

Catching up with the copycats?



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In May this year, the Unfair Commercial Practices Directive was signed by the European Parliament and Council, seeking to clarify consumers' rights and boost cross-border trade by harmonising EU rules on business-to-consumer commercial practices. The idea is that EU consumers will have the same protection against misleading marketing wherever they buy, while businesses will have a clear set of common EU rules to follow, rather than myriad divergent national laws.

The new legislation outlines 'sharp practices' which will be prohibited throughout the EU, such as pressure selling, misleading marketing and unfair advertising. Included is a ban on deliberately promoting a product in a similar way to another. Does this herald the end of products in look-alike – or copycat – packaging?

Such a practice has been used against shoppers for decades, and not just in the UK. A competitor will present a product in packaging similar to a leading brand to suggest to the shopper that either it is that brand or is associated with it. It is a practice that works. Many shoppers are misled over the quality of the copycat, some buy it, mistaking it for the brand, and generally the shopping experience is made more difficult.

The other side of the coin is the impact this deception has on business. Not only the copied product but others in the category lose sales when shoppers believe they are getting leading brand quality at a lower price, while the costs of the original product rise disproportionately as it strives to defend itself and to reassert its distinctiveness. Where a copycat targets an innovative new product, returns on investment are lowered and further investment in new products discouraged.

The Unfair Commercial Practices Directive,

however, is consumer protection legislation and therefore will only deal with the consumer aspects of the problem. Businesses – and policymakers – must look to other solutions in order to tackle the business and innovation effects that flow from this form of free riding.

So will this Directive bring anything new to the UK? To date, passing off and trade mark law are the best-known methods for tackling copycats. However both have problems. The copycat will adopt the same colouring and juxtaposition of features as the original to convey sufficient similarity to the shopper, but will usually be just different enough to avoid clear-cut passing off or trade mark infringement.

A trade mark is often of little assistance. For infringement, the brand owner needs to show a 'likelihood of confusion', which needs to be more than just 'a bringing to mind' of the registered mark. As the copycat usually uses a different name on the product, it is hard to find evidence of confusion that led shoppers to buy the wrong product, though it does happen.

Some assume that passing off is a sufficient remedy. However, again, confusion is very difficult to prove. Identifying witnesses who may have been confused is not easy (retail outlets selling copycats tend to deny access to the researchers) and consumers are often reluctant to admit they have been duped. Also complaints are rare where the copycat price is relatively low. To overcome these difficulties, companies have sought to use shopper surveys as a substitute but the courts have been highly critical of this approach.

Will the Unfair Commercial Practices Directive improve on this situation? For a specific look-alike to be unfair (and therefore prohibited), it must be false or misleading and cause the

consumer to buy a product he otherwise would not have bought. However it is not clear how confusion is to be interpreted in the context of the Directive. If it is to be interpreted strictly in the passing off/trade mark sense (i.e. that the consumer must believe that the product is another product), we will be no further on. More to the point, will the interpretation be the same in other Member States (where 'confusion' tends to be interpreted more broadly)? If interpretations differ, the Directive will have different effects in different markets.

Much will depend on how the Directive is implemented into UK law, how it will be enforced and how the courts apply it in practice. Although the Directive provides for organisations with a legitimate interest (e.g. competitors) to take legal action against unfair commercial practices, it looks probable that in the UK it will only be public enforcement bodies, and specifically Trading Standards, that are tasked with enforcement. Trading Standards, however, are already over-stretched and more used to dealing in areas that are relatively black and white (such as weights and measures, risks to health and counterfeits) than determining whether packaging is sufficiently similar to encourage a shopper to make a purchase they might not otherwise have done.

Whilst on the face of it the Directive may not provide significant change to what can be done about copycats, it is potentially a step forward and should be embraced as such. However, interpretation and implementation will be critical, not just in the UK but across Europe. Policymakers have a significant task ahead of them if this legislation is to deliver the harmonising effect across the markets of the Member States that they seek.