

# Parasitic copying

Briefing for Peers



Examples of a familiar brand and its copies (2012)

Misleadingly similar “parasitic” packaging (*aka* copycats or look-alikes) adopts distinctive features of the packaging of familiar branded goods. It diverts 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.

Research from a range of sources indicates that similar packaging induces as many as a third of shoppers to buy products they do not intend to and increases perceptions that both products come from the same factory and have similar characteristics. It also increases propensity to buy (IPI study for the IPO, [key findings](#)).

Theoretically, remedies lie in the **intellectual property regime** (notably Trade Mark law and the tort of Passing Off) enforced by brand owners and the **consumer protection regime** enforced by public authorities. In practice both routes are currently ineffective in the UK.

## INTELLECTUAL PROPERTY REGIME

The Paris Convention and TRIPs requires the UK to provide effective protection against acts of unfair competition ([Article 10<sup>bis</sup>](#)). The UK falls short in not providing protection against those that take “undue advantage of the work of another” (see [WIPO](#) para 31 and [Counsel’s Opinion](#)).

## Timeline

- 1994 *Trade Marks Bill* – Parasitic copying is seen primarily as a competition issue. The Minister undertakes to look again if the problem persists ([Hansard](#)).
- 1997 *Standing Advisory Committee on Intellectual Property (SACIP)* – In exploring WIPO's [Model Law on unfair competition](#), the Committee fails to reach consensus that action is needed.
- 1998 *Competition Bill* – Consensus could not be achieved to secure change ([Hansard](#)).
- 2000 *Copyright & Trade Marks Bill* – Minister argues that the UK is 'not deficient' in its compliance with the Paris Convention / TRIPs ([Hansard](#)).
- Response to Parliamentary Question* – The government's response fails to demonstrate the UK's compliance with the Paris Convention / TRIPs (see [Hansard](#) and [Counsel's Opinion](#)).
- 2006 *Gowers Review of IP* – the Review found that brands were not too well-protected in UK, suggesting the UK is not compliant with the Paris Convention / TRIPs. LACORS undertakes to enforce the [Unfair Commercial Practices Directive](#) when it comes into force. The Review recommends this be given a chance to work (see [page 100](#)).
- 2008 *Consumer Protection Regulations (CPRs)* – Government promises to review their effectiveness in relation to parasitic copying within two years (by 2010) ([Hansard](#)). The review was finally announced in 2014.
- Response to Parliamentary Question* – The Minister gives assurances that OFT and Trading Standards will enforce the CPRs ([Hansard](#)).
- The CPRs are introduced but with no additional resources allocated to Trading Standards to enforce this new duty.
- Competition Commission (CC)* – in its investigation of the groceries market, the CC concludes that parasitic copying is matter for [consumer protection](#) ([Annex 9.10, para 19](#)).
- 2012 *DG Markt study* – This [study](#) by Hogan Lovells assessed the laws relating to parasitic copying across member states, finding great disparity in remedies. It indicated that stronger protection is afforded brands in other countries than the UK (see para 44).
- 2013 *IP Bill* – This presented an opportunity to remedy the problem (see [Briefing](#)). However the Minister assures the House of Lords that the law already provides protection and the UK is fully compliant with the TRIPs agreement ([Hansard](#)).
- 2014 *IP Bill* – the Minister announces a review of the enforcement of the CPRs. This is due to report in October 2014 ([Hansard](#)).

## CONSUMER PROTECTION REGIME

The consumer protection regime, based on the Unfair Commercial Practices Directive, goes further than the protection afforded by registered IP rights and the tort of Passing Off in addressing confusion over equivalence or quality (see European Commission [guidance](#), pages 36-7). However in the UK the main enforcers are public authorities (primarily Trading Standards) which lack the resources to do so.

## Timeline

- 2006 The Gowers Review recommends the consumer protection regime be given a chance to work (see above)
- 2008 The Competition Commission points to consumer protection as the remedy (see above)
- BERR consultation on Consumer Protection from Unfair Trading Regulations* – Despite strong representations from brand owners, companies are not granted private enforcement rights in relation to misleadingly similar packaging, it being stated that enforcement by the OFT and Trading Standards is adequate ([Consultation response](#), page 16).
- 2008 - 20013 The Group engages Trading Standards, Office of Fair Trading and the Local Better Regulation Office to secure enforcement of the CPRs in relation to misleadingly similar packaging. However only one instance of enforcement action is known since the CPRs came into force.
- 2014 *Consumer Rights Bill* – Stella Creasy MP raises parasitic packaging in Committee ([Hansard](#)). It was also raised by the Minister at Second Reading in the House of Lords ([Hansard](#)).

## THE PREFERRED REMEDY

Brand owners strongly consider that effective enforcement of the CPRs to be an immediate means to remedy the problem of consumer goods being packaged in misleadingly similar packaging. The most effective enforcement would be to grant brand owners themselves private civil enforcement rights. Consumers' and brand owners' interests are wholly aligned in ensuring such packaging does not mislead.

Such an approach should not be controversial. Eighteen member states, when implementing the Unfair Commercial Practices Directive, gave companies private civil rights of action. Brand owners ask for the same rights, though only in relation to misleadingly similar packaging.

A potential amendment to the Consumer Rights Bill would most likely involve a new clause, worded as follows:

### **Private enforcement as respects certain unfair commercial practices**

(1) This section applies to an unfair commercial practice which concerns any packaging of a product which creates confusion with any products or the packaging of a competitor.

(2) For the purposes of Part 8 of the Enterprise Act 2002 (enforcement of certain consumer legislation) a person who reasonably believes that an unfair commercial practice to which this section applies is likely to cause confusion or association with any of their products or packaging is an enforcer as respects that unfair commercial practice.

(3) This section has effect only in relation to conduct which occurs, or which is likely to occur after the commencement of this section.”