

Briefing – Parasitic copying

Packaging consumer products to mimic familiar branded products free rides off brand reputation investments, misleads consumers and distorts competition. The UK offers brand owners poor protection, in contrast to competing economies.

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. Many shoppers also buy the product they didn’t intend to buy.



An example of a familiar brand and its copies

Unfair advantage

The copy hijacks the reputation of the brand, built up over years of consumer experience and investment in innovation and product performance. The copy bears none of the cost of building that reputation while reaping significant reward in terms of incremental sales and “assumed” reputation and quality. At the same time the brand is disproportionately damaged. The term “parasitic” is apt.

Lack of Government action

In 1994 at the time of the Trade Marks Bill, the Minister undertook to look at the problem of parasitic copying again if the problem persisted. It does persist. At the time of that Bill, copying was considered a competition issue. At the time of the Competition Bill (1998), officials considered it an intellectual property issue!

The Gowers Review of Intellectual Property (2006) found that brands in the UK were not well protected from misappropriation. It recommended that the (then) forthcoming Consumer Protection Regulations (CPRs) be given a chance to work and see whether they provided an adequate solution.

However, when the CPRs were enacted, the Government restricted enforcement powers to the over-stretched, under-resourced OFT and Trading Standards. This was a new obligation with no additional resources provided. Brand owners sought private rights for themselves, giving stronger consumer protection at no public cost. While this was rejected, a review was promised in 2010. It is still awaited.

In 2010 the Intellectual Property Office commissioned a major study of its own. Its key consumer findings, acknowledged by the IPO, are:

- consumers in substantial numbers buy the wrong product;
- similar packaging increases perceptions that the two products come from the same source;
- similar packaging enhances perceptions of quality;
- similar packaging increases propensity to buy.

WHY EXISTING LEGISLATION DOESN'T WORK

<i>Registered IP rights</i>	Designers who produce parasitic copies design around registered trade mark and designs to avoid infringement, while creating a similar overall impression.
<i>Copyright</i>	Parasitic copies tend to fall just short of the substantial reproduction test required for copyright infringement.
<i>Passing off</i>	The evidence required by the courts to show confusion is extremely difficult to obtain. Consumers tend not to complain about low-priced items, evidence cannot be gathered in store and courts often dismiss survey evidence as unreliable.
<i>Consumer Protection Regulations (CPRS)</i>	Parasitic copies are potentially unlawful under these Regulations as they mislead consumers. However civil enforcement action can only be brought by those designated under the Enterprise Act, essentially the OFT and Trading Standards. Both have declined to do so.

UK OBLIGATIONS UNDER THE PARIS CONVENTION AND TRIPS

Article 10^{bis} of the Paris Convention requires states to assure nationals effective protection against unfair competition. Counsel's Opinion suggests the UK is not compliant, a view supported by the Gowers Review findings. Government has not explained its contrary view.

UK OBLIGATIONS UNDER THE UNFAIR COMMERCIAL PRACTICES DIRECTIVE (UCPD)

This Directive, which underpins the CPRs, requires there to be adequate and effective remedies to unfair practices. As the OFT and Trading Standards are rarely able to enforce, this remedy is neither adequate nor effective and also means that the UK is not compliant with the Paris Convention and TRIPS.

A POTENTIAL SOLUTION? – THE INTELLECTUAL PROPERTY BILL

The IP Bill currently going through Parliament presents a rare opportunity to bring the UK into line with its treaty obligations *vis-à-vis* the Paris Convention, in the interests of consumers and companies that invest in strong, compelling reputations, the quality of their products and ongoing product innovation.

NOTES

1. The remedy sought is for products in misleadingly similar packaging to be promptly re-packaged in distinctive packaging. This solution preserves consumer choice and competition.
2. There is no concern with retailers' distinctively packaged own label products that compete fairly. This is the vast majority of own label products, demonstrating products need not copy to succeed.

PARASTIC COPYING CAN BE PERSISTENT WHICH EACH NEW BRAND DESIGN COPIED



MOST PRODUCTS ARE PACKAGED DISTINCTIVELY AND COMPETE ON THEIR OWN MERITS



RECENT EXAMPLES OF BRANDS FROM SMALLER COMPANIES AND THEIR COPIES

