**Copycat Packaging**

**BIS Call for Evidence**

**Comments from the British Retail Consortium**

**May 2014**

The BRC represents the vast majority of retailers in the UK both online and offline.

Issue 1.

As a matter of principle we believe that consumer protection law is best enforced through public enforcement not private enforcement. We believe this enables the right balance to be struck and the government’s approach of targeted, proportionate, education led enforcement to be upheld along with the Primary Authority approach. By allowing others to enforce the law there is a considerable risk these will be undermined.

We would reject the suggestion that there is an enforcement gap in relation to copycat packaging. As the consultation suggests and especially so in the current climate of austerity, enforcers will be careful to ensure their precious resource is used in a way that best reflects where true consumer detriment arises. The absence of enforcement is a clear indicator that detriment is either entirely absent or is adequately dealt with using the existing civil mechanisms.

Issue 2

We would direct attention to the community Trade Mark Registry’s manual

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 should be helpful as it summarises the main principles set out in various EU cases on likelihood of confusion on trade marks. It is a section of the Community Trade Mark Registry’s manual which governs assessment of likelihood of confusion between 2 marks.

It deals with differing levels of attention according to type of product but also helpfully points out that even for cheap, frequent and non-hazardous purchases brand loyalty can bring about high levels of attention i.e. consumers are less likely to be confused by similarities.

It also talks about 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).

We reject the notion that it is the packaging that denotes the quality of the product. It is the brand that does that. For example, car tyres are all similar to one another and all perform the same basic functions but few would imagine that all tyres are of the same quality and it is the brand (and perhaps to some extent the price) that denotes to the consumer that the qualities are different.

Issue 3

We would attach great importance to the existence in UK law of the tort of passing off. This distinguishes us from other EU member states and already provides businesses with the means to take appropriate action where the similarities between their products and those of competitors can be clearly shown to cause consumer detriment and damage to the brand owner. The fact that taking such actions may be difficult and potentially expensive ensures that they are only taken where there is genuine merit.

Issue 4

We do not believe this will really benefit the collective interests of consumers. We are concerned that as a tool, it is likely only to be used by the biggest brands due to the costs and challenges that would be entailed and would be too draconian in empowering those major brands. Potential new entrants into a market where a major brand operates already face great challenges in establishing their own identity and market. To restrict by the fear of injunctions their opportunity to signpost to potential customers, through its presentation, that their product represents an alternative to that major brand risks stifling competition.

Conversely, for many potential defendants, the cost of fighting the injunction is likely to be prohibitive with the likelihood that they simply roll over without the matter ever being properly examined. That would not be in the interests of consumers as they would be denied the benefits of a truly competitive market.

In any case the power would be narrower in its application as in order to prevent actions against inadvertent infringements, it would require the claimant to show intent on the part of the defendant so its overall value may be open to challenge.

Issue 5

This raises the question of the impact on the enforcement of the CPR’s in the UK. The BRC has always argued that any enforcement activity should be properly risk based and proportionate. Clearly there is a challenge around the capacity of 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. As you may imagine, we would be concerned at the possibility that 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. At the same time it could demoralise the existing public enforcers and certainly 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. It also risks shifting the perception of the legislation as a consumer protection tool to one of a business protection tool.

At the same time, any potential claimant faces of the challenge of satisfying their shareholders of the justification of using business funds in what would amount to altruistic behaviour in protecting consumers who may never be their customers.

Issues 6 and 7

When a public enforcer considers whether to embark on court action, there would ordinarily be extensive checks and balances in place to ensure the action is properly justified, including whether or not it is likely to succeed. These are vital to ensure inter alia, that court time is not wasted. We would be very concerned as to how comparable measures can be put in place to protect against inappropriate use of these powers if they were granted.

Issue 8

We would be concerned as to the risk that public enforcers will be railroaded into taking action that they could not otherwise justify through the threat of businesses resorting to injunctions amid criticism that they were only doing so due to the failure of the public enforcers to take action themselves.