



Review of enforcement provisions of the Consumer Protection from Unfair trading Regulations in respect to copycat packaging

The Alliance for Intellectual Property welcomes the opportunity to contribute to the review of the enforcement provisions of the Consumer Protection from Unfair Trading Regulations 2008 in respect to copycat packaging.

The Alliance has long maintained that existing legal protection, whether afforded by these regulations or other in other areas of the law, does not adequately protect consumers or businesses, resulting in the UK not complying with its international obligations.

Summary

Greater protection is needed for businesses and consumers against 'copycat' packaging of goods or services. Packaging consumer products to mimic familiar branded products free rides off investment in brand reputation, misleads consumers and distorts competition. A report published by the Intellectual Property Office in April 2013 showed that nearly 60% of people surveyed had accidentally purchased a copycat product mistakenly at least once.

In addition, 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.

Current legislation is ineffective and required reforms to enable consumers to make clear decisions about the products that they are using, while protecting the vast investment that business puts into creating, marketing and protecting their brands.

Why current provisions in the CPRs are ineffective

While parasitic copies are likely to be unlawful under these Regulations as they mislead consumers, enforcement is lacking as action can only be brought by those designated under the Enterprise Act, essentially the OFT and Trading Standards who, for reasons explored below, decline to take action in this area.

Why other legislation is also inadequate

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.

Therefore, the Alliance supports the British Brands Group in its proposal that one way of rectifying this problem would be to give brand owners the right of private action under the Consumer Protection Regulations.

The consultation asks for evidence across a number of areas to which the British Brands Group will be responding to in detail.

In support of the British Brands Group submission, the Alliance would like to highlight the following points:

1. There is clear evidence that consumers being misled in the quality and heritage of products they are purchasing.

In the report commissioned by the Intellectual Property Office and published in April 2013, it was found that:

- Consumers in substantial numbers buy the wrong product (nearly 60% surveyed);
- 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.

2. The significant reduction which has occurred in trading standards' funding and personnel means these regulations are not being enforced. The latest workforce survey from the Trading Standards Institute shows that by 2016 most trading standards services in England and Wales will have been cut by an average of 40% since 2010 and that, since the last workforce survey was conducted in 2009, trading standards staffing levels have fallen by approximately 45%.
3. As the purchase price of the vast majority of products in question is relevantly low, there is no real incentive for consumers to complain. This also impacts on enforcement as it gives the impression to trading standards that there is no consumer detriment from this illegal activity, and therefore it does not warrant action. In fact, when brands have requested that action be taken, trading standards have declined to do so precisely because they have not received any consumer complaints. This, therefore, makes consumer complaints a poor indication of whether the CPRs have been breached and an inappropriate test.
4. The UK is legally required to have in place effective remedies in place. Misleading packaging is identified within the Unfair Commercial Practices Directive as a banned, unfair, activity and Article 10bis of the Paris Convention requires Member States to provide brands with an effective remedy to unfair competition. As the CPRs are not being enforced for the reasons outlined above, they cannot be deemed to be "effective" and therefore the UK is not compliant with its international treaty obligations.
5. The Alliance and the British Brands Group have raised this problem with successive governments and believe that the level of evidence is now so high as to make continued inaction inexcusable.

About the Alliance

Established in 1998, the Alliance for Intellectual Property is a UK-based coalition of 24 trade associations concerned with ensuring that intellectual property rights are valued in the UK and that a legislative regime exists which enables the value and contribution of these rights to be fully realised. Our members include representatives of the audiovisual, music, games and business software, and sports industries, branded manufactured goods, publishers, retailers and designers.

Alliance members

Anti-Copying in Design
Anti-Counterfeiting Group
Association of Learned and Professional Society Publishers
Authors' Licensing and Collecting Society
British Brands Group
BPI (British Recorded Music Industry)
British Video Association
Business Software Alliance
Cinema Exhibitors Association
Copyright Licensing Agency
Design and Artists Copyright Society
Educational Recording Agency
Entertainment Retailers Association
Federation Against Copyright Theft
Film Distributors Association
Motion Picture Association
Premier League
PRS for Music
Publishers Association
Publishers Licensing Society
UK Interactive Entertainment
UK Music