**BOOTS**

**Question 1**

Some brand owners have suggested that there is an enforcement gap in that the current enforcers have not devoted sufficient resources to tackling copycat packaging (where, they say, it infringes the prohibition in the CPRs and the average consumer takes, or is likely to take, a different decision as a result). We would be interested in any views and supporting evidence as to whether there is an enforcement gap and, if so, the extent of it. Please use this space for any additional or general comments that you may have.

We don’t agree that there is an enforcement gap. Due to the limited available resources current enforcers are careful to ensure that such resources are allocated where there exists true consumer detriment. It would not be wasting its efforts on speculative situations. The fact that there is an absence of enforcement clearly demonstrates that detriment is either non existent or is sufficiently dealt with using the existing civil legal procedures.

**Question 2**

To respond to this question you may want to refer to the independent research The Impact of Lookalikes: similar packaging and fast moving consumer goods from the Intellectual Property Institute - see attached document. Please use this space for any additional or general comments that you may have.

We draw your attention to the community Trade Mark Registry’s Manual regarding “GUIDELINES FOR EXAMINATION IN THE OFFICE FOR HARMONIZATION IN THE INTERNAL MARKET (TRADE MARKS AND DESIGNS) ON COMMUNITY TRADE MARKS PART C OPPOSITION SECTION 2 IDENTITY AND LIKELIHOOD OF CONFUSION CHAPTER 6 RELEVANT PUBLIC AND DEGREE OF ATTENTION.” <https://oami.europa.eu/tunnel-web/secure/webdav/guest/document_library/contentPdfs/trade_marks/Guidelines/13_part_c_opposition_section_2_identity_and_likelihood_of_confusion_chapter_6_relevant_public_and_degree_of_attention_en.pdf> This material summarises the main principles on likelihood of confusion on trade marks for the European Community. It provides guidance on the assessment of likelihood of confusion between 2 marks. According to the manual levels of attention differ according to type of product. This demonstrated in the ECJ decision of 22/06/1999, C-342/97, ‘Lloyd Schuhfabrik Meyer’, para. 26 where its stated that: “the average consumer of the category of products concerned is deemed to be reasonably well-informed and reasonably observant and circumspect … It should also be borne in mind that the average consumer’s level of attention is likely to vary according to the category of goods or services in question.” Following from this principle it demonstrates that even for cheap, frequent purchases brand loyalty can bring about high levels of attention i.e. consumers are less likely to be confused by similarities. For example under 3.1.1.3 of the manual it states that a high degree of attention can be the consequence of brand loyalty. For example “Although tobacco products are relatively cheap mass consumption articles, smokers are considered particularly careful and selective as to the brand of cigarettes they smoke, so a higher degree of brand loyalty and attention is assumed when tobacco products are involved. Therefore, in the case of tobacco products a higher degree of similarity of signs may be required for confusion to occur. This has been confirmed by several Board decisions: decision of 26/02/2010, R 1562/2008-2, ‘victory slims’, where it was stated that the consumers of Class 34 goods are generally very attentive and brand loyal, and decision of 25/04/2006, R 61/2005-2, ‘Granducato’. The manual also adds that another example of high degree of attention as a consequence of brand loyalty could be the purchase of newspapers or magazines. The Manual also refers to cheap regular purchases such as foodstuffs having a low level of attention where there is no loyalty but this would logically lead to a conclusion that there is no detriment to the consumer if they make a mistake as there is no desire to ensure they get the right brand (even though there may be to the brand owner). See 3.1.2 of the Manual where it states “A low degree of attention can be associated, in particular, with habitual buying behaviour. Purchase decisions in this area relate to, for example, inexpensive goods purchased on a daily basis (see by analogy judgement of 15/06/2010, T-547/08 ‘Orange colouring of the toe of a sock’ para. 43). An example of low degree of attention could be basic foodstuffs. Given the above we do not agree with the argument that it is the packaging that denotes the quality of the product. It is the brand that denotes the quality of the product. One example of this concept can be seen by the sale of car tyres. All car tyres are similar to each other. They all perform the same basic functions. However the public would not agree that all tyres are of the same quality. It is the brand that conveys to the consumer that the qualities are different

**Question 3**

We would be interested to learn more about how these systems work and what has been the response of consumers, businesses and retailers. It would be very useful to have specific examples of the litigation that has taken place in relation to copycat packaging and its outcome. In responding to this question you may want to refer to the report that Hogan Lovells carried out a study for the European Commission - see attached document. Please use this space for any additional or general comments that you may have.

It should be noted that the UK and the Republic of Ireland are the only members in the EC that use the law of the tort of passing off. This differentiation from other Members of the EC is very important since it already provides UK businesses with the tools to take appropriate action in a situation where there exists similarities between their products and their competitors products which clearly shows consumer detriment and damage to the brand owner. It is an important factor to note that although the law of the tort of passing off might be difficult and expensive, it ensures that only cases with genuine merit are taken on.

**Question 4**

We note that the Irish legislation implementing the UCPD (the Consumer Protection Act 2007) gives businesses a right to apply for a court order to prohibit copycat marketing, but the right is a broad one in that it applies to alleged infringements of all of the UCPD’s provisions and it extends not only to businesses. Since the Irish legal system is in some ways similar to the UK’s, we would be particularly interested to hear how this system has worked and if there are any particular issues in respect of copycat packaging in Ireland. Please use this space for any additional or general comments that you may have.

No Comment

**Question 5**

Giving businesses enforcement powers might be expected to bring potential costs and benefits which it would be helpful to assess. Costs might include more enforcement before the courts and benefits might relate to addressing such consumer detriment as arises at present. We would be interested in any views on these issues. Of particular interest are any effects the proposal might have on the operation of markets, especially in relation to competition. Brand reputation can lower search costs for consumers, by enabling them to draw on their experience and other information about a product, but this mechanism only works if consumers can be confident they will purchase what they want to purchase. Equally, businesses will not invest in higher quality goods and services (and innovate) if they are not confident that consumers will correctly be able to distinguish them from lower quality ones. This potential market failure is addressed by the trademark system but, in theory at least, if consumers are being significantly misled by copycat packaging the market might be failing to work. On the other hand, and again in theory, brand reputation can create strong market power and make a market less contestable. By erecting barriers to entry and inducing market segmentation (by persuading consumers that similar products are different), branding may give rise to competition concerns. There is a fine line between confusing packaging and using generic cues to provide useful signs to consumers . We should be interested in any views or evidence which relates the issue of copycat packaging to competition and innovation. Please use this space for any additional or general comments that you may have.

We do not believe that giving businesses enforcement powers will provide any real benefit to the general consumers. Such enforcement powers are likely only to be used by the large and powerful brand owners in view of the costs and difficulties are attributed to such enforcement powers. In return, it would provide too much power in the hands of a few major brand owners. As such, competition would be stifled since entry into a market would become difficult major brand compete.

**Question 6**

Giving businesses enforcement rights over consumer legislation would be novel in the UK and we would be interested in views on how it would work in practice. It could result in a very different enforcement model than currently exists in the UK. In particular, might it cut across public enforcement which, as described earlier, can be carefully calibrated to suit the circumstances? Would it lead to a more litigious regime? Might it even give rise to mischief-making? On the other hand, the test to be met before the courts would be the same as now and it would focus on whether consumers have been misled, and not on whether competitors had lost business. In addition, given the financial pressures that the public sector including public enforcers face, would there be real benefits in mobilising private sector resources in this area? Please use this space for any additional or general comments that you may have.

Giving businesses enforcement rights over consumer legislation would potentially demoralise existing public enforcers in the UK since there is likelihood that they would conclude that there does not exist any need for them to enforce the criminal provisions in view of the fact that there is a civil route available to the only likely complainants in such matters. In addition there is the risk that this would no longer be legislation for consumer protection. Instead it would be used for business protection.

**Question 7**

Giving businesses an enforcement right would not readily fit in with the system described above of designating enforcers on the basis of statutory criteria orientated around protecting the collective interests of consumers. In practice, it would likely require substantial modification to the current civil enforcement regime or the setting up of a new one, with significant amendment to Part 8 of the Enterprise Act 2002 (which is a general enforcement regime for consumer law, not one restricted to the CPRs). The Department will consider further whether any such change could be made under section 2 (2) of the European Communities Act 1972 (under which the CPRs were made) or whether reliance on some other powers or primary legislation would be required, but if respondents have any views we would be interested to see them. The review is restricted to considering the case for providing businesses with a power to take civil injunctive action against copycat packaging and is not addressing other aspects of enforcement of the CPRs including a wider enforcement power for businesses. This implies that the practice can be readily identified among those prohibited by the CPRs. Again, the Department will be considering the legal issue further but would be interested in views including on whether a reference to Regulation 5(3)(a) would suffice for this purpose. Please use this space for any additional or general comments that you may have.

When public enforcers consider whether to initiate legal proceedings through the Courts, there exist considerable checks and balances to ensure that the legal prosecution is justified. The prosecutors would also need to take into consideration whether the case has a likelihood of success. These factors are necessary to ensure public resources are not wasted. Our concern is whether comparable measures can be implemented to protect against abuse of powers if they were granted to businesses.

**Question 8**

We have noted above some of the policy issues raised by this review and some of the legal advice we are seeking. We will consider when the review has progressed further what issues remain unresolved and what would be involved in implementing any proposals. Please use this space for any additional or general comments that you may have.

See comments to Question 7

**Question 9**

We have alluded above to a number of important considerations, pointing in different directions, which will be hard to quantify or indeed judge, such as the risk of more litigation. We shall be seeking to firm up views on some of these matters as the review progresses but in the meantime we would be interested in views – particularly those supported by evidence – on what constitute the most important risks. Please use this space for any additional or general comments that you may have.

No comment.

**Question 10**

We would be particularly interested, if respondents consider if there any significant issues we have not so far identified. Please use this space for any additional or general comments that you may have.

No comment.