

Copy that

What can the FMCG sector do to protect its branded products against copycats? Choose your battles wisely, argues Barker Brettell's **Carole Drury**

Copycat packaging is the practice of designing the packaging of a product to give it the general 'look and feel' of a competing well-known brand (typically the market leader).¹

Importantly, copycat packaging is distinct from counterfeiting. Counterfeit goods are products which are a copy of something else but sold as the genuine product, without permission from the brand owner. This is a criminal offence.

Instead copycat products seek to remind the consumer of the well-known brand. This is summed up the tagline of the supermarket chain Aldi: "Like Brands, Only Cheaper".

Companies in the fast-moving consumer goods (FMCGs) sector may be frustrated by their competitors' use of copycat packaging to sell lookalike products. There is no specific law designed to tackle the practice in the UK. Nonetheless, such products may infringe the brand owner's IP or the Consumer Protection Regulations² (CPRs).

Intellectual property

Intellectual property is the first line of defence against copycats. IP should be considered

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before a product is launched and then regularly thereafter. For example, when entering a new market or updating the packaging or recipe.

Companies have a range of IP options to protect their brands, including IP rights that must be applied for (eg, registered trademarks, patents and registered designs) and those which arise automatically (eg, unregistered design rights and copyright). Typically, registered rights are easier to enforce, and their publication may also act as a useful deterrent.

Registered trademarks

A registered trademark grants its owner a

limited monopoly to use that trademark in relation to the goods and services for which it is registered. A registered trademark can last indefinitely, provided renewal fees are paid every 10 years.

The Bass triangle was filed in 1876 and is still in force for pale ale!³

If an unauthorised third party uses a mark that is *identical* to a registered trademark and placed on *identical* goods, there is trademark infringement. There is no need to demonstrate any confusion on the part of the consumer.

Lookalike products seek to avoid this type of trademark infringement by using marks that are similar, but not identical. If a similar mark is used, trademark infringement will only be found if there is confusion as to the origin of the goods and the possibility of an association between the two marks.

Trademarks should certainly be considered for brand names and logos, but other types of trademarks are possible. Trademarks have been registered for a sound (the INTEL sound mark), a colour (eg, MILKA LILAC), and a three-dimensional shape (the contour shaped COCA-COLA bottle). Therefore it might be possible to obtain a registered trademark for the packaging or the product itself.

Patents

Patents protect inventions that are novel (new) and inventive (not obvious). A granted patent provides a monopoly for up to 20 years, provided renewal fees are paid. Patents may be available for innovative packaging for example.

Registered designs

A registered design protects the appearance of the whole or of a part of a product or packaging for up to 25 years from an application to register the design being filed, provided renewal fees are paid every five years.

Registered designs may provide narrower protection than expected. Proctor & Gamble (P&G) obtained a registered Community design⁴ for its FEBREZE trigger-operated sprayer in 2003 (which is still in force). P&G sued Reckitt Benckiser for infringing the design with their Air Wick Odour Stop product. Although infringement was found at first instance, this was overturned on appeal. The Airwick product was said to provide a "different overall impression".⁵

Unfair trading

Copycat packaging can be considered a form of unfair trading in some instances, but similarity is not enough.

Sale of a lookalike could be viewed as a misleading action in breach of the regulations if the packaging deceives consumers about matters such as the nature of the product or the affiliations or connections of the trader. For example, if a consumer would believe the product to be equivalent to the branded product.

Brand owners cannot enforce the CPRs directly. Enforcement powers reside with public authorities (trading standards or the Competition and Markets Authority).

Legal action

It is important to assess the strength of your case before considering how to tackle copycat packaging. However, this is not the only factor. It is worthwhile considering the harm caused by the lookalike (eg, does the lookalike eat into your market share or damage your reputation?) and then balancing this against the cost of legal action and any potential risk to reputation. As shown in the examples below, even if you believe your IP is being infringed, it may be prudent to tread carefully.

Oatly AB v Glebe Farm Foods⁶

Oatly acted against Glebe Farm, alleging that its PUREOATY product infringed their registered marks: three-word marks (OATLY, OAT-LY! and OATLY) and two device marks (the blue OAT-LY! carton mark and the grey

OAT-LY! carton mark). Images of the blue OAT-LY! carton mark and the PUREOATY product are shown in figure 1.

The judge found there to be no likelihood of confusion between the PUREOATY sign and carton and any of the OATLY trademarks. The overlapping portion of the mark, "OAT", was considered descriptive.

OATLY was perfectly entitled to bring the action and chose to do so at the Intellectual Property and Enterprise Court (IPEC) which has a cap on costs. However, critics perceived the legal action as a multinational company bullying a small UK independent, leading to significant publicity and support for Glebe Farms. Some customers chose to boycott Oatly products and a petition asking them to drop the case gathered more than 130,000 signatures.

In this case, the legal action may have led to an increase in the sales of the PUREOATY product.

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Toblerone v Twin Peaks

Poundland first tried to launch its Twin Peaks chocolate bar in the summer of 2017, and quickly received a warning from Mondelez International, the owner of Toblerone. The triangular shape of the Toblerone chocolate bar is registered as a three-dimensional trademark,⁷ as are aspects of the packaging.

The Twin Peaks product has two points per segment, rather than the single peak of Toblerone. However, Poundland had intended to sell the product in a light-gold wrapper, with red writing and an image of two peaks which had significant similarities with the traditional Toblerone packaging.

After negotiations, Poundland agreed to redesign the shape of its product. It was still able to go ahead with a limited launch of 500,000 bars, which were already in production, so long as they were sold in "distinctive packaging", different from the light-gold wrapper that was originally planned. The Twin Peaks product has since been relaunched and is now available in a range of flavours. Poundland has even registered Twin Peaks as a trademark.⁸

In this case the brand owner and the copycat have been able to reach an agreement without going to court.

Figure 1: Oatly's product (left) and Glebe Farm's Pure Oaty product (right)

Source: Reproduced from judgment⁹



Summary

The FMCG sector can protect its products from copycats by registering its IP. A strong IP position is then an excellent starting point for negotiations to avoid the financial costs of legal action and the potential risk to reputation.

Footnotes

1. Review of the enforcement provisions of the Consumer Protection Regulations 2008 against copycat packaging (October 2015).
2. Consumer Protection from Unfair Trading Regulations 2008/1 (the CPRs) <https://www.legislation.gov.uk/uksi/2008/1277/contents/made>
3. <https://trademarks.ipo.gov.uk/ipo-tmcase/page/Results/1/UK00000000001>
4. <https://euipo.europa.eu/eSearch/#details/designs/000097969-0001>
5. <https://www.baillii.org/ew/cases/EWCA/Civ/2007/936.html>
6. Neutral Citation Number: [2021] EWHC 2189 (IPEC).
7. <https://euipo.europa.eu/eSearch/#details/trademarks/000031203>
8. <https://euipo.europa.eu/eSearch/#details/trademarks/017424144>
9. <https://www.nationalarchives.gov.uk/doc/open-government-licence/version/3/>

Author



Carole Drury is a patent attorney and associate at Barker Brettell. She is an experienced patent attorney with a technical specialism in chemical technologies, in particular relating to food science.