Similar packaging

an IP, competition or consumer protection matter?

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Similar packaging a Consumer protection matter?

product A similar to a product B made by X

consumer is misled

product A is made by X when it is not
Similar packaging a Consumer protection matter?

Study on Parasitic Copying (Look-alikes) - Hogan Lovells

• The UCP Directive has been implemented across the EU with the aim of providing redress to consumers

• Any rights for businesses to take action against parasitic copies seem to be almost incidental

• Public authorities with responsibilities to take action tend not to take such initiative

• Right holders are better-placed to take action against look-alikes
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**Unfair Commercial Practices Directive**

persons or organisations, including competitors, may:

take legal action against such UCP;

and/or

bring such UCP before an administrative authority (to decide or to initiate legal proceedings).

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Similar packaging a Consumer protection matter?

It matters to consumers

but Consumer protection is not the answer
Similar packaging an IP or Competition matter?

One of the EU primordial tasks:

A system ensuring that competition is not distorted
Similar packaging an IP or Competition matter?

The removal of existing obstacles calls for concerted action in order to guarantee *inter alia* fair competition.
Similar packaging an IP or Competition matter?

In order to attain its objectives the EU is based on a system of **free, undistorted** and **fair** competition.
the system of undistorted competition requires that companies are able to create and maintain relations with their customers by virtue of the quality of their goods.

In other words

Trade Marks
Similar packaging an IP matter?

IP LAW can help:

Trade Marks

Designs

Copyright
Similar packaging an IP matter?

Carbonell  La Española
Similar packaging an IP matter?

Carbonell

La Española
Court of Justice of the European Union (GC)

The figurative elements are not secondary

There are no reasons to find the figurative elements weak.

Some fig. elements may be weak in isolation but not the combination is not. The CTMA copies the combination.
Trade mark No 10355402

Filed on 20/10/2011

Registered on 03/02/2012

Fees paid 900€
Trade mark No 10561827

Filed on 16/01/2012

Registered on 19/05/2012

Fees paid 900€
Trade mark No 10486942

Filed on 13/12/2011

Registered on 25/04/2012

Fees paid 900€
Filed on 23/11/2011

Registered on 30/03/2012

Fees paid 900€
Similar packaging an IP matter?

**IP LAW can help but it is not enough**

- Word TMs are still the rule (3D TMs is the exception)
- Policing and managing and a large portfolio can be expensive
- Registered TMs run in abstract mode, there no much room to look at competitors' behaviour and contextual circumstances
- TMs can be tricked
Similar packaging a (unfair) competition matter?

Parasitic copying
Similar packaging a (unfair) competition matter?

Study on Parasitic Copying - Hogan Lovells

The National regimes are inconsistent and lead to different results
Similar packaging a (unfair) competition matter?

Study on Parasitic Copying - Hogan Lovells

All MS offer some form of protection

the scope of this protection differs

there is no harmonisation

the effectiveness of the protection and remedies varies considerably

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Similar packaging a (unfair) competition matter?

All MS provide protection against similar packaging leading to confusion.

There is a general difficulty in establishing:
- goodwill / awareness /acquired distinctiveness
- confusion or likelihood of confusion

There are cases of differences in scope and remedies and enforcement mechanisms could be improved.
Similar packaging a (unfair) competition matter?

Would that solve the problem of similar packaging?

If not what can?
Similar packaging a competition matter?

Competition Law
Similar packaging a competition matter?

Can a bundle of unilateral conducts aligning under a pattern that has become customary practice in a given sector (retail)

be distorting competition by abusing a particularly powerful bargain power over manufacturers of branded goods?
Similar packaging a competition matter?

Are retailers in a particularly advantageous position to obtain strategic information from brand owners and use it to compete against them?

Thus annul some of the competitive advantage sought by brand owners?
Similar packaging a competition matter?

Can one be at the same time an indispensable business partner and a fair competitor?
Similar packaging

A complicated matter?

Thank you!

Jorge Novais Gonçalves
European Commission

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