection from Unfair Trading Regulations 2008, which implemented the Unfair Commercial Practices Directive), and now the Digital Markets, Competition and Consumers Act 2024). Such packaging misleads as it influences transactional decisions, being a misleading action (paragraph 225(4)(a)(i) and 226). It is also a banned practice (Schedule 20, paragraph 15). Furthermore, it may contravene the requirements of professional diligence (paragraph 229), falling short of an honest market practice (paragraph 229(a)). This is addressed above in relation to unfair competition.

Evidence that the practice is in scope is provided in the EU's [guidance](#) (see section 2.8.3 on confusion marketing) and the fact that Trading Standards succeeded in bringing to an end the misleadingly similar packaging of a yoghurt product (see [The Impact of Lookalikes](#), page 212).

Consumer protection law has been hailed as potentially effective protection:

[The Gowers Review](#), when concluding the brands were not well protected in the UK against this kind of copying, recommended that the consumer protection laws be given a chance to work (see page 103-4).

A Competition Commission investigation into the UK groceries market in 2008 identified the problem as a consumer protection issue (see Groceries Market Investigation, [appendix 9.10](#), para 19).

An amendment was tabled in the House of Lords to the Digital Markets, Competition and Consumers Bill ([Amendment 130](#)) which sought to strengthen provisions. This was rejected by government, with Lord Basham maintaining that the problem was already addressed by the prohibition on misleading actions.

However, the fundamental flaw is the absence of enforcement. Only public enforcers such as Trading Standards and the CMA have powers to enforce consumer protection laws and there has only been one (apparently informal) action, in 2008 involving Müller yoghurt.

The Brands Group has urged Government to grant affected brand owners civil powers of enforcement on a number of occasions. These have been consistently rejected:

In 2008 there were assurances that public enforcement would be sufficient<sup>8</sup> (see [Annex 3](#)), a claim countered by the evidence (only 1 (successful) enforcement action in sixteen years).

In 2015, following a public consultation, the Minister of State decided against granting private rights of enforcement under consumer protection law, stating there to be “little clear evidence that the use of similar packaging is causing any significant consumer detriment or hindering competition or innovation.” ([Ministerial statement](#)). These are not tests required for enforcement of consumer protection law, though they may form the bases for prioritisation principles for public enforcers. This helps demonstrate the inadequacy and ineffectiveness of the current regime.

In 2024, a Ministerial letter stated that the “new reforms will materially improve the volume and effectiveness of civil enforcement activity” (see [Annex 4](#)). This however lacks credibility, in that Trading Standards continue to suffer reductions in resource, limiting their ability to enforce, and the CMA continues to express no interest in the practice.

With no willingness to enforce by public enforcers, the recently introduced new powers and sanctions are meaningless. Consumer protection laws therefore continue to fail to meet the requirement for effective legal remedies required in Article 10<sup>bis</sup> of the Paris Convention. Furthermore, in restricting enforcement to public enforcers, the UK is not meeting the requirement of Article 10<sup>ter</sup> to provide nationals of other countries of the Union access to these legal remedies.

It is regrettable that public enforcers are unwilling to use consumer protection law against packaging that misleads shoppers and influences the choices they make. With brand owners having ineffective tools to protect themselves, and thereby indirectly protect shoppers, shoppers remain unprotected and vulnerable to this kind of subtle, often subconscious, manipulation.

### **Misleading comparative advertising**

There have been suggestions that parasitic packaging may amount to misleading comparative advertising. Were this the case, the remedy would depend on the application of consumer protection laws (such packaging being a business-to-consumer matter). This would require enforcement by public enforcers as affected brand owners do not have civil enforcement powers themselves, as outlined above. In some situations, where registered trade marks are being compared, it might enable brand owners to enforce their trade mark rights against the comparative advertiser, but then the same shortcomings apply as above in relation to trade mark enforcement.

### **Code of Advertising Practice**

Discussed above in relation to unfair competition and what constitutes ‘honest practices’, the UK’s Code of Advertising Practice (the [CAP non-broadcast code](#)) states that “marketing communications must not take unfair advantage of the reputation of a competitor’s trade mark,

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<sup>8</sup> Implementation of the Unfair Commercial Practices Directive. Government Response to the consultation on draft Consumer Protection from Unfair Trading Regulations. BERR. February 2008. URN 05/554. See page 16.

trade name or other distinguishing mark or of the designation of origin of a competing product” (Paragraph 3.43). There is no requirement to show confusion or deception.

The Code is monitored and enforced by the Advertising Standards Authority, an independent regulator.

While the Code gives a valuable indication of what constitutes ‘honest practices’, it has no application in relation to product packaging as this falls outside its scope. Discussions were held with the ASA on bringing packaging within scope but were rejected as it was deemed that the ASA did not have the necessary enforcement tools to effect compliance.

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## Annex 2 - Legislation

### The Paris Convention

Article 10<sup>bis</sup>

#### Unfair Competition

- (1) The countries of the Union are bound to assure to nationals of such countries effective protection against unfair competition.
- (2) Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition.
- (3) The following in particular shall be prohibited:
  - (i) all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor;
  - (ii) false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor;
  - (iii) indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.

Article 10<sup>ter</sup>

#### Marks, Trade Names, False Indications, Unfair Competition: *Remedies, Right to Sue*

- (1) The countries of the Union undertake to assure to nationals of the other countries of the Union appropriate legal remedies effectively to repress all the acts referred to in [Articles 9, 10](#), and [10bis](#).
- (2) They undertake, further, to provide measures to permit federations and associations representing interested industrialists, producers, or merchants, provided that the existence of such federations and associations is not contrary to the laws of their countries, to take action in the courts or before the administrative authorities, with a view to the repression of the acts referred to in [Articles 9, 10](#), and [10bis](#), in so far as the law of the country in which protection is claimed allows such action by federations and associations of that country.

### UK Trade Marks Act 1994

Registered trade marks

#### 10 Infringement of registered trade mark.

- (1) A person infringes a registered trade mark if he uses in the course of trade a sign which is identical with the trade mark in relation to goods or services which are identical with those for which it is registered.
- (2) A person infringes a registered trade mark if he uses in the course of trade a sign where because—
  - (a) the sign is identical with the trade mark and is used in relation to goods or services similar to those for which the trade mark is registered, or



(b) the sign is similar to the trade mark and is used in relation to goods or services identical with or similar to those for which the trade mark is registered,

there exists a likelihood of confusion on the part of the public, which includes the likelihood of association with the trade mark.

(3) A person infringes a registered trade mark if he uses in the course of trade a sign which—

(a) is identical with or similar to the trade mark,

(b) [Omitted]

where the trade mark has a reputation in the United Kingdom and the use of the sign, being without due cause, takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark.

### **Digital Markets, Competition and Consumers Act 2024** [\[link\]](#)

See in particular Part 4, Chapter 1, paragraphs 225-226 and 231. Also, Schedule 20, paragraph 15.

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## Annex 3 – Assurances on effective enforcement of consumer law

### Implementation of the Unfair Commercial Practices Directive

Government response to the consultation on draft Consumer Protection from Unfair Trading Regulations

BERR, February 2008

URN 08/54

#### Extract from the response on page 16:

*Businesses should not be able to enforce the CPRs*

The UCPD contains provisions designed to tackle copy-cat packaging design that misleads or confuses consumers. The Department received strong representations from brand owners and organisations representing the interests of brand and IP rights holders asking the Government to reconsider its decision (given in the Response to the 2005 consultation) not to allow companies with a legitimate interest to take civil (injunctive) enforcement action under the CPRs to stop copy-cat packaging. They argue that existing IP law is insufficient to protect brands against copy-cat packaging; that copy-cats cause considerable consumer detriment; and that to restrict enforcement powers to public bodies who have limited resources will result in very little, if any, action being taken against copy-cat packaging.

On balance the Government continues to believe that existing enforcement arrangements suffice to adequately enforce these provisions. OFT and Trading Standards will have to act in a manner consistent with their duty to enforce the Regulations. **The Government does not therefore propose to allow businesses to enforce the Regulations. However, this decision will be kept under review and will be formally reviewed 3 years after the Regulations come into force. This is in line with the conclusions of the Gowers Review.**

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**Annex 4 – Ministerial letter**, Digital Markets, Competition and Consumers Bill

**Lord Offord of Garvel CVO**  
**Parliamentary Under Secretary of State**  
**Department for Business and Trade**  
Old Admiralty Building  
Admiralty Place  
London  
SW1A 2DY

20 March 2024

House of Lords  
London  
SW1A 0PW

Dear Lord Leong and Lord Clement-Jones

Thank you for your constructive engagement during the second day of Report Stage of the Digital Markets, Competition and Consumers (DMCC) Bill on Wednesday 13 March. During the debate, I said that I would write to you on three issues.

**Working Group on Product Recalls and Safety**

[.....]

**Civil enforcement against unfair trading practices**

You asked what the guarantee is that there will be an effective enforcement regime to enforce the provisions in paragraph 14 of Schedule 19. You also asked for more particulars and assurance in this respect. Part 3 of the Bill strengthens the court-based civil enforcement regime for breaches of specified consumer protection legislation (including Part 4, Chapter 1 of the Bill that continues to ban the promotion of imitation products) through the introduction of monetary penalties of up to 10% of global turnover.

This is a considerable enhancement from the existing position, where enforcement orders predominantly focus on securing future conduct rather than sanctioning past infringements. As well as ensuring individual infringers are adequately sanctioned, we believe this will also have a significant wider deterrent effect, driving down the incidence of unfair trading and other infringements of consumer law.

As to how the volume of enforcement can be increased, the new CMA direct enforcement regime introduced by the Bill will increase the efficiency of enforcement and should therefore enable the CMA to increase both the speed and volume of cases. The extension of the power to apply for online interface orders to all public enforcers, which the government brought forward at Report, will improve the ability of those tackling unfair trading practices to remove harmful and infringing content directed at consumers online.

Further, by giving the courts and the CMA (respectively) the power to impose financial penalties on those who fail to comply with information notice requests, the Bill significantly

enhances enforcers' ability to efficiently obtain the information that they need to take enforcement action under Part 3.

Taken together, the government is confident that these reforms will materially improve the volume and effectiveness of civil enforcement activity. As such, we do not think it appropriate to make further reforms to tackle the sale of imitation products at this time, though we will continue to keep the situation under review. Finally, it is worth noting that infringements of paragraph 14 of Schedule 19 are also criminal offences and therefore enforceable through the criminal courts.

**CMA's approach to Primary Authority advice**

[.....]

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I hope what I have set out above is helpful. I will place a copy of this letter in the libraries of both Houses..

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Malcolm Offord', with a horizontal line underneath it.

**Lord Offord of Garvel CVO  
Parliamentary Under Secretary of State  
Department for Business and Trade**