



## Will new legislation stop copycat packaging?

**Experts at the British Brands Group roundtable broadly welcomed the Government's proposals to implement the Unfair Commercial Practices Directive in the UK, but saw the absence of a civil remedy as weakening its desired effect.**

John Noble – Director, British Brands Group said: "What we face today with the Unfair Commercial Practices Directive is the best opportunity the UK has had in 10 years to tackle the issue of copycat packaging once and for all."

Meeting Notes, Parliamentary Roundtable  
25th July 2007, Portcullis House, Westminster, London

### Attendance:

Lembit Öpik MP *Chairman*

Matt Appleton *Liberal Democrats*

Jonathan Baillie *Packaging Today*

Robert Buchan *Maclay Murray & Spens*

Lavinia Carey *Alliance against IP Theft*

Stefan Chomka *The Grocer*

Chris Griffin *PI Global*

Mervyn Kohler *Help the Aged*

Samantha Legg *L'Oréal*

Charlotte Lindsay *Intellectual Property Newsletter*

John Noble *British Brands Group*

James Nurton *Managing Intellectual Property*

Peter O'Byrne *Baker & Mackenzie*

Tess Raine *Packaging News*

David Sanders *Trading Standards Institute*

The meeting was held to discuss the problem of copycat packaging, explore the potential impact of the Unfair Commercial Practices (UCP) Directive and to identify potential solutions.

### BACKGROUND

The UCP Directive is consumer protection legislation that imposes a duty on businesses not to trade unfairly, and includes provisions against misleading consumers that effectively outlaw copycat packaging. It was adopted by the European Council of Ministers on 11 May 2005, with the UK Government now considering how best to implement and enforce it in the UK.

To that end, the Department for Business Enterprise and Regulatory Reform (DBERR) is consulting on draft Consumer Protection from Unfair Trading Regulations. This consultation closes on 21st August, with the regulations coming into force in the UK from April 2008.

Designers of copycat packaging avoid infringing intellectual property (IP) rights. The law against passing off is also ineffective as the copycat tends to carry a different name to the original, making it hard to show there has been misrepresentation. The recent Gowers Review of IP concluded that passing off does not go far enough to protect brands against misappropriation.

The UCP Directive represents a potential remedy. Copycat packaging is addressed by Article 6 (“Misleading actions”) and Clause 13 of the Annex which lists it amongst those practices that in all circumstances are to be considered unfair.

The effectiveness of the UCP Directive however depends on enforcement. Currently DBERR plans to restrict enforcement to organisations such as Trading Standards and the Office of Fair Trading. These organisations have wide responsibilities, limited resources and the strict need to prioritise cases according to the public interest.

## INTRODUCTION

The Chair, Lembit Öpik MP, opened by stating:

“if someone stole your share equity, that would be theft. Copycat packaging should be treated as theft”.

John Noble, in his introduction, stated that the British Brands Group has been engaging with Government on the copycat packaging issue since 1994, through the Trade Mark Bill and later the Competition Bill, but that the Unfair Commercial Practices Directive represents “the best opportunity we’ve had to resolve this issue in the last ten years”.

He argued that copycat packaging exploits both shoppers and the branded products they plagiarise. Shoppers are duped into buying something they believe to be linked with the brand when it is not. In other instances, shoppers simply buy the wrong product, being confused by the similar pack design. The reputation of the brand, built up over years of investment in innovation and product performance, is effectively hijacked. Sales are lost to the brand and its costs are increased, stifling the potential for further investment in innovation.

He pointed out that:

- determining what constitutes copycat packaging is rarely a clear-cut black and white issue;
- this is not a fight between manufacturers and retailers as often portrayed, as some manufacturers also produce copycats;
- the UK is out of step with the rest of Europe which has unfair competition laws that addresses the problem. Furthermore some European countries such as Ireland are allowing private prosecution of copycat infringements when implementing the Directive;
- preventing misleading copycat packaging is an issue on which the interests of brand manufacturers and consumers are 100% aligned.

## THE EXTENT OF THE PROBLEM

Research has demonstrated that around 20% of people have bought a copycat product accidentally and 30-50% people believed that there is a link in “brand quality” between similarly packaged products. These figures suggest that over 14 million households have been affected by the problem.

It was pointed out that copycat packaging is a consumer protection issue as much as a business issue. It is a difficult offence to prove as consumers tend not to complain, either blaming themselves for their error or not being prepared to make a fuss over a relatively low

value purchase. Many may remain unaware that they have been duped. Consumer research is often obstructed by retailers and tends to be considered as artificial by the courts.

Mervyn Kholer (Help the Aged) argued that copycat packaging presents a potential health risk to those picking up products with different ingredients and that it provides “unnecessary confusion” to the three-quarters of a million people living with dementia in the UK.

David Sanders (Trading Standards Institute) agreed that it is important to make packaging clearer to “bring some certainty and simplicity to an uncertain world”.

#### WHAT IS THE PROBLEM WITH ENFORCEMENT BY REGULATORY BODIES?

David Sanders said that historically 20-25% of their prosecutions came under the Trade Descriptions Act, which the UCP Directive will replace. He welcomed the Directive as it lays down the law more clearly through the 31 practices in the annex.

However, there was general consensus in the room that criminal prosecution is difficult to bring. There are also serious resource issues for the public authorities tasked with enforcement, which are likely to reduce the priority given to copycat packaging where public safety tends not to be an issue. This was elaborated upon by David Sanders as he pointed out that changes in the structure of Trading Standards agencies had resulted in ever smaller units that find it difficult to have experts in all fields.

David Sanders identified one of the major reasons behind the reluctance to allow companies to take action is a fear of “opening the floodgates” to a tide of private prosecutions. Whether to give individual consumers the right to take action has been referred to the Law Commission.

He pointed out that, as copycat packaging is a banned practice, the transactional test (whether an average consumer would make a transactional decision he would not otherwise have taken) would not apply but the professional diligence test would apply.

Samantha Legg (L'Oréal) argued that one of the problems for brand manufacturers is that often the producers of copycat packaging are retailers that constitute the manufacturer's biggest customers. She, and others, argued that this is likely to make manufacturers extremely careful when prosecuting, creating a market-driven brake on the number of prosecutions.

However, it was agreed that brand manufacturers would welcome the “back-up” deterrent of private prosecution in dealing with producers of copycat packaging.

Robert Buchan, Maclay Murray & Spens, Associate IP & Technology, said:

“Private prosecution would be a deterrent to copycaters, if they knew that brands had this weapon in their arsenal”

James Nurton (Managing Intellectual Property) asked whether companies needed to make their packaging more distinctive to protect themselves from this problem. This was, to an extent, accepted by attendees although it was pointed out that designers could still be able to create similarities while avoiding directly copying distinctive features. Lembit Öpik MP cited the example of the new distinctive shape of the Fairy Liquid bottle that set the standard for the sector but which was soon copied extensively.

## WHAT CAN BE DONE?

In looking for possible remedies, Lembit Öpik MP cited the example of parliamentary candidates for the “Literal Democrats” and “Conservatory Party” winning votes in elections. This instigated a parliamentary ban on such passing off<sup>1</sup> (essentially the copycatting of political brands), demonstrating that Parliament understood the issue well and had moved to protect itself. It was important for the commercial sector to have similar protection.

Lembit Öpik MP summarised six potential courses of action raised during the meeting:

- encourage more consumers to complain, to emphasise the importance of this issue in order to generate action from the public enforcement authorities;
- place the onus on those producing copycat packaging to show “due diligence”, demonstrating that they have taken the necessary steps not misled consumers. Designers need to be educated on their new responsibilities – and liabilities – under the Directive;
- increase the budget for Trading Standards to enable them to enforce the Directive effectively while ensuring local authorities gave sufficient priority to the problem;
- include a “civil remedy” in the adoption of the UCP Directive that enables companies to obtain rapid injunctions. This would act as a powerful deterrent to those producing copycat packaging;
- undertake research, perhaps using tachistoscope techniques, to indicate the consumer confusion caused by similar packaging;
- establish a gatekeeper to enforce against misleading packaging, which would enable self-regulation to work, along similar lines to the CAP Code regulated by the Advertising Standards Authority.

The chair said he was determined to flag up this issue in Parliament, to turn the likelihood of private prosecution being permitted in law “from a possibility to a probability”.

For more information, please contact:

John Noble  
Director  
British Brands Group  
[jn@britishbrandsgroup.org.uk](mailto:jn@britishbrandsgroup.org.uk)  
01730 821212

Luke Pollard  
Senior Account Manager  
Edelman  
[luke.pollard@edelman.com](mailto:luke.pollard@edelman.com)  
020 7344 1291

---

<sup>1</sup> Registration of Political Parties Act 1998