



LEGAL PROBLEMS RELATED TO PROTECTING CONSUMERS FROM  
UNFAIR TRADING PRACTICES: LOOKALIKE PRODUCT PACKAGING  
(COPYCAT)

BY

MISS NATSIRAYA ANANVORAPUNYA

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF  
THE REQUIREMENTS FOR THE DEGREE OF  
MASTER OF LAWS IN BUSINESS LAWS (ENGLISH PROGRAM)  
FACULTY OF LAW  
THAMMASAT UNIVERSITY  
ACADEMIC YEAR 2017  
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ENTITLED


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was approved as partial fulfillment of the requirements for  
the degree of the Master of Laws in Business Laws (English Program)

on August 10, 2018

Chairman

  
\_\_\_\_\_  
(Judge Nopporn Bhotirungsiyakorn)

Member and Advisor

  
\_\_\_\_\_  
(Aimpaga Techa-apikun, Docteur en droit)

Member

  
\_\_\_\_\_  
(Assistant Professor Bhumindr Butr-indr, Docteur en droit)

Member

  
\_\_\_\_\_  
(Assistant Professor Kittiwat Chunchaemsai, Ph.D.)

Dean

  
\_\_\_\_\_  
(Professor Udom Rathamarit, Docteur en droit)

Thesis Title	LEGAL PROBLEMS RELATED TO PROTECTING CONSUMERS FROM UNFAIR TRADING PRACTICES: LOOKALIKE PRODUCT PACKAGING (COPYCAT)
Author	Miss Natsiraya Ananvorapunya
Degree	Master of Laws
Major Field/Faculty/University	Business Laws (English Program) Faculty of Law Thammasat University
Thesis Advisor	Aimpaga Techa-apikun, Docteur en droit
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## ABSTRACT

Nowadays packaging plays an important role in protecting goods in transportation and preserving the quality of goods by cover and container. Business operators also use packaging as a marketing strategy to attract consumers and increase their sales volume. However, some business operators use lookalike product packaging to lure consumers into purchasing their product. This lookalike product packaging practice affects consumer, as it provides false information to deceive consumers, who may then make a different transactional decision. It creates confusion with the product and misleads consumers into believing that the product was made by a particular manufacturer when it was not. Moreover, this practice also affects competitors.

The effect of lookalike product packaging creates many legal problems that are worthy of study and consideration. Firstly, what is the characteristic of lookalike product packaging? Secondly, what is the legal measure related to controlling lookalike product packaging? Thirdly, how can consumers be protected from the effect of lookalike product packaging?

This thesis will study the legal measure to protect consumers from lookalike product packaging in Thailand. A comparison will be made with the United Kingdom Law, German Law and Australia Law to specify the most appropriate legal

measure to protect consumers from lookalike product packaging in Thailand. The study is based on laws, regulations and rules, textbooks, theses, the legal journal, legal articles, court decisions and other electronic data. This information will be analyzed to reach a conclusion and provide recommendations.

The results of this study indicate that the Thai law does not provide an appropriate legal measure to control lookalike product packaging, as Thailand does not have the enforcement authority to provide the power and duty to control lookalike product. The legal measures related to consumers' right to redress under the Trade Competition Act B.E. 2560 (2017) and the Consumer Case Procedure Act B.E. 2551 (2008) rely on interpretation. Moreover, in the case where consumers wish to claim compensation from business operators under the Thailand Civil and Commercial Code (CCC), it will be considered that the practice of business operators is a case of fraud, wrongful act or consumer's mistake.

Studies of foreign law, namely the United Kingdom, Germany and Australia, have found that each country had obvious legal measure to protect consumers from lookalike product packaging. In the case of consumers' right to redress from the effect of lookalike product packaging the United Kingdom and Australia laws provide a specific right to redress. The German law also provides a specific right to remedy, but this law does not give the right to consumers to directly take action.

After investigating the Thai law and foreign laws related to this issue, I suggest adding a legal measure related to controlling lookalike product packaging under the Thailand Consumer Protection Act B.E. 2522 (1979) and increasing the legal measure related to consumers' right to redress under the Thailand Consumer Case Procedure Act B.E. 2551 (2008).

**Keywords:** Packaging, Lookalike product packaging, Copycat product, House brand product, Unfair trading practice, Unfair commercial practice, Free-riding, Passing-off, Consumer protection law

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Miss Natsiraya Ananvorapunya

## TABLE OF CONTENTS

	Page
ABSTRACT	(1)
ACKNOWLEDGEMENTS	(3)
LIST OF FIGURES	(11)
LIST OF ABBREVIATIONS	(12)
CHAPTER 1 INTRODUCTION	1
1.1 Background and Problems	1
1.1.1 Characteristics of the problem	3
1.1.2 Effect of lookalike product packaging	4
1.1.3 Legal measure related to consumer protection and the control of lookalike product packaging	4
1.1.4 Legal measure related to remedying consumers from the effect of lookalike product packaging	5
1.2 Hypothesis	6
1.3 Objective of study	6
1.4 Scope of study	7
1.5 Method of study	7
1.6 Expected results	8
CHAPTER 2 THE BASIC PRINCIPLE OF CONSUMER PROTECTION AND LOOKALIKE PRODUCT PACKAGING	9
2.1 History of Lookalike Product Packaging	9

2.2 Character of Lookalike Product Packaging	11
2.2.1 Definition of Lookalike Product Packaging	12
2.2.2 Character of Packaging	15
2.2.2.1 Definition of Packaging	15
2.2.2.2 Function of Packaging	16
2.3 Effect of Lookalike Product Packaging	16
2.3.1 Manufacturer Competition	17
2.3.2 Retailer Competition	20
2.3.3 Consumer	21
2.4 The legal principle related to protecting consumers from lookalike product packaging	23
2.4.1 Consumer law	25
2.4.1.1 Concepts and theories of consumer protection	27
2.4.1.2 The relationship between Consumer law and lookalike product packaging	30
2.4.2 Trade Competition law	31
2.4.2.1 Concepts and theories of Trade competition	31
2.4.3 Unfair competition law	32
2.4.3.1 The relationship between lookalike product and Unfair Competition Law	34
2.4.4 Intellectual property law	34
2.4.4.1 Concepts and theories of intellectual property protection	36
2.4.4.2 Trademark Law	39
2.4.4.3 The relationship between Intellectual Property Law and lookalike product	40
2.5 Comparison between Unfair competition law and Passing off	41
CHAPTER 3 THE LEGAL MEASURE OF CONSUMER PROTECTION AND LOOKALIKE PRODUCT PACKAGING UNDER THAI LAW	43



3.1 The legal measure of consumer protection under Thai consumer protection	43
3.1.1 Consumer Protection Act B.E. 2522	43
3.1.2 Food Act B.E. 2522	51
3.1.3 Drug Act B.E. 2510	54
3.1.4 Cosmetic Product Act B.E. 2558	56
3.2 The legal measure of consumer protection under the Trade Competition Act B.E. 2542	59
3.2.1 The protection under Section 29	60
3.2.1.1 The objective of section 29	61
3.2.1.2 The elements of section 29	61
3.2.1.3 The guideline of section 29	62
3.3 The legal measure of consumer protection under the Thailand Competition Act B.E. 2560	62
3.3.1 The protection under Section 57	64
3.3.1.1 The Characteristics of Prohibited Practice	65
3.4 The legal measure of consumer protection under the Thailand Trademark Act B.E. 2534	69
3.4.1 Passing-off	71
3.5 The legal measure of consumer protection under the Thailand Penal Code B.E. 2499	74
3.5.1 Deceptive Trade Practices	74
3.5.1.1 Source of offence	75
3.5.1.2 The offender	75
3.5.1.3 The action of offence	75
3.5.1.3 The subject of offence	76
3.5.1.4 The results of offence	76
3.5.2 Compound Offense Relating to Trade	77
3.5.2.1 The offender	77
3.5.2.2 The action of offence	77
3.5.2.3 The subject of offence	78

	(7)
3.6 The legal measure related to remedying consumers from the effect of lookalike product packaging in Thailand	80
3.6.1 The right of consumers to claim and remedies under Thailand Civil and Commercial Code	80
3.6.1.1 Good Faith	80
3.6.1.2 Mistake	80
3.6.1.3 Fraud	84
3.6.1.4 Wrongful Acts	86
3.6.2 The right of consumers to claim and remedies under Special Law	87
3.6.2.1 Consumer Protection Act B.E. 2522	87
3.6.2.2 Consumer Case Procedure Act B.E. 2551	91
3.6.2.3 Trade Competition Act B.E. 2542	94
3.6.2.4 Trade Competition Act B.E. 2560	95
3.6.2.5 Trademark Act B.E. 2534	96
 CHAPTER 4 THE LEGAL MEASURE TO PROTECT CONSUMER FROM LOOKALIKE PRODUCT PACKAGING UNDER INTERNATIONAL CONVENTION AND FOREIGN COUNTRIES	 97
4.1 International	97
4.1.1 The Paris Convention for Industrial Property	97
4.1.1.1 Comparison between misleading action under Article 10 bis of The Paris Convention and deceptive trade practice under section 271 of the Thailand Penal Code B.E. 2499	100
4.1.2 The Agreement on Trade-Related Aspects of International Property Rights (TRIPs)	101
4.1.3 The European Parliament and the Council concerning unfair business-to-consumer commercial practice directive	101
4.1.3.1 Lookalike	102
4.2 Foreign Country	104
4.2.1 United Kingdom	104
4.2.1.1 Passing Off	105

4.2.1.2 The Consumer Protection from Unfair Trading Regulation 2008	108
4.2.1.3 The example case	111
4.2.2 Germany	114
4.2.2.1 The German Act Against Unfair Competition	114
4.2.2.2 The example case	117
4.2.3 Australia	118
4.2.3.1 The Australian Consumer Law	119
4.2.3.2 The Food and Grocery Code of Conduct	125
4.2.3.3 Comparative between action in passing off and the Australian Consumer Law action	129
4.2.3.4 The example case	130
4.3 The legal measure related to remedying consumers from the effect of lookalike product packaging under foreign law	132
4.3.1 The United Kingdom Consumer Protection from Unfair Trading Regulation	133
4.3.2 The German Act Against Unfair Competition	134
4.3.3 The Australian Consumer Law	135
CHAPTER 5 LEGAL PROBLEMS RELATED TO PROTECTING CONSUMERS FROM UNFAIR TRADING PRACTICES: LOOKALIKE PRODUCT PACKAGING	139
5.1 Effect of lookalike product packaging	140
5.2 Characteristic of lookalike product packaging	141
5.3 Legal measure related to consumer protection and controlling lookalike product packaging	146
5.3.1 Analyze the legal measures to control lookalike product packaging in Thailand: in the case of general products	146
5.3.2 Analyze the legal measures to control lookalike product packaging in Thailand: concerning specific products	153

5.3.3 Enforcement Authority	155
5.3.4 The legal measure for Controlling	157
5.3.4.1 Pre-market Control Measure	157
5.3.4.2 Post-market Control Measure	158
5.3.5 Penalty	162
5.4 Legal measure related to remedying consumers from the effect of lookalike product packaging	165
5.4.1 Analyze legal measure related to remedying consumers under Civil and Commercial Code in Thailand	166
5.4.1.1 The legal problem of Mistake	166
5.4.1.2 The legal problem of Fraud	168
5.4.1.3 The legal problem of Wrongful Act	169
5.4.1.4 The conclusion of legal measure related to remedying consumers under Civil and Commercial Code	170
5.4.2 Analyze legal measure related to remedying consumers under the special law in Thailand	171
CHAPTER 6 CONCLUSIONS AND RECOMMENDATIONS	179
6.1 Conclusions	179
6.1.1 Characteristics of lookalike product packaging	180
6.1.2 Effect of lookalike product packaging	182
6.1.3 Legal measure related to consumer protection and the control of lookalike product packaging	182
6.1.4 Legal measure related to remedying consumers from the effect of lookalike product packaging	186
6.2 Recommendations	188
6.2.1 Recommendations for the legal measure to control lookalike product packaging in Thailand	189
6.2.2 Recommendations for the legal remedies from the effect of lookalike product packaging in Thailand	192

(10)

REFERENCES

194

BIOGRAPHY

201



## LIST OF FIGURES

Figures	Page
1.1 Lookalike product packaging in Thailand	3
1.2 Lookalike product packaging in Thailand	3
1.3 Lookalike product packaging in foreign country	3
2.1. Coca - Coca and Classic Cola	10
2.2 The product packaging of house brand product in Thailand	12
2.3 The product packaging of well - known brand in Thailand	12
2.4 The product packaging of house brand product and product packaging of Well-known brand in Thailand	12
2.5 The product packaging of well - known brand and product packaging of House brand product in Thailand	12
2.6 Redesign packaging of Essence in Thailand	18
2.7 Essence's packaging in Thailand	18
2.8 Tesco's packaging in Thailand	18
4.1 Claimant's packaging in the United Kingdom	112
4.2 Defendant's packaging in the United Kingdom	112
4.3 Claimant's packaging in Germany	117
4.4 Defendant's packaging in Germany	117
4.5 The difference between Passing off Action and section 18 of ALC	130
4.6 Plaintiff's packaging in Australia	131
4.7 Defendant's packaging in Australia	131
4.8 Plaintiff's product in Australia	131
4.9 Defendant's product in Australia	131

## LIST OF ABBREVIATIONS

Symbols/Abbreviations	Terms
ACCC	the Australian Competition and Consumer Commission
ACL	the Australian Consumer Law
ASIC	the Australian Securities and Investments Commission
CPRs	Consumer Protection from Unfair Trading Regulations 2008
CMA	the Competition and Markets Authority
DETINI	the Department of Enterprise, Trade and Investment in Northern Ireland
DIP	the Thailand Department of Intellectual Property
ECJ	the European Court of Justice
EU	European Union
GATT	General Agreement on Tariffs and Trade
IP&IT Court	the Thailand Intellectual Property and International Trade Court
MIL	Moroccanoil Israel Limited
MOU	Memorandum of Understanding
TMB	the Thailand Trademark Board
TRIPs	the Agreement on Trade-Related Aspect of International Property Rights
TSS	Trading Standards Services in Great Britain
UCPD	Directive 2005/29/EC of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market

UK	United Kingdom
UWG	The German Act Against Unfair Competition (Gesetz gegen den unlauteren Wettbewerb)
WTO	World Trade Organization





## CHAPTER 1

### INTRODUCTION

#### 1.1 Background and Problems

At present, each department store has a wide range of products to lure consumers, who are confronted with 40,000 products.<sup>1</sup> Each entrepreneur will do everything to generate more business. They offer sales promotions to create consumers' positive attitude to buy their products and increase their sales volume.

Product packaging is the best marketing strategy that entrepreneurs will use for sales,<sup>2</sup> because it plays a crucial role in consumers' purchase decision.<sup>3</sup> The package creates an interaction with the consumer; it attracts attention and provides information on the product, finally leading to a buying decision.<sup>4</sup> However, consumers tend not to read the label on a product, but interact with the characteristics of a package, such as colour, design, painting, figure and texture to inform their choice.<sup>5,6</sup>

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<sup>1</sup> John Noble Tony Appleton, 'The value of brands and the challenge of free - riding' in Ioannis Lianos Deven R. Desai, Spencer Weber Waller (ed), *Brands, Competition Law and IP* (Cambridge University Press 2015) 54

<sup>2</sup> Sheena White, 'Influence of packaging on consumer buying behavior', <<https://www.labelvalue.com/documents/Influence-of-Packaging-on-Consumer-Buying-Behavior.pdf>> accessed 26 December 2016 (2)

<sup>3</sup> Silayoi Pinya and Speece Mark, 'Packaging and purchase decisions : An exploratory study on the impact of involvement level and time pressure' [Emerald Group Publishing Limited] *British Food Journal* 607

<sup>4</sup> Polyakova Ksenia, 'Packaging design as a Marketing tool and Desire to purchase' (Saimaa University of Applied Sciences 2013) 41

<sup>5</sup> C. Mooy Sylvia and S. J. Robben Henry, 'Managing consumers product evaluations through direct product experience' [MCB UP Ltd] *Journal of Product & Brand Management* 432

<sup>6</sup> Tony Appleton 54

Leading brands always focus on an eye-catching appearance of product design to remind consumers of the identity of a product, product quality, reputation and a source of product standard. The manufacturers of the leading brands enormously invest in the production process, advertising, and research and development to present their newest innovation to attract consumers and preserve their production standard. Moreover, the brand leaders strive to protect their prestige to maintain their best - selling position.

However, some companies copy, or imitate, the products packaging of leading brands in the same category. They can offer lower prices than the original product because they use low – quality material, and do not spend much money on product design and advertising as they merely copy the original product. Nevertheless, they can influence consumers’ buying decision. Copy Cat products create consumer confusion regarding the brand, nature and quality of the product, as consumers believe that products with similar packaging will have similar quality and that they may be associated with the brand leader.<sup>7</sup> This copy free – ride behavior does not only exist between manufacturers, but also between retailers.<sup>8</sup> This Copy Catting is an unfair commercial practice that has a detrimental effect on consumers. Sometimes the similarities of product packaging can cause harm to the life, body or well - being of consumers, in the case of lookalike medication errors that result from selecting incorrect drugs.<sup>9</sup>

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<sup>7</sup> Phil Evans, *Assessing consumer detriment* (Sweet & Maxwell Ltd. (UK) 2007) 7

<sup>8</sup> Tony Appleton

<sup>9</sup> Social news publication department, ‘Foundation For Consumer require FDA Thailand speed up to resolve lookalike drugs problems’ Thai News Agency (9 December 2016) <<http://www.tnamcot.com/content/611193>> accessed 4 January 2017



*Figure 1.1 Lookalike product packaging in Thailand*



*Figure 1.2 Lookalike product packaging in Thailand*



*Figure 1.3 Lookalike product packaging in foreign country*

### 1.1.1 Characteristics of the problem

Packaging plays an important role in all goods and products. It can protect products in transportation and preserve the quality of goods by a cover and a container. Packaging also plays another role in connecting with businesses and consumers by presenting details of the product, and it helps to increase the sales volume. Businesses aim to increase their brand equity and to attract consumers by designing distinctive product packaging, as well as creating brand loyalty. However, some manufacturers or large retailers attempt to lure consumers with lookalike

product packaging, and this practice creates a crucial problem for consumers, because it contains false information in relation to nature and the characteristics and origin of the product, and its overall presentation deceives, or is likely to deceive, consumers, who may make a different transactional decision as a result. It may also mislead consumers into believing that the product is made by the same manufacturer when it is not. Therefore, a question to consider is: what is a lookalike product packaging case? However, the legal measure in Thailand does not provide a definition and does not provide any measure for lookalike product packaging. This thesis will investigate the characteristics of product packaging to address the question of what is a lookalike product packaging case, in order to provide a recommendation.

### **1.1.2 Effect of lookalike product packaging**

Studying any part of the effect of lookalike product packaging will provide information to consider a legal measure in the future. It is hoped this legal measure will prevent business operators from using lookalike product packaging and protect consumers from suffering any effect from lookalike product packaging.

### **1.1.3 Legal measure related to consumer protection and the control of lookalike product packaging**

The legal measure to protect consumers related to product packaging in Thailand is controlled by many government organizations. This thesis will study the group of consumer protection laws that form the general consumer protection Act and any specific product protection Act, such as the Food Act B.E. 2522, the Drug Act B.E. 2510 and the Cosmetic Product Act B.E. 2558. Moreover this thesis will investigate the Trade Competition Act B.E. 2560 and the Trademark Act B.E. 2534, in considering the question “Do those Acts have any legal measure to protect consumers from lookalike product packaging?” and if Thailand has any legal measure to protect consumers from lookalike product packaging. This thesis will also consider “What organization has a duty to control lookalike product packaging?”, “Is the penalty against lookalike product packaging appropriate?” and “What is an appropriate penalty?”

#### **1.1.4 Legal measure related to remedying consumers from the effect of lookalike product packaging**

The Consumer Protection Act B.E. 2522 provides and protects consumers' right to have an injury considered and compensated under section 4 (4). In general, when consumers suffer damages from businesses operating with the intent to use unfair lookalike product packaging, the consumers who are injured have a right to claim for damages against the business. Moreover, in the case of damage to life, body, health, liberty or property due to consumer goods or services received from a the business, this is deemed as an infringement of consumers' rights. The consumers who are injured have a right to claim compensation for infringement under section 420 of the Civil and Commercial Code. Therefore, this thesis will investigate: "Are the legal measures related to consumers' redress from the effect of lookalike product packaging in the Thai law clear, suitable and adequate or not?" Appropriate legal measures to remedying consumers will also be proposed.

The second chapter of this thesis will investigate the characteristics of product packaging and its effect, in order to specify legal measures for the future. Chapter 3 will analyze and consider the legal measure to protect consumers related to product packaging in Thailand and investigate whether those Acts have the appropriate legal measure to protect consumers from lookalike product packaging. If Thailand did have a legal measure to protect consumers from lookalike product packaging, it will be considered what organization should have the duty to control this issue, as well as considering whether any penalty in this case is appropriate and how much that penalty should be. Moreover, Chapter 3 will investigate whether the legal measure related to consumers' redress from the effect of lookalike product packaging in the Thai law is clear, suitable and adequate. Chapter 4 will examine the legal measure to control lookalike product packaging and the legal measure related to consumer protection from any effects of lookalike product packaging under the international convention and foreign law to protect consumer and competitors. This thesis will research both common law countries and civil law countries to bring about an appropriate measure as a guideline and model law to develop the legal measure

to protect and control lookalike product packaging in the future. Chapter 5 will provide the results from documentary research to compare and analyze the legal problems in consumer protection from lookalike product packaging. Finally, this thesis will conclude and recommend a legal measure to control business operators in their use of lookalike product packaging, as well as a legal measure related to consumers' redress from any effect of lookalike product packaging in Thailand.

## **1.2 Hypothesis**

The use of lookalike product packaging has become widespread in the retail sector. By definition, a Copy Cat product is not a counterfeit product, as, although the design of a product or product packaging has imitated the original, the trade name is different. It has become a crucial legal problem from an international perspective. However, the Thai law does not have a legal measure to control lookalike product packaging, due to Thailand not having an enforcement authority with the power and duty to control lookalike product packaging. Also, the legal measure related to consumers' right to redress under the Trade Competition Act B.E. 2560 and the Consumer Case Procedure Act B.E. 2551 rely on interpretation. Moreover, in the case that a consumer claims compensation from a business operator under the Thailand Civil and Commercial Code, this thesis will consider that the practice of the business operator is fraud, a wrongful act or a consumer mistake. Therefore, the Thai law needs to be amended by adding a legal measure to control lookalike product packaging and increase consumers' right to redress.

## **1.3 Objective of study**

This study has the following four objectives:

- a. To study the characteristics and impacts of lookalike product packaging, as well as to study the legal principle related to consumer protection.
- b. To collect data and samples set forth by other countries with more efficient legal measures, consumer's redress and cases regarding lookalike product packaging matter.

c. To study and analyze the existing Thai laws related to this problem by comparing them with foreign laws, focusing on the United Kingdom, Germany and Australia, to determine the most appropriate measure of each country for proposing a consumer protection measure in Thailand.

d. To study, analyze and suggest more appropriate solutions to protect consumers and consumer's redress from copycat packaging practices, as well as maintaining fair trade in Thailand.

#### **1.4 Scope of study**

This thesis focuses on legal principles to prohibit lookalike product packaging and consumer protection and remedy measures from the unfair trading practice under foreign laws compared with the Thai legislation, to provide some recommendations related to the application and amendment of the Thai laws to protect consumers. The study excludes all intellectual property rights of the product packaging design for intellectual property owner benefits.

#### **1.5 Method of study**

The study is based on document research and a comparative study of laws, regulations and rules from various sources, such as domestic and international laws, policies, textbooks, theses, the opinions of a respective scholar, the legal journal, legal article, court decisions and newspapers. The thesis particularly adopts the framework of the study entitled "The impact of Lookalike: Similar Packaging and fast-moving consumer goods" by the United Kingdom Intellectual Property Office<sup>10</sup> as a guideline.

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<sup>10</sup> Johanna Gibson Philip Johnson, Jonathan Freeman, *The impact of Lookalikes: Similar packaging and fast - moving consumer goods* (2013)



### 1.6 Expected results

- a. To understand the characteristics and impacts of lookalike product packaging, as well the legal principles related to consumer protection.
- b. To understand the legal measures, consumer's redress and cases concerned with the lookalike product packaging of other countries.
- c. To understand the existing Thai laws related to this problem by comparing them with foreign laws, focusing on the United Kingdom, Germany and Australia.
- d. To propose appropriate solutions to protect consumers and for consumer's redress from the lookalike product packaging, as well as maintaining fair trade in Thailand.





## CHAPTER 2

### THE BASIC PRINCIPLE OF CONSUMER PROTECTION AND LOOKALIKE PRODUCT PACKAGING

Nowadays, packages have come to play an important role. They protect products in the way of transportation and preserve the quality of goods by cover and container, and play a further role in connecting with businesses and consumers by showing details of the product and helping to promote the sales volume. Businesses aim to increase their brand equity and to attract consumers by designing distinctive product packaging, as well as creating brand loyalty. However, some manufacturers or large retailers attempt to lure consumers by means of lookalike product packaging. This chapter will provide the characteristic and effects of lookalike product packaging. The history and legal principle relating to consumer protection will be discussed, as well as trade competition law, to propose appropriate solutions to protect consumers and businesses from this issue and to continue fair trade competition.

#### 2.1 History of Lookalike Product Packaging

In 1970 the own brand products held about 20% of the whole retail market. However, ten years ago the own brand products faced depression, due to the ending of price controls and monopoly trade. In the past decades a power transfer from the big manufacturers to the retailers, as well as the success of the house brands, appeared in Europe.<sup>11</sup> Retailers act as “double agents”, as they both sell the brand products to consumers and develop house brand products for consumers as an alternative choice. Furthermore, strong market power also repeatedly comes from

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<sup>11</sup> Landbouw-Economisch Instituut (LEI) B.V., *The impact of private labels on the competitiveness of the European food supply chain* (2011) 17

discussion of lookalikes. It appears that the market has developed in a way that, in a short period of time, brand loyalty plays a major role in the market.<sup>12</sup>

In the early 1990s, The Sainsbury Supermarket released a new product called “Classic Cola”, produced by the Cott Corporation. Its packaging imitates that of Coca-Cola by the Coca-Cola Company. This created the problem of trade competition in the public eye, due to retailers excessively boosting up its sales and reputation, by duplicating the packaging designs of well – known products and trusted brands. This practice is always performed using private label products of the retailers.<sup>13</sup>

Over recent decades the number of consumers who are committed to particular manufacturer brands has been only 30%. Although brand loyalty still exists, this shows that the loyalty consumers require manufacturers’ products as well as their retailers’. Certainly, store loyalty has precedence over other brand loyalty.<sup>14</sup>



*Figure 2.1: Coca - Cola and Classic Cola,*

*<https://thegoodthebadandtheconsumer.wordpress.com>,*

*'Buy n Large: Your Friend, and Your Leader'(2012)*

*<<https://thegoodthebadandtheconsumer.wordpress.com>>*

*accessed 16 May 2018*

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<sup>12</sup> *The impact of Lookalikes : Similar packaging and fast - moving consumer goods* (2013) 21 - 22

<sup>13</sup> Tony Appleton 53

<sup>14</sup> Philip Johnson 21

## 2.2 Character of Lookalike Product Packaging

Lookalikes destroy the essential distinguishing characteristic connecting the package and the brand. In some cases it is not clearly copying, but plagiarizing the trade dress<sup>15</sup> of the brand. Lookalikes show a visible relationship with product packaging, mimicking the shape and colour. In addition, lookalikes intentionally create free riding<sup>16</sup> on the investments of the manufacturer.<sup>17</sup> The practice has a number of names, including “lookalike”, “copycats” and “parasitic copies”<sup>18, 19</sup> This thesis will use the terms “copycat” and “lookalike”

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<sup>15</sup> Merriam-Webster.com, ‘trade dress’ <<https://www.merriam-webster.com/>> accessed 25 May 2017 provided Legal Definition of trade dress that “the overall image of a product used in its marketing or sales that is composed of the nonfunctional elements of its design, packaging, or labeling (as colours, package shape, or symbols)”

<sup>16</sup> Merriam-Webster.com, ‘free ride’ <<https://www.merriam-webster.com/>> accessed 25 May 2017 provided Definition of free ride that “a benefit obtained at another's expense or without the usual cost or effort; also or soft or easy treatment”

<sup>17</sup> Paul W. Dobson and Li Zhou, ‘The Competition Effects of Lookalike Private Label Products’ National Brands & Private Labels in Retailing 17

<sup>18</sup> Tony Appleton 53

<sup>19</sup> Ibid.,53 The European Brands Association (AIM) provides the definition preferred by brand owners :

“Parasitic copying takes many – but not necessarily all – of the marketing properties of a brand and become a variation on a theme. Thus the colour and shape of the packaging, the layout and the design of the label, the concept and style of the advertising and promotion and the design of the product itself are closely imitated.”



Figure 2.2 The product packaging of house brand product in Thailand



Figure 2.3 The product packaging of well - known brand in Thailand



Figure 2.4 The product packaging of house brand product and product packaging of well - known brand in Thailand



Figure 2.5 The product packaging of well - known brand and product packaging of house brand product in Thailand

### 2.2.1 Definition of Looklike Product Packaging

‘Copycat packaging’. This refers to “the practice of designing the packaging of a product (or its ‘trade dress’) to give it the general ‘look and feel’ of a competing well-known brand.” Copycat packaging is distinct from counterfeiting, as, normally, it does not involve copying trademarks. The problem posed by copycat

packaging is consumer confusion and, consequently, distortion of their commercial behavior.<sup>20</sup>

The Intellectual Property Institute commissioned by the United Kingdom Intellectual Property Office provides that “A lookalike product is a product sold by a third party which looks similar to a manufacturing brand owner’s product and, by means of that similarity, consumers perceive the lookalike to share a greater number of features with the manufacturer, or brand owner, than would be expected, by reason of the products being in the same product category alone.”<sup>21</sup>

“Copycat brands imitate a leading brand to make use of the latter’s brand equity.”<sup>22</sup>

“A brand imitation is a product that borrows or copies some special attributes of a famous or leading brand, such as name, shape or colour.”<sup>23, 24</sup>

“Copycats imitate the name, logo and/or package design of a leading national brand to take advantage of the latter’s positive associations and marketing efforts.”<sup>25, 26</sup>

“A copycat brand imitates the visual appearance of a leading brand with the aim of exploiting positive associations related to the leading brand.”<sup>27</sup>

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<sup>20</sup> European Commission Staff Working Document, *Guidance on the Implementation application of directive 2005/29 EC on Unfair Commercial Practices* (2016) 59

<sup>21</sup> Philip Johnson 13

<sup>22</sup> Tim Holmes, *Para-sight: A study of erroneous shopper decision making in the presence of copycat packaging* (2017) 4

<sup>23</sup> Ibid 4

<sup>24</sup> Lai Kay Ka-Yuk, Zaichkowsky and Judith Lynne, ‘Brand Imitation: Do the Chinese Have Different Views?’ 16 *Asia Pacific Journal of Management* 179

<sup>25</sup> Holmes 4

<sup>26</sup> Horen Femke van and Pieters Rik, ‘When High-Similarity Copycats Lose and Moderate-Similarity Copycats Gain: The Impact of Comparative Evaluation’ [American Marketing Association] 49 *Journal of Marketing Research* 83

“Copycats may imitate low – level, concrete perceptual attributes (such as colour, shape, size and lettering), as well as high – level, abstract themes (such as benefits, goals or usage context), communicated by the trade dress of a leading brand.”<sup>28,29</sup>

Lookalike – A Narrow Perspective: “The subtle goal of ‘lookalike’ packaging is to hijack the reputation and symbolism of the famous brand. To give two products a virtually identical visual appearance is to imply a similarity of quality, taste or efficiency.”<sup>30, 31</sup>

Lookalike – A Broader Attitude: A “parasitic copy takes many – but not necessarily all – of the marketing properties of a brand and becomes a variation on a theme. Thus, the colour and shape of the packaging, the layout and the design of the label, the concept and style of the advertising and promotion and the design of the product are closely imitated.”<sup>32</sup>

**Lookalikes and Intellectual Property rights:** the lookalikes often cover more than one intellectual property right, and sometime lookalikes can be protected by trademark, design, copyright and patent law.<sup>33</sup>

<sup>27</sup> Holmes 4

<sup>28</sup> Gaetano “Nino” Miceli and Rik Pieters, ‘Looking more or less alike: Determinants of perceived visual similarity between copycat and leading brands’ 63 *Journal of Business Research* 1121

<sup>29</sup> Holmes 4

<sup>30</sup> ‘Brand of Logic’ *The Times*

<sup>31</sup> Philip Johnson 145

<sup>32</sup> *Parasitic Copying : Trading on Innovation and creativity of others*, AIM Trade Mark Committee (2010)

<sup>33</sup> Philip Johnson 145

**Lookalikes and Unfair competition law:** this different to the intellectual property right, as it also covers activities that do not infringe the intellectual property law, but come within the scope of the unfair competition law.

In this thesis, the term lookalike will be used to describe “own – label products whose packaging is visually similar, but not identical, to a recognized branded product.”<sup>34</sup>

## 2.2.2 Character of Packaging

### 2.2.2.1 Definition of Packaging

Packaging means the materials in which objects are wrapped before they are sold.<sup>35</sup> Packaging combines both science skill and art skill that are used for the packing of goods for consumers, in order to respond to consumers’ needs at an appropriate cost. The best packaging should include suitable material and machine technology, along with a reasonable price of products. Moreover, the esthetic of a package conforms to product appearance that aims to persuade a target group to purchase the products.<sup>36</sup>

The meaning of packaging in marketing is the packing of goods and it has the goal of sales promotion, for example businesses need colourful and notable material, to enable them to present the goods and a shape suitable to the product.<sup>37</sup>

The packaging including a statement on the package material, such as advice on how to use the products, and the text provides the ingredients of

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<sup>34</sup> Holmes 4

<sup>35</sup> ‘Cambridge Dictionary’ (Cambridge University Press 2017)  
<<http://dictionary.cambridge.org/dictionary/english/packaging>>

<sup>36</sup> Thanet Patipatponkul, ‘Legal Measures For Consumer Protection in Large Size Outre Packaging’ (Thammasat University 2015)

<sup>37</sup> Katreeya Boondirek, ‘Trademark and Product Packaging ’ 7th Journal of Social Sciences Srinakharinvirot University 24

the product, the warning message of the product, and size and weight of the product. The packages also assist to communicate and to promote the sales from the manufacturers to consumers.<sup>38</sup>

The DIRECTIVE 94/62/EC of the European Parliament and the Council of 20 December 1994 on packaging and packaging waste provide that “‘Packaging’ shall mean all products made of any materials of any nature to be used for the containment, protection, handling, delivery, and presentation of goods, from raw materials to processed goods, from the producer to the user or the consumer. ‘Non-returnable’ items used for the same purposes shall also be considered to constitute packaging.”<sup>39</sup>

#### 2.2.2.2 Function of Packaging

In general, packaging has a major function of being a wrapping or container for protecting and preserving products from any damage that could possibly occur to the products from out of the factory to consumers’ hands. Moreover, packaging also plays a role in preserving the quality of products, including providing convenience for distributing goods, whether it be a small-sized product or for the benefit of transporting large goods. Furthermore, it helps promote the manufacturers’ sales volume and has a function of a label providing information about the product. If the product packaging has aesthetic appearance and satisfies consumers, it will create product value<sup>40</sup>

### 2.3 Effect of Lookalike Product Packaging

Every day people will consume products and pick several types of product packaging. When a business operator unfairly uses lookalike product

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<sup>38</sup> Ibid

<sup>39</sup> *The directive 94/62/EC of the European Parliament and the Council on packaging and packaging waste provide* ( the European Parliament 1994)

<sup>40</sup> Patipatponkul 11



packaging, this not only causes damage to consumers, but also affects other business operators, as follows:

### **2.3.1 Manufacturer Competition**

Most lookalike sources are related to multiple large retailers; however, manufacturers and importers may be sources, especially when lookalike product packaging begins when large retailers see an opportunity that they can be in the position of competing with manufacturer brands, so they build their own house brand and have the same target as leading manufacturer brands, resulting in the effect of free-riding on the original manufacturer brands, who had invested in innovation and marketing. The revenue's house brand product comes from uninformed or negligent consumers who are confused between two products, such as the original products and imitated packaging products. Shoppers may buy lookalike packaging products by mistake and may recognize the difference between the two products, but they assume that they are identical goods and made by the same manufacturer. Thus, this will negatively affect the sales volume and reputation of the original product company, because buyers presume that the same manufacturers produced both the lookalike package products and the original product, but the quality of the lookalike package product is not as good. For this reason, the original manufacturer has an impact on brand dilution, unclearness of the distinctive product's characteristics or loss of its reputation, which is more effective than common and foreseeable trade competition. To maintain the distinctiveness of their product packaging and leading position, the original manufacturers are forced to continually redesign their product packaging. This redesigning creates further costs in "over innovation." Furthermore, the large retailers have a financial advantage and have status, while the small or specialized manufacturers may be lacking in finances, as well as resources, to innovative their packaging, by redesigning or product reformulation for effective competition in lookalike product packaging. Moreover, large retailers can control the choice of products in his stock, and retailers can favor the lookalike packaging of their house brand product more than others, by selecting

or removing the original products from their department store shelves. These practices are barriers for the small manufacturers to survive and enter their product into the market, and they affect their sales volume and scale economies.<sup>41</sup>



Figure 2.6 redesigns packaging of Essence in Thailand



Figure 2.7 Essence's packaging in Thailand



Figure 2.8 Tesco's packaging in Thailand

Large retailers, who have power in the market and control over the supply chain, prefer to use these advantages for developing lookalike product packaging, rather than to present unique private label product packaging. With this condition, the large retailers remain in the best status to exploit unfair and anti-competition of the original manufacturer's image and goodwill that brand manufacturers have with developed consumers through careful and continual product and marketing development.<sup>42</sup>

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<sup>41</sup> 'Economies Of Scale ' (*Investopedia*) <<http://www.investopedia.com>> accessed 7 May 2017 provide that "Economies of scale is the cost advantage that arises with increased output of a product. Economies of scale arise because of the inverse relationship between the quantity produced and per-unit fixed costs; i.e., the greater the amount of a good produced, the lower the per-unit fixed cost because these costs are spread out over a larger number of goods."

<sup>42</sup> Dobson and Zhou 19 - 21

House brand goods are developed in numerous categories and have a flexible relationship with suppliers and retailers, which enables them to quickly respond in developing lookalike product packaging immediately after a new product from original manufacturers is released to the public. These capacities will enormously reduce the ability of the original manufacturers to repay their investment arising from the novelty of its product in consumers' minds before house brand duplication appears and catches sales. This Free – Riding Trend will result in reducing the quality and variety of products offered to consumers. Moreover, manufacturers hesitate to take legal action against retailers' copycats, because they are afraid that taking legal action may cause them to lose their shelf space in stores for their product. For this reason, the lookalike products will decrease consumers' choices. Secondary brand products' and<sup>43</sup> inter-brand products' competition<sup>44</sup> exists only if the leader brand products survive through continuing to produce new product and

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<sup>43</sup> Dr.Warat intasara, 'Brand Communication' (2010)

<<http://drwarat.blogspot.com/2010/11/8.html>> accessed 7 May said that “secondary brand is the goods that was recognized as the choices of goods, however their have quality as leading brand product but they are choices and the buyer will decision by price or other factors. Those goods often called that “Me – too brand” because it offers for sale like leading brand product and attempts to present their advantage.”

<sup>44</sup> 'Inter-brand competition' (*The Institute of Competition Law* )

<<http://www.concurrences.com/en/droit-de-la-concurrence/glossary-of-competition-terms/Inter-brand-competition>> said that Competition between firms that have developed brands or labels for their products to distinguish them from other brands sold in the same market segment. Although not perceived as being fully equivalent by consumers, branded products nevertheless compete with each other, but normally to a lesser degree. Coca-Cola versus Pepsi is an example of inter-brand competition.

packaging designs to compete with the own-label goods. Secondary brand products are declined in some goods' categories in major stores.<sup>45</sup>

### 2.3.2 Retailer Competition

By dressing house brand products in lookalike leading brand package, the retailers believe that they become related to the image of the leading brand. It is important that they do not give any signal to consumers that could reduce their distrust of house brand products. Retailers prefer to develop house brand products by imitating rather than innovating. This is especially easy to do when the existing laws are insufficient to protect product packaging design or characteristics. However, developing house brand products should be innovative and distinctive, but retailers are confident about continuing to develop lookalike package products, because they make more profit and have less risk, compared to developing new product packaging.<sup>46</sup>

In some circumstances, retailers can use placement and relocation of products, as well as shelf space, and promote goods directly to consumers by using lookalikes in specific product categories. Also, they use their power to control the retail prices and retailers may, sometimes, not stock up on some products to lead the demand away from the original product and, in this process, they can offer their house brand product to consumers instead.<sup>47</sup>

On the contrary, small retailers do not make their own house brand, or there is not enough demand to develop a house brand, and their sales volume will rely on the sales volume of leading brand products. Furthermore, they cannot negotiate or discount the prices of their product as low as the large retailers', and, in addition, the cost of leading brand products rise due to them being displaced by lookalike packaging product sales; thus the economy scales are lost.<sup>48</sup>

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<sup>45</sup> Dobson and Zhou 19 - 21

<sup>46</sup> Ibid 21 - 22

<sup>47</sup> Ibid 21 - 22

<sup>48</sup> Ibid 21 - 22

In particular, when the demand for original products falls gradually, this means that the costs of production experience a sudden increase, with the number of exporting products dropping suddenly. Meanwhile, the invisible expenses stay the same over the period, for example the advertising fee. Thus, their competitive position is weak when compared to the large retailer groups, which, therefore, reduces the effective inter-retailer competition. Moreover, the competition becomes weaker if the large stores using lookalike product packaging set their prices for getting rid of the competition, especially when the prices are set close to or below the cost so that it steals sales from small stores.<sup>49</sup>

Finally, there a significant decline in the number of retail stores, leading to the large retailers maintaining the power to control the market and having the opportunity to set high prices for their products. This action also reduces inter-retailer competition, as well as retailer competition, because some consumers do not search for goods from other various stores and one-stop-shopping has become a general. Consumers put precedence on store loyalty over brand loyalty. One result is that consumers prefer to choose and buy lookalike packaging products in a department store, rather than going to other stores. The original products become invested in advertising for generating their sales volume. This act will increase the opportunity to stock-out by retailer in an attempt to lure consumers to purchase lookalike package products. This act is reliable, because most consumers will visit department stores to shop for numerous products, not just a single brand product, and they have great loyalty with the store. The minority of consumers will turn to other shops to search for particular brands in responding to promotion prices or stock-out.<sup>50</sup>

### 2.3.3 Consumer

When imitation product packaging instantly entered and launched in the market, the original brand manufacturer may drop investment or begin to

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<sup>49</sup> Ibid 21 - 22

<sup>50</sup> Ibid 21 - 22

develop a new aspect of goods. This will decrease consumer welfare and reduce the quality of products more than without lookalike package products. The variety of particular products is diminished, resulting from a few manufacturers engaging in development, and especially secondary brand products may die away while the leading brand product manufacturers fight to keep their position by transforming their product design and repackaging.<sup>51</sup>

This situation brings excessive product development, which is a waste of resources and manufacturers are effectively pushed into rent-seeking behavior to keep one step ahead of lookalike products. Furthermore, there is a lack of a suitable and efficient law for preventing profits from investment being misappropriated by copyists. Nowadays, the law is not sufficient enough to protect retailers who are developing lookalike product packaging, while only a few products are protected by patent and trademark. Retailers have a broad scope to make products close to lookalike.<sup>52</sup>

The original product manufacturers, especially secondary brands, are extorted on wholesales by the market power of the retailer. This effect, combined with house brand products and non - price promotions, is increasing store loyalty, but reducing brand loyalty. The result is that retailer competition leads to the number of groceries shops declining, which results in detriment of consumer and social welfare.<sup>53</sup>

For the brand manufacturer, the retailers are the buyers and competitors, who are developing marketing and selling house brand products. These practices of retailers are a double agent role leading to the retailer using the advantages to be above brand producers and bringing about the brand manufacturers not hesitating to sue or collude to boycott the retailer, because they do not want to lose their sales and economic scale. There are only a few things the brand

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<sup>51</sup> Ibid 23 - 24

<sup>52</sup> Ibid 23 - 24

<sup>53</sup> Ibid 23 - 24

manufacturers can do to protect their investment, which is destroyed continually by the lookalike package of house brand products. Finally, this will disadvantage the consumer, as there will be a steady fall in the number of product choices, reduced investment in product quality and high prices of goods, while the retailers' power grows and the retail market become more important.<sup>54</sup>

#### **2.4 The legal principle related to protecting consumers from lookalike product packaging**

Consumer protection is becoming one of the most important objectives of Unfair Competition Law in some national and regional areas. Currently, the Unfair Competition Law is the field of the Consumer Protection Law and considers the effect on consumer interests.

The unfair competition law developed from the law of tort. Nevertheless, the Paris Convention created relationship intellectual property and the regulation of unfair competition law for extending "industrial property." Some countries consider the trademark law as a part of the Unfair Competition Law. Moreover, the legal issue of the likelihood of confusion are both involved with under competition Law ("confusion" and "passing off") and under Trademark law. This is causing people to question the scope of the Unfair Competition Law and Intellectual Property rights.<sup>55</sup>

All countries that have established market economy systems have devised some kind of safeguard against unfair business practices. However, they have chosen quite different approaches, while in other areas of industrial property law, such as those dealing with patents, designs or marks, it is generally agreed that protection is best afforded by a specific, comprehensive statute, and the legal basis for the repression of unfair competition can range from a concise general tort

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<sup>54</sup> Ibid 23 - 24

<sup>55</sup> Frauke Henning-Bodewig, *International handbook on unfair competition* (Munich : C.H. Beck 2013) 6

provision to a detailed regulation in a special statute. The reason for this diversity of approaches is often purely historical.<sup>56</sup>

The concept of the unfair competition law appeared first in France around 1850. Although at that time there was no specific prohibition of dishonest business practices, the French courts were able to develop a comprehensive and effective system of unfair competition law on the basis of the general provision contained in Article 1382 of the French Civil Code, according to which unlawful acts entail an obligation to pay damages. As far as the protection of competitors is concerned, the principles developed by court decisions on the basis of Article 1382 of the French Civil Code are still the main basis for relief against unfair competition in France. For the protection of consumers, a law on fraud in connection with products was enacted as early as 1905, and has since been complemented by numerous statutes and decrees, including the so-called "Loi Royer" of 1973, which prohibits misleading advertising, and the Consumer Information Laws of 1978 and 1989.<sup>57</sup>

In Germany, the situation evolved differently. Since the courts refused to extend the tort provisions of the Civil Code to unfair business practices, it was necessary to enact specific legislation on the subject. Thus, the Law Against Unfair Competition of 1909 became, and has remained, the main basis for the repression of acts of unfair competition. The Law contains two general provisions on dishonest and deceptive trade practices. Furthermore, it relies almost exclusively on private party complaints, granting the capacity to sue to competitors, consumers and business organizations. The German courts, relying especially on the two general provisions contained in Articles 1 and 3 of the Law, have developed a comprehensive system for the repression of unfair trade practices, which aims at protecting not only competitors but also consumers and the public at large.<sup>58</sup>

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<sup>56</sup> WIPO, *Protection Against Unfair Competition: Analysis of the Present World Situation* (1994) 15

<sup>57</sup> *Ibid* 15

<sup>58</sup> *Ibid* 16



The United Kingdom (England, Scotland, Wales and Northern Ireland) has taken a different approach, based on common law and equity, and has not developed a separate legal regime for protection against unfair competition. A traditionally liberal approach makes for reluctance to enact general rules that allow subjective opinions to be held on what is "fair" or not. The tort of passing-off, which has been recognized since 1824, is regarded as sufficient protection for competitors. Consequently, civil remedies for competitors are still restricted to isolated cases under uncodified tort principles, in particular the protection against passing-off, claims of injurious falsehood or breach of confidence. On the other hand, provisions on consumer protection against misleading acts were already introduced in 1862 and have, in the meantime, been supplemented by an autonomous set of consumer protection statutes, such as the Trade Descriptions Act of 1968, the Fair Trading Act of 1973, the Unsolicited Goods and Services Acts of 1971 and 1975 and the Consumer Protection Act of 1987. In 1988, the Control of Misleading Advertisements Regulations was enacted, pursuant to the EC Directive of 1984. Additionally, a number of self-disciplinary advertising codes are fully recognized.<sup>59</sup>

The conclusion that all regulated areas belong together is supported by the fact that the consumer protection against unfair commercial practices, at least indirectly, also protects competitors.<sup>60</sup>

#### **2.4.1 Consumer law**

Economics and commerce were formed in a free and simple way. What it depends on is that everybody is free and fair to consume products and services. The state does not control or intervene in the people's freedom on the consent of the parties to make a contract. Later, society, technology, industry and sciences were developed, as well as a capitalism system creating the expansion of economics, and businesses are competing to bring science and technical information to produce products and satisfy consumers' needs. The fast growth of industry

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<sup>59</sup> Ibid 16

<sup>60</sup> Henning-Bodewig 7

caused entrepreneurs to speed up to make products, and sometimes they might be careless on the quality and safety of raw materials, causing the products to lack quality for the consumer. Moreover, the markets are gathering together both the best quality goods and the bad quality goods, as well as every business attempting to continually reduce the cost of production to get high profits. For this fact, each country is more interested in consumer protection, because in society the state plays a crucial role and has to control industrial businesses as well as protecting the consumers' rights.<sup>61</sup>

In the past there was no consumer protection law, but there are some legal codes more than 1,000 years old, such as “The Old Testament” that is found in the old Bible of Christianity or “The Code of Hammurabi” or Articles and the code of India. These laws provide the measure to control fake food and defraud weighing machine. In the United States, consumer protection is shown in the Constitution, which provides the power to the parliament for determining the weighing measure, in the part of states enacting the law to examine liquor, tobacco, boarding wood, gunpowder, leather and some foods. In Europe, the legal principle related to consumer protection started in the fifteenth and sixteenth century, for example under French law it is said that the consumer has the right to throw bad eggs onto the seller who sold this egg. In Austria the law enforces that the vendor who sells dirty milk must drink his dirty milk.

The concept of consumer protection obviously began in 1960, and the United States by the government affirms the crucial consumer rights in four parts

1. Right to be informed.
2. Right to choose.
3. Right to safety and
4. Right to compensation/redress

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<sup>61</sup> Susom Supanit, *The explanation of the Consumer Protection Law* (Chalalongkorn University Press 2014) 1 - 3

Later, on 15 March 1962, John F. Kennedy the United States President outlined his vision of consumer rights. He said that “Consumers by definition, include us all. They are the largest economic group, affected by almost every public and private economic decision. They are the only important group whose views are often not heard.”

On the part of United Nations Guidelines for Consumer Protection (UNGCP), it is in 8 parts: Physical Safety, Promotion and Protection of Consumers’ Economic interests, Standards for the Safety and Quality of Consumer Goods and Services, Distribution facilities for Essential Consumer Goods and services, Measures Enabling Consumers to Obtain Redress, Education and Information Programmers, Promotion of Sustainable Consumption and Measures Relating to Specific Areas.

#### **2.4.1.1 Concepts and theories of consumer protection**

In ancient times, products and services were not sophisticatedly created, as the economic units in that era were limited to district or city level.

The commercial system was widely based on barter trade. The production process and service provision were simple. The government was not required to establish a legal tool or measure to ensure the consumer’s safety and fairness. At a later time, the concept of democratic governance with individual freewill and liberty as its basis evolved into economic liberalism. Economic liberalism (Laissez-faire) hypothesized that all humans had equal capacity to make decisions on their product/service selection. The state should not intervene in the freedom of bargaining between private parties. Subsequently, a commercial legal principle was established, “Let the buyer beware” or “Caveat emptor” in Latin, which implied that the seller should not bear the responsibility in cases where the buyer knew, or was supposed to know, a defect of products/services after reasonable due diligence.

Recently, the conditions of products and services and economic units considerably changed from their origin owing to the scientific and industrial advance. The production process became sophisticated and required more raw materials. The production process was advanced beyond knowledge of regular

users or consumers. The significantly-changed trade system forced the manufacturers to decrease their production cost and increase profit as much as possible. The trade expanded from local or city level to international level. However, the increasing production capacity reduced the precision and quality of products or services. Various products were circulated more widely than before. The “Let the buyer beware” principle was no longer valid, since the buyers and consumers could not catch up with the technological development. Regular due diligence was insufficient to help buyers and consumers to obtain benefits worthy of their payment. In addition, they could be unexpectedly harmed by the purchased product. For these reasons, in many countries the concept of consumer rights emerged to protect consumers and preserve their benefits, aside from their contractual right to remedy or right to claim the damages under a violation case according to the existing laws. As a result, in European countries, America and Australia, a consumer protection law was promulgated and consequently changed the principles of the existing laws, in terms of contractual liabilities and violation, to allow more remedy and reparation for the occurring damage resulting from consumption.

The new consumer protection law emphasizes on the production activity under the governmental control to prevent damage and prosecution to protect consumers.<sup>62</sup> The law theories concerning consumer protection are as follows;

### **(1) Freedom of Contract**

Freedom of Contract refers to freedom of all individuals to decide, convene, continue or suspend a contractual proceeding according to their will. After a contract is established, the state cannot intervene in the contract, since the state must guarantee individual freedom in accordance with individualism theory<sup>63</sup>. The theory believes that all humans are naturally born with individual

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<sup>62</sup> Ibid 1-3

<sup>63</sup> Sanankorn (Champee) Sothiphan, *Explication of Juristic Act and Contract* (18th ed edn, Winyuchon Publication House 2014) 287

freedom. Everyone has his/her individual freedom, although such freedom could be limited in some necessary cases.<sup>64</sup> After a contract is established, the state cannot interfere to change the parties' agreement. However, sometimes it is necessary to deny the freedom of contract to protect consumers, as the freedom of contract is valid for the case where the parties have equal negotiation leverage under the perfectly competitive market. Such consumer protection is not limited to the contract parties only, but also expands to entrepreneurs and third parties. On the contrary, according to the theory of liability of privity of contract, only contractual consumers are entitled to the remedy and reparation.<sup>65</sup>

## (2) Tort liability

Tort liability involves 2 prevailing liability theories, which are fault liability and strict liability. Strict liability means that the entrepreneur shall be liable even without intent or actual negligence to harm. The principle of tort liability is widely recognized in the case where the damage results from the product with sophisticated production process. The affected consumer has difficulty in proving whose fault caused the damage.<sup>66</sup> Hence, it is the entrepreneur's burden to prove his innocence.

The consumer protection law revolves around two main theories. The first notion believes that consumer protection is a part of unfair trade practices, since it is a part of trade control laws, as seen in Australia, etc. Another theory views that consumer protection requires specific measures. Therefore, the consumer protection law is separately promulgated, for example the consumer protection laws in the U.S., Japan, Thailand, etc. Anyhow, the consumer protection law is based on either theory in any country that has 2 common characteristics, which are;

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<sup>64</sup> Daraporn Thirawat, *Contract Laws: New Status of Current Contracts and Problems of Unjust Contracts* (2nd edn, Thammasat University Press 1999) 15

<sup>65</sup> Supanit 10-11

<sup>66</sup> Ibid 12

1) Onus of proof: Onus of proof regarding technical matters lies with the manufacturer or seller. The consumer only proves that he/she suffered damage from the defective or unsafe product and how.

2) The state acts as a lawful representative to prosecute cases on behalf of consumers

The consumer protection measures can be categorized into 2 types, as follows:

1) Pre-market control measures, for example code of conduct of entrepreneurs and standard determination for production process and product quality. The manufacturers are required to comply with the established standards.

Techniques for product standard determination can be divided into:

- Standard determination by item and
- General standard determination

With standard determination by item, the state or private regulatory agency has to work restlessly owing to the large quantity of products. They set up the standard after the production. On the contrary, general standard determination considerably relieves such burden, and in the same time encourages the manufacturers to develop the production process.

2) Post-market control measures, for example supply chain, product quality control, product information labeling, advertisement control, protection on consumers' free purchase decision, claim for compensation due to defective product and product recall measure.<sup>67</sup>

#### **2.4.1.2 The relationship between Consumer law and lookalike product packaging**

The lookalike product packaging practice will create a crucial problem for consumers to purchase the products, because it contains false

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<sup>67</sup> Patipatponkul 24

information in relation to the nature, characteristics and origin of the product or its overall presentation in anyway deceives or is likely to deceive the consumer takes, or is likely to take, a different transactional decision as a result; or creates confusion with any products such that the consumer takes, or is likely to take, a different transactional decision as a result; or mislead the consumer into believing that the product is made by that same manufacturer when it is not. The lookalike product packaging practice has a direct affect on consumers, and, therefore, this thesis will examine regulations that have the purpose of protecting consumers.

### **2.4.2 Trade Competition law**

Competition law is an important tool of government sectors for carrying on business competition; it is a policy that aims to promote free and fair trade. This law is widespread in many countries; 131 countries around the world have the competition law, and particularly the developed countries are substantially concerned about how to enforce the competition law, because this law has the status as the economic constitution of the country, in which all businesses, namely big business, medium enterprises and small business, are the same level. They must abide by this law.<sup>68</sup>

#### **2.4.2.1 Concepts and theories of Trade competition**

Trade competition is the main idea of economic liberalism. Economic liberalism or capitalism is an economic system under which private sectors have freedom to operate their economic activities. Private individuals have ownership of their properties<sup>69</sup> and can own factors of production, which they gained, such as land, labor, fund, technology, resources, etc. Private individuals have freedom in business operation and product/service selection for consumption, as long as such freedom complies with the laws. Any operations by private sectors must not violate the basic rights of others, such as production monopoly, etc. Under the trade

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<sup>68</sup> *Terms of reform of The Thailand Reform Commission : trade monopoly and fair trade : Thailand trade competition Act reform (2015)* 16

<sup>69</sup> Tabtim Wongprayoon, *Economic history and theories* (V.G. Printing 1993) 156

competition, price and market system are the main mechanism of resource allocation, since manufacturers determine the types and quantity of products based on the consumers' demand<sup>70</sup> in the market.<sup>71</sup>

Basic ideas of trade competition are developed to promote the existence of trade competition under economic liberalism or capitalism and to reflect the actual demand for production and product or service consumption. At the same time, it prevents the excessive right of production to the extent of monopoly. Hence, the basic ideas of trade competition help to prevent the monopoly and unfair trade competition.<sup>72</sup>

### 2.4.3 Unfair competition law

At the end of the nineteenth century, Europe was developing industrialization, as well as beginning the principle of free trade in Europe. The leading phenomenon of "competition" occurred at the same time, and many new techniques of market behavior emerged. The belief that freedom of competition will warrant the fair trade was found to be an illusion.<sup>73</sup>

All markets in the economy attempted to promote some protection from new unacceptable occurrences and balances them towards the economic freedom principle. This protection will depend on the legal system; there was a difference between the reaction of the common law countries and the response from the civil law country.<sup>74</sup>

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<sup>70</sup> Demand means consumers' demand to buy any products or services at a time and they have purchase power or capacity to fulfill such demand.

<sup>71</sup> Pamorn Anantachai, 'Offense and Legal Measure according to Article 27 and 28 of Trade Competition Act B.E. 2542' (Dhurakij Pundit University 2006) 8

<sup>72</sup> Wannawipang Manachotipong, *Summary and Analysis of Draft of Trade Competition Act (No. ....), B.E. ....* (2011) 1

<sup>73</sup> Henning-Bodewig 1

<sup>74</sup> Ibid 1



In France, the civil law the country provided was found in the general tort law clause under Article 1382 of the Civil Code. It was considered a proper solution that gives protection against competitors on the risk of confusion, imitation, parasitic competition. Germany enacts special unfair competition, which holds a general clause against unfair competition.<sup>75</sup> Contrary to, in common law country, choosing a different way,<sup>76</sup> some common law jurisdictions have interpreted the common law doctrine of passing off more broadly.<sup>77</sup>

In early 1900, the International Agreement prohibited all of the acts of unfair competition defined as being against “honest trade practices”, especially causing confusion, denigration of competitors and deceptive allegations that was the supplement to the “Paris Convention for the Protection of Industrial Property of 1883.” The suppression of unfair competition was seen as under Industrial property law. It recognized that the other more formal Intellectual Property rights for supplement and solution by a more flexible way of protection.<sup>78</sup>

In the case of protecting businesses from unfair trade practices widespread to overcome influence in national approaches to fight with unfair competition, the Article 10 bis of Paris Convention bound on 176 contracting parties’ states<sup>79</sup> and is still in force. The second major Intellectual Property International treaty is the “Agreement on Trade-Related Aspects of Intellectual Property (TRIPs).

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<sup>75</sup> Ibid 1

<sup>76</sup> Ibid 2

<sup>77</sup> Mary Lafrance, ‘Passing Off and Unfair Competition: Conflict and Convergence in Competition Law’ Vol. 2011 Scholarly Commons @ UNLV Law **1413**

<sup>78</sup> Henning-Bodewig 2

<sup>79</sup> World Intellectual Property Organization, ‘WIPO-Administered Treaties Contracting Parties > Paris Convention’ (*World Intellectual Property Organization*) <[http://www.wipo.int/treaties/en/ShowResults.jsp?treaty\\_id=2](http://www.wipo.int/treaties/en/ShowResults.jsp?treaty_id=2)> accessed 10 February 2017

It is not expressly concerned with unfair competition, but refers by general reference to Article 10 bis of the Paris Convention.<sup>80</sup>

#### **2.4.3.1 The relationship between lookalike product and Unfair Competition Law**

The business operators using similar product packaging with original products is deemed that those business operators take unfair advantage from the business operator who produce the original product packaging. If this practice is not controlled by other specific law, this practice will be controlled under the law of unfair competition, because this action creates obvious damages to business operators and affects consumers, who are misled into believing that the product is made by that same manufacturer when it is not. Some cases may cause harm to life or the health of consumers.

#### **2.4.4 Intellectual property law**

The most important thing concerned with the property is that the owner wishes to use and receive benefits of his property while other people cannot bring this property to their advantage without the proprietor's consent. However, the provision or regulation of Administration Sector has a restriction to limit the owner to exercise his right, for example the owner will build his house under the local regulation of Administration which is a land located. Intellectual Property is one of the ownership fields; it must comply with the same rule as other property.<sup>81</sup>

The original method to protect Intellectual Property is collecting a creation or innovation in the creator's brain, which can prevent other people to see and search it. The Intellectual Property is remaining to keep until the owner decides to disclose this creation.<sup>82</sup>

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<sup>80</sup> Henning-Bodewig 2

<sup>81</sup> Chaiyot Hemaratchata, *Characteristic of Intellectual Property law* (10 edn, Nititham 2016) 9

<sup>82</sup> Ibid 11

Furthermore, some Intellectual Property cannot be collected as a secret of the owner, because it is an expression of the idea, such as a book that is easy to copy by many approaches or computer programs that can duplicate.

In the long history of Intellectual Property Law, the Romans used marks on ceramics to show the maker of the ceramics. A Venetian Law of 1474 ruled to offer privileges to any man who is inventing new machines. An explosion of new ideas gave the law dramatically extensive importance in the Industrial and Transport Revolutions, carrying on to The Commercial and Information Age, which supports the significance of Intellectual Property Law.<sup>83</sup>

Many countries believe that the most proper means to protect Intellectual Property is the legal measure that is the law. It provides rules and a scope of the rights of protection. The laws relating to Intellectual Property protection might be created from a registration process or court's rule; it relies on the legal system of their countries.<sup>84</sup>

The developed countries have a law to protect Intellectual Property Rights in their country, such as the United States has Patents law, Copyright law, Trademark law and Unfair Competition law under the Federal law that is enacted by the Congress of the United States.<sup>85</sup>

Moreover, each country that favors Intellectual Property will have an Intellectual Property Law for their countries. However, with international transactions, economic, social and political, it seems that every country in the world is connected because of the communication system, which is non-stop developing. This causes the Intellectual Properties being easy to overspread and affects the rights of the Intellectual Property owner.<sup>86</sup>

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<sup>83</sup> Catherine Colston, *Principles of intellectual property law* (1st ed. edn, Cavendish 1999) 1

<sup>84</sup> Hemaratchata 12

<sup>85</sup> Ibid 12

<sup>86</sup> Ibid 14

After World Trade Organization (WTO) was established, in B.E. 2537 the member states are negotiating on the protection of Intellectual Property relating to trade in counterfeit goods, which lead to the Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods (TRIPs) for providing any rules and latest regulation concerned with obtaining, extent, Intellectual Property right and efficiency measure to enforcement Intellectual Property in trade.<sup>87</sup>

More countries consider that we will succeed in protecting international Intellectual Property if we have a standard model law. We are creating an Intellectual Property International Agreement.<sup>88</sup>

The Paris Industrial Property Convention 1993, gives a measure on patents, industrial design, well – known mark, names and unfair competition.<sup>89</sup>

The Berne Convention 1886 set up protection for literary, dramatic, musical and artistic works.<sup>90</sup>

#### **2.4.4.1 Concepts and theories of intellectual property protection**

The principle idea of intellectual property protection is protection of both individual right and property in accordance with the principle of human rights protection. The Universal Declaration of Human Rights (UDHR).<sup>91</sup> Article 27 of UDHR reads, “Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.”<sup>92</sup>

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<sup>87</sup> Ibid 15

<sup>88</sup> Ibid 15

<sup>89</sup> Colston 9

<sup>90</sup> Ibid 9

<sup>91</sup> Universal Declaration of Human Rights, GA Res 217A (III), GAOR 3rd sess, UN Doc. A/810 (1948).

<sup>92</sup> Ibid, art 27 states that “Everyone has the right to the protection of moral and material interests resulting from any scientific, literary or artistic production of which he is the author” [emphasis in original].

On the other hand, some disagree with intellectual property protection. The objectors view that intellectual property protection leads to monopoly, as it restrains the continual development of the invention during the period of legal protection. Some argue that some types of intellectual property protection may contradict public morality or ethics. For example, under the protection, a sole individual may utilize natural resources that are actually public property. Therefore, to study and understand intellectual property protection law, it requires good understanding of relevant principles, ideas and theories of both aspects, which are elaborated in the works of many philosophers<sup>93</sup> such as Adam Smith, Jeremy Bentham, John Stuart Mill, and Thomas Jefferson. They explain the principles of intellectual property protection in various aspects.

The most important theory of intellectual property protection is the reward theory of Adam Smith, Jeremy Bentham and John Stuart Mill. Adam Smith, a lawyer renowned as the father of economics, asserted that the economic development mechanism would function best in the liberal economic system free from governmental interference. Adam Smith's notion brought about an important economic theory pointing out that the government should interfere in the nation's economy as little as possible. The government's duty should be limited to maintenance of social order and justice only. The theory called "Laissez Faire" has influenced the field of economics until today. Generally, Adam Smith objected governmental interference, as it leads to economic monopoly. However, in his classic work titled "Wealth of Nations," he admitted that the government's promulgation of intellectual property law to protect the rights of inventors is a legitimate act according to the principle of reward theory.<sup>94</sup>

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<sup>93</sup> Chumpol Phinyosinwat and Phumin Butr-In, *History and Ideas of Intellectual Property* (Textbook and Instructional Materials Project, Thammasat University 2016)

<sup>94</sup> Adam Smith and Edwin Cannan, *An inquiry into the nature and causes of the wealth of nations* (University of Chicago Press 1976) Book V. Chapter I, 338

Bentham, the founder of utilitarianism theory, viewed that the nature destines humans to be under control of pain and pleasure. They determine what humans should do or should not do. The key of utilitarianism is “the greatest happiness for the greatest number” which becomes a renowned quote of Bentham. He believed that whether it is a law, morality or government, as long as they bring about the greatest happiness for the greatest number of people, they are goodness and pleasure. If a law is issued for the benefit and happiness of the majority of people, the people will respect the law, because it brings some advantages or goodness.<sup>95</sup>

Although Bentham developed the utilitarianism theory aiming at the happiness of the majority, all theories have an exception. Bentham realized this problem. Therefore, the exception of his theory is the intellectual property law (patent), which aims to protect innovation or invention created from human’s intelligence. The intellectual property law is the reward for inventors of intellectual property products. At the same time, it is suppression against the imitation by outsiders according to reward theory.<sup>96</sup>

Agreeing with Adam Smith’s and Bentham’s idea, John Stuart Mill (A.D. 1806-1873) improved the basic principles of the utilitarianism theory. He emphasized on humans’ satisfaction, which is human dignity, rather than physical needs. Liberation is enhancement of human dignity and honor. Freedom means independency from the government. However, according to Mill, intellectual property protection, which is actually a governmental measure, is an exception of his theory. He reasoned that the temporary privilege is a righteous act to protect the benefits of inventors.<sup>97</sup>

As for another theory, it believes that intellectual property is valuable and brings about general social benefits. Thomas Jefferson (A.D. 1743-1826),

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<sup>95</sup> Jeremy Bentham, *Manual of Political Economy* (1962) 31

<sup>96</sup> Ibid 71

<sup>97</sup> John Stuart Mill, *Principles of Political Economy* (Penguin 1985) 295-296

one of the founders and the 3rd President of the United States, perceived that intellectual property is the public's body of knowledge and does not specifically belong to anyone, as stated in his letter to Isaac McPherson, a representative of Missouri in 1813.<sup>98</sup>

Both theories dynamically drove the development of intellectual property law with the right balance. Namely, the main objective of intellectual property law is to protect products created from intelligence of creators, producers or inventors. The law grants the exclusive rights to inventors to do whatsoever with the products of their intelligence. At the same time, intellectual property protection creates social benefits, as it establishes the specific time period for inventors' exclusive right. After the said period, the intellectual property becomes public property.<sup>99</sup>

#### 2.4.4.2 Trademark Law

In general, the Trademark Law has two purposes: firstly, to collect any data of owners and usage of trademark; and secondly, in order to protect the rights of trademark owner and consumer.<sup>100</sup> Moreover, at present, the Trademark Law has an objective to develop economically, because the efficiency Trademark system will influence manufacturers to increase the sale of quality goods in the market, to add more production and employment. Additionally, the Trademark Law helps to improve the quality of life of people who use quality goods; it also revenue to people and gives benefits for the country. The best Trademark system will assist

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<sup>98</sup> Pawarit Lertdhamtewe, *The Knowledge about Intellectual Property Law* (Winyuchun Publication House 2018) 16

<sup>99</sup> Ibid 16-17

<sup>100</sup> Yanyong Puangrat, 'Who are protect by Trademark Law' 15 Lawjournal, The Faculty of Law, Thammasat University 1

fair trade competition between any in-house goods and foreign goods. Finally, this trade competition will be useful for consumers.<sup>101</sup>

(1) Duty of Trademark<sup>102</sup>

(a) Identity and distinguish any goods

To provide that the goods under trademark difference from any goods of other trademark.

(b) Describe an origin of products

To provide the goods' origin

(c) Describe a quality of products

To guarantee that any goods which attach same trademark having same quality

(d) Advertisement

Trademark assists to effective Advertisement by make the consumers quickly to known the product.

#### 2.4.4.3 The relationship between Intellectual Property Law and lookalike product

We will consider the relationship between Intellectual Property Law and lookalike product by focusing on the Trademark law

The packaging plays an important role and has duties for the product did not difference form trademark's role and duty. The product packaging's duty is to show any distinction between two or more products that are produced by different manufacturers. In addition, packages also inform consumer of the origin of goods or assist the consumers to decide to purchase the product.

Therefore, to communicate to consumers the difference between two or more products, the manufacturers always use the distinctive packaging from others manufacturers who produce or sell the same product category,

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<sup>101</sup> Thatchai Supaponsiri, *the explanation of Trademark Law* (1th edn, Nititham 1993) 6 - 7

<sup>102</sup> Ibid 8 - 9



for creating noticeable packaging and protecting consumers from being misled by similar product packaging.

## 2.5 Comparison between Unfair competition law and Passing off

The Unfair Competition Law and Passing off were both born from a distinct cultural and difference legal system; however they provide an important purpose to protect consumer from deception, and those that treat this goal are included within the larger goal of regulating competition. Essentially, the narrower goal of the consumer protection dominates in common law countries, while civil law countries have embraced the broader concept of unfair competition<sup>103, 104</sup>

In general, the approach of civil law countries increase the goal of fairness above that of competition, and have, thus, been criticized for being anticompetitive. The common law approach of the civil law approach tends to make competition as the primary goal,<sup>105</sup> treating fairness as a consideration only when a competitor's conduct is particular extreme, such as where the competitor's actions are likely to mislead or confuse consumers about the origin or nature of the goods on offer.<sup>106</sup> While both approaches consider the interests of both consumers and competitors,

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<sup>103</sup> As use here, the term “unfair competition” refers to the broad civil law doctrine, which restricts competitive activities even in the absence of consumer protection. In the United States, however, “unfair competition” is typically used as a synonym for passing off.

<sup>104</sup> Mary LaFrance, ‘Passing off Unfair Competition: Conflict and Convergence in Competition Law ’ 2011 Michigan State Law Review 1413

<sup>105</sup> See, e.g., L’Oreal SA v. Bellure NV, [2010] EWCA (Civ) 535, [20], [2010] R.P.C. 23 (U.K.)

<sup>106</sup> See, e.g., William R. Warner & Co. v. Eli Lilly & Co. v. Eli Lilly & Co., 265 U.S. 526, 532 (1924); U- Haul Int’l, Inc. v. Jartran, Inc., 681 F.2d 1159, 1162 (9<sup>th</sup> Cir. 1982)

under the common law approach the interests of consumers have generally been considered to be of primary importance.<sup>107</sup>

In civil law countries, the discussions of unfair competition tend to focus less on consumers and more on generalized, and regularly notions of “fair and honest” behavior by market competitors.<sup>108</sup>

In contrast, His Honour Judge Richard Hacon QC, Dr Birgit Clark and Professors Phillip Johnson and Christopher Wadlow suggested that “there are still differences between the two concepts, mainly the fact that unfair competition has more of a consumer protection element, whereas passing off is more business-to-business and competitor-to-competitor.”<sup>109</sup>

However, the gap in the differences between passing off and unfair competition has been narrowing. The conflict between these doctrines had been highlighted by a decision of the European Court of Justice (ECJ), which has interpreted several harmonization directives in a manner of consistency with a broad concept of unfair competition, thus creating pressure on the United Kingdom to interpret “passing off” in a manner far removed from its original meaning.<sup>110</sup>

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<sup>107</sup> Lafrance 1413

<sup>108</sup> Ibid 1413

<sup>109</sup> Kat Nadia, ‘Passing off and unfair competition : an event review’ (2014) <<http://ipkitten.blogspot.com>> accessed 26 April 2018

<sup>110</sup> Lafrance 1415

## CHAPTER 3

### THE LEGAL MEASURE OF CONSUMER PROTECTION AND LOOKALIKE PRODUCT PACKAGING UNDER THAI LAW

This Chapter will examine and consider the legal measure related to protecting consumers from lookalike product packaging and legal measures related to remedying consumers from any effect of lookalike product packaging in Thailand.

#### **3.1 The legal measure of consumer protection under Thai consumer protection**

The Thailand consumer protection law has both the general consumer protection Act and any specific product protection Act, such as the Food Act B.E. 2522, the Drug Act, B.E. 2510 and the Cosmetics Act, B.E. 2558 etc. Moreover, this thesis will study the Thailand trade competition Acts, as well as the Thailand trademark Act for determining whether or not Thailand has a legal measure to protect consumers and business operators from unfair practices relating to lookalike product packaging.

##### **3.1.1 Consumer Protection Act B.E. 2522**

This act provides fair legal measure to protect consumer in general:

###### **(1) Definition**

Section 3 in this Act:

“Goods” means articles produced or possessed for sale;

“Statement” includes an act expressed in the form of letters, pictures, cinematographic film, light, sound, sign, or any act enabling the public to understand its meaning;

“Advertisement” includes any act, which, by whatever means, causes the statement to be seen or known by an ordinary person for trading purposes;

“label” means a picture, design, paper or any other thing causing the statement relating to good to appear on the goods, or the goods, or container or

package of goods, or inserted in or put together with the goods or container or package of goods, and includes a document or handbook on usage, or tag attached to or displayed on the goods or container or package of such goods;

According to this definition, this act does not give a direct meaning of product packaging. Thus, this thesis will consider the definition of “Goods” a product packaging. In addition, it will consider if using lookalike product packaging may be deemed an “Advertisement”, leading consumers to believe that they are buying leading brand quality at a lower price.<sup>111</sup> Furthermore, using lookalike product packaging may be statement or any act expressed enabling the public to understand its meaning concerned with the product, which is displayed on the goods or container or package of such goods under a definition of "label." Therefore, if using lookalike product packaging as a "Goods," “Advertisement” and “label”, if this practice without control by others specific law, this practice will be under the control measure of Advertisement and Label in this Act. This part will be analyzed in chapter 5.

## (2) Enforcement Authority

The agency that has to control under this act is the Consumer Protection Board<sup>112</sup>, which has powers and duties under section 10.<sup>113</sup> It also provides

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<sup>111</sup> Tony Appleton 58

<sup>112</sup> The Consumer Protection Act B.E. 2522 section 9

<sup>113</sup> Ibid Section 10 “The Board shall have the following powers and duties;

(1) to consider the complaints from the consumers who suffer hardship or injury resulting from the acts of the business man;

(1/1) to arbitrate or conciliate issue of dispute concern with the infringement of consumer right which is the consumer and business consent before filing an action to the court, all this under the regulation as the Board specify and publication in the Government Gazette.

(1/2) to promote, develop and support the consumer protection work, all this under the regulation as specify by the Board

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- (2) to proceed with the goods which may be harmful to the consumer under section 36;
  - (3) to issue or publicize information concerning goods or services which may cause damage to or be prejudicial to the right of the consumers and for this purpose, the names of such goods or service or the name of the business man may be specifically
  - (4) to give recommendation and advice to the ad hoc committees, and consider and determine appeals against order of the ad hoc committees;
  - (5) to lay down rules concerning the performance of duties the ad hoc committees and sub-committees
  - (6) to scrutinize and expedite the execution of powers and duties of the competent officials, government offices or other state agencies in accordance with the laws as well as to expedite the legal proceeding by the competent officials for the offences regarding  
the infringement of the consumer's right;
  - (7) to institute legal proceedings regarding the infringement of the consumer's right as Board thinks fit or when there is a request under section 39;
  - (8) to recognize an association under section 40;
  - (9) to submit opinion to the Council of Ministers concerning the policy and measure for the protection of the consumer, and consider and give opinion in any matter regarding the consumer protection as entrusted by the Council of Ministers of Minister
  - (10) to do any other act as prescribed by laws to be the function of the Board. In the performance of duties under this section, the Board may entrust the Office of the Consumer Protection Board to carry out or prepare proposals to be submitted to the Board for consideration”

ad hoc committees under section 14<sup>114</sup> as follows: The Committee on Advertisement has the power and performance of duties under part 1 related to Consumer Protection against Advertising, the Committee on labels have the power and performance of duties under part 2 related to Consumer Protection against Labeling and the Committee on Contract have the power and performance of duties under part 2 bis related to Consumer Protection on Contract. Moreover this act established the Office of the Consumer Protection Board under section 19, it has the following powers and duties under section 20.<sup>115</sup>

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<sup>114</sup> Ibid Section 14. “There shall be ad hoc committees as follows:

- (1) The Committee on Advertisement;
- (2) The Committee on labels;
- (3) The Committee on Contract

An ad hoc committee shall consist of not less than seven but not more than thirteen members qualified in the relevant fields appointed by the Board.

A member of an ad hoc committee shall hold office for a term of two years and section 11 paragraph two and section 12 shall apply mutatis mutandis.

An ad hoc committee has the power and duty as prescribed in this Act and as entrusted by the Board.”

<sup>115</sup> Ibid Section 20 “The Office of the Consumer Protection Board shall have the following

powers and duties:

- (1) to receive complaints from the consumer who suffer hardship or injury resulting from the acts of the businessman for further submission to the Board;
- (2) to follow up and scrutinize actions of the businessman who may do anything infringing the consumer’s right, and arrange for testing or verifying any goods or services as it think proper for the protection of the consumer’s right;
- (3) to encourage or conduct the study and research of the problem concerning the consumer protection with other academic institutions and other agencies;

### (3) The Control Measure

To control advertisement and labels under this act, we have a legal measure separated into 2 processes: pre-market control measure and post-market control measure, as follows;

#### The Committee on Advertisement

The committee has the power to control any statement used as advertising if it conforms to this act. It has a pre-market control measure to provide that an advertisement may not contain a statement which is unfair to consumers or which may cause an adverse effect on the society as a whole.<sup>116</sup> In the case that the

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- (4) to promote and encourage the Providing of education the consumers at all levels of safety and harm from the goods or service;
  - (5) to propagate technical information and provide educational information to consumer in order to install the consumption habit promote health, is economical and maximizes the utilization of natural resources;
  - (6) to co-operate with the government offices or state, agencies which have the power and duty to control, promote or prescribe the standard of goods or services;
  - (7) to do any other acts as entrusted by the Board or the ad hoc committees.”

<sup>116</sup> Ibid Section 22 “An advertisement may not contain a statement which is unfair to consumers or which may cause adverse effect to the society as a whole; that is, notwithstanding such statement concerns with the origin, condition, quality or description of goods or services as well as the delivery, procurement or use of goods or services.

The following statements shall be regarded as those which are unfair to consumers or may cause the adverse effect to the society as a whole:

- (1) Statement which is false or exaggerated;

businessman who is doubtful whether his advertisement will violate or does not conform with this Act, this man may apply to the Committee on Advertisement for consideration and an opinion on such a matter before advertising. In this case, the committee on advertisement shall give an opinion and notify the applicant within thirty days from the date the Committee on Advertisement receives the application; or it shall be deemed that the Committee on Advertisement has given its approval thereto. Any act done pursuant to the opinion of the Committee on Advertisement under paragraph one shall not be deemed a criminal offence under section 29.<sup>117</sup>

The post-market control measure is controlling business operators to use any statement, which is unfair to consumers and concerns with the origin, condition, and quality of goods or services. In the case that the Committee on Advertisement has an opinion that any product packaging uses an unfair statement to consumers, the Committee on Advertisement shall have the power to issue one or several of the following orders under section 27:



(2) Statement which will cause misunderstanding in the essential elements concerning goods or services, notwithstanding it is based on or refers to any technical report, statistics or anything which is false or exaggerated;

(3) Statement which is directly or indirectly encouraging the commission of an unlawful or immoral act, or which adversely affects the national culture;

(4) Statement which will cause disunity or adversely affects the unity among the public;

(5) Other statements as prescribed in the Ministerial Regulation.

A statement used in the advertisement which an ordinary person knows that it is not possible to be true is not prohibited for use in the advertisement under (1).”

<sup>117</sup> Ibid section 29



- (1) to rectify the statement or the method of an advertisement;
- (2) to prohibit the use of certain statements as appeared in the advertisement;
- (3) to prohibit the advertisement or the use of such method for advertisement;
- (4) to correct by advertisement the possible misunderstanding of the consumers in accordance with the rules and procedure prescribed by the Committee on Advertisement.

In a case that the businessman uses any statement with an intention to cause misunderstanding as to the origin, condition, quality of goods or services, this man shall be liable to imprisonment for a term not exceeding six months or fine not exceeding fifty thousand Baht, or to both under section 47.<sup>118</sup> If this offence is a continuous offence, the offender shall be liable to a fine not exceeding ten thousand Baht a day or not exceeding double the advertising expenses throughout the period of the violation or non-compliance under section 51.<sup>119</sup>

#### The Committee on labels

The Committee on labels has a pre-market control measure to prescribe any goods which are manufactured for sale by the factories under the law on factories and products, which are ordered or imported into the Kingdom for sale

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<sup>118</sup> Ibid section 47 “Any person who, with an intention to cause misunderstanding as to the origin, condition, quality, quantity or other essential matters concerning goods or services, whether they belong to him or other persons, advertises or uses a label containing a statement which is false or know or should be known to cause the misunderstanding, shall be liable to imprisonment for a term not exceeding six months or fine not exceeding fifty thousand Baht, or to both.  
If the offender under paragraph one commits the same offence, the offender shall be liable to imprisonment for a term not exceeding one year or fine not exceeding one hundred thousand Baht or to both.”

<sup>119</sup> Ibid section 51

shall be a label-controlled goods. In the case of it appearing that goods may be harmful to health or cause physical or mental harm, because of the use or the nature of such goods or the goods regularly used by the public and the requirement of labels for such goods will be beneficial to the consumers, so that they may be aware of the material facts concerning such goods not being a label-controlled goods. The Committee on Labels shall have the power to declare such goods to be a label-controlled goods by publishing in the Government Gazette under section 30 and this label must have character under section 31.<sup>120</sup> Any businessman who is doubtful whether his label will violate or does not conform to section 31 may apply to the Committee on Labels for consideration and opinion on such a label. In this case, section 29 shall apply mutatis mutandis.<sup>121</sup>

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<sup>120</sup> Ibid section 31 “The label of a label-controlled goods shall be of the following descriptions:

(1)it shall contain truthful statements and have no other statements which may include misunderstanding as to the material facts concerning such goods;

(2)it shall contain the following statements;

- the name or trademark of the manufacturer or the importer for sale, as the case may be;

- the place of manufacturing or the place of operating import business, as the case may be;

- the statements which indicate what the goods are; in the case of imported goods, the name of the manufacturing country shall be specified;

(3) it shall contain necessary statements such as price, quantity, usage, recommendation, caution and an expiry date in the case of goods which can be expired or in other cases to protect the consumer rights; provided that, such protection shall be made in accordance with the rules and conditions prescribed by the Committee on Labels by publishing in the Government Gazette.”

<sup>121</sup> Ibid section 34

The post-market control measure is when the Committee on Labels opinioned that any label use statements, which may cause misunderstanding on the material facts concerning such goods to consumers. The Committee has the power to order the businessman to stop using such a label or revise such a label.<sup>122</sup> If the business operator fails to comply with this order, he shall be liable to imprisonment for a term not exceeding six months or to a fine not exceeding fifty thousand Baht or to both.<sup>123</sup> In addition, if any person business operator with an intention to cause misunderstanding for consumers shall be liable under section 47. Furthermore, if the offence under section 47 is a continuous offence, the offender shall be liable to a fine not exceeding ten thousand Baht per day or not exceeding double the advertising expenses throughout the period of the violation or non-compliance.<sup>124</sup> In the case that a person who sells and knows, or ought to have known, that the non - display of label or the display of such a label is against the law, shall be liable to imprisonment not exceeding six months or fine not exceeding one hundred thousand Baht, or to both.<sup>125</sup> As well as a person who agrees in return for remuneration to produce labels which do not conform to the law or to attach labels which do not conform to the law to any goods and knows or ought to have known that such labels do not conform to the law shall be liable to a fine not exceeding twenty thousand Baht.<sup>126</sup>

### **3.1.2 Food Act B.E. 2522**

The purpose of this Act is to protect any consumers on the part of controlling food's quality and food consumption safety. In this topic we will study and consider whether or not this Act has any legal measure related with controlling lookalike product packaging.

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<sup>122</sup> Ibid section 33

<sup>123</sup> Ibid section 53

<sup>124</sup> Ibid section 51

<sup>125</sup> Ibid section 52

<sup>126</sup> Ibid section 54

### (1) Definition

Section 4 In this Act:

“Container” means any objects used to contain food by placing, packing or other methods;

“Label” includes any figure, invented sign, mark or any statement shown on food, food container or package;

Therefore if any lookalike foods product packaging consider as a “container” and “label” under this definition, using this lookalike foods product packaging will be controlled under this act. This part will be analyzed in chapter 5.

### (2) Enforcement Authority

The Enforcement Authority under this act is a commission called the “Food Commission” under Section 7. This commission has power and duty under section 8.<sup>127</sup> For example, it give advice and recommendation to the Minister of Public Health, who is in charge and control of the execution of this Act in the case of publication for the interests of controlling food by prescribing the quality or standard of container and use of container including the prohibition to use any packaging materiel as a container of food as well as prescribing the class end, kind of food produced for sale, imported for sale or sale which required labels, the texts on the

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<sup>127</sup> The Food Act B.E. 2522 section 8 “The Commission shall have the duty to give advice and recommendation to the Minister or the grantor, as the case may be, in the following matters:

- (1) issuance of notifications under section 6;
- (2) consideration of an appeal under section 19;
- (3) revocation of a register of food recipe under section 39;
- (4) operation under section 44;
- (5) suspension or revocation of a license under section 46.”

labels, conditions and the display of the labels and also the principle and method of advertising on the labels under section 6 (6) and (10).<sup>128</sup>

### (3) The Control Measure

The Control Measure under this Act has two processes that are pre-market control measure and post-market control measure as follow:

The pre-market control measure provided that the Minister of Public Health shall be empowered to publish by prescribing the quality or standard of container and use of container including the prohibition to use any packaging materials as a container of food under section 6 (6).

The post-market control measure is when any business operator violates this notification issued under section 6 (6), the competent officer has the power to seize or attach substandard containers under section 43 (5). Moreover whoever violates notifications issued under Section 6 (6) shall be liable to imprisonment for not more than two years or a fine of not more than twenty thousand baht or both.<sup>129</sup>

In the case it is deemed that a “product packaging” as “Container” and “Label”, the Minister of Public Health shall be empowered to publish by prescribing categories, kinds, or characteristics of food to be produced for sale, imported for sale or for sale which required labels, content on labels, conditions and display of labels, as well as criteria and methods of advertising on labels under

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<sup>128</sup> Ibid section 6 “In the Interests of controlling food, the Minister shall be empowered to publish in the Government Gazette.

(6) prescribing quality or standard of the food container and how to use the container as well as any objects prohibited to be used as food container;

(10) prescribing categories, kinds, or characteristics of food to be produced for sale, imported for sale or for sale which required labels, content on labels, conditions, and display of labels, as well as criteria and methods of advertising on labels.”

<sup>129</sup> Ibid section 48

section 6 (10). If a business operator violated this notification issued shall be liable to a fine of not more than thirty thousand baht under section 51.

In the case that any foods labeled are deceiving or try to deceive the purchasers in matters of quality, quantity, usefulness or special nature or place or country of production be deemed adulterated food under section 27 (4) and section 25 (2). The competent officer has the powers to seize or attach adulterated food.<sup>130</sup> Furthermore, whoever violates section 25(2) shall be liable to imprisonment from six months to ten years and a fine from five thousand baht to one hundred thousand baht.<sup>131</sup>

### **3.1.3 Drug Act B.E. 2510**

The objective to enact this act is to control any businesses concern with production, sale, importation or order of drugs into the Kingdom, as well as to restrict pharmacists' ability to sell dangerous medicines for public safety and welfare.

#### **(1) Definition**

Section 4 in this Act:

“Label” includes any picture, design, mark or statement displayed on the container or package of drugs.

This Act does not provide an explicit definition of product packaging; however, using lookalike product packaging may have a picture, design, mark or statement displayed on the container or package of drugs under the definition of the label under section 4. Thus, if using lookalike product packaging is a "label," this action will be controlled under label in this Act. This part will be analyzed in chapter 5.

#### **(2) Enforcement Authority**

The Enforcement Authority has the duty under this Act, being the Food and Drug Administration by the Secretary-General of the Food and Drug Administration, who is a “licensing authority” under section 4.<sup>132</sup> The Minister of

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<sup>130</sup> Ibid section 43 (5)

<sup>131</sup> Ibid section 59

<sup>132</sup> The Drugs Act B.E. 2510 section 4 “licensing authority means:

Public Health has charge and control of the execution of this Act, and the power to appoint competent officials, issue Ministerial Regulations prescribing fees not exceeding the rates attached to this Act, granting fee exemptions and determine other operations for the execution of this Act under section 5. Also, the Drug Committee has the duty to submit recommendations and opinions under section 10.<sup>133</sup>

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- (1) the Secretary-General of the Food and Drug Administration or the person entrusted by him or her for licensing the production of drugs or the importation or order of drugs into the Kingdom;
- (2) the Secretary-General of the Food and Drug Administration or the person entrusted by him or her for the sale of drugs in Bangkok;
- (3) the Province Governor, for the sale of drugs within his territorial Jurisdiction, except Bangkok;”

<sup>133</sup> Ibid section 10 “The Committee shall have the duty to submit recommendations and opinions on the following matters:

- (1) the licensing of the production or sale of drugs, or importation or order of drugs into the Kingdom, and the registration of drug formulas;
- (2) the suspension, revocation of a license or revocation of the register of drug formulas;
- (3) the prescription of the rules, procedures, and conditions concerning the production or sale of drugs, importation or order of drugs into the Kingdom, importation of drugs as the sample for examination, and the inspection of the premises of production or sale of drugs, importation or order into the Kingdom and storage of drugs;
- (4) the exercise of the power by the Minister under section 76 or section 77;
- (5) other matters as entrusted by the Minister.”

### (3) The Control Measure

If lookalike product packaging is a “Label” under this Act, section 25 (3) provide that a licensee who produces modern drugs shall provide labels corresponding to the formulas registered affixed to containers and packages for drugs produced of which the details show such as the name of the drug, the name of the producer and the province where the premises of production is located and the date of production, etc. Any licensee who fails to comply with section 25 shall be liable to a fine from two thousand to ten thousand baht under section 105.

#### 3.1.4 Cosmetic Product Act B.E. 2558

The purpose of this Act was to develop a control measure to protect consumers relating to cosmetic products, including prohibited to produced, imported or sold in any category, kind, or characteristic of the cosmetic product, as well as prescribe any substance prohibited to be used as mixture in producing cosmetic product, nature of container of cosmetic product, and place of import of cosmetic product.

#### (1) Definition

Section 4 in this Act:

“Container” means any substance for use specifically in packing or wrapping a cosmetic product;

“Statement” means any act to make appearance of a letter, picture, movie, light, sound, sign, or any action enabling general people to understand the significance;

“Advertisement” means an act by any means enabling people to see, hear or know the statement for commercial purpose;

“Label” means picture, artwork, or any statement concerning cosmetic product displaying on the cosmetic product, container or package, or inserting or accompanying with the cosmetic product, container or package, and shall include document or manual of use accompanying the cosmetic product.

If the lookalike product packaging is a "Container," "Statement," “Advertisement” and “Label” under this definition, using lookalike cosmetic product



packaging will be enforced under the control measure in this Act. This part will be analyzed in chapter 5.

## (2) Enforcement Authority

The Enforcement Authority with the duty to control under this Act is the Cosmetic Product Committee, which has power and duty under section 10.<sup>134</sup> The Minister of Public Health have charge and control of the execution of this Act and shall have the power to appoint the competent official, issue Ministerial Regulation prescribing the fee not exceeding the rate attached hereto, exempt the fee, and determine other activity and issue rule or announcement for implementation of this Act.<sup>135</sup>

## (3) The Control Measure

The Control Measure under this Act has two processes that are pre-market control measure and post-market control measure, as follows:

The pre-market control measure, if the product packaging is a "Container," "Statement" and "Label", the Minister of Public Health, with the advice of the Cosmetic Product Committee shall have the power to announce the nature of container of a cosmetic product to protect the safety and sanitary of person.<sup>136</sup> Also, any person who wishes to produce for sale, import for sale, or is employed to

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<sup>134</sup> The Cosmetic Product Act B.E. 2558 section 10 " The Committee has the power and duty as follows:

- (1) to give suggestion to the Minister on the matter concerning policy and measure for controlling cosmetic product under this Act;
- (2) to give suggestion to the Minister on the issuance of an announcement under section 6;
- (3) to give suggestion on revocation of the information receipt under section 36;
- (4) to give approval concerning revocation of the information receipt under section 37;
- (5) to carry out other activity prescribed in this Act or as entrusted by the Minister."

<sup>135</sup> Ibid section 5

<sup>136</sup> Ibid section 6 (5)

produce cosmetic product must inform the details of the cosmetic product to the Information Receiver. Upon issuance of an information receipt by the Information Receiver, he may produce or import such a cosmetic product.<sup>137</sup>

The post-market control measure, if any person produces or imports without applying for an information receipt under section 14, he shall be liable to an imprisonment for a term not exceeding six months, or to a fine not exceeding fifty thousand Baht, or to both.<sup>138</sup>

Furthermore, the production and importation shall provide label having accurate statement, or no misunderstanding in the essential elements statement concerning cosmetic product under section 22 (1), if in the case that any label is not in accordance with section 22, the Secretary-General with the approval of the Committee, shall have power to order the informer of cosmetic product to stop using or to rectify such label under section 23. If the informer who continues use this label shall be liable to an imprisonment for a term not exceeding six months, or to a fine not exceeding fifty thousand Baht, or to both.<sup>139</sup> As well as any person producing for sale, importing for sale, or being employed to produce cosmetic product who uses label which is not in accordance with section 22 paragraph two (1), shall be liable to an imprisonment for a term not exceeding six months, or to a fine not exceeding fifty thousand Baht, or to both under section 67.

For the control measure on Advertisement, this Act provides power and duty to the Cosmetic Product Committee, the same as The Committee on Advertisement under the Consumer Protection Act B.E. 2522.<sup>140</sup> This Act provide a penalty provision, that is, any person whose advertisement is not in accordance with section 41, or who does not comply with section 42 shall be liable to an imprisonment for a term not exceeding one year, or to a fine not exceeding one

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<sup>137</sup> Ibid section 14

<sup>138</sup> Ibid section 62

<sup>139</sup> Ibid section 69

<sup>140</sup> Patipatponkul 41

hundred thousand Baht, or to both. under section 84 and Any person who fails to comply with the order of the Secretary-General under section 43 or section 44 shall be liable to an imprisonment for a term not exceeding one year, or to a fine not exceeding one hundred thousand Baht, or to both under section 85 of the Cosmetic Product Act B.E. 2558.

### **3.2 The legal measure of consumer protection under the Trade Competition Act B.E. 2542**

The Trade Competition Act has a principle to promote and support competition in the goods and services market for reaching the aim that is economically effective and provides consumer protection. Primarily, the critical objective of this Act is promoting consumer choice on price, quality, and services.<sup>141</sup>

#### **(1) Definition**

Section 3 in this Act:

"Goods" means an article capable of being used or consumed, including the document of title thereof.

This Act does not provide an explicit definition of “any act which is not a free and fair competition” under section 29; if using a lookalike product packaging as any act which is not a free and fair competition will be enforced under the control measure in this Act. This part will be analyzed in chapter 5.

#### **(2) Enforcement Authority**

The Minister of Commerce has charge and control of the execution of this Act, except in relation to financial undertakings in respect of which the Ministry of Commerce and the Minister of Finance shall jointly have charge and control, and have the power to appoint competent officials. Also, the Ministry of Commerce and the Minister of Finance have the power to issue Ministerial Regulations for the execution of this Act as well as Notifications under the provisions of this Act.<sup>142</sup> The

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<sup>141</sup> Chulalongkorn University Faculty of Law, *Comparative study on the Trade Competition Law relating with Penalty and Leniency Program* (2556) 10

<sup>142</sup> the Trade Competition Act B.E. 2542 section 5

Trade Competition Commission has the power and duty to investigate and inquire into the commission of offenses under this Act by themselves.<sup>143</sup>

### **(3) The Control Measure**

If any business operator carries out any action which is not free and fair competition, and has the effect of destroying, damaging, obstructing, impeding or restricting business operation of other business operators or is intended to prevent other persons from carrying out business or to cause them to cease their business, The Trade Competition Commission has the power to issue a written order requiring the business operator to suspend, cease or change such action.<sup>144</sup> However, in considering the case under section 31, the Commission shall afford the business operator concerned reasonable opportunities to give explanations and present supporting evidence under section 32. Moreover, any person violating section 29 shall be liable to imprisonment for a term not exceeding three years, or to a fine not exceeding six million Baht, or to both, and, in the case of repeat offence, shall be liable to twice as much the penalty.<sup>145</sup>

#### **3.2.1 The protection under Section 29**

Section 29 “A business operator shall not carry out any action which is not a free and fair competition, and has the effect of destroying, damaging, obstructing, impeding or restricting business operation of other business operators or is intended to prevent other persons from carrying out business or to cause them to cease their business.”

This section has essential characteristics, as follows:

(1) It is a clearly unfair trade practice rule, due to it does not provide any provision that a business operator with market dominance. That is different from section 25 which is must prove the market dominance.

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<sup>143</sup> Ibid section 14 and section 15

<sup>144</sup> Ibid section 31

<sup>145</sup> Ibid section 51

(2) To enforce section 29 will hold the rule of reason because this section said that “Has the effect of destroying, impairing ...” This is different from section 25 that is per se rule said that if can prove that a business operator with market dominance and has 4 behavior under (1)–(4) of section 25, it is deemed that guilty.

(3) Section 29 is emphasizing to damages that arise from the injured business. It is not damaging to process or condition of trade competition in the market. It is shown that this Act provides section 29 for protecting the business operator from unfair trade practice of other business operators, it not protected or preserve trade competition in the market as section 25 section 26 and section 27.<sup>146</sup>

### 3.2.1.1 The objective of section 29

To control the practice or action of the business operator and promote free and fair trade competition by protecting the business operator with dominant market power from abuse practices beyond the scope of the normal business operation. Also, this business operator need not be the business operator with market dominance power under notifications of Thai Trade Competition Commission.

### 3.2.1.2 The elements of section 29

A business operator who infringes on section 29 will fulfill the following elements of the offence:

- (1) Having a practice between business operators only
- (2) This practice characteristic is not free and fair-trade competition.
- (3) Such act has an effect on business of other business operator by:
  - Destroying
  - Damaging
  - Obstructing

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<sup>146</sup> Mariam Kreemee, Saowaluk Cheewasittiyant and Deunden Nikomborirak, *The research project of unfair trade practice of others countries for developed the guidelines under section 29 the Thai Competition Act B.E. 2542 (2001) 3-7*

- Impeding
- Restricting
- Preventing from carrying out business or
- Ceasing to carrying out business

### 3.2.1.3 The guideline of section 29

The unfair trading practices which might be an offence under section 29, such as:

- (1) Fix or maintain price level on purchasing or selling of products or services unfairly;
- (2) Fix trading conditions that restrict any options in carrying out of others business operators;
- (3) Refusal or discrimination to enter into the transaction without reasonable ground;
- (4) Abuse negotiation power to take advantages from others business operators;
- (5) Any act of any methods to obtain trade secret or technology of others business operators; and
- (6) Any act which is not commonly course of business as well as with intent to destroy, impair, obstruct, impede or restrict the business operation of other business operators or is intended to prevent other persons from carrying out business or ceasing to carrying out business.<sup>147</sup>

### 3.3 The legal measure of consumer protection under the Thailand Competition Act B.E. 2560

The Thailand Competition Act B.E. 2560 was developed for providing the measure to control more effective trade competition and specified flexible and independent Enforcement Authority.

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<sup>147</sup> Department of Internal Trade Office of Internal Trade Promotion, *The guideline on Unfair Trade Practices under section 29 of the Trade Competition Act B.E. 2542* , 1 - 3

### **(1) Definition**

Section 5 in this Act:

"Goods" means an article capable of being used or consumed, including the document of title thereof.

This Act does not provide an explicit definition of “any action which has the effect of damaging of other business operators by unfairly obstructing, unfairly utilizing superior market power or superior bargaining power or unfairly setting trading conditions that restrict or prevent”. Under section 57, if using a lookalike product packaging as any act which has the effect of damaging of other business operators by unfairly impeding will be enforce under the control measure in this Act or not. This part will be analyzed in chapter 5.

### **(2) Enforcement Authority**

The Minister of Commerce has charge and control of the execution of this Act and has the power to issue Ministerial Regulations for the execution of this Act as well as an issue any affair execution of this Act.<sup>148</sup> The Trade Competition Commission has the power and duty to investigate and inquire into the commission of offences under this Act by themselves.<sup>149</sup>

### **(3) The Control Measure**

If any business operator carries out any action which has the effect of damaging other business operators by unfairly obstructing the business operations of other operators, unfairly utilizing superior market power or superior bargaining power, unfairly setting trading conditions which is restricting or impeding in the business operations of other operators and conduct in other ways prescribed in the Trade Competition Commission’s notification. The Trade Competition Commission has the power to issue a written order requiring the business operator to suspend, cease or change such action under section 60. However, if the business operator is notified of the issue a written order and disagree with that issue, he shall have a right to file a

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<sup>148</sup> the Trade Competition Act B.E. 2560 section 6 and section 7

<sup>149</sup> Ibid section 21

lawsuit in an administrative court within 60 days from the date of order's receipt. Moreover, any person violating section 57 shall be subject to an administrative fine of not more than 10% of income in the years of offence committed, In a case where it is an offence committed in the first year of the business operation, the person committing the offence shall be subject to an administrative fine of not more than one million Baht.<sup>150</sup>

Moreover, this Act provided that the officers shall have to power to enter places and venues of operation, production, sale, purchase, storage of goods, service provision of business operator or any person, or other places where it is reasonably believed that there is a violation of provision under this Act in order to conduct an examination under this Act to search and seize documents or other evidence under this Act or to collect or bring a good in the required quantity as a sample for examination or analysis without paying for the good in accordance with the criteria prescribed in the Commission's notification under section 63 (2) (3).

### **3.3.1 The protection under Section 57**

Section 57 "No business operator shall undertake any conduct resulting in damage on other business operators in one of the following ways:

- (1) by unfairly obstructing the business operation of other business operators;
- (2) by unfairly utilizing superior market power or superior bargaining power;
- (3) by unfairly setting trading conditions that restrict or prevent the business operation of others;
- (4) by conduct in other ways prescribed in the Commission's notification."

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<sup>150</sup> Ibid section 82



### 3.3.1.1 The Characteristics of Prohibited Practice<sup>151</sup>

(1) Unfairly obstructing the business operation of other business operators

(1.1) Unfair Fixing or maintain price level or fixing price lower than cost

(1.1.1) Fixing price power than cost can be divided into two types:

(a) “sale below cost” means fixing of selling price of product or services to be lower or reduce sale price lower than average total costs. Average total cost consists of cost of production or purchasing cost inclusive of sale and management expenses including other costs. As the business operator can bear loss during certain periods of time or loss is compensated by others profits, other business operators, therefore, cannot compete nor reluctant to enter the market as it is not efficient investment. For example, the sale of certain types of products and services differs from average total cost of certain period or sale of various products at a lower price than average total costs by continuously alternating products.

In case of a promotion of new product entering into the market, the sale price shall not be lower than the average total costs for too long a period, depending on the types and sort of products. Normally, such a period should not exceed one month, except products which require rapid sale otherwise damages may occur, for examples, easy perishable goods, nearly expired goods or obsolete products.

(b) Predatory Pricing

“Predatory Pricing” means fixing the sale price or lowering the sale price lower than the average variable costs. Average variable cost is a cost of purchase of raw materials for production or purchase of goods for sale excluding sale and management expenses and other expenses which can be viewed that the business operator agrees to suffer loss for certain period of time as it is able to bear loss in such period or the loss can be compensated with profits from other

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<sup>151</sup> Office of Internal Trade Promotion 2 - 6

products. As a result other business operators being unable to compete and it may consequently eliminate competitors from the market or reluctant to enter the market, as it may not be worth an investment for a long-term monopoly.

**Except:** (i) Products that required rapid sale otherwise damage may occur; for example, easily perishable goods, nearly expired goods or obsolete products;

(ii) business operators may encounter problems, unable to continue to carry out business or must cease the business.

(1.1.2) Unfairly Fix Minimum Purchasing Price means to fix the purchasing price of products or services, or prefabricated products, or raw materials lower than the usual prior purchasing price, making other competitors who have a higher purchasing price unable to sell its products, as it bears higher costs or is unable to compete, including making it more difficult for new business operators to enter the market. For example, a manufacturer of animal foods purchases agricultural products from farmers at a very low price causing troubles to farmers and other manufacturers who purchase at higher price because they have higher costs and, therefore, are unable to compete.

(2) Unfairly utilizing superior market power or superior bargaining power

(2.1) Resale Price Maintenance

“Resale Price Maintenance” means the manufacturer orders its customers to sell products or services at a specified price. Non-observance will be penalized. This creates non-competition of prices between dealers or retailers, which restricts competition of customers re-selling such products or services. Cases where the resale prices are lower than specified price are prohibited, as consumers are unable to buy product at lower price. In cases where the resale price is higher than the specified price, this is prohibited; this is aimed to limit competition of other manufacturers who sells at higher price or made difficult for other new business operators to enter in to the market because the sale price is too low and it is not attractive to compete.

(2.2) Tie in-sale means a condition, either directly or indirectly, forces the buyer to purchase another product when buying a product without any option. The manufacturer will exploit a product that has dominant power in the market as main product and force compulsory purchase of other tied-in products. This makes manufacturers of tied-in products unable to sell or compete and makes new manufacturer unable to enter the market

**Except:** for when the tied-in product promote efficiency.

For example, the tied-in product is needed for utilization, make it easy for customers use or create effectiveness for the use of main product or product with quality guaranty, or to prevent damage or effect on efficiency of product such as copy machine and toner, if poor efficiency toner is used, it could damage the copy machine.

(2.3) Abuse of dominant position to take advantage, force or lure customer to trade with; or set up any demands without reasonable ground and damage business of others.

(3) Unfairly setting trading conditions that restrict or prevent the business operation of others

(3.1) Enter into exclusivity agreement, which does not include authorized dealer and franchise. There are two types of exclusivity

“Exclusivity dealing” means trade exclusivity, both directly or indirectly, forces customers to accept and observe terms of such a deal unfairly. Such a deal does not have an effect on efficiency or quality of products or services or after sale services. For example, prohibition on sale of products of other business operators, compulsory purchasing of specified products or raw materials, or only purchase products or raw materials specific from business operators which the product or raw material do not require specific quality, only gives credit to specified business operators including specifies other conditions for business operation of its customers. In case of non-observance by customers, such customers will be penalized such as refusing to sell quantity at a lower rate than usual practice and delayed delivery.

In cases of an authorized dealer and franchise, the manufacturer has invested in the authorized dealer to create efficiency or quality of products or services including sale promotion, it is, therefore justifiable to restrict certain rights by way of exclusivity deal to prevent competitor from harvesting benefits without prior investment (Free-Riding). The exclusivity deal solely allows the authorized dealer to sell its manufacturer's products only to prevent the authorized dealer from selling competitor's products.

“Exclusive Territories” means agreement to restrict the sale area or territory, both directly or indirectly; this forces customers to accept and observe the terms of such deal unfairly in order to limit sale territory or designate groups of customers in each area to divide sale territory or absolutely allocate types of customers to dealers. Such agreement does not have an effect on efficiency or quality of products or services or after sale services. It creates non-competition between sellers of cannibalized-brand whereas there is still a competition with other brands (Inter-Brand). For example, the manufacturer allocates territory to each dealer, the dealer can only sell the products to customers in its own territory, customers from other territories cannot buy from such dealer, each dealer can sell to designated groups of customers only. Non-observance dealer will be penalized such as refusal to sell or reduce product volume to lower than usual practice.

In case of an authorized dealer and franchise, the manufacturer has invested in the authorized dealer to create efficiency or quality of products or services including sale promotion, it is, therefore, justifiable to restrict certain right on exclusive territory or sale area for the benefit of efficiency of sale and after-sale services.

(3.2) “Price Discrimination” means fixing of sale price of products or services or offer reduction or specifying discriminating conditions for products of the same type, quality, sale quantity and sale costs, against customers or buyers of the same business line such as distributors or retailer. For example, fixing of different sale price for different customers by selling at higher price to some buyers or offer different reductions resulted in higher profits for manufacturer but create

higher cost for those buyers who buy at higher price and create disadvantages and unfairness to customers re-selling the products, making them unable to compete with other buyers.

(3.3) Refusal to deal or deal under discrimination without reasonable ground. This means refusal to deal, in any form, with certain business operators or discriminates against certain business operators by employing demands or conditions.

(4) by conduct in other ways prescribed in the Commission's notification

At present the commission does not provide any notification related to this section.

### **3.4 The legal measure of consumer protection under the Thailand Trademark Act B.E. 2534**

The objective of the trademark for protects benefits of the trademark owner and goodwill, which is more commercial duty than the practice for protecting the creation of work as the protection of copyright and patent. In addition, trademark also protects the consumers by providing any product information. It leads consumer comfortable to search the product from trademark, which is attached to the product, because a trademark gives consumers knowledge of the product's origin. Moreover, the consumer can bring the person who is responsible for the impaired product to court from the trademark. For this reason, the business operator who is the trademark owner must attempt to preserve his product quality.<sup>152</sup>

#### **(1) Definition**

Section 4 in this Act:

“Mark” means a photograph, drawing, invented device, logo, name, word, phrase, letter, numeral, signature, and combination of colours, figurative element, sound or combination thereof;

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<sup>152</sup> Hemaratchata 300 - 301

“Trademark” means a mark used or is to be used on or is in connection with goods to distinguish the goods with which the trademark of the owner of such trademark is used from goods under another person’s trademark;

Section 7 provided that “a distinctive trademark is a trademark which enables the public or users to distinguish the goods with which the trademark is used from other goods

A trademark having or comprising any of the following essential characteristics shall be deemed distinctive.

(5) a combination of colours represented in a special manner;

(10) a shape that is not the natural form of the goods or a shape which is not necessary to obtain a technical result of the goods or a shape which does not give value to the goods.”

**(1.1) combinations of colours** means to bring more than two colours mix in the trademark, which is a distinctive trademark, and enables the public or users to distinguish the goods with which the trademark is used from other goods. For example, the SHELL Oil Company trademark use combinations of red and yellow colours, British Petroleum Public limited company (BP) use combinations of green and yellow colours.

**(1.2) figurative element** means shape or configuration is distinctive trademark which enables the public or users to distinguish the goods with which the trademark is used from other goods.

The Supreme Court Decision Case No. 7024/2549

The Coca-Cola Company filed an application to register its Coca-Cola bottle with the Department of Intellectual Property (“DIP”) in 2006. The bottle was represented as a two-dimensional image. The Department of Intellectual Property found it a generic picture and descriptive of the relevant product (soft drink) and refused its registration.

Coca-Cola Co appealed with the Trademark Board (“TMB”). The TMB sustained the rejection ordered of the DIP. Coca-Cola Co filed the lawsuit with the Intellectual Property and International Trade Court (“IP&IT Court”). The IP&IT

Court held that the pictorial representation of the bottle was registrable. The DIP appealed with the Supreme Court.

The Supreme Court determined that Coca-Cola's subject marks were invented pictures that had sufficient characteristics to allow consumers to differentiate Coca-Cola's products from the products of other proprietors. Therefore, they were sufficiently distinctive for registration as two-dimensional marks (not three-dimensional marks). Under the law, the picture of the bottle in each of Coca-Cola's applications constituted an invented picture. Section 7(6) of the Thai Trademark Act stipulates that an invented picture shall be distinctive for registration. The Court therefore ordered the DIP to proceed with the registration of both marks as two-dimensional marks. Later the Supreme Court Decision case No. 630/2551 also allowed the Coca-Cola Company to register its "Green Dimple Bottle" for the same reasons.

If any product packaging considers as a combination of colours, shape or configuration under this definition of section 4, section 7 paragraph two (5) and section 7 paragraph two (10), using this lookalike product packaging will be controlled under this act. This part will be analyzed in chapter 5.

## **(2) Enforcement Authority**

The Trademark Board shall have powers and duties to consider the appeal against the order or decision of the Registrar, consider and to make orders on the application for registration revocation of trademarks, service marks, certification marks, collective marks or license to use a trademark or service mark, provide advice or consultation to the Minister in the issuance of Ministerial Regulations or Notifications and consider other matters as assigned by the Minister.<sup>153</sup>

### **3.4.1 Passing-off**

Section 46 "No person shall be entitled to bring legal proceedings to prevent or to recover damages for the infringement of an unregistered trademark

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<sup>153</sup> the Thailand Trademark Act B.E. 2534 section 96

The provisions of this section shall not affect the right of the owner of an unregistered trademark to bring legal proceedings against any person for passing off goods as those of the owner of the trademark.”

This law does not provide the meaning of passing-off; however, an expert gave an opinion that “Passing-off” means that in the case of a person bring the goods that are not legitimate trademark owner’s goods to defraud sale for the buyer believe that these goods are the trademark owner’s goods. The defraud sale make the buyer confused or misled on the origin of the goods, any method to defraud, including using someone’s trademark with his product by without any consent of the trademark owner.<sup>154</sup>

The Passing-off behavior can show in many methods. However, it must show that the use of trademark behavior make confused or misled on the owner of the goods to the public. This Passing-off practice is an infringement of the legal right of the trademark owner. No matter the seller will sell products on the same class or for goods on the different class with the trademark owner’s goods, if this practice make confused or misled on the owner of the goods. In the case that the trademark owner has right to claim the damages or protect his right or another right under Thai law, generally is TITLE V Wrongful Acts of the Thailand Civil and Commercial Code.<sup>155</sup>

From the beginning to consider the Passing – off often limit in the case of trademark body that be identical or confusingly similar to another trademark and has the Passing – off behavior, for example

The Supreme Court decision no. 2844/2516 said that the plaintiff registers his trademark “Tellme” in class no. 48, which is perfume and a cosmetic. After that the defendant registered his trademark “Tellme” for goods in class no. 38 that is clothes and costume. The plaintiff and defendant’s trademark are artificial

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<sup>154</sup> Comthanongchai Chayphiroj, *Intellectual property law (complete version)* (1 edn, Banana sweet 2012)

<sup>155</sup> Thatchai Supasiri, *the explanation of Trademark Law* (1th edn, Nititham 1993) 107



word using the English language in the same word, they are different only plaintiff's trademark is handwriting style, but the trademark of the defendant is tpestyle, even if trademark of a plaintiff in the circle and defendant's ellipse has not frame line, but it is not a clear distinction. The voice is called "Tellme" in handwriting style as same as tpestyle. Thus this is deemed that both trademarks have identical or confusingly similar characteristic may make confused or misled to the public. Nevertheless, a defendant registered his trademark in a different class with plaintiff's goods, but it causes damages the plaintiff because of the buyer may be confused or misled that the defendant's product is a plaintiff product. The practice of a defendant is dishonest, and a plaintiff has right to prohibit defendant use that trademark.<sup>156</sup>

This Supreme Court decision showed that Passing – off is not limited to only the same goods or same class of goods; moreover, it has a broader scope to any cases that the defendant bring his goods for passing off as another's goods; it is not only defraud on the object but also defraud on the owner of the goods.

Afterwards, this rule will be develop to expand the protection of Passing – off to any type of packaging.

The Supreme Court Decisions No. 2335/2553 that case between Schneider Electric Industries SAS Plaintiff V. Thai Bumroong Electric Co Ltd. defendants. The Supreme Court has affirmed a decision of the Central Intellectual and International Trade Court and ordered the defendant to refrain from passing off its product as that of the plaintiff.

The Central Intellectual and International Trade Court ruled to stop using packaging and product descriptions that were similar to those used by Schneider. The court found that the defendant sought to pass off its product as that of plaintiff's product, based on the following facts and elements:

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<sup>156</sup> Maturos Chermchansophon, 'Protection of Tradedress' (Chulalongkorn 2000) 250

(1) The defendant's packaging was similar to the plaintiff packaging which is defendant's packaging had a similar shape, colour, layout, content (EASYPACT v EASYSET), slogan ("it's so easy and simple!") and pictures;

(2) The defendant use similar labels (for example Similar description of product quantity, voltage current, models, amount of poles, product ID, product descriptions and product certificates); and

(3) The defendant product was similar to the plaintiff packaging on size, design, colour, words, and content.

The Supreme Court agreed with the Central Intellectual and International Trade Court, in that the defendant's mark "EASYSET" was similar to the plaintiff's mark and the defendant's packaging was confusingly similar to the plaintiff's, which could mislead the public into believing that the product originated from the plaintiff.<sup>157</sup>

However, from the Supreme Court decision, even if similar product packaging is used and it is a clearly different trademark, it is not passing off under section 46.

### **3.5 The legal measure of consumer protection under the Thailand Penal Code B.E. 2499**

#### **3.5.1 Deceptive Trade Practices**

Section 271 provides that "Whoever, selling the goods by any fraudulent and deceitful means in order to deceive the buyer as to the origin source, nature, quality or such goods quantity, if such act not constitute cheating and fraud, shall be imprisoned not out of three years or fined not out of six thousand Baht, or both."

This section provides a criminal offence and penalty for any act including passing-off, said that selling the goods by fraudulent and deceitful means to deceive the buyer as to the source, nature, quality or such products quantity.

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<sup>157</sup> Parichart Monaiyakul Nuttaphol Arammuang, 'Supreme Court prohibits use of copycat packaging' (2011) <[www.worldtrademarkreview.com](http://www.worldtrademarkreview.com)> accessed 10 May 2017

### 3.5.1.1 Source of offence

The Deceptive Trade Practices under section 271 have the same characteristic as cheating and fraud practice under section 341; however this provision has specific characteristic in the part of action.

Moreover, the deceptive trade practice must not constitute a cheating fraud practice under section 341. Thus, the offence under section 271 differs to the cheating fraud practice under section 341 in many factors, as follows:

- (1) the case of deception which is provided under section 271
- (2) the offence under section 271 did not cause injury to property in the same way with section 341
- (3) the offence under section 271, the offender did not have specific intention, which is dishonestly intention.

### 3.5.1.2 The offender

Whoever may be an offender under this offence, this section did not restrict only the merchant.

### 3.5.1.3 The action of offence

The action of offence is “selling” the goods by any fraudulent and deceitful, the definition of “sell” provide under section 453 of the Thailand Civil and Commercial Code.<sup>158</sup> Thus an injured person under this offence is the buyer, who is the party in sale contract.

The consumers who are deceived into buying goods are injured persons and they have a right to bring a criminal case against seller to the court. However, the business owner does not have the right to bring a criminal case

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<sup>158</sup> Section 453 of the Thailand Civil and Commercial Code provide that “Sale is a contract whereby a person, called the seller, transfers to another person, called the buyer, the ownership of property, and the buyer agrees to pay to the seller a price for it.”

under this section, because he is not an injured person under section 2(4) of the Thailand Criminal Procedure Code.<sup>159, 160</sup>

When considering this section it is found that the sale of goods case means buying and purchasing any goods; it is not limited to only any goods in the market, but not including immovable property. To deceive by any way, that is give an opinion, exaggerate, promise for make a deception and this practice was not done with the assertion of a falsehood or the concealment of the facts, which should be revealed. So that, by such deception, must make the buyer believe in the following:

### 3.5.1.3 The subject of offence

(a) Origin source means a place of production or the place where product occur. For example, the country of origin, may include the place, factory or manufacturer, Geographical Indication, namely the product made in Thailand but the seller said that this product made in Japan.

(b) Condition means nature or characteristic of goods. For instance, the seller said that this is a pure gold, but in the fact that the seller brings gold plating on a copper round or brass round for fake gold.

(c) Quality means benefits that consumer receive from that goods, such as the seller bring the low-quality goods for sale by fraudulent and deceitful that this is a high quality good.

(d) Quantity means net amount, weight, length, volume, such as in the label and packaging provided that net amount 50 grams but in fact that the product has net amount only 45 grams.

### 3.5.1.4 The results of offence

- (1) the buyer believes by deception.
- (2) sell the product

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<sup>159</sup> The Thailand Supreme Court Decision No. 1510/2514

<sup>160</sup> Surasak Likkhasitwatthanakun, *the explanation of Offenses against property under the Thailand Penal Code* (Winyuchun Publication House 2016) 186

The Thailand Supreme Court Decision No. 1124-1125/2506 decided that the plaintiff purchased the product from the defendant because it was a low price; the plaintiff did not believe by any deception. The plaintiff is not the injured person under section 2(4) of the Thailand Criminal Procedure Code, section 272 and section 274 of the Thailand Penal Code.<sup>161</sup>

The Thailand Penal Code did not provide the definition of “any fraudulent and deceitful means”. Therefore, this thesis will consider that in the case of the business operator uses lookalike product packaging is deemed that “any fraudulent and deceitful means” or not. This part will be analyzed in chapter 5

### **3.5.2 Compound Offense Relating to Trade**

Section 272 provided that “Whoever:

(1) Uses a name, figure, artificial mark or any wording in the carrying on trade of the other person, or causes the same to appear on a goods, packing, coverings, advertisements, price lists, business letters or the like in order to make the public to believe that it is the goods or trade of such other person”

#### **3.5.2.1 The offender**

Whoever may be an offender under this offence.

#### **3.5.2.2 The action of offence**

The practice of offence must consist of 2 factors

- (1) using without a consent’s authority.
- (2) appear on a goods, packing, coverings, advertisements, price lists, business letters or the like with his product without consent

Any business operator who uses a name, figure, artificial mark or any wording in the carrying on of trade of the other person, or causes the same to appear on goods, for example, to counterfeit any figure, artificial mark or any wording of the other person, it is not similar but identical.<sup>162</sup>

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<sup>161</sup> Ibid 187

<sup>162</sup> The Supreme Court Decision Case Number 783/2508

### 3.5.2.3 The subject of offence

(1) “Name” in the carrying on trade of the other person, for example, the name of the shop, the name of place, the name of a person or the name of products.

(2) “Figure” in the carrying on trade of the other person: namely, people figure, animal figure or any figure associated with trade of the other person, for instance the Darkie’s image of a wide-eyed, smiling dark-skinned black male wearing a top hat, monocle and bow-tie.

(3) “Artificial mark” in the carrying on trade of the other person: namely, imprint or mark.

The Supreme Court Decision Number 4925/2538: the plaintiff provides that the defendant brings a chemical solution mixed with a chemicals substance without a permit and put this solution in shampoo bottles that have a name, figure, artificial mark under Vidal Sassoon’s Trademark, Pantene Pro-v’s mark, Palmolive Optima’s Roman mark and Rejoice’s mark. Those are trademarks and used for the trade of the Colgate-Palmolive Company, Procter & Gamble Company that are registered in the United States. The defendant is doing this practice in order to deceive the buyer into believing it is the product of previous company and distributes it to the public. When any people use this product it will injure the health of consumers. The plaintiff’s plaint completely provides the element of offence under section 236 section 272 of The Thailand Penal Code and section 158 (5) of the Thailand Criminal Procedure Code.

(4) “Any wording” in the carrying on trade

That is, any statement in the carrying on trade.

Supreme Court Judgment No. 386/2509: The act of violation is an unlawful act against the legal rights of the plaintiff. Section 272 (1) of Criminal Code covers only the trademark, as a name or statement in business operation shall not be deemed as a pattern of the manufactured products. An artificial mark is a mark designed according to the manufacturer’s wish to serve as a trade symbol. A picture means the drawing or photography of a person, place or object appearing on

the product to make them recognizable as the product of such manufacturer. The picture shall not be considered as a shape or design of the product, because the product could be manufactured in any shape or design with any decoration. However, without a trademark in business operation, the manufacturer of the product cannot be traced. Section 272 (1) of Criminal Code is not probation against the manufacturing of duplicated or similar product. Without the legal protection of the benefit, which the plaintiff wants, the plaintiff accordingly has no lawful right to exercise against anyone.

Supreme Court Judgment No. 353/2510: Section 272 (1) of Criminal Code is a provision about trademark. However, it does not cover the shape and design of the product or merchandise. Therefore, it is not probation against the manufacturing of duplicated or similar product. Without the legal protection of invention right, although the defendant manufactures the product identical to the product of the plaintiff, this is not a violation against the plaintiff. The plaintiff cannot claim that the defendant unlawfully exercises the right or exercises the right in a way that causes damage against the plaintiff.

To consider that the packaging is an “artificial mark” under this section or not, from the result of study and the Supreme Court Decision, is not obviously decided on the packaging of product. This part will be analyzed in chapter 5

### **3.6 The legal measure related to remedying consumers from the effect of lookalike product packaging in Thailand**

This part will provide the consumer rights and remedies under the Thailand Civil and Commercial Code and Special Law, that is consumers have the right to claim damages under the general civil and commercial principle and study the practice of the business operator in the exercise of rights in bad faith, fraud or mistake, tort under the Civil and Commercial Code. Moreover, the consumers who suffer damage have the right to claim for damages under a special law, such as the Consumer Protection Act B.E. 2522, the Trade Competition Act and Trademark Act B.E. 2534

### 3.6.1 The right of consumers to claim and remedies under Thailand Civil and Commercial Code

#### 3.6.1.1 Good Faith

“Good Faith” is a general principle of Thailand Civil and Commercial Code provided in section 5 that. “Every person must, in the exercise of his rights and the performance of his obligations, act in good faith.” To the fundamental principle of Thai legal system by giving the duty of everyone who will exercise his rights or performance of his obligations must practice under the good faith.<sup>163</sup> This principle can use to support any rule of the contract or law for complete substance, control or prevent the parties to exercise the right in the way of unfair practice and developed right and duty of the parties to comply with each other in the future. Mainly, the court uses the good faith principle to prevent exercise the right to unfair act such as duplication of favor trademark by use this trademark for the buyer confused or misled on the origin of the goods and increase his sales, before enacting the Trademark Act. The court decided that duplication of the trademark is one of the exercises the right in bad faith.<sup>164,165</sup>

#### 3.6.1.2 Mistake

The declaration of intention with the mistake is the case of a party declaration of intention that is different from the intention in the recesses of his mind, but occurs when the party is unaware. Because, if a party knows that his declaration of intention is different from the intention of his mind, it will be a case of in the recesses of his mind does not intend to be bound by his expressed intention<sup>166</sup>

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<sup>163</sup> Kittisak Pakkati, *Good faith & supervening events: In the Germany France Anglo-America and Thai legal system* (Winyuchon 2012)

<sup>164</sup> *Ibid.*, 92 – 105

<sup>165</sup> The supreme court decision no. 38/2503

<sup>166</sup> The Civil and Commercial Code section 154 “A declaration of intention is not void on the ground that the declarant in the recesses of his mind does not intended to be



or in the case that a declaration of intention made with the connivance of the other party which is fictitious.<sup>167</sup>

In general in a declaration of intention under a mistake, a party may express his intention due to making a mistake by himself or in the fact that other people deceive him to make a declaration of intention under a mistake.<sup>168</sup>

(1) the declaration of intention made under a mistake as to an essential element of the juristic act

Section 156 provided that “A declaration of intention is void if made under a mistake as to an essential element of the juristic act.”

The mistake as an essential element of the juristic act under paragraph one is, for instance, a mistake as to a character of the juristic act, a mistake as to a person to be a partner of the juristic act and a mistake as to a property being an object of the juristic act.”

A declaration of intention under a mistake as to an essential element of the juristic act is void under section 156 paragraph one, arising from the party expressing his intention with a mistake as to an essential element of the juristic

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bound by his expressed intention, unless this hidden intention was known to the other party.”

<sup>167</sup> Ibid section 155 “A declaration of intention made with the connivance of the other party which is fictitious is void, but its invalidity cannot be set up against third persons injured by the fictitious declaration of intention and acting in good faith.

If a declaration of fictitious intention under paragraph one is made to conceal another juristic act, the provisions of law relating to the concealed act shall apply.”

<sup>168</sup> Akarawit Sumawong, *The explanation of the Civil and Commercial Code concern with juristic acts and contracts* (Institute of Legal Education of the Thai Bar Association 2014) 106

act, this declaration of intention different from intention of his mind and he did not know that his intention is expressed differently from intention in his mind.

The essential elements of the juristic act mean that the thing that will have a juristic act, if do not have that thing. The party will not bind by his juristic act. According to section 156 paragraph 2 gives an example that a mistake as to a character of the juristic act, a mistake as to a person to be a partner of the juristic act and a mistake as to a property being an object of the juristic act. This paragraph uses the word “for instance” showed that it not limited only an example which provided.

A mistake as to a property being an object of the juristic act

This means that the party mistake on a property being an object of the juristic act, when the misunderstanding arises is deemed that a party made under a mistake as to an essential element of the juristic act cause to a juristic act is void.<sup>169</sup> For example, the buyer would like to purchase that land. But when the parties made the sale contract, which specified that, buy another land and the buyer is not intent to buy another land. In that case is the mistake as to a property is an object of the juristic act. Thus a sale contract is void.

(2) The declaration of intention made under a mistake as to a quality of the person or a quality of the property.

Section 157 provided that “A declaration of intention is voidable if made under a mistake as to a quality of the person or a quality of the property.

A mistake under paragraph one must be a mistake as to the quality which is considered as essential in the ordinary dealings, and without which such juristic act would not have been made.”

A declaration of intention under a mistake as to a quality of the person or a quality of the property is not a case of a mistake as to a person or a mistake as to a property which is the mistake as to an essential element of the juristic

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<sup>169</sup> Ibid., 110

act. However, it is the case that the party expressed intention to make the juristic act with person or property is correct, but the party misunderstands that this person or property has any quality which appears that it has the quality difference from it fact. If being a mistake as to the quality which is considered as essential in the ordinary dealings, and without which such juristic act would not have been made, a declaration of intention shall be voidable.

A quality of the property which is deemed that as essential is the property is genuine or counterfeit, for example, the machine which is he buy can use with active or not.<sup>170</sup>

In the case that uses lookalike product packaging dress with his house brand product, it is deemed that this practice causes to any consumers mistake on products or quality or the origin of products. Thus this thesis will consider that the consumer's mistake on the product of the brand manufacturer is a mistake as to a property being an object of the juristic act and a mistake as to an essential element of the juristic act under section 156 or not. Also, we will consider that any consumers mistake on quality or the source of the product is a mistake as to a quality of the property which is considered as essential in the ordinary dealings under section 157 or not. Moreover, this case has an issue will consider that in the fact that many consumers lack duty of care to read and notice product packaging and labeling that this product are different from the brand product, it will be deemed that the case of consumers' gross negligence under section 158 or not. If it considered that in the case of gross negligence consumers cause to they could not avail him of such invalidity under section 158.<sup>171</sup>

For the legal consequence of mistake separate on 2 cases following

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<sup>170</sup> Ibid., 115 - 117

<sup>171</sup> The Civil and Commercial Code section 158 “If the mistake under Section 156 or Section 157 was due to the gross negligence of the person making such declaration, he cannot avail himself of such invalidity.”

(1) If A mistake as to an essential element of the juristic act, a declaration of intention is void. This declaration of intention is the nullity, and any property arising from a void act shall be return to their owner by the provisions on Undue Enrichment under section 172.<sup>172</sup> In this case different from a case of the declaration of intention is voidable which the parties shall be restored to the condition in which they were previously under section 176.

(2) If A mistake as to a quality of the property, which is considered as essential in the ordinary dealings under section 157, a declaration of intention is voidable. When the voidable act is avoided, it is deemed to have been void from the beginning; and the parties shall be restored to the condition in which they were previously, and if it is not possible to so restore them, they are indemnified with an equivalent under section 176 of the Civil and Commercial Code.

### 3.6.1.3 Fraud

The declaration of intention produced by fraud is the party expressed his intention as intention as in his mind. This declaration of intention produced by fraud is different from the case of hidden intention under section 154 and the fictitious declaration of intention under section 155.<sup>173</sup>

Section 159<sup>174</sup> paragraph one provided that “declaration of intention produced by fraud is voidable.”

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<sup>172</sup> Ibid section 172 “A void act cannot be ratified, and its nullity may be alleged at any time by any interested person.

The return of property arising from a void act shall be governed by the provisions on Undue Enrichment of the Code.”

<sup>173</sup> Sumawong *ibid.*, 123

<sup>174</sup> The Civil and Commercial Code Section 159 “A declaration of intention produced by fraud is voidable.

An act under paragraph one is voidable on account of fraud only when it is such that without which such juristic act would not have been made.

The Declaration of intention produced by fraud is the case of the party expressed his intention due to using deceitful means with the assertion of falsehood or the concealment of the facts which should be revealed for deceives the party believe, as well as the declaration of intention following the objective of the deceiver.

In the case that business operator intends to use lookalike product packaging with leading brand product, consumer mistake caused by copycat packaging can take many issues. They are deception on the brand, origin, and quality of the product. This thesis will consider that in this case is deemed that the business operator fraud consumers or not.

For the legal consequence of fraud separate on 2 cases following

(1) A declaration of intention produced by fraud under 159<sup>175</sup> is voidable, this result same the legal consequence of a declaration of intention made under a mistake as to a quality of the property according to section 157.

(2) Incidental Fraud under section 161<sup>176</sup>, a declaration of intention produced by incidental fraud is not voidable. The consumers only have entitled to claim compensation for damage resulting from such fraud.

When a party has made a declaration of intention owing to a fraud committed by a third person, the act is voidable only if the other party knew or ought to have known of the fraud.”

<sup>175</sup> Ibid section 159 “A declaration of intention produced by fraud is voidable.

An act under paragraph one is voidable on account of fraud only when it is such that without which such juristic act would not have been made.”

<sup>176</sup> Ibid section 161 “If the fraud is only incidental that is to say it has merely induced a party to accept more onerous terms than would otherwise have done, such party can only claim compensation for damage resulting from such fraud.”

### 3.6.1.4 Wrongful Acts

Section 420 of the Civil and Commercial Code stated that “A person who, willfully or negligently, unlawfully injures the life, body, health, liberty, property or any right of another person, is said to commit a wrongful act and is bound to make compensation, therefore.”

In the case that the business operator uses lookalike product packaging of other business, whether the practice of business operator will produce by willfully or negligently to unlawfully injures the property or any right of the consumer or not. This part will analyze in chapter 5.

If this practice is a wrongful act of the business operator done with consumers, the consumers have right to claim any compensation under section 438<sup>177</sup> and the consumers have right to claim the compensation within one year from the day when the wrongful act and the person bound to make compensation became known to the consumers, or ten years from the day when the wrongful act was committed.<sup>178</sup>

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<sup>177</sup> Ibid section 438. “The Court shall determine the manner and the extent of the compensation according to the circumstances and the gravity of the wrongful act.

Compensation may include restitution of the property of which the injured person has been wrongfully deprived or its value, as well as damages for any injury, caused.”

<sup>178</sup> Ibid Section 448 paragraph one “The claim for damages arising from the wrongful act is barred by prescription after one year from the day when the wrongful act and the person bound to make compensation became known to the injured person, or ten years from the day when the wrongful act was committed.”

### 3.6.2 The right of consumers to claim and remedies under Special Law

#### 3.6.2.1 Consumer Protection Act B.E. 2522

This act provides the legal measure to protect consumer on Advertisement, labels, contract etc. as well as there are 5 rights of consumers as follow:

(1) The right to receive correct and sufficient information and description as to the quality of goods or services. That is the right to receive actual advertisement or appearance of the label and without harm and damage to the consumer as well as the right to receive a correct and enough information of the goods or services and did not the misunderstanding of the consumers on an unfair purchase or receive services.

(2) The right to enjoy freedom in the choice of goods or services. That is the consumers have right to buy or accept services with their consent and without unfair inducement.

(3) The right to expect safety in the use of goods or services, said that consumers have right to receive safety and quality standard goods and services as well as its not injure life, body, health, or property of consumers, in the case that use follow by the suggestion or consumers uses it with careful according with condition of goods or services.

(4) The right to a fair contract, which is the right to receives fair contract.

(5) The right to have the injury considered and compensated in accordance with the laws. That is the right of consumer protection and remedies, after infringement of consumer right under (1) – (4).<sup>179</sup>

According to this Act provide and protect consumer right on the right to have the injury considered and compensated under section 4 (4). However, this Act provides only the general consumer right and did not provide any

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<sup>179</sup> The Consumer Protection Act B.E. 2522 section 4

detail of the legal measure related to consumer's right to redress. Therefore, the remedies measure of consumer will bring the general remedy measure and claim damages under the wrongful Act of the Thailand Civil and Commercial Code to apply with the Thailand Consumer Protection Act. In general, when consumers suffer the damage from businesses to responsibility under contract that this practice does not conform to the sale or service contract, the consumers who are injured have right can claim the damages against business. Moreover, in the case that consumers injure the life, body, health, liberty, property or any right due to consuming goods or receives services of the business. It deemed that an infringement of consumer right. The consumers who are injured have right to claim the compensation from infringer under section 420 of the Civil and Commercial Code.<sup>180</sup>

However, this Act did not provide the specific legal measure to claim and remedies for consumers, but this act more protects consumer than general protection. On the one hand, in general case under Civil and Commercial Code, consumers will bring the action by themselves, but on the other hand in the consumer case and the Consumer Protection Board consider that the pursuit of such legal actions will be beneficial to consumers at the large, not only consumers but also any Representative Organizations can claim property or damages for consumers under this Act, the Representative Organizations have two category follow as:

(1) The Public Representative Organization

This Act provide that the Consumer Protection Board have the powers and duties concern with infringement of consumer right such as consider the complaints from the consumers who suffer hardship or injury resulting from the acts of the businessman, institute legal proceedings regarding the infringement of the

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<sup>180</sup> Nonthawatch Navathakulphisut, *Consumer Protection Law* (The Textbook and study document of Faculty of Law Thammasat University 2017) 93



consumer's right as Board thinks fit or when there is a request under section 39 and arbitrate or conciliate issue of dispute concern with the infringement of consumer right.<sup>181</sup>

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<sup>181</sup> The Consumer Protection Act B.E. 2522 section 10 "The Board shall have the following powers and duties;

(1) to consider the complaints from the consumers who suffer hardship or injury resulting from the acts of the businessman;;

(1/1) to arbitrate or conciliate issue of dispute concern with the infringement of consumer right which is the consumer and business consent before filing an action to the court, all this under the regulation as the Board specify and publication in the Government Gazette.

(1/2) to promote, develop and support the consumer protection work, all this under the regulation as specified by the Board.

(2) to proceed with the goods which may be harmful to the consumer under section 36;

(3) to issue or publicize information concerning goods or services which may case damage to or be prejudicial to the right of the consumers and for this purpose, the names of such goods or service or the name of the businessman may be specifically

(4) to give recommendation and advice to the ad hoc committees, and consider and determine appeals against the order of the ad hoc committees;

(5) to lay down rules concerning the performance of duties the ad hoc committees and sub-committees (6) to scrutinize and expedite the execution of powers and duties of the competent officials, government offices or other state agencies in accordance with the laws as well as to expedite the legal proceeding by the competent officials for the offences regarding the infringement of the consumer's right;

(7) to institute legal proceedings regarding the infringement of the consumer's right as Board thinks fit or when there is a request under section 39;

(8) to recognize an association under section 40;

The Consumer Protection Board has the power to institute legal proceedings in the infringement of the consumer's rights under section 39.<sup>182</sup>

(2) The Private Representative Organization

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(9) to submit an opinion to the Council of Ministers concerning the policy and measure for the protection of the consumer, and consider and give opinion in any matter regarding the consumer protection as entrusted by the Council of Ministers of Minister

(10) to do any other act as prescribed by laws to be the function of the Board. In the performance of duties under this section, the Board may entrust the Office of the Consumer Protection Board to carry out or prepare proposals to be submitted to the Board for consideration.”

<sup>182</sup> Ibid section 39 “In the case where the Board thinks fit to institute legal proceedings in the infringement of the consumer's rights or upon receipt of complaints from the consumers whose rights were infringed and the Board is of the opinion that the institution of such legal proceedings will be beneficial to the consumers as a whole, the Board has the power to appoint a public prosecutor with the approval of the Director-General of the Department of Public Prosecutions, or an office of the Consumer Protection Board whose qualification is not below the Bachelor of Laws degree the consumer protection official having the duty to institute civil and criminal proceedings in the court against the persons infringing the consumer's rights, and when the Board has notified the Ministry of Justice in order to inform the court of the matters, the consumer protection official shall then have the power to institute legal proceeding as entrusted by the Board.

In the legal proceedings in the court, the consumer protection official shall also have the power to claim property or damages for the complainant and, for this purpose, all the costs will be exempted.”

This Act provides the “private organization” which has to protect consumer right parallel with the public organization concern with consumer protection. Mainly to give assist and facility to file a pliant to the court, in the case that consumer suffers injury resulting from the acts of the businessman which regarding infringement of the consumer’s right.

Section 41 paragraph one states that “In the legal proceedings for infringement of the consumer’s rights, the association which has been recognized by the Board under section 40<sup>183</sup> has the right to institute civil and criminal proceedings or bring any legal proceedings for the protection of the consumers and shall have the power to sue for the recovery of damages on behalf of its member if it has obtained a power of attorney to claim damages from its member.”

### 3.6.2.2 Consumer Case Procedure Act B.E. 2551

This act is one of the consumer protection laws that showed the high progress of the Thai legal system to improve the effective enforcement of consumer protection, especially in the case of file a plaint and procedure in the court. The Consumer Case Procedure Act B.E. 2551 enact for resolve the problem of “unfair” on filing and take action of the consumers against the business operator.<sup>184</sup>

#### (1) The controlling virtue and ethical behavior of business operator

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<sup>183</sup> Ibid section 40 “Any association which has as its object the protection of consumers or opposition against unfair trade competition and whose regulations with respect to the board, members and methods of operation of the association are in accordance with the conditions prescribed in the Ministerial Regulation, may file the application to the Board for its recognition so that the association has the right and power to institute legal proceedings under section 41.

The filing of the application under paragraph one shall be in accordance with the rules and procedure prescribed in the Ministerial Regulation. The recognition of the association under paragraph one shall be published in the Government Gazette.”

<sup>184</sup> Navathakulphisut., 169

To control of business operator realize with the morality and ethical behavior as well as preserve production standard, distribution, and service for consumers that assist in promoting the sustainable protection of consumer right.

Section 12 “In the exercise of his or her right, or in the performance of an obligation, the Business Operator shall act in good faith, taking into account the appropriate trade standard under the fair business system.”

The fact from evidence of the case that the business operator practice in good faith and taking into appropriate trade standard under fair business system or not, it is a substantial fact of the judicial discretion.

“The appropriate trade standard under fair business system” is deemed that “ordinary usage” which the court used with interpreted any contract in consumer cases. This Act did not provide a definition of “The appropriate trade standard under fair business system”, however if consider from “United Nations Guidelines for Consumer Protection” (as expanded in 1999) that Department of Economic and Social Affairs give this guideline to every member states,<sup>185</sup> also “United Nations Guidelines for Consumer Protection” which United Nations Conference On Trade and Development 2016 provide the principles for good business practices. The principles that establish benchmarks for good business practices for conducting online and offline commercial activities with consumers are (a) Fair and equitable treatment is businesses should deal fairly and honestly with consumers Businesses should avoid practices that harm consumers (b) Commercial behavior is business should not subject consumers to illegal, unethical, discriminatory or deceptive practices, such as abusive marketing tactics.<sup>186</sup> It should be used as a guideline and interpret section 12.

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<sup>185</sup> Thanit Kessawaphituk, *The Explanation of Consumer Case Procedure Law (2551)* 67

<sup>186</sup> United Nations, ‘United Nations Guidelines for Consumer Protection’ (United Nations Conference On Trade and Development ) provide on IV Principles for good business practices that

“(a) Fair and equitable treatment. Businesses should deal fairly and

## (2) Punitive Damages

Punitive damages or exemplary damages mean awarded - not only by way of compensation but also as a punishment to the defendant. It is compensation that the court specified as reminds<sup>187</sup> and deter the business operator to manage a business by intentionally takes advantage from the consumer unfairly as well as protect consumers as a whole from suffering hardship or injury resulting from consume goods or receive services by the bad faith business operator or consider on appropriate trade standard under a fair business system. Section 42 provided that the court has the power to order the business operators to pay punitive damages in addition to the actual damages.

(2.1) if the act upon which the plaint is based arises from the fact that the business operator

a) Intentionally takes advantage from the Consumer unfairly

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honestly with consumers at all stages of their relationship, so that it is an integral part of the business culture. Businesses should avoid practices that harm consumers, particularly with respect to vulnerable and disadvantaged consumer.

(b) Commercial behaviour. Businesses should not subject consumers to illegal, unethical, discriminatory or deceptive practices, such as abusive marketing tactics, abusive debt collection or other improper behaviour that may pose unnecessary risks or harm consumers.

Businesses and their authorized agents should have due regard for the interests of consumers and responsibility for upholding consumer protection as an objective.”

<sup>187</sup> Prateep Aowvichidkul, *The legal procedure under consumer protection law concise version* (Asiakit Pacprint 2008) 63

- b) Willingly causes damage to customer
- c) Grossly negligent without considering the damage caused to Consumer
- d) Act in a manner, which contravenes the responsibility as a person having occupation, or business that is trusted by the public

(2.2) the judgment that the Business Operator pays the actual damages to the consumer, the court shall have the power to order the business operator to pay punitive damages in addition to the actual damages.

(2.3) the court shall have considered the following factor to fixed the punitive damages such as

- a) The damage to the consumer
- b) The interest received by the business operator,
- c) Financial status of the business operator
- d) The fact that the business operator has relieved the incurred damage
- e) The fact that the Consumer has partly caused the damage.

The Court shall have the power to impose not exceeding two times of the actual damages imposed by the Court, but if the actual damage is not exceeding fifty thousand baht, the Court shall have the power to impose punitive damages not exceeding five times the actual damages imposed by the Court.<sup>188</sup>

### 3.6.2.3 Trade Competition Act B.E. 2542

The Trade Competition Act B.E. 2542 provides that the injured person who suffers damage as a consequence of the violation of section 29 shall have the right to bring an action for damages against violators under section 40. In bringing an action for damages the Consumer Protection Board or associations recognized under the law on consumer protection shall be entitled to bring an action for damages on behalf of consumers or members of the associations.<sup>189</sup>

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<sup>188</sup> Kessawaphituk 163 - 165

<sup>189</sup> the Trade Competition Act B.E. 2542 section 40 paragraph 2

This Act gives the private enforcement right for directly claim the damages from the violator contribute to increase efficiency enforcement and support the public sector to enforcement. As well as if the public sector ignored to bring an action for damages, the private rights of action for the person sustaining damage can claim the damages.<sup>190</sup>

However, if an action for damages pursuant to section 40 is not brought before the court within one year as from the date on which the person sustaining damage knew or ought to have known of the ground thereof, the right to bring the case before the Court shall lapse under section 41.

The Trade Competition Act B.E. 2542 did not provide a private right of a person sustaining damages for direct bring the criminal action on his motion, but he has a right to file a complaint with the commission for consideration under this Act under section 55.

#### **3.6.2.4 Trade Competition Act B.E. 2560**

The Trade Competition Act B.E. 2560 provides that the injured person who suffers damage as a consequence of the violation of section 57 shall have the right to bring an action for damages under section 69. In bringing an action for damages, the Consumer Protection Board or associations recognized under the law on consumer protection shall be entitled to bring an action for damages on behalf of consumers or members of the associations.

This Act gives the private enforcement right for directly claim the damages from the violator contribute to increase efficiency enforcement and support the public sector to enforcement. As well as if the public sector ignored to bring an action for damages, the private rights of action for the person sustaining damage can claim the damages.

However, if an action for damages pursuant to section 69 is not brought before the Court within one year as from the date on which the person

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<sup>190</sup> Suthee Supanid and Kamolvon Jiravisit, *Principles and rules of the Competition Act of 1999* (1 edn, Thammasartpress 2012) 18

sustaining damage knew or ought to have known of the ground thereof, the right to bring the case before the Court shall lapse under section 70.

### 3.6.2.5 Trademark Act B.E. 2534

This act did not provide any right of the consumer to claim and remedies. However, the trademark owner has the right to plaint passing off under section 46 against the imitator to protect his product packaging.

In the case of the passing off under section 46 cause the trademark owner suffers the damage, which is deemed that the violator commits a wrongful act under section 420 and 438 of the Thailand Civil and Commercial Code.<sup>191</sup>

Nevertheless, the Trademark Act did not provide the criminal offences concern with the commit of an unregistered trademark, we will bring the Thailand Penal Code, Specific Offenses, TITLE VIII, OFFENCE RELATING TO TRADE to enforce and fulfill with section 46 of the Thailand Trademark Act.<sup>192, 193</sup>

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<sup>191</sup> Hemaratchata 351

<sup>192</sup> Ibid 351

<sup>193</sup> Lertdhamtewe 148



## CHAPTER 4

### THE LEGAL MEASURE TO PROTECT CONSUMER FROM LOOKALIKE PRODUCT PACKAGING UNDER INTERNATIONAL CONVENTION AND FOREIGN COUNTRIES

This chapter will examine the legal measure to control lookalike product packaging and the legal measure related to consumer remedies from any effect of lookalike product packaging under the international convention and foreign countries, to protect consumer and competitors. Researching and studying in both common law countries and civil law country may bring an appropriate measure as a guideline and model law to develop a legal measure to protect and control lookalike product packaging in Thailand.

#### 4.1 International

##### 4.1.1 The Paris Convention for Industrial Property

The objective of the Paris Convention is to provide international protection to industrial property and the provisions concerning unfair competition law.

###### (1) Definition

Unfair competition as “any act of competition contrary to honest practices in industrial or commercial matters”<sup>194</sup>

###### (2) Control Measure

The lookalike product packaging may be prohibited under article 10 bis. This provision provides that “Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition.” Also, it gives an example act as a guideline for member states, that is:

The following, in particular, shall be prohibited:

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<sup>194</sup> The Paris Convention article 10 bis (2)

(i) all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor

(ii) false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor;

(iii) indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.

A list of three types of acts of unfair competition are expressly mentioned in Article 10 bis, namely, acts likely causing confusion, acts that discredit a competitor and acts that may mislead the public.<sup>195</sup>

(a) Causing Confusion

This covers any act in the course of trade involving a mark, sign, label, slogan, packaging, shape or colour of goods, or any other distinctive indication used by a businessman. Thus, not only indications used to distinguish goods, services or businesses, but also the appearance of goods and the presentation of services are considered relevant for the prohibition of confusion.;

(b) Misleading

Misleading is defined as creating a false impression of a competitor's own products or services.<sup>196</sup>

(c) Discrediting Competitors

Discrediting (or disparagement) is defined as any false allegation concerning a competitor that is likely to harm his commercial goodwill. There are a number of other acts that have been recognized as unfair practices, for example, certain aspects of an act of unfair "free riding".<sup>197</sup>

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<sup>195</sup> WIPO 26-27

<sup>196</sup> Ibid 37

<sup>197</sup> Ibid 44

The act of unfair competition which is not expressly mentioned in Article 10 bis

(d) Taking Undue Advantage of Another's Achievement ("Free Riding")

Free riding on another person's market achievements can be defined as any act that a competitor or another market participant undertakes with the intention of directly exploiting another person's industrial or commercial achievement for his own business purposes without substantially departing from the original achievement. In that sense, free riding is the broadest form of competition by imitation. Under the principles of a free market, however, the exploitation or "appropriation" of another person's achievements is unfair only under specific circumstances. On the other hand, acts that cause confusion or mislead normally imply free riding on another person's achievements, but are generally recognized as forms of free riding that are always unfair.<sup>198</sup>

**(3) Enforcement and Remedies**

The countries of the Union undertake to assure nationals of the other countries of the Union appropriate legal remedies effectively to repress all the acts referred to in Articles 9, 10, and 10 bis. further, to provide measures to permit federations and associations representing interested industrialists, producers, or merchants, provided that the existence of such federations and associations is not contrary to the laws of their countries, to take action in the courts or before the administrative authorities, with a view to the repression of the acts referred to in Articles 9, 10, and 10 bis, in so far as the law of the country in which protection is claimed allows such action by federations and associations of that country.<sup>199</sup>

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<sup>198</sup> Ibid 55

<sup>199</sup> The Paris Convention Article 10 ter

#### **4.1.1.1 Comparison between misleading action under Article 10 bis of The Paris Convention and deceptive trade practice under section 271 of the Thailand Penal Code B.E. 2499**

When considering the purpose of misleading action under Article 10 bis of the Paris Convention and the objective of the deceptive trade practice under section 271 of the Thailand Penal Code B.E. 2499, it shows the same purpose, that is to protect consumer from deception as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods; however, there are some similarities and some differences, as follows:

##### **(1) The action of offence**

The action of deceptive trade practice under section 271 provides a broader scope of the method to deceive, that is “any fraudulent and deceitful means” like the action of misleading under Article 10 bis of the Paris Convention, because there is a focus on the consumer’s deception.

##### **(2) The subject of offence**

The consumers are deceived as to the origin source, nature, quality or such goods quantity under section 271 of the Thailand Penal Code. While Article 10 bis of the Paris Convention protect consumer from mislead as to the nature, the manufacturing process, the characteristics, and the suitability for their purpose, or the quantity of the goods.

##### **(3) The results of offence**

Under section 271 of the Thailand Penal Code, the results of offence is deceive consumer, however under the international level, the results of offence occur when this practice is likely to deceive the consumer.

The results of this study provided that the provision of section 271 under Thailand Penal Code conform to Article 10 bis of the Paris Convention, but section 271 has limited scope. In my opinion, section 271 of the Thailand Penal Code is only one part of the misleading action under Article 10 bis, because the Paris Convention is the model law for guideline to the member state. This Convention

provides a broader scope of misleading action, while section 271 is the criminal law provision, which obviously measures protecting consumers and provides a penalty.

#### **4.1.2 The Agreement on Trade-Related Aspects of International Property Rights (TRIPs)**

The Agreement on Trade – Related Aspects of International Property Rights (TRIPs) has a compulsory requirement for WTO membership and submitting TRIPs to the enforcement of General Agreement on Tariffs and Trade (GATT).

The member states must bring the provision of protection of unfair competition under article 10 bis, as well as a remedies measure under article 10 of the Paris Convention according to Article 2(1) of TRIPs.<sup>200</sup>

#### **4.1.3 The European Parliament and the Council concerning unfair business-to-consumer commercial practice directive**

The Unfair Commercial Practice Directive (2005/29) of 11 May 2005 (the “UCPD”) expressed an essential concept in consumer protection law, both at the European level and internal state level. It is concerned with a relation of unfair commercial practices between businesses and consumers.<sup>201</sup>

The UCPD is founded on the following policy principle<sup>202</sup>:

(1) The object of the UCPD is to give effect to the aims of the Treaty, which is to attain a high level of consumer protection.<sup>203</sup>

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<sup>200</sup> The Agreement on Trade Related Aspects of International Property Rights Article 2

(1) In respect of Parts II, III and IV of this Agreement, Members shall comply with Articles 1 through 12, and Article 19, of the Paris Convention (1967).

(2) Nothing in Parts I to IV of this Agreement shall derogate from existing obligations that Members may have to each other under the Paris Convention, the Berne Convention, the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits.

<sup>201</sup> Philip Johnson

<sup>202</sup> British Brands Group, *A response DTI / BERR consultation: Consumer Protection from Unfair Trading Regulations* (2007) 2

(2) To remove internal barriers to trade within the single market by the development of a uniform regime which removes trade distortions resulting from divergent consumer protection regimes.<sup>204</sup>

(3) To allow all persons having a legitimate interest in a matter to initiate the legal or administrative proceeding.<sup>205</sup>

(4) Indirectly to “protect legitimate businesses from competitors who do not play by the rules of the directive, and thus guarantees fair competition in fields coordinated by it.”<sup>206</sup>

#### 4.1.3.1 Lookalike

##### (1) Definition

Article 2 for the purposes of this Directive:

“consumer” means any natural person who, in commercial practices covered by this Directive, is acting for purposes that are outside his trade, business, craft or profession;

“product” means any goods or service including immovable property, rights, and obligations;

“business-to-consumer commercial practices” (hereinafter also referred to as commercial practices) means any act, omission, course of conduct or representation, commercial communication including advertising and marketing, by a trader, directly connected with the promotion, sale or supply of a product to consumers;

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<sup>203</sup> *The Directive 2005/29 EC of the European Parliament and of the Council of 11 May 2005* (2005) Recital 1

<sup>204</sup> *Ibid* Recitals 3 - 6

<sup>205</sup> *Ibid* Recital 21

<sup>206</sup> *Ibid* Recital 8

## (2) Enforcement Authority

The UCPD only harmonizes the substantive laws of member states related to unfair commercial practices, but does not harmonize the enforcement mechanisms.<sup>207</sup> Based on Article 11, to ensure the proper enforcement of EU consumer protection laws, Member States should provide coordination in good faith between the different competent enforcement authorities. In those Member States where different authorities are responsible for enforcing the UCPD and sector-specific legislation, the authorities should closely cooperate to ensure that the findings of their respective investigations into the same trader and commercial practice are consistent.<sup>208</sup>

## (3) Control Measure

Copycat packaging constitutes a “misleading action” as defined by Article 6 of the UCPD, because it misleads consumers as to the commercial origins and/or characteristics of the product under Article 6 (1) (b) and/or creates confusion with products of a competitor under Article 6 (2) (a), in either case causing the consumer to take a transactional decision that he or she would not otherwise take. Additionally, copycats are covered by item 13 of the Annex to the UCPD; it is a “Commercial Practices, which are in all circumstances considered unfair.”<sup>209, 210</sup>

Consumer deception caused by copycat packaging can take many forms:

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<sup>207</sup> Kankanit Srisuphan, ‘Consumer Protection Against Unfair Marketing Practices in the Sales of Goods’ (Thammasat University 2013) 36

<sup>208</sup> European Commission, *Guidance on the implementation/appliation of Directive 2005/29/EC on Unfair Commercial Practices* (2016) 17

<sup>209</sup> British Brands Group 2

<sup>210</sup> , *The Directive 2005/29 EC of the European Parliament and of the Council of 11 May 2005 Article 5(5)*

- Outright confusion — the consumer buys the copycat product having mistaken it for the brand;
- Deception over origin — the consumer recognizes the copycat product is different but believes, due to the similar packaging, that the same manufacturer makes it;
- Deception over quality or nature — again, consumers recognize the copycat is different but believe, due to the similar packaging, that the quality is the same or close to that of the copied product.

The similar packaging suggests to consumers that the quality or nature of the copycat product is comparable to the quality or nature of the brand in question or at least that it is more comparable than they might otherwise assume. As such, similar packaging gives the impression to consumers that the price alone is the only term of comparison between the products (rather than the combination of price and quality).<sup>211</sup>

## 4.2 Foreign Country

In this topic, we will study the legal measure to control lookalike product packaging under the United Kingdom law, the Germany law and the Australia law separately in 2 parts, that is the Control Measure and the Enforcement Authority as follows:

### 4.2.1 United Kingdom

The United Kingdom consists of four countries: England, Wales, Scotland and Northern Ireland. The original way to battle lookalikes in the United Kingdom is “Passing Off”, while the majority of the European Union use the contrast way, which is unfair competition. Moreover, passing off requires customer confusion as a matter of fact, which is very difficult to prove, so the protection from lookalikes has long been deemed inadequate.

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<sup>211</sup> Commission 65



The Unfair Commercial Practices Directive (UCPD) aimed to harmonize unfair trading laws the EU, and prohibits trading practices that treat consumers unfairly. In the UK, the UCPD was implemented in the Consumer Protection from Unfair Trading Regulations (CPRs) to create strong protection for consumer from lookalike packaging.<sup>212</sup>

#### 4.2.1.1 Passing Off

This is a non-statutory cause of action; passing off has developed through case law.<sup>213</sup> It can be regard as the oldest action for the protection of goodwill.<sup>214</sup>

The common law of tort of passing off is the most significant economic tort in English law. It aims to protect consumers against misinformation, while protecting “successful” traders that have built up goodwill.<sup>215</sup>

Since 1896 the passing off has had three elements identified as the essential criteria: goodwill, misrepresentation, and damage.<sup>216, 217</sup> A modern

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<sup>212</sup> D Young & Co LLP, ‘The issue of lookalikes in the United Kingdom: present and future’ (2013) <<https://www.lexology.com/library/detail.aspx?g=b449a7cb-47aa-4c7d-a500-881d2553f457>> accessed 30 April 2018

<sup>213</sup> Susie Middlemiss and Steven Warner, ‘Is there still a hole in this bucket? Confusion and misrepresentation in passing off’ 1 *Journal of Intellectual Property Law & Practice* 131

<sup>214</sup> Li Yan, ‘A Comparative Study of Passing off among of the UK, Japan and China’ 20 *IIP Bulletin* 1

<sup>215</sup> Rogier W. De Vrey, *Towards a European unfair competition law: a clash between legal families: a comparative study of English, German and Dutch law in light of existing European and international legal instruments* (Martinus Nijhoff 2006) 233 – 234

<sup>216</sup> Catherine Colston, *Principles of intellectual property law* (Cavendish Publisher 1999) 310

<sup>217</sup> De Vrey 234

definition consists of five elements by Lord Diplock and Lord Fraser in the case of *Erven Warnink B.V. v. J. Townend & Sons (Hull) Ltd.*, [1979] AC 731, [1980] R.P.C. 31, also known as the *Advocaat* case, as follows:

**(1) A misrepresentation**

There must be a misrepresentation.

**(2) Made by a trader in the course of trade**

The misrepresentation must have been made by the trader in the course of trade.

**(3) To prospective or ultimate customers**

The misrepresentation must have been made to the trader's prospective customers or to ultimate consumers of goods or services supplied by him.

**(4) Which is calculated to injure the business or goodwill of another**

The misrepresentation must be calculated to injure<sup>218</sup> the business or goodwill of another trader.

**(5) Which causes or threatens actual damage to a business or goodwill of the trader by whom the action is brought**

The misrepresentation must cause actual damage to a business or goodwill of the trader by whom the action is brought or in the case of a *quia timet* action<sup>219</sup>, it must be probable that the misrepresentation will cause damage to a business or goodwill of the trader by whom an action is brought.

According to the five elements, the most essential element of the passing off is that the passing off action must be misrepresentation and cause damage to business or goodwill. The defendant's guilty mind (mental element) is not

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<sup>218</sup> "Calculated to injure" means in this sense that injury is a reasonably foreseeable consequence

<sup>219</sup> Oxford Dictionarie, 'Definition of quia timet in English' (*Oxford University Press*, 2017) <[https://en.oxforddictionaries.com/definition/quia\\_timet](https://en.oxforddictionaries.com/definition/quia_timet)> provided that "So as to prevent a probable future injury".

considered in this practice, thus the intention to commit a deception or defendant's good faith is not considered in a passing off case, because the proof of passing off needs only damage to a business or goodwill, due to defendant misrepresent on origin of the goods or services which is attach to goods or services. This practice of defendant should be deterring to prevent for more protection of plaintiff's damages. However, the proof of the plaintiff that the defendant's intention to commit a deception may be making an advantage to passing off case that it is an obvious evidence.<sup>220</sup>

Passing off is a tort that protects the 'get up' for a person's products and services. It has a much broader theoretical scope than registered trademark infringement, but can be evidentially far more difficult to prove. Unlike a registered trademark, a right in passing off is not to be considered as providing a monopoly right, but whether a trader obtains a de jure monopoly is often a moot point.<sup>221</sup>

Nevertheless, it will often be the case that the initial interest confusion is discovered before the purchase is made, but the person selecting the product buys it just to give it a try. In those circumstances, a misrepresentation has been created which has diverted custom from the claimant to the defendant. If the misrepresentation is a requirement of the tort, then it is satisfied. However, as confusion does not persist at the point of sale, traditionally UK law would not regard this as passing off.<sup>222</sup>

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<sup>220</sup> Chermchansophon 229 - 230

<sup>221</sup> British National Group, *Report of the British National Group, LIDC – Amsterdam Congress, Question B* (Should the objectives of the rules on unfair competition be the protection of competitors, or consumers, or of other interests?, How should any conflict between these objectives be resolved ?, 2006) 5

<sup>222</sup> Ibid 19

#### 4.2.1.2 The Consumer Protection from Unfair Trading Regulation 2008

The Consumer Protection from Unfair Trading Regulation 2008 prohibits traders from engaging in misleading commercial practices that cause the average consumer to take a transactional decision.

The copycat packaging possibility infringes the Consumer Protection from Unfair Trading Regulation 2008 (the “CPRs”), which implemented the Unfair Commercial Practices Directive 2005/29 EC<sup>223</sup> into United Kingdom law. The UCPD and the CPRs promote and protect fair competition by increasing the confidence and businesses in the United Kingdom and across internal European Union borders by prohibiting traders from engaging in unfair commercial practice with consumers.

##### (1) Definition

Regulation 2 in these Regulations

“average consumer” shall be construed in accordance with paragraphs (2) to (6)<sup>224</sup>

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<sup>223</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business – to consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, directive 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council

<sup>224</sup> *Consumer Protection from Unfair Trading Regulations* (2008)

(2) In determining the effect of a commercial practice on the average consumer where the practice reaches or is addressed to a consumer or consumers account shall be taken of the material characteristics of such an average consumer including his being reasonably well informed, reasonably observant and circumspect.

(3) Paragraphs (4) and (5) set out the circumstances in which a reference to the average consumer shall be read as in addition referring to the average member of a particular group of consumers.

“business” includes

- (a) a trade, craft or profession, and
- (b) the activities of any government department or local or public authority;<sup>225</sup>

“consumer” means an individual acting for purposes that are wholly or mainly outside that individual’s business;<sup>226</sup>

“product” means

- (a) goods,
- (b) a service,
- (c) digital content,
- (d) immoveable property,
- (e) rights or obligations, or
- (f) a product of the kind mentioned in paragraphs (1A) and (1B),

(4) In determining the effect of a commercial practice on the average consumer where the practice is directed to a particular group of consumers, a reference to the average consumer shall be read as referring to the average member of that group.

(5) In determining the effect of a commercial practice on the average consumer —

(a) where a clearly identifiable group of consumers is particularly vulnerable to the practice or the underlying product because of their mental or physical infirmity, age or credulity in a way which the trader could reasonably be expected to foresee, and

(b) where the practice is likely to materially distort the economic behaviour only of that group, a reference to the average consumer shall be read as referring to the average member of that group.

(6) Paragraph (5) is without prejudice to the common and legitimate advertising practice of making exaggerated statements which are not meant to be taken literally.

<sup>225</sup> *The Consumer Protection (Amendment) Regulations 2014* (2014)

<sup>226</sup> *Ibid*

but the application of this definition to Part 4A is subject to regulations 27C and 27D;<sup>227</sup>

“trader”

(a) means a person acting for purposes relating to that person’s business, whether acting personally or through another person acting in the trader’s name or on the trader’s behalf, and

(b) except in Part 4A, includes a person acting in the name of or on behalf of a trader.<sup>228</sup>

## (2) Enforcement Authority

This regulation gives the Trading Standards Services in Great Britain (“TSS”) and the Department of Enterprise, Trade and Investment in Northern Ireland (“DETINI”) and the Competition and Markets Authority (“CMA”) duty to enforce.<sup>229</sup> They can enforce the CPRs by bringing a criminal prosecution for one of the offences in regulations 8 to 12 of the CPRs. As well as they can enforce civil procedure and requires the trader to stop the unfair commercial practice under Part 8 of the Enterprise Act 2002.<sup>230</sup>

## (3) Control Measure

Copycat packaging may violate the Consumer Protection from Unfair Trading Regulation 2008 if<sup>231</sup>:

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<sup>227</sup> Ibid

<sup>228</sup> Ibid

<sup>229</sup> , *Consumer Protection from Unfair Trading Regulations* Regulation 19

<sup>230</sup> Innovation and Skills Department for Business, ‘Review of the enforcement provisions of the Consumer Protection Regulations 2008 against copycat packaging’ (2015) <[www.gov.uk/bis](http://www.gov.uk/bis)> 7

<sup>231</sup> Innovation and Skills Department for Business, *Review of the enforcement provisions of the Consumer Protection from Unfair Trading Regulations 2008 in respect of copycat packaging* (2015) 7

(1) It contains false information (concerning nature, characteristics, and origin of the product among other matter<sup>232</sup>) or its overall presentation in any way deceives or is likely to deceive the average consumer such that the average consumer takes, or is likely to take, a different transactional decision, as a result,<sup>233</sup>; or

(2) It concerns any marketing of a product which creates confusion with any products, trademarks, trade names or other distinguishing marks of a competitor, such that the average consumer takes, or is likely to take, a different transactional decision, as a result,<sup>234</sup> or

(3) It promotes a product similar to a product made by a particular manufacturer in such a manner as to deliberately mislead the consumer into believing that the product is made by that same manufacturer when it is not.<sup>235</sup>

#### 4.2.1.3 The example case

The claimant, Moroccanoil Israel Limited (MIL), makes and sells hair products including hair oil called Moroccanoil (its most successful product). MIL brought a claim in passing off in the Intellectual Property Enterprise Court against Aldi Stores Limited in relation to its own brand of hair oil sold under the name Miracle Oil (a trademark infringement claim and a counterclaim for unjustified threat of infringement proceedings stayed pending the outcome of invalidity proceedings before OHIM regarding MIL's Community trademark).

MIL claimed that Aldi's sales of Miracle Oil constituted passing off because of the name and get up of Aldi's product were so similar in combination with MIL's product that a substantial number of consumers would either:

- mistake Miracle Oil for Moroccanoil;
- assume they have the same manufacturer; or

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<sup>232</sup> , *Consumer Protection from Unfair Trading Regulations* regulation 5 (4), (5) and (6)

<sup>233</sup> Ibid regulation 5 (2)

<sup>234</sup> Ibid regulation 5 (3)

<sup>235</sup> Ibid Paragraph 13 of Schedule 1.

- otherwise, believe there was a trade connection between the two.



*Figure 4.1 Claimant's packaging in the United Kingdom, Jeremy Dickerson GS, Burges Salmon, 'MoroccanOil's passing-off claim against Aldi fails in lookalike product case in United Kingdom' (WorldTrademarkReview, 2014) <[www.worldtrademarkreview.com](http://www.worldtrademarkreview.com)> accessed 2 September 2017*



*Figure 4.2 Defendant's packaging in the United Kingdom, Jeremy Dickerson GS, Burges Salmon, 'MoroccanOil's passing-off claim against Aldi fails in lookalike product case in United Kingdom' (WorldTrademarkReview, 2014) <[www.worldtrademarkreview.com](http://www.worldtrademarkreview.com)> accessed 2 September 2017*

In *MoroccanOil Israel Ltd v Aldi Stores Ltd* ([2014] EWHC 1686 (IPEC), May 29, 2014), His Honour Judge Hacon dismissed MIL's claim, finding that MIL had failed to establish passing off because the evidence did not support actionable misrepresentation on the part of Aldi. HHJ Hacon commented that, whilst he thought that Aldi intended to make the public think of MoroccanOil when they saw Miracle Oil in its packaging (and that it had succeeded in doing so), this did not lead to any false assumption in the mind of purchasers that the two were the same thing, or connected. Further, even if such members of the public did exist, they would be too few in number to cause damage to MIL's goodwill. The focus of the case was on the misrepresentation aspect of the Jif Lemon 'classic trinity' (goodwill, misrepresentation, and damage) and, in particular, whether the concept of 'initial interest confusion' has a place in the law of passing off.

MIL submitted that there may be passing off even if the misrepresentation is dispelled by the time the customer comes to purchase the defendant's product (i.e., there is initial interest confusion'). MIL relied upon the judgment of Arnold J in *Och-Ziff Management v OCH Capital* in support of its argument. In that case, Arnold J had considered the concept of initial interest confusion in the context of trademark infringement under Article 9(1) (b) of the



Community Trademark Regulation (207/2009) (i.e., whether there was a Likelihood of confusion). Arnold J's view was that initial interest confusion could occur when a consumer viewed an advertisement, regardless of whether it resulted in a sale, and that this could cause damage to a trademark's reputation or erode its distinctiveness, even if the confusion was dispelled before purchase. Arnold J indicated that the same reasoning could apply to the passing-off claim, thus appearing to recognize initial interest confusion in the context of passing off.

The context was different in the present case – the confusion in question did not concern the viewing an advertisement for Miracle Oil, but allegedly took place when the customer was shopping in the store and spotted the Miracle Oil on the shelf.

Aldi (disagreeing with MIL) submitted that, if a purchaser is misled initially, but his/her misunderstanding is dispelled before he/she makes a purchase, then there is no actionable misrepresentation. Aldi relied on *Woolley v Ultimate Products Ltd*, in which Arden LJ said that the misrepresentation must be more than transitory and therefore it is not sufficient if a purchaser is misled initially but his/her misunderstanding is dispelled before any material step is taken. In this case, whilst a customer may have been momentarily confused when he or she spotted the Miracle Oil product on the shelf, this was soon dispelled when the customer picked up the product and examined it. Therefore, no material step in the customer's purchasing decision was taken whilst under any misapprehension. The evidence strongly supported this - there was no evidence at all of a single person being deceived; at most they thought that Aldi was cheeky in the selection of its packaging, but they clearly recognized that Aldi's product was different to MIL's.

HHJ Hacon, therefore, concluded that MIL was not entitled by law to rely on initial interest confusion and, even if it were, the evidence did not support the inference that initial interest confusion has happened or is likely to.

HHJ Hacon also emphasized that damage remains one of the three essential ingredients of the tort of passing off. Therefore, if a customer makes an initial false assumption as to a trade connection between the claimant's and the

defendant's goods (i.e., there is 'initial interest confusion'), but that assumption is dispelled before any purchase is made and the claimant suffers no damage as a consequence, then there is no passing off.

#### 4.2.2 Germany

In Germany, the repression of unfair competition was originally considered as an issue of tort law. However, the German courts were reluctant to follow the French and to apply the general tort clause to this new economic phenomenon. Due to theoretical arguments, the German legislator adopted a separated statute. The new act is called “Law against Unfair Competition” (UWG 1909).<sup>236</sup>

##### 4.2.2.1 The German Act Against Unfair Competition

The German law of Act Against Unfair Competition (Gesetz gegen den unlauteren Wettbewerb, UWG). This Act serves to implement Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market. This Act serves the purpose of protecting competitors, consumers and other market participants against unfair commercial practices. At the same time, it shall protect the interests of the public in undistorted competition.<sup>237</sup>

##### (1) Definition

Section 2 within the meaning of this Act the following definitions shall apply:

“Commercial practice” shall mean any conduct by a person for the benefit of that person’s or a third party’s business before, during, or after, the conclusion of a business transaction, which conduct is objectively connected with promoting the sale or the procurement of goods or services, or with the conclusion or the performance of a contract concerning goods or services;

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<sup>236</sup> Henning-Bodewig 266

<sup>237</sup> Act Against Unfair Competition (Gesetz gegen den unlauteren Wettbewerb, UWG) Section 1

Purpose of the Act

“goods” shall be deemed to include immovable property as well, and “services” also rights and obligations;

“Competitor” shall mean any person who has a concrete competitive relationship with one or more entrepreneurs supplying or demanding goods or services;

“A consumer” means every natural person who enters into a legal transaction for a purpose that is outside his trade, business or profession.<sup>238</sup>

## (2) Enforcement Authority

There is no public authority in charge of the enforcement of the UWG<sup>239</sup>, this Act provided the power to competitors, and certain trade associations, chambers of commerce and consumer associations are authorized to enforce the law by their right for injunctive relief.<sup>240</sup> The center for Protection against Unfair Competition (so – called Wettbewerbszentrale) is one of the experienced and most important institutions that have the right to take legal action against any business operators who infringe laws relating with unfair competition.<sup>241</sup> Moreover the center for Protection against Unfair Competition and German federal consumer organization (Verbraucherzentrale Bundesverband) or one of the 16 consumer centers of the German federal states (Verbraucherzentralen) which are most likely to bring a claim under section 8 of UWG.<sup>242</sup>

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<sup>238</sup> Ibid section 2 (2) provided that section 13 of the Civil Code shall apply mutatis mutandis to the term “consumer”

<sup>239</sup> Susanne Augenhofer, *German Report* (Seminar Unfair Commercial Practices 2013) 14

<sup>240</sup> Act Against Unfair Competition (Gesetz gegen den unlauteren Wettbewerb, UWG) section 8

<sup>241</sup> Muenker Reiner, ‘Enforcement of unfair competition and consumer protection laws by a private business association in Germany: the Wettbewerbszentrale’ 10 *Journal of Intellectual Property Law & Practice* 639

<sup>242</sup> Augenhofer 15

The Regional Courts shall have exclusive jurisdiction over all civil law disputes where the virtue of this Act asserts a claim.<sup>243</sup> The Land governments shall be empowered to designate by ordinance one such Regional Court as the court to hear competition disputes for the districts of several Regional Courts, provided this is conducive to the administration of justice in respect of competition disputes, mainly to ensure consistent court decisions. The Land governments can delegate this power to the Land departments of justice.<sup>244</sup>

### (3) Control Measure

Section 3 “Prohibition of unfair commercial practices

(i) Unfair commercial practices shall be illegal.

(ii) Commercial practices targeting or reaching consumers shall be unfair if they are not in compliance with professional diligence and are suited to materially distorting the economic behavior of consumers.

(iii) The commercial practices in relation to consumers listed in the Annex to this Act shall always be illegal.

Annex paragraph 13 provided that promoting goods or services similar to the goods or services of a specific manufacturer, with the intention of deceiving the consumer regarding the commercial origin of the goods or services promoted;”

Section 4 “Unfairness shall have occurred where a person ...

(iii). offers goods or services that are replicas of goods or services of a competitor if he

a) causes avoidable deception of the purchaser regarding their commercial origin;

b) unreasonably exploits or impairs the assessment of the replicated goods or services; or

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<sup>243</sup> Act Against Unfair Competition (Gesetz gegen den unlauteren Wettbewerb, UWG) section 13 (1)

<sup>244</sup> Ibid section 13 (2)

c) dishonestly obtained the knowledge or documents needed for the replicas;”

#### 4.2.2.2 The example case

On January 15, 2010, the Cologne Appeal Court held that a competitor must refrain from using a product packaging for cough drops with a similar picture of a polar bear depicted on a blue and white bag if the original get-up may claim increased competitive individuality. Under such circumstances, the competitor takes unfair advantage of the original’s reputation (“image transfer”) even if a deception as to origin must be denied due to a different trademark on the contested product.

The claimant was marketing cough drops in Germany since 1984, in a blue and white bag showing a polar bear since 2002



*Figure 4.3 Claimant’s packaging in Germany,*  
Hartwig H, ‘The Bardehle Pagenberg IP Report’  
(2010/11) [www.bardehle.com](http://www.bardehle.com)



*Figure 4.4 Defendant’s packaging in Germany,*  
Hartwig H, ‘The Bardehle Pagenberg IP Report’  
(2010/11) [www.bardehle.com](http://www.bardehle.com)

The Cologne Appeal Court confirmed that the original’s get-up could claim high inherent competitive individuality due to its highly creative design (polar bear as a powerful animal shown in an arctic setting, using the cold colours blue and white) supporting the attached quality claim “EXTRA STARK – EXTRA FRISCH” (“EXTRA STRONG – EXTRA FRESH”).

Additionally, the competitive individuality was supported by sufficient sales figures, market data, and a market survey. Notably, the market survey

supported the original's increased competitive individuality, showing, on the one hand, that in the view of the relevant public the trade name "Wick Blau" is linked with the features "polar bear" and "blue and white packaging" and, on the other hand, that the "polar bear" and the "blue packaging" are evaluated by the relevant public as typical features of the claimant's get-up. Furthermore, the Court held the original's get-up had been copied by the contested product, since the latter contained not only the original's characteristic features but also the inventive concept of promoting the claimed quality of cough drops ("EXTRA STRONG") with the image of a polar bear. As a consequence, the defendant took unfair advantage of the reputation of the original's get-up although a potential deception as to origin had to be denied due to the accused packaging clearly showing both the defendant's product and company name (here: "Atemgold" and "Storck" instead of "Wick Blau" and "Wick"). The Court held that the original enjoyed sufficient reputation among the relevant public due to its long-standing market presence. This was supported by a market survey showing that 81% of the interviewees were aware of the claimant's trademark "Wick Blau." Further survey evidence showed that consumers consistently, and partly even spontaneously, attributed a positive quality to the original.

Consequently, due to the lack of any valid justification for copying the original and in light of original's image transfer, the defendant was ordered to cease and desist.

Remarks: This decision is showing that the national concept of supplementary competitive protection against misappropriation may not only protect against imitations in case of a deception as to origin, i.e., when the relevant public confuses the copy with the original or at least assumes a commercial link with the manufacturer of the original. Instead, German law also offers protection where the copy shows its own, different trademark or trade name as long as the copy takes unfair advantage of the original's reputation.

#### **4.2.3 Australia**

In the past, the consumer protection in Australia has traditionally been the responsibility of the states, not the commonwealth. In 1947, the Trade

Practices act 1974 (Cth) changed this some extent by introducing a range of consumer protection that applied to trading and financial corporation.<sup>245</sup> The effect was to apply the commonwealth's consumer laws to a large proportion of Australian firms because corporations operate the majority of modern businesses. The problems began where the state laws and the Commonwealth law were not uniform.<sup>246</sup>

In 2008 the Council of Australian Government agreed that a uniform consumer protection law should apply throughout Australia. A set of consumer protection laws set out in a schedule to the Trade Practices Act. This set of laws is referred to as the Australian Consumer Law. The Australian Consumer Law was applied throughout the Commonwealth by the Trade Practices Act and in the various states by state application Acts. These Act apply the Australian Consumer Law to all conduct within the state's jurisdiction. The last, the name of the Trade Practice Act was changed to the Competition and Consumer Act.<sup>247</sup>

#### 4.2.3.1 The Australian Consumer Law

The Australian Consumer Law (the ACL) is the law governing consumer protection and fair-trading in Australia. From 1 January 2011, it applies nationally and as a law of each state and territory. The law also incorporates the national unfair contract terms law.<sup>248</sup> The Australian Consumer Law set out in schedule 2 of the Competition and Consumer Act 2010.<sup>249</sup>

##### (1) Definition

Section 1 (1) In this Schedule:

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<sup>245</sup> The provision in the Trade Practice Act were limited to trading and financial corporations for constitutional reasons.

<sup>246</sup> Brendan J. Sweeney, Mark Bender and Nadine Courmadias, *Marketing and the law* (5th ed. edn, Chatswood, N.S.W. : LexisNexis Butterworths 2015) 379

<sup>247</sup> *Ibid* 379 - 380

<sup>248</sup> Commonwealth of Australia, *Compliance and enforcement: How regulators enforce the Australian Consumer Law* (2010) 6

<sup>249</sup> The Arts Law Centre of Australia, 'Australian Consumer Law and Creators' (2016) 1

“acquire” includes:

(a) in relation to goods—acquire by way of purchase, exchange or taking on lease, on hire or on hire-purchase; and

(b) in relation to services—accept.

“consumer” see section 3<sup>250</sup>.

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<sup>250</sup> The Australian Consumer Law section 3 said that “Meaning of consumer”

*Acquiring goods as a consumer*

(1) A person is taken to have acquired particular goods as a consumer if, and only if:

(a) the amount paid or payable for the goods, as worked out under subsections (4) to (9), did not exceed:

(i) \$40,000; or

(ii) if a greater amount is prescribed for the purposes of this paragraph—that greater amount; or

(b) the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption; or

(c) the goods consisted of a vehicle or trailer acquired for use principally in the transport of goods on public roads.

(2) However, subsection (1) does not apply if the person acquired the goods, or held himself or herself out as acquiring the goods:

(a) for the purpose of re-supply; or

(b) for the purpose of using them up or transforming them, in trade or commerce:

(i) in the course of a process of production or manufacture; or

(ii) in the course of repairing or treating other goods or fixtures on land.

*Acquiring services as a consumer*

(3) A person is taken to have acquired particular services as a consumer if, and only if:

(a) the amount paid or payable for the services, as worked out under subsections (4) to (9), did not exceed:

(i) \$40,000; or



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(ii) if a greater amount is prescribed for the purposes of subsection (1)(a)—that greater amount; or

(b) the services were of a kind ordinarily acquired for personal, domestic or household use or consumption.

*Amounts paid or payable for purchases*

(4) For the purposes of subsection (1) or (3), the amount paid or payable for goods or services purchased by a person is taken to be the price paid or payable by the person for the goods or services, unless subsection (5) applies.

(5) For the purposes of subsection (1) or (3), if a person purchased goods or services by a mixed supply and a specified price was not allocated to the goods or services in the contract under which they were purchased, the amount paid or payable for goods or services is taken to be:

(a) if, at the time of the acquisition, the person could have purchased from the supplier the goods or services other than by a mixed supply—the price at which they could have been purchased from the supplier; or

(b) if:

(i) paragraph (a) does not apply; but

(ii) at the time of the acquisition, goods or services of the kind acquired could have been purchased from another supplier other than by a mixed supply;

the lowest price at which the person could, at that time, reasonably have purchased goods or services of that kind from another supplier; or

(c) if, at the time of the acquisition, goods or services of the kind acquired could not have been purchased from any supplier except by a mixed supply—the value of the goods or services at that time.

*Amounts paid or payable for other acquisitions*

(6) For the purposes of subsection (1) or (3), the amount paid or payable for goods or services acquired by a person other than by way of purchase is taken to be the price

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at which, at the time of the acquisition, the person could have purchased the goods or services from the supplier, unless subsection (7) or (8) applies.

(7) For the purposes of subsection (1) or (3), if:

(a) goods or services acquired by a person other than by way of purchase could not, at the time of the acquisition, have been purchased from the supplier, or could have been purchased only by a mixed supply; but

(b) at that time, goods or services of the kind acquired could have been purchased from another supplier other than by a mixed supply;

the amount paid or payable for the goods or services is taken to be the lowest price at which the person could, at that time, reasonably have purchased goods or services of that kind from another supplier.

(8) For the purposes of subsection (1) or (3), if goods or services acquired by a person other than by way of purchase could not, at the time of the acquisition, have been purchased from any supplier other than by a mixed supply, the amount paid or payable for the goods or services is taken to be the value of the goods or services at that time.

*Amounts paid or payable for obtaining credit*

(9) If:

(a) a person obtains credit in connection with the acquisition of goods or services by him or her; and

(b) the amount paid or payable by him or her for the goods or services is increased because he or she so obtains credit;

obtaining the credit is taken for the purposes of subsection (3) to be the acquisition of a service, and the amount paid or payable by him or her for the service of being provided with the credit is taken to include the amount of the increase.

“consumer goods” means goods that are intended to be used, or are of a kind likely to be used, for personal, domestic or household use or consumption, and includes any such goods that have become fixtures since the time they were supplied if:

- (a) a recall notice for the goods has been issued; or
- (b) a person has voluntarily taken action to recall the goods.

“goods” includes:

- (a) ships, aircraft and other vehicles; and
  - (b) animals, including fish; and
  - (c) minerals, trees and crops, whether on, under or attached to land or not; and
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*Presumption that persons are consumers*

(10) If it is alleged in any proceeding under this Schedule, or in any other proceeding in respect of a matter arising under this Schedule, that a person was a consumer in relation to particular goods or services, it is presumed, unless the contrary is established, that the person was a consumer in relation to those goods or services.

*Mixed supplies*

(11) A purchase or other acquisition of goods or services is made by a mixed supply if the goods or services are purchased or acquired together with other property or services, or together with both other property and other services.

*Supplies to consumers*

(12) In this Schedule, a reference to a supply of goods or services to a consumer is a reference to a supply of goods or services to a person who is taken to have acquired them as a consumer.

- (d) gas and electricity; and
- (e) computer software; and
- (f) second-hand goods; and
- (g) any component part of, or accessory to, goods.

“non-party consumer” means:

(a) in relation to conduct referred to in section 239(1)(a)(i)—  
a person who is not, or has not been, a party to an enforcement proceeding in relation to the conduct; and

(b) in relation to a term of a consumer contract referred to  
in section 239(1)(a)(ii)—a person who is not, or has not been, a party to an enforcement proceeding in relation to the term.

## **(2) Enforcement Authority**

The Australian Consumer Law administered and enforced jointly by the Australian Competition and Consumer Commission (the ACCC) and the State and Territory consumer protection agencies, with the involvement of the Australian Securities and Investments Commission (the ASIC) on relevant matters. All Australian consumer protection agencies have signed a Memorandum of Understanding (MOU), which sets out the way in which they will work together to administer and enforce the ACL. The MOU also includes the New Zealand Ministry of Consumer Affairs and the New Zealand Commerce Commission, reflecting the increasingly integrated nature of Australia and New Zealand’s markets.<sup>251</sup>

The CCA gives the ACCC the power to issue infringement notices under section 134 A.<sup>252</sup>

## **(3) Control measure**

Section 18 (1)<sup>253</sup> Misleading or deceptive conduct

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<sup>251</sup> Commonwealth of Australia, ‘The Australian Consumer Law’ (2017)  
<<http://consumerlaw.gov.au/the-australian-consumer-law/enforcement/>>

<sup>252</sup> Australian Government Solicitor, ‘Australian Consumer Law’ (2011) 6

Under this section 18 (1) the brand owner must show:

- (a) His product has a reputation.
- (b) Consumers are likely to be misled and deceived into thinking that the lookalike product is the branded product, or associated with it.

Section 29 False or misleading representations about goods or services

(1) A person must not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services:

(a) make a false or misleading representation that goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use; or

(g) make a false or misleading representation that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits; or

(h) make a false or misleading representation that the person making the representation has a sponsorship, approval or affiliation; or

(k) make a false or misleading representation concerning the place of origin of goods.

#### 4.2.3.2 The Food and Grocery Code of Conduct

The Food and Grocery Code of Conduct is a voluntary code.<sup>254</sup>  
The Code governs certain conduct by grocery retailers and wholesalers in their

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<sup>253</sup> The Australian Consumer Law section 18 (1) “A person must not in trade or commerce engage in conduct that is misleading or deceptive or is likely to mislead or deceive.”

<sup>254</sup> The following companies have signed up to the Code:

dealings with suppliers. It has rules relating to grocery supply agreements, payments, and termination of agreements, dispute resolution and a range of other matters.<sup>255</sup>

The Code provides an additional framework for dealings between retailers or wholesalers and suppliers. The Code made under section 51AE of the Competition and Consumer Act 2010.<sup>256</sup> Also, this Code does not override the existing provisions of the Competition and Consumer Act 2010 and the Australian Consumer Law. In particular, the provisions relating to unconscionable conduct, misleading or deceptive conduct and misuse of market power continue to apply.<sup>257</sup>

### (1) Definition

In this code:

“delist” means to remove a grocery product from a retailer’s range of grocery products.

“groceries” includes the following:

- (a) food including fresh produce, meat and dairy items (other than dairy items sold for in-store consumption);
- (b) pet food;
- (c) non-alcoholic drinks (other than drinks sold for in-store

- About Life Pty Ltd (retailer) (signed up on 19 May 2015)
- ALDI (retailer) (signed up on 15 June 2015)
- Coles Supermarkets Australia (retailer) (signed up on 1 July 2015)
- Woolworths Limited (retailer) (signed up on 1 July 2015).

Australian Competition & Consumer Commission, ‘Food and Grocery Code of Conduct’ (2015) <<https://www.accc.gov.au/business/industry-codes/food-and-grocery-code-of-conduct>> accessed 12 July 2017

<sup>255</sup> Ibid

<sup>256</sup> *The Food and Grocery Code of Conduct* (2015) section 3

<sup>257</sup> Australian Competition & Consumer Commission

consumption);

- (d) cleaning products;
- (e) toiletries, perfumes and cosmetics;
- (f) household goods, electrical appliances and kitchenware;
- (g) clothing;
- (h) “do-it-yourself” products;
- (i) pharmaceuticals;
- (j) books, newspapers, magazines and greeting cards;
- (k) CDs, DVDs, videos and audio tapes;
- (l) toys;
- (m) plants, flowers and gardening equipment;
- (n) tobacco and tobacco products.

“own brand product” means a grocery product:

- (a) produced, processed or manufactured by a retailer; or
- (b) produced, processed or manufactured for a retailer (including by a supplier); or
- (c) that carries a name or trademark owned by, or licensed to, a retailer.

“promotion” means any offer for sale (whether or not accompanied by some other benefit to a consumer):

- (a) at an introductory or reduced price, or involving non-standard sales activity; and
- (b) as agreed between a retailer and a supplier; and
- (c) that is intended to last only for a specified period.

“retailer” means a corporation:

- (a) to the extent that it carries on a supermarket business in Australia for the retail supply of groceries; and
- (b) to the extent that it carries on a business of purchasing groceries from suppliers for the purpose of resale to a person carrying on a supermarket business in Australia for the retail supply of groceries.

## **(2) Enforcement Authority**

The Australian Competition and Consumer Commission (the ACCC) is responsible for regulating compliance with the Code and can take enforcement action to enforce the Code, where appropriate. When the ACCC receives a complaint about an alleged breach of the Code, it undertakes a preliminary assessment of the claim. An initial confidential discussion with the complainant may be necessary as part of this assessment. Where the complaint is assessed as substantive, it is progressed to an ACCC enforcement officer. At this stage, further information and evidence will be sought from both parties.

While there are no financial penalties for a breach of the Code, other remedies are available including court-ordered injunctions, compensation to persons who have suffered loss or damage caused by the conduct and contract variations. Conduct that breaches the Code could also breach the unconscionable conduct provisions of the Australian Consumer Law, which carries penalties of up to \$1.1 million per contravention.<sup>258</sup>

## **(3) Control measure**

In Clause 24 (3) of Schedule 1 of Food and Grocery Code of Conduct provided that

“In developing or producing own brand products, the retailer must not infringe the intellectual property rights held by a supplier in relation to grocery products, including rights relating to branding, packaging designs or advertising.”

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<sup>258</sup> Australian Competition & Consumer Commission



#### 4.2.3.3 Comparative between action in passing off and the Australian Consumer Law action

There are some similarities between an action in passing off and an action under section 18 and section 29 of the Australian Consumer Law, however they are distinct forms of action and some differences are as follows:<sup>259</sup>

(1) The tort of passing off is a common law action. While an action for misleading and deceptive conduct under section 18 and section 29 (1) (a) (g) (h) (k) of the Australian Consumer Law is a statutory cause of action

(2) Passing off has objective to protect a trader's business interests and goodwill. The Australian Consumer Law action has the purpose of protecting consumers and the broader public interest.

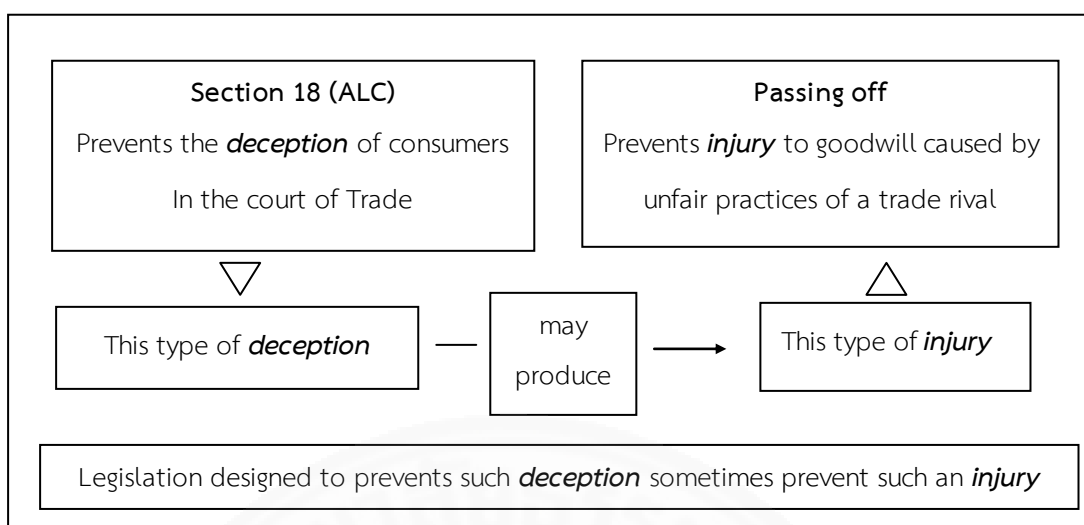
(3) Only a trader (or persons affected by injury to the trader's business and goodwill) has standing to bring passing off action. Any person may bring an action under section 18 or section 29 of the Australian Consumer Law.

(4) Passing off action is a possibly greater degree of reputation needed to establish the cause of action. The Australian Consumer Law action is possibly less degree of reputation needed to establish the cause of action.

(5) Passing off's relief may be more limited (for example, more geographically restricted to the areas in which the plaintiff can establish a reputation. The Australian Consumer Law action's relief may also be limited but an injunction more likely to be broader.

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<sup>259</sup> John Osha Sarah Matheson, Anne Marie Verschuur, *AIPPI Group Report Q45 - Taking unfair advantage of trademarks: parasitism and free riding* 3 -4



*Figure 4.5 The difference between Passing off Action and section 18 of ALC, Sweeney BJ, Bender M and Courmadias N, Marketing and the law (5th ed. edn, Chatswood, N.S.W. : LexisNexis Butterworths 2015)*

#### 4.2.3.4 The example case

Homart Pharmaceuticals Pty Ltd v Careline Australia Pty Ltd [2017] FCA 403 (20 April 2017)

##### Background

Ovine placenta extract (commonly referred to as sheep's placenta) is an increasingly common ingredient in cosmetic products in Asia (in particular China). This case concerns two Australian trade rivals that manufactured, distributed and sold skincare product ranges using a product known as "bio-placenta" (a component of which is ovine placenta extract). The primary target market for "bio-placenta" products in Australia is a consumer of Chinese ethnic origin.

Since 2008, Careline Australia (Careline), a health and skincare company, has manufactured and sold a bio-placenta product in Australia known as CHANTELLE SYDNEY (CHANTELLE). The CHANTELLE product is a skincare product that is touted to hydrate and firm skin, whilst improving skin repair and complexion. By all accounts, the CHANTELLE product is a popular product in Australia amongst Chinese residents and Chinese tourists. In 2015 - 2016, Careline's sales of the CHANTELLE product had tripled from the previous year to \$2,188,730.33.

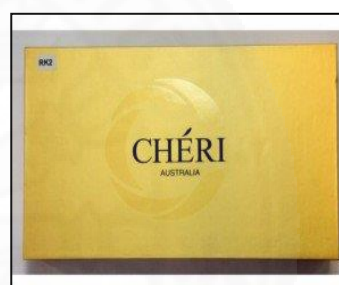
Having observed Careline's success, in early 2016, Homart Pharmaceuticals Pty Ltd (Homart), a trade rival to Careline, launched its own bio-

placenta product. Homart marketed this product under the brand CHÉRI AUSTRALIA (CHÉRI). Like the CHANTELLE product, the CHÉRI product was advertised as a product that hydrates, firms and lightens skin as well as improving skin repair. Also like the CHANTELLE product, the target consumer market for the CHÉRI product is a Chinese resident of Australia and Chinese tourists visiting Australia.

Despite the brand name difference, Careline considered that Homart's packaging for its CHÉRI product was the result of blatant copying. In particular, it considered that Homart had copied the gold rectangle carry bag, several aspects of the golden rectangle box and lid and the appearance of ampules of bio-placenta. The packaging for both the CHANTELLE and CHÉRI products is depicted below.



*Figure 4.6 Plaintiff's packaging in Australia, Dimitriadis P, Rumble H and Ritson L, 'Federal Court not sheepish about finding for cross-claimant in copycat cosmetics case' (2017) <<https://www.ashurst.com>> accessed 16 May 2017*



*Figure 4.7 Defendant's packaging in Australia, Dimitriadis P, Rumble H and Ritson L, 'Federal Court not sheepish about finding for cross-claimant in copycat cosmetics case' (2017) <<https://www.ashurst.com>> accessed 16 May 2017*



*Figure 4.8 Plaintiff's product in Australia, Dimitriadis P, Rumble H and Ritson L, 'Federal Court not sheepish about finding for cross-claimant in copycat cosmetics case' (2017) <<https://www.ashurst.com>> accessed 16 May 2017*



*Figure 4.9 Defendant's product in Australia, Dimitriadis P, Rumble H and Ritson L, 'Federal Court not sheepish about finding for cross-claimant in copycat cosmetics case' (2017) <<https://www.ashurst.com>> accessed 16 May 2017*

Careline sprang into action. It sent letters to certain of Homart's customers and media outlets to air its grievances. Careline employees also used WeChat (a Chinese social media platform) to complain about Homart's conduct. In tandem, Careline's lawyers sent a letter of demand to Homart alleging that it was engaging in breaches of the ACL and passing off.

On 13 May 2016, Homart sued Careline and sought interlocutory relief to restrain Careline from repeating the representations contained in the letter of demand and posted on WeChat. Careline cross-claimed and argued that Homart was not entitled to relief on the basis that it was engaging in misleading or deceptive conduct by having intentionally adopted a get-up for its CHÉRI product with the purpose of appropriating Careline's reputation in the CHANTELLE product.

#### The Decision

On 20 April 2017, Justice Burley of the Federal Court held that Homart had breached the ACL by engaging in conduct that was misleading or deceptive or likely to mislead or deceive. His Honour also dismissed Homart's original claim and awarded costs in Careline's favor.

The Federal Court of Australia has held that an Australian cosmetics company, Homart Pharmaceuticals Pty Ltd (Homart), contravened section 18 of the Australian Consumer Law (ACL) by intentionally appropriating the get-up of a trade rival's bio-placenta skincare product.

The Court restrained Homart from selling, offering for sale, distributing, promoting or marketing bio-placenta skincare products in Australia by using the trade rival's misappropriated get-up or any get-up deceptively similar to the trade rival's get-up.

### **4.3 The legal measure related to remedying consumers from the effect of lookalike product packaging under foreign law**

In this part we will study the legal measure related to consumer remedies from the effect of lookalike product packaging on the consumers' right to redress in the United Kingdoms, Germany and Australia as follow;

### 4.3.1 The United Kingdom Consumer Protection from Unfair Trading Regulation

The consumers have private right to redress<sup>260</sup>, unwind<sup>261</sup> the relevant contract or a discount<sup>262</sup> or damages<sup>263</sup> under the Consumer Protection from Unfair Trading Regulation 2008.

#### Tier 1 remedies

The type of Tier 1 remedy would depend on how soon after the event the consumers complain and whether the consumer has fully consumed the product:

#### **(1) The right to unwind<sup>264</sup> the contract**

The consumer would receive a refund of money paid and would not be required to meet any future obligations. Consumers would be entitled to unwind provided that they rejected some part of the goods or services, and acted sufficiently quickly. We tentatively suggested that consumers would need to complain to the trader within three months.<sup>265</sup>

#### **(2) The right to a discount**

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<sup>260</sup> , *The Consumer Protection (Amendment) Regulations 2014* regulation 27A.

<sup>261</sup> Ibid regulation 27E.

<sup>262</sup> Ibid regulation 27I.

<sup>263</sup> Ibid regulation 27J.

<sup>264</sup> The Law Commission and The Scottish law Commission, *Consumer Redress for Misleading and Aggressive Practices* (2012) 122 provide that “Unwind” would be generally understood to mean the restoration of the parties to the position in which they were before entering into the contract or making the payment. The consumer is entitled to a refund of the price paid but must return at least some element of the goods, or reject some element of the service. It also releases both parties from any further obligations.”

<sup>265</sup> Ibid 104

If the consumer waits more than three months to make a complaint or if the goods or services are fully consumed, then the consumer can claim a discount on the price.

#### Tier 2 remedies

Tier 2 remedies provide damages to compensate for indirect losses, including economic damage and distress and inconvenience. They are provided only if the consumer can prove that the unfair practice caused actual loss, meeting a “but for” test of causation. Furthermore, the trader can avoid this consequential liability if it can establish a due diligence defense.<sup>266</sup>

### **4.3.2 The German Act Against Unfair Competition**

Germany has the legal measure related to consumers remedies from lookalike product packaging which provide under the Act Against Unfair Competition (Gesetz gegen den unlauteren Wettbewerb, UWG) as follow:

#### **(1) The right to sued for elimination, cessation, and desistance**

Under section 8 (1) whoever engages in an illegal commercial practice under section 3 or section 7 can be sued for elimination, and in the event of the risk of recurrence to cease and desist. In the part of section 8 (2) where the contraventions are committed in a business by a member of the staff or by a person exercising a mandate and under section 8 (3) provided that the claims under subsection (1) shall vest in:

- Every competitor;
- Associations with legal personality that exist for the promotion of commercial or of independent professional interests;
- Qualified entities that prove that they are entered in the list of qualified entities pursuant to section 4 of the Injunctive Relief Act or on the list of the European Commission pursuant to Article 4(3) of Directive 2009/22/EC of the

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<sup>266</sup> The Law Commission and The Scottish law Commission, *Consumer Redress for Misleading and Aggressive Practices: summary of final report* (2012) 9

European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumer interests

- Chambers of Industry and Commerce or Craft Chambers.

**(2) The right to claim compensation for damages**

According to section 9, whoever while acting with intent or negligently, engages in an illegal commercial practice under section 3 or section 7 shall be obliged to compensate competitors for the damage arising therefrom. The compensation claim can be asserted against persons responsible for periodical printed matter only in the case of contravention with intent.

**(3) The right to sued for surrender of profits**

According to section 10 (1) provided that Whoever, while acting with intent, engages in an illegal commercial practice pursuant to section 3 or section 7, thereby making a profit to the detriment of numerous purchasers, can be sued for the surrender of such profit to the Federal budget by those entitled.

**4.3.3 The Australian Consumer Law**

Australia has the legal measure related to consumers remedies from lookalike product packaging which provide under the Australian Consumer Law (the ACL) as follow:

**(1) The right to sued for the court grant an injunction (preventative or corrective orders)**

A court may grant an injunction for contraventions or attempted contraventions of the ACL. To either restrain a person from doing an act or require a person to do a particular act. The ACL expressly recognizes that injunctions may be granted restraining a person from carrying on a business or supplying goods or services may be granted, requiring the refund of money or the destruction or disposal of property.<sup>267</sup>

**(2) The right to claim for pecuniary penalties**

Section 224 said that If a court is satisfied that a person:

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<sup>267</sup> Australia, 'The Australian Consumer Law' section 232

(a) has contravened any of the following provisions:

(ii) a provision of Part 3-1 (which is about unfair practices).<sup>268</sup>

The court may order the person to pay to the Commonwealth, State or Territory, as the case may be, such pecuniary penalty, in respect of each act or omission by the person to which this section applies, as the court determines to be appropriate.

### **(3) The right to claim for damages**

Section 236 of the ACL provides a right for a person to apply to a court for damages to compensate them for their loss or damage resulting from a contravention of the ACL.

### **(4) The right to claim for compensation**

Section 237 (2) provided that the order must be an order that the court considers will:

(a) compensate the injured person, or any such injured persons, in whole or in part for the loss or damage; or

(b) prevent or reduce the loss or damage suffered, or likely to be suffered, by the injured person or any such injured persons.

The court may award damages to persons who have suffered losses by conduct in contravention of the Australian Consumer Law. However, in general individual consumers do not seek damages because of the cost and risk involved. The ACCC may apply to the court on behalf of one or more persons injured by conduct in contravention of the Australian Consumer Law for compensation.<sup>269</sup>

### **(5) Orders for non-party consumers**

Section 239 provided that

(1) If:

(a) a person:

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<sup>268</sup> Refer to Section 29 in Part 3-1 -- Unfair practices of the Australian Consumer Law

<sup>269</sup> Sweeney, Bender and Courmadias 426



(i) engaged in conduct (the contravening conduct ) in contravention of a provision of Chapter 2, Part 3-1, Division 2, 3 or 4 of Part 3-2 or Chapter 4; or

(ii) is a party to a contract who is advantaged by a term (the declared term ) of the contract in relation to which a court has made a declaration under section 250; and

(b) the contravening conduct or declared term caused, or is likely to cause, a class of persons to suffer loss or damage; and

(c) the class includes persons who are non-party consumers in relation to the contravening conduct or declared term;

The claim for orders to redress must be an order that the court considers will:

(a) redress, in whole or in part, the loss or damage suffered by the non-party consumers in relation to the contravening conduct or declared term; or

(b) prevent or reduce the loss or damage suffered, or likely to be suffered, by the non-party consumers in relation to the contravening conduct or declared term.

Section 239 provides a regulator with the power to apply to a court for orders to give redress to persons not named in the proceedings, where there has been a contravention of the ACL. A court may make any order it considers appropriate redress could include, in this context, refunds, contract variations and non-financial redress such as apologies. In making an order for non-party redress, the court may not make an award of damages. This is because it is necessary, in assessing damages, to consider the particular circumstances of the individual to whom the award of damages is to be made. Orders that might be made under this provision are listed in section 243 of the ACL in a non-exhaustive way and may include orders to vary contracts, refund money, return property or pay compensation.

Under section 241 of the ACL a person is not obliged to accept redress under a non-party order, but if the person does so, they will forfeit any other right of action they may have.<sup>270</sup>



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<sup>270</sup> Commonwealth of Australia, *The Australian Consumer Law: A guide to provisions* (2010) 48

## CHAPTER 5

### LEGAL PROBLEMS RELATED TO PROTECTING CONSUMERS FROM UNFAIR TRADING PRACTICES: LOOKALIKE PRODUCT PACKAGING

This chapter will analyze on the legal problem and legal measure to protect consumers from lookalike product packaging. Since the results of this study indicate that Thai law does not contain any obvious legal measure to control lookalike product packaging, thus any businesses are free to use lookalike product packaging from leading brand. However, in the case of some business operators use lookalike product packaging create the crucial problems for consumers to purchase the products because this lookalike packaging contains false information that confuses consumers and lead them to make. an erroneous purchase because they are misled to believe that the false product is made by the same manufacturer as the genuine one. Moreover, this practice also affects the competition in the market. It will be suggested that, Thailand must have appropriate solutions to protect consumers from the lookalike product packaging as well as remain fair trade in Thailand.

Therefore, this chapter will study on the legal measure to protect consumers from lookalike product in foreign countries, which is the United Kingdom, Germany, and Australia for study concept as a guideline to solve the problem concern with lookalike product. The legal measures of each country are very interesting. A documentary analysis will be used to compare the legal problems related to protecting consumers from lookalike product packaging in the following four aspects namely, the effect of lookalike product packaging, the characteristic of lookalike product packaging, the legal measure related to consumer protection and controlling lookalike product packaging as well as the legal measure related to consumers remedies from the effect of lookalike product packaging.

### 5.1 Effect of lookalike product packaging

From study fundamental principle and theory concern with consumer protection, competition law and intellectual property law showed that in the case of business operator using lookalike product packaging effect with consumer's deception caused many forms:

- Outright confusion — the consumer buys the copycat product having mistaken it for the brand;
- Deception over origin — the consumer recognizes the copycat product is different but believes, due to the similar packaging, that the same manufacturer makes it;
- Deception over quality or nature — again, consumers recognize the copycat is different but believe, due to the similar packaging, that the quality is the same or close to that of the copied product.

The similar packaging suggests to consumers that the quality or nature of the copycat product is comparable to the quality or nature of the brand in question or at least that it is more comparable than they might otherwise assume.

Lookalike product packaging also diminishes the opportunity of business operators who use distinctive and fair packaging to sell their products and this may have an especially negative impact on small business operators, who find it hard to exist in the market or make new business operators hesitate to compete. However, the result of a study of Thailand legal measure, in that case, provided that Thailand not give obvious legal measure related to consumer remedies from the effect of lookalike product packaging.

While foreign laws, namely, United Kingdom, Germany, and Australia have the specific legal measure related to consumer remedies from the effect of lookalike product packaging.

The legal measure to protect other business operators who are affected from lookalike product packaging in Thailand provided under The Trade Competition Act B.E. 2542, The Trade Competition Act B.E 2560 and the Trademark Act B.E. 2534.

Those acts promote free trade operation and prevent the unfair trading practice, and it may apply to lookalike product packaging case.

## 5.2 Characteristic of lookalike product packaging

The problem related to the characteristic of lookalike product packaging has not been addressed in the Thai legal system; hence, it is proposed that Thailand should examine certain foreign legal measures and court decisions to adopt some guidelines for legal measures to prevent lookalike product packaging, specifically those of the United Kingdom, Germany, and Australia.

The decision of the English High Court in *Moroccan Oil Israel Ltd v Aldi Stores Ltd*.<sup>271</sup>, passing-off case provided that although Aldi admitted to borrowing aspects of MIL's get-up, particularly its turquoise colour, though this get-up was not found to be distinctive of MIL and the court found that Aldi had "intended to make the public think of Moroccan Oil when they saw Miracle Oil in its packaging and succeeded." However, MIL no evidence that any consumers had actually assumed either that Miracle Oil and Moroccan Oil were the same product, that they came from the same manufacturer or that they were closely linked in trade because of Miracle Oil's name and get-up. Therefore, given the finding that there had been no likelihood of a misrepresentation by Aldi, an essential ingredient of the tort was not present, and the action failed.

However, the United Kingdom Consumer Protection from Unfair Trading Regulation provides the obvious characteristic of lookalike product packaging as follow:<sup>272</sup>

(1) It contains false information (concerning the nature, characteristics, and origin of the product among other matter)<sup>273</sup> or its overall presentation in any

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<sup>271</sup> See also, *Moroccan Oil Israel Ltd v Aldi Stores Ltd* [2014] EWHC 1686

<sup>272</sup> Department for Business, 'Review of the enforcement provisions of the Consumer Protection Regulations 2008 against copycat packaging' 7

<sup>273</sup> , *Consumer Protection from Unfair Trading Regulations* regulation 5(4), (5) and (6)

way deceives or is likely to deceive the average consumer so that the average consumer takes, or is likely to take, a different transactional decision, as a result,<sup>274</sup> or

(2) It concerns any marketing of a product that creates confusion with any products, trademarks, trade names or other distinguishing marks of a competitor, so that the average consumer takes, or is likely to take, a different transactional decision, as a result,<sup>275</sup> or

(3) It promotes a product similar to a product made by a particular manufacturer in such a manner as to deliberately mislead the consumer into believing that that same manufacturer makes the product when it is not.<sup>276</sup>

In the present the United Kingdom Court did not decide on imitation product under the Consumer Protection from Unfair Trading Regulation because this provision protects the consumer and enforce by the government sector. This Regulation did not give business take action and civil injunctive power to prevent copycat product packaging.<sup>277</sup>

Under Germany, the legal system accepts product protection against imitation, whereas it is not protecting under Intellectual Property Law. The manufacturer in Germany does not request register Intellectual Property Right to protect product packaging against imitation.<sup>278</sup>

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<sup>274</sup> Ibid regulation 5(2)

<sup>275</sup> Ibid regulation 5(3)

<sup>276</sup> Ibid SCHEDULE 1 commercial practices which are in all circumstances considered unfair Paragraph 13

<sup>277</sup> House of Commons of the United Kingdom, ‘Publication of Government decisions on copycat packaging:Written statement’ (2015) <<https://www.parliament.uk>> accessed 5 June 2018

<sup>278</sup> Bardehle Pagenberg partnerschaft mbb Partnerschaft mbB, ‘Protection against Imitation under Unfair Competition Law’ (2015) <<https://www.bardehle.com/de.html>> accessed 5 June 2018

The German Act against Unfair Competition provides the protection against unfair imitation under section 4 (3) and a blacklist of illegal commercial practices within the meaning of section 3 (3); although lookalike products are not expressly mentioned in the legal code, their meaning has been developed by the German court, as follows;<sup>279, 280</sup>

(1) The manufacturer of the original product must show the individual and distinctive character of the original

The original product is individual and is obviously distinguishable from comparable products. For example, it is sufficient if the product differs from other comparable product on German market.

(2) Imitator's knowledge of the original

The imitator was aware of the original product as it was his model when he manufactured the contested product. This is to be assumed if the contested products come onto the market later than the original product.

(3) Similarity between original and imitation

The imitation must have a sufficient degree of similarity to the original.

(4) Protection even if the Trademark is changed<sup>281</sup>

The application of a different trademark to the imitation is win the protection of the original in many cases.

(5) All claims require "unfair element"

For instance, the likelihood of confusion, exploitation of reputation, dilution or obstruction of market entry.

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<sup>279</sup> , *Parasitic Copying : Trading on Innovation and creativity of others*, AIM Trade Mark Committee

<sup>280</sup> Angela Fox and Michael Nielen, 'Fighting unfair competition in the UK and Germany: An Anglo-German perspective' (2016) <<http://www.managingip.com>> accessed 5 June 2018

<sup>281</sup> mbB

The Australian Consumer Law also prohibits any person, in trade or commerce, to engage in conduct that is misleading or deceptive or is likely mislead or deceive under section 18 (1) and section 29 (1) (a) (g) (h) (k).

Moreover, the Australia Court<sup>282</sup> provided a factor to consider whether consumers are likely to be misled or deceived as follows:

(1) Strength of the applicant's reputation, and the extent of distribution of its products

Consideration of the reputation developed by original business operator in the original product. This involves consideration of evidence of sales, promotion and packaging by imitation of its products. A significant aspect of this issue involves addressing the detailed evidence of competing products available in the marketplace.

(2) Strength of the respondent's reputation, and the extent to which the respondent has undertaken any advertising of its product;

Consideration of the strength of the imitator's reputation in his trade name prior to the commencement of sales of its products.

(3) Nature and extent of the differences between the products, including whether the products are directly competing;

Consideration of a comparison of the similarities and differences between the packaging of the original and imitation products.

(4) Circumstances in which the products are offered to the public; and

Consideration of the evidence in relation to the relevant consumers of the products in issue, including their ethnicity and the trade channels.

(5) Whether the respondent has copied the applicant's product or has intentionally adopted prominent features and characteristics of the applicant's product.

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<sup>282</sup> See also, *Homart Pharmaceuticals Pty Ltd v Careline Australia Pty Ltd* [2017] FCA 403 (20 April 2017), chapter 4, 4.2.3.4 The example case



Consideration of whether the imitator has intentionally adopted prominent features and characteristics of the original product.

(6) Any evidence of confusion

The complaint by consumers, for example, the buyer said, “it was so similar to the product I had bought I was confused. I had not seen this happen in Australia before where there are two products the same.”

Specifying the characteristic of lookalike product packaging in the United Kingdom, Germany and Australia, which have benefits and disadvantages said that the benefits of the characteristic of lookalike product packaging in the United Kingdom, Germany and Australia due to those legal measures and the court jurisprudence specify the obvious characteristic of lookalike product packaging and prohibit any business operator to use imitate product, as well as those, are inform the business operators to know the basic principle of the legitimate design of product packaging and assist the consumers to easy consider the characteristic of lookalike product packaging.

The characteristic of lookalike product packaging in the United Kingdom and Germany is provided under the legal code in the same way by following the UCPD, who said that they granted the flexible legal measure, which remain the fair trade in the market. Moreover, they also have been developing the protection by the court jurisprudence over decades and adjusted from time to time.

While the section 18 (1) of the Australian Consumer Law provides to prohibit broadly any misleading and deceiving conduct and rely on the court interpretation. It is suitable for Australia, because Australia has the common law country system. The Australian judges have the authority and duty to resolve the issue. The court states an opinion that gives reasons for the decision, and those reasons together with past decisions as the precedent to bind future judges and litigants. The Australia court can interpret section 18 (1) reach to prohibit lookalike

product packaging case.<sup>283</sup> Nevertheless, Thailand has the civil law country system; in general, the Thailand court decides cases by using any legal provisions on a case-by-case basis.

In my opinion, the legal provision to specify the character of lookalike product packaging in the United Kingdom and Germany is very interesting and appropriate with the civil law system in Thailand, because they provide an obvious legal measure in the legal code to prevent lookalike product packaging.

### **5.3 Legal measure related to consumer protection and controlling lookalike product packaging**

The legal measure of consumer protection of Thailand covers both general products and any specific product. This thesis will study the provision under the general Consumer Protection law and any protection Act of particular daily use product to consider whether these laws have the legal measure to control lookalike packaging or not and specify any authority organization which has the power to control and the punishment for lookalike product packaging are appropriate or not, the details are as follows.

#### **5.3.1 Analyze the legal measures to control lookalike product packaging in Thailand: in the case of general products**

This part will analyze the legal measures of consumer protection related to controlling lookalike product packaging on the general products in Thailand, namely, the Consumer Protection Act B.E. 2522, the Trade Competition Act B.E. 2542, the Trade Competition Act B.E. 2560, the Thailand Trademark Act B.E. 2534, the Thailand Penal Code B.E. 2499.

##### **(a) The Consumer Protection Act B.E. 2522**

Under the Consumer Protection Act B.E. 2522, this Act did not define the word “packaging”; however, we consider the definition of “Goods” under

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<sup>283</sup> See also, Homart Pharmaceuticals Pty Ltd v Careline Australia Pty Ltd [2017] FCA 403 (20 April 2017), chapter 4, 4.2.3.4 The example case

section 3 of this Act, which means articles produced or possessed for sale. Usually, the packaging is a part of goods, and it is sold with products, the packaging deems that articles are produced or possessed for sale. Therefore, the packaging is a “good” under section 3.

However, when studying all of the provisions of the Consumer Protection Act B.E. 2522, the results revealed that this Act did not provide the legal measure to prohibit business operators using lookalike product packaging.

Nevertheless, using lookalike product packaging will be deemed a statement of advertisement and did not follow the law under this Act, and it must be controlled under the Committee on Advertisement, or not? When we consider the definition of the word “statement” which showed that we must interpret the definition of “statement” that is the characteristic of lookalike product packaging is deemed that any act is enabling the public to understand its meaning or not. According to this interpretation, from my point of view, using lookalike product packaging is an act enabling the public to understand its meaning. In other words, lookalike product packaging may create consumers’ understanding that the nature, characteristics, and origin of the product or its overall presentation in any way deceive consumers or it creates confusion with any products, trademarks, trade names or other distinguishing marks of a competitor or a product similar to a product made by a particular manufacturer in such a manner as to deliberately mislead the consumer into believing that the product is made by that same manufacturer when it is not. Although this understanding is not made directly by the act, it is expressed in the form of letters, pictures, cinematographic film, light, sound, sign under section 3 of the definition of “statement.” Thus, the characteristic of lookalike product packaging is the “statement” under this Act, and using lookalike product packaging will be controlled under the Committee on Advertisement.

Moreover, we notice that using lookalike product is deemed a “label” and it must be controlled under the Committee on Label. In general, the meaning of “packaging” showed that packaging is not a label, as well as considering the definition of “label” under section 3, which said that a “label is the last thing to

appear on the goods, or the goods, or container or package of goods”, thus according to this fact “packaging” and “label” are not the same thing, However when considering a definition of “label”, it showed that lookalike product packaging is deemed a picture, design, paper or any other thing causing the statement relating to good to appear on the goods, or the goods, or container or package of goods, or inserted in or put together with the goods or container or package of goods, and includes a document or handbook on usage, or tag attached to or displayed on the goods or container or package of such goods under section 3. In my opinion the characteristic of lookalike product packaging deceives consumer or creates confusion with any products or misleads the consumer into believing that the product is made by that same manufacturer when it is not, even if, this misunderstanding of consumers did not emerge from letters, pictures, cinematographic film, light, sound, sign.

However, when considering the meaning of “statement” under section 3, it was revealed that lookalike product packaging is deemed any act enabling the public to understand its meaning. For this reason using lookalike product packaging is a “statement.” The feature of lookalike product packaging is deemed that any other thing causing the statement relating to good to appear on the goods, or the goods, or container or package of goods, thus using lookalike product packaging is a “label” and it shall be under control of Committee on Labels, which shall have the power to declare any goods which are manufactured for sale by the factories under the law on factories and goods, which are ordered or imported into the Kingdom for sale shall be a label-controlled goods.<sup>284</sup>

From the above analysis, we can see the legal measures and the facts are analyzed by loosely interpreting the definition of "statement," “label” and “advertisement”. In my opinion, the practice of business operator is not obviously violating the provision of the Consumer Protection Act BE. 2522. In this case it will be deemed that the business operators do not commit an offence and they should not be punished by the Consumer Protection Act B.E. 2522, because the legal

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<sup>284</sup> The Consumer Protection Act B.E. 2522 section 30

measure of the Consumer Protection Act B.E. 2522 provides a criminal penalty and it must be strict interpretation.

**(b) The Trade Competition Act B.E. 2542**

Under the Thailand Trade Competition Act B.E. 2542, when considering section 29, it may be said that lookalike product packaging is uncommon practice of business operators due to in ordinary practice of business operators must use distinctive and specific characteristic product packaging to attract consumers to buy their products; moreover it assists to remind consumer's recognition, create brand loyalty and increase his sales volume, as a result using the lookalike product practice has the effect of destroying, damaging, obstructing, impeding or restricting the business operation of other business operators or is intended to prevent other persons from carrying out business or to cause them to cease their business. Therefore, this practice is reaching the element of section 29. However, from the above analysis, we can see the legal measures and the facts can be analyzed by loose interpretation. In my opinion, the practice of the business operator is not obviously violating the provision of section 29 under the Thailand Trade Competition Act B.E. 2542. In this case it will be deemed that the business operators do not commit an offence and they should not be punished under the Thailand Trade Competition Act B.E. 2542, because of the legal measure under section 29 providing a criminal penalty according to section 51 of the Thailand Trade Competition Act B.E. 2542 and it must be strict interpretation.

**(c) The Trade Competition Act B.E. 2560**

The newest Thailand Trade Competition Act B.E. 2560, when considering section 57, it may be said that lookalike product packaging is uncommon practice of the business operator, due to, in ordinary practice, business operator must use distinctive and specific characteristic product packaging to attract consumers to buy his product; moreover it assists to remind consumers' recognition and create brand loyalty and increase his sale volume, as a result using lookalike product practice has the effect of damaging other business operators by: Unfairly obstructing the business operations of other operators; Unfairly using market dominance or abuse

of superior bargaining power; Unfairly setting trading conditions which is restricting or impeding in the business operations of other operators. Therefore, lookalike product packaging practice reached the element of section 57. However, from the above analysis, we can see the legal measures and the facts are analyzed by loose interpretation. In my opinion, any conduct resulting in damage on other business operator will obviously be prescribed in the commission's notification. At present, the Trade Competition Commission does not provide any notification under section 57 (4). Therefore, the conduct that violate section 57 is limited on the sample of the unfair trading practice of the regulations on unfair trade practice section 29 under the Thailand Trade Competition Act B.E. 2542, for example, unfair fixing or maintain price level or fixing price lower than the cost. Because the regulations on unfair trade practice section 29 were issued under the Trade Competition Act B.E. 2542 that are effective on the date before the Thailand Trade Competition Act B.E. 2560 takes effect, they shall still remain effective as long as they do not conflict or contradict this Act and until ministerial regulations, notifications, or regulations issued under this Act are effective under section 92. The lookalike product packaging practice is not obviously provided on the regulations on unfair trade practice section 29 under the Trade Competition Act B.E. 2542. Therefore, in the case that business operators use lookalike product packaging of other business operators, it is not deemed as any conduct resulting in damage on other business operator under section 57 of the Thailand Trade Competition Act B.E. 2560

**(d) The Thailand Trademark Act B.E. 2534**

According to the definition of "Mark" in section 4 of the Thailand Trademark Act B.E. 2534 it is a restricted definition, as it said that the Thailand Trademark Act uses the words "is defined as", this word showed that the "Mark" under this Act will confined to only "a photograph, drawing, invented device, logo, name, word, phrase, letter, numeral, signature, combination of colours, figurative element, sound or combination thereof." The term product packaging is not directly provided in the definition of "Mark"

Due to the fact that the packages also assist to communicate and promote sales from the manufacturers to consumers, it plays an important role and its duty for the product is not different to a trademark's role and duty. The product packaging's duty is to show any distinction between two or more products that are produced by different manufacturers. In addition, packages also inform consumer about the origin of goods or assist the consumers in deciding to purchase the product. Moreover, the product packaging is defined as the materials in which subjects are wrapped before sold and used for the packing of goods to contribute such goods to any consumer, as well as the physical appearance of the packages include the design, colour, shape, labeling and logo. Therefore, the shape, colour and logo of product packaging are deemed as a combination of colours and figurative element under section 4 of this Act.

Furthermore, the product packaging is deemed that the examples stated in section 7 paragraph 2 (5) and (10), which said that any of the following essential characteristics shall be deemed distinctive trademark, namely, a combination of colours represented in a special manner and a shape which is not the natural form of the goods or a shape which is not necessary to obtain a technical result of the goods or a shape which does not give value to the goods.

Form the interpretation earlier, the characteristic of product packaging, which consist of the shape, colour and logo, is deemed as a combination of colours represented in a special manner and a shape which is not the natural form of the goods and a shape which is not necessary to obtain a technical result of the goods or a shape which does not give value to the goods under section 7 paragraph 2 (5) and (10) and if it enables the public or users to distinguish the goods with which the trademark is used from other goods under section 6 of this Act.

However, the analysis earlier is loose interpretation and on the result of the study, the Supreme Court's decision does not allow any business operator to use the product packaging as a "mark" under section 4 and section 7 (5) of the Thailand Trademark Act. The Supreme Court only allows business operators to register the shape of product as the two-dimensional mark, not three-dimensional mark.

The Thailand Trademark Act B.E. 2534 did not provide the definition of “passing off” under section 46; however, when considering the main objective of this Act, which is to protect the benefits of the trademark owner and goodwill as well, as the Supreme Court decisions decided that passing off under section 46 of Thailand must have the important factor of a defendant mark similar to plaintiff’s mark,<sup>285</sup> even though the defendant’s packaging was confusingly similar to the plaintiff’s, but the defendant use clearly difference trademark. This practice is not passing off under section 46. Therefore, the characteristic of lookalike product packaging is not passing off under section 46.

**(e) The Thailand Penal Code B.E. 2499**

The Thailand Penal Code B.E. 2499; this Code did not provide the definition of the word “any fraudulent and deceitful means” under section 271, when we consider this word it is a broader way to deceive the buyer as to the source, nature, quality or such product quality; however this offence did not consist of the assertion of a falsehood or the concealment of facts which should be revealed. Therefore, with lookalike product packaging, it is deemed that any fraudulent and deceitful means to deceive the buyer as to the source, nature, quality or such product quality.

From the above analysis, we can see the legal measures, and the facts are analyzed by loose interpretation of the words “any fraudulent and deceitful means”. In my opinion, the practice of the business operator is not obviously violating the provision of the Thailand Penal Code B.E. 2499. In this case, it will be deemed that the business operators do not commit an offense and they should not be punished by the Thailand Penal Code B.E. 2499, because of the legal measure of the Thailand Penal Code B.E. 2499 providing a criminal penalty, and it must be strict interpretation.

When we consider the definition of “Artificial Mark “under section 272 (1) it means imprint or mark and the definition of “Mark” is provided

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<sup>285</sup> The supreme court decision no. 2335/2553



under section 4 of the Thailand Trademark Act B.E. 2534 as “a photograph, drawing, invented device, logo, name, word, phrase, letter, numeral, signature, combination of colours, figurative element, sound or combination thereof.” Product packaging is not directly provided in the definition of “Mark,” and the results of the study on the Supreme Court decision showed that the decision did not obviously interpret packaging to be deemed as an “Artificial Mark.” However, we found that Artificial Mark or Mark attach on packaging includes protecting the product packaging.<sup>286</sup>

When considering section 271-272 of Thailand Penal Code B.E. 2499 it prohibits some part of unfair trading practice; the product packaging is one of the tools in the carry on trade and this code also protect product packaging.

However, from previous analysis, the Thailand Penal Code B.E. 2499 will apply to any right and freedom of people. We must make a strict interpretation on this Code.

### **5.3.2 Analyze the legal measures to control lookalike product packaging in Thailand: concerning specific products**

This part will analyze the legal measures of consumer protection related to controlling lookalike product packaging on specific products in Thailand, namely, the Food Act B.E. 2522, the Drug Act B.E. 2510 and the Cosmetic Product Act B.E. 2558.

#### **(a) Food Products**

According to the Food Act B.E. 2522, when considering the definition of “container” under section 4 and the character and meaning of packaging in chapter 2, it is deemed that container is the one of packaging categories; however, when considering all of the provisions and legal measures under this Act, it showed that this Act had only a legal measure in other cases, but did not provide the provision to prohibit business operators’ practice on lookalike product packaging.

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<sup>286</sup> The Supreme Court Decision Case No. 4925/2538

Considering the definition of “label” under section 4<sup>287</sup> by interpretation, it displays that lookalike product packaging is a practice to deceive consumers or create confusion with any products or mislead the consumer into believing that the product is made by that same manufacturer when it is not, even if this misunderstanding of consumers did not arise from any figure, invented sign, mark or any statement. Therefore, using lookalike product packaging is not a “label” under this Act. This interpretation is different from “label” under the Consumer Protection Act B.E. 2522, in which it is deemed that characteristic of lookalike product packaging is a “label”, because the Consumer Protection Act B.E. 2522 provides the definition of “statement” that includes an act expressed in the form of letters, pictures, cinematographic film, light, sound, sign, or any act enabling the public to understand its meaning. Nevertheless, this Act did not define the word “statement,” thus we must interpret the word “statement” according to Thai Dictionary of the Office of the Royal Society B.E 2554 which provided that a sentence or context. Therefore, the characteristic of lookalike product packaging makes others understand its meaning, but it did not use the statement and it is not a “label” under the Food Act B.E. 2522.

#### **(b) Drugs**

Under the Drug Act B.E. 2510, when considering the definition, it showed that this Act did not provide the definition of product packaging; nevertheless using lookalike product packaging may be a picture, design, mark or statement displayed on the container or package of drugs, which is a definition of “label” under section 4. This definition revealed that lookalike product packaging is not a picture, design, or mark. Moreover, when considering the “statement,” this Act did not define the word "statement." Therefore, for the definition of “statement” under this Act, we must interpret it as “statement” on the part of the Food Product. Thus, the characteristic of lookalike product packaging is not a “statement” and a “label” under this Act.

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<sup>287</sup> The Food Act B.E. 2522 section 4 provided that “Label” includes any figure, invented sign, mark or any statement shown on food, food container or package.

### (b) Cosmetic Products

In the Cosmetic Product Act B.E. 2558, when considering the definition under this Act, it showed that it defined the word of “container”<sup>288</sup> under section 4 of this Act similar to the definition of “container” under the Food Act B.E. 2522.<sup>289</sup> Therefore “packaging” is a “container” under this Act. Nonetheless, from studying, it showed that this Act did not provide the control measure of lookalike product packaging. Also, this Act gave the meaning of "Statement," “Advertisement” and “Label” in the same way as the definition under the Consumer Protection Act B.E. 2522. Thus, the characteristic of lookalike product packaging is an “Advertisement” and “Label” under this Act by loose interpretation. As a result, we should not use loose interpretation to enforce and control business operators using lookalike product packaging, because the legal measure of the Cosmetic Product Act B.E. 2558 is providing a criminal penalty and we should consider strict interpretation same as the reason in the part of the Consumer Protection Act B.E. 2522

This study of the legal measure of consumer protection of both general products and any specific product in Thailand related to controlling lookalike product packaging showed that Thailand does not obviously provide a legal measure to control lookalike product packaging.

#### 5.3.3 Enforcement Authority

From the study of legal measures to control lookalike product packaging in the case of general products and specific products in Thailand, the result of the study found that Thailand does not provide an Enforcement Authority that has a specific duty to control lookalike product packaging, as well as a lack of an obvious legal measure to control lookalike product packaging.

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<sup>288</sup> The Cosmetic Product Act B.E. 2558 section 4 provided that “Container” means any substance for use specifically in packing or wrapping cosmetic product.

<sup>289</sup> The Food Act B.E. 2522 section 4 said that “Container” means any objects used to contain food by placing, packing or other methods.

In the United Kingdom, the law provided the Trading Standards Services in Great Britain (“TSS”) and the Department of Enterprise, Trade and Investment in Northern Ireland (“DETINI”) and the Competition and Markets Authority (“CMA”) duty to enforce. They can enforce the CPRs by bringing a criminal prosecution for one of the offences in regulations 8 to 12 of the CPRs. They can also enforce civil procedures and require the trader to stop the unfair commercial practice under Part 8 of the Enterprise Act 2002.

The Germany law gives power to certain trade associations, chambers of commerce and consumer associations; they are authorized to enforce the law by their right of injunctive relief. The center for Protection against Unfair Competition (so-called Wettbewerbszentrale) is one of the experienced and most important institutions that have the right to take legal action against any business operators who infringe laws relating to unfair competition. Moreover, the center for Protection against Unfair Competition and German federal consumer organization (Verbraucherzentrale Bundesverband) is one of the 16 consumer centers of the German federal states (Verbraucherzentralen), which are most likely to bring a claim under section 8 of UWG.

The Australian Consumer Law administered and enforced jointly by the Australian Competition and Consumer Commission (the ACCC) and the State and Territory consumer protection agencies, with the involvement of the Australian Securities and Investments Commission (the ASIC) on relevant matters. All Australian consumer protection agencies have signed a Memorandum of Understanding (MOU), which sets out the way in which they will work together to administer and enforce the ACL. The MOU also includes the New Zealand Ministry of Consumer Affairs and the New Zealand Commerce Commission, reflecting the increasingly integrated nature of Australia and New Zealand’s markets. The CCA gives the ACCC the power to issue infringement notices under section 134 A.

In Thai law, the enforcement authority and the commission who has the power and duty to control each law are currently separate and inconsistent. However, since this practice is one offence and the same act affects many people,

there should only be one legal measure to enforce protection and balance the interests of both business operators and consumers in order to effectively develop and promote fair trading. As well as protecting consumers and businesses, this would eliminate some of the redundant processes involved in enforcement and court proceedings, reduce the time of government officials to collect and prove evidence, and cut costs.

The name of the Committee that has the authority to control and exercise power to protect business operators and prohibit them from using lookalike product packaging should be revised from “the Committee on labels” to “the Committee on labels and packaging”. This will be beneficial because a label is generally attached or enclosed with the packaging. Therefore, specifically increasing the power of the Committee on labels to control packaging is appropriate and the new duty of the committee has the same purpose of imposing a legal measure on labels is to protect consumers from misunderstanding related to this essential matter concerning goods.

#### **5.3.4 The legal measure for Controlling**

Thailand does not provide an obvious legal measure to protect consumers from lookalike product packaging. This part will analyze the legal measure to protect consumers from lookalike product packaging under the United Kingdom law, German law and Australia law, as well as considering the legal measure to control advertisements and labels under the Thailand Consumer Protection Act B.E. 2522.

##### **5.3.4.1 Pre-market Control Measure**

The Thailand Consumer Protection Act B.E. 2522 provides the legal measure to control advertisements and labels. The pre-market control measure said that in the case of the business operator who is doubtful whether his advertisement or labels will violate or not conform to this Act, this man may apply to the Committee on Advertisement or the Committee on Labels for consideration and opinion on such a matter before advertising or using such a label. In this case, the Committee on Advertisement or the Committee on Labels shall give an opinion and notify the applicant within thirty days from the date the Committee on

Advertisement or the Committee on Labels receives the application; or it shall be deemed that the Committee on Advertisement or the Committee on Labels has given its approval thereto. Any act done pursuant to the opinion of the Committee on Advertisement or the Committee on Labels shall not be deemed a criminal offence under section 29 and section 34.

From my point of view, Thailand should provide a pre-market control measure by bringing the pre-market control measure on advertisement and labels as a guideline that the business operator may apply to the Committee on Advertisement or the Committee on Labels for consideration and opinion on such a matter before advertising or using labels to apply in the case of the pre-market control measure on packaging, because it is able to resolve the problem of lookalike product packaging at the roots. The pre-market control measure on packaging should specify that the business operators may send the sample of packaging if it is doubtful whether it is lookalike product in the market or not, to the Committee for consideration and opinion on such a matter before using this packaging. Moreover, Thailand should specify the regulation on using product packaging and characteristics of packaging, which may cause misunderstanding on the product or material facts concerning such products to consumers.

#### **5.3.4.2 Post-market Control Measure**

Section 27 of Thailand Consumer Protection provides that the Committee on Advertisement shall have the power to issue one or several of the following orders:

- (1) to rectify the statement of the method of an advertisement;
- (2) to prohibit the use of certain statements as appeared in the advertisement;
- (3) to prohibit the advertisement or the use of such method for advertisement;

(4) to correct by advertisement the possible misunderstanding of the consumers in accordance with the rules and procedure prescribed by the Committee on Advertisement.

When considering consumer protection on the label under the Thailand Consumer Protection Act, section 33 said that when the Committee on Labels is of the opinion that any label does not conform to section 31, the Committee has the power to order the businessman to cease using such label or rectify such label.

Also considering consumer protection under the power of the Consumer Protection Board of section 10 (3), this Act's section provides the post-market control measure that the Consumer Protection Board shall have the following powers to issue or publicize information concerning goods or services which may cause damage to or be prejudicial to the right of the consumers and for this purpose, the names of such goods or service or the name of the businessman may be specified.

The United Kingdom provides that Copycat packaging may violate the Consumer Protection from Unfair Trading Regulation 2008 if:

(1) It contains false information (in relation to nature, characteristics, and origin of the product among other matter) or its overall presentation in any way deceives or is likely to deceive the average consumer such that the average consumer takes, or is likely to take, a different transactional decision as a result; or

(2) It concerns any marketing of a product which creates confusion with any products, trademarks, trade names or other distinguishing marks of a competitor, such that the average consumer takes, or is likely to take, a different transactional decision as a result; or

(3) It promotes a product similar to a product made by a particular manufacturer in such a manner as to deliberately mislead the consumer into believing that that same manufacturer makes the product when it is not.

The German law of Act Against Unfair Competition (Gesetz gegen den unlauteren Wettbewerb, UWG) states that in Section 3 “Prohibition of unfair commercial practices

(1) Unfair commercial practices shall be illegal.

(2) Commercial practices targeting or reaching consumers shall be unfair if they are not in compliance with professional diligence and are suited to materially distorting the economic behavior of consumers.

(3) The commercial practices in relation to consumers listed in the Annex to this Act shall always be illegal.

In the Annex, paragraph 13 provides that promoting goods or services similar to the goods or services of a specific manufacturer, with the intention of deceiving the consumer regarding the commercial origin of the goods or services promoted;”

Section 4 “Unfairness shall have occurred where a person ...

iii offers goods or services that are replicas of goods or services of a competitor if he

a) causes avoidable deception of the purchaser regarding their commercial origin;

b) unreasonably exploits or impairs the assessment of the replicated goods or services; or

c) dishonestly obtained the knowledge or documents needed for the replicas;”

Under the Australian Consumer Law (the ACL)

Section 18 (1) by the interpret of the Australia court said that a person must not in trade or commerce engage in conduct that causes any consumers are likely to be misled and deceived into thinking that the lookalike product is the branded product, or associated with it.

Section 29 False or misleading representations about goods or services



(1) A person must not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services:

(a) make a false or misleading representation that goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use; or

(g) make a false or misleading representation that goods or services have sponsorship, approval, performance characteristics, accessories, uses or benefits; or

(h) make a false or misleading representation that the person making the representation has a sponsorship, approval or affiliation; or

(k) make a false or misleading representation concerning the place of origin of goods.

In my opinion, the legal control measure on the label under section 33 of the Thailand Consumer Protection Act B.E. 2522 provides that the Committee on labels has the power to order the businessman to cease using such a label or rectify such a label. This legal control measure is appropriate to be applied with the controlling on packaging. The specified Committee on labels and packaging has the power to order the businessman to stop using or revise any labels or packaging which may cause misunderstanding on the material of facts concerning such goods to consumer, including the power of the Committee on labels and packaging to issue infringement notices. The business operators will pay an infringement notice penalty within a prescribed period. This legal measure makes business operators afraid to commit, more carefully on the practice that contravened certain consumer protection laws and reduces the consumer protection cases in the court proceeding.

Moreover, the Consumer Protection Board has the power and duty to issue or publicize information concerning goods or services which may cause damage to or be prejudicial to the right of the consumer under section 10 (3) of the Thailand Consumer Protection Act B.E. 2522 is a proper legal measure, because

this legal measure is to alert consumers to know about any products which may cause misunderstanding on the material fact and prevent any damage to consumer.

Furthermore, to specify the Committee on labels and packaging to issue infringement notice and the power of the Thailand Consumer Protection Board to issue public warning notice conform to the power of the Australian Competition and Consumer Commission.<sup>290</sup>

### 5.3.5 Penalty

Under Section 47 of the Thailand Consumer Protection Act specified criminal penalty, in the case that business operator with an intention to cause misunderstanding as to the origin, condition, quality, quantity or other essential matters concerning goods or services, whether they belong to him or other persons, advertises or uses a label containing a statement which is false or know or should be known to cause the misunderstanding, shall be liable to imprisonment for a term not exceeding six months or fine not exceeding fifty thousand Baht, or to both. Also, if the offence is a continuous offence, the offender shall be liable to a fine not exceeding ten thousand Baht a day or not exceeding double the advertising expenses throughout the period of the violation or non-compliance.<sup>291</sup>

In the United Kingdom, Part 3 of Regulation 9, Offences of the Consumer Protection from Unfair Trading Regulations 2008, provides that traders are guilty of an offence if they engage in a commercial practice that is misleading based on Regulation 5 otherwise than by reason of the commercial practice satisfying the conditions in Regulation 5 (3) (b). A person guilty of an offence under Regulation 8, 9, 10, 11 or 12 shall be liable, on summary conviction, to a fine not exceeding the

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<sup>290</sup> Section 223, The Australian Consumer Law

<sup>291</sup> The Consumer Protection Act B.E. 2522 section 51 said that “If the offence under section 47, section 48, section 49 or section 50 is a continual offence, the offender shall be liable to a fine not exceeding ten thousand Baht a day or not exceeding double the advertising expenses throughout period of the violation or non-compliance.”

statutory maximum, or on conviction on indictment, to a fine or imprisonment for a term not exceeding two years or both under Regulation 13.

The German Act against Unfair Competition does not impose a criminal penalty in the case of lookalike product packaging, but it does provide for the Federal budget to profit in Section 10.

Civil penalties and criminal sanctions do not apply in Section 18 of the Australian Consumer Protection Act, because it has an extensive scope. Section 18 of the ACL creates a norm of business conduct and allows persons to seek remedy for harm caused by breaches of that norm, rather than giving rise to a contravention that attracts punitive sanctions. Other prohibitions against specific forms of false or misleading conduct may also apply in cases of misleading conduct and attract specific penalties and criminal sanctions.<sup>292</sup>

In my opinion, the United Kingdom provides the most effective penalty for traders who are guilty of an offence that is a misleading action by imposing a fine or prison term not exceeding two years or both. I believe that this penalty will deter business operators from committing a continuous offence. Therefore, I think that imposing a penalty of imprisonment in Section 47 of the Thailand Consumer Protection Act will be appropriate to control lookalike packaging because a prison sentence is more likely to deter business operators from continuing to commit an offence than just a fine. Furthermore, the Thai law specifying imprisonment conforms to the penalty under the United Kingdom Consumer Protection from Unfair Trading Regulation 2008.

However, on the part of the fine, I suggest that they should increase the fine by specifying a fine based on the rate of such profit of the business operator. This fine will make business operators afraid, prevent continuous offences and be adequate for the detriment of numerous purchases.

From the study and analyses of the existing Thai laws by comparing them with foreign laws, it is my point of view that the Thailand Consumer Protection

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<sup>292</sup> Australia 4

Act B.E. 2522, the Thailand Trade Competition Act B.E. 2560, the Thailand Trademark Act B.E. 2534 or the Thailand Criminal Code B.E. 2499 does not provide an obvious legal measure to control lookalike product packaging. In the case of lookalike product packaging, the practice affects consumers, businesses operators, trade name, the reputation of brand and goodwill, and therefore this practice is an offence, and several people sustain damage related to many laws.

The Thailand Consumer Protection in the case of general products as well as specific products does not provide an obvious provision to protect consumers from lookalike product packaging.

The Thailand Trade Competition Act B.E. 2542 and the Thailand Trade Competition Act B.E. 2560 have the important objective of protecting business operators and the provision to protect the unfair practice between business operators only. If we propose an amendment or add a legal measure to protect lookalike product packaging this may affect other section and the important purpose of the whole Act.

The Thailand Trademark Act B.E. 2534 does not give an obvious provision to protect lookalike product packaging, and the primary objective of this Act is protecting the trademark owner. If we propose an amendment or add a legal measure to protect lookalike product packaging this may affect other sections and the important purpose of the whole same as the reason in the part of the Thailand Trade Competition Act.

The Thailand Penal Code B.E. 2499 prohibits some part of unfair trading practice. The product packaging is one of the tools in the carry on trade and this code, also protect product packaging. However, If we propose to amendment or add the legal measure to protect lookalike product packaging may effect to any right and freedom of people.

At present Thai laws, the enforcement authority and the commission who has power and duty to control of each law are separate and inconsistent. Therefore, to develop and promote fair trading effectively as well as protect consumers and businesses, in addition to reduce redundancy in process of enforcement and the court proceeding, decrease the time of government officials to

collect and prove evidence and Cost Cutting due to this practice is a one offence and the same act, should have only a one legal measure to enforce protection and balance the interests of business operators and consumers.

From the result of my study and compare with foreign law, on my point of view the Thailand Consumer Protection Act B.E 2522 should develop by amendment for protect consumers from lookalike product packaging by adding a definition of “Packaging”, The name of the Committee that has the authority to control and exercise power to protect business operators and prohibit them from using lookalike product packaging should be revised from “the Committee on labels” to “the Committee on labels and packaging”, add the new part and new section provide that Part 2 ter CONSUMER PROTECTION IN UNFAIR MARKETING PRACTICE to specify that business operator use following packaging may deemed that the packaging which cause consumer misunderstanding related with an essential matter concerning goods or an origin of goods and Section 47 of the Thailand Consumer Protection Act B.E 2522 should include a penalty to apply with the lookalike product control measure and the fine should be increased by imposing a specific fine based on the profits of the business operator. This fine will discourage business operators from committing this offence to the detriment of numerous purchasers.

#### **5.4 Legal measure related to remedying consumers from the effect of lookalike product packaging**

The legal measure related to consumers remedies from the impact of lookalike product packaging in Thailand. The results of this study provided that Thailand may have any provision give the right of the consumer to claim and remedies in special law, that is the Consumer Protection Act B.E. 2522, the Consumer Case Procedure Act B.E. 2551 and the Trade Competition Act B.E. 2560. If consumers would like to claim damages under Thailand Civil and Commercial Code, we must consider that the practice of business operator use lookalike product is deemed that a mistake, fraud and wrongful act or not. Moreover, this part will analyze remedy

measure, namely rescission of the contract, the right of the consumer to a refund of the price paid and damages.

#### **5.4.1 Analyze legal measure related to remedying consumers under Civil and Commercial Code in Thailand**

##### **5.4.1.1 The legal problem of Mistake**

Business operators use lookalike product packaging of the copied product may cause or likely to causes the consumers confusion and mistake on many cases as follow;

###### **(1) mistake on products**

In the case of consumer mistake on products is deemed that he mistakes as to a property being an object of the juristic act and this mistake as to an essential element of the juristic act under section 156 paragraph 2. As a result in the case that consumer mistake on the product is void under section 156 paragraph one cause to this declaration of intention of the consumer is a nullity and any property arising from a void act shall return to their owner by the provisions on Undue Enrichment under section 172 of the Thailand Civil and Commercial Code.

###### **(2) mistake on brands, trademarks, trade name or other distinguish mark of a competitors**

On the fact that consumer mistake on brands, trademarks, trade name or other distinguish mark of a competitors, the declaration of intention of the consumer is not made under a mistake as to an essential element of the juristic act under section 156. When considering that a mistake on brands, trademarks, trade name or other distinguish marks is deemed that a case of a mistake as to a quality of the property which is considered as essential under section 157 or not. In my opinion that the brands, trademarks, trade name or other distinguish marks is the quality of the property. Therefore this case is a mistake as to a quality of the property that is considered as essential and a declaration of intention is voidable under section 157. Moreover, consumers have right to avoid this voidable contract and it is deemed to have been void from the beginning; and the parties shall be restored to the condition in which they previously and if it is not possible to so restoring them, they be

indemnified with an equivalent under section 176 of the Civil and Commercial Code. In consequence, the consumer is entitled to a refund of the price paid, and this result differs from a void act which is the parties might not restore to the position in which they were before entering into the contract because they might not return any properties under the provision of Undue Enrichment. However, if it is not possible to restore them, the consumer is entitled to claim the damages to compensate under section 176.

(3) mistake over origin due to similar packaging, consumers believe that the same manufacturer makes it.

The results of the study indicate that mistake over origin is deemed that a case of a mistake as to a quality of the property which considered as essential and a declaration of intention is voidable under section 157. The consumers have right to avoid this voidable contract, and it is deemed to have been void from the beginning; and the parties shall be restored to the condition in which they previously and if it is not possible to so restore them, they be indemnified with an equivalent under section 176. Therefore, the consumer is entitled to a refund of the price paid. However, if it is not possible to restore them, the consumer is entitled to claim the damages to compensate, in the same way as the part of a mistake on brands, trademarks, trade name or other distinguish mark of competitors.

(4) mistake over quality or nature due to similar packaging, consumers believe that the quality is the same or close to that of the copied product.

In the case that consumer mistake over quality or nature is deemed that a case of a mistake as to a quality of the property, which considered as essential and a declaration of intention is voidable under section 157. The consumers have right to avoid this voidable contract and it is deemed to have been void from the beginning; and the parties shall be restored to the condition in which they previously and if it is not possible to so restoring them, they be indemnified with an equivalent under section 176, in the same way as the part of mistake on brands, trademarks, trade name or other distinguish mark of a competitors and mistake over origin.

Nevertheless, when we considering interesting issue that the consumers lack of duty of care to read and notice labeling as well as packaging that the business operators showed any information on brands, trademarks, trade name or other distinguish mark of a competitors, manufacturer name and quality or nature of product is deemed that a case of consumer's gross negligence under section 158 or not.

Gross negligence means that the party lack of duty of care and he do not use a little due diligence, cause to a mistake. Thus, in the case that consumer purchases any products and he did not read and notice labeling is deemed that consumer's gross negligence. Due to consumers must check and noticed labeling on brands, trademarks, trade name, the position of manufacturer and quality or nature, that are correct or not. However, if consumer carefully considers on labeling and the causation of mistake arise from business operators use the complicated tactic by lookalike product packaging is deemed that consumer is not making sale contract by gross negligence.

Furthermore, the consumer bought lookalike product and still repurchases it. In the second purchase, the consumer is not entitled to claim on mistake because he has known any actual information of this product that has brands, trademarks, trade name, the position of manufacturer and quality or nature, this case is not deemed that the mistake under Thailand Civil and Commercial Code.

#### **5.4.1.2 The legal problem of Fraud**

In the case of business operators intend to use lookalike product packaging of the leading brand manufacturer may cause consumers mistake on products, brands, trademarks, trade name or other distinguishing marks of a competitor, origin, quality or nature, in many reasons as follow

(1) Outright confusion

The consumer buys the copycat product having mistaken it for brand;

(2) Deception over origin

The consumer recognizes the copycat product is different but believes, due to the similar packaging, that the same manufacturer makes it;



### (3) Deception over quality or nature

The consumers recognize the copycat is different but believe, due to the similar packaging, that quality is the same or close to that of the copied product.

As a result, in these cases is one of the declarations of intention of the consumers produced by fraud because the practice of business operators is intended to mislead consumers and cause the consumer to take the transactional decision with him to buy his product.

The purchase decision of the consumers, consumers will pick out any product from its brands, trademarks, trade name or other distinguish mark of a competitors, origin, quality or nature. These factors all influence in the purchase decision of the consumers, if the business operator did not use lookalike product packaging, the consumers will absolutely not select to buy his product. Thus, using lookalike product packaging is deemed that produced by the fraud of business operator cause to the consumer is entitled to avoidance this voidable Act under section 159 of the Thailand Civil and Commercial Code.

However, on the fact that consumer bought lookalike product and still rebuy it. In the second purchase, the consumer is not entitled to claim on fraud because he was known any actual information of this lookalike product, namely, the brand, trademark, trade name, the position of manufacturer and quality or nature of the product. Therefore, this is not a case of the declaration of intention of consumer produce by fraud.

#### **5.4.1.3 The legal problem of Wrongful Act**

When considering the factors of wrongful Act under section 420 of the Thailand Civil and Commercial Code, this section showed that in the case of business operator use lookalike product packaging with leader brand product instead of choosing to use difference product packaging. This practice of business operator is deemed that he is done this practice whether the business operator will produce by willfully or negligently or not as well as this practice is unlawful.

This practice cause consumers must more expense is deemed that damages to property right of consumer which is the basic right of people, Therefore if the business operators use lookalike product packaging cause consumer buy it by deception that it brands, trademarks, trade name, position of manufacturer and quality or nature as well as damages to property right of consumer. This Act is deemed that infringe with consumer and the consumer has right to claim the compensation under this Code.

#### **5.4.1.4 The conclusion of legal measure related to remedying consumers under Civil and Commercial Code**

The results of this study provided that the practice of business operators who use lookalike product packaging may be possible in various cases as follow;

In the case of consumer mistake on products is deemed that he mistakes as to a property being an object of the juristic act and this mistake as to an essential element of the juristic act under section 156 paragraph 2. As a result, in the case that consumer mistake on the product is void under section 156 paragraph 1 cause to this declaration of intention of the consumer is a nullity and any property arising from a void act shall return to their owner by the provisions on Undue Enrichment under section 172 of the Thailand Civil and Commercial Code.

On the fact that consumer mistake on brands, trademarks, trade name or other distinguishing marks of a competitors, origin and quality or nature is deemed that a case of a mistake as to a quality of the property which considered as essential and a declaration of intention is voidable under section 157. Also using lookalike product packaging is deemed that produced by the fraud of business operators under section 159. The consumers who suffer damages have right to avoid this voidable contract, and it is deemed to have been void from the beginning; and the parties shall be restored to the condition in which they previously and if it is not possible to so restore them, they be indemnified with an equivalent under section 176. Therefore, the consumers are entitled to a refund of the price paid and return a whole product to business operators. However, if it is not possible

to restore them, the consumer is entitled to claim the damages to compensate. Moreover, consumers who were fraud under section 161, he is entitled only claim compensation for damage resulting from such fraud.

Moreover, in the case of business operator use lookalike product packaging with leader brand product by intent to mislead consumers instead of choosing to use distinctive product packaging and it cause consumer injures their property or any right under section 420. This practice is deemed that infringes with consumer and is bound to the business operator pay compensation. The compensation under the wrongful act has the objective to restore consumer into the condition in which they previously, before wrongful act arise. It is not purposed to punish the infringer.

On my point of view, the legal measure related to consumers' remedies under Civil and Commercial Code for lookalike product packaging relies on interpretation, and it does not provide obvious remedy measure. Furthermore, measure remedy is not cover and inappropriate with the damages of consumers.

#### **5.4.2 Analyze legal measure related to remedying consumers under the special law in Thailand**

The results of this study provided that legal measure related to consumers remedies under special law in Thailand which may enforce in the case of lookalike product packaging that is the Trade Competition Act B.E. 2542, the Trade Competition Act B.E. 2560, the Trade Mark Act B.E. 2534 and the Consumer Case Procedure Act B.E. 2551

##### **(a) The Trade Competition Act B.E. 2542 and the Trade Competition Act B.E. 2560**

When consider section 57 of the Trade Competition Act B.E. 2560 may said that using lookalike product packaging is uncommon practice of the business operator due to in ordinary practice of business operator must use distinctive and specific characteristic product packaging to attract consumers for buy his product, moreover it assist to remind consumer's recognition and create brand

loyalty and increase his sale volume, as a result using lookalike product practice has the effect of damaging of other business operators by unfairly obstructing in the business operations of other operators, Unfairly using market dominance or abuse of superior bargaining power, Unfairly setting trading conditions which is restricting or impeding in the business operations of other operators in the same way as section 29 of the Thailand Trade Competition Act B.E. 2542. Thus, the injured person who suffers damage or the Consumer Protection Board or associations recognized under the law on consumer protection shall be entitled to bring an action for damages on behalf of consumers or members of the associations under section 69.

However, the element of section 57 is the practice between business operators only and provided to protect the business operator. Therefore, this section is not protect consumer.

#### **(b) The Trade Mark Act B.E. 2534**

Thailand Trademark Act B.E. 2534 did not provide the definition of “passing off” under section 46, however when consider the main objective of this Act which is protect benefits of the trademark owner and goodwill as well as the Supreme Court decisions decided that passing off under section 46 of Thailand must have the important factor is a defendant mark similar to plaintiff’s mark. Even though the defendant’s packaging was confusingly similar to the plaintiff’s but a defendant use clearly difference trademark. This practice is not the passing off under section 46. Therefore, characteristic of lookalike product packaging is not a passing off under section 46.

For this reason, this act did not provide any right of the consumer to claim and remedies.

#### **(c) The Consumer Case Procedure Act B.E. 2551**

In the case that the business operators use lookalike product packaging is deemed that he intent unfairly to take advantage of consumers and cause consumer suffer damages. Thus, the court has the power to order the business operator to pay punitive damages in addition to the actual damages. The court shall have considered the following factor to fixed the punitive damage such as the

damage to the consumer, the interest received by the business operator, financial status of the business operator, the business operator has relieved the incurred damage and the fact that the consumer has partly caused the damage. The court shall have the power to impose not exceed two times of actual damages imposed by the court, but if the actual is not exceeding fifty thousand baths, the court shall have the power to impose punitive damages not exceeding five times the actual damages imposed by the court under section 42.

In my opinion, the legal measure related to consumers remedies from the effect of lookalike product packaging under the special law in Thailand under the Trade Competition Act, the Trade Mark Act B.E. 2534 and the Consumer Case Procedure Act B.E. 2551 does not enough to protect consumers.

While the United Kingdom provide the legal measure related to consumers remedies from the effect of lookalike product packaging under the Consumer Protection (Amendment) Regulation 2014, Part 4A, consumers' right to redress from misleading action and aggressive conduct under the Consumer Protection from Unfair Trading Regulation 2008

The consumers have private right to redress by unwind the relevant contract or a discount or damages under the Consumer Protection from Unfair Trading Regulation 2008.

#### Tier 1 remedies

The type of Tier 1 remedy would depend on how soon after the event the consumers complain and whether the consumer has fully consumed the product:

##### (1) The right to unwind the contract

The consumer would receive a refund of money paid and would not be required to meet any future obligations. Consumers would be entitled to unwind provided that they rejected some part of the goods or services, and acted sufficiently quickly. We tentatively suggested that consumers would need to complain to the trader within three months.

(2) The right to a discount

If the consumer waits more than three months to make a complaint or if the goods or services are fully consumed, then the consumer can claim a discount on the price.

Tier 2 remedies

Provide that consumer can claim damages to compensate for indirect losses, including economic damage and distress and inconvenience. They are provided only if the consumer can prove that the unfair practice caused actual loss, meeting a “but for” test of causation. Furthermore, the trader can avoid this consequential liability if it can establish a due diligence defense.

From my point of view, the legal measures related to remedying consumers from the effect of lookalike product packaging under the special law of the United Kingdom has many advantages in that it provides redress for consumers, including protection for them in various situations, as well as obviously awarding consumers with the appropriate right to directly complain to the trader before take action in the court due to a civil recovery for this practice being difficult.

In Germany has the legal measure related to consumers remedies from the effect of lookalike product packaging under the Act Against Unfair Competition (Gesetz gegen den unlauteren Wettbewerb, UWG) as follow:

(1) The right to sued for elimination, cessation and desistance

Provided that the following has right to the claim; every competitor, the Associations with legal personality which exist for the promotion of commercial or of independent professional interests, Qualified entities that prove that they are entered in the list of qualified entities pursuant to section 4 of the Injunctive Relief Act or on the list of the European Commission pursuant to Article 4(3) of Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumer interests, the Chambers of Industry and Commerce or Craft Chambers.

Therefore, consumers have not right to take action for elimination, cessation and desistance.

(2) The right to claim compensation for damages

Whoever while acting with intent or negligently, engages in an illegal commercial practice under section 3 or section 7 shall be obliged to compensate competitors for the damage arising therefrom. The compensation claim can be asserted against persons responsible for periodical printed matter only in the case of contravention with intent.

(3) The right to sued for surrender of profits

Whoever, while acting with intent, engages in an illegal commercial practice under section 3 or section 7, thereby making a profit to the detriment of numerous purchasers, those can sue entitled.

The Associations with legal personality which exist for the promotion of commercial or of independent professional interests, Qualified entities that prove that they are entered in the list of qualified entities pursuant to section 4 of the Injunctive Relief Act or on the list of the European Commission pursuant to Article 4(3) of Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumer interests, the Chambers of Industry and Commerce or Craft Chambers is entitled to sue for the surrender of such profit.

However, the consumer and other competitor have not right to sue for the surrender of such profit.

The legal measure related to remedying consumers from the effect of lookalike product packaging under the special law of Germany under the UWG is inadequate to redress consumers, since the objective of this Act is to prevent Unfair Competition. Therefore, the measure under this Act only focuses on penalising competitors who violate the unfair competition law rather than providing consumers with redress. Moreover, this Act does not provide consumers with the right to directly bring a claim in civil proceedings against the business operators who use lookalike product packaging.

In Australia has the legal measure related to consumers remedies from the effect of lookalike product packaging under the Australian Consumer Law as follow;

(1) The right to sued for the court grant an injunction (preventative or corrective orders)

The court may grant an injunction concerning contraventions or attempted contraventions of the ACL. To either restrain a person from doing an act or require a person to do a particular act. The ACL expressly recognizes that injunctions may be granted restraining a person from carrying on business or supplying goods or services may be granted, requiring the refund of money or the destruction or disposal of property.

(2) The right to claim for pecuniary penalties

The court may order the person to pay to the Commonwealth, State or Territory, as the case may be, such pecuniary penalty, in respect of each act or omission by the person to which this section applies, as the court determines to be appropriate.

(3) The right to claim for damages

Section 236 of the ALC provides a right for a person to apply to a court for damages to compensate them for their loss or damage resulting from a contravention of the ACL.

(4) The right to claim for compensatory and preventative orders

This provision provided that the order must be an order that the court considers will:

(a) compensate the injured person, or any such injured persons, in whole or in part for the loss or damage; or

(b) prevent or reduce the loss or damage suffered, or likely to be suffered, by the injured person or any such injured persons.

(5) Orders for non-party consumers

If a person engaged in conduct (the contravening conduct) in contravention of a provision of Chapter 2, Part 3-1, Division 2, 3 or 4 of Part 3-2 or



Chapter 4; or is a party to a contract who is advantaged by a term (the declared term) of the contract in relation to which a court has made a declaration under section 250; and the contravening conduct or declared term caused, or is likely to cause, a class of persons to suffer loss or damage; and the class includes persons who are non-party consumers in relation to the contravening conduct or declared term.

The legal measure related to remedying consumers from the effect of lookalike product packaging under Australian law has many advantages in that this is a law that is designed to especially provide consumers with redress, including protecting consumers in various situations, as well as giving them the obvious and appropriate right to redress. Furthermore, this Act also protect non-party consumers.

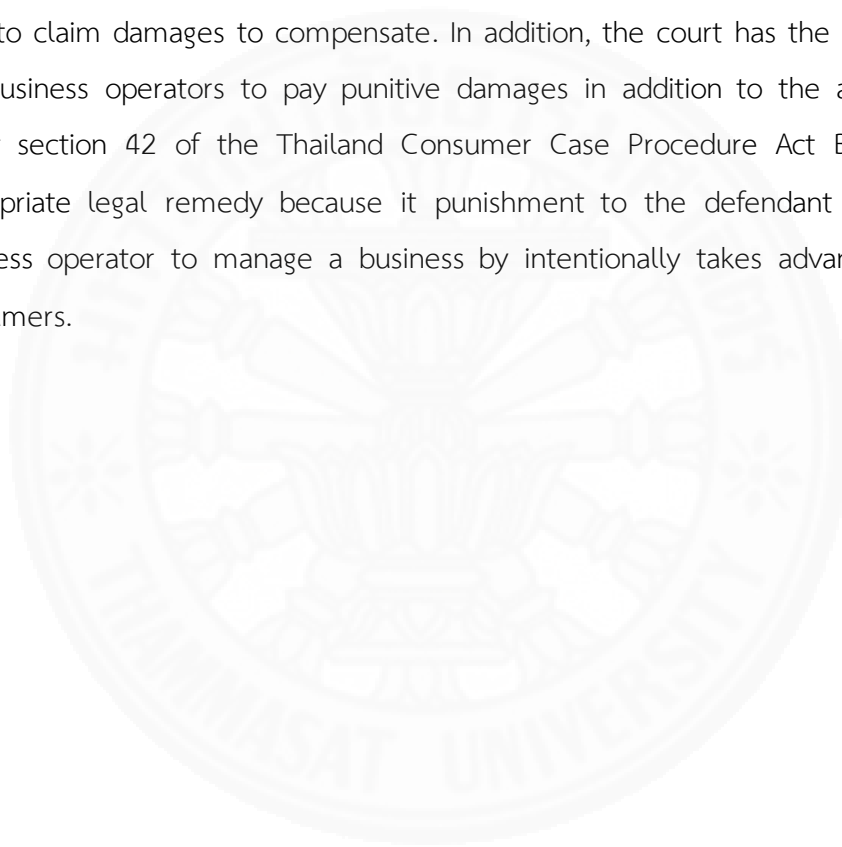
From the study and analyses the existing Thai legal measure related to remedying consumers from the effect of lookalike product packaging under Thailand Civil and Commercial Code and special law by comparing them with the legal measure of foreign countries such as United Kingdom, Germany, and Australia

On my point of view that the Thailand Consumer Case Procedure Act B.E. 2551 should developed to add legal measure related to remedying consumers from the effect of lookalike product packaging as well as consumers' right to redress from any case of misleading or deceptive conduct and Unfair Commercial Practice as well as this consumers' right to redress will conform with the new provision to protect consumer from lookalike product packaging.

Moreover, the legal measure related to remedying consumers under Thailand Civil and Commercial Code is inappropriate with damages that consumers suffer from business and complicated because consumers will take action by themselves, waste of time and more costs. Though if this case is a consumer case and the Thailand Competition and Consumer Commission, Consumer Protection Board, associations recognized under the law on consumer protection have an opinion that bringing an action for damages will benefit with consumers as a whole. In that case, consumers have private right to bring a claim to enforce the right of redress. Also, the Thailand Competition and Consumer Commission, Consumer

Protection Board, associations recognized under the law on consumer protection shall be entitled to bring an action for damages on behalf of consumers.

In response to the legal problems related to remedying consumers from the effect of lookalike product packaging, it is suggested that the Thailand Consumer Case Procedure Act B.E. 2551 should be amended to increase consumers' rights by giving them the right to redress for damage caused by lookalike product packaging, namely, the right to unwind the contract, the right to a discount and the right to claim damages to compensate. In addition, the court has the power to order the business operators to pay punitive damages in addition to the actual damages under section 42 of the Thailand Consumer Case Procedure Act B.E. 2551 is an appropriate legal remedy because it punishment to the defendant and deter the business operator to manage a business by intentionally takes advantage from the consumers.



## CHAPTER 6

### CONCLUSIONS AND RECOMMENDATIONS

#### 6.1 Conclusions

Nowadays, the business operators use any marketing method to promote their sale volume, in the case that the business operator use lookalike product packaging from leading brand product. This lookalike packaging contains false information that confuses consumers and leads them to make an erroneous purchase because they are misled to believe that the false product is made by the same manufacturer as the genuine one. Moreover, this practice also affects the competition in the market. Form the result of the study in the previous chapter finds that we have the legal problems related to protecting consumers from lookalike product packaging in the following three aspects;

Firstly, the characteristic of lookalike product packaging, we will consider that “What is the characteristic of lookalike product packaging” and “What are rules that able to differentiate between lookalike product packaging and valid product packaging?”

Secondly, the legal measure related to control lookalike product packaging said that foreign countries provide difference approach to protect consumers. In this issue, we will consider that “What is an appropriate measure to control lookalike product packaging in Thailand?”

Thirdly, the legal measure related to consumers’ right to redress from the effect of lookalike product packaging, we will consider that “What are the proper consumers’ right to redress from the effect of lookalike product packaging in Thailand?”

The legal measure to protect consumers from lookalike product packaging in Thailand is studied in this chapter and compared with the United Kingdom Law, German Law and Australian Law. The findings showed that each

country has any interesting legal measures related to protecting consumers from lookalike product packaging and provide specific rights to redress as follows;

### **6.1.1 Characteristics of lookalike product packaging**

The problem related to the characteristic of lookalike product packaging has not been addressed in the Thai legal system; hence, it is proposed that Thailand should examine certain foreign legal measures and court decisions to adopt some guidelines for legal measures to prevent lookalike product packaging, specifically those of the United Kingdom, Germany, and Australia.

According to the Consumer Protection from Unfair Trading Regulation of the United Kingdom, lookalike product packaging has the following features;

(1) It contains false information (concerning the nature, characteristics, and origin of the product among other matter) or its overall presentation in any way deceives or is likely to deceive the average consumer so that the average consumer takes, or is likely to take, a different transactional decision, as a result, or

(2) It concerns any marketing of a product which creates confusion with any products, trademarks, trade names or other distinguishing marks of a competitor, so that the average consumer takes, or is likely to take, a different transactional decision, as a result, or

(3) It promotes a product similar to a product made by a particular manufacturer in such a manner as to deliberately mislead the consumer into believing that that same manufacturer makes the product when it is not.

The German Act against Unfair Competition provides protection against unfair imitation in Section 4 (3) and a blacklist of illegal commercial practices within the meaning of Section 3 (3); although lookalike products are not expressly mentioned in the legal code, their meaning has been developed by the German court, as follows;

(1) The manufacturer of the original product must show the individual and distinctive character of the original

(2) Imitator's knowledge of the original

(3) Similarity between original and imitation

(4) Protection even if the Trademark is changed

(5) All claim require "unfair element"

The Australian Consumer Law also prohibits any person, in trade or commerce engage in conduct that is misleading or deceptive or is likely mislead or deceive under section 18 (1) and section 29 (1) (a) (g) (h) (k).

Moreover, the Australian court provides the factors to be considered to determine if consumers are likely to be misled or deceived, as follows;

(1) Strength of the applicant's reputation, and the extent of distribution of its products

(2) Strength of the respondent's reputation, and the extent to which the respondent has undertaken any advertising of its product;

(3) Nature and extent of the differences between the products, including whether the products are directly competing;

(4) Circumstances in which the products are offered to the public; and

(5) Whether the respondent has copied the applicant's product or has intentionally adopted prominent features and characteristics of the applicant's product.

(6) Any evidence of confusion

Therefore, the characteristic of lookalike product packaging is that it is visually similar, but not identical, to a recognised branded product. For example, the combination of colour and the design or shape of the packaging are identical or similar to those of products of other business operators and the lookalike business operator intends to use this packaging to mislead consumers and imply a similar quality or taste, as well as take unfair advantage of the business that produced the products with the original packaging.

### **6.1.2 Effect of lookalike product packaging**

When a business operator unfairly uses lookalike product packaging, it not only damages consumers, but also has a negative effect on other business operators. The similar packaging misleads consumers into thinking that the quality or nature of the copycat product is comparable to that of the original brand, or at least, more comparable than they might otherwise have assumed.

Lookalike product packaging also diminishes the opportunity of business operators who use distinctive and fair packaging to sell their products and this may have an especially negative impact on small business operators, who find it hard to exist in the market or make new business operators hesitate to compete.

### **6.1.3 Legal measure related to consumer protection and the control of lookalike product packaging**

It was found from the results of this study that the consumer protection law related to general products in Thailand's Consumer Protection Act B.E. 2522 and the legal measure concerning specific products in the Food Act B.E. 2522, the Drug Act B.E. 2510 and the Cosmetic Product Act B.E. 2558 contain no obvious legal measures to protect consumers from lookalike product packaging, as well as no enforcement authority and no specific penalty.

After studying and analysing the existing Thai laws by comparing them with foreign laws, it is also evident that the Thailand Consumer Protection Act B.E. 2522, the Thailand Trade Competition Act B.E. 2560, the Thailand Trademark Act B.E. 2534 and the Thailand Criminal Code B.E. 2499 also do not provide obvious legal measures to control the use of lookalike product packaging. However, this practice has a negative effect on consumers, businesses operators, trade names, the reputation of the original brand and its goodwill; hence, it is an offence that damages several people and is related to many laws.

The Thailand Consumer Protection Act does not contain an obvious provision to protect consumers from lookalike product packaging in the case of general products as well as specific ones.

The Thailand Trade Competition Act B.E. 2542 and the Thailand Trade Competition Act B.E. 2560 have the important objective to protect business

operators, but the provision only protects business operators from unfair practices by other business operators. If an amendment is proposed or a legal measure is added to protect consumers from lookalike product packaging, it may affect other sections and the important purpose of the whole Act.

The Thailand Trademark Act B.E. 2534 does not contain an obvious provision to protect consumers from lookalike product packaging because the primary objective of this Act is to protect the trademark owner. Again, if an amendment is proposed or a legal measure is added to protect consumers from lookalike product packaging, it may affect other sections and the important purpose of the whole Act, the same as the Thailand Trade Competition Act.

The Thailand Penal Code B.E. 2499 prohibits some unfair trading practices and product packaging is one of the tools of the trade; therefore, this code also applies to product packaging. However, if an amendment is proposed or a legal measure is added to include protection against lookalike product packaging, it may affect people's rights and freedoms.

In Thai law, the enforcement authority and the commission who has the power and duty to control each law are currently separate and inconsistent. However, since this practice is one offence and the same act affects many people, there should only be one legal measure to enforce protection and balance the interests of both business operators and consumers in order to effectively develop and promote fair trading. As well as protecting consumers and businesses, this would eliminate some of the redundant processes involved in enforcement and court proceedings, reduce the time of government officials to collect and prove evidence, and cut costs.

In the United Kingdom law provided the Trading Standards Services in Great Britain ("TSS") and the Department of Enterprise, Trade and Investment in Northern Ireland ("DETINI") and the Competition and Markets Authority ("CMA") duty to enforce. They can enforce the CPRs by bringing a criminal prosecution for one of the offences in regulations 8 to 12 of the CPRs. As well as they can enforce civil

procedure and requires the trader to stop the unfair commercial practice under Part 8 of the Enterprise Act 2002.

Under the Germany law gave the power to certain trade associations, chambers of commerce and consumer associations are authorized to enforce the law by their right for injunctive relief. The center for Protection against Unfair Competition (so-called Wettbewerbszentrale) is one of the experienced and most important institutions, which have the right to take legal action against any business operators who infringe laws relating to unfair competition. Moreover, the center for Protection against Unfair Competition and German federal consumer organization (Verbraucherzentrale Bundesverband) or one of the 16 consumer centers of the German federal states (Verbraucherzentralen) which are most likely to bring a claim under section 8 of UWG.

The Australian Consumer Law administered and enforced jointly by the Australian Competition and Consumer Commission (the ACCC) and the State and Territory consumer protection agencies, with the involvement of the Australian Securities and Investments Commission (the ASIC) on relevant matters. All Australian consumer protection agencies have signed a Memorandum of Understanding (MOU), which sets out the way in which they will work together to administer and enforce the ACL. The MOU also includes the New Zealand Ministry of Consumer Affairs and the New Zealand Commerce Commission, reflecting the increasingly integrated nature of Australia and New Zealand's markets. The CCA gives the ACCC the power to issue infringement notices under section 134 A.

The legal measure to prohibit lookalike product packaging in the United Kingdom, Germany and Australia, which have benefits and disadvantage said that the benefits of the controlling of lookalike product packaging in the United Kingdom, Germany and Australia due to those legal measures and the court jurisprudence specify the obvious characteristic of lookalike product packaging and prohibit any business operator to use imitate product, as well as those, are inform the business operators to know the basic principle of the legitimate design of product



packaging and assist the consumers to easily consider the characteristic of lookalike product packaging.

The legal measure to control lookalike product packaging in the United Kingdom and Germany is provided under the legal code in the same way by following the UCPD, which said that they granted the flexible legal measure which remains the fair trade in the market. Moreover, they also have been developed the protection by the court jurisprudence over decades and adjusted from time to time.

While section 18 (1) of the Australian Consumer Law provides to prohibit broadly any misleading and deceptive conduct and rely on the court interpretation. It is suitable for Australia because Australia is the common law country system. The Australian judges have the authority and duty to resolve the issue. The court states an opinion that gives reasons for the decision, and those reasons together with past decisions as precedent to bind future judges and litigants. The Australian court can interpret section 18 (1) to reach to prohibit lookalike product packaging cases. Nevertheless, Thailand is the civil law country system; in general, the Thai court decides cases by using any legal provisions on a case-by-case basis and the Thai Court is likely to strictly interpret on the legal code.

In my opinion, the legal provision to control lookalike product packaging in the United Kingdom and Germany is very interesting and appropriate with the civil law system in Thailand because they provided the obvious legal measure in the legal code to prevent lookalike product packaging.

Moreover, in the part of penalty, the United Kingdom provides the most effective penalty for traders who are guilty of an offence that is a misleading action by imposing a fine or prison term not exceeding two years or both. I believe that this penalty will deter business operators from committing a continuous offence. Therefore, I think that imposing a penalty of imprisonment in Section 47 of the Thailand Consumer Protection Act will be appropriate to control lookalike packaging because a prison sentence is more likely to deter business operators from continuing to commit an offence than just a fine.

#### **6.1.4 Legal measure related to remedying consumers from the effect of lookalike product packaging**

The results of this study showed that the legal related to remedying consumers from the effect of lookalike product packaging in Thailand may give the right of consumer to claim and remedies in special law, that is the Consumer Protection Act B.E. 2522, the Consumer Case Procedure Act B.E. 2551 and the Trade Competition Act B.E. 2560. Especially, the consumer is entitle to claim damages and punitive damages under the Consumer Case Procedure Act B.E. 2551 If consumers would like to claim damages under Thailand Civil and Commercial Code, the business operator use lookalike product packaging cause to consumer mistake on products is deemed that he mistakes as to property which is an essential element of the juristic act under section 156 paragraph 2 , as a result the declaration of intention by mistake on product from lookalike product packaging is void under section 156 paragraph 2.

In addition, this practice is deemed that the case of a mistake as to a quality of the property which is considered as essential and a declaration of intention is voidable under section 157, if consumer mistake on brands, trademarks, trade name or other distinguishing mark of a competitors, origin and quality due to the business operator use lookalike product packaging from leading brand product. Moreover, using lookalike product packaging is deemed that produced by the fraud of business operators under section 159 of the Thailand Civil and Commercial Code. Thus, the consumers who suffer damages also have right to avoid this voidable contract, and the parties shall be restored to the condition in which they previously under section 176. Furthermore, the consumer who was fraud under section 161, he is entitled only claim compensation for damage resulting from such fraud.

However, on the fact that consumer bought lookalike product and still rebuy it. In the second purchase, the consumer is not entitled to claim on fraud because he is known any actual information of this lookalike product, namely, the brand, trademark, trade name, the position of manufacturer and quality or nature of the product. Therefore, this is not a case of the declaration of intention of consumer produce by the fraud of business operators or the case of consumer mistake.

When considering the principle of the wrongful act under section 420, it is shown that, in the case of business operator using lookalike product packaging, consumers injure their property under section 420. This practice is deemed that infringe section 420 and the business operator shall pay compensation. However, the compensation under wrongful act of section 420 has the purpose to restore consumer into the condition in which they previously before wrongful act arises, it is not purposed to punish the infringer.

From my point of view, the legal measure to remedies consumers from the effect of lookalike product packaging relies on interpretation and does not provide an obvious remedies measure. Furthermore, the consumer's remedies are not covered and appropriate with the damaging effect to consumers.

While the United Kingdom provides legal measure related to remedying consumers from the effect of lookalike product packaging in Part 4A of the Consumer Protection (Amendment) Regulation 2014, consumers' right to redress from misleading actions and aggressive conduct can be found in the Consumer Protection from Unfair Trading Regulation 2008 as follow;

- (1) Right to unwind the contract:
- (2) Right to a discount
- (3) Right to claim damages to compensate for indirect losses, including economic damage and distress and inconvenience.

From my point of view, the legal measures related to remedying consumers from the effect of lookalike product packaging under the special law of the United Kingdom has many advantages in that it provides redress for consumers, including protection for them in various situations, as well as obviously awarding consumers with the appropriate right to directly complain to the trader before take action in the court due to a civil recovery for this practice being difficult.

The legal measures related to remedying consumers from the effect of lookalike product packaging in Germany can be found in the Act against Unfair Competition (Gesetz gegen den unlauteren Wettbewerb, UWG) as follows;

- (1) Right to sue for elimination, cessation and desistance

(2) Right to claim compensation for damages

(3) Right to sue for surrender of profits

I think the legal measure related to remedying consumers from the effect of lookalike product packaging under the special law of Germany under the UWG is inadequate to redress consumers, since the objective of this Act is to prevent Unfair Competition. Therefore, the measure under this Act only focuses on penalising competitors who violate the unfair competition law rather than providing consumers with redress.

The legal measures related to remedying consumers from the effect of lookalike product packaging can be found in the Australian Consumer Law, as follows;

(1) Right to sue for the court granting an injunction (preventative or corrective orders)

(2) Right to claim for pecuniary penalties

(3) Right to claim for damages

(4) Right to claim for compensatory and preventative orders

(5) Orders for non-party consumers

From my point of view the legal measure related to remedying consumers from the effect of lookalike product packaging under Australian law has many advantages in that this is a law that is designed to especially provide consumers with redress, including protecting consumers in various situations, as well as giving them the obvious and appropriate right to redress. Furthermore, this Act also protects non-party consumers.

## 6.2 Recommendations

In response to the legal problems related to protecting consumers from lookalike product packaging, it is suggested that the Thailand Consumer Protection Act B.E 2522 and the Thailand Consumer Case Procedure Act B.E. 2551 should be amended to control lookalike product packaging and increase consumers' rights by

giving them the right to redress for damage caused by lookalike product packaging, as follows;

### **6.2.1 Recommendations for the legal measure to control lookalike product packaging in Thailand**

It is suggested that the Thailand Consumer Protection Act B.E. 2522 should be amended to protect consumer from lookalike product packaging as follows:

#### **(1) Definition**

Adding a definition of “Packaging” to any container or wrapping in which any goods is enclosed for use in the delivery or display of that goods to retail purchasers.

#### **(2) Enforcement Authority**

The name of the Committee that has the authority to control and exercise power to protect business operators and prohibit them from using lookalike product packaging should be revised from “the Committee on labels” to “the Committee on labels and packaging”. This will be beneficial because a label is generally attached or enclosed with the packaging. Therefore, specifically increasing the power of the Committee on labels to control packaging is appropriate and the new duty of the committee has the same purpose of imposing a legal measure on labels is to protect consumers from misunderstanding related to this essential matter concerning goods.

#### **(3) The Control Measure**

The Thailand Consumer Protection Act B.E. 2522 should add the new part and new section provide that Part 2 ter “CONSUMER PROTECTION IN UNFAIR MARKETING PRACTICE”.

#### **Pre-market control measure**

It should be specifically stated that business operators who use the following packaging will be deemed to have caused consumers to misunderstand an essential matter concerning the goods or the origin of the goods;

(a) It contains false information (concerning the nature, characteristics, and origin of the product among other matters) or its overall presentation in anyway deceives or is likely to deceive the average consumer so that the average consumer takes, or is likely to take, a different transactional decision as a result, or

(b) It concerns any marketing of a product that creates confusion with any product, trademark, trade name or other distinguishing marks of a competitor so that the average consumer takes, or is likely to take, a different transactional decision as a result, or

(c) It promotes a product similar to a product made by a particular manufacturer in such a manner as to deliberately mislead the consumer into believing that the product was made by that same manufacturer when it was not.

Packaging having or comprising any of following essential characteristics shall be deemed to cause consumers misunderstanding;

(i) Similar visible packaging of products;

(ii) Both the combination of colour and imitation design or shape of packaging identical or similar to the product of another business operator;

(iii) Both trademarks, trade names or other distinguishing marks and imitation design or shape of packaging identical or similar to the product of another business operator

Exceptions in the case of similar visible packaging of products will have reasonable grounds as follows;

(i) the packaging is commonly used with such goods

(ii) any reason that will be considered in each case.

Moreover, this measure should provide that business operators may send the Committee a sample of packaging if there is doubt about whether it looks like another product in the market or not for their consideration and an opinion on this matter before use.

### **Post-market control measure**

In terms of a post-market control measure, the Committee on labels and packaging should be given the power to order businessman to stop using or revise any labels or packaging that may cause consumers to misunderstand the material facts concerning these goods because this will act as a deterrent because business operator will be afraid to engage in this practice again and be more careful about contravening the consumer protection law.

### **Interaction between post-market control measure and pre-market control measure**

According to my recommendation on the pre-market control measure, the Committee on Labels and Packaging has the power and duty for consideration and opinion on such packaging in whether this label will violate or does not conform with the consumer protection law. In this case, the committee on Labels and Packaging shall give an opinion and notify the applicant within thirty days from the date the Committee on Labels and Packaging receives the application; or it shall be deemed that the Committee on Labels and Packaging has given its approval thereto.<sup>293</sup>

However, the giving of opinion by the Committee on Labels and Packaging shall not be deemed to curtail the power of the Committee on Labels and Packaging to review the matter when there is a reasonable cause. Any act done pursuant to the opinion of the Committee on Labels and Packaging shall not be deemed a criminal offence.<sup>294</sup>

In considering the case of consumers taking action and claiming damages from business operators who use approved packaging by the Committee on Labels and Packaging, from my perspective the business operators shall not be deemed a committing a criminal offence. Nevertheless, the Committee on labels and

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<sup>293</sup> As for analysis on The Consumer Protection Act B.E. 2522 ,section 29 and section 34

<sup>294</sup> As for analysis on The Consumer Protection Act B.E. 2522, section 29 paragraph 2 and paragraph 3

packaging has the power to order the businessman to stop using or revise that packaging and if a consumer suffer damages caused by the business operator's packaging, the consumer has the to redress and the business operator may be enforced under the legal measure related to consumers' right to redress.

#### **(4) Penalty**

Section 47 of the Thailand Consumer Protection Act should include a penalty to apply with the lookalike product control measure and the fine should be increased by imposing a specific fine based on the profits of the business operator. This fine will discourage business operators from committing this offence to the detriment of numerous purchasers.

### **6.2.2 Recommendations for the legal remedies from the effect of lookalike product packaging in Thailand**

It is suggested that the legal remedy should be developed by adding a new provision in the Thailand Consumer Case Procedure Act B.E. 2551 for consumers' right to redress, as follows;

#### **(1) Right to unwind the contract**

The consumer would receive a refund of money paid and would not be required to meet any future obligations. Consumers would be entitled to unwind provided that they rejected some part of the goods, and acted sufficiently quickly. However, those consumers would need to complain to the trader within three months.

#### **(2) Right to a discount**

If the consumer waits more than three months to make a complaint or if the goods are fully consumed, then the consumer can claim a discount on the price.

The addition of the new section in Part I General Provisions and recommends, as follows

*Section ... "Upon purchasing goods or services, the consumer has a right to redress and shall elect to proceed in one of the following ways*

*(1) Right to unwind the contract*



*The consumer has a right to unwind the contract by delivering a written letter stating his or her intention to unwind the contract within 90 days from the date that he or she receives the goods to the business operator. The consumer is entitled to a refund of the price paid but must return at least some element of the goods; or*

*(2) Right to a discount*

*If the consumer waits more than 90 days to make a complaint or if the goods are fully consumed, then the consumer can claim a discount on the price.”*

**(3) The right to claim damages to compensate**

If consumers’ misunderstanding is related to an essential matter concerning goods or the origin of goods under the provision of the Consumer Protection Act, they may claim compensation for damages against the business operator as prescribed in the Civil and Commercial Code and will not have to prove that they have suffered from damage caused by the business operator’s products.

The adding of a new section in Part III Judgment and Order Disposing of Case is recommended, as follows:

*Section ... “consumers’ misunderstanding is related to an essential matter concerning goods or the origin of goods under the provision of the Consumer Protection Act, they may claim compensation for damages against the business operator as prescribed in the Civil and Commercial Code and will not have to prove that they have suffered from damage caused by the business operator’s products..”*

Also, the court has the power to order the business operators to pay punitive damages in addition to the actual damages under section 42 of the Thailand Consumer Case Procedure Act B.E. 2551 is an appropriate legal remedy, because it punishes the defendant and deters the business operator to manage a business by intentionally taking advantage of the consumers unfairly, as well as protecting consumers on the whole from suffering hardship from buying goods from a bad faith business operator.

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**BIOGRAPHY**

Name:	Miss Natsiraya Ananvorapunya
Date of Birth:	November 24,1988
Educational Attainment:	Academic Year 2011: Bachelor of Laws (2 <sup>nd</sup> Class Honours), Kasetsart University Academic Year 2012: Barrister at Law, The Institute of Legal Education Thai Bar Association
Work Position:	Legal Officer, Practitioner Level The Bangkok Metropolitan Administration
Publications:	Natsiraya Ananvorapunya, <i>“LEGAL PROBLEMS RELATED TO PROTECTING CONSUMERS FROM UNFAIR TRADING PRACTICES: LOOKALIKE PRODUCT PACKAGING (COPYCAT)”</i> (A Thesis for the Degree of Master of Laws in Business Laws (English Programme) Thammasat University, 2017)
Work Experience:	2013-Present: Legal Officer, Practitioner Level The Bangkok Metropolitan Administration