



Unfair competition and the Unfair Commercial Practices Directive

28th November 2007

The voice for brands



What is the problem?





What is the problem?

- Impact on consumers
 - increased likelihood of buying the wrong product
 - similar packaging suggests a link to the brand
- Impact on the original company
 - lost sales
 - increased costs
 - dilution of distinctiveness
- Impact on competition



What is the problem?





What is the problem?

Supermarket own label products

- 16 – 20% of shoppers buy own label due to similar packaging (BRC)
- 21% of shoppers buy own label as they believe them to be made by brand manufacturers (BRC)
- Retailer controls consumer pricing, shelf position and in-store marketing
- Competitor is also major customer



Is it a problem?

- Code of Advertising Practice
- IGD Dispute Resolution Procedure
- Paris Convention (and TRIPS)
- Unfair Commercial Practices Directive



Is it a problem?

Paris Convention (and TRIPS)

- (1) Countries of the Union are bound to assure nationals of such countries effective protection against unfair competition
- (2) Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition
- (3) The following in particular shall be prohibited:
 - (i) All acts of such a nature as to cause confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor



Current regulatory regime

- Trade marks
 - “The main characteristic of a look-alike product is that it does not copy a trade mark” Patrick McLaughlin MP, 1994
- Registered Design
 - Must create a very similar overall impression
- Copyright
 - Necessary to show substantial reproduction
- Passing off
 - “... passing off does not go far enough to protect many brands and designs from misappropriation ...” Gowers Review, 2006



Unfair Commercial Practices Directive

- **Aims:**
 1. To strengthen consumer protection
 2. To harmonise unfair trading law
- **General principle**

Unfair commercial practices shall be prohibited
- **Three categories:**
 1. Conduct that contravenes professional diligence and which distorts consumers' economic behaviour
 2. Misleading actions / omissions and aggressive practices
 3. A blacklist of 31 practices



Unfair Commercial Practices Directive

Commercial practices which in all circumstances are considered unfair

Promoting a product similar to a product made by a particular manufacturer in such a manner as deliberately to mislead the consumer into believing that the product is made by that same manufacturer when it is not (Clause 13)



Unfair Commercial Practices Directive

- Practices which harm consumers and thereby indirectly harm the economic interests of legitimate competitors (Recital 6)
- Indirectly protects legitimate businesses from competitors who do not play by the rules, thus guaranteeing fair competition in fields coordinated by it (Recital 8)



Unfair Commercial Practices Directive

Enforcement

Member States shall ensure that adequate and effective means exist to combat unfair commercial practices in order to enforce compliance with the provisions of this Directive in the interest of consumers.

Such means shall include legal provisions under which persons or organisations regarded under national law as having a legitimate interest in combating unfair commercial practices, including competitors, may: (a) take legal action against such unfair commercial practices. (Article 11.1)



Summary

- Where does the remedy to look-alikes lie?
- A strong case that the UK is not compliant with 10^{bis}
- UCP Directive a potential step in right direction
- Effective enforcement is key
- Future opportunities to align look sparse



British Brands Group
8 Henrietta Place, London W1G 0NB

info@britishbrandsgroup.org.uk
www.britishbrandsgroup.org.uk

The voice for brands