



Similar packaging

**an IP, competition or
consumer protection
matter?**

Institute of European and
Comparative Law –
University of Oxford

Jorge Novais Gonçalves
European Commission



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



Similar packaging a Consumer protection matter?

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).



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



Court of Justice Case HAG II 1990

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

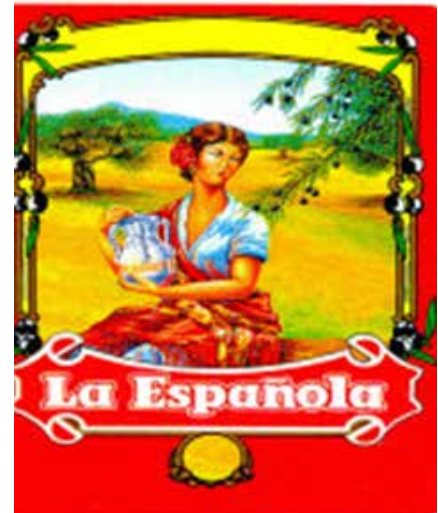
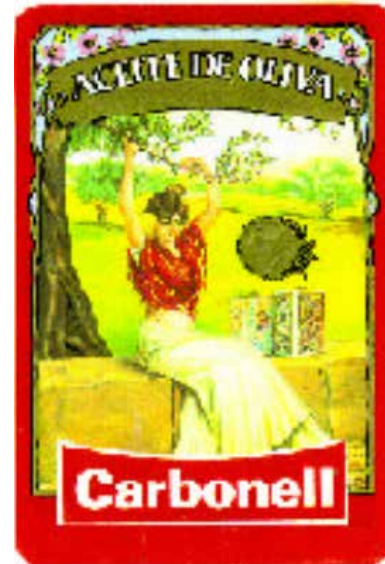


Court of Justice of the European Union (GC)

*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€

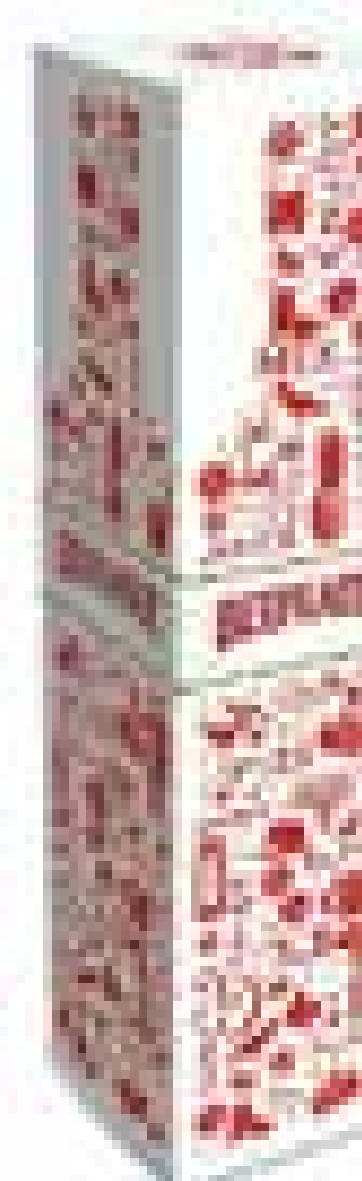


Trade mark No 10486942

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 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



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