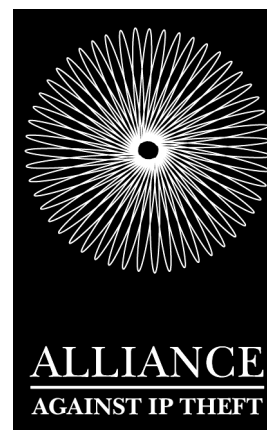


# Consultation on Implementing the EU Directive on Unfair Commercial Practices Directive and Amending Existing Consumer Legislation

## Response from the Alliance Against Intellectual Property (IP) Theft



Wednesday 8 March 2006

### INTRODUCTION

The Alliance Against Intellectual Property (IP) Theft is a UK-based coalition of British trade associations and enforcement organisations, with an interest in ensuring intellectual property rights receive the protection they need and deserve. Our members include representatives of the film/TV and video, music, games, business software industries, branded manufactured goods, publishers, retailers and designers.

The Alliance represents businesses that have a combined turnover of more than £250 billion, employing over one million people in the UK. It seeks to strengthen and bring consistency to existing laws in the area of intellectual property to ensure people's ideas and creativity is properly valued and protected.

In our response to this consultation on the Implementation of the Unfair Commercial Practices Directive, we endorse the more detailed comments made by the British Brands Group, a member of the Alliance.

Intellectual property is clearly being abused in cases of copycat packaging. By deliberately making a product look like another (generally the leading brand), the producer is seeking to mislead the consumer. This practice can persuade shoppers to buy goods they did not intend to buy, while misleading many more into believing the products have similar qualities and heritage to the brand being mimicked when they do not. In addition, distinctiveness is destroyed making it harder for consumers to make choices, while enormous damage is caused to the brand owners and the years of investment, innovation and reputation-building they have undertaken.

### UNFAIR COMMERCIAL PRACTICES DIRECTIVE

The Alliance welcomes this directive and its implementation into UK law. Its introduction of a general duty on businesses not to trade unfairly will enhance and empower consumers. By including in the Annex of Banned Practices, "*Promoting a product similar to a product made by a particular*

#### Members:

Anti-Counterfeiting Group  
British Association of Record Dealers  
British Brands Group  
British Jewellery & Giftware Federation  
British Music Rights  
British Phonographic Industry  
British Video Association  
Business Software Alliance  
Copyright Licensing Agency  
Entertainment and Leisure Software Publishers Association  
Federation Against Copyright Theft  
Federation Against Software Theft  
Film Distributors Association  
Institute of Trade Mark Attorneys  
Publishers Licensing Society  
Video Standards Council

*manufacturer in such a manner as deliberately to mislead the consumer into believing that the product is made by the same manufacturer when it is not*", copycat packaging is clearly within the scope of the directive.

Our main concerns lie with issues surrounding enforcement and the implications for the Trade Descriptions Act, and therefore we have restricted our comments to these issues.

## **ENFORCEMENT**

### **Questions 12 & 13 The Injunctive Regime and Public Enforcers**

While the Alliance endorses the concept of maximum harmonisation behind the directive, we have concerns regarding the practicalities of this being achieved and strongly urge the Government to adopt Option 2 in relation to the implementation of Article 11.

Limiting enforcement powers to those listed in Part 8 of the Enterprise Act would severely restrict the Government's ability to fulfil its obligations under the Unfair Commercial Practices Directive. It would result in some practices that should always, as described by the Directive, be considered unfair, such as copycat packaging, to go unchallenged.

The Alliance supports the British Brands Groups call for *both* consumers and competitors to be given enhanced enforcement rights in order to fulfil the objective of the Directive.

To restrict such rights to consumers and enforcement organisations such as Trading Standards will result in the UK failing to meet its requirement clearly noted in the Directive that "*persons or organisations...having a legitimate interest in the matter must have legal remedies for initiating proceedings against unfair commercial practices*".

The reasoning behind this is clear and two-fold:

1. Given the low individual purchase cost of many products with copycat packaging, the Alliance believes it is highly unlikely that consumers would be minded to make an official complaint and seek redress through the courts. More likely, is that such a mistake, or confusion, would be put down to experience or that the confusion would never actually be noticed. In these cases, it is vitally important that the manufacturers of the copied product be able to take action against the infringing company.
2. Trading Standards simply do not have the time and resources to act against manufacturers producing copycats. Already overstretched and under-resourced, Trading Standards understandably focus on the more clear-cut cases of trade mark infringement, although in this area, too, they are unable to provide the level of service they would like, having so many other duties involving complex legal and regulatory matters. Copycat cases can be even

more complex and as such require a greater level of knowledge and understanding. Without, therefore, complaints from consumers (which for the reasons above we don't believe will be forthcoming), it is highly unlikely that Trading Standards will take action against copycat manufacturers. It is imperative therefore, that competitors have a right to enforce the measures contained in the Directive.

As outlined in the submission from the British Brands Group, it is not proposed that competitors be empowered to act in respect of all forms of unfair or misleading commercial practices covered by the Directive. Existing effective mechanisms to deal with many of these issues are already in place.

The issue of copycat packaging is different. It is a very specific example of misleadingness where the interests of consumer and competitors are one and where effective consumer protection is most likely to be achieved through enabling competitors to bring civil actions. In the absence of any other effective mechanism, this is crucial, and therefore the Alliance supports the recommendation of the British Brands Group and believes that the scope for competitors to take action could be reasonably restricted to those practices covered by Article 6 and Clause 13 of the Annex. Examples as to how this may work in practice can be found in the submission from the British Brands Group.

## **TRADE DESCRIPTIONS ACT 1968**

### **Question 49 How do you think the Trade Descriptions Act should be repealed or amended, and why?**

The consultation asks whether the Trade Descriptions Act 1968 should be repealed or amended to take into account the new measures contained in the Unfair Commercial Practices Directive.

The Alliance strongly believes the Act should be amended as opposed to repealed or partially repealed for the reasons outlined below:

1. Many pieces of legislation refer to the powers of trading standards set out in the Trade Descriptions Act. The Alliance is concerned that there is a very real risk, as illustrated by Part 9 of the Enterprise Act 2002, that repeal and re-enactment will fail to anticipate and re-enact all connected legislation in a way that covers all current uses. The Government should adopt a "do no harm" approach to the existing law, and should simply craft the changes in B2C required by the Directive and carve out exceptions or additions to the existing act by way of amendment.
2. The UCP Directive consolidates much of the business to consumer regulation and legislation which at present exists within the TDA, but, crucially, does not cover business to business transactions. To repeal this Act would result in no recourse available for those businesses that found themselves at the receiving end of trade description infringements. For example, a business may be supplied with counterfeit business software by a business to business supplier

resulting in them infringing the copyright of a third party software supplier. Partial repeal of the TDA is an option as noted, but the Alliance recommends maintaining one piece of legislation which deals with the commercial practices of both B2C and B2B.

3. While Section 107A of the CDPA has yet to be implemented (which would give trading standards the duty to enforce copyright law), trading standards are able to utilise the powers of investigation in, and prosecute under, the TDA in those cases where there is no evidence of trade mark offences having been committed. In these circumstances, without Section 107A there is little other legal recourse open to trading standards in these situations and so the Alliance strongly advocates the TDA's retention.

The Alliance, therefore, strongly recommends Option 1 - the amendment of the TDA to include the fairness tests in the Directive in relation to both B2C and B2B commercial practices. This would serve to strengthen existing legislation, avoid unforeseen and unintended consequences, and ensure the regulation of B2C and B2B commercial practices remained within a single piece of legislation.

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