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A three-in-one report summarising
three significant studies into packaging
and consumer behaviour

UNWRAPPED

The hidden power of packaging



in partnership with
Norwich Business School,
Mountainview Learning and
Speechly Bircham LLP



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Foreword

Packaging is integral to modern life, present in every home in the land, preserving and protecting the products that feature in our everyday lives and providing the information on how to use them. In stores of all sizes packaging also speaks the language of commerce, vying for our attention, presenting credentials and influencing our choices. It underpins competition and enhances product performance. We take it for granted yet the tangible and intangible functionality of packaging is significant.

Some 124 billion units of packaging were used in fast moving consumer goods categories in 2011. The food and drink industry, as one example, would be a shadow of its scale if one excluded packaged goods and we are talking about an industry that contributes £57.3 billion gross value added and employs nearly 2 million people in manufacturing, distribution and retailing.

So why the fuss? Packaging has been under-appreciated for decades so why change now?

What is changing is the increasing regulatory and policy interest that is being taken in packaging and the impact it may be having on our lives. There are concerns for the sustainability of the planet's resources and the impact of used packaging on our environment. The power of packaging as a communication medium is being recognised, with the state requiring space on-pack to communicate its own messages and warnings to consumers. More recently, we are seeing proposals to remove brand imagery from packaging with the intention of changing consumer behaviour, imagery that consumers use to understand products, differentiate between them and determine their choices.

For policy to be well-informed, effective and proportionate, a full understanding of the many functions of packaging is necessary. After all, policy on packaging cannot be discriminatory, focusing its effect on one function while leaving others untouched. The interlinked nature of the functions of packaging means that all the implications need to be assessed if policy is to be informed and unforeseen consequences avoided.

The British Brands Group, which provides the voice for brands and also has some of the country's most important consumer packaged goods companies in its membership, recognises the need to bring greater knowledge and insight to policy making. Working with its partners, it has brought together in this report the summaries of three significant new studies, contributing to that goal:



1 Using current academic, government, industry and other sources, Norwich Business School provides a comprehensive picture of the consumer, competition and economic importance of packaging, bringing together for the first time in one place a holistic picture of the crucial commercial role it plays;

2 Through original consumer research, using techniques that indicate actual consumer response (not how consumers say they might respond), Mountainview Learning demonstrates how different sizes of distinctive brand elements affect consumer behaviour and the effect where choices include packs of similar design;

3 To what extent are government policy, actual consumer behaviour and judicial practice aligned in ensuring markets work well? Speechly Bircham in its report addresses this question, focusing in particular on consumer confusion, how it is identified in the Courts and the tests that are applied.

Our ambition is for these three reports to make a meaningful and constructive contribution to public policy, encouraging the many functions of packaging to be considered whenever it falls under scrutiny. Informed policy will in turn lead, we hope, to a proportionate, evidence-based and effective approach. This can only be positive for consumers, policymakers and the environment for packaged products in the UK.

Andrew McCarthy
Chairman, British Brands Group

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The hidden power of packaging

What you will find in this report

This report presents executive summaries of three significant studies. Here you will find the key arguments and findings. Links to the full reports are given at the end of each summary.



1 Packaging in a market economy

On-pack branding and packaging for fast moving consumer goods (FMCGs) perform key functions in a market economy, from a consumer perspective (such as providing information, confidence, choice, satisfaction, and reduced search costs) and from an economic and competition perspective (in respect of its role in differentiation and segmentation while supporting rivalry, commercialisation and innovation). The study 'Packaging in a market economy: The economic and commercial role of packaging communication' reviews the current academic literature to show how these functions provide important economic effects by supporting economic growth and promoting well-functioning markets.



2 The effect of branding on consumer choice

Branding on packaging acts as an important cue to guide consumer choice in the retail environment. From a psychological perspective, branding acts as a memory cue, allowing consumers to identify brands quickly and efficiently. The ease and speed with which consumers are able to identify brands is crucial in guiding decision making and giving consumers the confidence to buy. Original consumer research was commissioned to investigate how branding influences consumer choice in two specific cases, when branding was reduced and when brand copies were introduced.

The key findings indicated that reducing branding on packaging has a detrimental effect on consumers' ability to find and recognise a brand they are looking for. Furthermore, the presence of a brand copy impairs consumers' ability to identify brands. It is possible that reducing branding or introducing copycat brands distracts or confuses consumers, resulting in a delay in their processing of information and increased frustration when buying from the category.



3

Confusion, heuristics and the consumer

'Parasitic copying', whereby a competitor adopts packaging designs strongly reminiscent of those of familiar brands, has been exercising brand owners, lawyers, policymakers and others for years. To what extent do such 'copycats' misrepresent or take unfair advantage of the goodwill of the original? Furthermore, how is a court to determine to any degree of certainty and predictability what is in 'the minds of the public' at point of purchase, when the court is examining evidence in a very different context and some time after the event? This study explores how consumers make decisions in a modern, self-service retail environment offering extensive choice, and how we use heuristics (mental shortcuts) to speed our choices. Modern research techniques present a means to measure the heuristic responses of consumers, to identify whether the heuristics associated with a particular product are being unduly and unfairly misrepresented and to inform court judgments, in association with oral evidence and judicial opinion.

REPORT 1

Packaging in a market economy



On-pack branding and packaging for fast moving consumer goods (FMCGs) perform key functions in a market economy, from a consumer perspective (such as providing information, confidence, choice, satisfaction and reduced search costs) and from an economic and competition perspective (in respect of its role in differentiation and segmentation while supporting rivalry, commercialisation and innovation). The study 'Packaging in a market economy: The economic and commercial role of packaging communication' shows how these functions provide important economic effects by supporting economic growth and promoting well-functioning markets.



Packaging has many roles beyond protection, preservation and presentation. Notably, packaging offers brand owners the possibility to communicate with consumers through distinctive designs and on-pack communication in the form of logos, graphics, images, colours, messages and product information. This represents an important medium for marketing communication and an important battleground for the intense rivalry evident in most FMCG markets where brands compete for the attention of consumers.

Such competition is both *immediate* in nature, i.e. how existing packaged products compete with each other, as well as *dynamic* in the sense of the process by which new products enter the market and existing ones adapt and improve through innovation and new product development. Both aspects of competition are vitally important to a well-functioning market and for economic progress for the public good.

The analysis and discussion of packaging communication is addressed in three key study areas in the report: the consumer dimension, the competition dimension, and the economic dimension.

The **consumer dimension** considers consumers' relationship with packaging and the public interest desire that consumers should be well-informed and confident in making their purchasing decisions. This requires consideration of the range of information that is conveyed by packaging, its influence on consumers' purchase decisions, and how it can generate consumer understanding, trust, reassurance and confidence. Packaging communication plays a key role in assisting the consumer at the point of sale but also provides on-going product information and performance to influence future purchasing decisions.

The **competition dimension** addresses the public desire to see open, competitive markets where packaging is used by FMCG companies to communicate, differentiate, segment and ultimately compete through packaging's ability to support product quality, variety, and diversity as well as provide scope for innovation for the benefit of consumers.

The **economic dimension** examines how packaging is economically important through supporting innovation, new entry, competitiveness, trade and strong economic growth, while recognising that it entails some environmental costs.

Consideration of packaging communication's role in these three dimensions serves to highlight the broader context in assessing the role and functions of branding, and specifically what it can and cannot achieve. This consideration recognises that branding may be able to play differing roles at different stages of a category's development. For example, in relatively new categories, a confidence-inspiring brand (like Apple) might encourage take-up of the new product or service, growing the category as a result. In mature markets this role may not be possible. For example, taking an everyday category like shampoo, it is difficult to envisage that established products have much influence to encourage people to use more shampoo in the absence of new innovations, no matter how attractive the packaging.

At issue is a more general question: Does branding have the power to induce people to buy things they do not want? This is a claim sometimes levelled by policymakers. The answer lies with consumers. If consumers are informed, rational and confident then they can make effective purchase decisions that take full account of the choices available to them. On-pack branding and communication has a role to play in providing information and reassurance but cannot persuade informed consumers to buy things they do not want.

The fundamental nature of FMCGs is that they are generally repeat purchase items, so consumers have the opportunity to learn which products best suit them, regardless of how they are packaged and sold. The experience nature of these products is such that if they were tried and not liked then consumers would shift to buying alternative products, so there is always commercial pressure on producers to maintain product quality and consistency, while innovating to remain competitive.

Supporting consumer choice requires the presence of effective competition at all levels of the supply chain. To reach out to consumers, brands need access to shelf space, which can prove

difficult if retailers have excessive gatekeeper power when retail markets are highly concentrated. Equally, retailers need a good selection of brands to display to give consumers suitable choice. Imperfectly competitive markets characterised by anti-competitive behaviour are not conducive to fair choice or fair prices for consumers.

For policymakers and regulators each of the three dimensions point towards a key need. In respect of the consumer dimension, it is vital that the policy aim is directed towards supporting and developing well-informed, confident consumers. For the competition dimension, policy needs to support and promote open, competitive markets. For the economic dimension, policy must be directed at supporting competitiveness and economic growth.

Any regulatory intervention that affects how producers communicate through their packaging must tread carefully to ensure that it supports and does not undermine packaging's positive competitive and economic role. Ensuring appropriate, well-conceived, and well-executed regulatory intervention is not an easy task. There is an equal danger of too little regulatory involvement (such as failing to protect intellectual property rights or provide regulatory certainty to aid business planning) just as there is with too much regulatory involvement (which can distort competition and add to industry's cost burden). Striking the right balance is not easy, but is vital in economic terms.

This calls for a careful *Goldilocks* assessment, to make sure that regulation is just at the right level, neither too little nor too much, and appropriate for the needs of the market to support consumer choice and confidence while ensuring or propagating effective competition.

In the context of packaging, though, there are two particular situations which can give rise to a concern that competition and innovation could be stifled or distorted and economic harm arise

with inappropriate or insufficient regulation. First, regulation that restricts firms' ability to compete effectively through their packaging may impede the competitive process. Second, firms that deliberately free-ride on and undermine the intellectual property investments of others can distort competition to the detriment of consumers.

The first of these, regarding regulatory requirements on the form of marketing communications, can take the form of either mandating specific information or requiring the removal of information. Inappropriate regulatory action can detrimentally impact competition and confuse consumers. Two controversial policy areas are particularly pertinent:

- First, with front-of-pack nutritional labelling on food products, the failure for policymakers and regulators to be decisive in applying universal requirements means that there is no single industry-wide platform on which to compete, resulting in a proliferation of labelling formats making it harder for consumers to readily make direct product comparisons. While this situation persists, consumers can be confused and make ill-informed purchasing decisions.
- Second, plain packaging regulations for cigarettes (as due to be introduced in Australia and currently under consideration in the UK) remove on-pack branding and so make it harder for consumers to identify the brand at the point of purchase. This has the potential to distort competition by focusing attention on price rather than quality, opening up the prospect that a regulation intended to reduce demand might perversely increase demand and sales if the intensification of price competition leads to lower prices and reduced average quality, while generating smaller revenues for the industry and government (through a reduced tax take).

In the second situation, where regulation has a role to support healthy competition by ensuring that intellectual property investments are protected, the main policy consideration is in regard to similar packaging and the problem of parasitic copying. In this regard, the branding and packaging investments made by established brands can be undermined by copycat packaging free-riding on these investments and diverting sales away from established brands, and so distorting competition.

Existing laws and regulations provide limited protection for brand owners, leaving them vulnerable to this problem and exposing consumers to the risk of making mistaken or misleading purchasing decisions.

This is a summary of the report 'Packaging in a market economy: The economic and commercial role of packaging communication', by Professor Paul Dobson and Dr Arvind Yadav of Norwich Business School, University of East Anglia (2012). The full report can be found at www.britishbrandsgroup.org.uk.

REPORT 2

The effect of branding on consumer choice



In today's cluttered retail environment, consumers are overwhelmed with choice. The average UK supermarket carries approximately 45,000 SKUs (stock keeping units). The average shopper buys around 50 items in 50 minutes. Consumers must therefore weigh up around 900 items each minute. However, consumers aren't even able to attend to all of the items on display, let alone weigh up all of the available options; they must decide what to buy in the blink of an eye.

In order to make such fast decisions, consumers need to use mental shortcuts, or heuristics, to guide their choices. Certain cues present in the environment guide shoppers' attention and aid their decision making in store. Often consumers are not conscious of the cues or the mental shortcuts they have used to arrive at a decision.



Perhaps the most powerful mental shortcut available to the consumer is branding. Branded packaging allows consumers to quickly and efficiently select from a huge array of products. Specifically, branding draws consumers' attention to certain products; it allows them to recognise familiar products and serves as a cue for retrieving stored information from memory about those products. Understanding this important role of branding in decision making is the broad aim of the current research.

This research is particularly timely for two reasons. First, recent developments in the brain and behavioural sciences have expanded our understanding of how the brain takes in and stores information, and how we make decisions. We now understand just how much information processing and decision making takes place below consciousness. We also have the means by which to examine these unconscious processes. While in the past, researchers relied on asking consumers' opinions, we can now make the deep dive to examine the decision-making processes that consumers are not even aware of. This scientific knowledge and the rigorous methodologies have only just begun to be applied in the consumer context. However, they have a great deal to offer in understanding how consumers choose between products.

Second, a greater understanding of the effects of branding on consumer choice is particularly pertinent in light of current public policy and legal considerations. With restrictions on cigarette branding imminent in Australia and strict regulations in other categories likely, brand owners are keen to understand how these changes will impact consumer choice and ultimately sales. Aside from this legislation, brand owners face a further threat, that is, 'parasitic' copycat branding. By using branding that is similar to another well-established brand, copycat brands enjoy an unfair advantage. However, there is a desire to understand more clearly how copycat branding works to influence consumer choice.

This research addresses the issues raised above using rigorous scientific techniques, underpinned by an understanding of human decision making. The specific aims of the current research were to examine the role of branding on decision making in two specific areas:

- i The impact of reduced branding on consumer behaviour. When branding on packaging is reduced, how does this influence behaviour?
- ii The impact of copycat branding on consumer behaviour. When a brand is perceptually similar to another, well established brand, how does this effect behaviour?

Branding and psychological processes

In order to understand consumer behaviour, it is necessary to understand the underlying psychological mechanisms that guide consumers, and how branding can influence these conscious and non-conscious processes.

Branded packaging acts as a signal, influencing how quickly and easily a brand comes to mind; that is, it allows consumers to recognise brands they are looking for or brands they are familiar with. Branding acts as a memory cue, allowing consumers to retrieve relevant information from memory. This may be about past experience with the brand, brand perceptions or brand associations.

Branded packaging facilitates these memory processes, giving consumers the information they need quickly and efficiently. The speed with which consumers can find and recognise products is crucial in determining their decisions. A wealth of research on 'processing fluency' suggests items that come to mind quickly and easily are liked more and perceived to be of higher value. Consumers need to be able to find and recognise brands in a matter of milliseconds.

This research therefore investigated how quickly and accurately consumers could find and identify brands, using a response latency measure. Speed of recognition is a crucial factor in determining consumer decision making. Furthermore, response latency methodologies can measure automatic behaviour, which is not likely to be under conscious control. Therefore, this kind of measure avoids many of the pitfalls of traditional consumer research, facilitating measurement of the conscious and non-conscious processes that guide consumer behaviour.

In order to evaluate brand memory, we employed a speeded response, visual search procedure. This test required participants to search for a brand within a display and make a physical response as fast as possible. By recording both accuracy and response time, the technique is a highly sensitive measure of recognition and one that is able to measure participants' automatic responses, before any filtering for sense or social desirability has taken place.

Methodology

We investigated the impact of branding on packaging within the retail context by using lab-based, computerised tasks. Data was collected from 35 participants. Research has shown that sample sizes of 20–30 are sufficient for robust results in this kind of research.

Stimuli comprised high resolution photographs of product packaging, displayed on a screen. Participants were shown an array of six brands and asked to identify a key brand from the array. Participants were instructed to use the mouse to point to and click on the key brand as quickly as possible. Both speed and accuracy of recognition were recorded.

Part i: The impact of reduced branding

In order to understand the impact of reduced branding on packaging, we manipulated the size of branded elements displayed on packaging. We then investigated the impact of those manipulations on speed of recognition. Specifically, the size of the logo (or logotype) was reduced to 75% and 50%. The logo size manipulations were carried out on all of the brands shown in the experiment.

Products from five categories were included in the study: biscuits, gravy, crisps, fizzy drinks and butter. Five products from each category were included. In this experiment, there were three conditions:

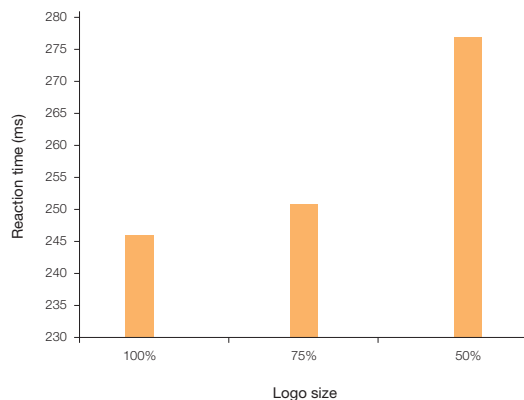
Condition 1: Size of logo – 100% (original image)

Condition 2: Size of logo – 75%

Condition 3: Size of logo – 50%

Results

In order to investigate the impact of size of branding, we analysed how response time varied as a function of logo size. The graph below shows the average response times across the three conditions. The data demonstrates that when the size of the logo



was decreased, participants were slower to recognise the key brand. This effect was particularly pronounced in the third condition where the logo was significantly reduced¹.

The data suggests that reducing branding on packaging has a detrimental effect on consumers' ability to recognise and find brands they are looking for.

Part ii: The impact of copycat branding

In order to understand the effect of copycat branding, we investigated the impact of perceptually similar (copycat) brands on established brands. We compared cases where an established brand was displayed alongside a copycat brand with cases where the established brand was displayed alongside brands that were not perceptually similar. The goal of this study was to measure the impact of a copycat brand on consumers' ability to identify the established brand.

Products from five categories were included in the study: shampoo, toothpaste, dishwasher tablets, energy drinks and butter. Each category included the key brand, a copycat brand, a supermarket own brand that was not a copycat and four filler brands, from within the category. In this experiment, there were three conditions:

Condition 1: Key brand and four filler brands

Condition 2: Key brand plus copycat brand, and three filler brands

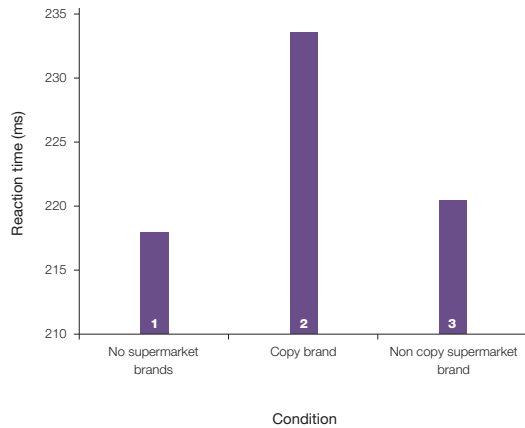
Condition 3: Key brand plus non-copy brand, and three filler brands

Results

The goal of this study was to investigate whether the presence of a copycat brand influenced participants' recognition of the key brand. We therefore analysed differences in response times across each of the three conditions. The graph below shows the average reaction times across the three conditions. Participants were slower to identify the key brand when a copycat brand was present, than in either of the other two conditions².

¹ Statistical analyses of the reaction time data showed a significant main effect of condition ($p > 0.001$), suggesting a strong impact of logo size on brand recognition.

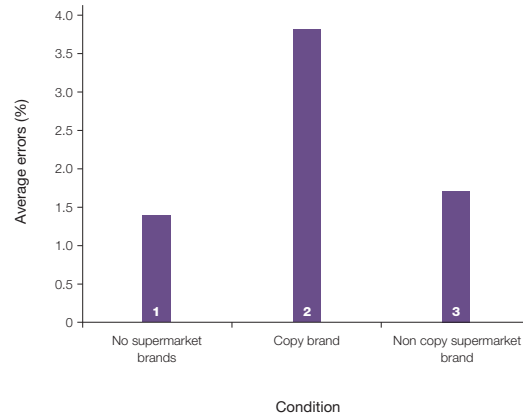
² Statistical analyses of the reaction time data showed a significant main effect of condition ($p > 0.001$). This suggests that reaction times vary depending on the presence of a copycat brand. Further analyses revealed that this effect was driven by significant differences between conditions 1 and 2, and 2 and 3, but no significant difference between 1 and 3.



Importantly there was no difference in speed of recognition when a non-copy brand was present. This suggests that it is the perceptual similarity of the copycat brand to the established brand that is driving the effects. It is likely that this perpetual similarity distracts or confuses consumers, impairing their ability to identify the key brand.

In addition to the response time data, we conducted further analyses on the accuracy data, to investigate whether the presence of a copycat brand could cause participants to select the wrong brand; would participants select the copycat brand, mistaking it for established brand?

The graph below shows the average percentage of errors made by participants across the three conditions. Participants were more likely to make an error when a copycat brand was present, than in either of the other two conditions. These results suggest that in some cases, participants were choosing the copycat brand because they had mistaken it for the key brand.



Summary

The results from this study indicate that branding has a strong impact on consumers' ability to find and recognise brands. They demonstrated that changes to branding or the existence of copycat branding slow down consumers; this slowing down is likely to have a number of important consequences for consumers and brands.

First, brands that are not recognised quickly are perceived to be less valuable and less desirable. A wealth of research on 'processing fluency' shows that things that come to mind quickly and easily are positively evaluated; they are liked more and perceived to be of higher value.

Second, brands that are not recognised quickly and easily are less likely to be purchased. Research shows that more fluent brands are more likely to feature in a consumer's consideration set and ultimately more likely to be chosen.

Third, it is possible that slowing down brand recognition will cause some distress to consumers. Previous work shows that when our trading environment is easy to process we experience more

positive feelings. By slowing down consumers' decision making in store, it is possible that they may end up feeling confused or overwhelmed with the decision-making task they face.

The ability to make fast and efficient decisions is particularly crucial in today's complex retail environment. Brand owners and consumers rely on the use of visual cues to facilitate the buying process. The findings from this study should therefore be considered in terms of the possible negative consequences to both brand owners and consumers.

This study investigated two specific areas of branding, size of branding and copycat branding. In the case of size of branding, the results show that reducing the size of branding on packaging can impair consumers' ability to identify certain brands.

This finding has important implications for any brand owners who may be required to reduce or eliminate branding from their packaging. It suggests that when faced with a shelf of minimally branded products, consumers find it difficult and time-consuming to process the information around them; they are less likely to make an efficient decision.

In the case of copycat branding, the study demonstrated the negative impact that a copycat brand has on a well-established brand. When looking for their brand of choice, a consumer will find it harder to find that brand if there is a copycat present. In some cases, they may even select the copycat brand by mistake. These findings have serious implications for legal issues around copycat brands; they suggest that established brands do suffer at the hands of copycat brands; they also provide some evidence that copycat brands distract or even confuse consumers at the point of decision making.

The findings from this study have wide implications, since they provide strong evidence for the important role of branding on decision making. Furthermore, this study demonstrates, for the first time, that these effects are quantifiable using robust scientific techniques. The techniques employed in this study should be considered in the future when assessing a range of branding issues from packaging changes to legal disputes over copycat branding. It is hoped that continued use of scientific methodologies will further our understanding of consumer decision making and the part that branding plays in this process.

This is a summary of the report 'The effect of branding on consumer choice', by Dr Jane Leighton of Mountainview Learning and Dr Geoff Bird of University College London (2012). The full report can be found at www.britishbrandsgroup.org.uk.

REPORT 3

Confusion, heuristics and the consumer



Sir Robert Peel based the formation of the police force on the simple premise that,

‘It is not the severity of punishment which acts as a deterrent, but rather the certainty of that punishment.’

In order to facilitate markets that work effectively, the law and its application must provide a degree of legal and evidential certainty. As lawyers we are often asked to look at product packaging and advise whether the presentation of a competing product is ‘too close’ to some original product. That is, do we believe that a product in similar packaging – a copycat – is wrongfully appropriating the goodwill in the original product? Neither the lawyers who are advising nor the courts that must adjudicate have established a structured measurable explanation or methodology for the evidence of what is happening in the ‘mind of the consumer’ and how we evidence confusion.

Whether a copycat makes a misrepresentation or takes advantage of its host’s goodwill is a question of fact and therefore evidence. The challenge for counsel is how to represent something in oral or written evidence that is essentially a process in the mind of the consumer. Traditionally, courts are presented with survey evidence attempting to show how the copycat confused consumers. This ignores, however, a wide body of research that is well established in the field of heuristics – mental shortcuts that allow people to solve problems and make judgements quickly and efficiently. These strategies shorten decision-making time and allow people to function without constantly stopping to think about the next course of action.

1 The law

The law of passing off and trade marks has a hybrid origin. The mark of the trade is a specific visual signal associated with the goodwill of a particular business. These symbols create a means by which the customer can quickly identify the vendor with whom she

wishes to trade; or if not the specific vendor at least that the product comes from a single source.

The symbol and the goodwill which that symbol represents are intertwined. The misappropriation of the symbol damages the goodwill. Goodwill therefore evolved as an asset identified or synonymous with a visual representation, namely the sign or mark of the trade. A modern trade mark is registerable if it is ‘capable of distinguishing the goods and services of one proprietor from those of another.’ At common-law, goodwill must be proved. For a registered trade mark, goodwill is presumed and need not be proved.

The key principle is that the wrong occasioned by the appropriation of another business’s trade mark (registered or unregistered) is damage to goodwill, not merely the replication of the sign.

In 1901 Lord Macnaghten provided an enduring definition of goodwill as follows³:

‘the benefit and advantage of the good name, reputation, and connection of a business. It is the attractive force which brings in custom.’

Lord Macnaghten additionally stated that goodwill is composed of a:

‘variety of elements. It differs in its composition in different trades and in different businesses. One element may preponderate here and another element there.’

Misrepresentation is an essential element in a cause of action for passing off⁴. However, ‘the representation is implied in the use or imitation of a mark, trade name, or get up with which the goods of another are associated in the minds of the public.’ The tort extends to all aspects of a product or service. The misrepresentation may

³ Inland Revenue Commissioners v Muller and C Margarine (1901) ACS 213, at 223

⁴ Warnick (Erven) Besloten Vennootschap v J Townend & Sons (Hull) Ltd (the so-called *Advocat* case) (emphasis added)

be overt or implied. If we can establish that the public has made an 'association,' then we can move towards asking the question, is this of such a nature as to damage or take advantage of or 'free-ride' on the goodwill created by the owner of that goodwill?

The way in which the misrepresentation operates on the 'minds of the consumer' however represents serious evidential challenges. How does one explain or evidence how a representation has operated on the 'minds of the consumer'?

The presentation of evidence throughout the history of passing off has relied upon calling witnesses to explain what the impact of the offending get up was on them, that is to say how they were misled or confused. When the courts consider this question they are frequently presented with many witnesses all with their own particular perception as to how the copycat packaging affected their decisions, often confused and inconsistent. The judgments show how often the courts are forced back to the Judges' own perceptions.

2 Heuristics and behavioural science

The science of behavioural economics lies at the interface between law, economics and psychology but it has also played a significant part in competition law in the guise of game theory. The science explains how in order to cope with the vast quantities of information we all receive we take **mental shortcuts**. These shortcuts are known as **heuristics**. This process allows us, and in this context shoppers, to solve problems and make judgements quickly and efficiently. These strategies shorten decision-making time and allow us to function without constantly stopping to think about the next course of action.

Whilst it may be obvious or self evident that a copycat does operate on the mind of the consumer (there would be no incentive to copy if they did not), the case law demonstrates that consumers have great difficulty explaining (after the event) how this occurred.

Despite the fact that the science of behavioural psychology and its commercial application in 'behavioural economics' has been well understood for many years, there has been little or no evidence of the courts being introduced to this as a tool for structuring their explanations and judgments.

3 The research

What differs between modern (particularly retail) purchases and those made when the law of trade marks and passing off were developed is the volume and complexity of media input which a consumer receives, the self-service nature of the sales environment and the extent to which decision making has moved from rational and reasoned to instantaneous and responsive. Research shows that one-half of all available brands receive no attention at all⁵, meaning that the consumer has a method of either selecting the brands quickly and/or filtering out those which are not relevant to the proposed decision.

It shows that changes to brand size and copycat branding can strongly influence consumers' ability to identify or recognise familiar products.

In order to account for these behavioural anomalies, Kahneman and Tversky developed the Prospect Theory, for which they were awarded a Nobel Prize in 2002. Kahneman and Tversky suggested that people rely on a limited number of heuristics, or mental shortcuts, which reduce the complex task of assessing probabilities and predicting values to simpler judgemental operations. A large body of empirical data as well as further theoretical advancements have supported their work. Shah & Oppenheimer (2008) describe these mental shortcuts in terms of an effort-reduction framework where heuristics make decision-making easier and more efficient.

The first stage in processing large quantities of information has been explained as 'rational bounded decision making.' We associate certain characteristics or attributes with particular

⁵ Russ J Edwards K & Leclerc F (1994) An eye fixation, analysis of choice processes for consumer nondurables. Journal of Consumer Research

products and filter out or exclude information to make an acceptable decision.

After this initial filtering of information, in the second stage only a few products or characteristics are processed. Where we have a strong brand preference this bounded decision may be to a single product. Having made a 'bounded decision,' we then make a decision between criteria falling within those bounds. It might be that the only decision is whether to purchase the 250g or 500g product.

The way in which we limit our choices will depend on many factors, but dominant amongst these is recognition. Recognition of brand features is learnt over time and once 'learnt' it is difficult to unlearn or change. When we see a particular attribute, we accept that it represents the product which we have learnt to associate with that feature. This is no surprise to brand marketers who understand only too well how valuable brand loyalty is and how the strength of a brand lies in the strength of these associations.

The research undertaken by Mountainview as part of this project gives further insight. It focussed on two areas:

- the impact of reduced branding;
- the impact of copycat branding.

It shows that changes to brand size and copycat branding can strongly influence consumers' ability to identify or recognise familiar products.

4 Assessing confusion – applying the research to the law

The question arising from the Mountainview and other research is whether the emulation of another brand's get up is sufficient to constitute a misrepresentation which has led or is likely to appropriate the goodwill of that brand. The 'relevant confusion' is, we suggest, the implied misrepresentation from which the copycat enjoys the benefit.

Only the owner of the goodwill may use a trade mark or signs which represent the goodwill of that owner. If a copycat presents their product that takes advantage of the commercial benefit of that goodwill by creating a misrepresentation then the law provides a remedy.

In the Penguin/Puffin case⁶ the Judge's own perception was that 'he' could not have confused the two products and that to his eye, the Puffin did not wrongfully appropriate the goodwill belonging to United Biscuits' Penguin.

The judgment shows how uncertain the witnesses were and how they had difficulty explaining objectively how they made their purchase decision and what the effect of the copycat was. The witnesses' evidence was that, notwithstanding clear differences, consumers purchased the 'Puffin' chocolate biscuit 'thinking it to be a 'Penguin' biscuit'.



In the end, the Judge accepted that the association between the 'Puffin' and 'Penguin' bar created in the consumer's mind was between a seabird and a chocolate biscuit. The heuristics relied upon by the shopper are not necessarily limited to pure visual

comparisons. They may include conceptual similarities. The court needs to discern what the attribute is which creates the heuristic response. In this case the 'attribute' is a seabird. It may not matter whether it is the same species of bird or depicted in the same pose or even using the same colours. The question is, does it operate 'heuristically'?

Brand owners invest heavily over time in symbols, graphics and product presentation that secures for them 'reputation' and recognition in the market place. Packaging and product get up is a significant component of the goodwill of the business. In a cluttered market the brand owner relies on creating instant recognition by a large proportion of consumers so as to increase the likelihood of the product being noticed and therefore chosen. Reputation equates to speed of recognition and association in the mind of the consumer with specific qualities. It creates in the mind of the consumer a series of heuristic memories, prejudices and preferences 'associated' or triggered by perception of a particular signal.

When we therefore talk about a passing off 'misrepresentation', what we are really (or should be) suggesting is that the copycat appropriates the heuristic trigger which the originator has spent time and money building. If the 'strength' of a brand may be equated with the speed with which a consumer can identify it, then we can test how a consumer actually responds when a copycat is present and perhaps how the consumer reacts to the copycat when the established brand is not present.

Survey evidence fails to account for this. The shopper's purchase decision cannot be replicated in a situation devoid of the pressures and influences or context present in the real life situation. It is this context that needs to be evaluated in a structured way and with a clear hypothesis as to how the purchase decision is being made.

If the conceptual basis for accepting that the visual presentation misrepresents itself as a product carrying equivalent goodwill,

it free-rides its way inside the bounded decision, specifically by taking advantage of the host's goodwill. In that it is the goodwill that brings in business, the research shows how brand recognition and consumer preferences are engaged in the modern consumer retail environment. Visual recognition and goodwill are inextricably intertwined.

In the more recent Specsavers case⁷ the Court at First Instance rejected the assertion that the ASDA presentation would 'take unfair advantage of the reputation of the Specsavers mark' (without due cause). This was reversed by the Court of Appeal. In both cases the court relied heavily on its perception and discarded much of the oral and survey evidence.



The information, prejudices, likes and dislikes, preconceptions and emotional responses we as consumers have stored in our memories about brands are crucial in guiding our decisions. In a crowded, media-rich world, our heuristic responses dominate our selection of one product over another. The Mountainview and other research provides a fresh perspective and suggests a new way of testing whether the symbols and cues are operating on the consumer so as to enable the copycat to free ride and take advantage of the goodwill developed by the 'host' brand.

⁷ Specsavers International v Asda Limited 22 April 2010 and Court of Appeal 2012 E.T.M.R 17

5 Conclusion

The judgments show that the courts intuitively understand the ways in which packaging, advertising and media can influence the consumer and how the misappropriation of symbols and ciphers can free ride on, and be damaging to, goodwill.

The judges have adapted the basic concepts of confusion and misrepresentation to accommodate the multiplicity of ways in which the goodwill of a competitor can be appropriated by using visual representations.

The existing methods of providing evidence to a court are not only expensive, unreliable and unpredictable; they do not address what we know to be the process by which copycat packaging appropriates goodwill.

By building virtual retail stores and deploying the techniques mastered by Dr Leighton, we can accurately identify which components, individually or collectively, stimulate the heuristic response. The virtual store allows us to introduce the copycat and test for the responses to the stimuli.

Using the techniques alluded to in combination with expertise before the courts, we can, by manipulating the stimuli in terms of similarity of ciphers and symbols, colour and shape of other products in the class, measure and explain the sub-conscious response to 'learnt' or heuristic triggers.

When building and developing brand recognition and deciding which elements or symbols to deploy as brand ciphers, we can test for recognition of these both individually and as part of the 'global appreciation'. Knowing, for example, that a 'seabird' is a heuristic for Penguin, one could build a family of products benefitting from association. Understanding what creates the mental association is as important to the brand owner as it is to the copycat. Knowing this also enables brand owners to decide which cases to pursue and which are not likely to have a material impact.

There is no suggestion that a science-based approach to evidence should replace oral testimony or that judicial evaluation should be displaced. However incurring the time and cost of pursuing a case relying solely on witness testimony, without the corroborating empirical verification, will continue to mean that advisors are making educated guesses as to whether a particular copycat will be, or can be proved to be, unlawful.

As the courts become familiar with these techniques, greater reliance can be placed on this form of evidence. For the present it is likely to add a layer of corroboration and rational support for what the Judges intuitively accept, but have difficulty explaining. Given that the Judges have ostensibly voiced all of the elements of this approach, this is not a big step.

Both judicial comment and the evidence given in a number of high profile cases are consistent with the hypotheses set out in this paper but, in the absence of a structured presentation of the evidence, judgments will remain unpredictable and vulnerable to individual biases and perceptions of particular Judges.

The building of a computer-simulated marketplace to test any number of variations is now underway.

This is a summary of the report 'Confusion, heuristics and the consumer', by Alexander Carter-Silk of Speechly Bircham LLP and Dr Jane Leighton of Mountainview Learning (2012).

The full report can be found at www.britishbrandsgroup.org.uk.



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