

Briefing – Parasitic copying

IP Bill, Committee Stage, House of Lords

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.



Examples of a familiar brand and its copies (2012)

A selection of examples found on the market in 2012 is available [here](#). Recent and historical research into the consumer effects can be found [here](#) and [here](#).

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 the Trade Marks Bill, copying was considered a competition issue. At the time of the Competition Bill (1998), officials considered it an IP issue.

The Gowers Review (2006) concluded that brands in the UK are not well protected from misappropriation, recommending the Consumer Protection Regulations (CPRs) be given a chance to work. Despite calls at the time for companies to have civil rights of action against parasitic copies, Government declined, restricting enforcement to the OFT and Trading Standards, neither of whom has the resources and/or considers this a sufficient priority to enforce. The Government however gave assurances in Parliament that both had a duty to enforce. A review of the effectiveness of the CPRs was promised in 2010. This is still awaited.

The IPO has just published a study in this area but this makes no policy recommendations.

WHY EXISTING LEGISLATION DOESN'T WORK

Registered IP rights	Designers who produce parasitic copies design around registered trade mark and design rights to avoid infringement, while creating a similar overall impression.
Copyright	Parasitic copies tend to fall just short of the substantial reproduction test required for copyright infringement.
Passing off	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.
Consumer Protection Regulations (CPRS)	Parasitic copies are likely to be 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. Despite numerous calls to enforce, both have declined to do so.

THE UK'S OBLIGATIONS UNDER THE PARIS CONVENTION AND TRIPS

Article 10^{bis} of the Paris Convention and Article 2 of TRIPS require signatories (of which the UK is one) to assure nationals effective protection against unfair competition. When challenged in Parliamentary debate on this point, the Government responded via a written Parliamentary Question that failed to show compliance. A subsequent Counsel's Opinion suggests the UK is not compliant, a point reinforced by the conclusion in the Gowers Review that brands in the UK are not well protected against misappropriation.

The introduction of the CPRs (2008) has not changed this situation. They are not being enforced so cannot be deemed to be "effective".

WHY THE IP BILL?

“IPRs ... incentivise innovation through the offer of a time-limited return on innovative investment. This reduces the risk in inventing and creating new products, so stimulating innovation, competition and stronger economic growth.” Hargreaves, IP Review

Parasitic copies free ride off investments in innovation and the reputation that follows.

The IP regime is the appropriate context to address protection under unfair competition obligations. The IP Bill therefore presents a rare opportunity to bring the UK into line with both the Paris Convention and TRIPS and to address the problem of parasitic copying.

THE SOLUTION? AMEND THE IP BILL TO INCLUDE A CLAUSE ON LOOKALIKES

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THE AMENDMENT

28A*

Insert the following new Clause—

“Lookalikes

(1) A person (“A”) shall not, in relation to any goods or services, use any features of packaging, marking, labelling or decoration in such a way that the public is likely to attribute to A’s goods or services the reputation of another person (“B”) or the qualities or reputation of B’s goods or services.

(2) For the purposes of subsection (1) it is immaterial whether there is any similarity between the goods or services of A and those of B.

(3) Subsection (1) shall not apply to features of packaging, marking, labelling or decoration that are commonplace.”

While parasitic copying tends to affect product packaging, services are included because:

- the trade mark classification system covers goods and services. There is no basis to discriminate against one group of trade marks;
- retailers have strong brands and should be entitled to the same protection if someone were to set up a retail service that traded on their reputation;
- online, this would be an additional measure against traders who copy services such as banks and oil exploration in order to phish for personal data.

NOTES

1. The British Brands Group seeks a solution to parasitic copying whereby products in packaging that is found to take unfair advantage are promptly re-packaged in distinctive packaging. Such a solution would preserve consumer choice and competition.
2. 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.
3. 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.