



Department  
for Business  
Innovation & Skills

## CONSUMER PROTECTION

Review of the enforcement provisions of the Consumer Protection from Unfair Trading Regulations 2008 in respect of copycat packaging

OCTOBER 2015

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## INTRODUCTION AND EXECUTIVE SUMMARY

This report reviews the case for granting businesses a civil injunctive power in relation to “copycat packaging”, that is the practice of designing the packaging of a product (or its “trade dress” or “get up”) to give it the general “look and feel” of a competing well-known brand (typically the market leader). Copycat packaging is distinct from counterfeiting as normally it does not involve copying trademarks.

Copycat packaging potentially infringes the Consumer Protection from Unfair Trading Regulations 2008<sup>1</sup> (the “CPRs”) which implemented the Unfair Commercial Practices Directive<sup>2</sup> (the “UCPD”) into UK law. The UCPD aims to provide a high level of protection for consumers against unfair commercial practices, particularly those directed at influencing the transactional decisions of consumers in relation to products.<sup>3</sup> By prohibiting traders from engaging in unfair commercial practices with consumers, the UCPD and the CPRs promote and protect fair competition by increasing the confidence of consumers to shop and businesses to trade in the UK and across internal European Union borders.

Amongst other things, the CPRs prohibit traders from engaging in certain misleading actions including marketing a product in a way which creates confusion with any products, trademarks, trade names or other distinguishing marks of a competitor, such that the average consumer takes, or is likely to take, a different decision as a result.<sup>4</sup> They also prohibit (in all circumstances) promoting a product in such a manner as to deliberately mislead the consumer into believing falsely that it is made by the manufacturer of a similar product.<sup>5</sup>

Intellectual property (“IP”) law, under which brand owners have certain powers to assert their IP rights, may also be relevant to copycat packaging. However, this report concerns a civil injunctive power under the CPRs and therefore only touches upon IP rights where considered necessary.

By no means will all instances of copycat packaging be a breach of the CPRs. However, it could be a breach under regulation 5(2) if the packaging deceives consumers about matters such as the nature of the product or the affiliations or connections of the trader; under regulation 5(3) if the packaging creates confusion with products, trademarks, trade names or other distinguishing marks of a competitor; or under paragraph 13 of Schedule 1 if the product is promoted in a manner so as deliberately to mislead the consumer into believing it is made by the same manufacturer as the copied product. Similarity of

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<sup>1</sup> <http://www.legislation.gov.uk/ukxi/2008/1277/contents/made>

<sup>2</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, directives 97/7/EC, 98/27/EC and 202/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council.

<sup>3</sup> Directive recital 7.

<sup>4</sup> Regulation 5 CPRs.

<sup>5</sup> Paragraph 13 of Schedule 1 CPRs.

packaging is not enough. There must be deception or confusion of an average consumer<sup>6</sup> affecting a transactional decision or a deliberate intent to mislead.

The CPRs are enforced by specified enforcers through criminal prosecutions under the regulations themselves as well as by civil sanctions under Part 8 of the Enterprise Act 2002 (“EA 2002”). Although the UCPD contains an option whereby persons or organisations having a legitimate interest in combating unfair commercial practices, including competitors, may be given enforcement powers<sup>7</sup>, that option was not exercised when the CPRs were made. This review addresses whether the option should now be exercised in relation to copycat packaging.

We received submissions of evidence from persons or organisations representing manufacturers (essentially brand owners), retailers (who do of course have their own brands), statutory enforcers, Which? and the legal profession.

The views expressed were polarised: brand owners argued forcefully in favour of granting the power while retailers and most enforcers were strongly opposed; there were mixed views only from the legal stakeholders. Those in favour argued in particular that the CPRs have not been properly enforced in respect of copycat packaging, resulting in consumers being misled, business being diverted from brand owners and competition being distorted. For retailers, these arguments illustrate that the case is driven by commercial considerations rather than genuine consumer concerns and they consider granting a civil injunctive power could be anti-competitive while not benefiting consumers, whom they do not consider suffer detriment from copycat packaging.

The enforcers do not consider copycat packaging to be a priority for enforcement, while being prepared to consider complaints and assess whether action would be justified in any particular case. On the basis of what they have seen so far, they do not currently consider there is consumer detriment arising out of similar packaging (and if there were potential detriment, it would be mitigated by the availability of quick and easy redress i.e. by exchange of products). Which? also did not see this issue as a concern of consumers and, like the public enforcers, questions the appropriateness of facilitating enforcement by businesses.

Our analysis of the evidence relating to the effects of copycat packaging on consumers, competition and innovation is set out in Annex B. The evidence suggests that:

- copycat packaging reduces consumers’ ability to make accurate decisions. However, this does not confirm detriment;
- some consumers deliberately buy copycat products and a high proportion are happy with their purchase.

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<sup>6</sup> The average consumer is reasonably well informed, reasonably circumspect and reasonably observant. Where a product targets a particular group of consumers, including a vulnerable group of consumers e.g. the elderly, the average consumer is an average member of that group (regulation 2 CPRs).

<sup>7</sup> In Article 11.

Due to data and methodological constraints, there is a lack of empirical evidence that tests the impact of copycat packaging on prices or on brands' incentives to innovate.

Theoretical arguments can be used to support the arguments that:

- higher prices may be charged for copycat and branded products than when distinctive packaging is used;
- copycat packaging can both encourage and discourage brand innovation.

We reflect at the end of this report on some of the issues it has raised. We note that it is likely that a civil injunctive power could be introduced through secondary legislation but that there would be matters to be resolved over its scope and the details of what would likely be a bespoke enforcement regime. Whether to grant the power would seem to depend on the extent to which similar packaging presents a genuine problem (which among other things involves consideration of its effects on consumers, competition and innovation) and the likely consequences (including on negotiations between brand owners and retailers and any litigation between them, and on the operation of the enforcement regime).

We reflect on the reasons for the absence of much enforcement activity and we speculate on the amount of litigation that might result from granting the power. The experience of other countries in enforcing the CPRs and other IP and unfair competition laws does not seem particularly illuminating for the UK. While actual court cases might be few, the existence of an injunctive power might be expected to have an impact on commercial disputes between businesses. We conclude by noting that, before taking a decision to grant the power, Ministers would wish to consider the appropriateness, doubted by retailers, many enforcers and Which? but endorsed by brand owners, of amending a consumer protection measure to facilitate business to business litigation, and what this might mean for the current public enforcement regime.

## BACKGROUND TO THE REVIEW

1. At the time of the making of the CPRs, the Government decided not to take up the option in Article 11 of the UCPD to give an enforcement role to 'competitors' but said that this decision should be reviewed in the light of experience.
2. A call for evidence was published by BIS in April 2014.<sup>8</sup> The document highlighted the following issues as particularly relevant to the review:
  - The nature and scale of any problems associated with the current enforcement arrangements;
  - The extent of any consumer detriment arising from copycat packaging;
  - The equivalent enforcement provisions existing in other Member States and how they have worked;
  - The costs and benefits of giving businesses the power including any effects on competition and innovation;
  - How the power would work and what impact might there be on the way in which enforcement of the CPRs operates in the UK;
  - The legal changes that might be needed to provide businesses with the new right of action such as defining the practice;
  - Whether there are any legal or policy issues to be resolved and the scope of the implementation task; and
  - The nature and scale of any risks associated with both continuing the present arrangements and giving businesses the power.
3. The call for evidence also drew attention to certain existing relevant materials for stakeholders to consider and invited them to send us comments and any other evidence they considered pertinent to the review.
4. In addition, stakeholders were consulted by email, face-to-face interviews and in a roundtable event. To facilitate the event an interim report was circulated to stakeholders setting out the main arguments which had by then been put to us. At the event the initial work that was being carried out by BIS' analysts was also presented and the stakeholders were invited to share any further comments or evidence. We would like to take this opportunity to thank all those who took part in the review for their valuable contributions. A list of those who submitted views is at Annex A.
5. We turn next to the main provisions of the CPRs, notably their arrangements for enforcement, before setting out the responses we received to the call for evidence.

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<sup>8</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/305207/bis-14-724-call-for-evidence-review-of-enforcement-provisions-of-consumer-protection-regulations-2008-in-respect-of-copycat-packaging-revised.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/305207/bis-14-724-call-for-evidence-review-of-enforcement-provisions-of-consumer-protection-regulations-2008-in-respect-of-copycat-packaging-revised.pdf).

## THE CPRs AND THEIR ENFORCEMENT

6. The CPRs prohibit traders from engaging in misleading commercial practices which cause or are likely to cause the average consumer to take a transactional decision they would have not taken otherwise. Copycat packaging may breach the CPRs if:
  - a. It contains false information (in relation to the nature, characteristics and origin of the product among other matters<sup>9</sup>) or its overall presentation in any way deceives or is likely to deceive the average consumer such that the average consumer takes, or is likely to take, a different transactional decision as a result<sup>10</sup>; or
  - b. It concerns any marketing of a product which creates confusion with any products, trade marks, trade names or other distinguishing marks of a competitor, such that the average consumer takes, or is likely to take, a different transactional decision as a result<sup>11</sup>; or
  - c. It promotes a product similar to a product made by a particular manufacturer in such a manner as to deliberately mislead the consumer into believing that the product is made by that same manufacturer when it is not.<sup>12</sup>
7. The CPRs place Trading Standards Services in Great Britain (“TSS”) and the Department of Enterprise, Trade and Investment in Northern Ireland (“DETINI”) under a duty to enforce the CPRs and give the Competition and Markets Authority (“CMA”) a power to do so.<sup>13</sup> They can enforce the CPRs by bringing a criminal prosecution for one of the offences in regulations 8 to 12 of the CPRs. Alternatively they can seek an enforcement order or undertaking under Part 8 of the EA 2002. This is a civil law procedure and requires the trader to stop the unfair commercial practice.
8. Under the EA 2002 a number of other enforcers also have a power to seek an enforcement order or undertaking to stop a breach of the CPRs and other domestic and Community legislation. These are mainly public enforcers such as the Civil Aviation Authority, Ofgem and the Financial Conduct Authority, but private bodies can be designated as enforcers if they meet certain criteria, including having as one of their purposes the collective interests of consumers.<sup>14</sup> To date Which? is the only private body to be designated as an enforcer under Part 8 of the EA 2002.<sup>15</sup>

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<sup>9</sup> For a full list see regulations 5(4), (5), and (6).

<sup>10</sup> Regulation 5(2).

<sup>11</sup> Regulation 5(3).

<sup>12</sup> Paragraph 13 of Schedule 1.

<sup>13</sup> Regulation 19.

<sup>14</sup> Section 213 EA 2002 and Enterprise Act 2002 (Part 8 Designated Enforcers: Criteria for Designation, Designation of Public Bodies as Designated Enforcers and Transitional Provisions) Order 2003/1399.

<sup>15</sup> Enterprise Act 2002 (Part 8) (Designation of the Consumers’ Association) Order 2005/917.

9. The CMA also has an oversight role for Part 8 of the EA 2002. All enforcers must notify the CMA before they take any action under Part 8 and the CMA has the power to direct that only the CMA or such other enforcer as they direct may make an application for an enforcement order in respect of a particular infringement.<sup>16</sup>
10. The CPRs were amended last year to allow an element of private redress enforcement by consumers.<sup>17</sup> Consumers can obtain the right to unwind the relevant contract, or a discount or damages where there is a commercial practice that is misleading under regulation 5 or aggressive under regulation 7, which they can enforce in the civil courts.
11. In addition, any person, including a brand owner, may institute a prosecution for a criminal offence under regulations 8 to 12 of the CPRs.
12. Although Article 11 of the UCPD provided the option of allowing “competitors” to take a role in enforcement, this option was not exercised when implementing UCPD. In particular, it was decided at that time not to give businesses a civil injunctive power in relation to copycat packaging that breached the CPRs. This review looks at that decision anew.

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<sup>16</sup> Section 216 EA 2002.

<sup>17</sup> Consumer Protection (Amendment) Regulations 2014/870.



# THE RESPONSES RECEIVED

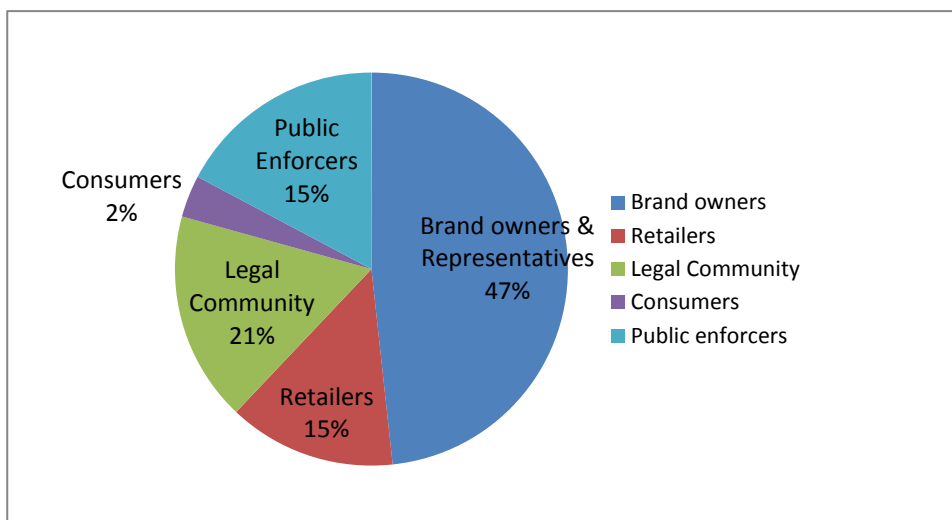
## OVERVIEW

13. A total of 34 responses to the call for evidence were received and some face-to-face interviews were carried out, the notes of which were asked to include as responses. Non-confidential versions are published alongside this report and are available at; <https://www.gov.uk/government/consultations/consumer-protection-copycat-packaging-call-for-evidence>.
14. A breakdown by sector is below, with representative bodies allocated to the sectors they represent:

Figure 1: Table of responses by sector:

Sector	Number of responses
Brand owners & Representatives	16
Retailers	5
Legal Community	7
Public Enforcers	5
Consumers	1

Figure 2: Graph by sector:



15. Views expressed by the stakeholders were polarised. The British Brands Group (“BBG”) spoke for several brand owners in voicing concerns that there are shortcomings in the current law and how it is enforced. They submitted that where consumer products closely imitate distinctive features of a well-known brand’s packaging, they are free-riding on investment made by that brand, even if the similarity does not infringe IP law. They also argue that the CPRs have not been properly enforced in respect of copycat packaging due to the limited resources available to the TSS. They believe that granting a civil injunctive power to businesses would provide brand owners with an effective tool to negotiate fair settlements while increasing the levels of consumer protection at no cost to the taxpayer. Some stakeholders underline the deliberate nature of the practice, from which they infer an intention to divert business from the brand owner through misleading consumers, thereby distorting competition.
16. Retailers themselves saw complaints about similar packaging to be driven by commercial considerations rather than genuine consumer concerns and believed that granting a civil injunctive power could be anti-competitive. They fear it may give rise to an increase in self-interested litigation that could stifle competition and innovation and they question the viability of the proposal as, in their view, it would not be any easier to establish a breach of the CPRs in relation to copycat packaging than it currently is to establish a breach of IP law such as passing-off.
17. In the view of the Law Society of England and Wales, the extent of consumer detriment is unclear. However, the Law Society does not consider there is a material enforcement gap that would be solved by providing brand owners with greater powers to obtain injunctions which would duplicate rights in trade mark infringement and passing off.
18. Several enforcers of the CPRs also doubted there was an enforcement gap and were concerned about the integrity of the consumer protection regime and potential unintended consequences if the proposal was implemented. Which? reports the absence of an appetite among consumers for action in this area, and it questions the appropriateness of amending consumer protection law to facilitate business-to-business litigation.

## **DETAILED VIEWS OF THE STAKEHOLDERS**

19. Some of the main arguments that have been put to us in the review have been set out below. They have been marshalled under the specific issues highlighted in the call for evidence, although by their nature some of the issues and therefore the comments overlap.

## Issue 1: The nature and scale of any problems associated with the current enforcement arrangements

20. The extensive views expressed by the stakeholders on this issue were split between those who felt that the current enforcement arrangements are flawed (“those in favour” of granting business a civil injunctive power) and those who thought that granting additional powers to brand owners would be unjustified and undesirable (“those who oppose”).

21. Those in favour argued that:

- a) The law of trade marks does not offer brand owners adequate protection from copycat packaging because:
  - Very often the trade mark of the brand is not infringed;
  - There are limitations about what can be registered as a trade mark;
  - The fast pace at which packaging evolves makes it difficult to establish distinctiveness in court;
  - Under trade mark law it is not sufficient to demonstrate that consumers are prompted by the similar packaging to make an association between the copy and the original. There must be, it is said, evidence of outright confusion or confusion over origin.<sup>18</sup>
- b) The tort of passing-off is said to offer limited protection because of the difficulty and high cost to establishing goodwill and misrepresentation in court. The difficulties include the fact that the copycat product often appears before the brand owner has the means to prove reputation or goodwill, it is very difficult to obtain evidence in store, and the courts often dismiss survey evidence as artificial or unreliable.
- c) There is therefore said to be a lacuna which the CPRs have not filled. It is suggested that the CPRs have not been properly enforced due to the limited resources and the prioritisation principles applied by enforcers. The evidence shows that there has been one instance of enforcement against misleadingly similar packaging since 2008, and the case did not result in any case law as an enforcement undertaking was agreed before getting to trial.
- d) The CPRs provide wider protection to that available under IP law and in particular passing-off in that they cover cases of deception by equivalence or quality.

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<sup>18</sup> *Sabel v Puma ECJ 1997*

22. Conversely, those who oppose believe that the current legal system offers adequate protection for brand owners and they consider the enforcers are correct to direct inherently limited resources to areas where true consumer detriment arises. They state there is little evidence to suggest that existing IP law/passing-off protections available to business (which TSS, as well as businesses, are already able to enforce where appropriate) are inadequate to deal with business interests where there is clear evidence that they are illegally harmed by breaches of those protections. They note:
- a) There is not a specific length of time during which the claimant must have used the mark in question for the judge to consider that he has acquired sufficient reputation on that product<sup>19</sup>;
  - b) Even though it is difficult, it is possible for features that are commonplace or that have only little inherent distinctiveness to establish sufficient reputation. For example, in *United Biscuits v Burton's Biscuits Ltd*<sup>20</sup> the dark-blue background of the packaging was held an important distinctive feature. Highly remarkable or well-known features may dominate the general impression so strongly that other features in which the copycat packaging differs from the original will be deemed negligible;
  - c) Passing-off covers deception over equivalence<sup>21</sup>;
  - d) The protection available under passing-off has recently been “extended”<sup>22</sup>, so that for example, the use of specific terms to qualify the product (such as “Spanish champagne”; “Champagne cider”; and “Swiss Chocolate”) is not permitted;
  - e) It is clearly possible for brand owners to take successful legal action under existing mechanisms without the need to rely on the prohibition in the CPRs, as in the recent Saucy Fish/Aldi case.<sup>23</sup> Granting additional powers to brand owners would be unjustified and undesirable;
  - f) The lack of action under the CPRs indicates not that the system is failing but on the contrary that it is working well. Cases like *United Biscuits*<sup>24</sup> and *Diageo v. Intercontinental Brands*<sup>25</sup> have shown that that relief is available to a rights holder who wishes to complain about the ‘get-up’ of a competitor product but have also,

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<sup>19</sup> Kerly’s Law of Trade Marks and Trade Names.

<sup>20</sup> [1992] FSR 14

<sup>21</sup> In *Erven Warnick v Townend* [1979] AC 731 the judge ruled that calling a product “advocaat” when it was not, was passing-off.

<sup>22</sup> *Bollinger v. Costa Brava Wine Co Ltd* (1960) Ch 262; (1961) 1 WLR 277; *Taittinger Sa v. Allbevev Ltd* (1993), FSR 641; *Scotch Whisky Association v. Glen Kella Distillers Ltd* (1997), ETMR 470; *Chocosuisse Union des Fabricants Suisses de Chocolat v. Cadbury Ltd* (1999), RPC 826; *Diageo North America Inc v. Intercontinental Brands (ICB) Ltd* (2010) EWCA Civ 920; (2011) RPC.

<sup>23</sup> <http://www.thegrocer.co.uk/fmcg/fresh/saucy-fish-co-set-to-sqaure-up-to-aldi-over-copycat-line/357058.article>

<sup>24</sup> ([R.P.C. 513] (*Penguin v. Puffin*).

<sup>25</sup> ([2010] EWHC 17 (Ch))

importantly, shown the appropriate limits of that relief. Informed by such cases, and incentivized by the Civil Procedure Rules to settle cases without going to court, and by the strong supplier/purchasers that exist, retailers and brand owners have reached equitable solutions.

23. Some stakeholders in favour of the proposal consider the intention behind the practice of copycat packaging as an indicator of guilt i.e. it is a deliberate practice to deceive the consumers and drive sales away from the brand owners. In reply to this, it was submitted that neither trade mark infringement nor passing-off have a mental element, and that there is an important difference between an intention to deceive i.e. to misappropriate the goodwill and an intention either to copy or to sail close to the wind. An intention to copy is permissible as there is not a tort of copying. It was suggested that an intention “to sail close to the wind” may be considered in the favour of the potential wrong-doer as it would indicate that the defendant did not actively wish to “cross the line”. As the CPRs require deception/confusion of a consumer or an intention deliberately to mislead, an intention to copy or to sail close to the wind may be insufficient to support a claim for CPR infringement.
24. Many of these points relate to disputes between businesses. There is little evidence of complaints by consumers, from which the two camps drew opposite conclusions. Those opposed to the proposal saw it as a sign that copycat packaging is not a concern to consumers but for those in favour it shows a lack of awareness by consumers of the damage they have suffered. Those in favour argued that complaints are not a reliable indicator of a breach of the CPRs because consumer confusion can exist even if the complaint has not been made i.e. a consumer may be unaware of having been duped, they may feel embarrassed because they think it is their fault for not paying attention when picking the product from the shelf, or that complaining is not worth it due to the low cost of the product. It is also reported that, in the small number of occasions when consumers do take action, they will most likely address their complaint to the retailer rather than enforcers (to the retailers this point illustrates that any problems can be and are addressed).
25. The public enforcers of the CPRs submit that a complaint must be supported by evidence of collective consumer harm in order to justify action under the CPRs. The CMA takes the view that there is a fine line between packaging practices that – while they may seek to influence consumers’ perceptions – do not go so far as deliberately to manipulate them in a manner which is unfair and harmful (in which case the CMA would expect IP and passing off law to apply). While there may be difficulties in applying IP and passing off law without clear evidence of the impact of similar packaging on consumers, the same would apply under the CPRs and no greater consistency or clarity in outcomes would be achieved.

## Issue 2: The extent and nature of consumer detriment arising from copycat packaging

26. The relevance of consumer detriment was queried by some stakeholders in favour of the proposal. They consider that the UCPD only requires that the average consumer's behaviour is affected by something which is unfair and misleading.<sup>26</sup> While they recognise the need for enforcers to prioritise, they consider the enforcers' view on consumer detriment renders enforcement of the relevant provisions of the CPRs against copycat packaging inadequate.

However, for retailers and several enforcers the question of consumer detriment was a key consideration. In their view, enforcers rightly direct inherently limited resources on areas where true consumer detriment arises: the absence of enforcement (and, it is said, of complaints) indicates that detriment is either absent or adequately dealt with through other means. While consumers can, and do, sometimes make mistakes, it was felt that that alone does not necessarily signal either unfair practices or detriment. The 2013 Report by the Intellectual Property Institute (the "IPI study")<sup>27</sup> found that mistaken purchase is nearly as likely to be a positive experience for consumers as a negative one. The view was expressed that the evidence is not conclusive in establishing detriment and that if there were potential detriment, it would be very significantly mitigated by the availability of quick and easy redress (i.e. by exchange of products bought in error) and the effects of consumer learning. Any enforcement activity should be properly risk based and proportionate and should therefore reflect the scale of any problems attached to copycat packaging, if indeed there are any.

27. The BBG made detailed submissions on this aspect, including:

- *Mistaken purchase*: The IPI study found that 57.2% of consumers have bought the wrong product due to similar packaging at least once. The *Which?* article in May 2013 reported that 20% of its members have bought products by mistake. British Market Research Bureau (BMRB)<sup>28</sup> research for the BBG found that 33% of consumers had bought products by mistake (rising to 54% amongst 16-24 year olds). Assuming there is one shopper per household (the BBG consider there is likely to be more), these findings suggest that between 8 million and 15 million UK consumers have bought products in error due to similar packaging at least once (*Which?* members have not been included as they may not be representative of UK shoppers).
- *Confusion over origin*: the IPI study found a significant correlation between similar packaging and perceptions of common origin in nine of the twelve product sets it researched. The BMRB research found the same correlation in nine of the ten product sets researched. The effect can be significant, with at least two thirds more

<sup>26</sup> Article 5.4(a) of the UCPD.

<sup>27</sup> <sup>27</sup> <http://www.ipo.gov.uk/ipresearch-looklikes-310513.pdf>

<sup>28</sup> <http://www.britishbrandsgroup.org.uk/upload/File/BBG%20packaging%20study%20Feb%2009.pdf>

considering it likely rather than unlikely that the product in the similar packaging came from the same source as the original in relation to four of the sets of products.

- *Perceptions*: The IPI study found a statistically significant lookalike effect across the twelve product sets tested, finding that increased perceived similarity of packaging is significantly correlated with higher perceived (ratings/expectations of) price, quality, suitability for intended use and (marginally) value for money.
- *Propensity to buy*: The BMRB study found “a very strong link between similarity to a branded product and likelihood of purchasing that product”. In eight of the ten products tested there was a higher propensity to buy the copy than the corresponding control, indicating an influence on buying behaviour.
- *Exposure to misleadingly similar packaging*: An environment in which unlawfully similar packaging goes unchallenged is likely to encourage the incidence of such packaging. The Which? article (see paragraph 30 below) identified around 150 examples in the grocery market. Meanwhile the IPI study found that 2.2% of consumers – over ½ million individuals – confirm they buy the wrong product frequently due to similar packaging.
- *Longer term effects*: It can be deduced from research findings that sales are diverted from the original to the copy for a range of reasons and to a significant extent. This can only impact negatively on brand producers’ scope to invest in quality, choice and innovation over the long term, to the detriment of consumers.

28. Which?, not only a consumer organisation but also a designated enforcer of the CPRs, suggests that it is difficult to prove consumer detriment because of the social, cultural, linguistic and economic factors to be taken into account (including the economic context and market conditions in which consumers operate). Which? reports split views among consumers on the benefits and detriments of copycat packaging. Which? concludes that its research does not show strong consumer demand for enforcement action against copycat packaging; it comments that there is as much evidence that consumers welcome own-brand products, even when they look like branded ones.

29. Which? and the BBG each submitted an article entitled “Spot the difference: Big brands or supermarket equivalent?”.<sup>29</sup> The article shows the results of a survey conducted on 2,244 Which? members and it reports that a fifth of them (449 people) have bought a copycat product accidentally thinking that it was the brand’s label on the pack. Its findings are set out in more detail below:

- a) There seems to be an increasing tendency to deliberately buy copycat products due to their lower price and to see if the copycat product is as good as the branded

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<sup>29</sup> Which? May 2013 investigation: ‘Spot the difference’

product. However, the perceptions of consumers about the copycat products are less favourable where the purchase is due to confusion between the copycat product and the brand. From that fifth of the Which? members who bought a product by mistake, 38% were annoyed by this, and 30% felt misled.

b) Copycat products “can be a good thing”: they are cheaper, they can indicate a similarity with the brand leader, and a number of own-label supermarket products are Which? “Best Buys”.

30. Which? considers that it is possible for brand owners to take successful legal action under existing mechanisms in appropriate cases without the need to rely on the CPRs. This view is illustrated by the three cases quoted in the article mentioned above where in each case the brands were able to use IP law to protect their packaging designs (on the grounds of passing-off, a settlement outside the courts and by registering a colour as a trade mark).

31. The enforcers and retailers are not convinced there is consumer detriment arising immediately out of copycat packaging practices. While consumers can, and do, sometimes make mistakes, it was felt that that alone does not necessarily signal either unfair practices or detriment.

32. Retailers emphasised that they are themselves brand owners who have no interest in confusing consumers or giving them a poor customer experience. It is noted that the IPI study found that a much higher proportion of those consumers who purchased a ‘lookalike’ product reported the experience to be advantageous than disadvantageous.

33. BIS officials have reviewed the evidence on consumer detriment (and on the effects of copycat packaging on competition and innovation) and the results are set out in Annex B. This is also discussed below under issue 4.

### **Issue 3: Equivalent provisions in other Member States and how they have worked**

34. A number of respondents drew attention to the Hogan Lovells’ report 2011<sup>30</sup> referenced in the call for evidence. The report shows that the legal framework in the UK differs markedly from that of many other EU Member States.

35. The views expressed about this issue were again very different between those in favour of the proposal and those against. The stakeholders in favour felt that the different approach of the UK places us at the far, weak end of the spectrum of protection because:

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<sup>30</sup> [http://ec.europa.eu/internal\\_market/iprenforcement/docs/parasitic/201201-study\\_en.pdf](http://ec.europa.eu/internal_market/iprenforcement/docs/parasitic/201201-study_en.pdf)



- a) The majority of Member States provide redress under a combination of laws against unfair competition and also unfair commercial practices provisions based on the UCPD. The UK is the only exception.
- b) Only two Member States do not have unfair competition law, the UK and the Republic of Ireland having the tort of passing-off instead. It is noted that the Republic of Ireland provides for civil enforcement under the UCPD.
- c) Because of the limitations, of the tort of passing-off copycat packaging considered unlawful in other Member States would not be challengeable in the UK.

36. Those against said that, while the UK does not have unfair competition law as such, we do have a number of other legal remedies, which taken together provide protection from unfair competition. They suggest that a “different” approach does not equal a “weaker” approach because:

- a) The UCPD does not harmonise the enforcement procedures: while the UCPD allows for enforcement by competitors it leaves to Member States to decide about the appropriateness or otherwise of granting such private rights to business competitors.
- b) This enabling provision should not be seen as indicative of a consistent European position on the desirability of consumer protection measures being enforced by private interests.
- c) European experience of implementing the UCPD as part of the wider unfair competition laws which include a civil right to an injunction does not prove that enforcement is somehow ‘better’ in those jurisdictions. It is impossible to determine whether those regimes are more effective in preventing copycat packaging that ‘crosses the line’ in some way.

37. The situation in the Republic of Ireland appears to be particularly pertinent to this review. According to the Irish Department of Jobs, Enterprise and Innovation (DJEI) the Irish Consumer Protection Act 2007 gives businesses a right to apply for a court order to prohibit copycat marketing. However, the right is a broad one, in that it applies to alleged infringements of all of the UCPD provisions as well as to parties other than businesses. Any such application must be on notice to the public enforcement authority, the National Consumer Agency; the courts, moreover, may not make an order unless the Agency has been afforded an opportunity to be heard and to adduce evidence.

38. The DJEI state that this broad approach to injunctive relief was not an innovation of the 2007 Act. It was preceded by the Irish Regulations that gave effect to the UCPD's

precursor (Directive 84/450/EEC on Misleading Advertising), which provided that 'any person' (with *locus standi*) could apply to the courts for an order prohibiting misleading advertising. It has been submitted to us that the only two court cases involving applications for injunctions under the UCPD which proceeded to trial were taken by retailers. The then enforcement authority - the Director of Consumer Affairs - favoured criminal rather than civil enforcement of the Directive's provisions.

39. The DJEI reports that there has only been one legal action (*McCambridge Ltd v. Joseph Brennan Bakeries*)<sup>31</sup> in which a private right holder sought a prohibition order under the 2007 Act against a competitor's product on the basis that the packaging was alleged to be too similar. The plaintiff's claim for the order was in the event refused, although the Court held that the defendant's product was a passing-off. In the view of Whitney Moore solicitors (in a letter supplied by the BBG) passing-off is still seen as the main cause of action in the Republic of Ireland.

#### **Issue 4: The costs and benefits of granting a civil injunctive power to business, including any effects on innovation and competition**

40. The stakeholders addressed this issue in their responses comprehensively. Some of their points overlapped with those in Issue 5: How would the power work, and Issue 8: Risks. Where relevant, cross reference has been made below to the analysis that BIS carried out regarding the potential impact of copycat packaging on competition and innovation.<sup>32</sup> The key points raised by stakeholders revolved around competition and innovation, brand innovation, "cues", litigation and implementation costs:

##### Competition and innovation

41. Those in favour argued that:

- a) Copycat packaging practices can harm competition (and thereby cause consumer detriment). It is submitted that the retailers can set the price of both branded and own label products. In theory, this would give the retailers the opportunity to price less competitively on branded products in the category in order to encourage purchase of the potentially misleadingly similar own label product, on which their margins may be higher.
- b) The practice of developing similar products that do not have copycat packaging can be perceived as pro-competitive: consumers have more products at competitive prices and it does not hinder innovation overall. Learning effects can (where brands offer a genuinely superior product) enhance brand value by encouraging consumers

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<sup>31</sup> [2012] (ESC) 46.

<sup>32</sup> The full BIS analysis can be found in Annex B.

to take corrective actions for subsequent purchases, as well as weaken it where a branded product relies very heavily on customer perceptions that are not borne out by the underlying quality of the product.

- c) Consumers are also likely to enjoy lower prices in those instances where the product in similar packaging is priced more highly than would otherwise be the case were it competing on its own merits in distinctive packaging. Consumers are also likely to benefit from competitors having to offer more tangible consumer benefits to prompt trial and purchase.

42. Those who oppose say that:

- a) This proposal would have a negative impact on new entrants into a market: where a major brand already operates in a market, smaller businesses face great challenges in establishing their own identity and market. To restrict by the fear of injunctions new entrants' opportunity to signpost to potential customers, through its presentation, that their product represents an alternative to that of a major brand risks restricting competition.
- b) There is limited evidence that copycat packaging practices lead to any reduction in the aggregate number of new products; in their view, what matters is not the identity of innovators (i.e. whether new products come from retailers or brand owners) but the aggregate amount of innovation in a market or sector, because this is what contributes to economic growth.
- c) Granting the power would have an adverse impact on markets, and on SMEs in particular, with bigger players seeking to use financial strength, coupled with the new rights, as a means of achieving disproportionate power in respect of their brands, so as to preserve market share and force competitors (particularly newcomers and smaller businesses) out.

43. The analysis by BIS set out in Annex B indicates the complexities of the link between copycat packaging practices and pricing. The wide range of influences on consumer prices outside packaging and product formulation (e.g. variances in the supply market, economic conditions, retail competition and product competition) make it difficult to isolate the impact of packaging on price. Additionally, own brand ranges can be anything from "finest" to "value", affecting consumer expectation and therefore propensity to select on price above other factors. Because of these barriers as well as the absence of data available on pricing, we could not find evidence of a positive or negative impact on prices arising out of misleadingly similar packaging.

## Brand innovation and “cues”

44. Analysing the influence of copycat packaging practices on a brand’s incentive to innovate is also complex. R&D trend data cannot be used to generate confident results; the causal link between copycat packaging and R&D is multifaceted and it is not possible to isolate effects arising from copycats from other effects (such as competition, new technology, business strategy, regulation, and sustainability) that drive R&D. Below we have set out the main points raised on this topic by the stakeholders:

- a) Those in favour consider that copycat packaging could have a negative impact on brand innovation; they will only invest in their brand if they are fairly sure of their ability to reap the reward from their investment, but if this is no longer so, then manufacturers will become much less willing to make the necessary investments.<sup>33</sup>
- b) In the view of those who oppose, each product category has its package code e.g. yellow bottles for cream cleaners. They submit that the use by market leaders of this package code may restrict new entrants and competitors from inserting a similar product without using this typical code, and they consider it undesirable to allow the monopoly of a sign that other traders may legitimately wish to use. This is the case for commonplace and generic features.
- c) “Cues” were discussed extensively at the stakeholders’ roundtable. At this event brand owners argued that there is no threat to generic ‘cues’. There is, it is said, a big difference between competitors who use a generic or category cue to depict a type of product and those that set out to mimic a range of features associated with a familiar brand in order to create a similar overall appearance. It is alleged that in copycat packaging, the competitor is copying brand rather than generic cues. Generic cues do not signal specific products and will not give rise to breaches of the CPRs when used in conjunction with otherwise distinctive packaging.
- d) Retailers, however, argued that copycat packaging can allow consumers to understand that a product does not originate from a particular brand owner, but it is instead a substitute i.e. an “own-brand” product. Retailers argue that, far from being detrimental to consumers, category cues direct them to what consumers want and they drive competition.

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<sup>33</sup> The Competition Effects of Lookalike Private Label Products, Paul W. Dobson and Li Zhou (2014).

## Issue 5: How would the power work and how would it impact on the current enforcement procedures of the CPRs

45. Those in favour of granting the power argued that it might result in a few test cases, as the scope of the power is explored. They consider a rise in litigation to be unlikely because court action is expensive and therefore not undertaken lightly, many copies are produced by brand producers' retail customers, action against whom is likely only as a last resort, and while the provisions of the CPRs provide more effective protection than IP rights they do not provide certainty of outcome. Brand producers would continue to be reluctant to take action where there is a possibility of failure, given their potential exposure in costs and also the risk that this would only encourage others to copy. Further, they consider that cases would still turn on their merits.
46. These test cases would clarify the interpretation of the law, they submit, accompanied by revised behaviour by competitors who can be expected to take greater care to ensure that their packaging designs will not mislead consumers. Brand owners would rather avoid dedicating significant resources to pursuing a claim in court as this takes valuable resources away from business development, brand building and other areas of investment crucial to success. Were brand owners able to rely on the provisions of the CPRs, they would be able to negotiate more effectively with the manufacturers of own-brands, making it easier to reach satisfactory out-of-court settlements.
47. These respondents suggest that not only would public and private enforcement co-exist comfortably with each other with no downside, as they already do in other areas of the law, but that using private sector resources to enforce against misleadingly similar packaging will result in consumers being better able to make accurate, well-informed and efficient decisions, achieving higher levels of consumer protection at no cost to the taxpayer. On the contrary, there would, in these respondents' opinion, be benefits in mobilising private sector resources, given that enforcement of the CPRs in relation to lookalike products is, they say, constrained as a direct result of finite public sector resources. They argue that reducing the pressure on public enforcement bodies would enable such bodies to allocate their resources in the most effective way by focusing on those practices best addressed with their involvement, such as counterfeiting activities.
48. Those who oppose the granting of the power were concerned among other things by:
- a) The risk of adverse impacts on business planning and innovation as a direct result of increased legal uncertainty.
  - b) The risk of an increase in frivolous or mischievous/obstructive claims, and a risk of parallel actions (under the CPRs and in relation to IP law), imposing additional costs and burdens on business. The costs of enforcement before the courts would be high, so it is argued, because demonstrating that the average

consumer is likely to be misled specifically by lookalike packaging will probably be difficult.

- c) A rise in self-interested litigation at the expense of consumer choice and price. The commercial driver will not always be aligned with consumer protection: as a result, businesses may have an incentive to bring enforcement action where there is no detriment – or even a benefit – to consumers, if it is to their commercial advantage.

49. They also emphasised the underlying consumer protection purpose of the UCPD and of the CPRs. They consider the purpose is effectively safeguarded by the fact that enforcement powers are explicitly vested only in public authorities acting wholly and exclusively, and together, in the collective interests of consumers. This, they consider, gives the UK consumer protection regime a particular strength and integrity, which should not be compromised. They say that allowing businesses a narrow and limited right to enforce in respect of only one very specific type of commercial practice, where it is clear that the primary motivation of businesses making such claims would be the protection of their own individual commercial interests, has the potential to damage the integrity of the regime.

50. At the same time it is considered that it could demoralise the existing public enforcers and risks them taking the view that there is no need for them to enforce the criminal provisions when there is a civil route available to the only likely complainants in such matters. These respondents argue that it also risks shifting the perception of the legislation as a consumer protection tool to one of a business protection tool.

**Issues 6 and 7: What legal changes might be needed to provide businesses with the right to exercise this civil injunctive power against copycat packaging, including defining the practice covered by the private right of action in order to capture what is intended. Whether there are any legal or policy issues to be resolved and the scope of the implementation task**

51. There were comparatively few responses on these issues. The BBG considered that section 2(2) of the European Communities Act 1972 could be used to grant businesses this power under the CPRs, and that it would involve fairly limited textual amendments to apply the enforcement procedures in Part 8 of the EA 2002.

52. Giving “competitors” enforcement powers is clearly allowed under the UCPD, and we consider it likely that section 2(2) of the European Communities Act 1972 could be used to do so. A final view could only be reached in the event of concrete policy proposals. However, we do not think the procedures in Part 8 of the EA 2002 are well suited for adoption by businesses, and we consider that it would probably be better to create a bespoke injunctive enforcement regime, for example something like the

Business Protection from Misleading Marketing Regulations 2008<sup>34</sup> - which replaced the Trade Descriptions Act 1968 in respect of protecting businesses from misleading business-to-business advertising - and which impose further restrictions on how businesses compare their products to rival products from other companies, might be an appropriate model.

53. Consideration would also need to be given to issues such as who exactly should have the power to seek an injunction; whether it should just be competitors; and how to define competitors - whether it should be any trader or whether to extend the power to consumers, whose protection is the purpose of UCPD. Further, consideration would need to be given to whether to extend the power to infringements of any of the prohibitions in the CPRs, not just those potentially engaged by copycat packaging or if not how to define copycat packaging. There is the issue of whether these potential infringements of the CPRs can be distinguished from any others, which could also result in business being lost as a result of infringing practices by competitors, apart from the interest shown in copycat packaging by brand owners.

**Issue 8: The nature and scale of any risks associated with both continuing the present arrangements and giving businesses a civil injunctive power**

54. The responses received covered this issue extensively. Some of these consequences have already been covered under the other Issues, in particular Issue 4.
55. Those in favour of granting the power to businesses considered that there are some significant risks in continuing with the present arrangements. They did not see any significant risks in giving businesses the power in the area of misleading similar packaging. They argued that:
- a) Consumers will continue to be misled in significant numbers by similar packaging and inhibited from making accurate, well-informed purchasing decisions. Longer term, some detrimental impact on choice and innovation can be expected.
  - b) The UK will continue to be a market that condones misleadingly similar packaging. Copiers will know they can copy the packaging of familiar brands with impunity as long as they do not blatantly infringe IP rights.
  - c) Brand owners in the UK will continue to be deprived of a fair return on their investments in innovation, product quality and reputation, continuing damage to

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<sup>34</sup> Business Protection from Misleading Marketing Regulations 2014/1276.

the UK's reputation as a market conducive to the creation and building of brands.

- d) The risks of granting the new power are minimal. Granting private rights is not some leap into the dark as many countries have provided such rights, which have been in place for around six years. Any significant unforeseen consequences will have become apparent by now. A number of Member States have legislative provisions against similar packaging that go further than the CPRs in protecting competitors from unfair imitation and free riding. These have not created difficulties in relation to the functioning of those markets.

56. For those opposed to granting the power the risks of continuing the present arrangements are low, since businesses already have a wealth of IP rights to use as appropriate and the evidence of real detriment to consumers caused by lookalike packaging is, they say, unreliable. In contrast, they consider the risks of giving businesses the power wide ranging, including harm to competition, limitation of choice for consumers, discouraging innovation and introducing a greater litigation culture. They submitted that:

- a) The commercial driver may not always be aligned with the interests of consumers, and businesses may have an incentive to bring enforcement action where there is no detriment to consumers, if it is to their commercial advantage. This could lead to tactical litigation, which would harm competition. Some stakeholders were also concerned about parallel claims: arguments made under IP law (including passing-off) that reached dissatisfying conclusions for the claimants could be revisited under the CPRs before reaching the same result through the prism of the average consumer test. Such parallel cases could introduce legal uncertainty with consequential adverse impacts on the ability for businesses in the affected market to plan ahead. The limited time of the courts would also be taken to resolve these claims.
- b) Concerns were also raised in relation to how the scope of the new power be defined; if the scope of the CPRs is in fact greater, then the precise limits of the new boundaries would need to be established. This, it was felt, could pose difficulties. In the view of some stakeholders, this lack of clarity of the scope of the right, if put in the hands of private business, could have a chilling effect upon competition.
- c) Some stakeholders questioned the viability of the proposal; in their view the new power would not provide any additional protection to brand owners because of the difficulties of satisfying the tests of the average consumer and/or deliberate deception in court.



- d) Extending the injunctive power to business in respect of packaging that is deceptive as to origin would also duplicate rights, which are, generally, already available in respect of trade mark infringement and passing-off. Such duplication could generate legal uncertainty.
- e) This might represent the thin end of the wedge by setting dangerous precedents for the movement of responsibility out of the hands of public enforcers into private hands.
- f) The development of law and policy in relation to the CPRs could be distorted due to an imbalance in the ability to take cases between larger businesses, who are able to commit significant resources in support of claims they decide (or threaten) to litigate, and smaller businesses who are unable to commit similar resources to either defend such claims or take cases themselves. New enforcement rights in this area may therefore, they suggest, unbalance the selection of cases being taken overall and any increase in resourcing of enforcement cases would be restricted to too small a range of cases to be of real benefit to the general consumer interest.
- g) The same difficulties as there are in applying IP law (including passing-off) will be imported into the ambit of the CPRs and introduce unnecessary confusion in their interpretation. It is argued that the difficulties which it is anticipated would occur in applying the universal concepts and principles of the CPRs in this very specific area may then adversely impact the interpretation of those concepts and principles across the wider range of CPRs breaches, and hinder the achievement of clarity in relation to the CPRs. Difficulties in applying the CPRs could, in turn, feed back into, and undermine, any legal certainty and consensus that has been reached in IP law.

## REFLECTIONS ON THE ISSUES RAISED

I. We reflect here on some of the issues raised by this review. In particular, we highlight some matters on which stakeholders have very contrasting positions.

II. The UCPD allows the UK to introduce legislation to enable competitors to take injunctive action against infringement of the CPRs by copycat packaging. It is likely that this could be done by secondary legislation using powers under the European Communities Act 1972.

III. If this option were to be exercised, rather than apply the enforcement provisions in Part 8 of the EA 2002 it would probably be better to create a bespoke enforcement regime. Further consideration would need to be given to issues including: who precisely should be given the power and whether the power should be restricted to copycat packaging or extend to other breaches of the CPRs.

IV. There has been only one instance of enforcement action on the basis that copycat packaging has infringed the CPRs. This does not necessarily mean the enforcement mechanisms are defective. A similarity between packaging is not enough for there to be a breach of the CPRs; that also requires there to be deception under regulation 5(2), confusion under regulation 5(3) or deliberate misleading under paragraph 13 of Schedule 1. An intention to copy per se is not the same as deceiving, confusing or deliberately misleading. In addition under regulation 5 it is also necessary to show that the packaging caused or was likely to cause the average consumer to take a transactional decision that he would not have taken otherwise.

V. The enforcers, while being prepared to consider complaints and assess whether action would be justified in any particular case, do not consider copycat packaging to be a priority for enforcement. In determining how to comply with their enforcement duties they may consider factors such as the desirability of encouraging control of unfair commercial practices by such established means as they consider appropriate having regard to all circumstances of the particular case.

VI. On the basis of what they have seen so far, the enforcers do not currently consider there to be consumer detriment arising out of similar packaging (and if there were potential detriment, believe that it would be mitigated by the availability of quick and easy redress, i.e. by exchange of products). While consumer detriment is not required to prove a breach of the CPRs or the UCPD, the enforcement regime is designed to be “in the interests of consumers”. This makes it appropriate that enforcers take factors such as consumer detriment into consideration in deciding whether or not to prioritise a particular unfair practice and whether or not to take action in a particular case.

VII. The lack of enforcement activity may reflect the inherent difficulties of fulfilling the legal criteria to establish a breach, a lack of suitable cases and administrative prioritisation influenced by a view on the consumer detriment which arises from similar packaging.

VIII. Although we are satisfied that the current enforcement regime meets the UK's obligation under the UCPD to provide an adequate and effective means to combat unfair commercial practices, granting businesses a civil injunctive power would potentially add further to the resources devoted to enforcement in this area, although that is not to say that there would necessarily be either more injunctions or changes in styles of packaging. Whether to grant the power would seem to depend on the view taken as to the extent to which similar packaging presents a genuine problem (which among other things involves consideration of its effects on consumers, competition and innovation) and the likely consequences (including on negotiations between brand owners and retailers and any litigation between them, and on the operation of the enforcement regime).

IX. As set out in this report, starkly different views have been expressed by brand owners and retailers on these questions. On the magnitude of any problem, brand owners argue that instances of harmful copycat packaging are being left unaddressed because of inadequacies in IP law and a failure to enforce the CPRs; the result is said to be that consumers are misled, business is diverted from brand owners and competition is distorted. For retailers, who doubt consumers suffer problems as a result of similar packaging, these arguments illustrate that the case is driven by commercial considerations rather than genuine consumer concerns and they consider granting a civil injunctive power could be anti-competitive.

X. For its part, Which? reports split views among consumers and notes the absence of demand by them for any government action to tackle copycat packaging (some consumers welcome own-brand products, even when they look like branded ones). Which? and the other enforcers also question whether there is consumer detriment arising from copycat packaging.

XI. The evidence on the economic impact of copycat packaging is hard to evaluate. Our analysis, as set out in more detail in Annex B, regarding the influence on a consumer's ability to make accurate and informed decisions, on prices and on innovation activity, concludes that:

- Evidence suggests that copycat packaging reduces consumers' ability to make accurate decisions. However, this does not confirm detriment;
- There is evidence that some consumers deliberately buy copycat products and a high proportion are happy with their purchase;
- Due to data and methodological constraints, there is no empirical evidence that tests the impact of copycat packaging on prices. There are theoretical arguments

which supports that higher price may be charged for copycat and branded products than when distinctive packaging is used;

- Due to data and methodological constraints, there is no empirical evidence that tests the impact of copycat packaging on brands' incentives to innovate. Theoretical arguments can be used to argue that copycat packaging can both encourage and discourage brand innovation.

XII. Turning to the impact of a decision to grant the power on litigation and the enforcement regime, this too is uncertain because it is inherently a speculative exercise.

XIII. For brand owners, granting a civil injunctive power to businesses would provide them with an effective tool to negotiate fair settlements. They believe benefits to brand-owners, consumers and to competition would ensue.

XIV. Retailers, on the other hand, fear it may give rise to an increase in self-interested litigation that could stifle competition and innovation and they question the viability of the proposal as, in their view, it would not be any easier to establish a breach of the CPRs in relation to copycat packaging than it currently is to establish a breach of IP law such as passing-off in those situations. For the Law Society of England and Wales too, providing brand owners with greater powers to obtain injunctions would duplicate rights in trade mark infringement and passing off.

XV. International comparisons do not greatly assist here, not least because of wide differences in IP and "unfair competition" laws. Legal, historical, societal and cultural differences between different jurisdictions also limit the reliance that can be placed on conclusions drawn from such comparisons. However, the low number of cases to date in the Republic of Ireland (where there is a similar power to that contemplated here) suggests that concerns about a rise in litigation and a deleterious effect on public enforcement might be misplaced. On the other hand, the Irish experience questions the extent to which this power may be used by businesses in the UK and therefore the value and purpose of providing it.

XVI. While it is feasible that the new power could give rise to cases of frivolous or mischievous/vexatious litigation, this risk may be mitigated by the provisions already available in the current legal regime to prevent hopeless or spurious claims. In addition, claims on misleading similar packaging would still have to meet the tests of deceiving or confusing the average consumer and/or deliberate misleading contained in the CPRs. Brand owners might therefore find bringing a case under the CPRs little easier than under IP laws. We understand that the difficulty of establishing consumer confusion and then linking it to a direct effect on market outcome, like a loss of sale, is one of the reasons why it may be difficult to succeed in a claim for passing off.

XVII. However, such checks within the legal system would not prevent all tactical litigation. A few cases might be expected to go to a full court hearing, and these might at least clarify

the circumstances in which copycat packaging infringes the CPRs. More commonly the availability of the power would likely be a factor in disputes which already occur between businesses over IP rights connected to packaging, arguably complicating them.

XVIII. A decision to grant the power would require Ministers to be comfortable with amending consumer protection law to facilitate business-to-business litigation. Retailers, several enforcers and Which? all questioned the appropriateness of this. They consider the fundamental consumer protection purpose of the CPR regime is effectively safeguarded by the fact that enforcement powers are given only to authorities acting wholly and exclusively in the collective interests of consumers. This they consider gives the UK consumer protection regime a particular strength and integrity. They hold that any enforcement activity should be properly risk based and proportionate, and they emphasise the challenge for a business with a vested interest in the outcome to act dispassionately, objectively and in the collective interests of consumers rather than their own self-interest. They consider this could set back the Government's efforts to make enforcement more targeted, proportionate and education-led. There is concern at the possibility that accepting this proposal might represent the thin end of the wedge by setting dangerous precedents for the movement of responsibility out of the hands of public enforcers into private hands. They also argue that granting businesses enforcement powers risks shifting the perception of the legislation as a consumer protection tool to one of a business protection tool.

XIX. By contrast, those who support the proposal suggest it would only be a small step. They emphasise that only a narrow right of action is being proposed in an area where the interests of business and consumers are, they say, wholly aligned. They further note that, for action to succeed, businesses would have to satisfy the court over exactly the same tests as public enforcers would.

## **ANNEX A: LIST OF RESPONDENTS AND INTERVIEWEES**

Respondents to the call for evidence included:

ALDI

Alliance for IP

Anti-Copying In Design (ACID), including Newsletter Issue 49 & 50

Association of Chief Trading Standards Officers (ACTSO)

Baker and McKenzie

Boots

British Brands Group (BBG)

British Retail Consortium (BRC)

British Toy and Hobby Association (BTHA)

Chartered Institute of Marketing (CIM)

Coca-Cola

Competition and Markets Authority (CMA)

Health and Beauty Association (H&BA)

International Trademark Association's (INTA)

The Law Society of England and Wales

The Law Society of Scotland

Müller, including cover sheet

PAGB

Pepsi-Cola

Red Bull

Sainsbury's

Scotch Whisky Association

Trading Standards Institute (TSI)

Trading Standards Officer

Unilever, including two annexes and an article

Which?

Members of the judiciary were also interviewed including:

Christopher Morcom Q.C.

Justice Richard Arnold

Sir Robin Jacob, and meeting minutes.

Michael Edenborough Q.C.

## ANNEX B: ANALYTICAL EVIDENCE

### Summary of findings:

1. Evidence suggests that copycat packaging reduces consumers' ability to make accurate decisions. However, this does not confirm detriment;
2. There is evidence that some consumers deliberately buy copycat products and a high proportion are happy with their purchase;
3. Due to data and methodological constraints, there is no empirical evidence that tests the impact of copycat packaging on prices. There are theoretical arguments which supports that higher prices may be charged for copycat and branded products than when distinctive packaging is used;
4. Due to data and methodological constraints, there is no empirical evidence that tests the impact of copycat packaging on brands' incentives to innovate. Theoretical arguments can be used to argue that copycat packaging can both encourage and discourage brand innovation.

### Evidence

5. We assessed the existing evidence in three areas:

- a) *The influence on a consumers ability to make accurate and informed decisions*
- b) *Impacts on prices*
- c) *The impact on brands' innovation activity*

#### **a) The influence on a consumer's ability to make accurate and informed decisions**

6. Copycat packaging may cause a consumer to be misled if...
  - Shoppers not paying full attention may buy the copy in error, mistaking it for the brand;
  - The consumer can distinguish the copy from the brand but believes, due to the similar packaging, that both are made by the same manufacturer/come from the same factory;
  - The consumer can distinguish the copy from the brand but believes that the quality is the same or closer to the brand than they would assume were the packaging more different.



***Which? Survey, Lookalike Packaging Investigation: Spot the difference – Big brand or supermarket equivalent (May 2013)***

7. Which? commissioned a survey to look into consumers' attitudes and experiences of copycat products. The results showed that:
- 20% had purchased a copycat believing it to be a manufacturer brand owner's product at least once. Of those who had mistakenly purchased the lookalike product, 38% were annoyed by the fact and 30% felt misled.
  - 18% had deliberately purchased an own-brand product because it resembled a branded product. Of these, 60% chose to because the own-brand product was cheaper. 59% did so to test whether the own-brand was as good as the branded product.
8. The participants of this survey were Which? members. Accordingly, the result may be lower than the population as a whole since Which? members are likely to be more aware of consumer issues and so are less likely to be confused.

***A study into the impact of similar packaging on consumer behaviour, Don Edwards & Associates Limited, (Feb 2009)***

9. A similar consumer survey<sup>35</sup> commissioned by the British Brands Group in 2009 found that:
- Almost three times as many shoppers agreed (65%) than disagreed (23%) that it can be confusing or misleading when the packaging of two grocery shopping items looks similar.
  - 64% of shoppers agreed that it would concern them if the packaging of a grocery item suggested that the item was connected to a long established make or brand when actually it was not. 19% disagreed.
  - An online survey using images of real products was also used as part of this study. When asked how likely it was that a pair of products were made by the same manufacturer, for 9 out of 10 copycat products, a much higher proportion thought the product were made by the same manufacturer as the brand, compared to non-copycat products.
  - For 8 of the 10 copycat products, there was a higher stated likelihood of buying than for the corresponding non-copycat product. This suggests that the use of copycat packaging makes a product more appealing to consumers.
10. In reviewing this research, the literature review of the IPO *The effect of Lookalikes* study points out that 'at the outset it is clear the results are unnecessarily leading. That

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<sup>35</sup> A study into the impact of similar packaging on consumer behaviour, Don Edwards & Associates Limited, February 2009

aside, where the packaging is “confusing or misleading” or the consumer has been “confused or misled” nothing goes further to determine what *caused* the confusion or related to the consumer being misled (i.e., there is no information as to whether it was origin, consistency, price, quality, value for money or something else).’

***The effect of Lookalikes: similar packaging and fast moving consumer goods, the Intellectual Property Office (2013)***

11. Even if a consumer is misled in the ways explained above, it does not confirm that detriment has occurred i.e. a misled consumer may not be any worse off had they not been misled. In fact, the IPO study suggests that consumers can be better off by the presence of copycat packaging:

- A high number of UK households reported that the accidental purchase of lookalikes/copycats disadvantages them very much (1.68 million households) or somewhat (9.92 million households).
- Yet a substantial number of households reported such a purchase to advantage them very much (0.99 million households) or somewhat (8.99 million households).
- This suggests that some consumers suffer detriment from the mistaken purchase while others find it to be a positive experience.
- The research found a very high number of consumers had purchased a lookalike deliberately (60-70%) and a much higher proportion of those consumers reported the experience to be advantageous (10-20% at the highest level of advantage and approximately 50% at the second highest level)

***The Effects of Branding on Consumer Choice (2012) By Dr. Jane Leighton (Mountainview learning) and Dr. Geoff Bird (UCL)***

12. Even if consumers are not misled when making their final buying decision (i.e. they buy the intended product), copycat products can distract or confuse consumers, resulting in a delay in their processing of information and increased frustration when buying from the category. This may result in some detriment.

13. As part of a study into the effects of branding, eye tracking technology was used to investigate consumer attention. The time spent looking at a product is a predictor of attention which indicates consumer choice. 35 participants were asked to view photos of brands, copycats and non-copycat Fast Moving Consumer Goods. The study found<sup>36</sup>:

- The presence of copycats slows consumer recognition time. When asked to identify a key brand from a selection of photos, participants took:

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<sup>36</sup> These findings are reported to be statistically significant.

- ~235 milliseconds when photos of copycats were shown
- ~225 milliseconds when no photos of supermarket brands were shown
- ~220 milliseconds when photos of non-copy supermarket brands were shown

14. Note that only 35 participants took part in this experiment and it is unlikely that this would be a representative sample of the population or for results to be highly statistically significant.

#### **b) Impacts on price**

15. Copycat products are typically cheaper than branded goods. However, it may be the case that retailers charge a different price for both copycat and branded goods than they would have had distinctive packaging been used, potentially causing detriment to consumers.

16. Analysing a link between copycat packaging practices and pricing is complex, not least because:

- Price is one of many factors that determine consumer choice.
- Product offerings and price vary over time. In addition there are temporary effects from promotions, advertising and other factors;
- It is difficult to isolate the impact of packaging on price. There are a wide range of influences on consumer prices outside packaging and product formulation e.g. variances in the supply market, economic conditions, retail competition, product competition and others;
- Access to the best data may be restricted; and
- Private label ranges can be anything from "finest" to "value", affecting consumer expectation and therefore propensity to select on price above other factors.

17. Because of these barriers we have found no analytical evidence, nor has any additional evidence been provided by stakeholders, to suggest there is either a positive or negative impact on prices.

#### **Stakeholder comments**

18. In the response following our request for further analytical evidence, it was affirmed that retailers can choose whether to have a greater price differential between branded products in the category and their own private label offerings in order to increase private label volumes, or to keep pricing similar to the branded products in order to increase their own margins.

19. Where misleadingly similar packaging increases propensity to buy the private label product to a greater extent than if the consumer were choosing on objectively verifiable

qualities alone, there is a risk that consumers will be paying more for the (misleadingly similar) product.

20. Since retailers set the price of both branded and private label products, there is also a risk that the retailer will price less competitively on branded products in the category in order to encourage purchase of the (misleadingly similar) private label product on which their margins may be higher.

21. While these premises cannot be tested using price data, it appears reasonable to consider them as potential risks of consumer detriment from copycat packaging. Whether this detriment occurs is dependent on the pricing strategies of retailers and whether overall consumers (of both copycats and branded products) end up paying more than they would have had the packaging been distinctive.

### C) Impact on brands' innovation activity

22. In theory, copycat packaging could have the following impact on brands' incentive to innovate if:

- Brand leaders are not confident that consumers will be able to distinguish their product;
- The brand leader's market share has declined so much that the cost of research cannot be recovered;
- The existence of copycats drives up competition for branded products, incentivising brand leaders to innovate to maintain their positions;
- Branded products are adapted for the sake of change alone leading to 'over investment'.

23. Encouraging brand innovation benefits consumers in terms of better and more innovative products and more choice. Discouraged brand innovation prevents these benefits from being realised.

24. Analysing the influence of copycat packaging practices on a brand's incentive to innovate is complex. R&D trend data cannot be used to generate confident results - the causal link between copycat packaging and R&D is complex and impossible to track and it is not possible to isolate effects arising from copycats from other effects that drive R&D (such as competition, new technology, business strategy, existing / potential regulation, sustainability and other factors).

25. Therefore there is no empirical evidence of the link between copycat packaging and brand innovation. However there is some limited literature on the topic.

***The effect of Lookalikes: similar packaging and fast moving consumer goods, the Intellectual Property Office (2013)***

26. This study reviews the literature on innovation in the wider context of own brand goods, assuming that similar issues are at play with copycats. It finds that:

- In the food sector in Europe the presence of own brand on the market does not inhibit innovation;
- Own brand actually spurs innovation amongst the manufacturer brand owners;
- There was some support from the research that own brands, and copycats, necessitate innovation as it is the only way for a manufacturer brand owner to maintain an edge. It is through innovation that the manufacturer brand owners can stay ahead and maintain the price differential with copycats;
- However, there may be a tipping point where the lost sale caused by copycats (or other competitors) is such that research can no longer be funded or commensurate;
- It does not appear that costs are wasted by repeated packaging redesigns caused by copycats; rather, any redesigns undertaken would happen in any event as part of the normal lifecycle of the product.

**Stakeholder comments**

27. One stakeholder provided arguments in favour of the view that copycats inhibit innovation. They made the following points:

- Branded products tend to lead on innovation and reputation, demonstrated by the fact that copying takes place;
- Branded products innovate more than non-branded products;
- Copying reduces revenues and increases costs to brand owners that tend to lead innovation in many categories;
- Reduced returns on investments in quality, innovation and reputation inhibit future investment in those areas.

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